The Hearsay Rule and Delayed Complaints of Child Sexual Abuse: The Law and the Evidence

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This article discusses the implications of two recent High Court cases on the admissibility of hearsay evidence of a child’s delayed disclosure of child sexual abuse. It compares and contrasts the traditional legal significance of delayed disclosure (as being evidence of fabrication) with prevalence studies from the psychological literature which show that a majority of children delay disclosure and that, rather than being an aberrant feature of child sexual abuse, delay is a typical response of sexually abused children as a result of confusion, denial, self-blame and overt and covert threats by offenders. In addition, several self-report studies of offenders confirm that grooming processes create a relationship of power between the child and offender such that delayed disclosure appears to reflect the position of powerlessness of the sexually abused child within that relationship. In light of what the psychological literature tells us, this article challenges the narrow legal approach to the admissibility of hearsay evidence of delayed disclosure and suggests that a special exception should be made for hearsay statements of a child’s delayed disclosure in child sexual assault trials.

The accepted wisdom about the rules of evidence that apply in the criminal trial is that they “ensure that the trial process is fair for [both] parties” to the proceedings (Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission (HREOC), 1997, p. 322). Contrary to this accepted wisdom, however, child sexual assault has been identified as one of the most difficult crimes to prosecute (Brereton and Cole, 1991; Cashmore, 1995; Parliament of Victoria, Crime Prevention Committee, 1995; Royal Commission into the New South Wales Police Service, 1997), not least because the rules of evidence in the adversarial trial have the potential to prevent a child complainant from fully explaining their evidence and to prevent that evidence from being assessed in the actual context in which the assault is alleged to have occurred. In particular, children can be effectively silenced as witnesses due to the existence of common law “[c]ompetency rules, judicial warnings regarding children's evidence, rules against hearsay and prohibitions on expert testimony and on tendency and coincidence evidence” (ALRC and the HREOC, 1997, p. 322). In fact, the Royal Commission into the New South Wales Police Service (1997, p. 1090) commented that the sexual assault trial has always been “peculiarly weighted” against a child complainant for these reasons, as well as the expectation that a child witness should give evidence in the same ways as adults in the witness box in the presence of the accused.

Whilst a number of reforms have been introduced in recent years to address some of these problems, such as legislation which enables a child,
in some jurisdictions, to give evidence from a remote room via CCTV (ALRC and HREOC, 1997, p. 304-352), a review of the NSW case law indicates that the traditional common law approach to issues such as lack of corroboration, delays in complaint and tendency evidence (Cossins, 1999; 2001; R v OGD (No.2) [2000] NSWCCA 404) still operates to de-contextualise the unique circumstances surrounding the sexual abuse of children.

This article examines two recent decisions by the High Court of Australia which concern the admissibility of hearsay statements of recent and delayed complaint in sexual assault trials and discusses the implications of these cases for the reception of such evidence in child sexual assault trials in NSW. The article then contrasts the legal approach to the perceived problems of admitting the hearsay statements of a child’s delayed complaint with a number of psychological studies that have documented the frequency of, and reasons for, delayed disclosures of child sexual abuse. Finally, the article discusses the implications of these studies for the admissibility of hearsay evidence of a child’s delayed disclosure in a child sexual assault trial.

The Hearsay Rule and Recent Complaint Evidence in Sexual Assault Trials

Since the introduction of the Evidence Act in NSW and at the Commonwealth level in 1995 (also known as the Uniform Evidence Law), dozens of appeal cases have interpreted many of its provisions, including the operation of the hearsay rule and one of the hearsay exceptions with respect to recent complaint evidence (a type of prior consistent statement). The impact of the hearsay rule in a child sexual assault case is illustrated by two recent High Court cases, Papakosmas v R [1999] HCA 37 and Graham v R [1998] HCA 61, which dealt with recent complaint evidence and delay in complaint evidence, respectively. Whilst Papakosmas was an adult sexual assault case, it highlights the problems associated with delay in complaint, a common feature of child sexual assault trials, and illustrates the High Court’s thinking on the issues of recent and delayed complaint.

The common law position in relation to recent complaint evidence in a sexual assault trial was summarised by Gleeson CJ and Hayne J in Papakosmas as follows:

From ancient times, the common law permitted a court to receive evidence of recent complaint in cases involving alleged sexual offences. However, if such evidence had been treated as evidence of the truth of the facts asserted in the complaint, then it would have infringed the rule against hearsay. Whether or not evidence of a statement made out of court is hearsay depends upon the use that is sought to be made of the evidence … Under the rules of evidence developed by the common law, it was the potential use of evidence of a statement made out of court as evidence of the truth of what was asserted in the statement that made it hearsay. The common law did not create an exception to the rule against hearsay by permitting evidence of complaint to be used for a hearsay purpose. Rather, it permitted such evidence to be used for another purpose. The rule permitting such use was an exception to the rule relating to the admissibility of evidence of prior consistent statements ([1999] HCA 37 at para 12).

The law relating to evidence of recent complaint appears to be derived from a 13th century prescription that a woman’s failure to immediately raise the “hue and cry” after being raped was a defence to an allegation of rape (NSW Department for Women, 1996, p. 201; citing McDonald, 1994). Historically, “[v]ictims [of violent crimes including rape] were required to travel around the locality present- ing their injuries for inspection of ‘men of good repute’ and local law enforcement officials” (Bronitt, 1998, p. 44), such that the failure to raise a “hue and cry” in relation to an allegation of rape resulted in dismissal of the allegation and the prosecution of the victim for making a “false appeal” (Bronitt, 1998, p. 44).

