Despite significant reforms to the criminal prosecution of sexual offences against children, a gap persists between the number (prevalence) of people who have experienced sexual abuse as a child and the far lower number of incidents that are adjudicated. Through a process of attrition, only a small number of cases are prosecuted.¹ In this paper, I reflect on a second, related, gap between what the social science evidence tells us about the dynamics of child sexual abuse, and what the criminal law is able to countenance as “legal evidence”.

The social science research on the reasons for this gap points to the misconceptions and mythologies about both victims and offenders that have shaped legal actors’ decision-making.

With the increased willingness of victims to step forward and report (see Cossins, 2010, for a summary), and as investigative training increasingly draws on research about sexual abuse, and offenders’ tactics and motivations, and locates sexual offending explicitly as a “crime of and in relationships” (P. Tidmarsh, personal communication, December 2010), this gap has become more pronounced. There is something peculiar to the criminal law that makes the empirical understanding of sexual abuse difficult to translate into the legal arena: the complex edifice of legislation, case law and jurisprudence about precisely what information about the sexual abuse can be admitted to the court and heard by the trier of fact (usually the jury).

¹ In Australian legal systems, much effort has been directed towards closing the “attrition gap” and improving victim/survivors’ experiences. This includes increased specialisation among investigating officers in relation to both the dynamics of sexual offending and in the techniques used to gather this evidence in their investigations, specialisation among prosecutors (in some cases), greater collaboration and interagency responses to investigating sex offence matters, and using processes and protocols to minimise the distress associated with giving evidence. This is in addition to legislative reforms to judicial warnings on corroboration and delayed complaint.
This chapter briefly discusses the persistent “prevalence vs attrition” gap before highlighting three key issues that affect the extent to which a comprehensive narrative of sexual abuse can be presented to the jury: the laws of evidence, judicial warnings and directions to the jury, and the extent to which “extra-legal” evidence can be, and is, adduced by the court. I am limiting this discussion to issues that are relevant to the criminal jurisdiction, specifically the higher courts. These issues are contextualised in light of the current empirical evidence base in relation to delayed disclosures, the context and dynamics of sexual abuse, and perpetrators’ grooming and offending tactics. The discussion is particularly focused on child sexual abuse perpetrated by family members (immediate and extended), and subsequently, where there is a high likelihood that the case is a delayed complaint or relates to historical child sexual abuse.

The prevalence–attrition gap

Significant numbers of people in Australia are survivors of child sexual abuse. Looking at nationally representative data from the Australian Bureau of Statistics (ABS; 2006) Personal Safety Survey, 956,600 women (12%) and 337,400 men (4%) experienced sexual abuse before the age of 15. These figures are in the range suggested by other Australian prevalence studies with community samples. Child sexual abuse is thus not uncommon, with somewhere between 1 in 10 to 1 in 7 males, and 1 in 8 to 1 in 3 females having experienced some form of child sexual abuse (Child Family Community Australia, 2013).

Yet the numbers of incidents of child sexual abuse that enter the criminal justice system and that result in a conviction are very small by comparison. Of child sex offence matters progressing through the New South Wales justice system between 1995 and 2004, fewer than 16% of the cases reported to the police resulted in proven charges (Cossins, 2010). This was more pronounced in cases involving adult complainants (Daly & Bouhours 2010). Beyond victim/survivors not reporting the offence to police at all (approximately 8 out of 10 victims do not), it is in the early stages of the justice process—

---

2 By “laws of evidence”, I am referring to the Acts, legislative provisions, case law and jurisprudence by which “legal evidence”—as opposed to medical, scientific or empirical evidence—is constituted, and the manner in which it can be used in proving a charge.

3 The criminal law remains a highly symbolic and powerful system of meaning. Its task is to assign criminal liability for incidents such as homicide or rape, which subsequently results in the loss of liberty (and historically, death). As such, in addition to the rules of due process (including the burden and onus of proof), judicial interpretation of seemingly pedestrian concepts such as relevance, harm, fault, causation and intention sets the bar very high. One consequence of this is that criminal law has developed as a relatively closed, self-referential knowledge system (Cover, 1986; Luhmann, 1987). Concepts of harm or intention from other knowledge systems, including empirical social science, are thus not easily integrated.

