Attrition in child sexual assault cases: Why Lord Chief Justice Hale got it wrong

Christine Eastwood, Sally Kift and Rachel Grace

Successful criminal prosecutions for sexual offences against children are more difficult to secure than for any other offence. Sexual assault defendants are less likely than other defendants to plead guilty, less likely to proceed to trial, and more likely to be acquitted. Nevertheless, four centuries after Lord Hale expressed the view that accusations of rape are easily made and hard to refute, the adage is still repeated as though it were established truth in contemporary court decisions and by 21st century lawyers. While there is widespread agreement in the research literature about the entrenched difficulties in child sexual assault cases, the underlying reasons for the low conviction rate are less well understood. It is argued that socio-legal, systemic and child-related factors may contribute to the high attrition rate in child sexual assault cases. The need for further research is discussed.

INTRODUCTION

It must be remembered that it [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.1 Lord Chief Justice Hale got it all wrong. Widely regarded as possessing a legal mind of the highest order,2 Hale attested to the belief that young girls and women were not to be trusted where accusations of sexual offences were concerned. Though Hale’s other claim to legal fame has not had such a pervasive jurisprudential influence – as a passionate believer in witchcraft, he also presided over one of the most notorious witches’ trials of the 17th century3 – his articulation of this “commonsense” stereotype has been an enduring echo in legal pronouncements through the ages to the endemic detriment of sexual assault victims of all ages and profiles. Centuries after Hale, another eminent lawyer and legal commentator, Wigmore,4 reiterated the stereotypical assumption that women and children lie about sexual assault; while decades further on, Salmon J repeated the homily:

In cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts, girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate and sometimes for no reason at all.5

More recently, expressions of this fundamental misconception about female sexuality have been framed around issues of consent borne of “rougher than usual handling”, or whether “no” means “yes” or perhaps “maybe”, or whether particular classes of women or girls are more or less likely to be truthful or have suffered less psychological harm than their more chaste sisters (for example, females

3 Atkinson, n 2 at 78-79.
4 See generally 3A Wigmore on Evidence (1940 ed) p 744, s 924a.
5 R v Henry (1968) 53 Cr App R 150 at 153.
such as prostitutes, hitchhikers, marital or relationship rape complainants, children, and complainants who allege sexual assault against high-profile sporting personalities).

It is therefore perhaps not surprising that Hale’s 17th century statement is still frequently quoted as “recognised fact” by 21st century lawyers. Indeed, recent Victorian (2003) and Queensland (2000) Bar Association submissions repeat the adage as if it were established truth; while an unnerving number of quite contemporary court decisions infamously buttress its longevity. It is also true that Hale’s historical rendering is perpetuated by contemporary community attitudes, which in turn are reflected in the gendered beliefs that continue to be evidenced by police, legal practitioners, the judiciary and juries. The complete factual fallacy of Hale’s stereotype, as proved by a significant body of knowledge and research gathered for over half a century, sadly has not yet reached the halls of justice. The empirical evidence absolutely contradicts Hale and his contemporary protégés; in fact, on all available evidence, allegations of sexual offences made by children are the most difficult to make, and some of the easiest to refute. More than any other offence, successful prosecutions for sexual offences against children are difficult to secure in the criminal justice system.

National crime statistics indicate that sexual assault is the most under-reported offence against the person. Exacerbating this great under-reporting, only a small number of alleged offenders are charged proportionate to victims’ complaints. When proceedings are commenced, sexual assault defendants are less likely than other defendants to plead guilty, less likely to proceed to trial and more likely to be acquitted. Simply put, conviction rates are low for sexual assault.

Insofar as child complainants are concerned, in both Australian and overseas jurisdictions only around 17% of reported sexual offences against children result in a conviction. In 2003, the Queensland Crime and Misconduct Commission suggested that, of 6,500 child sex assault offences reported to the Queensland Police Service each year, just over half of those offences will come before the lower courts, about one-quarter will reach the higher courts, and about one-fifth (17%) will result in conviction of an offender. Given that around one in four girls and one in eight boys are sexually abused, the need to address the problem of case attrition should not be underestimated.