According to Gobbo (1970, p. 245), by the beginning of the 18th century, case law indicated that the failure to raise a “hue and cry” had evolved into a presumption of fabrication on the part of the rape complainant. For this reason, evidence of a so-called speedy complaint became admissible to boost the complainant’s credit, that is, “to demonstrate consistency between her … conduct and evidence at trial” (Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General, 1996, p. 185). Since the rule was informed by the belief that a rape complainant could only be believed if she could demonstrate she had publicly denounced the perpetrator, rape complainants became a special category of witness
whose credibility could be boosted by evidence of recent complaint. However, at common law, such evidence was not considered to be relevant to the facts in issue in a sexual assault trial, namely whether or not the complainant had consented (Kilby v R (1973) 129 CLR 460).

In Papakosmas, the High Court reversed this common law position by holding that evidence of recent complaint was, in fact, relevant to the issue of consent under s55 of the Evidence Act 1995 (NSW and Cth). In a child sexual assault trial, evidence of recent complaint would be relevant to whether or not the alleged sexual conduct had taken place, since consent is not a fact in issue in relation to the majority of child sex offences.3

Even though it is relevant, a witness’s evidence of a complainant’s recent complaint is caught by the exclusionary hearsay rule under s59 of the Evidence Act 1995 (NSW and Cth). Nonetheless, it is evidence that falls within the hearsay exception, s66, which applies when the maker of a previous representation (here the complainant) is available to give evidence in the proceedings in question.4 Thus, because evidence of recent complaint was held to be relevant to a fact in issue in Papakosmas and found to fall within a hearsay exception, it then became admissible evidence that went before the jury. In particular, the recent complaint evidence in Papakosmas was held to fall within s66 because it satisfied the “fresh in the memory” test under s66(2):

If a person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
(a) that person; or
(b) a person who saw, heard or otherwise perceived the representation being made;
if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

At trial, three of the complainant’s work colleagues had given evidence of what the complainant had said happened to her at the hands of the accused (“Papakosmas raped me”). Because the complainant had informed her work colleagues about being sexually assaulted by the accused almost immediately after the events in question, the “freshness” requirement under s66(2) was satisfied. Whilst the outcome in Papakosmas can be considered to be a significant development since recent complaint evidence was held to be relevant to the issue of consent (unlike the position at common law), arguably, the case serves to highlight the more common situation, particularly in child sexual assault cases, where the complainant delays making a complaint for weeks, months and often years.

In Graham, the High Court was required to consider the scope of s66(2) since, instead of evidence of recent complaint, evidence had been admitted of what the complainant had told a girlfriend some six years after the events which lead to the complainant’s father being convicted of various counts of child sexual assault when the complainant was aged 9 and 10 years. The High Court held that this evidence was not admissible under s66(2) on the grounds that, because the complaint was made six years after the alleged sexual abuse, the complainant had not told her girlfriend when the events were fresh in her memory. The High Court interpreted the word, “fresh” to mean:

… ‘recent’ or ‘immediate’. It may also carry with it a connotation that describes the quality of the memory (as being ‘not deteriorated or changed by lapse of time’) … but the core of the meaning intended, is to describe the temporal relationship between ‘the occurrence of the asserted fact’ and the time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years (Graham [1998] HCA 61 at para 4, per Gaudron, Gummow, & Hayne JJ; emphasis added).

The High Court’s reasons for defining the word, “fresh”, in this way were threefold: first, because s66 only applies as a hearsay exception when the maker of the previous representation is available to give evidence, evidence of a prior consistent statement that was based upon “some assessment of the vividness or quality of the recollection (as opposed to its being made very soon after the events) would be to distract attention from the quality of the evidence [the complainant] gives in court” (Graham [1998] HCA 61 at para 5, per Gaudron, Gummow and Hayne JJ). The second reason was based on the view that “experience demonstrates that the memory of events does change as time passes” (Graham [1998] HCA 61 at para 5, per Gaudron, Gummow and Hayne JJ) whilst, lastly, the High Court considered that the exception created by s66 should be limited to situations where the tender of the previous representation is
likely to add useful material before the court. In relation to the facts in Graham, the High Court considered that the complainant’s prior consistent statement to her girlfriend was not useful material because it was made so many years after the events in question.

The definition given to the word, fresh, by the High Court can be compared to that given by Levine J (with whom Newman and Barr JJ agreed) in the Court of Criminal Appeal in Graham:

... [s]hortly stated, common sense would seem to indicate that the notion of freshness particularly in this area of the law is not anchored to nor determined by simple notions of the ‘lapse of time’. It is concerned with, in my opinion, the ‘quality’ of the memory. A person might never forget the details of an event many years previously because it took place in circumstances which impressed it into the witness’s memory (quoted in Graham [1998] HCA 61 at para 27, per Callinan J; emphasis in original). In light of the High Court’s decision in Graham, it is necessary to ask whether its reasoning is appropriate in the context of child sexual abuse, given that there is extensive material to show that the vast majority of children who are sexually abused do not report the abuse within hours or days and, as discussed in the next section, that delay in complaint is a typical response of a child who has been sexually abused.

Indeed, it is necessary to consider whether the evidentiary impact of a recent complaint is distinctly different from that of evidence of delay in complaint. On the one hand, the High Court considered that the 6-year-old complaint in Graham was such that “it may be doubted that a jury could gain assistance from [it] ... in deciding whether the complainant had fabricated her story” (Graham [1998] HCA 61 at para 9, per Gaudron, Gummow and Hayne JJ). However, if that were the case, the fact of its admission at trial should have had no impact on the appeal. Nonetheless, the High Court found that, because the admission of the 6-year-old complaint “was not inevitable, we cannot say that the appellant did not lose a significant chance of acquittal and it follows that the appeal should be allowed” (Graham [1998] HCA 61 at para 10, per Gaudron, Gummow and Hayne JJ). Clearly then, the High Court considered that the evidence of the complainant’s 6-year-old complaint might have been weighed by the jury such that any reasonable doubt of innocence was removed. Indeed, since complainants are routinely cross-examined about delays in complaint in ways that suggest fabrication, it may be that evidence given by a child complainant’s first confidant about the complainant’s experiences of being sexually abused, and the circumstances in which it was made, would be weighty evidence in a jury’s mind.

