INNOVATIVE APPROACHES OF THE CHILDREN'S COURT OF VICTORIA TO SEXUAL OFFENDING AND ABUSE

Introduction

Some of the most, if not the most, difficult cases which come before the Children's Court are those in which allegations of sexual abuse are made. When the alleged perpetrator is a child,[1] provided the child is of or above 10 years of age[2] and has been charged by the police, the matter will be listed in the Criminal Division of the Court. Since February 2009 such matters in the Melbourne Children's Court have been listed in the specialist Sexual Offences List.

There may be an overlap between those matters in the Criminal Division and those sexual abuse cases in the Family Division of the Court. The Australian Institute of Criminology noted '*The majority of reported sexual offences against children are family related.*'[3] Such cases will be listed in the Family Division when the Department of Human Services (Child Protection) has issued a protection application arising out of protective concerns for a child due to an allegation of sexual abuse. The alleged perpetrator may be a child of any age or an adult.

The specific challenges which apply in relation to sexual offences were summarised in the Evaluation prepared by the Australian Institute of Criminology in respect of reforms introduced in the ACT:-

- most sexual offences are not reported to the police;[4]
- sexual offences have a very high rate of attrition in the criminal justice system;[5]
- sexual offences in particular with children have one of the highest rates of attrition;[6]
- many more sexual offences take place than are reported;[7]
- children often delay reporting sexual offences (self blame, shame, threats by or fear of the offender and/or psychological effects of the abuse;[8]

---

[1] The Court has jurisdiction when the person who is alleged to have committed an offence "was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court." (s.3 (CYFA).

[2] "It is conclusively presumed that a child under 10 years of age cannot commit an offence." (s.344 Children Youth and Families Act 2005 (CYFA).)

[3] Evaluation of the ACT Sexual Assault Reform Program Final Report 2012 www.aic.gov.au

[4] AIC Report at page 2. Refer to Bouhours and Daly 2008, Lievore 2003.

[5] AIC report page 2. Refer to Kelly Lovett and Regan 2005, Lievore 2003.

[6] AIC Report page 2. Refer to Eastwood Kift and Grace 2006.

[7] AIC Report page 3. Refer to Nearne and Heenan 2003.

[8] AIC Report page 3. Refer to Lewis 2006.

- 'often police do not proceed with the investigation of an offence due to evidentiary difficulties.'[9] Examples cited:- insufficient evidence, no offender identified, little prospect of conviction,[10] for example, due to the complainant having a mental illness, intellectual disability and/or 'repeat complainant.'[11]
- 'conviction rates for sexual offences and typically lower than for other offence types.'[12]
- barriers to reporting sexual offences include 'personal barriers' and 'criminal justice system barriers.'[13]

The legislative amendments and innovations introduced in the Sexual Offences List seek to address the manner in which the criminal justice system responds to proceedings in respect of sexual offending.

This Paper describes the operation of the specialist list in the Criminal Division and the benefits which have flowed from the establishment of the List. To highlight the benefits, I have included a comparison of how matters would proceed at court prior to and since the Sexual Offences List was established. The Paper also refers to the work which has been done and which is continuing in order to seek to establish a specialist Sexual Abuse List in the Family Division.[14]

Background – Law Reform – Sexual Offences

On 25 August 2004 the Victorian Law Reform Commission *The Sexual Offences: Final Report* was tabled in the Victorian Parliament. It made a number of recommendations with the ultimate objective being to improve the response of the criminal justice system in sexual assault cases.

The recommendations included

- *better education and training for police, lawyers and judges;*
- *improved police responses to all complainants, but particularly indigenous and non-English speaking background people, children and people with a cognitive impairment;*
- *reducing the time taken to get to trial for children and people with a cognitive impairment;*
- *introducing a specialist approach to the listing of sexual offence cases in the Magistrates' Court;*
- *reducing the number of times children and people with a cognitive impairment must give the same evidence;*
- *tightening cross examination regulations and barring the accused from questioning the complainant or other vulnerable witnesses in person;*

[9] AIC Report page 3. Refer to Borzycki 2007.
[10] AIC Report page 4. Refer to Kelly Lovett and Regan 2005
[11] AIC Report page 4. Refer to Kelly Lovett and Regan 2005.
[12] AIC Report page 5. Refer to Fitzgerald 2006.
[13] AIC Report page 3.
[14] Refer to the Addendum.

