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INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

Proceedings of a Seminar on

INCEST

CHAIRMAN:

P. G. Ward,
Acting Director, Institute of Criminology

27 June 1984
State Office Block, Sydney

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FOREWORD

Hon. Peter Anderson, M.P.,
Minister for Police and Emergency Services.

Incest is a problem that challenges the full spectrum of the social measures which have been developed to cope with it in the past.

Although the Departments of Health, Education and Police, as well as the welfare and legal systems of this State, have responded to the problem in the past the increasing incidence of reports on child sexual abuse would suggest that a more comprehensive and co-ordinated approach is necessary.

The Seminar on Incest, held by the Institute of Criminology, represents a first step in assessing what the effects of the current investigative, legal and rehabilitation procedures are on offenders, on victims and on their families as a whole. From the views expressed in the papers given at the seminar, however, one thing is clear: it is likely that these procedures are every bit as damaging to the victims of such crime as is the assault itself. The repetitive and detailed questioning of victims, who are unlikely to be aware of their rights, of court procedures, of the ensuing family tensions, and of the possible reprisals and feelings of guilt, is singled out in these papers both as the most prominent factor adversely affecting the resolution of such cases in human terms and as the single most damaging psychological trauma after the fact of the crime.

These conclusions will form a worthwhile basis from which the Child Sexual Assault Task Force (set up in June of this year and to report to the Premier, Mr Wran, within five months) may be able to review comprehensively the current situation and so alleviate the suffering of all involved. The task force will examine the laws relevant to sexual assault, make recommendations on the training of personnel within the health, welfare, police and justice systems that deal with this crime, and perhaps most importantly it will investigate ways of preventing child sexual assault.

It must be remembered that child sexual abuse is a deepseated problem, the causes of which are not confined to any faults in the judicial, welfare or policing systems. Child abuse could also be said to be the result of a deeply entrenched attitude to the structure of the family: one which places the parents, and particularly the father, in a position of absolute dominance. Perhaps the most difficult task of those interested in this programme will be to discover ways of changing people's attitudes about what children are. Are they just part of our goods and chattels, a possession? Or are they a privilege and a responsibility? Above all, they are human beings who are entitled to protection.

The saddest commentary of all is that despite all the intellectual and technological advances of the human race we still have so many children who will grow to adulthood having been victims of child sexual abuse. What is even worse some of them will believe that what happened to them was "normal".

The growing awareness and acknowledgment of the problem of child sexual abuse should be the impetus for society to confront the issue and to devise an effective response.

No society has a greater resource than its children, we therefore have a duty to protect them.

CHILD RAPE

Detective Sergeant 1st Class Brian Rope,
Officer in Charge, Child Mistreatment Unit, Police Department, NSW.

After a long period of denial that child rape really exists in our society the problem has finally established itself on the agenda of the helping professionals. This paper explores the legal, social and philosophical definitions of child rape and attempts to establish a premise, "that sex between adults and children is wrong". It may then be established that child rape is predominant in our society and that it is under reported. The paper explores the reasons why little attention is paid to the serious problem of sexual molestation of children.

Definition

As greater community awareness is being created by the media and the attitudes of the professions is also changing a number of innovations have been proposed for possible changes to the law and also the way in which children are required to act as adults when giving evidence in a criminal jurisdiction. These changes are necessary if professionals intend to help children and minimise any trauma they may suffer. However, this cannot be done without support.

Prior to the 14 July, 1981 the New South Wales *Crimes Act,* No. 40 of 1900 (as amended) legally defined rape as, "sexual intercourse with the prosecutrix without her consent". The medical, social and welfare definition of rape is entirely different and varied. One of the more accepted versions in this field is proposed by Connell.

> The involvement of dependent and developmentally immature children and adolescents in sexual activities they do not fully comprehend and to which they are unable to give informed consent. Such activities violate social taboos and often family roles.[1]

Pearn[2] suggests that society's attitude to child sexual abuse is very broad. At the one end there are groups within our society such as the Rene Guyon Society, in America SYBOL and The International Paedophile Information Exchange, both with members in Australia, who advocate; "Sex before eight or then it's too late". On the other hand we have Sgroi[3]

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1. H. M. Connell, "The psychopathology of sexual abuse in children," in Queensland Co-Ordinating Committee of Child Abuse, *Conference Papers: Second Australasian Conference on Child Abuse.* (Brisbane, 21-25 September 1981) pp 79-83.