The relevance of recent complaint evidence under s55 of the Evidence Act 1995 (NSW and Cth) is derived from the common law assumption that a victim of sexual assault will complain “at the first reasonable opportunity and that, if complaint is not then made, a subsequent complaint is likely to be false” (Suresh v R (1998) 72 ALJR 769 at 770, per Gaudron & Gummow JJ). In other words, “the making of an early complaint is regarded as being consistent with what a complainant would do if he or she had been assaulted as alleged” (Papakosmas at para 76, per McHugh J; see also para 59, per Gaudron & Kirby JJ). Nonetheless, McHugh J also recognised that “the admissibility of [recent] complaint evidence ‘is based on male assumptions, in earlier times, concerning the behaviour to be expected of a female who is raped, although human behaviour following such a traumatic experience seems likely to be influenced by a variety of factors, and vary accordingly’” (at para 76, quoting the view of Fitzgerald P in R v King (1995) 78 A Crim R 53 at 54). As the NSW Department for Women (1996) observes:

... [i]n no other type of assault matter does the law look to evidence of recent complaint or continue to insist that absence or delay in complaint is something the jury can take into account when deciding whether to believe the complainant or not. Just as there is no evidence that can be pointed to that indicates that sexual assault complainants are prone to lie, there is no empirical evidence that suggests that a delay in complaint is indicative of fabrication (1996, p. 212; footnotes omitted).

Unfortunately, Graham’s case illustrates the untainted assumption that evidence of complaint made months or years after the alleged events is to be treated with the same suspicion that common law judges have historically brought to the issue (NSW Department of Women, 1996; Bronitt, 1998; Cossins, 1999) since the reasons for its exclusion do not stand up to scrutiny. Although, traditionally, hearsay evidence is considered to be unreliable because the maker of the statement cannot be cross-examined about its veracity, the hearsay
exception under s66(2) overcomes the strictness of this approach because it applies when the maker of the statement is available to give evidence and is thus available for cross-examination.

Furthermore, the Court of Criminal Appeal in *Graham* identified that there are some events that happen in a person’s life that are never to be forgotten, even if, with the passing of time, exact dates and times are forgotten. The High Court failed to recognise the documented differences between traumatic and non-traumatic memories and how the retention rates and qualities of such memories differ (Squire & Zola-Morgan, 1991; van der Kolk & Fisler, 1995). The evidentiary importance of a complaint (whether recent or delayed) is not only to show that a complaint was made, but also to provide the context in which it was made. It may be that it is only when a child feels that she or he will be believed, or when threats made by the perpetrator against the child and/or family members have been removed, or when a child feels there is someone to trust that it becomes safe for a complaint to be made. However, as a result of the decision in *Graham*, evidence of a complaint made more than months or years after the events in question will not be admissible under s66 of the *Evidence Act 1995* (NSW and Cth).5

Although the psychological response of children to sexual abuse was first reported almost 20 years ago by Summit (1983) and, despite at least 20 years of worldwide research on the phenomenon of child sexual assault and the behaviour of child sex offenders, the criminal justice system remains stuck in a time warp that denies the documented responses of children to sexual abuse, as well as the developmental and emotional barriers that prevent children acting as an empowered adult might act. In particular, the decision in *Graham* displays no understanding of the context in which child sexual abuse occurs and the relationship of power between the child victim and adult offender, as discussed in the next section.

Studies on the Patterns of Disclosure of Sexually Abused Children

Studies on the prevalence of child sexual abuse within the general community contain important information for understanding the dynamics of child sexual assault and the response of victims, contrary to the assumptions underpinning the legal interpretation of evidence of delayed disclosure.

The studies discussed below are those which reported data on (i) the proportion of respondents who disclosed the abuse prior to the survey in question; (ii) the age of onset of the abuse; and (iii) the extent of repeated abuse.

In relation to disclosure of abuse, Russell (1983) reported that, of the women in her American community sample who reported at least one experience of sexual abuse before the age of 18, only 2% of intra-familial sexual abuse cases and 6% of extra-familial sexual abuse cases were ever reported to the police (1983, p. 142). Similarly, Baker and Duncan (1985) found that, out of the men and women in their British study who reported being sexually abused before the age of 16, only 12% of female respondents and 8% of male respondents disclosed the abuse (1985, p. 459). The first national prevalence study of child sexual abuse in the USA conducted by Finkelhor, Hotaling, Lewis and Smith (1990) showed that the majority of respondents (56% of men and 57% of women) did not report the abuse within a year of its occurrence and a significant proportion of respondents never reported the abuse to anyone (42% of men and 33% of women).

In a study of a community sample of New Zealand women, Anderson Martin, Mullens, Romans, and Herbsin (1993) reported that only 37% of victims disclosed within one year of the abuse, 10% disclosed between one to 10 years after the abuse, 24% disclosed 10 years or more after the abuse and 28% had not disclosed before the survey, whilst only 7.5% of victims “had the abuse reported to either social work or police investigators” (1993, p. 915). In addition, Anderson et al. found that “[t]here were differences in reporting patterns for relationship with the abuser, with those abused by a close family member being significantly less likely to report the abuse within a year, compared with other victims” (1993, p. 915). When respondents to the survey were asked what prevented them disclosing the abuse, 29% said they expected to be blamed, 25% said embarrassment, 24% said not wanting to upset anyone, 23% expected they would be disbelieved, 18% said they were not bothered by the abuse, 14% said they wished to protect the abuser, 11% said fear of the abuser and 3% said obedience to adults (1993, p. 915).