4 I am predominantly referring to abuse perpetrated by an adult family member or mature minor (i.e., 15+ years of age). Siblings constitute a significant proportion of intra-familial perpetrators; however, the circumstances of their abusive behaviours are not entirely commensurate with adult offenders (Stathopoulos, 2012). Young people displaying sexually abusive behaviours are sometimes themselves victims of child abuse, including sexual abuse. For these reasons, criminal justice and therapeutic responses increasingly distinguish between adult and adolescent perpetrators.

5 Note that there is no standard definition of what constitutes “historical” or “delayed”.

6 It is difficult to obtain an accurate picture of what specific proportion of historical child sexual abuse cases are filtered out of the justice system, as such cases tend not to be disaggregated, either from data on child sex offence cases (which include child complainants) or adult sexual offence data involving all adult complainants (including adult survivors of child sexual abuse). The information could be included in both.
from the incident report to police clearance,⁷ and between clearance and before the commencement of criminal proceedings—that matters are most likely to not proceed. In terms of child sex offences, the predominant reasons for this are because either no suspect is identified or the victim withdraws the complaint (Cossins, 2010).

Closing the gap through “front-end” reform?

As noted, trying to close the prevalence–attrition gap has seen an extensive program of reforms across Australian jurisdictions for both child sexual abuse and sexual assault (including adult survivors of child sexual abuse). In a review of recent sexual assault law reform, Daly (2011) identified some 48 unique approaches that endeavour to improve both victim/survivors’ experiences of the justice system and improve systems’ outcomes (e.g., decreasing victim withdrawal, and increasing guilty pleas and verdicts). In addition to fairly standard approaches to law reform (i.e., reforming the substantive aspects of the offence and the admissibility of different types of evidence) are a host of other changes to the justice response to sexual offences.

Particularly noticeable are efforts to increase the level of specialisation of police investigators and to enable and improve collaboration among first responders (i.e., sexual assault services, child protection, police and forensic examiners). This specialisation may be the consequence of the changed nature of cases being reported to police. Not only are more victim/survivors reporting to police, but the nature of the sexual abuse being reported has altered; reported cases increasingly involve family members, historical incidents, ongoing sexual abuse, and adult survivors reporting abuse upon discovering the perpetrator abusing another child (e.g., their own child or sibling) (Cossins, 2010; Daly & Bouhours, 2010). Such sexual victimisation challenges the stereotypes of child sexual abuse. To be clear, it is not that the nature of child sexual abuse itself has changed. Thirty years of research has already demonstrated that, contrary to received wisdom, child sexual abuse is not a rarity, a fantasy of the child, the result of a precocious sexuality, the result of mothers’ sexual absence, or due to the predatory behaviour of an unknown sexual deviant (Cossins, Goodman-Delahunt, & O’Brien, 2009; Eastwood, Kift, & Grace, 2006; Goodman-Delahunt, Cossins, & O’Brien, 2011; Taylor & Joudo, 2005). Child sexual abuse—like adult sexual assault—has been demonstrated to be fundamentally located within familial and familiar relationships, and that it is precisely these relationships that provide the opportunities for offending, and for silencing and denying (Clark & Quadara, 2010; Craven, Brown, & Gilchrist, 2007).

An effective and appropriate investigative response requires a significant degree of knowledge about child sexual abuse and offender behaviours, and a high level of skill in conducting investigations and interviewing victims, witnesses and suspects. Thus specialist police responses have been established, such as the Sex Offences and Child Abuse Investigation Teams (Victoria), the Joint Investigation Response Teams (NSW), and the Sexual Assault & Child Abuse Team (ACT). These are complemented by collaborative and multidisciplinary service provision (e.g., multidisciplinary centres in Victoria comprising sexual assault services, police, child protection workers). The overall effect is an increasingly specialised investigative capacity, enriched and supported by experts in both the victim services and offender treatment sector. Findings from the limited evaluation data suggest that victims of sexual offences are having more positive sex.

---

⁷ Police clearance refers to the point at which police have ceased the investigation, which may or may not result in charges being laid.
experiences when reporting to police (Success Works, 2011). Anecdotal evidence from the sector indicates improved attitudes and increased knowledge among police, and a greater capacity by the police to see themselves as partners alongside other agencies in supporting victim/survivors to engage the justice system and to prevent further offending.