2. J. H. Pearn, "Child Abuse — an overview, with priorities for the future," in Queensland Co-Ordinating Committee of Child Aubse, *Conference Papers: Second Australasian Conference on Child Abuse.* (Brisbane, 21-25 September 1981) p.535.

3. S. Sgroi, "Introduction: A National needs assessment for protecting victims of sexual assault," in A. W. Burgess, A. N. Groth, A. W. Holstrom and S. Sgroi, *Sexual assault of children and adolescents* (Lexington: D. C. Heath and Company, 1978) p.xv.

and Martin[4] who maintain that sex with children is wrong because of the lack of informed consent. These philosophies are very different but each denotes an unequal struggle in an exploitive structure, either family or society in general. It is philosophically no different, that a child cannot sign a hire purchase agreement, go to gaol for debt or if under ten commit a crime, philosophically the same should apply that no crimes should be committed against children.

The term "rape" was abolished from the statutes of New South Wales on 14 July, 1981 by virtue of the introduction of the *Crimes (Sexual Assault) Amendment Act.* The new legislation categorised all forms of sexual assault committed upon males and females alike. The legislation also broadened the legal definition of the term "sexual intercourse" to mean:

(a) Sexual connection occasioned by the penetration of the vagina of any person or anus of any person by —

(i) any part of the body of another person; or

(ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes;

(b) Sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;

(c) cunnilingus; or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b), or (c)

Statutory rape is legally defined as carnal knowledge (sexual intercourse) with a female child under the age of sixteen years. Sections 67 to 72 of the *Crimes Act* make provision for these offences or attempted offences. Special provision is made by s.73 for schoolmasters, teachers, fathers and step-fathers who have carnal knowledge of female children between the ages of ten and seventeen years. Consent, generally, is not a defence to offences committed under the aforementioned sections of the *Crimes Act.* Section 78A of the *Crimes Act* make provisions for the offence of incest being committed by a male upon his sister, daughter or grand-daughter, provided the relationship is half or full blood. Other forms of sexual deviancy committed upon male and female children are dealt with under different aspects of the criminal law. In the majority of statutes cited it is necessary to prove that sexual intercourse actually occurred. If this fact can not be proved beyond reasonable doubt we are unable to establish at law that child rape was committed.

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4. J. P. Martin, "Family Violence and social policy," *Violence and the family.* (London: John Wiley and Sons Ltd., 1978) pp. 199-254.

Incidence

During 1978 a phone-in survey was conducted by the Sydney Rape Crisis Service[5] over a period of one week. The survey sample consisted of 300 responses from women who admitted that they had been sexually assaulted when they were children, the majority being incest victims. This evidence tends to indicate a much higher frequency of incest than indicated by official figures. The official reported cases of incest for the years 1976, 1977, 1980 and 1981 (*see* **Appendix II**) (page 21) was zero, four, ten and twenty two respectively. The Sydney Rape Crisis Service survey tends to confirm that the collection of data, in respect of sexual abuse, which is unimpeachable, is certainly difficult — perhaps impossible. The majority of information available is not from Australia and it can only be speculation, perhaps reasonable to suggest, that a similar situation would apply in Australia. As can be seen from the statistics set out in **Appendix II** sexual assault is officially categorised under numerous headings; age and sex are not taken into consideration.

Berliner and Stevens[6] and Keefe[7] were also critical of the complexities of the *ad hoc* data available in the United States of America, when conducting their enquiries in Seattle, Washington and New York respectively. Keefe suggests that using the figures for reported sexual assaults committed upon children under fourteen for 1975, in Brooklyn, N.Y., as a base it could be estimated that for the same period there would have been an estimated 3,068 cases in New York alone and if projected nationally the true alarming figures would be seen.

Sarafino's research in 1979 (cited in Simmons[8]) indicated a reporting rate of 122.5 cases of sexual abuse annually per 100,000 children in the United States of America and the unreported rate of sexual abuse would be three to four times greater. Simmons, basing his research on Sarafino's suggested figures estimated that New South Wales should have an annual reporting rate of sexual abuse in the order of 1,666 cases and nationally a figure of 4,904 reported cases. According to Simmons the number of cases of unreported sexual abuse in New South Wales would be of the order of 7,497 and nationally 22,068. The total accepted reports of all kinds of sexual abuse, for males and females for the years 1976/77 and 1980/81 (*see* **Appendix II,** page 21) do not come any where near the figures proposed by Simmons. The official figures do not differentiate between adults and children.