Anderson et al. (1993) concluded that because “[t]he majority of abuse episodes were serious assaults (involving genital contact, intercourse, attempted intercourse), carried out by family
members or known acquaintances, on prepubertal girls, which were rarely reported” (1993, p. 918) and because stranger abuse accounted for only 15% of all abuse experiences, there is “a substantial number of children in the community who know and could identify their abuser but are unable to unwilling to do so” (1993, p. 917). In fact:

…the findings of this study indicate that if abuse is not disclosed within a year of the episode, it is likely the victim will not disclose for some time, up to 10 years or more later. This has implications for providers of therapeutic services for victims, who may see victims as young adults disclosing for the first time, and also for legal services dealing with late disclosures as a complaint against the perpetrator. It is important those professionals understand the frequency and the reasons for late disclosure (Anderson et al., 1993, p. 917; emphasis added).

In a study of a community sample of Australian women, Fleming (1997) reported that only 10% of abuse victims reported the abuse to the police, a doctor or other agency, such as a sexual assault service. Eighty of the 144 women who reported sexual abuse had disclosed or tried to disclose the abuse as children, although the pattern of disclosure varied. Of these 80 women, 5 attempted to disclose the abuse but their attempts to do so were unsuccessful, 23 disclosed or tried to disclose at the time of the abuse, 7 within the first year, 14 disclosed or tried to disclose between one and 10 years after the abuse, whilst 36 (45%) “did not disclose until at least 10 years after the first abuse episode” (1997, p. 67). In fact, Fleming reports that “there were significant differences in the timing of disclosure … by age at time of abuse. Girls under 12 years at the time of the abuse were less likely to tell someone within a year of the abuse than were girls aged over 12 years” (1997, p. 67). In 49% of cases, mothers were the person most frequently told of the abuse, followed by friends (32%) and siblings (29%) (1997, p. 67). Fleming also reports that:

…[w]hen the women were asked what prevented disclosure, by far the most common reason given was embarrassment or shame (47/80 [46%]), followed by the belief that the other person would not be able to help them (23/80 [23%]), or would somehow blame or punish them for the abuse (19/80 [18%])” (1997, p. 68).

Another feature of the patterns of disclosure reported by Fleming was that rates of disclosure “showed a significant decrease with age”, with 83% of women aged 17–24 years having disclosed the abuse, compared with 59% of women aged 25–35 years, 51% aged 35–44 years and 38% aged 45 years or over (1997, p. 68).

Some of these studies also provide information about the severity of abuse experienced, the likely impact on the victims’ lives and their ability to disclose. For example, Baker and Duncan (1985) reported that 23% of respondents in their study were repeatedly abused by the same person and 14% were subject to multiple abuse by different offenders (1985, p. 459). Baker and Duncan also found that respondents were more likely to have reported that the abuse had a damaging effect on their lives if they were female and were “repeatedly abused within the family from before the age of 10 years” (1985, p. 462). Such information tells us that:

…[a]t least as important as the sexual nature of the act in determining the effect of the experience may be the abuse of power, betrayal of trust and distortion of relationships … Sexual abuse by strangers may be less damaging if the experience is not repeated and if the child can tell his/her parents and be believed, supported and protected in the future… Children are less likely to be able to adjust satisfactorily after such trauma if they are punished, accused, made to feel responsible, disbelieved or indeed if their preexisting relationship with their parents or caretakers precludes them from talking at all. Within a family setting, sexual abuse creates even greater dilemmas for the child, and the destructive potential which arises out of secrecy, coercion and long-term distortion of relationships is very great (Baker & Duncan, 1985, p. 465).

Siegel, Sorenson, Golding, Burnam, and Stein (1987) reported that of those who were sexually abused before the age of 16, 46% had been assaulted more than once during childhood, with 13 respondents reporting that the number of times they were abused was too many to count (1987, p. 1148). When these 13 respondents were excluded, Siegel et al. found the average number of assaults to be 3.9. Twenty-three per cent of respondents (out of a total of 149) reported that they had experienced continual assault during childhood, the mean age of onset of the abuse for these respondents was 8.5 and “the mean number of years the situation persisted was 4.7” (Siegel et al., 1987, p. 1149). The perpetrators of the respondents who experienced continual abuse were
“equally divided among relatives … and acquaintances”, whilst five respondents reported continual assault by both (Siegel et al., 1987, p. 1149). Continual assault by a relative was significantly higher amongst female children than males (59% compared with 8%).

In relation to severity of abuse, Anderson et al. (1993) reported that 42% of women in their study experienced more than one episode of abuse, with 28% experiencing abuse 2 to 10 times and 14% more than 10 times. Twenty per cent of abuse episodes lasted for more than one year, with 10% of episodes lasting more than three years (1993, p. 914). Sexual abuse was rarely reported before four years of age, although Anderson et al. consider that this “may be an underrepresentation of the true prevalence of sexual abuse in very young girls” (1993, p. 914). Their study shows that “[t]he ages of greatest reported risk were 8 to 12 years, with the 11th year having the maximum abuse rate” (1993, p. 914).

Fleming (1997) reported that the mean age at first abuse experience was 10 years which is consistent with the other studies discussed above; that is, that “most of the reported abuse occurs in prepubescent girls”. However, Fleming notes that since few women reported abuse under the age of five, and, since “the [incidence] rate of sexual abuse per 1000 children is similar in the 2- to 5- and 6- to 10-years age groups (2.7 and 2.6 per 1000 children) … [t]his suggests that abuse in this survey may have been under-reported because abuse that occurred before the age of 5 was not remembered” (1997, p. 68; footnotes omitted). In relation to frequency of abuse, of the 55 women who were abused only once in Fleming’s study, 70% were abused by someone outside the family. However, “[w]hen the abuser was a relative, the abuse was significantly more likely to have occurred regularly”. In addition, “[t]hose abused by a relative were significantly more likely to have been abused more often … than those abused by non-relatives” (1997, p. 67). For the women in Fleming’s study who had been abused more than once, “[t]he period of abuse was less than one year for 57% of episodes, less than two years for 14% of episodes, and more than two years for 29% of episodes” (1997, p. 66). Furthermore, the majority of the women who were abused (72%) reported that some form of coercion was used and “most commonly, they were frightened into compliance”, that is, 64% reported verbal threats and threats of violence and 7% reported actual violence (Fleming, 1997, p. 67).

