Defying Reality: Child Sexual Assault And The Delay In Complaint Rule

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Introduction

It is widely accepted that the crime of child sexual assault has particular features which make it one of the most difficult crimes to prosecute (Parliament of Victoria, Crime Prevention Committee 1995; Cashmore 1995; Royal Commission into the NSW Police Service 1997). In NSW, for example, overall conviction rates and conviction rates at trial for child sex offences have been found to be significantly lower than similar conviction rates for the category combining all other criminal offences (Cashmore 1995; Cossins 1998),[1] despite reforms[2] that were implemented in the 1980s to remove some of the major obstacles for child witnesses in child sexual assault trials. As Cashmore (1995:50) observes:

> [These reforms] have not... necessarily had any effect on the probability of a conviction.... There is therefore some concern that increased numbers of children are now subject to the stresses of testifying, with the delays and the problems inherent in an adversarial process heavily dependent on oral evidence... Furthermore, there is now a decreased chance of a conviction at the end of the process.

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1 Using outcome of charges data supplied by the NSW Bureau of Crime, Statistics and Research, I found that, for the period January 1992 to December 1996, the *overall* conviction rate for sex offences against children in the NSW lower courts was 35.3%, compared to an overall conviction rate of 80.6% for all criminal offences (excluding sex offences against children) (Cossins 1998). For the same period, I found that the conviction rate *at trial* for sex offences against children in the NSW higher courts was 34.1%, compared to 40.3% for all criminal offences (excluding sex offences against children). The *overall* conviction rate in the NSW higher courts for sex offences against children was 69.7%, compared with 79.1% for all criminal offences (excluding sex offences against children). These conviction rates are very similar to the conviction rate obtained by Cashmore (1995) who reported that, for the period April 1991 to April 1992, the conviction rate for sex offences against children (38.0%) compared unfavourably with conviction rates for all criminal offences for the three periods, 1990/91 (44.9%), 1991/92 (46.7%) and 1992/93 (45.9%). Note that the category of all other criminal offences will include some offences that are even more difficult to prosecute than child sex offences, such as assaults by police (Anderson, 1995).

2 See Cashmore (1995:32) and Gallagher and Hickey (1997:54) for a summary of these reforms, such as changes to competency requirements, the corroboration rule, the prohibition against conviction on uncorroborated unsworn evidence, as well as the introduction of screens and closed-circuit television.

Indeed, the decreasing trend in conviction rates observed by Cashmore in her 1991-1992 study has continued; that is, since 1992, the conviction rate for child sex offences in the NSW higher courts continued to decrease from 39.8% in 1992 to 28.6% in 1994, although it rose slightly in 1995 to 33.5% and to 33.3% in 1996 (Cossins 1998). This decreasing trend suggests that relatively low conviction rates for child sex offences may be attributable to the way the child sexual assault trial is conducted, rather than to the fact that the complainant is a child, or even a young child. In other words, whilst it could be argued that sexual assault cases involving children are harder to prosecute because of the difficulties associated with children's evidence and lack of corroborating evidence, such an argument obscures the context in which such cases are heard and the possibility that it may be something about the specific relations of power within the child sexual assault trial that makes them harder to prosecute.

Although reforms in the 1980s, such as changes to competency requirements, were designed to remove the traditional barriers that may have prevented the successful prosecution of child sex offences and have significantly increased the number of child sexual assault cases going to trial, the reforms have not 'necessarily had any effect on the probability of a conviction' (Cashmore 1995:50). Cashmore reports that while the *number* of trials for child sexual offences increased markedly between the early 1980s and the late 1980s, from 34 trials in 1982 to 148 trials in 1988 and a high of 233 trials in 1990, there was a concomitant 'sharp decrease in the guilty plea rate' by defendants and a marked decrease in the conviction rate at trial (1995:40). Cashmore observes that 'the percentage of guilty verdicts fell from a high of 58.8% in 1982 to a low of 33.8% in 1988 and a gradual subsequent increase to 43.4% in 1992' (1995:40). In fact, based on data from Cashmore (1995) and Cossins (1998), 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.

Such data raises the following questions: how should the criminal justice system respond to a crime whose hallmark is an imbalance of power between the offender and victim? Are the rules of evidence too far weighted in favour of the presumption of innocence of the alleged offender? Do we need specific rules of evidence that recognise the unique features of the crime of child sexual assault? Should an entirely different system for the prosecution of child sex offences be devised?

Although measures have been introduced around Australia to improve the collection of evidence in relation to child sexual abuse allegations, improvements in the investigation of child sexual abuse cases may not necessarily have the effect of changing the particular practices or barriers within the trial process that may affect the successful prosecution of the vast majority of child sex offences that proceed to trial. In NSW, for example, the NSW Government set up joint investigative teams (JITs) in 1994 for the purposes of interviewing child victims of sexual or physical abuse (NSW Child Protection Council 1997:2).[3] Whilst it can be expected that, as a result of the introduction of the JITs, more cases of child sexual abuse will be prosecuted, and that more reliable and uncontaminated evidence will be presented at trial, it can also be expected that the particular practices or barriers within the child sexual assault trial that affect the likelihood of obtaining a conviction will remain

3 The teams undertake investigations into those cases of sexual and physical abuse where a criminal offence has been alleged (Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, 1997:311). In other Australian jurisdictions, there are particular policies and practices for the joint investigation by police and community services agencies of cases of child sexual abuse (Broadbent & Bentley, 1997:6).

unchanged. Since more information is required to identify these practices or barriers,[4] this article examines the delay in complaint rule in order to determine the extent to which the rule might affect conviction rates for child sex offences. Whilst it is recognised that the decisions of juries and judges (who may direct a jury to make a finding of not guilty and the nature of whose summing up may be critical to the fact-finding process of juries) will be affected by a number of overlapping and complex evidentiary issues that arise in the course of a child sexual assault trial, for reasons of space the delay in complaint rule only is considered in this article. However, this analysis of the rule constitutes a starting point for considering the dynamics of the child sexual assault trial in more detail (see Cossins 1998).