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5. S. Stumm, "Sexual abuse starts in the home". *Sunday Telegraph, 1979.*

6. L. Berliner and D. Stevens, *Advocating for sexually abused children in the Criminal Justice system,* Washington: Sexual Assault Centre, Harborview Medical Centre (November, 1976) pp. 1-16.

7. M. L. Keefe, "Police investigation in child sexual assault," in A. W. Burgess *et al, op. cit.* pp. 159-170.

8. W. J. Simmons, *Revelations by parents of sexually abused children: Implications for Social Work practice.* (University of Sydney, 1981) pp. 24-104.

Summit and Kryso[9] report that the Child Sexual Abuse Treatment Project, San Jose, California has an annual incidence rate of 165 cases of father-daughter incest per million population. Applying those figures to New South Wales for the year 1977, population of children under fifteen 1,365,936, would suggest an annual reporting rate of 220 cases of father-daughter incest, 216 cases more than accepted in the official figures.

An extensive survey was carried out by the Australian *Women's Weekly* of some 30,000 women in Australia. This survey has been summarised by O'Donnell and Craney[10] (1982) who report that three percent of Australian women had engaged in sexual relationships with family members, other than their husbands. The sample which represented all women over fifteen years of age in Australia meant that about 157,167 cases of incest had occurred in Australia in the past fifty years.

Finkelhor[11] argues that children, *ipso facto,* are incapable of consenting to sexual activity between themselves and adults. Furthermore that where the proof of consent is required to be established it must be shown that the child knew what she was consenting to and that she was free to say yes or no. If we accept the premise that sex with children is always wrong and sexual activity with a child can never be consensual, and as rape implicitly indicates a lack of consent, then child rape is a particularly predominant form of unreported rape.

Literature suggests that nearly all sexual abuse committed upon children is intra-familial. Finkelhor[12] conducted a survey of 795 undergraduates at six New England (U.S.A.) Colleges. Over 90% of the students were engaged in the survey. The survey indicated that 19% of the women had had a sexual experience as a child. He suggests that in 75% of these incidents the perpetrator was an older male person known to the child, 44% of the incidents involved family members, which included uncles, grandfathers, brothers-in-law, fathers and brothers, 24% were within the nuclear family . . . six percent were with fathers and step-fathers. Other studies[13] also suggest similar experiences: that the perpetrator is an older male known to the victim and not the stereotype "stranger danger" as widely accepted by the community at large.

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9. R. Summit and J. Kryso, "Sexual Abuse of children — A Clinical spectrum". *American Journal of Orthopsychiatrists,* 48, 2 (April 1979) pp. 237-251.

10. C. O'Donnell and J. Craney, "Incest and the reproduction of the patriarchal family" in *Family Violence in Australia.* Eds. C. O'Donnell and J. Craney, (Longman Cheshire, Melbourne 1982) p. 157.

11. D. Finkelhor, "What's wrong with sex between adults and children? Ethics and the problem of sexual abuse". *American Journal of Orthopsychiatrists* 49, 4 (October 1979) pp. 692-697.

12. D. Finkelhor, "Social forces in the formulation of the problem of sexual abuse," in *Sexually Victimized Children.* (New York: Free Press, 1979).

13 R. Summit (1980); Berliner and Stevens *op. cit.;* Simmons *op. cit;* and W. G. Waterlow "Child Abuse and Neglect: A Sequel of Incest," in Queensland Co-Ordinating Committee of Child Abuse, *Conference Papers: Second Australasian Conference on Child Abuse.* (Brisbane, 21-25 September, 1981) pp. 52-78.

In his article "Typical characteristics of Father-Daughter incest" Summit suggests, "children rarely tell"[14]. He bases this premise on the unequal distribution of power exhibited over the child by both parents, the child fearing the repercussions from the father, even in the absence of physical threats or injury, the possible disbelief or punishment by the mother and the obligations to the family in general. He proposes that the "helping professionals", in general, are partly to blame because they are incapable of rationalising that the child could be repeatedly molested without immediately bringing the incident out into the open. The victim then risks not only the mother disbelieving her story but the helping professionals as well. He states; "Reported, investigated cases are the exception, not the norm".