All in all, the above studies provide evidence of six main consistent features of children’s reactions to sexual abuse:

(i) a majority of sexually abused children do not report the abuse at the time it occurs;
(ii) a majority of children either only disclose the abuse some years after it occurred or never disclose at all;
(iii) the younger the child, the less likely she or he will report the abuse;
(iv) embarrassment, shame, fear of punishment and feeling responsible for the abuse are key factors that prevent children from reporting;
(v) a significant minority of children will experience repeated abuse over an extended period of time;
(vi) repeated abuse appears to be more likely to occur if the abuser is a relative and the intrafamilial relationship means a child is less likely to disclose.

Failure to disclose, thus, appears to be compounded by factors such as the closeness of the relationship between offender and victim, the victim’s age at time of abuse (with most reported abuse occurring to pre-pubescent children) and repeated abuse. For example, the complainant in Graham’s case was aged 9 years at the time of the first alleged incident of sexual assault, the accused was her father and the alleged assaults continued over a 1-year period, all of which is consistent with delayed disclosure. Like the crime of adult sexual assault (NSW Sexual Assault Committee, 1994; Australian Bureau of Statistics, 1994; Parliament of Victoria, Crime Prevention Committee, 1995, p. 75), under-reporting of child sexual assault is a typical, rather than an aberrant, feature of the crime.

The Impact of Offender Patterns of Sexual Abuse on Disclosure

Studies on how offenders target and silence children are also an important source for understanding the patterns of disclosure of sexually abused children. A number of studies show that child sex offenders engage in a complex process of grooming their victims in order to initiate and maintain sexual contact and to prevent disclosure. In recognising that sexual abuse usually occurs “in the context of a relationship” (Berliner & Conte, 1990, p. 37) whether or not the child is actually
related to the offender, Berliner and Conte describe a three-stage process by which sex offenders “groom” their victims: “sexualisation of the relationship [by the offender], justification of the sexual contact, and maintenance of the child’s cooperation” (1990, p. 37). The features of this process are as follows:

(i) **Sexualisation** is designed “to engage the child in the sexual activity and permit the abuse to go on over time”. It generally “appears to take place gradually” commencing with “normal affectional contact or in the context of ordinary physical activities” and “[i]n few … cases [do] the children perceive the relationship to have abruptly changed from normal to sexual” (Berliner & Conte, 1990, p. 37; emphasis added). At the initiation stage, “[o]ffenders say that they test the children’s response to contact with body parts close to the genitals or make genital contact appear accidental as they gradually approximate sexual touch. Social learning principles of desensitisation and progressive approximation, support the power of this technique to condition behavior” (Berliner and Conte, 1990, p. 39). It also appears that the sexualisation process is accompanied by distorted interpretations and beliefs about the child’s involvement or desire for the abuse; for example, Phelan (1995) reports that more than half of the incestuous fathers in her study stated that their daughters enjoyed the abuse, that they willingly acquiesced or willingly initiated sexual activity, whilst none of the daughters reported enjoyment, willing acquiescence or initiation of the abuse (Phelan, 1995, p. 16).

(ii) **Justification and rationalisation** are used by sex offenders to ensure continued access to the child. Berliner and Conte (1990) report that the two most common justifications that were used by offenders to their victims were “to assert that it was not really sexual or to acknowledge that it was sexual but was presented as acceptable” (1990, p. 37). Such justifications are likely to allow the offender to deny the nature of their behaviour, as well as having the effect of silencing their victims (Phelan, 1995, pp. 15–16).

(iii) **Cooperation** is the third aspect of the victimisation or grooming process and describes “the way offenders find to engage the children in sexual relationships, keep them involved, and prevent them from telling” (Berliner & Conte, 1990, p. 37). It may involve threats, intimidation, exploiting a child’s vulnerability (rather than overt forms of coercion) such as “the exploitation of a child’s normal need to feel loved, valued, and cared for by parents” or exploiting a “child’s urge to protect parents whom they love” (Berliner & Conte, 1990, p. 38). Despite the apparent fact that some people find it difficult to believe that offenders engage in intentional and pre-meditated sexual exploitation, as Berliner and Conte observe, this belief “contrasts with what the offenders themselves say about their own conduct … and the overwhelming evidence that they are fully aware of the process they employ” (Berliner and Conte, 1990, p. 38). Similarly, Conte, Wolf and Smith (1989), Phelan (1995) and Elliott, Browne, and Kilcoyne (1995) all report that offenders target children for sexual exploitation, condition the children over a period of time to accept sexual contact and increasingly serious types of sexual contact, and manipulate them verbally or non-verbally to maintain sexual access. Delays in reporting will also be an inevitable result of some cases of child sexual abuse where the child is of pre-verbal age or where the child suffers from traumatic amnesia.

Berliner and Conte report that in their study of 23 victims of child sexual abuse, “almost all the children reported some type of coercion either to gain [their] cooperation or to prevent reporting” and a majority reported threats, such as threats of physical harm (death or mutilation), threats of abandonment, or rejection, threats of the family being destroyed, or the offender being punished or emotional coercion such as bribery or what people would think about the victim (Berliner and Conte, 1990, pp. 34–35). In addition, a majority of children reported that they did not know they were being sexually abused and that “in most cases offenders made statements about the sexual activity to justify it”, such as “I need to do this to reduce my tension”, “I’m teaching you about sex”, “You won’t remember”, “You’re my daughter so its OK”, “This is the way people show their love”, “You want me to do this” (Berliner and Conte, 1990, p. 34–35). More than half of the victims interviewed reported they were told that:
They would like it or wanted it or that they looked older or were mature for their age. In many cases offenders talked about how they needed the contact because they were lonely or their wives didn’t love them or it made them feel better. The children were [also] made to feel complicit by such statements as ‘You didn’t tell me to stop’ (Berliner & Conte, 1990, p. 34).

