Historical Child Sexual Abuse Investigations: A Case for Law Reform

Michael Newbury*

Abstract

Historical child sexual abuse investigations typically present with degraded evidence, which hinders successful prosecutions. However, the poor state of evidence in these cases is not merely a function of the passage of time, but also the result of unnecessary complexity and restrictions on investigative procedures. This is particularly true of the investigative procedures around police obtaining admissions and confessions. Admissions and confessions are among the most potent forms of evidence against an accused person, but they take on an even more important role in investigations where other evidence is degraded. This article argues that the common law prohibition on adverse inferences being drawn from the right to silence, and the exclusion of most sexual offences from the *Telecommunications (Interception and Access) Act 1979* (Cth), should be reconsidered as important steps to obtaining more viable evidence for historical child sexual abuse cases.

Keywords: child sexual abuse – police – investigations – evidence – admissions – confessions – right to silence – telecommunications interception

Introduction

The term 'historical child sexual abuse' (or 'HCSA') is an informal, non-legal phrase that struggles for precise definition. Technically, all response investigations are historical — whether by minutes or by decades — so historicity is always a matter of degree. However, the phrase also accounts for a phenomenon almost unique to child sex abuse crimes: namely, the extensive reporting delays by victims, which often amount to years if not decades (London et al 2005:198, 200, 204; O'Leary and Barber 2008:139; Alaggia 2005:454). This is atypical of almost every other victim-reported crime, as demonstrated by the general lack of concern for historical crimes of theft, property damage, drug use or traffic violations. Perhaps the closest parallel to HCSA matters is historical homicides, although in these cases victims play no role in delaying the reporting or discovery of a crime. The practical implication for investigators (and, by association, prosecutors) is that HCSA files typically

* BA (Hons) (*Adel*) LLB (Hons) (Flinders University) LLM (Int Law & Int Rel) (*Flin*) Adv Dip Public Safety (Police Investigations) Adv Dip Policing; Detective Brevet Sergeant, Major Crime Investigation Branch, South Australia Police. Correspondence: c/- Law Publishing Unit, Sydney Law School, Law Building F10, The University of Sydney NSW 2006, Australia.

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present with degraded evidence and this, in turn, decreases the probability of a successful prosecution. In the case of summary offences (the lowest tier of offences), statutory limitations provide an arbitrary bar to prosecution irrespective of the quality of evidence.[1] In South Australia, some sex offences, such as indecent behaviour and gross indecency, are summary offences; while others, like child pornography, have been upgraded to indictable offences. This makes the timing of some historical sex offences critical in determining whether or not they can be prosecuted.

This article argues that the limitations on evidence in HCSA cases are not merely a function of the passage of time (about which little can usually be done), but also of unnecessary legal restrictions on investigative procedures that prevent the recovery of evidence that does, or at least could, exist. Arguably, the focus of law reform around HCSA could broaden from the prosecution phase at the 'back-end' of the criminal justice process to investigative procedures at the 'front-end'. The high rate of attrition of HCSA matters pre-trial (Daly and Bouhours 2010:565), and the hegemony of the offender's rights over those of the victim, suggests that the continued focus on back-end reforms, while necessary, is unlikely significantly to improve the quality or quantity of available evidence. However, a focus on front-end investigative procedures, primarily the restrictions around the gathering of admissions and confessions, could increase the amount of viable evidence and, in turn, increase the number of cases making it to court and succeeding.

The role of admissions and confessions in HCSA investigations

To understand the issues surrounding the loss and/or degradation of evidence in HCSA cases and its impact on investigative procedures, we first need to understand the sources of evidence to which those procedures apply. All investigations have up to five sources of evidence: offenders, victims, witnesses, crime scenes and exhibits (Newbury 2014:3–4). In an HCSA investigation, the investigator will typically seek the following types of evidence from each of these sources:

- **Offenders:** admissions and confessions (the subject of the latter part of this article).
- **Victims:** a statement disclosing the offence, the identity of the offender and potential sources of evidence to corroborate the account.
- **Witnesses:** a statement to corroborate either the victim or suspect; identification evidence; historical circumstances and context; CCTV can also be considered as a form of witness.
- **Crime scenes:** physical crime scenes, both primary and secondary; electronic crime scenes, such as internet pages and mobile phone data; and evidence gleaned from the body of offenders, victims and witnesses by forensic procedure.
- **Exhibits:** documents; maps and sketches; photos and videos; letters, postcards and telegrams; and electronic exhibits, such as computers, mobile phones and DVDs.