Between 1.1.83 and 31.3.83 thirty three cases of intra-familial sexual abuse were reported to the New South Wales Child Mistreatment Unit (*see* **Appendix I,** page 20). I have examined each case separately and in five of those cases, where sexual contact was continuous for a period of three to six years, the mother and other close family would not believe the story told by the victim. In fact, in two of those cases, attempts were made by the mother or other family members to influence the victim to withdraw his/her complaint. One mother suggested, "I love both Deiter and my husband (perpetrator), however, Deiter will be leaving home soon and who will I have to look after me?" [names changed].

Summit[15] suggests, "Whatever a child says about incest, she is likely to reverse it". If children are left in the home with the perpetrator after court action has commenced in respect of such complaints, or even whilst in protective custody with access to the mother, attempts may and in fact have been made to induce the victims to retract or change their story. He also argues strongly:

> The message from home is very clear, often explicit: "Why do you insist on telling those terrible stories about your father? If you send him to prison we'll all be on welfare. Is that what you want to do to us? We miss you . . . ."[16]

My experience, during the past four years, in this field, has been very similar and on one occasion where five children had been removed from the family because of sexual abuse by the *de facto* the mother visited the children and showed them a photograph of the *de facto* and stated, "Isn't he a nice man".

Judicial Arena

In a judicial or law enforcement arena the child is placed in an impossible situation where they are forced to conduct a case which is not

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14. R. Summit, *Typical characteristics of Father-Daughter Incest.* California: Harbour-UCLA Medical Centre, Torrance, 1980.

15. *ibid* p. 9.

16. *ibid* p. 10.

only child versus adult but that of child versus caregiver, and that such a situation really exists is incredible and is beyond the mental and emotional strengths of a child. It is in fact systems abuse.

When considering reported cases of child sexual abuse we must critically analyse such reports on two levels. Firstly, whether the child is capable of giving evidence in their own right (capable of being sworn as a witness). Secondly, if the child is unable to be sworn, whether or not they are competent to understand the nature of the court proceedings and capable of understanding the duty of telling the truth. Bearing in mind that the majority of such offences takes place in private, only the perpetrator and the victim being present, coupled with the requirement that the evidence of all children of tender years must be corroborated by other material evidence it can be seen why it is difficult, at law, to establish complaints of child sexual abuse. In those instances where the evidence of the child, unable to be sworn, is admitted by virtue of s.418 of the *Crimes Act,* it must be corroborated by other sworn evidence. Even when the victim relates a clear factual account of the abuse to the court they may be totally destroyed by the defence counsel during cross-examination. Most children are mesmerised by the enormity of the court, let alone being required to stand in the witness box and again relate the horrific personal details of the offence before the jury of twelve strange adults and at the same time being surrounded by numerous other strange adults dressed in "funny" wigs and coloured gowns. Even when counselled prior to court appearances it is a traumatic experience for an adult, let alone a child of tender years. No wonder they become confused or have a complete loss of memory and are unable to give a realistic account of what happened with daddy.

Marsden[17] suggests ". . . the issues are often 'zero-sum' games . . . if one wins the other loses and because of the unequal distribution of power in the family the man (father) usually wins". Where children are continually subjected to this type of interaction in the family structure, and they are always "losers" it follows that they will believe that if they complain about the actions of their father towards them they will again be the "loser". Consider a situation at a barbecue where the sausages were eaten and a child was blamed. Everyone present would believe that the child had in fact eaten the sausages whether it was true, in fact, or not. No wonder that a child is often not believed when making allegations of rape.

Extent of Problem

Too little attention has been given to the alarming proportions of the problem of the sexual abuse of children because society, in general, is incapable of rationalising that sexual abuse of very young children does in fact occur. Too few professionals including police, medical practitioners and social welfare workers, are equipped with, or they have a low priority in obtaining, adequate skills to be able recognise the indicators, let alone believe, that sexual abuse is or could be occurring within the family unit.

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17 D. Marsden, "Sociological perspectives on family violence", in J. P. Martin, (ed.) *Violence and the family.* (London: John Wiley & Sons Ltd., 1978) p.111.

Too few professionals are able to come to terms with their own sexual feelings and inadequacies to be able to consider the problems of sexual abuse of children. Sgroi[18] argues although sexual abuse is abhorred in the community, it is tolerated; 'It seems to be "too dirty", "too Freudian" or perhaps "too close to home" '.