Other studies support the grooming process described by Berliner and Conte. For example, Phelan (1995) reported the methods used by offenders to silence their victims after conducting interviews with 40 step-fathers and fathers involved in a treatment program for child sex offenders, together with interviews of their daughters. Five men reported threatening their daughters (e.g., “I told her not to tell anybody. I told her I’d go to jail and, your mother and I will get a divorce”), some men bribed their children, whilst others used other forms of verbal manipulation, such as, “I’d tell her that if she said anything … I’d tell her mother about all her little sexual acts and that she was quite active”, or “I told her it was natural to have intercourse, that it would probably hurt a little bit but it would give her pleasure too” (Phelan, 1995, p. 10). Fourteen fathers said that silence surrounded the abuse and that they used nonverbal means to initiate sexual activity and to maintain it. These nonverbal means, together with their daughters’ own accounts of the abuse, suggest that these girls were silenced by confusion, lack of understanding, and lack of knowledge that the abuse was wrong (Phelan, 1995, pp. 11–12), particularly since in the majority of cases, the abuse “began as part of already existing and, generally speaking, culturally normative family interactions”, such as putting a child to bed, watching TV, reading bedtime stories, play, and caring for a sick child (Phelan, 1995, pp. 10–11). In addition, Phelan reports that the daughters of these offenders commonly dealt with the abuse by saying to themselves, “this is not happening to me” and that by the time they realised that their fathers’ behaviour was wrong, they felt responsible for failing to take action the first time the sexual abuse occurred, thus blaming themselves rather than their fathers. This combination of blame and denial is likely to be a very powerful self-silencing mechanism used by sexually abused children. For example, some daughters reported (Phelan, 1995, pp. 18–19):

The whole time I’m thinking, ‘I’m imagining this, hold on, this can’t be happening, no way’. My dad wouldn’t be doing that, what am I thinking?

I’m making it up or something — so I would push it out of my mind so I wouldn’t have to remember it.

I knew there was something wrong. I just didn’t know what it was.

I was ignorant. I didn’t know what he was doing. I didn’t know what it was called so I wasn’t brave enough to tell what he was doing or tell anybody what it was.

I didn’t know what to do about it. I was scared and I don’t know what he was doing.

I really didn’t know what to do. I didn’t know how to react. I was confused and didn’t want to get hurt.

Phelan (1995) reports that most of the 44 daughters in her study did not report the abuse the first time it occurred and in most cases the abuse was repeated on several occasions over periods of 0.125 to 8 years (Phelan, 1995, pp. 19–20). Berliner and Conte (1990) also report that a majority of children in their study did not report the abuse the first time it happened and “in many instances the child did not initiate the report” (1990, p. 38). They consider that a child’s particular emotional vulnerability can make them an easier target for sexual abuse and that this emotional vulnerability itself can prevent a child from reporting the abuse.

In fact, emotional vulnerability appears to be a primary risk factor for victimisation, as evidenced by Elliott et al.’s (1995) study of the selection patterns of 91 child sex offenders and an analysis of offender interviews by Cossins (2000) in which some offenders described how they were aware of the economic and cultural vulnerability of their victims. Elliott et al. found that children were selected by offenders on the basis of their vulnerability: “the child who was most vulnerable, had family problems, was alone, was nonconfident, curious, pretty, ‘provocatively’ dressed, trusting, and young or small” (Elliott et al., 1995, p. 580) was the child most likely to be selected for abuse. In relation to the first national prevalence study of child sexual abuse in America, Finkelhor et al. (1990) reported that “[g]rowing up in an unhappy family appeared to the most powerful risk factor for abuse … [since] both men and women who described their families this way were more than twice as likely to be abused” (1990, p. 24).
In another study of the methods used by child sex offenders, Kaufman, Hilliker, Lathrop and Daleiden (1993) analysed the targeting practices of 32 offenders who were undergoing treatment in a treatment program. The offenders were asked to complete questionnaires about how they sought out victims and how they maintained their silence, whilst their therapists were asked what they knew about such behaviours of their clients. By comparing the responses of offenders and therapists, Kaufman et al. found that offenders under-reported their use of threats and coercion compared to the history provided by their therapists, leading Kaufman et al. to conclude that these “results suggest that, even under the best of circumstances, offenders’ self-report … may reflect only a portion of their actual activities” (1993, p. 224). In fact:

… [the] frequent and well documented presence of a ‘grooming’ process as a precursor to the abusive behavior … and the presence of ongoing attempts to secure victims’ silence following the abuse … highlight the need for a broader based investigation of the victim–offender ‘relationship’. Findings from this study suggest that the process of coercion may begin long before the actual occurrence of the sexual act, and continue long after sexual contact has ceased. For example, offenders may initially provide victims with added attention and special privileges, or even facilitate their participation in inappropriate behavior (e.g., use of drugs and alcohol) simply to create a context where a victim feels dependent upon the discretion of the offender. Threats to revoke benefits or reveal improprieties can then be used to gain and maintain sexual involvement with the victim, and ensure the victim’s silence regarding the abusive acts (Kaufman et al., 1993, p. 226; references omitted; emphases added).