- *making testimony by closed circuit television routine and allowing videotaped testimony for children and people with a cognitive impairment;*
- *restricting access to the complainant's counselling records;*
- *widening the definition of allowable evidence and who can give it;*
- *the establishment of a working party to examine potential responses to young sexual offenders.*

It was recognised that the Law Reform Commission considered that '*a combination of legal and cultural change would be required for law reform in relation to sexual offences to be effective.*'[15]

The Government's response was referred to as the *'Sexual Assault Reform Strategy' (SARS).*

In the 2006/2007 State Budget, the Victorian Government 'allocated $34.2 million to transform the criminal justice system's response to sexual assault.'[16]

Legislation was introduced to change the way in which sexual assault matters proceeded in Victoria. The legislative reforms included: –

- *Crimes (Sexual Offences)Act 2006*
- *Crimes (Sexual Offences) (Further Amendment) Act 2006*
- *Crimes Amendment (Rape) Act 2007*
- *Justice Legislation Amendment (Sex Offences Procedure) Act 2008*

As a result of these reforms major changes have been made to the procedure by which sexual offences proceed before the courts. The reforms include:-

- the establishment of specialist Sexual Offence Lists in the Magistrates' and County Courts;

- the establishment of the Child Witness Service – in order for children and those people with a cognitive impairment to give their evidence at a remote location, that is, away from the court and from the alleged offender. Their evidence is given via a video link.[17]

- children and people with a cognitive impairment are not cross examined at committal hearings;

- the prohibition upon complainants being cross examined in relation to their sexual histories unless the court grants leave;

---

[15] Sexual Assault Reform Strategy Final Evaluation Report Success Works Pty Ltd (SARS Report) January 2011 page 9.
[16] SARS Final Report page 7.
[17] Written Exit Surveys conducted by the Child Witness Service (CWS) from 2009-2011 have indicated a high level of satisfaction with the CWS, for example, "Without this service, we could never have got through this bad experience." (Parent of a child under 12). (2009 Survey)

- the prohibition upon the accused personally cross examining a complainant;

- the exclusion of 'protected evidence' (confidential communications) without leave of the court.

Amendments were made to the *Magistrates' Court Act 1989* [18] to establish a Sexual Offences List. The List was established in the Magistrates' Court in 2006.[19] Unlike the Magistrates' Court and the County Court, the Children's Court did not receive any funding pursuant to the SARS to establish a specialist list.

However, in February 2009 the Melbourne Children's Court, Criminal Division, introduced a pilot specialist Sexual Offences List for children and young people charged with sexual offences. It was established within the court's own resources which has meant that there is not a specific list co-ordinator, the court does not have the capacity to record statistics and the judicial officers prepare the list within their existing workload, at times requiring them to prepare cases in their own time.[20]

The Sexual Offences List was supported by the police prosecutors but due to the absence of any additional resources, a Prosecutor could only be provided on the basis that the Court would not list any criminal contested matters on the day the Sexual Offences List sits.

This Paper concentrates upon the establishment of the Sexual Offences List in the Children's Court and the proposal for a specialist sexual abuse list in the Family Division. It is beyond the scope of this Paper to consider the other recommendations and changes made to the criminal justice system or other innovations proposed in the literature.[21]

The Sexual Offences List

The List sits on the first Friday of each month in a separate courtroom from the main criminal list. This facilitates a 'more respectful' approach to all concerned as sensitive information is raised regarding both the complainants and the accused.[22] Whenever possible, a maximum of 10 matters are listed per sitting.[23]

---

[18] Section 4R

[19] The List commenced as a Pilot in April 2006 and was formally established on 1/12/2006. Rural Sexual Offence Lists commenced on 1/7/2007.

[20] SARS Final Report Page 102

[21] For example, the application of restorative justice principles in group conferences for sexual assault matters. Australian Centre for the Study of Sexual Assault No.12 of 2011. Refer also to the article by Justice Neave, Court of Appeal Victoria and Chief Judge Rozenes, County Court of Victoria "Providing Justice to Sex Assault Victims Takes More than Trials." The Age 15 September 2011. The Department of Justice has prepared a draft Scoping Paper "Alternative Justice Models and Sexual Assault."