It is incredible and very unfortunate that too few professionals appreciate the seriousness for proper and adequate medical examinations of children suspected of having been sexually abused. Failure to identify genital, urethral or pharyngeal gonococcal infections in children[19] not only fails to provide the children with corroborative evidence of a sexual abuse but could also place the health of the child in jeopardy. The problems caused by gonococcal infections are many times worse in children than adults.

The first principle that must be adopted in order that we can adequately deal with the complex issues of child sexual abuse is for the community, generally, and the helping professionals, in particular, to accept that child sexual abuse is a vast problem in our society today. Martin[20] points out three levels of intervention. Firstly, nominal, or noting the existence of a problem at that low level and merely assuming that there are adequate services to meet the problem; Secondly, procedural, by the establishment of special services and procedures to handle the problem — the New South Wales Police Child Mistreatment Unit and the Department of Youth and Community Services Child and Family Crisis Service (Montrose) would come within this category; Thirdly, material, providing the economic resources in order that the policy can be properly carried out. In New South Wales, at the present time, due to the economic recession only an *ad hoc* band aid patchwork system exists at the procedural level.

This observation is supported by Waterlow[21] when he suggests the three levels of prevention. Tertiary: recognition, treatment and prevention of further abuse; Secondary: identifying suspect parents and families to protect at risk children; and, Primary: identifying suspect parents and families at an even earlier stage. (For several years research has been carried out at the Royal Hospital for women, Paddington, into primary prevention with pre and post natal motherhood classes but to date no findings have been published. I am aware, however, that a number of vulnerable parents have already been identified at that early stage.) Recently I was personally involved where a child, born to psychiatric drug dependent parents, was identified as being at risk at birth, however, nothing was done to intervene. It was not until three further notifications

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18 Sgroi *op. cit. p.xv.*

19 *ibid.*

20 Martin *op. cit.*

21 W. G. Waterlow "Identification of Abuse — In the Hospitals", in R. Smith and V. Meyer, Conveners, *Conference Papers: Interdisciplinary Conference on Child Neglect and Abuse.* (Sydney: D. West, Government Printer, 24-28 September, 1980).

that the case was referred to a specialist unit for assistance and the child was subsequently removed from the family.

Education in the Community and of Professionals

Although numerous sexual abuse training workshops have been carried out throughout New South Wales during the past two years only a minute proportion of the 20,000 plus helping professionals are skilled enough to be able to identify or intervene with sexually abused victims, the perpetrators and their families. A vast education and training programme is of paramount importance, not only for the helping professionals but the judiciary, legal officers, educators, corrective services personnel and the community generally in order that appropriate identification of the problem can be recognised and intervention commenced, at an early stage, for the protection of children.

Children must be educated that their body is a very personal thing and that no person has the right to interfere with it. This education programme must be commenced at a much earlier stage in life than at present as the vulnerable period is from eight to twelve years of age. In some instances sexual abuse occurs at an even earlier period in life. This education programme must be carried out by the parents or counsellors specially skilled in child development.

Society must be aware that a vast number, if not the majority of children who are sexually abused are of an age when their evidence will not or can not be accepted on oath by the courts. It is essential that serious consideration be given to adjustments to the law or alternative methods of having the evidence of child victims introduced before the court. As previously stated the norm is that only the victim and the perpetrators are present in these types of offences, and it can be clearly seen, in these circumstances, that the rights of the perpetrators are considered before those of the victim.

Innovative methods are being looked at in other countries such as America, where the child gives evidence before the judge in his chambers in the presence of the prosecution . . . and defence attorneys in an informal manner and the proceedings are screened in court on closed circuit television. Kerr[22] reports other innovations in England, Canada and Israel. By far the most important is in Israel where a youth examiner is appointed on behalf of the child. This specially qualified person is the only person entitled to speak to the child victim and then give evidence in court on such child's behalf.

A further practice adopted in New South Wales is plea bargaining which takes place after a person has been committed for trial. It is worthy of considering updating this principle which is similar to that operating in California where plea bargaining conferences take place and Summit[23] in

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22 M. Kerr, "Legal considerations in sexual abuse — criminal jurisdiction," in R. Smith and V. Meyer. *ibid.*

23 Summit (1980) *op. cit.*

reporting this process suggests that provided the perpetrator undertakes, on recognizance, to leave the family home and participate in therapy both individually and with the family, he will be given a guarantee that he will not be incarcerated for a period in excess of one year. The norm is for the perpetrator to plead guilty and the child is never required to attend court and give evidence against her father or caregiver.