However, best efforts at this “front end” of the justice system do not necessarily translate into improved outcomes in relation to prosecution and conviction (the “back end”). The arena of adjudication (i.e., the courtroom) is markedly different from the investigative one. The police role is to investigate a complaint by gathering all the available evidence and put together a brief of evidence to support a charge that has reasonable prospects of conviction. Moreover, unlike the court arena, in which there is no victim per se but a witness for the prosecution (or complainant), police are victim-focused. This is not to say they advocate for victims, but their role is in response to a victim’s complaint.

The courtroom, on the other hand, is an arena in which the evidence gathered is tested (at law) by a judge and by the tribunal of fact (usually a jury, in indictable offences). The evidence is tested for: its relevance to the elements of the offence and the particular facts in issue; its admissibility, that is, what of the gathered evidence can legitimately be heard by the jury; its credibility; and its reliability (is it accurate and complete). With these requirements met, the trier of fact also needs to be satisfied that all offence elements for each charge have been proven beyond reasonable doubt (Bronitt & McSherry, 2001). The role of the judge in this is to guide the jury’s assessment and use of the evidence in their decision-making (and to guide them in such a way that it does not occasion an appeal).

This is the overall framework in which indictable offences are tried. Arguably, sexual offences are presented with additional evidentiary obstacles in the form of exclusionary rules on evidence and judicial warnings on witness testimony. While these are not limited to sexual offences, they occasion significant difficulties when one considers the circumstances in which child sexual abuse occurs. These issues are taken up in the next sections.

**The dynamics of child sexual abuse**

The majority of child sexual abuse occurs within familiar and familial relationships. As such, it tends to be characterised by:

- prolonged or repeated victimisation;
- secrecy; and
- delayed disclosure (see Finkelhor, 1986; Herman, 1992; Smallbone & Wortley, 2001).

Perpetrators expend significant effort in identifying and building a connection with a potential victim, and use a range of “grooming” strategies to do so, such as:

---

8 Nationally representative statistics for 2006 show that approximately 90% of girls and 80% of boys who had been sexually abused knew the perpetrator, with girls being more likely to have been sexually abused by family members. Fathers, step-fathers and other male relatives (including siblings) made up more than half (52%) of perpetrators against females, and one-fifth (21%) against boys (ABS, 2006; see also Mouzos & Makkai, 2004).

9 Reviewing the research on grooming, Craven, Brown, and Gilchrist (2006) provided the following definition: “A process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining the child’s compliance and maintaining the child’s secrecy to avoid disclosure” (p. 297).
- **identifying the most vulnerable child** (e.g. the child who is picked on by her siblings, is struggling at school, or is lonely) (Craven et al., 2007);
- **identifying vulnerable or receptive families** (e.g., a single mother with primary care for her children) (Leberg, 1997; Van Dam, 2006);
- **isolating the child from other children or guardian** (e.g., sending other siblings to bed early, encouraging the child's mother to take up activities outside the home);
- **confering a “special status” on the child** (e.g., making them feel more adult or worldly) (Herman, 1992);
- **gradually desensitising them to sexual touch** (Smallbone & Wortley, 2001); and
- **becoming “indispensable” to significant adults in the child’s life** (e.g., offering to look after the child or children, or do tasks parents, teachers have little time for and which puts them in a position of trust) (Craven et al., 2007).

These strategies demonstrate long-term planning (whether conscious or not), such that perpetrators gain “insider status” and its benefits (e.g., trust, authority and respect) long before they start offending (Van Dam, 2006). These benefits are amplified in contexts of intra-familial sexual abuse.

Perpetrators may also use bribes, threats, coercion, denial and blackmail to continue the offending and to ensure victims’ compliance and silence. This can take the form of creating secrets the child must keep, thus rendering them complicit or co-conspirators in their abuse (Paine & Hansen, 2002); demonstrating potential for violence by harming others; threatening the family will break down or non-offending parents will be upset if the child discloses; or making the child feel responsible for not stopping the abuse (Craven et al., 2006, 2007).