[22] SARS Final Report Page 102.

[23] When the List was first established, the maximum number was 6.

Provision of the Police Brief

As a result of the establishment of the pilot two magistrates, my colleague Magistrate Belinda Wallington and myself, sit in the List.[24] We are provided with the police brief which enables a thorough preparation of the case. This was an innovation introduced when the List was established as judicial officers do not otherwise have access to police briefs in the summary determination of offences in the court. In order for this to occur, the court has relied upon the co-operation of Victoria Police prosecutors. Neither Magistrate Wallington nor myself hear any matters in the List which proceed to a contested hearing and to which we have had access to the Police Brief.

The following significant case management practices have developed in the List and were referred to in the Final SARS Report:-

- *providing time to discuss matters with the prosecution and the defence practitioner in the presence of the informant and the accused;*
- *narrowing issues with the result that some witnesses may not be required;*
- *foreseeing any potential delays;*
- *ensuring the case proceeds when listed*.[25]

These practices have been able to occur due to the nature of the List. The smaller number of cases in the List as compared to a Mention Court list ensures there is time available for meaningful discussions to take place. The discussions do not only occur between the prosecutor and defence counsel. The judicial officer sitting in the List will be more interventionist than would ordinarily be the case because they have read the police brief, can identify the issues in the case and will not be hearing any contested hearing.

Practice Direction No.2 of 2009

The narrowing of issues has also been assisted by the introduction of the Children's Court of Victoria Practice Direction 2 of 2009 [26] which provided for the introduction of Form A. The Practice Direction provides that before the date for a summary contested hearing is fixed, the Form A must be completed and filed. The Form requires details to be provided of issues in dispute and matters which are not in dispute. The magistrate sitting in the Sexual Offences List will peruse the completed Form A, seek clarification if necessary and may adjourn the matter for a Special Mention in order to ensure, as far as is practicable, that the matter will be ready to proceed on the first day of the contest.

Prior to the List being established, it was not unusual for matters not to be ready to proceed on the first day of the contest. This was recognised as a

[24] Since 1 February 2013 Magistrate Darrin Cain has commenced sitting in the List.
[25] SARS Final Report Page 102.
[26] Practice Direction no. 2 of 2009 Sexual Offences List Summary Contest Listings 16 January 2009. The Practice Direction commenced on 27 January 2009.

major criticism of the court process. Complainants, often young children, would attend court to give their evidence only to be told that the matter was being adjourned and usually being adjourned for a period of some months. The co-ordinator at the Melbourne Children's Court, Ms Catton has confirmed that since the introduction of the List there are fewer adjournment applications of sexual assault contests and that if a case is to be adjourned, the court is generally notified prior to the contest date; thus not requiring the complainant to unnecessarily attend the Child Witness Service.

Pre proof assessments – Diversionary Approach

Another innovation introduced when the List was established was the referral, in appropriate cases, of matters to the Children's Court Clinic for pre proof assessment and/or counselling[27] to be conducted. These are matters in which the prosecution may have difficulties proving its case, for example, the complainant/s may be very young or have a disability and the prosecution would have difficulty adducing the evidence required to establish the offence, where the prosecution would or may experience difficulties proving the intent of the accused or sibling incest cases. In such cases, the referral is made on the understanding that the young person attend for the assessment and/or counselling and/or comply with any recommended treatment and provided the young person complies, the prosecution will withdraw the charge/s. Such a process is not embarked upon without the consent of the prosecutor who will have ensured that the complainant/complainant's family agree to the proposed course.

Lawyers for the accused have agreed to their clients participating in a pre proof assessment/counselling as the prosecution has agreed not to seek access to the report provided to the court but to instead rely upon the judicial officer confirming that the young person has attended for the assessment/counselling and that there has been compliance with any recommendations made by the clinician. It may mean that the matter is not finalised for 12 months with perhaps a special mention after 6 months to assess the progress of the counselling. The charges would not be withdrawn until the counselling has concluded and there has been compliance with any other recommendations.