The Delay in Complaint Rule: Fantasising Children or the Law's Fantasy?

Child sexual assault has, historically, been perceived by legislators and the criminal justice system as a crime committed by men against female children. Like the crime of rape, it is argued that this historical 'sex and gender specificity' (Edwards 1996:178) has affected both the way child sex offences are prosecuted and conviction rates. For the purposes of this discussion, I will focus on the child sexual assault trial involving the male accused and the female complainant which reflects the fact that the majority of child sex offenders are male, that the majority of victims are female and that, historically, child sexual assault was only ever criminalised where the offender was male and the victim was female.

The difficulties associated with the prosecution of child sex offences take place within an historical context in which the complainant is faced with the criminal justice system's historical desire to protect the accused man from false accusations (Gorham 1978; Edwards 1981; Sturma 1985; Tyler 1986; Allen 1990; Rayner 1991; Bavin 1991; Boniface 1994) because of the entrenched, cultural belief that women and girls commonly lie about being sexually assaulted. Complainants are also faced with the contemporary cultural belief that child sexual abuse is committed by 'deviant' men, all of which suggests that the truth/fiction dichotomy will be central to the gendered construction of the complainant and the accused within the child sexual assault trial.

Since consent is not a fact in issue in relation to the majority of provisions which criminalise sexual behaviour with children[5], the main factual issue in a child sexual assault trial will be whether the sexual behaviour constituting the alleged offence actually occurred, unlike adult sexual assault where the major fact in issue is not whether the sexual act occurred but whether it occurred without the consent of the complainant (Model Criminal

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4 Whilst the use of the term 'barrier' may be considered too rigid a metaphor for describing the practices of the criminal justice system (and the trial process in particular), I am reminded of Connell's (1987) view that "[s]tructure is always emergent from practice and is constituted by it. Neither is conceivable without the other" (Connell, 1987:94) and each varies as a function of time (history) and place. Furthermore, the concept of social structure (such as institutional barriers within the criminal justice system) is a way of expressing "the constraints that lie in a given form of social organization" (Connell, 1987:92). In other words, I use the term 'barrier' here whilst keeping in mind that: "[s]ocial structures originate, are reproduced, and change through social practice. In short, we can only speak of *structured action*: social structures can be understood only as constituting practice; social structures, in turn, permit and preclude social action.. Thus, as we engage in social action, we simultaneously help create the social structures that facilitate/limit social practice" (Messerschmidt, 1993:62; emphasis in original).

5 In NSW, for example, where a female child falls within the age range of restricted consent (in NSW, 15 years: s 77(1) *Crimes Act* 1900 (NSW)), the accused can raise the defence of reasonable belief as to age (s 77(2); see also s 72(2)). The defence is gender specific in that it is not available where both the offender and child are male (s 78R) but is available where the offender is female and the child is either male or female.

Code Officers' Committee (MCCOC) of the Standing Committee of Attorneys-General 1996:31). This means that the focus of the child sexual assault trial is on whether the complainant is telling the truth about the occurrence of the alleged sexual behaviour, so that the 'truth/lie' distinction (Edwards 1996:188) becomes central to the trial. For example, Smart (1989) considers that under England's first child sexual assault laws, the sexually abused child became:

> as much of a focus of surveillance as the abuser. Under this regime the abused child came to pose a particular problem. Having been abused it was feared that she might contaminate other 'innocent' children because she had knowledge which it was unfitting for children to have; she was morally damaged. Such attitudes persist, transforming the abused child into the problem which needs regulation.... [T]his [then] creates a situation of blaming the child for her abuse since, by being abused, she forfeits the protection of innocence (52-53).

This focus was evident at the time in England and Australia when sexual abuse between family members was first criminalised, since the arguments against criminalising intra-familial sexual abuse were based on unsupported assumptions that incest was a rare occurrence, that to criminalise it 'would put ideas into people's heads which otherwise they would never have thought of and that it would create new opportunities for blackmailing innocent men' (Smart 1989:54) by girls. It is likely that these historical beliefs about the so-called propensity of girls to falsely claim they have been sexually abused were the basis for the application of rules which protected the men accused of such crimes, such as the corroboration rule which required a girl's evidence to be corroborated by independent evidence before a man could be convicted of a child sex offence (Boniface 1994). This means that it can be argued that the female complainant of child sexual assault 'does not enter the witness box on neutral terms, she ... is already partially disqualified' (Smart 1989:57), if it is accepted that the cyclical reproduction of gender patterns within the criminal justice system create a context in which the continued reproduction of that pattern is more likely to occur.