The dynamics of child sexual abuse produce complex barriers to disclosing, such as fear of not being believed; being blamed; shame; fear of, or feeling responsible for, the consequences (Quadara, 2008). “A neat, coherent and timely disclosure should be regarded as the exception rather than the rule” (Staller & Nelson-Gardell, 2005, p. 1417). A US survey (Kogan, 2004) with 1,958 adolescent women found that although 24% disclosed their abuse within 24 hours, the majority either delayed or did not disclose at all. One in five waited more than a year, while one in four had never disclosed until the survey, findings that are reflected in the broader literature (see Cossins, 2010, for a summary of these studies). Perpetrators themselves commonly deny or normalise their behaviour (Nugent & Kroner, 1996; Van Dam, 2006); however, it is very difficult for this understanding to be translated into the criminal justice setting.

**Prosecution and conviction issues**

This section discusses three issues: the difficulties with providing courts with the full context in which the sexual abuse occurred; judicial warnings and directions to their jury; and the treatment of “extra-legal” evidence by the court. Discussion is with reference to jurisdictions in which uniform evidence legislation is in operation.\(^{10}\)

---

\(^{10}\) These jurisdictions are the Commonwealth, the Australian Capital Territory, New South Wales, Tasmania and Victoria. Uniform evidence law has been a long project, and legislation has been introduced in a staggered fashion across the different jurisdictions. The overall legislation applies to both civil and criminal law and codifies some aspects of the common law (i.e., it puts into statute principles the common law has developed over time). However, it also diverges from the common law (Hulme, 2009).
**Evidence of context**

During investigations, police gather different types of evidence from a range of sources (the victim, other witnesses, documents, phone records, etc.). In cases of historical child sexual abuse, this process is significantly challenged because much of the strongest corroborative and forensic evidence (e.g., a disclosure made to an adult or evidence of sexual penetration) is no longer available. Often, the only evidence is the account of the survivor herself, which may well be of multiple offences over several years. Investigators will need to follow leads and clues in that account in order to provide the specificity required for an actual charge. However, not all this evidence will be admitted into the courtroom if the case goes to trial. Indeed a number of threshold requirements are in place that whittle away at the narrative initially provided, namely: whether the evidence is relevant to the facts in issue; whether the evidence is hearsay or opinion evidence; whether it invites the jury to make propensity reasoning, or “similar fact” reasoning; and whether the probative value of the evidence is outweighed by the prejudicial effect it has for the defendant. These thresholds apply to all offences; however, as Judge Roy Ellis (2007) observed, child sexual abuse cases differ in that the allegation typically involves a “course of conduct” over a period of time; in other words, there may be multiple charges relating to an extended period of time. This has evidentiary implications in that complaints lack specificity. Further, concepts such as time or the sequence of events may not yet be fully developed. However, some specificity and parameters may be possible; for example, the first or last incident of sexual abuse, incidents that occurred on particular or special days, such as birthdays, and incidents that may have occurred at different locations or in different circumstances than normal. Ellis went on to note that:

> in these cases, if a jury is to gain appropriate insight into the real context of the allegations it may be necessary for events not the subject of a charge to be referred to. The real context in this sense means a number of things, including but not confined to the history between the complainant and the accused and the circumstances in which the complainant was living at the time of the allegations. (para. 13)

In other words, knowledge about a range of behaviours (some of which may constitute offences of their own, e.g., killing the family pet, and are referred to as “uncharged acts”), interactions and events that are not related to the charges can be put to the jury. The purpose of this is twofold: to enable the recollection of the actual charges and to locate the sexual abuse within in its “proper context” such that the charged acts don’t appear as though they came “out of the blue” (Hamer, 2008). This is context evidence, which may also include relationship evidence (although there is a lack of precision in the use of these terms and whether they are interchangeable or different categories).

However, courts do not like evidence that invites “propensity reasoning”; that is, it is not permissible for the jury to improperly conclude that because the defendant behaved in the way presented by the prosecution (e.g., the uncharged act of killing the family dog...
or of other sexual[ised] interaction with the victim), it is more likely he did the charged act (i.e., the charge of child sexual abuse). Hulme (2009) noted this was a particularly prominent issue in sexual offence matters, and that context evidence introduced specifically for the purpose of helping the jury to understand the circumstances in which the charges occurred was “likely to be highly prejudicial to an accused person, and the jury must be carefully directed as the extent to which it may legitimately use the evidence when determining the facts in issue” (p. 16).

