PROBLEMS IN PROSECUTING CASES INVOLVING HISTORICAL CHILD SEXUAL ABUSE: THE VICTORIAN EXPERIENCE†

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I INTRODUCTION

Sexual offences involving children are unique. By and large, child sexual abuse cases are the only types of offences which are commonly prosecuted many years after the event.[1] This is not because it is only sexual offences against children that are so serious that they justify the unrelenting pursuit of offenders. It is rare for other offences which typically attract even more serious sanctions than sexual offences, such as homicide and armed robbery, to be prosecuted many years after the event. And when they are it is almost invariably because it has taken many years to establish the identity of the offender. Not so with child sexual offences, where identity is rarely in dispute.

The uniqueness of child sexual offences is also not due simply to the age of the complainants. Other offences commonly committed against children where the offender is known, such as assaults and thefts, are either prosecuted immediately, or not at all. For example, where a child is assaulted by his or her parents or has his or her bicycle stolen by a friend, if the offender is not dealt with immediately the offender will forever escape prosecution. Once again, this is not the case with sexual offences.

The not uncommon delay between the commission of a child sexual offence and complaint leads to several difficulties in the prosecution of such offences. First, it is necessary to contend with problems that typically stem from delay, such as unavailability of witnesses and the frailty of memory. However, even more troubling are the peculiar

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[1] In a recent NSW report it was reported that there was a significant difference between the median age of offenders at the time of the commission of the offence (35 years) and the time of *arrest* (41 years). Thus the median delay was 6 years (Judicial Commission of New South Wales, *Child Sexual Assault* (1997) x).

problems resulting from the reasons that are responsible for delay in complaining, such as the reluctance by victims of sexual offences to defy their abusers.

This paper will first discuss the reasons for delay in prosecuting child sexual offence cases. This will be followed by an analysis of the problems that delay, and the reasons for it, create in the prosecution of such matters. Finally, the manner in which the courts and legislature in Victoria have attempted to deal with these issues is considered.

II REASONS FOR DELAY IN REPORTING SEXUAL OFFENCES

A *Lack of Overt Evidence, Ignorance of Illegality of Conduct*

There are numerous reasons for delay in the reporting of sexual abuse cases which set them apart from other offences committed on children.[2] Although by its very nature sexual abuse is intrusive and is one of the most flagrant assaults upon an individual's bodily and psychic integrity,[3] the victim is often too young to appreciate the wrongness of the conduct.[4] This is perpetuated by the fact that sometimes offenders attempt to persuade victims that what is occurring is normal or natural.[5]

Further, except in relation to the most serious instances of sexual abuse, there is generally no overt evidence of the offence: there is no physical evidence, injury or harm. Thus where the child is not aware of the illegality of the conduct, there is a significant likelihood that those responsible for the child's welfare, or others in close contact with the child, may also be oblivious to the events. This is in contrast to other serious violations that children may be subject to, such as physical abuse or even theft of property.

B *Mixed Emotions Regarding Offender, Reluctance to Speak About Sexual Matters*

When a child does have sufficient knowledge and understanding to realise the wrongness of sexual abuse, they are often reluctant to complain because the offender is commonly a person they love,[6] respect or have reason to fear.[7] Studies have also shown that

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[2] In fact most incidents of sexual abuse on children are never reported. In one particularly illuminating study it was revealed that more than half (57%) of children with sexually transmitted disease did not disclose sexual abuse. See Louanne Lawson and Markin Chaffin, 'False Negatives in Sexual Abuse Disclosure Interviews: Incidence and Influence of Caretaker's Belief in Abuse Cases of Accidental Abuse Discovery by Diagnosis of STD' [1992] *Journal of Interpersonal Violence* 532.

[3] See generally Diana Russell, *The Secret Trauma: Incest in the Lives of Girls and Women* (1986).

[4] The Judicial Commission of New South Wales, above n 1, 25, reported that the median age for sexual child abuse victims was nine years for males and ten years for males.

[5] Gary Ernsdorff and Elizabeth Loftus, 'Let Sleeping Memories Lie? Words of Caution about Tolling the Statute of Limitations in Cases of Memory Repression' (1993) 84 *Journal of Criminal Law and Criminology* 129,135-137.

[6] For example, see M Sauzier, 'Disclosure of Child Sexual Abuse; For Better or Worse' (1989) 12 *Psychiatric Clinics of North America* 455; Dayna Glaser and Stephen Frosh, *Child Sexual Abuse* (1988) 13-15. The research undertaken by Sauzier reveals that children are much less likely to report abuse when the offender is their natural father; however, are more prone to disclose the abuse where the offender is a non-family member. Children are also particularly reluctant to report abuse where the abuse occurs in the context of day care (David

children are very good at keeping secrets, even ones that objectively they should not, when requested to do so.[8] Victims may also not promptly report abuse because they fear the consequences for themselves, the family unit[9] and perhaps even the offender.[10] These mixed emotions make it far easier to do nothing, rather than taking the step of disclosing the abuse. It often takes many years for these mixed emotions to resolve. The dilemma that sexually abused children face is compounded by the fact that when they are aware of the gravity of the violation they have been subjected to, they are often *too aware* of it. They may come to believe that due to the extremely sensitive and intrusive nature of sexual contact, irrespective of the context, it is not a proper topic of discussion.

There is a general social taboo imposed on young people talking about such matters. It is not an area they are comfortable discussing with parents, teachers or other people in authority. It often takes children many years of social training to discern that the prohibition on sexual discourse is not absolute; there are exceptions, and the main being where one's sexual autonomy is violated. Developmental factors regarding motivational influences also play a key role in influencing the reporting of sexual abuse.[11]

C *Self Blame, Family Dynamics and Lack of Faith in Others*

Children also often feel that they have done something wrong and blame themselves for what has occurred.[12] This often depends on the dynamics of the child's family. Families may ignore or downplay reports of sexual abuse by children to preserve family unity. This distorted sense of family loyalty in favour of the offender may foster an environment where the child is blamed for what has occurred.[13]

Another strong discouragement to reporting abuse in the eyes of many children is the perception that they will not be believed. After all it will be their word against that of an adult. This perception is unfortunately not illusory. In relation to females in particular, there has been a prevailing attitude that their evidence of sexual abuse was inherently unreliable.[14] Further, children who suffer sexual abuse often experience extreme severe

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Finkelhor and Linda Williams (eds), *Nursery Crimes: Sexual Abuse in Day Care* (1988)).

[7] Aggression towards the child is equally likely to lead to reporting as non-disclosure, while both threats and intimidation inhibit immediate disclosure (M Sauzier, above n 6). See also Gary Ernsdorff and Elizabeth Loftus, above n 5.

[8] M Pipe and G S Goodman, 'Elements of Secrecy: Implications for Children's Testimony' (1991) 9 *Behavioural Sciences and the Law* 33.