The following discussion analyses the extent to which the delay in complaint rule operates to reproduce those cyclical patterns, in particular whether it operates to construct universal gender categories within the child sexual assault trial and the likely effect of those categories on the outcome of the trial.

The Delay in Complaint Rule: Its Past and Present

At the outset, the accepted wisdom about the rules of evidence that apply in a criminal trial is that they 'ensure that the trial process is fair for [both] parties' to the proceedings (ALRC and HREOC 1997:322). Generally speaking, however, these rules have the potential to prevent a child complainant from fully explaining their evidence and to prevent their evidence from being assessed in the actual context in which the assault is alleged to have occurred due to a general reluctance to admit 'similar fact' evidence and the general trend in Australia to hold separate trials where the accused has allegedly sexually assaulted more than one child. In other words, as the ALRC and the HREOC observe, children can be effectively silenced as witnesses due to the existence of '[c]ompetency rules, judicial warnings regarding children's evidence, rules against hearsay and prohibitions on expert testimony and on tendency and coincidence evidence' (1997:322). In fact, the Royal Commission into the NSW Police Service (1997) has observed that:

- [u]ntil reforms were achieved in recent years, the criminal trial process in child sexual assault cases seemed peculiarly weighted against the child witness;
- the evidence of young children in some cases was not received at all, and in other instances where a child was thought to be too young to give evidence on oath his/her

unsworn evidence was not capable of providing a foundation for a conviction without corroboration;
- judges were required to warn juries of the dangers associated with convicting on the uncorroborated account of children who gave sworn evidence; and
- the child witness was required to give evidence from the witness box in the same way as adult witnesses even though the presence of the accused, often a near relative, was likely to be particularly intimidating (1997:1090).

Arguably, the delay in complaint rule is also one of the rules of evidence that is now 'inappropriate or artificial in the context of child sexual abuse which is generally of an ongoing kind, rather than a one-off event' (Royal Commission 1997:613) and which is frequently accompanied by psychological trauma, threats and other forms of abuse.[6]

Under the common law recent complaint rule, 'evidence of the fact that a complainant made a complaint as speedily as could reasonably be expected, as well as the contents of that complaint, are admissible' (MCCOC 1996:185), if the complaint of sexual assault was made freely and voluntarily and at the first reasonable opportunity (Aronson & Hunter 1998:871; *Osbourne*:561, Ridley J). As Bronitt (1998) observes:

> [d]etermining whether the complaint was made at the first reasonable opportunity is the cornerstone of the recent complaint rule. This issue determines whether the judge should admit the evidence, or conversely, whether the jury should be warned that delays in reporting 'without good reason' reflect negatively on the truthfulness of the complaint. Indeed, under this framework, notions of immediacy and reasonableness are flexible, contingent upon the facts of the case and the experience of the trial judge (1998:49).

However, '[t]he law relating to the admissibility of a sexual assault victim's recent complaint is generally considered anachronistic' (Aronson & Hunter 1995:757), since the rule developed as an exception to the general principle that 'a witness may not be asked whether he or she made a prior consistent statement' (MCCOC 1996:185). 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 (1996:212; footnotes omitted).

The rule 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 1996:201; citing McDonald 1994). Bronitt (1998) observes that:

> [v]ictims [of violent crimes including rape] were required to travel around the locality presenting their injuries for inspection to 'men of good repute' and local law enforcement officials. Indeed making a complaint of rape without raising a 'hue and cry' automatically resulted in the allegation being dismissed and the victim being prosecuted for making a 'false appeal'. To supplement these common law obstacles, parliament enacted a statute of limitation which stipulated that a complaint of rape, to be actionable by the complainant,

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6 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 maintain the child's silence (Berliner & Conte 1990; Greenwald & Leitenberg 1990; Kaufman et al 1993; Cameron 1994; Elliott et al 1995; Phelan 1995). For example, 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' (1994:117) in ways that she found to be analogous to the experiences of veterans of the Vietnam war.

> had to be made within 40 days. In the absence of professional policing and only limited state involvement in prosecution, these procedural hurdles were viewed as the only safeguard against malicious prosecution (1998:44).

According to Gobbo (1970:245), by the beginning of the eighteenth 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. As such, 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' (MCCOC 1996:185). 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.

Not surprisingly, given the historical legacy of the recent complaint rule and the sexual assault trial's preoccupation with the moral worthiness of the complainant, recent complaint evidence cannot be used as proof of the assault alleged but merely as a factor to assess the honesty of the complainant. This role of recent complaint evidence was affirmed by the High Court of Australia in *Kilby* which held that a prompt complaint of sexual assault or a failure to make a prompt complaint goes only to the complainant's credibility and not to a fact in issue, such as consent.[7] In *Kilby*:472, Barwick CJ stated:

> [t]he admission of a recent complaint in cases of sexual offences is exceptional in the law of evidence. Whatever the historical reason for an exception, the admissibility of that evidence in modern times can only be placed, in my opinion, upon the consistency of statement or conduct which it tends to show, the evidence having itself no probative value as to any fact in contest but, merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence.[8]

In this context, Barwick CJ (465) considered that:

> [i]t would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining whether to believe her, they could take into account that she had made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not only be proper but, depending of course on the particular circumstances of the case, ought as a general rule be given.