Thus, the introduction of context evidence is not automatic, being subject to a number of considerations: whether propensity is an incidental effect rather than central purpose of the context evidence, whether the evidence actually applies to any issues that have been raised in the trial, the necessity of balancing between its probative value and its prejudicial nature and, ultimately, judicial discretion as to its admissibility.

**Judicial warnings and directions to the jury**

A jury is the tribunal of fact. It is not the jury’s role to become entangled in the intricacies, fine gradations and customs of the criminal law. However, in the assessment of facts and the use to which they are put in deciding the guilt or otherwise of the accused, jury members must be guided about how to make sense of evidence presented by the prosecution and defence.

The following three directions (or warnings) relate specifically to corroboration and delayed complaint:

- **The Murray direction** (*R v Murray 1987*): Where there is only one witness, the evidence of that witness “must be scrutinised with great care" before the jury should arrive at a verdict of guilty.

- **The Longman warning** (*Longman v the Queen 1989*): Where the complaint has been delayed, it would be “unsafe or dangerous" to convict on the uncorroborated evidence of the complainant alone unless the jury has scrutinised the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, and were satisfied as to its truth and accuracy.

- **The Crofts direction** (*Crofts v the Queen 1996*): If a jury is informed that a delay in complaint does not necessarily indicate that the allegation is false and that there may be good reasons for why a victim of sexual assault may hesitate in making a complaint, the jury should also be informed that the absence of complaint or its delay may be taken into account in evaluating the evidence of the complainant and in determining whether to believe him or her (Cossins, 2010).

The Longman warning in particular has been subject to significant discussion and criticism, both from judicial officers (e.g., Wood CJ, see Nicholson, 2008) and the wider legal fraternity (e.g., Hamer, 2010). The warning is essentially about the “forensic disadvantage” caused to the accused by virtue of delayed complaint; had the complaint been made in a timely fashion, the accused would have had better opportunity to gather evidence and mount a defence. Criticisms of the Longman warning and its application in Australia include:

- There is no definition or guidance on “delayed complaint”, with earlier cases having defined “delay” as being in the realm of hours or days, but more recent cases considering six months to be a relevant delay.

- Loss of evidence and the forensic disadvantage caused to the defendant has been presumed in Australian case law rather than being something the defendant needs to specifically identify or demonstrate.
It is not always necessary to demonstrate the specific disadvantage caused, nor is there much discussion about the probative significance of that evidence (i.e., the lost evidence may in fact be peripheral to the case).

Phrases such as “dangerous to convict” are an invitation for the jury to acquit.

It conflates the specific issue of forensic disadvantage with the credibility of the complainant.

Legislative reform in some jurisdictions has attempted to limit the scope of such warnings by requiring the defendant to request the warning, the judge to indicate the nature of the disadvantage, and the phrase “dangerous to convict” not to be used. Nevertheless, the Longman warning remains for the most part mandatory (particularly where clear legislative prohibitions are absent) in an effort by trial judges to err on the side of caution and not risk an appeal by failing to give the direction. A study of successful appeals against conviction by the Judicial Commission of NSW (Donnelly, Johns, Poletti, & Buckland, 2011) found that 60% of those appeals related to a deficiency in the Longman warning, resulting in an error of law. In a majority of these appeals an inadequate Longman warning was the only error at law.

The Crofts direction is also problematic. Like Longman, it is a direction given in relation to a delayed complaint. Previously, a Kilby direction (Kilby v the Queen 1973) could be given in which the trial judge directed the jury that a delay or absence of complaint could be used as a factor in determining the credibility of the complainant. Given that such a direction reinforced stereotypes and misconceptions about victims of sexual abuse and disclosure (i.e., a “genuine victim” would raise a “hue and cry” at the earliest opportunity), legislative reform was introduced in Victoria to the effect that in relevant cases the trial judge needed to direct the jury that an absence or delay in complaint did not necessarily mean that the allegation was false (s 61(1)(b) of the Crimes Act 1958 (Vic.)). In the appeal case Crofts v the Queen,13 the High Court held that s 61(1)(b) did not preclude the giving of a Kilby direction. Thus, it is possible for a jury in the one trial to be directed both that an absence or delay in complaint does not necessarily mean the allegation was false and that the very same absence or delay can be used in the jury’s determination of the complainant’s credibility.