[9] A recent report noted that most female victims are abused by family members, while male victims were more likely to be abused by non-family members known to them or their family (Judicial Commission of New South Wales, above n 1, xi).

[10] Independent Commission Against Corruption, *Interim Report on Investigation into Alleged Police Protection of Paedophiles,* Sydney (1994).

[11] Kay Bussey, Kerry Lee and Elizabeth Grimbeek, 'Lies and Secrets: Implications For Children's Reporting of Sexual Abuse' in Gail Goodman and Bette Bottoms (eds) *Child Victims, Child Witnesses: Understanding and Improving Testimony* (1993) 147.

[12] Kay Bussey, 'Allegations of Child Sexual Abuse: Accurate and Truthful Disclosures, False Allegations, and False Denials" (1995) 7(2) *Current Issues in Criminal Justice* 176, 183.

[13] Dayna Glaser and Stephen Frosh, above n 6, ch 3.

[14] This bias was noted by Deane J in *Longman v The Queen* (1989) 168 CLR 79, 90-92 ('*Longman*').

psychological harm and this harm itself may contribute to delay in reporting the incident.[15]

III PROBLEMS FOR THE PROSECUTION AND THE VICTIM

Due to the lapse in time in complaining there are several types of problems which the victim and prosecution commonly need to overcome in the trial process: delay, fading memory and lack of corroboration.

First there is the problem that delay invariably leads to suspicion regarding the veracity of the complaint and invites the question why the complaint was not made sooner. The memory of the victim will also have faded to some extent and the associated vagueness or uncertainty regarding some aspects of the victim's evidence may adversely impact upon the persuasiveness of the victim's testimony.

Then there are incidental problems which can occur in most cases but which are made more likely due to delay. The most significant of these is the increased risk of lack of corroboration. For example, another child who may have witnessed the abuse many years ago may no longer be able to recall the event, and the 'torn pyjama' will obviously no longer be available. The relationship between the victim and accused also places added strain on victims in giving evidence.[16] Delay typically does nothing to alleviate this – in fact it can quite often perpetuate the power imbalance and subtle intimidation which can be projected towards the victim.

There is also the general perception that children are less reliable and credible witnesses:

> it is less likely that their complaints will result in convictions than those made be adults. Despite all our knowledge of child development gained in the 20th century there is still a pervasive myth that children are essentially unreliable and untruthful, hence juries find it very difficult to convict in these matters where it is usually the child's word against an adult who has usually established over a much longer lifetime a reputation that can be called in aid. Suggestibility and its consequences must be distinguished from untruthfulness.[17]

For example, in 1962 the Supreme Court of Canada held that evidence of children was fundamentally deficient,[18] and it was not until nearly thirty years later that such a view was held to be based on 'false science'[19] and it was acknowledged that the evidence of children regarding sexual abuse is 'inherently reliable'.[20]

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[15] For example, Post Traumatic Stress Disorder. This may also result in the child retracting evidence or failing to recall specific details of the experience (Catherine Koverola and David Foy, 'Post Traumatic Stress Disorder Symptomatology in Sexually Abused Children: Implications For Legal Proceedings' (1993) 2(4) *Journal of Child Sexual Abuse* 119, 125).

[16] Judicial Commission of New South Wales, above n 1, 5.

[17] N Cowdrey QC, Director of Public Prosecutions (NSW), *Statement to Royal Commission into the NSW Police Service* (1996) 2.

[18] *R v Kendall* [1962] SCR 469.

[19] *R v Meddouli* (Unreported, 23 November 1990).

[20] *R v Khan* (1990) 59 CCC (3d) 92 (Lamer CJC, Wilson, Sopinka, Gonthier, McLauchin JJ)

Nevertheless, the fundamental problem remains that in child sexual abuse cases 'children are required to challenge the statements of someone who is usually more knowledgeable, believable, and of higher status than themselves, about an experience that many adults do not want to believe happens to children.'[21] The cumulative effect of such mistrust of children and the suspicion accompanying delay create a significant barrier to prosecution of historical child sexual offences. These problems continue to exist despite the fact that current literature indicates 'that children are no more prone to deliberate fabrication than adults; even young children have the ability to recall, albeit with some problems of free recall; suggestibility is not necessarily more of a problem with children than adults; and that adult testimony is not necessarily more accurate than that of children.'[22]

Modern empirical studies also debunk some other myths about the reliability of child evidence: children are not more likely to lie than adults; the immature tendency to mix fact and fantasy does not apply to children after the age of about six; and sexual abuse is in any event not likely to be a theme of childish fantasy.[23] Studies also show that there are very few instances where children demonstrably lie in making allegations of sexual abuse. Demonstrable lying by children on such matters is very probably lower than for adults who testify.[24] False allegations are most frequent in circumstances involving custody disputes and children in care;[25] however, there does not appear to be a need for more than normal vigilance in investigating allegations of sexual abuse by children even in these circumstances.[26]

The suspicion with which the evidence of children is viewed, however, remains. For example, in New South Wales the guilty verdict rate for child sex cases is about 33% compared to about 45% for other offences that proceed to trial.[27]

Despite the fact that the thrust of empirical evidence generally supports the soundness of the evidence of children, there is one particular danger with such evidence. A significant body of literature shows that younger children are more suggestible than older children and that children can be led to make false reports about significant matters.[28] Despite

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[21] Bussey, above n 12, 176, 177.

[22] J C Robb, *The Disadvantaged Witness* (Paper prepared for the Alberta Law Reform Commission, 1991), 285. See also Nurcombe, 'The Child as Witness: Competency and Credibility' (1986) 25 *Journal of the American Academy of Child Psychology* 4:478-80; Bussey, above n 12, 176.

[23] M Dixon, 'The Credibility of Children as Witnesses: Memory, Suggestibility, Fact and Fantasy'(1993) 20 (4) *Brief* 34.

[24] Kay Bussey, 'The Competence of Child Witnesses' in Gillian Calvert, Adrian Ford and Patrick Parkinson (eds), *The Practice of Child Protection: Australian Approaches* (1992) 69.

[25] John Spencer and Rhona Flin, *The Evidence of Children* (1990) 266.

[26] Graham Davies, 'Children in the Witness Box: Bridging the Credibility Gap' (1993) 15 (3) *Sydney Law Review* 283, 285.

[27] P Dart, *Recent Development in New South Wales in the Criminal Jurisdiction Relating to Children and the Work of the Children's Evidence Taskforce* (Paper delivered at the National DPP Victim Services Seminar, Sydney 3 July 1997) 2. Similar data for Victoria is not available.

[28] Stephen Ceci and Maggie Bruck, 'Suggestibility of the Child Witness: A Historical and Review and Synthesis' (1993) 113 *Psychological Bulletin* 403, 432.

this, little work has been undertaken to work out how best to circumvent this danger.[29] Part of the answer here must obviously lie in limiting the use of leading questions, given that when children are questioned in an open-ended style the accuracy of the information they supply is the same as for adults. The temptation for asking leading questions to young children stems from the fact that they provide less spontaneous and pointed answers than adults.[30] However in the interests of truth, it may be necessary to extend far greater patience when examining, or for that matter cross-examining, children.

