Loddon Campaspe Centre Against Sexual Assault Judicial System Submission October 2015

We are a service providing counselling, support, advocacy and referral for people in the Loddon Campaspe region who have experienced sexual assault. Our service has been operating for over thirty years and we have supported many victim/survivors who have been involved in the criminal justice system as victims and witnesses. We are concerned that the current legal system denies fair and reasonable treatment of victim/survivors and effectively re-traumatises them. While we acknowledge that there are many areas of concern in the process of a criminal trial we have chosen to focus this submission on giving evidence, particularly in the trial.

Our concerns are due to our clients' direct experiences and include:

- That the trial process means that the victim/survivors are placed under undue stress by lengthy periods of cross examination which results in deliberate attempts and increased opportunity to discredit and marginalize their legitimate testimony.
- Brain research establishes that the psychology of trauma (relating to survival fight, flight and freeze responses) means that a person who has been traumatised by sexual abuse, when under stress or exposed to reminders of the abuse, (including during giving evidence and being cross-examined), can experience any number of the following:

  *Confusion and loss of concentration (due to the executive function of the pre-fontal cortex being overridden when a traumatic response is triggered).

  *Feeling nauseous (vomiting is potentially part of the fight/flight response which can be triggered).

  *Flashbacks which are a vivid re-experiencing of trauma (which is experienced as being in the present) and can be visual, auditory, olfactory or somatic (for example body pain).

*Dissociation, a foggy state of disconnection from physical and emotional feelings and inability to access many memories.

*Panic attacks which can include shakiness, chest pain, and hyperventilation and an intense terror response.

Due to the aforementioned trauma responses it is difficult for victim/ survivors to be able to tell a coherent story in an ordered or chronological fashion, remember details and stay cognitively aware for the duration of providing evidence in court. It means that being interrupted and pressured affects their evidence, because of the trauma (emotional activation) responses occurring internally and they are therefore more easily discredited. It also means they are deeply impacted by lengthy periods of cross-examination both in their mental and physical well-being and in the quality of evidence they are providing.

Among the many examples our service have worked with are included:

A case of a nine year old girl whose four playmates previously gave evidence that a male adult had sexually assaulted them while they were in child care. Initially the young girl had refused to speak to police. When she did undergo the special hearing this year she cried inconsolably for two days afterwards, at the trauma , humiliation and anger of the experience. She is unlikely to have received such cold and offensive treatment as she experienced from the defence lawyer, at any other time in her life, apart from during the child sexual offences.

A recent case of an adult man who after years of waiting for police and the courts, was so scared that his mental health will collapse if he was subjected to hours of questions about the child sexual assaults that occurred many years ago, that he agreed to the two more serious charges against his grandfather to be dropped in a plea bargain, which left only two much

more minor charges to be sentenced. The perpetrator had three adult family members all alleging past child sexual assaults, yet he and his lawyer have the opportunity to make choices about which offences to admit to, so two victims got offers of plea bargains, while a third now has to decide whether to battle on in court alone. It is quite likely given the available evidence that not only did all these offences occur but also other offences had occurred which could not be recalled sufficiently well after thirty years, to be included in the police charges. So the maybe four offences that the alleged perpetrator faces sentencing for (4 offences from 2 victims)is possibly a fractional part of the offences committed.

A sixteen year old girl who gave evidence about repeated sexual assaults by her stepfather when she was 14 years old and younger. The majority of offences occurred during the period that her mother was dying of cancer. When her mother had died the girl found the strength to report to police. Two years later when it came to court she felt abused, disbelieved, significantly humiliated and depressed by the rigorous cross examination, and then again by the case outcome of not guilty. This girl, her father and brother were truly devastated that there was no possibility of justice or closure for them.

A woman who found the courage to report to police more than twenty-five years after numerous horrendous child sexual assaults by her brother in law, when she realised from her professional training about child abuse; that the alleged perpetrator had used every form of grooming observed in paedophiles. This witness had two other competent witnesses able to corroborate parts of the events. Police and prosecutors had confidence in her ability as a witness and were hopeful of a positive result for them. After two weeks of trial it was still as difficult as is usually expected to get a conviction. A split jury deliberated for more than two

days, the result was he was found not guilty on all charges. This is despite many in the jury apparently feeling that the perpetrator was guilty beyond reasonable doubt.

It appears from the experience of our clients who are witnesses that the victim/survivors are literally on trial and not the accused. This is how their experience is perceived individually, but also reflects the reality that the structural protection for the accused leaves them quite well protected by the system and the witness not feeling at all protected, supported or understood by the court.

The way evidence is received by the court involves the deliberate destruction of the victim/survivor's previously credible evidence. The case does not reach court if police, prosecutors and committal magistrates did not find the witness's evidence credible. The defence attempts to create doubts where the prosecution has not had doubts. The practice of directing closed questions with the express intent to undermine the credibility of the witness is especially traumatic for sexual assault survivors, particularly when the witnesses have not reported sexual assaults for years for fear of not being believed. In some instances they did not report earlier because some family members did not believe their childhood disclosures. Alternately the delay occurred when the victim felt they had less social status or credibility than the accused person and this prevented them approaching the authorities. The issue of being heard, believed and thought worthy of compassion from supportive others at what they have suffered, is central to the emotional recovery of victim survivors. Particularly since at the time of the crime for child sexual assault survivors, their powerlessness, vulnerability and lack of safety had usually effectively prevented them seeking or in some cases receiving assistance.