Since *Kilby*, 'it has been widely accepted in Australia that evidence of early complaint or lack of complaint is relevant only to the credibility of the victim and not to prove the charge against the accused' (NSW Department for Women 1996:202; footnotes omitted),[9] although 'the distinction between issues of fact and credibility is difficult for jurors to grasp' (Bronitt 1998:46). Indeed, the jury 'may not be aware of the legal rules which underlie [a *Kilby* direction], that is, that the law simply imposes a *presumption* of unreliability which is rebuttable in the particular circumstances of the case' (Bronitt 1998:49).

The corollary of the recent complaint rule is that it 'permits the defence to invite the drawing of the inference that where an alleged victim has failed to complain, the credibility of her testimony is reduced' (Aronson & Hunter 1995:757); that is, that the delay is

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7 This aspect of the decision in *Kilby* is authority for rejecting the idea that failure to complain was evidence of consent as had been held in *Hinton*:24, per Mansfield J (*Kilby*:466, 472, Barwick CJ).

8 This rule has recently been restated by the High Court in (*Jones*:53, Brennan CJ, Toohey, Gaudron, McHugh & Kirby JJ: see also *Suresh*:770, Gaudron & Gummow JJ).

evidence of the complainant's fabrication of her allegation of sexual assault. In cases where a complainant was deemed to have failed to complain at the earliest reasonable opportunity:

> it was the practice of trial judges to give a *Kilby* direction to the jury. This was to the effect that, in determining whether to believe the complainant, the jury might take into account his or her failure to complain at the earliest reasonable opportunity. The direction assumed that a prompt complaint was consistent with an assault having taken place, while delay or absence of a complaint was contrary to normal expectation and hence a matter properly taken into account in determining the witnesses' credibility (Royal Commission 1997:1121-1122).

The common law rule governing recent complaint has now been ameliorated to some extent 'by statute in most jurisdictions. Almost all now require that the judge warn the jury in sexual offence proceedings in terms broadly similar to the NSW provision' (Bargen & Fishwick 1995:69); that is, s 405B of the *Crimes Act* 1900 (NSW).[10] Under that provision, if a question is asked which tends to suggest an absence of, or delay in making a complaint, the trial judge is required to:

- give a warning to the jury to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false (s 405B(2)(a)); and
- inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault (s 405B(2)(b)).

Whilst the architects of the legislation appear to have envisaged that s 405B would provide sufficient protection for complainants from discriminatory treatment in a sexual assault trial (see Walker 1981:4773), as Bargen & Fishwick (1995) observe:

> because [a] judge is not precluded by these rules from making any comment on the delay in making a complaint (except in the ACT), being required only to warn the jury negatively, some judges continue to direct the jury that evidence about lack of swift complaint can and possibly should be used to undermine the complainant's credibility (1995:69).

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9 In NSW, under ss 62 and 66 of the *Evidence Act* 1995, 'evidence of complaint can be used a proof of the sexual assault' (MCCOC, 1996:185), indicating that s 66 has altered the common law rule relating to recent complaint in NSW to some extent. The provision governs first-hand hearsay evidence where the maker of the representation (such as the complainant in a sexual assault trial) is available to testify. Under s 66(2), the hearsay rule does not apply 'if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation'. This means that, in NSW, first-hand hearsay evidence could be introduced as evidence to support an allegation that a sexual assault occurred, contrary to the position at common law (Odgers, 1997:110), if such evidence satisfies the test of relevance under s 55 of the *Evidence Act* 1995 (NSW Department for Women 1996:215). However, the sting in the tail of s 66 is the emphasis on freshness of memory which is based on the belief that delay in complaint increases the risk of fabrication (Odgers, 1997:110). This has been recently confirmed in *Graham* Aronson and Hunter (1998) also consider that the admissibility of recent complaint evidence would be governed by s 102 of the *Evidence Act* 1995 (which excludes evidence that is relevant only to a witness's credibility) and s 135 of the *Evidence Act* 1995 (which excludes relevant evidence if 'its probative value is substantially outweighed by the danger that the evidence might', amongst other things, be prejudicial to a party).

10 See the NSW Department for Women (1996:202) for a summary of the legislative history of this provision and its applicability in the child sexual assault trial. See also Walker (1981:4772). Analogous provisions to s 405B may be found in s 61(1)(b), *Crimes Act* 1958 (Vic); s 371A, *Criminal Code* 1924 (Tas); s 76C, *Evidence Act* 1971 (ACT); s 36BD, *Evidence Act* 1906 (WA); s 4, *Sexual Offences (Evidence and Procedure) Act* 1994 (NT). South Australia still relies on the common law (Bargen & Fishwick, 1995:69). See Aronson and Hunter (1998:873-874) for a list of the child sex offences in NSW that are not subject to a s 405B direction.

In other words, s 405B did not displace the common law warning concerning delay in complaint. In fact, following the introduction of s 405B in NSW, 'it was held that, apart from the warnings set out in that section, in cases where there had been no complaint, or a delay in making complaint it still remained appropriate to direct the jury in terms of *Kilby*' (Royal Commission 1997:1122; citing *Davies*).[11] This development now applies to all provisions in other jurisdictions that are analogous to s 405B as a result of the High Court decision in *Crofts* (discussed below).