The manner in which the criminal justice system has responded to some of the difficulties posed by child sex cases is discussed in section 5 below. But first a reflection on some of the difficulties delay creates for the accused.

IV PROBLEMS FOR THE ACCUSED CAUSED BY DELAY

A *Loss of Opportunity to Advance Defences - Alibi and Absence of Mens Rea*

As a consequence of delay in reporting sexual abuse, the accused often loses the opportunity to advance the strongest type of defence evidence available: alibi. Further, the accused is also impeded from contradicting the complainant's evidence by either denying the events totally or providing an innocent explanation for the actus reus of the offence. This is especially significant in the case of sexual offences, where the difference between a permissible contact and an unlawful one can turn solely on the private intentions of the offender.[31] It is not intrinsically unlawful to rub a child on the backside or wash a child in the shower; however, these acts may be unlawful if the accused has sinister intentions. Where there is delay in prosecuting acts which are not inherently unlawful the accused is effectively deprived of placing them in an innocent context by providing a thorough and coherent account of the situation in which they occurred. Human memory is such that we do not recall historic events which are unremarkable. Thus the paradoxical situation that accused find themselves in when an old child sexual offence is alleged against them, is that the more likely it is that the act was innocent the less probable it is that they will be able to provide a detailed innocent explanation for the incident.

Some of the problems an accused experiences where there has been delay in complaining were outlined by the High Court in *Jones v The Queen*:[32]

> Delay in complaining may be so long that it hampers an accused person's right to defend him or herself. An innocent person's ability to recall the events which took place at the time of the alleged incident is undoubtedly impeded by any extensive delay in the making of the complaint against him or her. As Ma-

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[29] Bussey, above n 12, 176, 178.
[30] Gail Goodman, Christine Aman and Jodi Hirschman, 'Child Sexual and Physical Abuse: Children's Testimony' in Stephen Ceci, Michael Toglia and David Ross (eds), *Children's Eyewitness Memory* (1987) 1, 9-20.
[31] *R v Flattery* (1877) 2 QB 410; affirmed [1923] 1 KB 340.
[32] (1997) 149 ALR 598.

honey CJ said in the Court of Criminal Appeal, delay is a matter of 'considerable importance to the person accused', and has the effect of relegating the accused from giving an account of what actually happened to 'what *must* have happened' [emphasis added]. As a result of the long delay in this case, the applicant's opportunity to obtain evidence refuting the circumstances of each alleged offence was significantly reduced.[33]

B *The Desirability of a Statute of Limitations and Abuse of Process Principle*

One way to minimise the above problems experienced by the accused is to establish a statute of limitations for the prosecution of child sex offences or refuse to prosecute old matters on the grounds that this would constitute an abuse of process. The benefits of this are not confined to curing problems faced by the accused; the important rule of law virtues of certainty and finality would also be promoted.[34] Each member of the community has a strong interest in knowing at any particular time how the law effects or may effect them. Absent such assuredness it becomes extremely difficult to plan and prepare for daily tasks and long term projects. It is important that criminal matters are finalised expeditiously: 'justice delayed is justice denied'.[35] In recognition of these virtues most jurisdictions have a statute of limitations period for prosecution of less serious criminal offences.[36]

However, the interests of each person in securing finality in respect of his or her legal affairs must be considered in light of the reasons for the delay. Where the accused is the cause of the reason or reasons why the offence is unlikely to be reported for some time, if ever, it would be offensive if the accused were then permitted to rely on rule of law virtues as a ground for exculpation.

It may seem curious to imply that people who commit criminal offences can also have 'clean hands'. In saying this we do not refer to the wrongness of the accused's conduct; most criminal conduct is repugnant. But while most theories of punishment support the principle that the commission of a criminal offence permits prosecution and punishment of offenders, this principle is not absolute. There are times when despite the commission of a criminal offence it is wrong to prosecute: on the particular facts of the case, other weightier or more relevant principles step in to trump the normal presumption in favour of prosecution. Thus where the offence is very minor or the behaviour it proscribes is no longer in keeping with contemporary community attitudes[37] or the trial would simply be too expensive, or the police or prosecution have been tardy in gathering evidence or

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[33] Ibid 598, 609-10. See also *R v K* (1997) 68 SASR 405, 409.

[34] For a discussion on the rule of law virtues see J Finnis, *Natural Law and Natural Rights* (1980) 35-6 & 165; J Raz, *The Authority of Law* (1979) ch 11.

[35] County Court of Victoria, *Annual Report* (1992) 2.

[36] In Victoria charges regarding summary offences must be filed within a year of the offence: *Magistrates Court Act* 1989 (Vic) s 26(4).

[37] There have been recent examples in Australia where people have admitted to engaging in euthanasia or performing abortions in unlawful circumstances, yet no prosecution was undertaken.

charging, to avoid placing the law into disrepute it may be desirable not to proceed.[38] In certain circumstances the community loses the opportunity to fairly prosecute an offender. Where this occurs it is not to deny the fact that the offender may be guilty of a criminal offence, but merely that other matters *external to the intrinsic features* of the offence (matters not caused by the offender) are more significant.

Obviously this argument does not apply in the case of historic child sex offences where the main reason for not prosecuting, delay, stems from an intrinsic feature (the age of the victims) of the criminal behaviour which the offender has chosen to engage. Somewhat more pragmatically, to prescribe a statute of limitations or accept an abuse of process claim in respect to child sex matters is untenable because given the frequency with which there is a delay in reporting such offences, this would amount to a green light to sex offenders. Similarly, the interests of each person in securing finality in respect of his or her legal affairs must be considered in light of the reasons for the delay. Where the accused is the cause of the reason or reasons why the offence is unlikely to be reported for some time, if ever, it would be offensive if the accused were then permitted to rely on rule of law virtues as a ground for exculpation.

V DEALING WITH OLD SEX OFFENCE CASES

The courts have attempted to deal with the difficulties in prosecuting old child sex offence cases by developing a number of rules of practice concerning the application of the general rules of evidence, and by formulating a range of jury instructions which are applicable to sexual offences generally, or old sexual offences specifically. The application of the rules of evidence and jury instructions in the context of sexual offences is designed to shield juries from potentially prejudicial evidence and assist them with the chain of reasoning that should be adopted in reaching their verdict.

When it comes down to sentencing sexual offenders, the typically stern sanctions reflect the seriousness and repugnance with which such conduct is viewed.[39] However, this repugnance does not appear to be manifested in a commensurate determination to convict sexual offenders. This is made apparent from the overall operation of the rules of evidence and the nature of jury instructions in the context of sexual offence cases which are slanted heavily in favour of the accused. At first sight this appears incongruous: the interests of the community are best served by making those who engage in acts seen as abhorrent accountable for their behaviour. However, the extra advantages conferred on accused charged with old sexual offences seem to stem from the perceived special dangers involved in the prosecution of such matters and an application of the maxim that it is 'better that ten guilty people are acquitted, than one innocent person is found guilty.'