In addition, directions may be given in cases where they are not relevant to the evidence (see discussion by Australian Law Reform Commission, 2010; Hamer, 2010; Tasmanian Institute of Law Reform, 2006). There is also the matter of what the research tells us about delayed complaint in child sexual abuse; that delayed complaint is the rule not the exception.

True enough, reform has been introduced with the aim of bringing this empirical knowledge into the courtroom. However, the Longman and Crofts directions point to a deeper issue: the ongoing tension between the power of legislative reform against the power of common law, in which it is judicial interpretation that often gives effect and substance to the operation of legislation, sometimes contrary to the spirit of the reform itself.

**Expert evidence and specialised knowledge**

Some effort has been made to provide courts with an empirically informed understanding of child sexual abuse with the introduction of s 79. This provides that expert evidence

---

13 In Crofts v the Queen (1996), the complainant reported that she had been sexually assaulted by a family friend over a period of six years, and made a complaint six months after the last assault.
can be presented to the court, but is limited to its applicability to the specific matters at hand, not the general pattern of child sexual abuse. Further, its focus is on understanding the behaviour of the child, not the perpetrator. Finally, it is not clear how often it is being used. Anecdotal discussions with prosecutors and the NSW judicial commission suggest that it has not been used advantageously. The research literature tends to support this view in that scholarship on the use of social science evidence in criminal proceedings peaked in the late 1980s and into the 1990s; there is very little contemporary analysis. Previous research (Blumenthal, 2002) suggested that there is a divide between legal and empirical evaluations of social science evidence, namely that:

- Judges have questioned the material value that research findings and expert evidence provide, seeing the conclusions to be “commonsensical”.
- Too much expert evidence on such commonsensical findings invaded the “province of the jury”.
- Juries nevertheless could not be left to their own devices in evaluating such evidence.
- Social science researchers have not been particularly effective in undertaking legally relevant research and judges see the research paradigms as atheoretical.
- Social science research findings have not been presented in such a way that the court easily uses them.

Overall, the available commentary paints social science evidence and the law as “rival systems” (Tanford, 1990)—social science is innovative, while law resists innovation; social science is based on data and observation, law on precedent and hierarchy; social science seeks objective answers and law an adversarial victory; social science findings are probabilistic, but law’s conclusions must appear certain. Tanford concluded that social scientists needed to accept that research that runs counter to law’s epistemic and value system was unlikely to have influence. At the same time, the law aims to adjudicate on matters that occur in the empirical world—the very world that much social science research attempts to document and understand. Given the hidden nature of child sexual abuse, it would appear that such expert knowledge would be essential in assisting the jury in their deliberations.

**Implications for future reform**

What, then, are the ways forward? The issues discussed certainly raise the question of whether the criminal law is in fact the best arena for dealing with sexual offences, particularly offences that are historical in nature and involve intimates or family members. Indeed, there is ongoing discussion and, in some situations, implementation of alternative justice responses to child sexual abuse (for example, restorative justice conferences) (Gossins, 2010; Gavrielides & Coker, 2005; Jülich, 2006). However, it is not clear to me that we have yet exhausted opportunities within the justice system. Justice Neave of the Victorian Court of Appeal observed that the law—particularly evidence law—was “limping behind” the research base on child sexual abuse (Neave, 2012). She pointed out that there are many gateways inhibiting the presentation of the full context (or the “whole story”) of an experience of sexual abuse into the courtroom (relevance, admissibility, exclusionary rules, and the balance of probative versus prejudicial evidence), which is a matter of concern, and an area where more work could be done within the current system.

In late 2011, the Australian Institute of Criminology, the Australian Institute of Family Studies and Victoria Police hosted the two-day national Truth, Testimony and Relevance
symposium to discuss these issues with police, legal officers, the judiciary, academics and researchers. There was agreement that while it was dangerous to have juries reasoning outside the evidence presented, and beyond the caveats provided through jury directions, it was also the case that juries would fill in the gaps in the story by drawing on their own, not always accurate, understandings about child sexual abuse. This is particularly the case in relation to victims’ behaviours and reactions in relation to the defendant that appear counter-intuitive (e.g., calling the defendant or making a time to see the defendant).