It is essential that research be carried out to determine the incidence of child sexual abuse, furthermore that proper statistics are maintained in all government departments of such abuse. The practice of grouping together adult/child sexual abuse should be terminated. Such statistics should then be published not only in scientific literature but also widely in the media in order that children will realise that no person has a right to sexually interfere with them.

Provision should be made for a communication network (hot line) to be made available for sexually abused children. This network must be staffed with skilled personnel who are not only capable of responding to the child needs but will believe them, and act accordingly.

As well as new education and training programmes for the helping professionals consideration must be given to the following:

(1) Consciousness raising of the public that:

  (i) sexual assault of children occurs within the community in so called "normal" homes;

  (ii) children (certainly of primary school age) tell the truth about allegations of sexual abuse; and

  (iii) "stranger danger" is rare but "uncle, daddy danger" is very common.

(2) Children need to learn:

  (i) that what they do not have to do (be screwed or sexually interfered with);

  (ii) who to tell if it does occur?

(3) Who speaks for the child, and

(4) If a child must appear at court they do so only once (i.e. statement only produced at committal proceedings).

The struggle is between adult and child and we must accept that this struggle is unequal, therefore we must always ensure that the child is not left to carry on this struggle alone and unaided.

APPENDIX 1

NEW SOUTH WALES POLICE CHILD MISTREATMENT UNIT REPORTED CASES OF CHILD SEXUAL ABUSE 1-1-83 to 31-3-83

Age	*Sexual Intercourse*		*Other forms of Sexual Abuse*	
	Male	Female	Male	Female
3-5	—	—	—	5
6-8	—	—	1	7
9-11	1	2	2	3
12-14	—	—	—	6
15-17	1	2	3	—
	2	4	6	21
				TOTAL 33

APPENDIX II
EXTRACTS FROM NEW SOUTH WALES POLICE ANNUAL REPORTS 1977 AND 1981

Sexual Offences	**1976**		**1977**		**1980**		**1981**	
	accepted reports	*cleared up*	*accepted reports*	*cleared up*	*accepted reports*	*cleared up*	*accepted reports*	*cleared up*
Carnal Knowledge — (including Carnal Knowledge under 10)	413	394	248	230	150	144	96	97
Indecent Assault Female	464	261	480	262	527	297	243	119
Incest	0	0	4	3	10	10	22	19
Homosexual Offences	330	267	480	262	253	203	212	173
Indecent Assault on Child	159	114	122	89	144	115	62	42
Rape	119	78	154	108	207	129	117	82
Rape Attempts	67	47	47	36	—	—	—	—
Sexual Assaults — Category 1 Inflict Grievous Bodily Harm	—	—	—	—	—	—	4	1
Sexual Assault — Category 2 Inflict/Threaten Actual Bodily Harm	—	—	—	—	—	—	52	23
Sexual Assault — Category 3 Intercourse without consent	—	—	—	—	—	—	128	87
Sexual Assault — Category 4 Indecent Assault/Act of Indecency	—	—	—	—	—	—	269	132
TOTALS	1,552	1,161	1,535	990	1,291	898	1,205	775

PRESENTATION OF PAPER

Detective Sergeant Brian Rope

The paper that I wrote attempted to explore the legal, social and philosophical definitions of child rape and attempts were made to establish a premise that sex between adults and children was wrong. This can also be likened to the theme of this seminar which was "Incest". It is a very narrow description of sexual molestation of children and to be able to establish incest we must be able to prove that actual intercourse took place. We realise that with the sexual molestation of young children, especially in the family, intercourse would only account for probably less than 10% of all sexual abuses committed upon young children.

As a greater community awareness has been created by the media, and the attitudes of the professionals are also changing, a number of innovations have been proposed in the paper for possible changes to the law and also the way in which children are required to act as adults when giving evidence in a criminal jurisdiction. I think it is a ridiculous state of affairs, and this is my opinion, where young children are expected to act as adults to prosecute offenders for sexual abuse, and when I say "act to prosecute" I mean that they are required to give evidence as adults in a criminal jurisdiction.