---

9 Scott, n 2; Atkinson, n 2.
12 Hale’s comments were reiterated, eg, by King CJ in R v Sherrin (No 2) (1979) 21 SASR 250 at 254 and Bollen J in R v Johns (unreported, Sup Ct, SA, 26 August 1992). Note also the criticisms made by the Canadian Supreme Court of ill-informed and irrelevant judicial comments in R v Ewanchuk [1999] 1 SCR 330 at [87]-[88] and generally the naming of rape myths and stereotypes by L’Heureux-Dubé J in R v Seaboyer: R v Gayme [1991] 2 SCR 577.
13 Eastal, n 7.
16 Queensland Crime and Misconduct Commission, n 15.
According to a number of recent studies, there is widespread agreement about the entrenched difficulties and problems of attrition in child sexual assault prosecutions.\(^{18}\) However, what remain less certain are the underlying reasons for the high drop-out rate in these cases. Since the groundbreaking 1997 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission\(^{19}\) report on children in the legal process, a myriad of reforms have followed in most jurisdictions, although varying in their scope, impact and effectiveness.\(^{20}\) Despite best legislative efforts, reforms have not delivered the solutions that were both promised and so needed. Serious questions remain about the manner in which the criminal justice system responds to victims of child sexual abuse: every myth and stereotype evident in adult sexual offence cases presents in child cases, but is further distorted due to the additional layers of complexity resulting from the particular vulnerability of children. Moreover, the harm to a child victim of sexual assault may be aggravated significantly given that children are at a crucial stage of their cognitive, emotional and psychological development.\(^{21}\) Reforms have not delivered to children the belief, protection or justice to which they are entitled; so much so that, in recent years, there has emerged in the literature a growing awareness and articulation that substantive legislative and procedural reforms are not enough.\(^{22}\)

Clearly, deeper analysis of the individual, systemic and social factors that contribute to the problem of attrition in child sexual assault cases is required. In recognition of gaps in the body of knowledge, this article provides a context for understanding why, despite widespread legislative and procedural reforms, a significant proportion of child sex assault cases are discontinued and why conviction rates are so low. Specifically, the problem of attrition in child sex cases is considered from three interacting perspectives: the socio-legal perspective; the criminal justice system perspective; and the child’s perspective. Each perspective interacts to present the child sexual abuse complainant with entrenched and complex barriers to achieving a just outcome.

**THE SOCIO-LEGAL PERSPECTIVE**

Overwhelmingly, the empirical evidence referred to above does not support Hale’s contention that sexual abuse is a claim “easily made”. Nevertheless, as an Australian community, we do not trust children’s experience of abuse. In a recent study conducted by the Australian Childhood Foundation,\(^{23}\) just over one in every two respondents did not believe, or were uncertain whether to believe or not, children’s stories about being abused. Clearly, police, legal practitioners, magistrates and judges, as part of the community, may be likely to have similar beliefs and attitudes to those of their community peers. However, echoing the comments of White J in *M v JMP* (1999) 108 A Crim R 139, the abuse of children should “rightly [be] regarded with abhorrence by the community”\(^{24}\). It is arguable that, in this aspect of professional engagement more than any other, law and justice practitioners have


a greater professional duty and responsibility to be relevantly informed, accountable and sensitive to the rights and needs of children in extremis than community attitudes might otherwise dictate. Specifically, it is unacceptable for law and justice professionals who are required to question and interact with vulnerable children in circumstances that are stressful and traumatic at numerous points of the justice, including court, processes, to remain ignorant of the dynamics and context of child sexual abuse.

The way in which sexual offences against children are dealt with in the criminal justice process is a particularly sensitive issue. In this area, more than any other, discriminatory beliefs, cultural mythologies and ill-informed stereotypes impact on every stage of the investigation, prosecution and trial. In the last decade, sexual offence law reform through legislative statement has endeavoured to expose and neutralise the powerful and pervasive myths that surround sexual assault.