This diversionary-type approach of the young person engaging in counselling and the withdrawal by the prosecution of the charges bears some similarities to Therapeutic Treatment Orders (TTO).

Despite those similarities, there are a number of significant differences. They include that a TTO can only be made in the Family Division of the Court. However, in the Sexual Offences List the diversionary procedure may occur in cases in which there are not any Family Division proceedings. In addition, the other legislative requirements of Therapeutic Treatment Orders are not required to be met, for example, that the child is under 15 years of age and

[27] The counselling may be provided by a suitably qualified psychologist with whom the young person has already established a therapeutic relationship.

that the Order 'is necessary to ensure the child's access to, or attendance at, an appropriate treatment program.'[28] Such a requirement penalises a parent who is responsible and acts protectively.[29] That is not the situation in the cases in the List in which the approach I have described has been adopted. In fact the reverse is often the case. In those cases in which families have acted appropriately and sought counselling for their child, the prosecution would be in a stronger position to recommend to the complainant's family that this diversionary approach be adopted.

One of the strengths of this approach is that the young person undergoes treatment. In the long term it is hoped that this intervention may prevent young people from becoming adult sexual offenders. Mr Phil Rich in his book *Understanding, Assessing and Rehabilitating Juvenile Sexual Offenders*[30] states :-

> *….. juvenile sex offenders are still children and remain open to corrective emotional and cognitive experiences that will help reframe their ideas and worldviews, address their emotional and behavioural difficulties and help them to engage pro socially and in ways that yield greater personal satisfaction and a sense of self efficacy."*

Case Study

One case in which this diversionary approach was adopted involved Peter[31] who was 15 years of age and had been charged with incest offences in respect of his younger brother aged nine. Over a 12 month period Peter engaged in 28 sessions of assessment and counselling. This is an extract from the final report the court received from the clinician which in my view exemplifies the diversionary approach of the court and the benefits which can be achieved for all involved

Following the last report provided, Peter, Jack and their parents participated in a family apology session on 10 November 2011 whereby Peter expressed an extremely heartfelt apology to his younger brother for the hurt he has caused him. He also talked about the following things with his brother and his parents:–

- *an expression of understanding about the impact that this abuse has had on his brother and his parents and how he had betrayed the trust of his brother and his parents;*
- *a full acceptance of responsibility for his actions and an expression of remorse for his actions;*
- *every assurance that this would never occur again;*

[28] Section 248(b).
[29] It was in response to this concern that s 251 and s 354A *CYFA* were introduced.
[30] Second Edition 2011 John Wiley and Sons Inc. Page 256
[31] A pseudonym

- *what he has learnt in counselling that has allowed him to be able to provide such reassurances;*
- *an acknowledgement that the role of the big brother is to protect his younger brother and this is the role he will take from now on.*

The session concluded the counselling of both Peter and Jack and thus CPS will conclude their involvement with this family following this court hearing on Friday. Councillors have made it clear to the family that they are welcome to contact CPS or re-refer either boy for counselling in the future should the need arise.

On 9 June 2011 a meeting was conducted with the key stakeholders (Magistrate Wallington and myself, the senior lawyer in charge of the specialist sex offences unit OPP, senior police prosecutor and senior solicitor Victoria Legal Aid) to review the operation of the List. The views were all positive and included

- better file management by both the prosecution and legal aid, (including a continuity of representation);
- increased opportunity for matters to resolve;
- a greater certainty that contested hearings would commence on the listed date;
- an improved understanding by members of the Victoria Police of TTOs and
- specific legislative reforms were identified as being recommended regarding TTOs and special hearings.

A number of the findings were consistent with the case management practices in the SARS Report, to which reference was previously made.

It was also agreed that due to the effectiveness of the List, all sexual offence matters which had been transferred to Melbourne from another Court (including those in which a contest mention had already been conducted) would be listed in the Sexual Offences List, prior to being listed for a contested hearing.

A comparison of the process of a sexual offence matter in the Children's Court prior to and post the establishment of the specialist list

In order to illustrate how the List operates, it may be helpful to compare the way in which a sexual offence matter may have proceeded before the court prior to the List being established with how it is conducted in the List.