With time, offenders have the opportunity to escape, dispose of evidence and construct alibis; victim and witness memories fade or are distorted; witnesses become hard to locate or identify, and in some cases die; and crime scenes and exhibits are obliterated or

[1] For example, in South Australia, s 52 of the *Summary Procedure Act 1921* (SA) provides a two-year limitation on the commencement of summary offence prosecutions.

contaminated. Evidence recovery in HCSA matters is also highly unpredictable. Some relatively recent crimes have almost no extant evidence, while some historical crimes have a substantial trove. Evidence decay is most substantial within the first few hours and days, reinforcing the need for a rapid response, timely intelligence and adequate resource deployment. By the time historical offences come to light, in some cases 40 to 50 years later, experience shows that the availability and reliability of evidence is often highly uncertain. Although it is improbable that evidence will be recovered after months or years have elapsed, it remains possible and therefore cannot be ignored. Further delay might assist the defence by giving rise to arguments of forensic disadvantage to stay the prosecution (see *Longman v The Queen*; *Crampton v The Queen*). Put simply, time is the enemy of the investigator.

Admissions and confessions, being statements against the suspect's interest, are often the strongest form of prosecutorial evidence in an investigation, but they take on an even greater significance in HCSA cases where other forms of evidence are typically very limited. Ultimately, admissions and confessions have the ability to corroborate aspects of the victim's account. Admissions and confessions can be obtained in several ways, including:

- **A direct approach (police interview):** this occurs when police approach the suspect, caution him/her about the right to silence, and conduct a record of interview.
- **A covert approach:** this can occur in a variety of ways. It might include an undercover officer engaging the suspect and recording the conversation; it might involve a victim contacting the suspect and recording the conversation using a 'pretext conversation';[2] or it might involve the use of listening and surveillance devices, or a telecommunications interception.
- **Documentary and electronic exhibits:** preserved documentary records (such as letters and postcards) and electronic records (such as text messages and blogs) may contain admissions and confessions.
- **Legal proceedings:** an accused may, in the course of legal proceedings make admissions or confessions by a statement supplied through a solicitor, by pleading or by testifying at trial.

The first of these, police interviews, are not only the most common, but they are also among the most highly contested aspects of evidence in any voir dire. The Australian Defence Lawyers Alliance website, for example, notes that admissions and confessions are a 'common area of dispute', and '[t]he starting point for any decent lawyer is to look at the interview and assess if it is admissible' (Australian Defence Lawyers Alliance 2009). Sustained, vigorous attacks on police interviews have not simply resulted in a 'substantial body of law' governing the judicial discretion to exclude (Australian Defence Lawyers Alliance 2009), but a body of law that has become almost impenetrably complex and dysfunctional for investigators.

While it is not possible to review all the investigative procedures that relate to the gathering of admissions and confessions, there are two that deserve specific scrutiny in the context of HCSA investigations: (1) the right to silence; and (2) telecommunications interception.

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[2] This is authorised pursuant to state and territory laws for listening and surveillance devices and is not considered a telephone interception. Some states, such as New South Wales (NSW), require a judicial warrant, while in other states, like South Australia (SA), it is exempt from the relevant Act's restrictions.

The right to silence

The common law holds that for a police interview to be admissible, suspects must not be questioned without first being cautioned that they are not obliged to answer questions (see, for example, *R v Swaffield*; *Petty v The Queen*). The High Court has held that this right to silence is both a human right protecting the dignity of the accused (*EPA v Caltex* at 548) and a 'fundamental rule of the common law' (*Petty v The Queen* at 99). Furthermore, article 14(3)(g) of the *International Covenant on Civil and Political Rights* states that no person can be compelled to testify against himself/herself, or to confess guilt. The common law holds that silence by a suspect cannot be the subject of adverse comment in later proceedings by the presiding judge, nor can any adverse inference be drawn by a jury (*Weissensteiner v The Queen*; *Petty v The Queen*). This is true even when the accused makes a late statement, such as during the trial.