Two decades ago, when the extent of sexual abuse was reignited in public awareness, the importance of “believing” the child was established as a cornerstone of the child’s psychological survival. Prominent researchers in the area emphasised the crucial importance of “acceptance and validation” to the child. There was also an implicit assumption that the truth which children were struggling to tell would be self-evident in the legal system. According to Kelly, this view rapidly diminished when it became clear how legal practices and procedures systematically disadvantage children. A frequent and powerful tactic is to undermine the child’s credibility and to attribute blame to the child through aggressive cross-examination, utilising the worst excesses of the adversarial justice system. These aggressive practices continue despite the fact that some of the more well-documented extremes of the adversarial system in this regard would be unlikely to stand the test of the United Nations Convention on the Rights of the Child as regards preserving children’s rights and dignity when they appear in court. If children are still being abused in the criminal justice system, then ultimately the reasons why this continues must be addressed. Many authors argue that the fundamental problem is the ongoing history of denying credibility to children and the continuing influence of centuries of disbelief and suspicion of children who accused adults (usually men) of sexual crimes. A review of research and case law indicates that legal attitudes remain problematic.

Research

In 1998, a study of the experiences of child complainants in Queensland indicated a defence culture which considered that “if in the process of destroying the evidence, it is necessary to destroy the child, then so be it”. Further research in 2003 also reported the existence of problematic attitudes exhibited by some defence counsel, prosecutors and judicial officers, including beliefs that children frequently lie about sexual abuse and that child complainants of eight years of age can be cross-examined.
aggressively because they are little “Lolitas”. Minimisation and trivialisation of sexual abuse were also reported, for example by referring to child sexual abuse cases as “kiddy fiddling”.

The 2003 Eastwood and Patton study also reported that prosecutors, defence counsel and members of the judiciary were asked if they would want their own child in the criminal justice system if the child was a victim of serious sexual assault. Only one-third of legal participants indicated they would. Like the children, legal participants frequently articulated a belief that it is not worth the trauma suffered by the child and that the process is “cruel and horrible”.

**Case law**

Erroneous beliefs about sexual abuse are entrenched in case law. Decisions are being made in Australian courts on a daily basis which most judges are not qualified to make. Recent legal decisions and reasoning espoused in advice such as that given in the recent Volkers case in Queensland further substantiate such a view. Lawyers may be experts in law – but not in sexual abuse. Therefore it is not surprising that the primacy of judicial reasoning has been criticised as, in fact, not reasoned but mere opinion in cases involving child abuse. The claim that legal reasoning is objective and neutral and unaffected by ideology and values is false. In reality, the beliefs and attitudes of lawyers do affect the decisions which are made in Australian courts on a daily basis.

The case law on sexual assault reflects the bias and misinformation with which judicial decisions are often made. Generally, key issues, which for decades have been widely recognised as characteristic features of sexual assault victims, are still not fully acknowledged or accepted by the courts. For example, judgments on issues of fresh complaint, sexual history and corroboration have too often perpetuated myths about sexual assault complainants.

---

33 Eastwood and Patton, n 21. In-depth interviews were conducted with 29 legal professionals in Queensland, New South Wales and Western Australia.


37 The rule of fresh complaint was finally abolished in January 2004 in Queensland (s 4 of the *Criminal Law (Sexual Offences) Act 1978* (Qld)) as it was based on erroneous beliefs about rape and on empirical evidence that most victims rarely make an early complaint. Late disclosure or complaint has often been used to imply that the account is a lie. However, an event can still be fresh in mind many years after its occurrence – particularly in relation to traumatic events. Section 4A reflects the view expressed by Thomas J in *R v S* (1998) 103 A Crim R 101 at 104 that “evidence of first complaint should always be admitted as it permits a better understanding of the [victim’s] story, regardless of when it was made”. See also McHugh J in *Suresh v The Queen* (1998) 72 ALJR 769 at 770 who stated: “[T]he admissibility of recent complaint evidence is based on male assumptions.” Note also the High Court decision in *Graham v The Queen* (1998) 195 CLR 606 where it was held that evidence of complainant disclosure was not admissible six years after the event as the word “fresh” is to be taken to mean “recent or immediate”. See also *Crofts v The Queen* (1996) 186 CLR 427 which particularly ignores that children may delay reporting for many years. Such rulings ignore overwhelming evidence that delayed reporting is typical in the context of child sexual abuse.