Prior to the List commencing, the charges would be listed with any other criminal matters in a mention court list that is there may be driving offences, armed robberies and then the next file would relate to an accused who has been charged with rape. The court may be very crowded with people waiting for their cases to be called. If the accused is pleading guilty, then a summary would be read by the prosecutor. Prior to the summary being read the judicial officer would not know any of the details of the offence/s. If the complainant is

in court, the prosecutor may have indicated this fact to the judicial officer or the judicial officer may have asked whether the complainant was in court. If that was the case, the complainant would be pointed out and everyone in court would look at him/her just as they would, the accused.

The facts of these cases are almost always extremely sensitive. The complainant may have completed a victim impact statement, which again often contains very personal information. In the general mention court, if the matter did not resolve, there would be a cursory examination by the judicial officer as to the number of witnesses required, the number of days for the contest, the nature of the issues in dispute and the matter would be listed for hearing.

When the Sexual Offences List was introduced each sexual offence file was placed in a red manila folder. This meant that if for some reason the file is first mentioned in the general mention court (for example, the accused is in custody and appears on a non Sexual Offences List day), the judicial officer is immediately aware that there are sexual offence/s alleged.

The Sexual Offences List is not conducted in a closed court. The List is conducted in Courtroom 9 at Melbourne which is a relatively small courtroom. The tendency is for the accused and any complainant and any support people who have attended to remain outside court until their matter is called.

One of the cases which was dealt with in the Sexual Offences List involved Tiffany[32], a 13-year-old girl. She was at a music festival with her girlfriends. She had been drinking alcohol and was unstable on her feet. She saw two boys aged 16 and 17, one of whom she knew. She left her girlfriends to speak to them. The boys assisted her to walk to a nearby playground. Whilst at the playground, the boys raped her. There was oral, anal and vaginal penetration. One of them in particular, subjected her to extremely humiliating and degrading acts of sexual violence. The matter was reported and the boys were interviewed.

There were initial denials by both boys that anything had occurred. Telephone intercepts at the boys' homes recorded the boys discussing a false alibi. The telephone intercepts also included some incredibly offensive references as to what they had done and equally offensive comments about Tiffany. Tiffany and her mother attended court. Tiffany had completed a victim impact statement.

If the matter had proceeded as a plea of guilty in the general list, the judicial officer would not have read the Police Brief. The summary would have been read in open court and it would be likely that the court would have been crowded. This has an impact not only on any complainant who is present but also on the accused. Tiffany would have heard the most appalling comments the boys had made about her and would have heard about them bragging as

[32] Tiffany is a pseudonym. I have changed some of the facts to ensure confidentiality.

to what had occurred. Reference may also have been made to the impact on Tiffany as described in her Victim Impact Statement.

In the Sexual Offences List however, as I have stated the magistrate has had the benefit of having read the summary on file and having read the brief. Whilst in this case by consent it was not necessary for that portion of the summary which was so offensive, to be read aloud; nevertheless I had regard to those matters. That could not have occurred if the judicial officer had not read the Brief. I cannot imagine the impact on Tiffany had she been made aware of the comments which had been made and of which she was previously unaware.

The accused pleaded guilty on separate dates and were also sentenced on separate dates. The male offender who performed the less major role apologised to the complainant. It was not just “I’m sorry” but rather it was more heartfelt. In many cases complainants do not seek an apology and are critical of apologies being made in these circumstances. However, in this case Tiffany had sought an apology from him. It would be most doubtful that this result could have been achieved in a large mainstream courtroom.

Conclusion

It is generally accepted that the sexual assault reforms which have been introduced have improved the response of the criminal justice system. The introduction of a specialist list in the Magistrates’ Court and County Court was one such reform. Despite the lack of funding, the Children's Court at Melbourne introduced its specialist Sexual Offences List.

Whilst there are many views as to the effectiveness and relevance of court for complainants and accused in sexual offence matters, in my view and the view the stakeholders, the innovations introduced in the Children’s Court Sexual Offences List have changed for the better the manner in which these cases are conducted in the courtroom from both the perspective of the accused and the complainant.