The practice of asking leading closed questions also allows defence lawyers to ask questions to which can be difficult to answer yes or no to, without giving a misleading

impression of the victim's evidence. The distortion of their evidence is by compelling them to agree to an insulting premise or to a premise that is apparently contradicting their previous testimony. A recent witness explained how she had very repeatedly attempted to explain why both answers yes and no were frequently inaccurate or misleading. These explanations were specifically not what the defence wanted and the lawyer concerned tried to block the witness from making the more fulsome answers. After hours of questions, which the victim/survivor found quite unreasonable in the way the questions were skewed to mislead the jury to the benefit of the defendant, but not to the benefit of truth or reality. The judge finally told her it would be in her interest to answer yes or no and save herself a great deal of effort. The witness collapsed in emotional distress at this point, since previously she had believed the judge appeared neutral or sympathetic to her case. After being directed to answer yes or no, without any acknowledgement that the questions were manipulative and contrived to discredit her veracity, the witness felt alone and abandoned during the seven hour process of trying to accurately give her honest testimony. The witness felt that the defence lawyer had a victory in being able to continue to make a misleading picture of events and create doubts which did not exist. The current process does not require that the doubts created be real or based on fact. The defence attempted to argue that it was likely the offences did not occur because the perpetrator's children were young and young ones get up in the night, to which the witness responded that this had not occurred during the offences. The defence's argument did not have to take account of the allegation that many offences occurred during the day and away from the house. The defence had only to confuse the issues and their case is half won, and any evidence provided by witnesses is treated by them as irrelevant compared with the imagined doubts and assassination of character that the defence case can unfairly rely on.

It is our experience as counsellors that most victim/survivors go into reporting child sexual assault cases with a naïve belief that the legal system will be fair, will give them a fair

hearing and that the legal system is concerned with the business of justice. They are understandably horrified to discover that they were on trial and the alleged perpetrator can remain silent and is not cross examined about their actions, motives or memories. Not only does the witnesses have to answer questions for many hours, but for some of that time they are cross examined by a hostile and experienced professional person whose intent is patently to make them look stupid, confused and unreliable. This is for having the temerity to report an appalling crime that the arms of government allege that they are wanting to prosecute. So while a trial is traditionally about points of law and officially a rather dry academic exercise; parts of the trial appear like a stage play where witnesses are routinely humiliated to allow professional people to appear superior to the less experienced public. It is hardly surprizing that some senior lawyers recommend their own children not to take sexual offence cases to court. Lawyers are aware it is not worth it and too traumatic and much too unlikely to succeed. How unfortunate that so many victims/ survivors report to police with the intention of protecting the rest of the community and with no real knowledge of the lengthy and humiliating process they are agreeing to.

Why are crimes that in the large majority of cases are directed at females still able to be tried by a jury that can consist of a majority of males? Why is there no gender balance mandated for juries? It appears that some male jurors can be manipulated by the defence to find the fear of being falsely accused of sexual assault much more emotionally compelling than the traumas experienced by many survivors including child sexual assault.

The practice of repeatedly reminding the jury before the trial and three times after the completion of evidence that they must not find the defendant guilty beyond reasonable doubt, if they have the slightest doubt about the case; has the effect that even when the great majority of the jury believes the defendant is very likely guilty of the crimes alleged, they cannot find the confidence as a group to pronounce guilt. So the defence is required only to

make a confusing picture and make many false allegations about the witnesses' dishonesty for the workings of a sexual assault trial to be a farce that only rarely succeeds in bringing about a conviction. The most recent trial that one of the writers is aware of consisted of the defence quite simply calling four honest people liars repeatedly for days and successfully allowing a child sexual assault perpetrator accused by a family member to pretend not guilty means unequivocal innocence. One witnesses commented in frustration to the defence, "Liar, liar is that all you have got ?" Unfortunately the defence's basic and primitive tactic succeeded in this case as in so many others.

There is a great deal of discretion for judges in which words or which lines of questioning they can find objectionable. Frequently judges do not intervene to protect the witness from unfair, unreasonable and offensive lines of questioning, even though judges do already have the power to intervene. This does not make a level field between trials, for the witnesses being harried by the defence or for prosecution barristers seeking to make objections about tactics used.

In the aforementioned recent case the prosecution did not object to some unfair questioning and the judge did intervene and complain that the prosecution had failed to protect their witness by not making objections frequently enough, about the defence's tactics. Some confusion apparently reigned for the prosecution about what and when they should intervene during the cross examination of their witnesses .There appears to be a great deal of latitude and inconsistency in the decisions of points of law that occur. Legal counsel also seem to become hardened by frequent exposure, to the appallingly traumatic experiences that sexual assault witnesses routinely undergo in the current Victorian legal system.

We strongly advocate that:

- There is a limitation placed on the length of time under which a victim/survivors is cross examined, with a maximum imposed of two x two hours periods of questioning of any witness for the state.
- It is standard practice that evidence is given in a narrative form, rather than this relying on the power and understanding of an individual judge, to be able to request an opportunity for the witness to give their own narrative. It is our opinion that the current practise, including the exclusion of aspects of the witness's original statement and the significant editing of the accused's police statement, so that the jury do not have the full narrative, leads to isolation of incidents and allows facts to be taken out of context and more easily discredited.
- We especially recommend that the use of a neutral third person to deliver the defence questions to the witness, this would give some possibility for the witness to provide coherent, logical and pertinent testimony. The judge could effectively contain excessive or irrelevant information. This would especially allow the witnesses to feel that they have not had to face torment from a hostile source in order to give their evidence.

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