38 Despite the irrelevance of sexual history to a complaint of rape, discretionary provisions can allow the sexual history of the complainant to be admitted into evidence with the leave of the court under s 4 of the *Criminal Law (Sexual Offences) Act 1978* (Qld): sexual history with the accused goes to both consent and credit. In *R v Allingham* [1991] 1 Qd R 429 at 434-435 the issue was whether the prosecution could lead evidence on virginity. The evidence was allowed to be led on the basis that it is unsafe to convict on the uncorroborated evidence of the one witness, judges continue to warn juries on the danger of uncorroborated evidence in sexual assault cases although it is clearly discriminatory against women and children and is based on unscientific notions of the context of sexual assaults. See *Murray v The Queen* (1987) 30 A Crim R 315 at 322; *Longman v The Queen* (1989) 168 CLR 79; *R v Robinson* (1999) 197 CLR 162. Note also comments by Wood CJ in *R v BWT* [2002]...
Clearly, there is a problem. Sexual offence proceedings have been particularly susceptible to sexist assumptions by the judiciary. As L’Heureux Dubé J commented in her dissenting judgment in \textit{R v Seaboyer; R v Gayme} [1991] 2 SCR 577, sexual offences law has been particularly prone to the use of stereotypes: an “unfortunate concomitant of a society which, to a large extent, holds these beliefs”. Indeed, according to L’Heureux-Dubé J in \textit{R v Ewanchuk} [1999] 1 SCR 330 at 370, myths about sexual abuse and “stereotypes of sexuality” pervade the criminal justice process. The Victorian Rape Law Evaluation Project\textsuperscript{41} noted that a lack of consistency and knowledge on matters of sexual assault may impact on the approach taken by prosecutors in taking a proactive role in protecting the complainant during cross-examination. The Victorian Law Reform Commission\textsuperscript{42} also argued that lawyers and judges are more likely to be responsive to the needs of complainants and consequently more effective in their roles if they understand the context in which sexual offences occur. The combination of these factors may well account for the continuing evidence of significant gaps between the intent of legislative reform and the outcomes of it in practice where sexual offences are involved.\textsuperscript{43} Decades after legislative reforms for child complainants of sexual abuse, the authority and influence of old legislation and case law continue to dominate the criminal justice system.\textsuperscript{44} It would still seem to be the case that in child sexual assault cases in particular, more than any other area of law, stereotypes and prejudicial myths pervade the investigation, prosecution and trial.\textsuperscript{45}

The importance of the relationship between law reform and cultural reform has recently been reiterated by the Victorian Law Reform Commission. The Commission noted that past experience has shown that procedural and evidentiary reforms are unlikely to make the system more responsive unless accompanied by cultural change and support from those who work in the system such as police, prosecutors, defence counsel and judiciary.\textsuperscript{46}

\textbf{Systemic perspectives}

In reality, the facts and figures on attrition and convictions in child sexual assault cases also do not support Hale’s claims that sexual assault accusations are easily made and hard to refute. For example, in New South Wales in 1992 the number of child sexual abuse prosecutions commenced was four times the number in 1982. During that period the guilty plea rate dropped from 83.6% to 58%. The


\textsuperscript{42} VLRC, n 11, pp 146-149.


\textsuperscript{45} Barnes M, Kift S and Walsh T, Submission to the Inquiry into the Handling of Sexual Offence Matters by the Criminal Justice System (Brisbane, 2002); O’Gorman, n 44.

\textsuperscript{46} VLRC, n 11, pp 141-145.
conviction rate also fell from 92.3% to 76.5%. In other words, although more prosecutions were commenced, defendants were less likely to plead guilty, while the chance of obtaining a conviction also decreased.47

In the last decade, most Australian jurisdictions have enacted significant legislative and procedural reforms for child complainants including widespread use of CCTV and pre-recording, restrictions on children being called to give evidence at committal proceedings, and control on aggressive cross-examination.48 However, the nature and extent of reforms have varied considerably between jurisdictions. For example, since 1992, children have not been required to appear at committals in Western Australia.49 More recently, the Evidence (Protection of Children) Amendment Act 2003 (Qld) placed restrictions on the calling of children to give evidence at committal proceedings in Queensland.

However, reforms do not appear to have resulted in substantive justice for victims nor in increased conviction rates. Although concerns remain about the overall low disclosure rate for child sexual assault,50 across all jurisdictions there has been a substantial increase in prosecutions for sexual offences against children. However, increased prosecutions have not resulted in increased convictions.51 Criminal court statistics reveal that for all offences in 2003-2004, 93% of adjudicated defendants (that is, finalised as guilty, acquitted or guilty plea) were proven guilty in the higher courts.52 While 84% of adjudicated defendants were finalised by pleading guilty, those defendants with sexual assault offences were less likely to plead guilty than any other offence (62% pleaded guilty). Furthermore, the offence with the highest acquittal rate (as a proportion of trial outcomes) was sexual assault with an acquittal rate of 61%.53 This rate of acquittal represents a 10% increase in rates from 51% in 2002-2003.