FAMILY DIVISION

Introduction

The Family Division of the Children's Court also deals with matters in which sexual abuse is alleged. As in the case of contested criminal proceedings, the contested Family Division proceedings in which sexual abuse is alleged are often challenging and difficult. In light of the improvements which had been introduced by the Sexual Offences List in the Criminal Division and in order for the court to more effectively manage alleged sexual abuse cases, the Children’s Court at Melbourne determined that consideration should be given to establishing a specialist Sexual Abuse List in the Family Division.[33]

[33] Refer to the Addendum.

The Establishment of a Consultative Committee and the Cummins Report

In April 2011 the President of the Children's Court, Judge Grant, invited representatives from the following organisations DHS – Child Protection, the Australian Institute of Family Studies, Monash University, Children's Protection Society, Children's Court Clinic, Gatehouse Centre, Victoria Police and legal practitioners who work in the Family Division to establish a Consultative Committee in order to discuss the implementation of such a list in the Family Division. The Committee is chaired by Judge Grant. Magistrates Wallington, Cain and myself are also members of the Committee.

The establishment of a specialist list for sexual abuse cases in the Family Division was also recommended in The Cummins Report 'Protecting Victoria's Vulnerable Children Inquiry' (2012)[34]

> *The Children's Court should establish specialist Sexual Abuse and Koori lists in the Family Division. The court should be resourced to create and implement these lists as a matter of priority. To ensure these lists are suitable for implementation across the state, a pilot could be run in the Melbourne Children's Court or another suitable court location.*

Despite the resolve of the Children's Court to establish a specialist list, it has not commenced. The Court has not been resourced to establish the list. In the absence of any additional resources or funding being provided, the Court does not have the capacity to conduct a specialist list in the Family Division. The difficulties for the Court can be highlighted when it is appreciated that the workload pressures in the Court are continually increasing.

Region	*Primary Applications initiated 2011/2012*	*% change from 2010/2011*	*% change from 2006/2007*
Melbourne	6971	13.9%	30.69%

Whilst the List has not commenced, regular meetings of the Consultative Committee have continued to take place. The perspectives of different professionals and areas of expertise have been exchanged. In addition, preparatory work for a specialist list to be established has been and continues to be undertaken. This includes:-

- One of the senior lawyers from the Child Protection Litigation Office Ms Catherine Middlemiss has provided a monthly list to the Court of those cases in which new protective applications have been issued since January 2012 and in which sexual abuse is alleged;

[34] Recommendation 62.

- Magistrate Wallington has prepared summaries of the allegations in those matters;

- The Court files in which sexual abuse is alleged will be marked with coloured tape so that that they are readily identifiable.

- Research grants have been sought in order for an evaluation to be undertaken.[35] To date, the applications have either been unsuccessful or are still under consideration.

- Magistrate Wallington and myself have met with Dr Daryl Higgins[36] and Associate Professor Rosemary Sheehan[37] to draft a template of the relevant particulars which will need to be recorded in order for an analysis to be conducted of the course of sexual abuse files through the court from 1 July 2010 and ongoing. In the event funding was provided and the specialist list was established, an analysis could be conducted comparing the progress of those cases prior to and post the establishment of the list.

It would be proposed that where relevant, the key innovations of the specialist Criminal Division List would be adopted and adapted in the Family Division Specialist List; for example, that specialist magistrates would sit in the List, files would be marked to identify them as sexual abuse files and there would be close case management of the files, that is, if possible that a docket system would be introduced.

The Family Court introduced a docket system when it established the Magellan List for cases in which there were residence and contact disputes and there were allegations of sexual abuse or serious physical abuse of children.[38]

In September 2006 the Australian Institute of Family Studies was appointed to conduct an evaluation of the Magellan List: 'Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan case-management model.'[39] A comparison was made of cases in which similar allegations had been made which were in the List and those which were not in the List.[40]

The outcome of the Evaluation was that:-

> *The data suggest that the Magellan protocols are achieving the desired benefits for the Court (and hopefully for children and families):*

[35] Associate Professor Rosemary Sheehan Co-ordinator, Higher Degrees by Research Program Department of Social Work, Faculty of Medicine, Nursing and Health Services, has submitted applications, for example, for a Criminology Research Grant and to the Legal Services Board.
[36] Deputy Director (Research) Australian Institute of Family Studies.
[37] Refer to footnote 18.
[38] The Pilot was introduced in 1998 and the List was extended nation wide in 2003.
[39] The Evaluation was conducted by Dr Daryl Higgins.
[40] Co-operation and Co-ordination: An evaluation of the Family court of Australia's Magellan case-management model." Page 24.