The fact that s 405B and analogous provisions did not abolish the common law warning about delay in complaint means that a judge is now required to direct a jury that 'delay in making a complaint may [still] be taken into account in evaluating the evidence of the complainant and in deciding whether to believe her' (NSW Department for Women 1996:203; footnotes omitted). As the NSW Department for Women observes:

> [t]he result is that Judges are able to give the new direction about the good reasons for delaying in making a complaint (in section 405B) *and* the former common law ruling that the absence or delay in complaining should be taken into account in evaluating the evidence of the complainant. It has been argued that if the jury gets both these directions they effectively cancel each other out (1996:203, emphasis in original).

Recently, as Aronson and Hunter (1998:869) note, the High Court in *Crofts*:451 (Toohey, Gaudron, Gummow and Kirby JJ), stated that the purpose of a provision like s 405B was:

> to reform the balance of jury instruction not to remove the balance. The purpose was not to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses.... It was simply to correct what had previously been standard practice by which, based on supposed 'human experience' and the 'experience of courts', judges were required to instruct juries that complainants of sexual misconduct were specially suspect, those complained against specially vulnerable and delay in complaining invariably critical. In restoring the balance, the intention of the legislature was not to 'sterilise' complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for their consideration.

In fact, Toohey, Gaudron, Gummow and Kirby JJ considered that, in some circumstances, 'the delay may be so long, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false' (*Crofts*:448).

Essentially, cases that have interpreted the effect of s 405B (and analogous provisions) on the common law rule have argued that the delay in complaint doctrine should be retained in order to restore the balance of the interests of justice. In other words, s 405B has been interpreted by the courts as 'tilting the balance in favour of the complainant' (*R v Davies*:278, Hunt J) with the delay in complaint rule being seen as a way of restoring that balance. Such a view has particular implications for the child sexual assault trial, in the common situation in which the complainant has delayed reporting childhood sexual abuse for a period of years.

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11 In *Davies*, the appellant had argued that s 405B did not 'touch the principles laid down in *Kilby's* case' (278, Hunt J). Hunt J agreed with this interpretation of the effect of s 405B when he stated: 'All that s 405B does is to make obligatory the directions on what I have described as the other side of the coin. The section does not purport to codify the law relating to evidence of complaint; if it was intended by the legislature to preclude the usual direction referred to in *Kilby's* case, the section should have contained an express exclusion. A simpler course may have been to exclude altogether the anomalous admissibility of evidence of complaint. But neither course was followed'(278).

The dubious medieval belief that women and girls who have been raped will immediately take to the streets raising a 'hue and cry' has seen the development of a legal doctrine which allows the defence, in both adult and child sexual assault trials,

> to argue that a failure to make timely complaint increases the probability that the complainant is fabricating her in-court allegations. It also means that in appropriate cases a judge is *obligated* to direct the jury of this (Aronson & Hunter 1998:869, emphasis in original).

The fact that sexual assault complainants are considered to be a class of witness whose credibility requires boosting by evidence of recent complaint suggests that the rule is a product of the cyclical reproduction of gender patterns within the child sexual assault trial which create universal gender categories, the construction of which, it is argued, creates particular cyclical relations of power between the accused and the child complainant in the child sexual assault trial.

The Operation of the Delay in Complaint Doctrine as a Sex Segregation Rule within the Child Sexual Assault Trial

Arguably, the power of the criminal justice system's gender practices is evidenced by its ability to create universal categories of gender — the Woman (Smart 1992), the Unreliable Child, and the Man of legal discourse — which are essentialist in their operation, relying as they do on one or more cultural or biological essences which then describe all women, all children, all men. The universal nature of the Unreliable Child category is evident in the fact that whether a child's complaint was made at the first reasonable opportunity is a question of law which is applied as an objective standard and which is characteristically applied irrespective of the complainant's individual experience and without reference to the social and psychological effects of child sexual abuse upon a child.

It can be argued that the delay in complaint rule is evidence of the reproduction of gender practices within the criminal justice system, in that the rule was historically only applicable to sexual assault trials involving a male accused and female complainant. The rule was thus applied to the evidence of the complainant as a function of her sex, creating a gendered division of rights between the accused and complainant. It is also a rule that can be applied irrespective of whether the delay constitutes hours, days, weeks or years (NSW Department of Women 1996:219). In particular, the application of the rule as a sex segregation rule both justifies its imposition and the differential treatment of the female complainant who is considered to have delayed unreasonably, since the construction of the Unreliable Child through the operation of the rule becomes the standard by which the falsity of the female complainant's allegations is 'proved'.[12]

A finding that a complainant has unreasonably delayed making a complaint is used to justify the criminal justice system's characterisation of her evidence as unreliable and its differential treatment of her. The criminal justice system's historical preoccupation with the moral worthiness of the child complainant (in order to protect men from false accusations) has given rise to a segregation rule, the imposition of which is then used to *justify* her differential treatment and makes rational such treatment. Arguably, the construct of the

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12 This is not to say that the male child complainant's evidence is not similarly subject to the delay in complaint rule, merely to emphasise the criminal justice system's historical preoccupation with sexual assault as a gender specific crime. In fact, it can be argued that the criminal justice system's historical *non*-recognition of male complainants of rape and child sexual abuse gave men and male children no protection against sexual abuse, thus creating specific *but different* gendered relations of power between, in particular, male offenders and male victims. An application of the delay in complaint rule to the male complainant places him in a similar (although not necessarily identical) gendered category of Unreliable Child.