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[38] The general law of abuse of process is discussed in Andrew Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993). See also *Jago v District Court of NSW* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292.

[39] For example, see the comments in *R v Bustos* (Unreported, Court of Criminal Appeal (NSW), Gleeson CJ, Scheler and Hulme JJA, 27 June 1995); *Schnabel v The Queen* (Unreported, Court of Criminal Appeal (Vic), Anderson, Murray and Ormiston JJ, 28 August 1984); *Young v The Queen* (Unreported, Court of Criminal Appeal (Vic), Kaye, Gray and Phillips JJ, 18 September 1985).

Despite the persuasiveness of these considerations it would appear that the courts have gone too far in attempting to avoid the possibility of unsafe convictions in this area.

A *Application of Rules of Evidence in Sexual Offence Cases*

There are no special rules of evidence that relate solely to *historical* sexual abuse cases. However, the manner in which the courts have applied the normal rules of evidence to sexual offence cases in general or devised special rules of evidence for sex cases requires some consideration because this may have indirectly contributed to the delay which frequently occurs in the reporting of sexual offences. There is a perception that some rules of evidence are so significantly slanted in favour of an accused charged with sexual offences that it is pointless reporting such matters, especially given that victims of sexual abuse are disadvantaged from the outset, vis a vis other victims, given the intimate nature of their testimony. The bias against the victim is so severe that it has led many to question whether it is the victim or accused who is on trial. This has created an environment where many victims of sexual offences, particularly those least empowered (children), are reluctant to report sexual abuse to authorities. Even where children are too young to be influenced by such a perception, they are indirectly affected through the attitudes of adults who may discourage reporting of child sexual abuse in the belief that it is contrary to the interests of the child.

1 *Similar Fact Evidence Rule*

The rule of evidence which has operated most harshly against the interests of sexual offence victims is the similar fact evidence rule. Similar fact evidence is evidence of the accused's character or disposition, arising from prior occasions, which is tendered to prove that the accused acted in a similar way on the occasion in dispute. There are numerous ways in which similar fact evidence may be logically relevant to the facts in issue. For example it can be used to rebut a defence, coincidence, mistake, or innocent association;[40] to prove system;[41] or identity.[42] However in the context of sex cases, it can be especially useful to prove intent[43] or demonstrate a specific criminal propensity, such as that of engaging in sex with children.[44]

The courts have traditionally been extremely reluctant to admit similar fact evidence. This is not because the accused's behaviour is not logically relevant to the facts in issue, but because of the assumption that it will attract such a high prejudice and engender such unfavourable sentiments towards the accused that the evidence of previous conduct will assume disproportionate inculpatory persuasiveness. There are two underlying reasons for this. First, human behaviour is not always constant and repetitive. The fact that people act wrongly at some point in their lives does not mean that they will do so again.

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[40] *Makin v A-G (NSW)* [1894] AC 57 ('*Makin*') - 12 babies buried in the backyard.
[41] *R v Straffen* [1952] 2 QB 911 ('*Straffen*') - strangulation of young girls.
[42] Ibid.
[43] *Perkins v Jeffrey* [1915] 2 KB 702 - to show that the exposure was with indecent intent.
[44] *R v Ball* [1911] AC 47 - evidence that brother and sister charged with incest were previously married; *R v Boardman* [1975] AC 421 ('*Boardman*') - sex with a number of young boys.

Also, it is thought that triers of fact may form such an unfavourable disposition against the accused due to his or her earlier conduct that this simple and uncontroversial truth (that behaviour is not *necessarily* repetitive) will escape them. To avoid the 'forbidden chain of reasoning' that the accused is guilty of the crime charged because of what he or she may have done before, the courts have set an extremely high threshold for admissibility of similar fact evidence.

Since Lord Herschell first articulated the statement of the rule for admissibility in *Makin*,[45] the courts have made several attempts to develop a test which will properly balance the interests of the accused and the community (which of course includes the victim). Four broad approaches have been advanced in Australia. Under the first approach, similar fact evidence is inadmissible unless a particular exception applies, such as where it is used to prove intent, or identity or to rebut a defence of mistake or accident.[46] Under the second approach similar fact evidence is admissible if it can be shown to be relevant otherwise than via propensity,[47] such as where it is adduced to rebut the likelihood of coincidence or mistake. The third approach provides that similar fact evidence will only be admissible if its probative value outweighs its prejudicial effect. This is the test which has gained the most judicial support,[48] and is essentially in line with that adopted by the House of Lords in *R v P*,[49] which provides that similar fact evidence is admissible where its probative force is sufficiently strong to make it fair to admit it notwithstanding its prejudicial effect.

Recently the High Court of Australia devised another test, known as the 'another rational view test'.[50] This provides that similar fact evidence is only admissible if there is not another reasonable view of the evidence consistent with innocence.[51] This test tips the

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[45] The statement of the similar fact evidence rule from *Makin* is as follows:

> [I]t is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused ([1894] AC 57, 65).

This rule was illogical (the second inclusionary sentence is wider than the first and hence renders the first sentence of no effect – so that the test was essentially that similar fact evidence was admissible if relevant to an issue before the jury) and was thereby discarded.

[46] This approach, however, was seen as too mechanical as it failed to address the rationale behind the exclusionary rule. It was therefore rejected in *Boardman* [1975] AC 421.

[47] Gibbs CJ in *Perry v The Queen* (1982) 44 ALR 449, 450 ('*Perry*'), and *Sutton v The Queen* (1984) 152 CLR 528 ('*Sutton*'), and McHugh J in *Pfennig v The Queen* (1995) 127 ALR 99; 133 ('*Pfennig*'). However, this approach is unsatisfactory since it is evident that propensity evidence is typically the most common form of similar fact evidence (for example, *Boardman* [1975] AC 421 and *Straffen* [1952] 2 QB 911).

[48] *Perry* (1982) 44 ALR 449; *Sutton* (1984) 152 CLR 528; *Boardman* [1975] AC 421.

[49] [1991] 3 All ER 337.

[50] See *Pfennig* (1995) 127 ALR 99.

[51] There are many unresolved issues regarding the nature of this test. It is unclear whether it now is *the complete* test for the admissibility of similar fact evidence (as was alluded to by Mason CJ, Deane, and Dawson JJ in *Pfennig* (1995) 127 ALR 99), or whether it is merely a threshold issue which must be determined in the positive (ie. it must be concluded that there is no rational view consistent with innocence) in relation to the probative limb before the weighing process against the prejudicial limb can commence (Dawson J in *Harriman v The Queen* (1989) 167 CLR 590), or whether the court in *Pfennig* was providing that this is merely another,

balance too far in favour of the accused, since if applied literally it means that similar fact evidence is only admissible if its probative value alone, independent of all of the other evidence adduced at trial, is sufficient to convict the accused. Another controversial aspect of the 'another rational view' test is that whenever there are two or more connected complainants in a case involving similar fact evidence, such evidence is invariably excluded since the possibility of concoction is another rational explanation for the existence of the disputed evidence.