Even though the right to silence is a basal principle of the common law, a schism has emerged in common law jurisdictions over what inferences can be drawn from that silence. Statutory reform of the common law right to silence in England, Wales and Northern Ireland has permitted adverse inferences to be drawn from an accused's silence since 1994, subject to specified protections (known as the 'special caution' to differentiate it from the common law caution) (*Criminal Justice and Public Order Act 1994* (UK) ss 34–39). New South Wales recently broke ranks with the rest of Australia and the common law to follow the United Kingdom's model of permitting adverse inferences from silence (*Evidence Act 1995* (NSW) s 89A). As a result, NSW police now deliver a UK-style special caution that warns the suspect that he/she does not have to say anything, but it may harm their defence if the person does not mention something they later rely upon in court, and that anything they do say may be used in evidence. This applies to offences punishable with more than five years' prison, and only when a solicitor is present for the questioning.

The NSW amendments have attracted heated debate — largely mischaracterised as being between those who are for or against the right to silence. For example, a media release by Australian Lawyers for Human Rights incorrectly claimed: 'The people of NSW will no longer have the right to remain silent' (Australian Lawyers for Human Rights 2013). In fact, both sides of the debate agree that the right to silence should remain and cannot be removed without offending our international obligations; the point of distinction is whether inferences should be permitted from that silence. Critics of the NSW law, such as Simon Breheny of the Institute of Public Affairs, claim that the special caution is an 'outrageous attack on fundamental legal rights' and that it 'undermines procedural fairness and creates an unjust legal system' (Breheny 2013). Such concerns must be addressed because any move that undermines fairness will ultimately alienate the public from the justice system and prove counterproductive in the long run.

There can be little doubt that the common law right to silence poses challenges, even if there is no agreement over whether the special caution is an appropriate solution. It permits an accused to review the full range of evidence arrayed against him/her and then decide whether or not to make a statement. This provides a forensic advantage of such magnitude that it is routinely fatal to prosecution cases. It is perfectly designed to facilitate, if not encourage, accused persons to lie and fabricate evidence to fit around prosecution disclosure. Charges are routinely dropped when prosecutors cannot exclude a version of events consistent with the innocence of the accused — even though the accused has given no version at all. In effect, the mere possibility of recent invention is enough to sabotage some cases. These well-documented and long-standing problems led Jeremy Bentham

(1827:194), one of the fiercest opponents of the right to silence, to go so far as to describe the right as 'one of the most pernicious and most irrational notions that ever found its way into the human mind'.

The common law right to silence first emerged in the 17th-century Court of Star Chamber with *Lilburne's case*, but found its modern form in the English 'Judges' Rules', which were first drawn up in 1912. The Judges Rules reflect a time when admissions and confessions were handwritten, often by police under dictation, without any independent party present, and later read to the court by the officer. Courts have long been sceptical about the reliability of police handwriting confessions and alive to the potential for duress and fraud,[3] especially for capital crimes where the confession is under dispute. It is therefore no coincidence that the UK amendments to create a special caution in 1994 followed the widespread availability of audio-visual recording methods for suspect interviews; it is perhaps more surprising that Australia did not follow. Video recording of interviews has almost entirely eliminated disputes over what was said, leaving only questions over the appropriateness of police questions and conduct.

The UK experience since 1994 provides no basis for thinking that investigative or prosecutorial standards will decline with a special caution and the drawing of inferences from silence. A UK evaluation conducted by Bucke, Street and Brown (2000:69–73) found several noteworthy benefits, including:

- Police were more inclined to provide earlier disclosure of salient features of the case, as disclosure was required in order to put questions about evidence to the suspect.
- The laws resulted in 'greater efficiencies in the investigative and prosecution process' as police could check the version of events provided by a suspect to resolve matters, one way or another, pre-trial.
- There was a steep decline in the use of silence by serious offenders.
- Weak cases could be stopped earlier without proceeding to trial if a suspect's disclosures were found to be unassailable.
- The certainty of convictions was increased when a suspect's lies were included in the body of evidence.
- There were no significant changes noted in the number of suspects charged or the level of guilty pleas; while in terms of the proportion of defendants convicted, '[t]he evidence was slightly more positive, albeit not conclusive'.