> *Magellan cases have fewer Court events, are dealt with by fewer different judicial officers and more often settle early compared with Magellan-like cases.*[41]

The judicial officers in the Family Court and the Children's Court are required to perform different functions. In the Family Court the judicial officer is not required to make a positive finding that abuse has occurred, whereas in the Children's Court, the court must make a finding that the DHS has or has not proved that the child has suffered or was likely to suffer significant harm as a result of sexual abuse.

The matters in which sexual abuse is alleged are the most difficult matters in the Family Division. This is one of the reasons they require intensive case management. Less than 3% of protection applications by safe custody proceed to a contested hearing. In the overwhelming majority of those contests the issue in dispute is where the child is to reside, that is disposition or the type of Order is in dispute. However, when sexual abuse is alleged it is almost invariably the case that proof of the protection application is contested in addition to disposition.

In the event a specialist Sexual Abuse Family Division List was established in the Children's Court there would be many challenges, especially when the perpetrator of the alleged sexual abuse is an adult. It would be hoped that if a specialist list was established, there would be a reduction in the period of time the matter is before the court prior to a final determination being made. However, these cases are complex and there are a number of factors which may impact upon the period of time the matter is before the court. Such complexities include the status of any criminal charges, the privilege against self-incrimination and the reluctance of the alleged perpetrator to attend for risk assessment and/or treatment. However in my view the challenges are not a reason not to properly resource a Pilot List. As in the case of the Sexual Offences List when innovations were introduced in response to the issues which were presented to the court, innovative approaches could be introduced into a Family Division specialist Sexual Abuse List.

A Case Study – The potential benefits of a specialist list

I would like to conclude by referring to a contested case which in my view highlights how a specialist list could have ensured that there was a better outcome for the child in that case. The case has not been selected as a criticism of the court or of any party but rather as an example of what can happen and how a specialist list may have and in my view would have made a difference.

Jamie[42] was 14.5 years of age.[43] He was living with his parents and seven siblings. One day his mother who had been experiencing difficulties

[41] Ibid at page 177.
[42] Jamie is a pseudonym.
[43] However, he was functioning at an emotional level of an 8 year old. The person who had commenced the risk assessment was unaware until he was giving evidence that this was the

controlling his problematic behaviours, rang an agency seeking respite. His behaviour had included breaking toys, making holes in walls and assaulting his siblings. After his mother had finished the call, she observed video images on her mobile phone and she was very troubled. She observed images of a child's buttocks, Jamie and his 8 year old brother's penises, and their 2 year old sister touching Jamie's penis. Jamie could be heard making sexually explicit and inappropriate comments including such words as 'lesbian' and 'poofter' and he could be heard telling his brother to ask their 2 year old sister to say 'suck cock.' Jamie's mother immediately contacted the respite agency again and advised what she had observed. She agreed to Jamie being placed voluntarily in out of home care and ultimately on an Interim Accommodation Order to foster care.

The police investigated the matter. Jamie had not been charged. The view of the police was that if Jamie was placed on a TTO then charges would not be proceed. Jamie and his parents were seeking Jamie's immediate return home.

When the contest commenced before me, Jamie had been out of home for 6 months. The DHS' position was that whilst there was a reunification caseplan, there was an unacceptable risk for Jamie to return home until a risk assessment could be conducted and the Department would be guided by the risk assessment. An assessment had not been sought until shortly prior to the contested hearing commencing.