The similar fact evidence test is most regularly invoked in sexual abuse cases, particularly those involving children. This is because the propensity to engage in such predatory and extreme conduct as sex with children is not a transient trait, and when it is manifested once, is often expressed again. Thus it is common that accused who are charged with sexually abusing a child, are alleged to have abused more than one child. In fact the paradigm offence of child sexual abuse is committed by an adult in a position of trust who systematically abuses a number of children under his or her supervision or care. In such circumstances, the children are often known to each other and there is always at least the *theoretical* chance of concoction. Accordingly the application of the 'another rational view test' results in evidence of abuse of other children being ruled inadmissible. However, it should be noted that the troubling unstated assumption in this is that children are prone to lie and exaggerate (at least 'theoretically').

This result is unsatisfactory. It ignores the fact that while human behaviour is not necessarily repetitive, it is also certainly not random. This is especially so in relation to certain forms of extreme or bizarre behaviour (such as child sexual abuse). Such behaviour is often indicative of such a pointed and pervasive attitude or mindset that it is likely that it will be repeated. It cannot be denied that the fact that a person has engaged in such extreme behaviour as sexually abusing children is extremely relevant to the inquiry into whether he or she has done so again. The greater the similarity between the previous behaviour and the allegations in dispute and the greater the frequency of past behaviour the greater the relevance of such evidence. To not admit such evidence is an affront to common sense and distorts the nature of the factual inquiry.

This strong presumption against the admissibility of similar fact evidence is particularly troubling when viewed in conjunction with the rule relating to severance of trials, which provides that joint trials should not occur where there is a risk that the inherent dangers

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more precise, way of articulating the probative value/prejudicial effect test. The probative value/prejudicial effect test was not expressly overruled in *Pfennig* and cases which adopt that test, such as *R v P* [1991] 3 All ER 337, were cited with approval, hence it may be that the court in *Pfennig* was not attempting to formulate a new test for the admissibility of similar fact evidence. The little judicial authority that there is on the issue goes either way. In *R v McKellin* (Unreported, Court of Appeal (Vic), Phillips CJ, Charles JA and Vincent AJA, 19 Dec 1997) Vincent AJA stated, at 4, that '*Pfennig* approved of the approach taken in *R v P*'. This is in contrast to Batt JA's judgment in *R v G.A.S* (Unreported, Court of Appeal (Vic), Brooking, Ormiston and Batt JJA, 27 November 1997) where he states, at 34, that the new legislative amendments 'will overrule the *Pfennig* test for the admissibility of similar fact evidence.' More recently see *R v Best* (Unreported, Court of Appeal (Vic), Phillips CJ, Callaway and Buchanan JJA, 23 July 1998); *R v Bullen* (Unreported, Court of Appeal (Vic), Phillips CJ, Callaway and Buchanan JJA, 23 July 1998). These decisions are discussed further in Ken Arenson, 'Propensity Evidence: A Triumph For Justice or an Affront to Civil Liberties?' (1999) *Melbourne University Law Review* (forthcoming, on file with the authors).

[52] *De Jesus v The Queen* (1987) 61 ALJR 1; *Sutton* (1984) 152 CLR 528.

relating to such evidence cannot be adequately alleviated by a direction to the jury to assess each count on its merits. It is generally felt that in sex cases the bias to the accused stemming from joint trials is so strong that severance is almost mandatory.[52]

As a consequence, the practical effect on these rules of evidence is that child sex cases in Australia are often tried separately and hence juries are deprived of the capacity to reach a verdict on the basis of all the probative material available. This has added significantly to the problems in prosecuting these already sensitive and difficult cases.

To circumvent these problems new legislation has been introduced in Victoria to lower the threshold for the admissibility of similar fact evidence. The legislation is modeled on the current English position. Section 398A(2) of the *Crimes Act 1958* (Vic), which commenced on 1 January 1998, provides that 'propensity evidence ... is admissible if ... it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.' It also provides that the issue of whether there is a reasonable explanation consistent with innocence is relevant to the weight of the evidence or credibility, as opposed to the threshold question of admissibility.[53] There is also a presumption that counts on a single presentment alleging sex offences, which are properly joined, will not be severed.[54] The amendments also exclude as a sufficient basis for rebutting this presumption, the assessment that the evidence on one count is not admissible on another.[55]

It is anticipated that these amendments will better balance the interests of the community and the accused, thereby lessening the reluctance of victims of sexual abuse to report the matter to the authorities at an early point in time.

2 *Evidence of First Complaint*

There are also several rules of evidence which apply specifically to sexual offences. In most jurisdictions evidence is admissible of complaint by a victim of a sexual offence where the complaint alleges an offence of a sexual nature and reports it at the first available opportunity.[56] This is an exception to the general prohibition against prior consistent statements.[57] Ostensibly this rule may seem to assist victims of sexual abuse, by allowing them to bolster credibility and show consistency with oral testimony. However, as is discussed below, the jury direction accompanying such evidence often takes away more than it gives to victims. For present purposes it is worth noting the curious nature of this rule. The underlying justification for it is that victims of sexual abuse are more likely to complain than victims of other types of offences. However, there is no empirical evidence to support the claim that a victim who has just been assaulted or robbed is not likely to complain just as readily and loudly. In fact, given the sensitive and intrusive nature of sexual offences, armchair logic would suggest the converse to be the case.

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[53] *Crimes Act 1958* (Vic) s 398A(4).
[54] *Crimes Act 1958* (Vic) s 372.
[55] *Crimes Act 1958* (Vic) s 372 (3AA) to (3AC).
[56] *R v Giffin* [1971] Qd R 12; *R v Freeman* [1980] VR 1; *Kilby v The Queen* (1973) 129 CLR 460.
[57] Prior consistent statements are inadmissible due to their self-serving nature – for example, see *Corke v Corke and Cook* [1958] P 93.

3 *No Cross Examination Regarding Sexual History*

There is also a statutory prohibition on cross examination of sexual abuse victims regarding their sexual history, unless, broadly, it is in the interests of justice.[58] The interesting feature of this 'protection' is that it was necessary in the first place. Evidence of sexual history is hardly likely to pass the threshold test of relevance[59] for admissibility of evidence and is rarely a matter which goes fairly to credit.