Unreliable Child prevents any interpretation of delay in complaint *other than* fabrication. The idea of the Unreliable Child is unrelated to real children and their individual reactions and survival strategies to sexual abuse, thus creating a category of false universalism.

However, it is necessary to distinguish between the concept of Unreliable Child as a specific gender category within the criminal justice system (as constructed by particular rules of evidence) and the different gender practices of the child complainant, one of which may have been to experience such a degree of powerlessness as a result of being sexually abused, as to *act out* that powerlessness by remaining silent. In particular, if offenders' sexual behaviour with children is a specific masculine sexual practice that creates gendered relations of power between offender and child (Cossins 1998), the child who has been sexually abused can be expected to actively practise the gendered position of powerlessness that sexual abuse can impose upon her. Curiously, the gender practices of the criminal justice system construct the victim of sexual abuse as having a degree of power that does not accord with this position of powerlessness, and construct the man accused of child sex offences as particularly vulnerable to the false allegations of revengeful or fantasy prone female children.

Like the criminal justice system's gender practices within the adult sexual assault trial, the delay in complaint rule constructs the female child complainant as a *type* of child, the Unreliable Child who is differentiated from the Truthful Child who, like the universal category of the Man of legal discourse (Smart 1992), makes a complaint of sexual abuse within a reasonable but *undefined* period of time. Thus, the Unreliable Child represents a contradictory dualism: as the revengeful, dishonest or fantasy prone, dangerous child, she represents that which is not Man (the unitary category into which the accused is presumptively placed), as well as being distinguishable from the Truthful Child, and yet is what every child could potentially be. Arguably, the Unreliable Child construct can be expected to be sufficiently prejudicial in the minds of jurors as to have a significant influence on the decision as to the guilt of the accused, to the extent that the construct accords with popular and historical notions about fantasy-prone and/or dishonest female children.

The ongoing currency of the common law rule concerning delay in complaint indicates the primacy of the rule for the cyclical reproduction of gender practices within the child sexual assault trial; that is, as a device for assigning relative positions of power to the accused and child complainant through specific gendered constructions. Reforms to the delay in complaint rule (for example, in the form of s 405B, *Crimes Act* 1900 (NSW)) are thus easily subverted by either the discretionary power of a judge to give the common law warning about delay in complaint in addition to s 405B directions (as a result of the decisions in *Davies* and *Crofts*), or by virtue of the fact that some judges may ignore the s 405B direction altogether (NSW Department of Women 1996). Such reforms exemplify how attempts to reform the rules of evidence governing sexual assault trials merely appear to tinker at the edges of the institutional nature of the criminal justice system, since the fundamental gender practices of the criminal justice system remain unchallenged and unchanged. In other words, reforms to the delay in complaint rule do not appear to have prevented the cyclical reproduction of particular gender practices within the child sexual assault trial and the creation of specific relations of power between the complainant and accused.

However if we step outside the universal category of Unreliable Child, the assumption of delay in complaint being equivalent to fabrication does not sit well with the observation that:

> [i]ronically, research indicates that the major problem with children's evidence is not the risk of a child making false allegations, although this is still a possibility. *Rather the major problem is their significant level of false denials and retractions*. While children can be encouraged to say that an event occurred knowing full well that it did not, this is difficult to do. When children do make false statements at the encouragement of others, the statements are often not very credible and these children rarely persist with their made up story. On the other hand, to avoid punishment, to keep promises not to tell or to avoid revealing embarrassing information, most children will deny knowing information about an event that they know occurred (ALRC and the HREOC 1997:307; emphasis added).

Back to the Future: The Resurrection of the Common Law Delay in Complaint Rule in Crofts

The operation of the delay in complaint rule as a sex segregation rule is exemplified by how the rule was applied in *Crofts*. In that case, the complainant alleged she had been sexually abused on eight separate occasions between the ages of ten and sixteen by Crofts, a close friend of her family, although the accused was only convicted of four counts of sexual penetration of a child between 10 and 16 years of age. At trial, the judge did not inform the jury they were entitled to take a six year delay in complaint into account when assessing the complainant's credibility and the High Court quashed the convictions of the appellant because of the trial judge's failure to give the common law *Kilby* direction.

At the outset, the High Court accepted that delay in making a complaint was relevant to an assessment of the complainant's credibility. This means that the Court applied the standard represented by the universal category of Unreliable Child in considering the significance of the delay by the complainant in *Crofts*. In other words, because of the complainant's six year delay between her first alleged experience of sexual abuse and her complaint, the High Court held that the 'substantial' delay of six years before a complaint was made about the first assault when the complainant was ten, entitled the jury 'to accurate assistance by the trial judge concerning the legal significance of the absence of complaint soon after the alleged incidents' (*Crofts*:442, Toohey, Gaudron, Gummow and Kirby JJ).