The research also found that while more suspects were inclined to provide a statement, the right to silence was still being utilised by some. Importantly, the drawing of inferences from silence 'has not led to undue practical disadvantage to defendants' (Bucke, Street and Brown 2000:73). Instead, it appears that the defence accrue equally valuable benefits from the special caution — such as earlier termination of weak cases and earlier disclosure of evidence — countering scepticism that the special caution might be nothing more than a shortcut to more convictions. Perhaps just as convincing is the fact that the UK special caution has not been repealed in two decades, and is now used in NSW.

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[3] See, eg, *Mallard v The Queen*, which shows that judicial scepticism of handwritten confessions rightly continues up to the present.

Critics of the special caution overlook the fact that the right to silence has never existed in the absolute form they perhaps imagine or desire; rather, it has always been tempered with common sense and pragmatism to stop it subverting the criminal justice system. There is a long list of exemptions in South Australia alone, including the obligations: for witnesses and suspects to provide their name and address to police (*Summary Offences Act 1953* (SA) s 74A); for owners to answer questions about their motor vehicle (*Road Traffic Act 1961* (SA) s 40V); to answer certain questions about firearms (*Firearms Act 1977* (SA) s 30); to answer questions about a child at risk (*Children's Protection Act 1993* (SA) s 19(3)(d)); to provide pre-trial disclosure of alibi (*Criminal Law Consolidation Act 1935* (SA) s 285C); and to provide pre-trial disclosure of mental incompetence, self-defence, provocation, accident, duress, claim of right, automatism and intoxication (*Criminal Law Consolidation Act 1935* (SA) s 285BB). In the Federal jurisdiction, the Australian Crime Commission has been given coercive examination powers, often used by state police, albeit creating immunity for admissions made under cross-examination (*Australian Crime Commission Act 2002* (Cth) s 30). All of these statutory provisions directly undermine the right to silence and impose criminal sanctions and/or forensic disadvantage on a failure to disclose. By comparison, permitting adverse inferences takes a far more subtle and generalised approach, and it may even make further direct attacks on the right to silence redundant.

An argument has been made that the right to silence helps guilty and innocent suspects alike (Seidmann and Stein 2000:431–2), based on the observation that innocent people tend to speak to police while guilty people tend to assert the right to silence. This is known as the anti-pooling argument, because the right to silence creates separate 'pools' from which a determination of guilt is more easily made. If the right to silence were abolished, the argument goes, then both groups would look the same (or pool) and this would disadvantage the innocent by camouflaging them among the guilty. However, this is a logic that can only make sense in a game-theory analysis divorced from the real world, and does not withstand even modest scrutiny.

In reality, the right to silence significantly *disadvantages* innocent suspects by increasing their risk of arrest. This, in turn, leads to increased stress, legal costs, restrictions on liberty (with bail conditions or remand in custody), loss of employment and social stigmatisation. It also leads to the diversion of investigative resources from the real offender, a problem of real concern to innocent suspects who are related to, or closely associated with, the victim and genuinely want to see the real offender apprehended. So great are these consequences for an innocent suspect that it is difficult to conceive of a situation where that person, possessing a chance to proclaim their innocence, would not reveal it or would reveal it for the first time part way through a trial: criminal trials are not a sport to be enjoyed by defendants. Furthermore, in jurisdictions that retain the common law right to silence, judges direct juries not to take an accused's silence into account. This purposefully pools the innocent and guilty alike, and thus obscures any benefit that may have flowed from anti-pooling logic. But such a direction is founded on the questionable presumption that jurors will understand and pay regard to judicial directions, even though research has shown that the interpretation of complicated legal directions is 'potentially challenging' for jury members (Goodman-Delahunty et al 2007:89). The possibility that jurors may regard silence as incriminating, even when directed not to, erodes its value to both innocent and guilty suspects alike. The special caution avoids this pitfall altogether: it trusts jurors to draw reasonable inferences from the facts presented, a task with which they have been entrusted for centuries.