The grooming process described above supports the theory proposed by Summit (1983) that sexually abused children suffer from “child abuse accommodation syndrome” which, as a coping behaviour, contradicts the beliefs about how children should and do deal with being sexually abused. The features of this syndrome can account for the high degree of non-disclosure that has been reported in various studies, with these features being (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted and unconvincing disclosure, and (5) retraction (Summit, 1983, p. 181). In a later study, Sorensen and Snow (1991) proposed a similar pattern of disclosure for children who had been sexually abused; that is, denial, tentative disclosure, active disclosure, recant and reaffirm. Although Bradley and Wood (1996) consider there is little empirical support for the phenomenon of retraction by sexually abused children, what Summit and Sorensen and Snow describe correlates with offenders’ accounts of how they maintain their victims’ silence and indicates that, rather than disclosure being a spontaneous event, it is a slow, difficult process for the sexually abused child. For example, the process of accommodation to incest involves the belief by the child that she has a “responsibility to keep the family together by submitting to the sexual abuse and keeping it a secret — in other words, living a lie” as well as withdrawal from friends and society: “[k]eeping the incestuous secret demands guardedness and restraint — don’t have too many friends, don’t talk about oneself, don’t be noticed. Long term accommodation to the abuse makes withdrawal almost a necessity” (German, Habenicht & Futcher, 1990, p. 434). Greenwald and Leitenberg (1990) confirm that several studies have shown that the impact of child sexual abuse is greater the longer the duration of the abuse, if force or threat of force is used, if penetration occurred and if the abuser was a parent. Cameron (1994) describes some survivors of child sexual abuse as “veterans of a secret war” because they have “endured conditions of helpless terror and threats to body and life” (1994, p. 117) in ways that she found to be analogous to the experiences of veterans of the Vietnam war. Prompt complaint as required by the criminal justice system, therefore, becomes an impossibility for those children who must adapt for survival reasons to the position of powerlessness that sexual abuse imposes upon them.

Phelan (1995) considers that the failure of children to report can be understood in light of the social context in which children are raised, that is, the context in which “[f]amilies and schools … have historically socialised children to acquiesce to authority, to be compliant to adults, and to unquestionably follow the rules” (Phelan, 1995, p. 21). More particularly, the grooming process by child sex offenders supports the theory that child sex offending establishes specific relations of power between the offender and child (Cossins, 2000). Offenders’ accounts of how they target their victims indicates that the grooming of children is really a process by which the offender establishes a
relationship of power with the child, through gaining a child’s trust, promising them special favours, appearing to be more interested in a child than their parents, targeting children who are neglected and unloved and who crave love and attention, using secrecy, blame and/or threats to silence a child or playing on a child’s or parents’ sympathy for the abuser. Where such a relationship of power is established, this suggests that a child’s response to sexual abuse will be one of silence and denial, rather than a quick, prompt declaration of abuse. In other words, the sexually abused child can be expected to engage in activities that reflect their position of powerlessness (silence and denial) rather than activities that reflect a position of empowerment (disclosure, complaint and reporting to police).

Finally, delays in complaint may well continue long after childhood has passed due to the long-term effects of child sexual abuse. A plethora of studies show that victims of child sexual abuse may suffer depression, low self-esteem, psychiatric hospitalisation, substance abuse, self-abuse, somatisation disorder, erotisation, learning difficulties, posttraumatic stress disorder, anxiety, dissociative disorders, conversion reactions, re-victimisation, impaired personal relationships and eating disorders (Steele & Alexander, 1981; Carmen, Rieker & Mills, 1988; Schetky, 1990; Greenwald & Leitenberg, 1990; Saunders, Villeponteaux, Lipovsky, Kilpatrick & Veronen, 1992; Miller, McCluskey-Fawcett & Irving, 1993; Cameron, 1994; Mennen & Meadow, 1995; Lanz, 1995; Salter, 1995).

It is likely that the more severe the long-term effects, the less likely it will be that a traumatised adult will turn to the criminal justice system as a way of dealing with their emotional and psychological problems. In addition, other factors in a victim’s life can contribute to the severity of the long-term effects of child sexual abuse, as Steele and Alexander (1981) explain:

... [t]he later effects of sexual abuse cannot be simplistically related to the sexual nature of the abuse. The impact of such events upon the child will be markedly different according to the child’s age, state of psychosexual development, the nature of the abusive act, the frequency of repetition, the amount of aggression involved, and the relationship of the abused to the abuser. There are also the profound effects of the kind of relationships existing with non-abusing caretakers and with other significant figures in the child’s life, both before, during, and after the sexually abusive episodes. In addition to these factors, the response of the environment when abuse has been revealed has a significant impact on the ways in which the child understands his/her experience (1981, pp. 223–224).

Such information challenges the criminal justice system’s perception of child sexual abuse victims as having the “free will” to extricate themselves from the relationship of abuse imposed upon them and to promptly report, irrespective of whether the abuse involves overt or subtle forms of coercion. It also poses a challenge to the prevalent belief that children will make up allegations of child sexual abuse as an act of revenge against authority figures. As Summit observed nearly 20 years ago:

... [t]he victim of child sexual abuse is in a position somewhat analogous to that of the adult rape victim prior to 1974. Without a consistent clinical understanding of the psychological climate and adjustment patterns of rape, women were assumed to be provocative and substantially responsible for inviting or exposing themselves to the risk of attack. The fact that most women chose not to report their own victimisation only confirmed the unchallenged suspicion that they had something to hide. ... The turnaround for adult victims came with the publication of a landmark paper in the clinical literature during a time of aroused protest led by the women’s movement ... A similar reception is long overdue for juvenile victims (1983, p. 189).

Conclusion: Is There a Solution?
One of the major difficulties associated with prosecuting child sexual assault is lack of corroborating evidence which is commonly associated with delayed disclosure. In such a case, the circumstances and context in which a child first discloses their experiences of sexual abuse is relevant evidence, in a legal sense, since it not only serves to confirm the child’s evidence but also assists in understanding the reasons for the delayed complaint.

As discussed by the High Court in Papakosmas, hearsay evidence of a recent complaint of sexual assault satisfies the relevance test under the Uniform Evidence Law because it is capable of “rationally affecting the assessment of the probability of a fact in issue”, bearing in mind that the test of relevance is a value judgement, not a mathematical
calculation, despite the use of the term, “probability”. Similarly, this article’s detailed review of the studies that describe how children typically disclose sexual abuse and how offenders target and silence children shows that hearsay evidence of a child’s delayed disclosure also satisfies the relevance test, since, a value judgement informed by these studies makes the fact in issue (whether the accused committed the alleged sexual abuse) more probable with that evidence than without it.