4 *Giving Evidence via Alternative Means*

Recently the legislature in some jurisdictions has instituted positive changes to the law which will assist victims of sexual abuse, especially children, to overcome some of the unique problems with which they have been forced to contend. For example, complainants in sexual offence cases in Victoria who are under the age of 18 can give evidence by means of closed-circuit television where the judge is satisfied that were the complainant to be required to give evidence in the usual manner that he or she would be likely to suffer emotional trauma or be intimidated.[60] There is also provision for the victim of a sexual offence to give his or her evidence in chief in the form of an audio or video recording.[61] In a 1993 survey, it was reported that having to face the accused in court was the major concern for children and parents in sex abuse cases. Over 75% of parents and 65% of children referred to seeing the defendant in court as either the worst aspect or the aspect they would most like to change in relation to going to court.[62] Thus the alternate arrangements for giving evidence are likely to claw back many of the peculiar disadvantages suffered by child sexual abuse victims and offset some of the reasons which militate against complaint.

5 *Privileged Communications Regarding Sexual Offences*

Measures have also been taken to provide a new category of privilege for communications between victims of sexual offences and their medical practitioner or counsellors.[63] This will not directly result in more sex offences being reported to police. However, by instilling confidence in sex offence victims that their communications with others will not be divulged, this is likely to encourage more victims to seek professional help to

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[58] For example, see *Evidence Act 1958* (Vic) s 37A.
[59] See John Strong (ed), *McCormick on Evidence* (first published 1954, 5th ed, 1992) 822-824.
[60] *Evidence Act 1958* (Vic) s 37C.
[61] *Evidence Act 1958* (Vic) s 37B.
[62] J Cashmore, 'The Perceptions of Child Witnesses and Their Parents Concerning the Court Process - Results of the DPP Survey of Child Witnesses and Their Parents' in Judicial Commission of New South Wales, *Evidence of Children* (1993) 24, 44. Other main concerns, in order of significance, were cross-examination (particularly being accused of lying), difficulty in language, and procedural and administrative concerns: closed court, absence of support persons, delays and adjournments; and intimidating court room environment.
[63] *Evidence (Confidential Communications) Act 1998* (Vic). This is based on similar legislation in New South Wales.

assist them in working through their trauma. This may indirectly result in more sex offences being reported and the more expeditious reporting of these offences.[64]

B *Jury Instruction In Sexual Offence Cases*

In the context of sexual offence cases there are several jury instructions which are significant. As will be seen, delay in complaining to authorities is relevant to all of the instructions, either to their content or as a factor bearing upon whether it is appropriate for a particular warning to be given. The trend of these instructions reveals a discernible level of mistrust by the judiciary towards complainants in sex cases. The basic reason for this is the suggestion that allegations of sexual abuse are easy to make but hard to refute,[65] and the associated view that victims of sexual offences are as a class less credible than other witnesses. Thus in cases where there was uncorroborated evidence of sexual abuse, a rule of law or practice developed which required the jury to be informed of the special dangers of convicting the accused. Legislation in most Australian states has made inroads into this. For example s 61(1)(a) of the *Crimes Act 1958* (Vic) provides that in a sexual offence trial the judge must not warn the jury that the law regards complainants in sexual offence cases as an unreliable class of witness.[66]

1 Longman *Warning*

The High Court in *Longman v The Queen*[67] held that the effect of such a provision[68] was only to dispense with the requirement to warn of the general danger of acting on the uncorroborated evidence of alleged victims of sexual offences as a class, but not of the requirement to warn when the evidence of an alleged victim of sexual abuse is uncorroborated and the facts suggest that it may be unsafe to convict, for example where there has been a delay in making a complaint. The effect of this is that where there is uncorroborated evidence of sexual abuse the jury are still often instructed that it may be unsafe and dangerous to convict the accused.[69]

Thus while there is no longer a rule of law requiring a mandatory corroboration warning to be given in cases of uncorroborated testimony of a sexual offence, as a matter of practice this is still often the case. Where there has been delay in reporting the incident to authorities a judge is still required to give a direction to the jury,[70] carrying the authority of the judge's office, that it would be dangerous and unsafe to convict on the un-

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[64] Awareness instilled by counselling and child protection agencies is one of the main catalysts to reporting abuse. Other common catalysts are incidental discovery by third parties and family conflict (R Summit, 'The Child Sexual Abuse Accommodation Syndrome' (1983) 7 *Child Abuse and Neglect* 177).

[65] *Kelleher v The Queen* (1974) 131 CLR 534, 543 and 553.

[66] See also *Crimes Act 1900* (NSW) s 405C(2); *Evidence Act 1929* (SA) s 34i(5); *Evidence Act 1906* (WA) s 50.

[67] (1989) 168 CLR 79, 88-89.

[68] The legislation in question was the *Evidence Act 1929* (SA) s 34i(5).

[69] It was held in *Longman* (1989) 168 CLR 79 that no particular form of wording is necessary. .

[70] As opposed to a mere judicial comment.

corroborated evidence of the complainant.[71] The reasons underlying the inherent distrust of alleged victims of sex offences are alluded to by King CJ in *R v Pahuja*, where in the context of considering the South Australian equivalent to section 61(1)(a) of the *Crimes Act 1958* (Vic), he states that

> [a]cts of parliament do not, and do not purport to, change human nature. There are aspects of human nature and behaviour, such as sexual appetite, *certain motives for making false complaints and proneness to certain types of fantasies, which have a peculiar bearing upon sexual cases* and which may be important in certain factual situations (emphasis added).[72]

2 Kilby *Warning*

The rule of evidence which allows evidence of first complaint in sexual cases to be admitted has turned out to be a two edged sword. While one may have thought that this would assist victims in establishing the truth of their testimony, the jury instruction which has been developed to accompany such evidence may be so damaging to the victim to more than offset any benefit that has been conferred on them by this rule. The High Court in *Kilby v The Queen*[73] made the unobjectionable observation that evidence of first complaint is not evidence of the facts alleged, and that it can only be used for the narrow purpose of judging consistency of the conduct of the victim with his or her evidence: it merely goes to credibility. However, the court went further and provided that it is proper for a trial judge in evaluating the evidence of an alleged sexual abuse victim to take into account a failure to make a complaint at the earliest available opportunity in determining whether to believe the victim.[74]

The effect of this ruling is to use the rule allowing admissibility of evidence of first complaint regarding sexual offences as a weapon against the victim. The jury direction implies that immediate complaint in sexual matters is to be *expected*; hence the prosecution case is not assisted where there is evidence of such complaint, but is impaired where it is absent.

Once again there have been statutory incursions into this direction. In most jurisdictions there is a statutory requirement that where the absence of complaint is raised or a delay in making a complaint is alluded to, the judge is required to warn the jury that those matters do not necessarily indicate that the allegation is false and that there may be good reasons why a victim of sexual assault may hesitate in making a complaint.[75]

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[71] For example, see *R v Johnson* (Unreported, Court of Appeal (Vic), Winneke P, Charles and Callaway JJA, 27 February 1997).
[72] (1987) 49 SASR 191, 199.
[73] (1973) 129 CLR 460, 466.
[74] Ibid 465, 472.
[75] For example, see *Evidence Act 1995* (NSW) s 66; *Evidence Act 1906* (WA) s 36BD; *Criminal Code 1924* (Tas) s 371A.