It is this author's experience that anti-pooling serves only a limited purpose and, even then, only during the investigation phase. Where there are numerous potential suspects, the

one who asserts the right to silence is probably an offender with something to hide. However, the cases to which it applies are rare, the investigative benefits are extremely limited, no evidentiary inference can be drawn from this behaviour at trial and, in any case, some defendants will continue to self-select by asserting the right to silence even under a system with the special caution. If an investigator had the choice between a suspect's lies or silence, they would take lies every time.

The common law right to silence operates with a high level of discrimination against suspects who are vulnerable or disadvantaged — a point that has become confused in the debate over the NSW amendments. Those arguing against the special caution have frequently made the point that it would pressure more vulnerable suspects into making admissions and confessions, ignoring the fact that this problem already vexes the common law right to silence. The common law has long dealt with admissions and confessions from vulnerable suspects, whether the vulnerability arises from mental impairment or intellectual capacity (*Jackson v The Queen*; *R v Lee*), physical impairment (*Ebatarinja v Deland*), intoxication (*Sinclair v The Queen*; *R v Garth*), or cultural and language barriers (*R v Anunga*). All states and territories have statutory rights for children and people of non-English speaking background who are arrested, along with protections for people with a physical or mental incapacity in other procedural laws. There is no reason to think the courts (or police or prosecutors for that matter) will find it any more difficult to deal with these exact same problems under the special caution.

Although the common law right to silence is available equally to all people, it is not utilised equally by all people. Experienced investigators quickly become aware that older, more intelligent, criminally experienced, remorseless and uncooperative offenders (the 'non-vulnerable group') are far more likely to assert the right to silence than younger, less intelligent, criminally inexperienced, remorseful and cooperative offenders (the 'vulnerable group'). The perverse result is that fewer admissions and confessions are obtained from the non-vulnerable group, leading to a lesser risk of conviction and gaol. This creates the potential for skewing of convictions and custodial sentences towards the vulnerable group. Or, to put it another way, the common law right to silence provides greater protection for suspects who are equipped to use it to their advantage. The special caution is likely to rebalance (at least in some small degree) the inequity faced by vulnerable suspects: non-vulnerable suspects will now have less incentive to remain silent and attempt 'trial by ambush'.

It is sometimes argued that the right to silence is, and must be, an absolute right irrespective of the consequences. However, this proposition leads the right to silence into direct conflict with other classical rights — most notably the right to life, such as when a suspect possesses information that can potentially save the life of a victim yet asserts his/her right not to cooperate. The infamous 2002 German case of child killer Magnus Gäfgen demonstrates just such a danger. Gäfgen abducted a child, only to be arrested after collecting the ransom. He asserted his right to silence, refusing to tell German police where the child was or even whether the child was still alive. Faced with this dilemma, German police threatened to torture an answer out of Gäfgen — the mere threat of which led him to reveal the location of the child's body. Although Gäfgen was found guilty of murder, he successfully and controversially sued police for threatening him and breaching his human rights (BBC News 2004). Permutations of Gäfgen's case are by no means unheard of in Australia. While HCSA cases are themselves unlikely to stray into a conflict between the rights to silence and life, they still involve significant public policy questions about the risk management of suspects for serious offences. The common law right to silence can be asserted even to the exclusion of the community's right to safety or the victim's right to justice. These risks, which are very real, cannot be said to outweigh the largely hypothetical

risks of the special caution. If anything, the special caution may even decrease the incentive for investigators to engage in unethical interviewing of the kind seen in Gäfgen's case, and limit pre-trial disputes around ethical interviewing.

It is widely recognised that the right to silence is grossly inefficient because it prevents legal disputes being narrowed prior to trial. An enormous number of investigative hours are wasted pursuing evidence needed to rebut potential defence cases that never eventuate. In one case, an investigator spent six months full-time just reviewing CCTV evidence to prove a suspect's identity — which the defence subsequently conceded. While the inefficiency attached to the common law right to silence is incontestable, some argue this might even be desirable as the necessary cost of obtaining justice. Efficiency arguments must be made with great caution as they could be followed to their natural end, *reductio ad absurdum*, and result in an entirely efficient justice system that is also entirely unjust. Chris Berg highlights this danger when he says that 'inefficiency is better called protection of the innocent' (Berg 2013). This, he argues, is a necessary price to pay for the protections afforded by the common law right to silence. This is a particularly indulgent view of police and prosecutorial resources, as well as public safety, none of which should be squandered pursuing a right that appears so grossly unfit for contemporary criminal justice. Efficiency is not antithetical to justice, nor does inefficiency prove a system is just. This is hardly a reassuring prospect for victims, especially when the delays are not in any way related to protecting them or their rights.