In a Queensland Police Service study of 28,777 sex offences from 1994-2001, about two-thirds of reported offences progress to committal stage. Of the two-thirds to reach committal, 64% were committed to a higher court, and 27% were withdrawn or dismissed, 11% found guilty and given a prison sentence or suspended sentence, while a further 8% were found guilty and given an intensive correction order, probation, bail or fine. About 35% of the matters committed from the Magistrates Courts to the higher courts were discontinued by the prosecution (either no true bill before indictment or nolle prosequi after indictment or during trial). Of the remaining matters in the higher courts, 8% were found not guilty, 9% were discharged, and 83% were found guilty (by trial or plea).54


48 See eg Evidence (Protection of Children) Amendment Act 2003 (Qld); Acts Amendment (Evidence of Children and Others) Act 1992 (WA); Crimes Legislation Amendment Act 2003 (NSW).

49 The Acts Amendment (Evidence of Children and Others) Act 1992 (WA) inserted s 69(2a). It states that, in a Sch 7 preliminary hearing, the “affected child” is not to be called as a witness unless the magistrate is satisfied that there are special circumstances that justify the complainant being called. However, as of 3 January 2001, by Act 71 of 2000, a new s 69 of the Justices Act 1906 (WA) dispensed with the discretion to permit the affected child to be called and cross-examined if the defence could establish special circumstances. In 2002 the Criminal Law (Procedure) Amendment Act 2002 (WA) abolished preliminary hearings and replaced them with a regime of disclosure by the prosecution, and to a lesser extent, by the defence.

50 Queensland Crime and Misconduct Commission, n 15.

51 Parkinson et al, n 47; Richards J, “Protecting the Child Witness in Abuse Cases” (2000) 34 Fam LQ 393 at 393-420; Cashmore, n 47.

52 According to the Australian Bureau of Statistics, non-adjudicated cases are finalised by a variety of means including withdrawn by the prosecution, defendant unfit to plead, accused dies and statute of limitations.

53 Acquittal rate as a proportion of trial outcomes: Australian Bureau of Statistics, Criminal Courts 2003-2004 (2004). It should be noted these figures do not differentiate between adult and child sex offences.

54 Queensland Crime and Misconduct Commission, n 15.
A recent New South Wales study on attrition in sexual assault cases\textsuperscript{55} reported that criminal proceedings were commenced in only 15\% of incidents involving a child victim. The study also found that only around 8\% of recorded incidents involving children resulted in a sexual offence being proven in court.

**Attrition and the key drop-out points**

Attrition can occur at a number of points in the justice process. Legal decisions to discontinue a case may also occur for many reasons, and at any stage of the criminal justice process. Given the significant resources used in the prosecution of cases and the reliance placed on convictions as a child protection strategy, it is important to identify the proportion of cases that are discontinued, and at what stage this occurs.\textsuperscript{56} However, data comparison is difficult due to a sheer lack of data and definitional variations. Conviction rates alone can be misleading as conviction rates will depend on a series of decisions at various stages of the prosecution process. Given that around 17\% of all reported child sexual offences result in a conviction, decisions made during the criminal justice process are central to the problem of case attrition.\textsuperscript{57} In a recent South Australian study, Wundersitz\textsuperscript{58} tracked cases from police incident report to finalisation in the courts and reported that 16.1\% of reported child sex offences resulted in conviction. The study found that only a small proportion of child sexual offence cases make it through to trial completion. Most drop-outs occur in the early stages of police investigation. In Queensland, Project Axis compared the progress of indecent dealing matters through the criminal justice system with other matters in order to determine if there were significant differences in the treatment of child sex offences in the criminal courts. Magistrates Court data show that indecent dealing matters are more likely to be withdrawn than non-sexual assault matters; and indecent dealing matters are more likely than other offence types to be discharged from the Magistrates Court due to lack of evidence. District Court data similarly show that a higher proportion of indecent dealing matters are discontinued than non-sexual assault matters.\textsuperscript{59}