3 Crofts *Warning*

Courts have again, however, displayed reluctance in heeding the statutory message. In *Crofts v The Queen*[76] the court stated that such provisions merely entail that the judge should warn that delay in complaining does not *necessarily* indicate that the allegation is false and that there may be good reasons for hesitating in complaining: 'But in the particular circumstances of a case, *the delay may be so long*, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false' (emphasis added).[77]

Where the victim is a child who has delayed in complaining the courts have been particularly quick to give such a warning. In *Jones v The Queen*[78] it was held that 'not only a comment but a warning about the danger of convicting without supporting evidence other than the testimony of the child' was required. In the same case Brennan J also suggested that a warning about the difficulty of establishing the defence case where there had been a delay in complaining was also necessary.[79]

The preparedness of courts to give warnings where children have delayed in reporting sexual abuse is at odds with research indicating that delay in reporting is more likely to indicate the truth of a complaint, rather than its fabrication.[80] In fact some level of delay is consistent with the typical disclosure pattern for children that have been sexually abused. For example, Sorenson and Snow have identified a four stage progressive disclosure process: denial, disclosure (first tentative, then active), recant and reaffirmation.[81]

It follows that legislatures, on the whole, have been far more progressive in responding to the concerns of sexual offence victims and thereby encouraging reporting of such matters, but the reluctance of the courts to heed this message means that on the whole the weight of jury instructions in sex cases still favours the accused.

On a more fundamental level there are further problems with the type of jury instructions discussed above. First, there is a substantial body of empirical evidence showing that standard jury instructions are poorly understood by jurors.[82] This is particularly so in the case of instructions such as those in *Crofts*, which merely takes with the one hand what it gives with the other and hence is more apt to confuse rather than assist the jury. Further, if the role of the jury is to be taken seriously, confidence must be shown in their collective ability to identify unsafe paths of reasoning and avoid illogical conclusions.

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[76] (1996) 186 CLR 427.

[77] Ibid 448-9. The *Crimes (Amendment) Act 1997* (Vic) s 6, seeks to re-dress this situation; however is it unlikely to prevent such a direction being given where there is a significant delay, because it provides that such a direction is still permissible where it is necessary to ensure a 'fair trial' (s 6(2)).

[78] (1997) 149 ALR 598, 602.

[79] Ibid 603. The difficulties adverted to are those discussed above.

[80] Judicial Commission of New South Wales, *Child Sexual Assault* (1997), 69.

[81] Teena Sorenson and Barbara Snow, 'How Children Tell: The Process of Disclosure in Child Sexual Abuse' (1990) 70(1) *Child Welfare* 3. See also other disclosure pattern proffered by K Bussey, K Lee and EJ Grimbeek, above n 11.

[82] For example, see Robert Charrow and Veda Charrow, 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979) 79 *Columbia Law Review* 1306.

A jury hardly needs extensive life experience to be mindful of the fact that where two people give differing version of events, one should be very cautious before forming a strong preference (beyond reasonable doubt) for either version. Accordingly, in the context of a criminal trial where opposing versions of events are about equally credible an acquittal must follow.[83]

It follows that it can be queried whether jury instructions of the type discussed above which relate to matters within the collective experience of the jury are desirable at all.[84]

VI PROBLEMS IN SENTENCING

A *Justifying Punishing an Accused Guilty of Historical Child Abuse*

At the sentencing stage, there are peculiar difficulties which may arise in sentencing offenders found guilty of old child sexual offences. These mainly stem from the inordinate period of time which has elapsed between the offence and conviction. This can put a completely different complexion on the sentencing inquiry, given that most of the variables relevant to sentencing are primarily contingent upon the accused's character and predictions of future conduct. The aims of rehabilitation, specific deterrence and community protection all turn on such considerations. Where these matters are certain or are otherwise not relevant the only sentencing considerations remaining are retribution and general deterrence.[85]

As an example, where a stepfather systematically, over a period of years beginning twenty years ago, abused his wife's children, and has not committed any other offences, this would constitute conclusive evidence that there is no need for specific deterrence, rehabilitation or community protection. Yet, there remains the desire for punishment.

It might be thought that a ready solution to this dilemma can be achieved if one adopts a retributive theory of punishment. Indeed in most western cultures retributivism, under the banner of 'just deserts', has replaced utilitarianism, at least ostensibly,[86] as the prime philosophical underpinning of punishment,[87] particularly in the United States,[88] and to a

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[83] See comments in Geoffrey Flatman QC & Mirko Bagaric, 'Juries Peers or Puppets - The Need to Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207, 210.

[84] Ibid.

[85] The *Sentencing Act 1991* (Vic) s 5(1), provides that the *only* purposes for which punishment may be imposed are rehabilitation, deterrence, denunciation, community protection and just punishment (ie retribution).

[86] It has been argued, however, that a utilitarian theory of punishment still best fits the relevant sentencing variables – see Mirko Bagaric, 'The Disunity of Confiscation and Sentencing' (1997) 21(4) *Criminal Law Journal* 191, 197.

[87] For an overview of the academic and social trends in punishment see R A Duff and D Garland, 'Introduction: Thinking about Punishment' in R A Duff and David Garland (eds), *A Reader on Punishment* (1994) 1, 8-16. See also Andrew von Hirsch, *Past or Future Crimes* (1985) ch 1; N Walker, Why Punish? (1991) ch 1. In the United States the just deserts model was responsible for the move away from wide discretionary sentencing powers, to laws aimed to promote greater certainty and consistency in sentencing, see Andrew Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995) ch 13.

[88] The revival of retributivism is also due in a large part to the work of Andrew von Hirsch, particularly *Doing Justice: The Choice of Punishments* (1976). See also, Andrew von Hirsch, above n 87.

lesser extent in England[89] and Australia. The movement away from utilitarianism, since about the 1970s, is largely the result of a perceived failure of penal practice and the closely connected treatment based goals of sentencing to measure up to the prime utilitarian goals of deterrence and rehabilitation.[90] Research findings relating to rehabilitation were at one point so depressing that a 'nothing works' attitude pervaded.[91]

Forward looking considerations such as rehabilitation, deterrence and community protection carry no weight for the retributivist. The only matter of importance is that an offence has been committed and this alone is thought to be sufficient to justify the imposition of State imposed unpleasantness on an offender. However, even on this account it is not obvious that punishment of historic child offenders is always necessary. Even the desire for revenge subsides over time and given the close relationship that often exists between the complainant in sex cases (or the complainant's family) and the accused there is often no desire by the victims for revenge in the form of harsh sanctions. Absent such a desire by the victim some retributivists would maintain that punishment is not justified.[92]