The collective expertise across these sectors highlighted that there are a number of ways in which the gap between the empirical picture of child sexual abuse and the evidential picture can be closed. However, while there was shared agreement about the importance of comprehensive “whole-story” investigation practice, there were questions about how far this approach would be able to shift practice at later stages of the criminal justice process. That is, there are barriers at the trial stage that preclude this evidence from being heard by a jury. The symposium debate on this pointed to organisational and systemic factors such as:

- Building a whole-story case enables the prosecution to create a narrative in the courtroom. However, there is rarely feedback to police investigators as to the way in which this information can be used, especially at trial.
- Further, much of this information is not identified or capitalised on to its full potential, especially as far as police and government prosecutors are concerned.
- The point was made on a number of occasions by participating members of the judiciary that there is capacity for prosecutors to use evidence law to a greater extent than is being currently exercised. It may be that entrenched or formulaic practices of both prosecution and defence in sex offences cases have limited the capacity of this legislation to be explored.

In response to these issues, a number of areas for improvement and innovation were identified. One key avenue relates to the legislative and jurisprudential aspects of criminal law. A second avenue relates to practice within the justice system. Suggestions here included:

- pre-trial “capacity building” for juries, as is occurring in New Zealand, so that jurors are better able to assess the evidence;
- better integration and feedback mechanisms from the prosecution to the police as to how the brief can be prepared so that it can be used more effectively in cases, regardless of plea; and
- strategic litigation to define and evaluate the principles and parameters within the Uniform Evidence Act.

While some effort has been made to provide courts with an empirically informed understanding of child sexual abuse through expert evidence provisions, there remains a sense that social science evidence and the law are “rival systems” of knowledge. Yet, the hidden nature of both adult sexual assault and child sexual abuse indicate that specialist knowledge and access to empirically based information would assist both legal professionals and the fact finder in their deliberations.

**Conclusion**

The harms associated with child sexual abuse are now well recognised. Moreover the particular contexts in which child sexual abuse occurs, perpetrators’ grooming strategies
and their many tactics of normalisation, silencing and denial are becoming increasingly well understood by the agencies charged with investigating these offences.

However, the efficacy of “front-end” reforms and improvements take place in the long shadow cast by judicial decision-making. That is to say, assessments of “reasonable prospects of conviction” made by the Director of Public Prosecutions and, further downstream, by police, are informed by what happens upstream in the realm of judicial interpretation and creation of case law. While the evidence gathered in investigation may situate the sexual abuse in its full context, providing a comprehensive understanding of how the abuse occurred, only select types of evidence are admissible in court. The consequence is that the front end of the system may wonder at the purpose of gathering such evidence if it is not presented to the jury.14

A question to consider is to the extent to which increased specialisation and collaboration among “first responders” and investigators about the dynamics and strategies of perpetration and the behaviours of victim/survivors in response to this has occasioned a deepening chasm between an empirically informed understanding of sexual abuse and what will be heard in the court by the fact finder. The idea of a chasm between the reality of what sexual victimisation looks like empirically and what the law imagines is not new. Significant feminist research has theorised the ways in which sexual assault against women has been reimagined and reconfigured in the law according to masculinist, patriarchal and Anglo-centric systems of logic (Heath & Naffine, 1994; Kaspiew, 1995; Naffine, 1991; Young, 1998). Many of these have been diluted through law reform. What remains, however, are the rigors of the laws of evidence in which narratives are carved up such that the whole circumstance of sexual abuse by a caregiver, guardian or relative is fragmented. Crucial information—at least from the point of view of an empirically informed picture of sexual abuse—is absented through exclusion rules, tests and balancing acts. In other words, the very things that make prolonged sexual abuse possible and hidden, and the victim silenced and cooperative, are in opposition to many of the principles of the laws of evidence.

Closing this gap will become increasingly pertinent. Not only is criminal law an important plank in effective prevention (in that it reflects prevention messages and actions at the community level), but, as the Royal Commission into Institutional Responses to Child Sexual Abuse progresses, there will be increasing expectations that the criminal justice system can respond to particular charges. While developing, implementing and evaluating alternative justice practices is important, there are many avenues within the criminal justice system that can also be explored.

References

---

14 This was a significant element of discussion on day two of the symposium.


Herman, J. (1992). *Trauma and recovery: From domestic abuse to political terror*. New York: Basic Books.