The substantive and procedural intent of many legislative reforms has been to facilitate obtaining cogent and reliable evidence from children in a supportive environment. However, it is important to recognise that any benefits may be counteracted not only by myths and stereotypes about sexual assault victims but also by decisions which reduce the numbers of cases accepted for prosecution. For example, in 1998 the New South Wales Director of Public Prosecutions issued a memorandum to legal staff that he was of the view that a “significant number” of sexual assault cases should be discontinued. Those cases subjected to scrutiny included cases based on late complaint, cases where there was an arguable motive for false complaint (such as a family dispute), and cases where different


\textsuperscript{56} Parkinson et al, n 47; Queensland Crime and Misconduct Commission, n 15.

\textsuperscript{57} Australian Institute of Health and Welfare, Child Abuse and Neglect in Australia, Child Welfare Series No 17 (AIHW, Canberra, 1995-1996); Parkinson et al, n 47; Queensland Crime and Misconduct Commission, n 15. See also Hood M and Boltje C, “The Progress of 500 Referrals from the Child Protection Response System to the Criminal Court” (1998) 31 Australian and New Zealand Journal of Criminology 31 which followed 500 cases of child sex abuse in South Australia from reporting through the criminal prosecution process. The study found that only 27\% of cases substantiated by child welfare agencies resulted in prosecutions in the courts. Only 17\% resulted in convictions, with half of these convictions a result of guilty pleas. Prosecutorial decisions about whether to proceed impacted significantly on the attrition rate. Also, Parkinson et al, n 47, tracked cases in New South Wales and found evidence of 45 of the 183 cases reaching trial or sentence. Of the 45 that reached trial or sentence, 32 convictions were recorded. This represents a 71\% conviction rate for those that reached trial, and a 17\% conviction rate of the 117 cases that were able to be tracked. Other studies report a 14\% conviction rate: see Goddard G and Hiller P, Tracking Physical and Sexual Abuse Cases from a Hospital Setting into Victoria’s Criminal Justice and Child Protection Systems: A Report for the Victorian Law Foundation (Department of Social Work and Department of Anthropology and Sociology, Monash University, 1992) Vols 1-3; see also Gallagher P, Hickey J and Ash D, Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994 (Judicial Commission of New South Wales, 1997).


\textsuperscript{59} Queensland Crime Commission and Queensland Police Service, n 18.
versions of events had been given. Such a direction would appear to be in direct contradiction to what is known about the context, dynamics, and disclosure of sexual abuse.

Attrition and tests

Different tests are applied at different stages by police and prosecutions, and by magistrates at committal proceedings. In addition, the tests and the manner in which they are interpreted and applied differ across jurisdictions. Every State Director of Public Prosecutions has guidelines for prosecutors in making decisions about the conduct of cases. There are two key considerations. First, there must be sufficient evidence to justify the prosecution and provide reasonable prospects of conviction. This assessment considers factors such as witness competence, credibility and availability of witnesses, the admissibility of evidence and any other factors that could affect the likelihood of a conviction. The second and overriding consideration is whether it is in the public interest for the matter to proceed. This is claimed not to be a question of political or popular pressure, but rather an objective consideration of the seriousness and prevalence of the offence, factors related to victim and defendant, and the need to maintain public confidence in the courts. More research needs to be done on how these guidelines are applied in practice in individual cases. The very few instances in which Director of Public Prosecutions’ advice becomes available for public scrutiny would not suggest that the process is a value-free one.

The child’s perspective

One of the most powerful rebuttals of Hale’s contention comes from the children themselves. Child complainants can attest to the fact that to accuse an adult of sexual abuse is one of the most difficult and traumatic experiences in the life of a child. Indeed, the legal process itself causes further trauma and abuse to the child.

In recent research with child complainants aged 8 to 16 years across three jurisdictions (Queensland, New South Wales and Western Australia), Eastwood et al investigated the experiences of child complainants in the criminal justice system. When asked if they would ever report sexual abuse again following their experiences in the criminal justice system, only 44% of children in Queensland, 33% in New South Wales and 64% in Western Australia indicated they would. It is worth noting that the outcome of the criminal trial was not necessarily a predictor of response to this question, as two-thirds of children who experienced convictions said they would not report sexual abuse again. Comments from the children indicated a widespread belief that the process was not worth the trauma suffered.