Thus the only way to justify the imposition of stern sanctions in the case of some historic sexual abuse offences is to defer to the old favourite: general deterrence.[93] This requires a reversion to utilitarian reasoning. This is not troubling per se given that the sentencing laws of most jurisdictions still expressly advert to general deterrence as being one of the purposes of sentencing. However, the difficulty with this is that there is no evidence supporting the view that stern sanctions imposed on particular accused serve to deter others.[94] This problem is obviously not unique to old sexual offences: it applies whenever this objective is used to justify a particular sentence. But the problem is more acute

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[89] The White Paper forming the basis of the *Criminal Justice Act 1991* (UK) declared that the aim of reforms was to introduce a 'legislative framework for sentencing, based on the seriousness of the offence or just deserts' (Home Office, *Crime, Justice and Protecting the Public*, White Paper (February 1990) [2.3]). Ultimately the Act did not expressly adopt these goals (see Andrew Ashworth, *Sentencing and Criminal Justice* (1995) 81-84). However the message was received in relation to length of custodial sentences, the obligations of community sentences and quantum of fines (Ss 2(2)(a), 6(2)(b), 18 *Criminal Justice Act 1991* UK) where the most critical consideration is the seriousness of the offence.

[90] A E Bottoms, 'An Introduction to the Coming Crisis' in A E Bottoms and R H Preston (eds) *The Coming Penal Crisis: A Criminological and Teological Exploration*, (1980) 1.

[91] Robert Martinson, 'What Works? - Questions and Answers About Prison Reform' (1974) 35 *The Public Interest* 22, 48-50. Following research conducted between 1960 and 1974, Martinson initially noted that empirical studies had not established that any rehabilitative programs had worked in reducing recidivism. Martinson, however, softened his position several years later, concluding that some types of rehabilitate programs, particularly probation parole, may be effective (Robert Martinson, 'New Findings. New Views: A Note of Caution Regarding Sentencing Reforms' (1979) Vol 7, No. 2 *Hofstra Law Review* 243, 254).

[92] For example, see G Sher, *Approximate Justice: Studies in Non-Ideal Theory* (Rowman and Littlefield, 1997), ch 12.

[93] For example, see *Kane* (1987) 29 A Crim R 326; *Burchell* (1987) 34 A Crim R 148. Denunciation which is also often regarded as a discrete sentencing goal is most commonly associated with retribution, and hence should not be a weighty consideration where retribution does not feature prominently.

[94] For example, see Franklin Zimring and Gordon Hawkins, *Deterrence - The Legal Threat in Crime Control* (1973) 29 and 201-2; T Tyler, *Why People Obey the Law* (1990) 107 and 175-6. For an overview of the literature on deterrence, see J Q Wilson, 'Penalties and Opportunity' in R A Duff and D Garland (eds), *A Reader on Punishment* (1994) 177, where he argues that the main factor relevant to deterrence is not the penalty level, but rather the perceived probability of apprehension.

in this case since it appears to be the only coherent justification for imposing severe sanctions.

The answer is probably found somewhere in the comment of Jacobs J:

> [t]he deterrent to an increased volume of serious crimes is not so much heavier sentences as the impression on the minds of those who are persisting in a course of crime that detection is likely *and punishment will be certain.* The first of these factors is not within the control of the courts, the second is. Consistency and certainty of sentence must be the aim. ...Certainty of punishment is more important than increasingly heavier penalties (emphasis added).[95]

B *Change in Law During Delay*

A further problem which arises is whether delay per se should be viewed as a mitigating factor in sentencing. Effectively, the courts have resolved this by implicitly invoking the clean hands principle discussed above. Where the accused has not caused or contributed to the delay, generally delay may be an appropriate basis for leniency.[96] However, it is not a significant mitigatory factor in cases of child abuse:

> [o]ffences involving child abuse ... are by their very nature likely to remain undetected for substantial periods, partly because of fear, partly because of family solidarity and partly because of embarrassment. We consider that whilst any factors which have positively emerged in the time between the offences and the trial are open to the court to be taken into consideration [such as evidence of rehabilitation]; the mere passage of time cannot attract a great deal of discount by way of sentence in relation to offences of this kind.[97]

However, where as a result of the delay *relevant* changes occur, such as changes to the law, the courts have taken a more lenient approach to accused found guilty of sexual offences. Thus where the relevant sentencing law changes during the period of the delay, the accused will not be affected for the worse, but can take advantage of any such change (for example, a reduction in the maximum penalty for the offence).[98]

Despite this, where as a result of the delay the offender's effective legal status changes so that he turns from being a child to an adult, he or she is not conferred the benefit of being sentenced pursuant to the less severe sentencing regime which is applicable to children. The sentence which would have been imposed had there not been a delay is a relevant sentencing consideration, however, essentially the offender is dealt with under the sentencing regime that is applicable to a person of his or her maturity at the time of sentence. As far as the accused is concerned this is an extremely undesirable qualification to the rule that the accused will not be disadvantaged by any change in the sentencing law that occurs during the delay. In normal circumstances, where children are

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[95] *Griffiths v The Queen* (1977) 137 CLR 293, 327.
[96] *R v Kane* [1974] VR 759, 767.
[97] *Tiso* (1990) 12 Cr App R (S) 122, 125.
[98] *R v Morton* [1986] VR 863, 866.

sentenced for sexual offences, unless the offence is extremely serious, a custodial term is unlikely, however for adults charged with the same offence a custodial term is the norm.

This may seem unduly harsh and an unwarranted departure from the rule that accused should not suffer more as a result of a change in the law consequent upon a delay in reporting the offence. However, the additional punishment does not stem from a change to the law, but rather a change undergone by the offender. Viewed in this light, it does not seem unreasonable that given the nature of the offending behaviour the accused has chosen to engage in, which carries inherent risks of not being reported for many years, the accused should bear any natural disadvantages flowing from this. As a practical matter it is also often impossible to go back in time and impose sanctions which may have been available had the offender been dealt with many years earlier. For example, it would be inappropriate to sentence an adult to a youth training centre.

VII CONCLUSION

The prosecution of historical child sexual abuse cases present numerous difficulties. However, these are not insurmountable. A considered and coherent approach to the prosecution of such matters can minimise some of them. However, in order to secure a fair balance between the interests of the accused and the community it is vital that the rules and practices developed by the courts and legislatures are in keeping with modern research evidence regarding children as witnesses and changed community attitudes towards children. This would result in a correction of some of the rules and processes in the criminal justice system in favour of the interests of victims. Education about the dynamics of child abuse will hopefully lead to a situation where 'delayed disclosure, retraction and incremental disclosure are not assumed to cast doubt on a child's credibility.'[99] This would have the incidental effect of encouraging greater diligence in reporting child sexual abuse and accordingly reduce the need to overcome problems traditionally consequent upon delay.

[99] I Schwarz, 'The Canadian Experience: Child Witnesses' (1993) *Community Care* 24.