However, as discussed above, Graham’s case places an insurmountable barrier in the way of admitting hearsay evidence of a child’s delayed disclosure as a result of a strict interpretation of the hearsay exception under s66(2) of the Uniform Evidence Law. This interpretation means that hearsay statements of a child’s first disclosure of sexual abuse will not be admissible if, when they were made, the facts asserted in the statements were not fresh in the child’s memory; that is, were not made within hours or days. As a result, the hearsay statements of the complainant in Graham’s case were held to be inadmissible because of the 6-year delay between the time of the first alleged sexual assault and the time of first disclosure by the complainant to her girlfriend.

However, a detailed review of the psychological literature shows that the typical pattern of disclosure for sexually abused children is in the order of months or years after the abuse, and that this response is not, as assumed by judges for hundreds of years, evidence of fabrication, but, rather, evidence of the trauma experienced by the sexually abused child. In particular, a number of studies support the view that a relationship of power is established between the offender and the child as a result of the complex grooming processes of sexualisation, justification and cooperation (Berliner & Conte, 1990) which result in the child’s psychologisation, justification and cooperation (Berliner & Conte, 1990) which result in the child’s psychologisation, justification and cooperation (Berliner & Conte, 1990).

This relationship of power, which is created and maintained by offenders in order to ensure secrecy and future access to the child, means that the sexually abused child can be expected to engage in activities that reflect their position of powerlessness (silence, denial and self-blame) rather than activities that reflect a position of empowerment (prompt disclosure and complaint).

Clearly, it is time for the criminal justice system to catch up with literature that has documented the phenomenon of child sexual abuse and its short and long term effects on children. The strict approach to hearsay evidence of delayed disclosure in sexual assault trials, based as it is on beliefs that contradict the evidence from the psychological literature, indicates that law reform measures are necessary to ensure that such evidence is admitted under a special exception to the hearsay rule, irrespective of the time that has elapsed between the alleged events in question and the hearsay statements by the child.10 Such an exception could be either broadly or narrowly constructed to allow the admission of any hearsay statements by a child that are relevant to a fact in issue (ALRC & HREOC, 1997, p. 332), or merely to allow the admission of a child’s hearsay statements of delayed disclosure. Nonetheless, it can be expected that certain caveats would need to be included, such as the recommendation by the ALRC and HREOC (1997, p. 332) that “[a] person may not be convicted solely on the evidence of one hearsay statement admitted under [an] exception to the rule against hearsay”.

**Endnotes**

1 Based on the data from the studies of Cashmore (1995) and Cossins (2001), it can be predicted that there is just slightly more than a one third chance of obtaining a conviction in NSW higher courts for a child sex offence where the accused pleads not guilty. Cashmore (1995) reported a conviction rate at trial of 38.0% in the NSW higher courts for the period April 1991 to April 1992 which was found to be a considerable decrease compared to previous years. Cossins (2001) found that the conviction rate at trial in the higher courts was 34.1% for the period January 1992–December 1996 and that the decreasing trend observed in Cashmore’s study has continued.

2 Evidence of recent complaint was considered to satisfy the relevance test under s55, that is, to “rationally affect the assessment of the probability of a fact in issue in the proceedings, the fact being that the complainant did not consent to have intercourse with the appellant” (Papakosmas v R [1999] HCA 37, at paras 30–31, per Gleeson CJ and Hayne J.)

3 Where a female child falls within the age range of restricted consent (in NSW, 15 years: s77(1) Crimes Act 1900 [NSW]), the accused can raise the defence of reasonable belief as to age. Otherwise, consent is not a fact in issue. See s77(2) and s72(2).

4 The complainant is the person who made the previous representation and is available to give evidence about the asserted fact, the asserted fact being a fact that a person (who made a previous
representation) intended to assert by the representation: s59. In a sexual assault trial, the complainant is the Crown’s chief witness who, of course, is available to give evidence according to the dictionary definition of the Evidence Act 1995 (NSW and Cth); see cl 4.

5 The only possible route for admissibility is via s108 as a prior consistent statement for the purposes of re-establishing the complainant’s credibility, although this will require leave by the court to adduce the evidence, which in turn depends on satisfaction of s192. See also s60 once a prior consistent statement is admissible in this way, and the recent High Court case, Adam v R [2001] HCA 57, for an interpretation of the relationship between ss55, 102 and 60.

6 No data were reported on how many respondents reported the assaults to police or others.

7 This concurs with the findings of Mullen, Romans-Clarkson, Walton, and Herbison (1988) who reported that repeated assaults were more common amongst those reporting abuse when the perpetrator was a relative (1988, p. 842).

8 This finding is supported by a study of 125 sexually abused children under the age of six years carried out by Mian, Wehrspann, Klajner-Diamond, LeBaron and Winder (1986) who found that disclosures were significantly less frequent when the abuse was intra-familial.

9 In 1993, the Australian Bureau of Statistics conducted an Australia-wide crime and safety survey and found that only 25% women over the age of 18 who reported being sexually assaulted reported the incidents to police. Only 39% of adult sexual assaults and 24% of child sexual assaults recorded in a confidential phone-in conducted in November 1992 were reported to police (NSW Sexual Assault Committee, 1994, p. 35). Of the sexual assaults that were reported to police, those perpetrated by strangers and those which involved a weapon or physical force were far more likely to be reported (NSW Sexual Assault Committee, 1994, p. 27).

10 Although the ALRC and HREOC (1997, p. 332) has made a similar recommendation in its inquiry into the admission of children’s evidence, its recommendation would not necessarily overcome the problems associated with “fresh in the memory” requirement under ss66(2), Evidence Act 1995 (NSW and Cth).

References