On the one hand, it could be argued that the directions under s 61(1) of the *Crimes Act* 1958 (Vic) (the Victorian equivalent of s 405B of the *Crimes Act* (NSW) 1900, discussed above), with which the trial judge complied, contained the 'accurate assistance' concerning the legal significance of the absence of complaint; that is, that the 'delay in complaining does not necessarily indicate that the allegation is false' (s 61(1)(b)(i)), and 'that there may be good reasons why a victim of sexual assault may hesitate in complaining about it' (s61(1)(b)(ii)). In fact, at trial, the judge stated to the jury:

> [t]he law requires me to give you this advice, but... it is a matter that accords with commonsense and human experience. Delay in complaining in sexual abuse cases does not necessarily mean the allegations are false; there may be good reasons why victims of sexual assaults hesitate in making complaints about them. The experience of the law confirms that complaints are often not made immediately after sexual assaults. [The prosecutor], in his address to you, suggested that she was young, confused, [had] feelings of guilt, fear of disbelief, fear of family upheaval, fear of accusation against a family friend. [These] were all suggestions that were put forward that may explain such a delay, and there may well be others. Experience has shown that it is not uncommon for such a delay and the law requires me to say that it does not necessarily mean the allegations are false (Judge Williams, quoted in *Crofts:* 444).

On appeal to the High Court, the defence argued first, that the trial judge, when giving his first direction to the jury about the significance of the six year delay in complaint, had erroneously informed them that delay in complaint could not be used to draw the inference

that the offences did not happen (thus inferring that delay in complaint evidence could be used to prove a fact in issue). Secondly, the defence argued that the trial judge, in a second direction to the jury, had not corrected this error and that '[t]he jury were not given instruction that the absence of early complaint could be used by them in their assessment of the credibility of the complainant. The result was that the direction properly given under s 61(1)(b)... was unbalanced and unduly weighted in favour of the prosecution' (*Crofts*:445). Furthermore, the defence argued that the trial judge was required, under s 61(2), to comment on the considerable delay in complaint 'in the interests of justice'.[13] In other words, the defence argued that s 61 *required* the trial judge to give, not only the directions specified under the provision, but also an instruction that '"the lack of a recent complaint is something that the jury can use to found an inference, that inference being that the allegations are false"' (*Crofts*:445), thus effectively cancelling out the benefits of a s 61 direction. However, at trial, 'Judge Williams declined to do this, considering that any such instruction would run counter to the requirements of s 61(1)(a) of the Act. He regarded the request as one which asked him to do 'exactly what I am not supposed to do'. The appellant submitted that this represented a misconstruction of the section, read as a whole' (*Crofts*:445).

Whilst the Criminal Court of Appeal of Victoria also rejected the defence's submission, arguing that the trial judge was under no compulsion to give any direction other than that specified in s 61, the High Court disagreed, on the grounds that:

> [t]he enactment of specific provisions altering the general rules of practice as to the directions given to a jury concerning the reliability of the evidence of alleged victims of sexual offences did not affect the requirement to give specific and particular warnings where they were necessary to avoid a perceptible risk of a miscarriage of justice arising from the circumstances of the case (*Crofts*:446).[14]

This finding was based on an interpretation of the word 'necessarily' in s 61(1)(b)(i) ('that delay in complaining does not *necessarily* indicate that the allegation is false') which was considered to be critical to the operation of the provision in that the word opened the door to other (traditional) interpretations of delay in complaint:

> [d]elay in complaining may not *necessarily* indicate that an allegation is false. But in the particular circumstances of a case, the delay may be so long, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false (*Crofts*:448, emphasis added).

Nonetheless, the delay by the complainant in *Crofts* was neither inexplicable nor unexplained, since the delay was explained at trial and it is the very type of behaviour that is characteristic of child sexual abuse victims.[15] However, it can be argued that such considerations were obscured by the gendered construction of the complainant in *Crofts* as the Unreliable Child of legal discourse, by virtue of the essentialist assumptions embodied in that construction about female children who delay their complaints, with such assumptions giving rise to the belief that a miscarriage of justice had occurred.

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13 Section 61(2) states '[n]othing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice'. There is no provision equivalent to s 61(2) in the *Crimes Act* 1900 (NSW).

14 The decision in *Crofts* is a culmination of a number of cases (*Davies*; *Omarjee*, *Miletic* in which courts have effectively undermined the effectiveness of reform provisions such as s 61 and s 405B, by insisting that the common law rule (as stated in *Kilby*) was not precluded by such reforms, on the grounds that 'common fairness and common experience' dictated that delay in complaint 'should be taken into account in favour of the accused'(*Davies*:278, Hunt J).

But what is the source of the miscarriage of justice envisaged by the High Court in the trial judge's failure to give the common law ruling about delay in complaint? What informs the concept 'in the interests of justice' on which this decision was based? A common enough phrase, 'ordinary human experience' (*Crofts*:451), was the term used to explain the meaning of the delay in complaint and to justify the High Court's decision that the jury ought to have been warned, in order to ensure that the accused obtained a fair trial. In fact, this term, 'ordinary human experience', can be equated with the category of Man of legal discourse, since no reference was made by the High Court to the actual experiences and responses of sexually abused children. Even though the Court conceded that 'the warning should not be expressed in such terms as to undermine the purpose of the amending Act by suggesting a stereotyped view that complainants in sexual assault cases are unreliable or that delay in making a complaint about an alleged sexual offence is invariably a sign that the complainant's evidence is false' (*Crofts*:451), the Court's resort to notions of 'ordinary human experience' for assessing the 'meaning' of a six year delay had the effect of introducing the very stereotype (or gender construct) it warned against.