It makes me feel like it is no good going to court … It is just a waste of time … They don’t look after you. They couldn’t care less. It is the hardest thing and it ruins your life. You never forget it. [New South Wales child, 14 years]

We are supposed to be free after this but we are not free, we are even more caged up. It’s a joke – don’t put yourself through the trauma. [New South Wales child, 16 years]

It’s too hard I wouldn’t want to go through it again. [Western Australian child, 16 years]

Parents also maintained that the way children are treated in the courts leaves many children damaged and disillusioned.

She is still very traumatised by the process and still cannot talk about it. [Queensland parent]

60 Parkinson et al, n 47.
64 Eastwood, Patton and Stacy, n 21. See also comments of Pigeon J in Angus v Di Lallo (1993) 11 WAR 93.
Eastwood, Kift and Grace

She just wondered why she bothered. She is quite disillusioned and quite angry. She said “they didn’t believe me”… Children aren’t stupid. They picked up on how ridiculous the system was – it needs big changes. [Queensland parent]

The study identified a number of issues for child complainants, including difficulties reporting the abuse, lack of child-friendly facilities in courts, giving evidence in chief, pre-recording evidence, judges and magistrates, verdict and sentence and problems with legal language.65 However, overwhelmingly the three key difficulties identified by the children across all jurisdictions were waiting for trial (an average of 20 months), seeing the accused, and the cross-examination process.

The underlying reasons for the high attrition rate need to be addressed. Both vulnerable child complainants and society in general need to have confidence in the efficacy, sensitivity and objectivity of the criminal justice processes. Unless the problem is addressed, the message sent to victims may be that the stress of the court process is not warranted, given the limited chance of getting through the process, let alone achieving a conviction. The problem of attrition also contributes further to under-reporting. The message being sent to perpetrators appears to be that the likelihood of being apprehended and convicted of a sexual offence is minimal and that offenders can continue to offend with impunity. Somehow, complainants of child sexual abuse need to know the justice system will take their complaint seriously and will treat them with care and respect.66

THE FUTURE

The preceding discussion has provided an analysis of socio-legal, systemic and child-related perspectives on the low conviction rate in child sexual assault cases. However, definitive analysis is not possible without a detailed and comprehensive analysis of individual cases and the reasons why cases are discontinued.67 Future research needs to track individual cases and include qualitative data in order to enable a deeper understanding of the reasons for cases not progressing – whether systemic or individual. It would also be important to understand the consequences for the complainant of failure to proceed, particularly in the light of concerns about underreporting and the trauma of the court process itself. Research would also inform the investigation and prosecution of child sexual assault cases in the criminal justice system and inform the development of a theoretical framework crucial to understanding the larger problem.

In summary, contrary to the claims of Hale and others, it is extremely difficult to bring a charge of child sexual abuse. Based on empirical research data,68 the following scenarios illustrate precisely how difficult:

• If you are a child complainant, there is less chance of the offender being convicted than for any other criminal offence. If 100 children are sexually abused, it is likely that only about 10 of those children will actually report the abuse. Of those, only about 6 will reach committal proceedings in the lower courts, and only 2 or 3 will reach the higher courts. Of those, only about 1 or 2 cases will result in a conviction.

• On the other hand, if you are accused of sexual abusing a child, you have an excellent chance of being acquitted. For a perpetrator, there is less than a 1 in 10 chance that the child will even report that s/he has been sexually assaulted. Even if the child does report the abuse, a perpetrator has a 1 in 3 chance it will not even make it to a preliminary hearing. If the matter gets through committal proceedings there is a 1 in 3 chance the case will not proceed to trial (discontinued by no true bill or nolle prosequi). If the case proceeds to trial, the accused will have a 61% chance of being acquitted – a better chance of being acquitted than for any other criminal offence.

65 Eastwood, n 21.

66 See also San Lazaro C, Steele A and Donaldson L, “Outcome of Criminal Investigation into Allegations of Sexual Abuse” (1996) 75 (2) Archives of Disease in Childhood 149.


Hale didn’t have a clue. With the knowledge and evidence available today, today’s lawyers have no such excuse in cases of child sexual abuse.