I returned Jamie home on an IAO with appropriate conditions. I found that there was not an unacceptable risk for Jamie to return home and that it was not in Jamie's emotional or psychological wellbeing for him to remain out of home.[44]

If this matter had been in a specialist list, the Court would have required the specialist risk assessment of Jamie to have been conducted as soon as possible after the protection application had issued and would have monitored its progress. In my view this case was not accorded the priority it deserved from:-

- the court - which due to the workload in the general list and the absence of a specialist list, the file could not be adequately monitored;
- DHS - due to the workload pressures of the Department the file was unallocated for 3 of the 6 months that Jamie was out of home and the risk assessment was not prioritised;
- the solicitors for the parties - did not bring the delay in the risk assessment being conducted to the attention of the Court.

---

case. After being apprised of that information, he expressed some reservations as to whether the behaviour which he had previously categorised as sexually abusive; was sexually abusive.

[44] The DHS issued the Protection Application in respect of Jamie only and not his siblings.

The delay in this case was a great concern for a number of reasons: –

- Jamie had never resided away from home apart from short periods of respite;
- the longer a child is separated from his family, the more difficult it can be to achieve a successful return home and
- the prospect of the counselling being effective may have been reduced due to the delay, especially in light of Jamie's emotional immaturity and borderline intellectual capacity.

In addition, prior to the police officer giving evidence, there was conflicting evidence as to precisely what the mobile phone images were and what Jamie had said. Incorrect and incomplete information was provided to the Children's Protection Society and the Therapeutic Treatment Board. Had there been a specialist list and had the court had details of the police investigation then perhaps the concerns of DHS relating to Jamie's behaviours may have been significantly reduced.

In my view had there been a specialist list it was likely that the following would have occurred:-

- Jamie would have been returned home much earlier;
- a contested hearing may not have been conducted; thereby saving the community the expense of a contest and sparing Jamie and his family the stress associated with the contest and
- in all likelihood, Jamie's counselling would have commenced, increasing the prospect of the counselling being successful.

Conclusion

The Children's Court together with the members of the Consultative Committee and the Cummins Report support the establishment of a specialist Sexual Abuse list in the Family Division. It would be anticipated that the innovations introduced in the specialist Sexual Offences List where relevant, could be introduced or adapted into a specialist Family Division List and in response to the challenges in the List, other innovative approaches would be adopted. The benefits which flow from a specialist list have been demonstrated in the Criminal Division and in the Magellan List in the Family Court. However, this List cannot be introduced without funding and/or additional resources being provided. It is to be hoped that such funding will be forthcoming.[45]

Jennifer Bowles
Magistrate
Children's Court
Melbourne
21 August 2012.

[45] Refer to the attached Addendum.

ADDENDUM

- Since this Paper was prepared, the Sexual Abuse List (the D List) commenced as a pilot in January 2013.

- An evaluation of the D List was funded by the Legal Services Board. It was conducted by Associate Professor Rosemary Sheehan. The Evaluation found that the D List was successful in

    - parties being accountable for undertakings they gave to the court;
    - early resolution of matters thereby reducing the number of contested hearings;
    - reducing the trauma for children and families due to the early resolution of matters and
    - identifying cases which could not resolve and booking them in for contested hearings much earlier than would otherwise have been the case.

    As a result of the positive evaluation, the List ceased to be a pilot and in early 2014 it became a permanent specialist list in the Children's Court at Melbourne.

- In 2017 the Children's Court of Victoria sitting at Melbourne introduced docketing in the Family Division. All matters are case managed by the docketed magistrate. Accordingly, the Children's Court does not have a D List now.

- The Royal Commission into Family Violence (March 2016) made the following recommendations

    Recommendation 33

    '*The Victorian Government ensure that the Sexually Abusive Behaviours Treatment Service and other suitable treatment programs are available for all age groups up to and including 17 year olds and resource enhanced delivery of the programs across Victoria [within two years]'*

    and

    Recommendation 34

    'The Victorian Government amend the Children Youth and Families Act 2005 (Vic) to extend the therapeutic treatment order regime to young people aged 15 to 17 years, so that the Children's Court of Victoria can order attendance at appropriate programs [within two years].'

    The State Government has confirmed it will implement all of the recommendations of the Royal Commission. To this end, the Sexually

Abusive Behaviour Treatment Services (SABTS) Steering Group has been established and a subcommittee - the Legislative Reform Working Group - has also been established specifically in respect of the implementation of Recommendation 34.

Jennifer Bowles
Magistrate
8 March 2017