Serious concerns about the inefficiency of the common law right to silence were raised in the case of *Ling v SA Police* after a defendant successfully conducted a 'trial by ambush' — that is, the defence case was only revealed part-way through the trial, leaving no time for the prosecution to respond in any meaningful way. Having won the case, the defendant then unconscionably attempted to claim costs. This led to the following observation by Doyle CJ:

> It may be that the time has come for some limits to be placed upon the right of silence and for some obligation to be imposed upon the defence to join in the identification of and limiting of issues in criminal proceedings to an extent inconsistent with the maintenance of the right of silence. … The appropriate balance between the responsibility of the court for the efficient conduct of cases before it, and so the width of its powers of case management on the one hand, and the operation of the right of silence on the other hand, is an important issue. It is an issue which, I believe, will have to be faced by the Courts and by Parliament in due course. I am not to be taken as suggesting that the right of silence should be abolished. I merely observe that whether it should be limited is an important issue. The right is, to my mind, so fundamental that if it is to be removed that can be done only by Parliament or by statutory authority clearly conferred, and should be done only in the light of a careful consideration of the desirability of the limitation of the right of silence and of the extent of any limitation. (*Ling v SA Police* at [31]–[32])

Nearly two decades have passed since Doyle CJ made those observations. In that time, the special caution has proven itself superior in every way to the common law right to silence.

Telecommunications interception

The interception of telecommunications, pursuant to the federal *Telecommunications (Interception and Access) Act 1979* (Cth) ('the Act'), is only one method of covertly obtaining admissions and confessions from suspects, but the anomaly surrounding their use in HCSA matters singles them out for detailed consideration here. The Act enables the capturing of phone calls, text messages, and internet data as they occur in real time, along with metadata such as the time the communication was made, the cell tower and the number

of any non-targeted party engaged in the communication. It also enables the retrieval of stored communications, such as emails and text messages, from service providers. The interception of telecommunications is clearly a significant and intrusive power. However, it has long been obvious that serious, organised and transnational crime cannot be defeated by routine beat patrols, and that sophisticated investigative methods must be adopted to keep abreast of the technology used by offenders. The real debate is over the extent to which law enforcement agencies are permitted, at law, to use these methods.

The clear advantage of covertly intercepting communications lies in obtaining a suspect's unguarded admissions and confessions. The direct approach — that is, conducting a record of interview under caution — rarely yields information of the same quality. Just as significantly, the direct approach also alerts a suspect that they are under investigation and creates a risk of counter-strategies (such as destroying evidence, suborning witnesses, creating false alibis and fleeing). Investigations targeting serious and organised crime (such as drug dealing and murder) rely heavily on telecommunication interception, as suspects are extremely unlikely to cooperate with police or answer questions. Furthermore, once a suspect asserts their right to silence, covert operatives can no longer gather admissible evidence (*R v Swaffield*).

However, in what can only be described as a bizarre omission, sexual assaults (including HCSA matters) are not captured directly by the Act, and therefore cannot be subject to interception. To put it another way, sexual assaults are not considered to be 'serious offences' by the Act, even though some forms of theft and handling stolen goods are. Sexual assaults are primarily offences under state law, over which the Federal Government has no inherent jurisdiction to legislate, and no referral of power has been made by the states to the Commonwealth for this purpose. This means that the only sexual offences specifically covered by the Act (s 5D(3B)(a)) are those committed by Australian citizens on children overseas (*Criminal Code* div 272), and some child pornography offences (*Criminal Code* div 273, div 471 subdivs B–C). Some child sex offences can be indirectly captured by the general provisions of the Act, but only if the behaviour also endangers the child's life or creates a risk of serious personal injury (s 5D(2) of the Act), or if the crime was part of a multi-offender conspiracy using 'sophisticated methods and techniques' (s 5D(3) of the Act). It is sufficient to point out that these criteria are unlikely to be met in anything but the most anomalous HCSA cases. The outcome of the legislation is, perversely, that an interception is possible for a person who possesses child pornography images, but not for the person who actually sexually assaulted the child in the film — unless it was an Australian citizen abusing a child overseas.