In particular, 'ordinary human experience', a category of false universalism, was the measure and means by which the complainant in *Crofts* was constructed as the Unreliable Child of legal discourse. On the one hand, she is distinguished from the Truthful Child (whose 'ordinary human experience' is to report sexual abuse at the first reasonable but undefined opportunity); on the other hand, she epitomizes the Unreliable Child in 'contradistinction to Man' (Smart 1992:36) because she is (as the delay in complaint rule prophesises) what any female child could be. Thus, the rule justified her differential treatment as a particular *type* of child: according to the High Court, the complainant had the opportunity to complain earlier but failed to do so (*Crofts*:444), a 'fact' which justified her placement into the gender category of Unreliable Child, whilst Crofts, who denied all allegations of abuse, is presumptively placed in the category of Man of legal discourse and thereby distinguished from the complainant.

The resort to 'ordinary human experience' thus dispenses with the actual lived experience of the complainant and creates a category of false universalism: it is 'ordinary human experience' that a delay of six years is suggestive, not of a sexually abused and traumatised child, but a child prone to fabrication. By being placed in this specific gender category, the complainant in *Crofts* is distinguished from the Truthful Child and the Man of legal discourse, and becomes a product of the cyclical practices of gender within the criminal justice system, thus justifying the differential treatment of her through the operation of the delay in complaint rule.

In particular, this analysis conceives of the concept of 'ordinary human experience' as a specific *gender* practice that reinforces the relationship of power between the complainant and the accused; that is, through the universal concept of 'ordinary human experience', the complainant becomes 'unbelievable' and is constructed as the Unreliable Child of legal discourse, whilst the accused becomes 'believable', and is constructed as the Man of legal discourse. In addition, the concept of 'ordinary human experience', arguably, becomes the means by which the holders of power reinforce that power through giving their own

15 Although attempts have been made to admit evidence of the reasons why children typically do not tell anyone about the abuse they have suffered (for example, the child abuse accomodation syndrome: Summit (1983)) they have not yet been successful (see, for example, *C v R*; *F v R*). In *F v R*, for example, evidence of the child abuse accomodation syndrome was not admitted under the common knowledge rule, although this rule has been abolished under s 80(b) of the *Evidence Act* 1995 (NSW). As Bronitt (1998:50) observes, '[u]naided by expert evidence, discriminatory assumptions about victim behaviour may surface within the jury room'.

subjective version of commonsense the status of universal knowledge and truth.[16] Arguably, this status is a function of the public power that judges exercise and the analysis of the judicial decision-making in *Crofts* shows how judges reproduce that power through the application of gender specific rules and concepts within the trial process.

Conclusion

This article has argued that the delay in complaint rule constitutes evidence of the cyclical reproduction of gender practices within the child sexual assault trial, in that the rule was, historically, only applicable to sexual assault trials involving a male accused and female complainant and was thus applied to the evidence of the complainant as a function of her sex. Further, it was argued that the criminal justice system's historical preoccupation with the moral worthiness of the female child complainant (in order to protect men from false accusations) justified the imposition of the rule. It was shown how the construction of the Unreliable Child through the operation of the rule becomes the standard by which the falsity of female complainant's allegations can be 'proved', in circumstances where the complainant is considered to have delayed unreasonably and irrespective of the complainant's individual reactions and survival strategies to sexual abuse. Indeed, the delay in complaint rule constructs the female child complainant as a *universal* type of child, the Unreliable Child, who is differentiated from the Truthful Child who, like the category of Man of legal discourse, makes a complaint of sexual abuse within a reasonable (but undefined) period of time. Thus, as a gender construct, the Unreliable Child is inherently contradictory: she represents that which is not Man (the unitary category into which the accused is presumptively placed), is distinguishable from the Truthful Child, and yet is what every child could potentially be.

Nonetheless, such a construct cannot be said to *inevitably* lead jurors to a decision that an accused is innocent of sex offences against a child. Each child sexual assault trial will comprise a pattern of gender relations that are both unique (because of the particular facts of the case, the nature of the evidence, age of child, relationship of child to accused, racial and socioeconomic backgrounds of accused and complainant and so on) *and* constituted by cyclical patterns of gender that characterise the trial process. This suggests that if the reproduction of those specific gender patterns is sufficiently cyclical within any given trial (through, for example, the application of sex segregation rules), and if their reproduction is directed towards the construction of the Unreliable Child, then their reproduction is more likely to result in a finding of not guilty by the jury.

Arguably, any effective reform of the operation of the adversarial system within the child sexual assault trial to improve conviction rates for child sex offences must address the relations of power between the accused and the complainant and the ways in which a gendered division of rights between the accused and complainant is established through the application of particular rules of evidence and the process of cross-examination. In particular, this article highlights the limitations of law reform attempts to curtail the applicability of one particular sex segregation rule (the delay in complaint rule), since, arguably, such attempts did not address the structure of the criminal justice system as an institutional site for the reproduction of particular relations of power. Indeed, the question arises as to whether the most effective way to limit the effects of the legal system's institutional gender practices within the child sexual assault trial is by reforming specific

16 See, e.g. Smart (1990) who has analysed the disjuncture between law's construction of the truth and women's experiences of sexual assault.

rules of evidence without addressing the adversarial and gendered context in which child sex offences are prosecuted.

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