Statistics in the 2013 Annual Report on the Act provide some insights into the Act's substantive priorities (Attorney-General's Department (Cth) 2013). During the previous 12-month reporting period, lawfully intercepted information was given in evidence in 6,746 prosecutions: serious drug offences made up 51% of these, followed by loss of life and personal injury (16%) and people smuggling (9%) (Attorney-General's Department (Cth) 2013:25). Frauds, money laundering, murder, conspiracies, bribery/corruption, kidnapping and criminal organisation offences completed the top ten. Child pornography offences comprised only 0.3% (25 cases in total) of the prosecutions utilising warrant information (Attorney-General's Department (Cth) 2013:25). The Annual Report does not identify whether any sexual offences were included in the catch-all 'other serious offences' category (assuming they could be captured by the indirect route, such as being an adjunct to the endangerment of life). Sexual offences are clearly not a substantive priority for interception.

One reason for this may be the perception that telecommunication interceptions are not useful in sexual assault matters generally, or HCSA matters specifically. Unlike organised

crimes (such as drug dealing, money laundering and people smuggling), sexual offending is stereotypically committed without co-offenders, planning, logistics or communication. On that basis it may seem improbable that a lone offender would discuss his/her crime on the phone or by email with another person and be amenable to interception. But this prejudges telecommunication interception as entirely ineffective and undesirable for HCSA investigations, rather than leaving the question of utility to be resolved on a case-by-case basis for investigators.[4] HCSA cases are likely to be highly amenable to telecommunications interception where there are multiple parties who need to communicate. Furthermore, sex offenders, as a category of criminal, are among the least aware of covert police methodologies and are therefore among the most susceptible to their deployment.

The interception of telecommunications is always a sensitive topic that elicits a passionate response from civil libertarian and privacy groups. As with the right to silence, it appears that some people and non-government organisations hold fixed ideological positions that are implacably opposed to the use of telecommunications interception as an investigative tool, irrespective of the enormous benefits it has brought in dismantling serious and organised crime. Short of abolishing telecommunication interceptions altogether, there are regular calls for the Act's capability to be restrained with increasingly burdensome regulation.[5] The Act is already one of the more tortured pieces of legislation in Australia, with regulatory complexity flowing through into operational inefficiency. In this environment, expanding the Act to cover more offences will inevitably meet with opposition from privacy advocacy groups. However, the criminal law is largely a zero sum game: the protection of offenders comes at the expense of victims.

Conclusion

HCSA presents something of a paradox. On the one hand, it is recognised as being among the most heinous of all crimes; it is punished with extensive prison sentences, registration and monitoring; it is widespread and, in places, systemic; it has potentially catastrophic consequences for victims; and it is hard to detect and prosecute. At the same time, the law routinely bars investigators from obtaining the most potent form of evidence against offenders — admissions and confessions. The consequence is fewer cases making it to court, fewer cases succeeding in court, and offenders obtaining de facto immunity by virtue of poorly conceived or outdated laws.

The prohibitions on adverse inferences from silence and telecommunications interception entail wider consequences for the criminal justice system. These include: a lower deterrence rate; a lower victim participation rate; a continued capacity by suspects to offend; reduced public confidence in police, prosecutors and the courts; bigger workloads for police; inefficient case management within the courts; and increased trauma for victims. While law reform always carries risks, so too does maintaining the status quo and turning a blind eye to offenders gaming the system. Tough decisions lie ahead for policymakers.

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4 Because this is a matter of covert methodology attracting public interest immunity, detailed discussion here is not appropriate. However, as a general observation, investigators are likely to find numerous uses for telecommunications interception in HCSA matters if they were permitted to be used.

5 For example, the Telecommunications Amendment (Get a Warrant) Bill 2013, introduced by Australian Greens Senator Scott Ludlam MLC and supported by the Law Council of Australia, would require intercepting agencies to obtain a warrant even for prospective data. This would significantly limit the capability of law enforcement agencies and divert an enormous number of operational personnel into warrant application processes, yet this impracticality does not appear to have received any consideration. For further discussion, see Law Council of Australia (2013).

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