We have a situation where very few people in this room, including the police, are in fact good witnesses in the witness box. Yet when we look at sexual abuse we expect young children, probably the majority of whom are under 12 years of age, to go into that strange arena, to sit up in the witness box where you have twelve strange adults, the majority of whom are men, where you have all these other people dressed in funny wigs and gowns. Worst of all it is like me here speaking from this platform and you staring me in the face and you are saying "No". The child is mesmerised; the child is, in fact, threatened by the mere fact that the male caregiver in her life, who may be her father, is sitting across looking at her and nodding his head. How many adults can cope with that let alone a young child under 12? Because they are mesmerised they quite commonly make mistakes in their evidence. They quite commonly talk about "yesterday", and in the life of a child yesterday may have been last week, last month, or, in fact, last year. Time for young children is a void, and then we accuse them of telling lies, we accuse them of saying it didn't happen. My experience has been, and I think it has been confirmed by a lot of research, that young children, particularly pre-pubertal children, do not tell lies in respect of sexual abuse which has been committed upon them.

It is a very unfair situation because when we look at these sorts of offences we find that there are only two people present, the offender and the victim. Our laws are structured, particularly in sexual abuse cases, that the evidence of a child of tender years, and I believe that all children under the age of 12 are children of tender years, if it is not taken on oath is required to be corroborated by other material evidence which links the offender with the crime. There have been many times where the offender has said "Yes. I agree that this child has been horrifically sexually abused, but I didn't do it", Medical evidence is part corroboration, but it doesn't in

fact link the offender with the crime, so where does that leave the victim? It leaves the victim in a situation where they can't corroborate what has been happening to them. I think it is very fortunate that the Premier has announced the establishment of a new Task Force looking at sexual assault and I am sure there will be more said about that at this seminar.

When we have such a narrow legal definition of what sexual abuse is all about, I like to adopt Connell* when she suggested that the definition of sexual abuse is the one quoted in my paper (p. 11).

> The involvement of dependent and developmentally immature children and adolescents in sexual activities they do not fully comprehend and to which they are unable to give informed consent. Such activities violate social taboos and often family roles.

That is a fairly broad definition and I think it covers the majority of all forms of sexual abuse. In 1981 when the *Sexual Assault Amendment Act* came out everybody believed that that was the be all and end all of sexual abuse or rape. It eliminated the word "rape" from our laws, but it was supposed to cure a lot of problems. I think the greatest travesty of justice there was the fact that it did not look at children's rights because it was unlawful sexual intercourse. It meant that the Crown was required to prove that it was an unlawful act, and that, in fact, the victim did not consent to the act. That is fair enough if you can be sworn in as a witness, if you are old enough to give evidence to say that you did not consent. There are provisions in the legislation that reckless consent shall not be accepted, but why should we be put to that test. If we look at carnal knowledge under the provision of s.67 of the *Crimes Act* and the victim is under the age of 10, consent is no defence. To me that should apply in respect of all sexual abuse committed on young children, particularly in familial sexual abuse. We should not have to prove that the child did not consent, because the parent being a person having full knowledge of the age of the child and being the guardian of that child should be prohibited from even putting that up as a defence.

It is put forward many, many times that the child did, in fact, consent. I think all workers in this field will accept that children do consent to sexual offences being committed upon them, basically because they know no better, but it creates an argument that all acts of sexual molestation on young children should be consensual, but how does a child consent to something that they don't know anything about? It is very, very difficult to create a law that is going to remove a defendant or a perpetrator's rights, but to me they are placed in a position of trust and if we look at the amount of sexual abuse within our society we look at the long term repercussions of all those sexual molestations committed upon children. We have a problem that is going to be very, very hard to overcome.

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*H. M. Connell. "The Psychopathology of sexual abuse in children", in Queensland Co-ordinating Committee of Child Abuse, Conference Papers: Second Australian Conference on Child Abuse, Brisbane, 21-25 September, 1981, pp 78-83.

I think that all young children should be taught that their body is a very personal thing and that nobody has a right to touch it without their consent, and I mean informed consent. If anyone does that they tell their mothers, or as some research in America has indicated, they come out with this gut scream, which is different from a scream or anger, to say that something is happening to them.

PROTECTING CHILDREN FROM THEIR PROTECTORS

Sandra Heilpern, B.Sc.,
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On current figures, the N.S.W. Department of Youth and Community Services is investigating about 25 new cases per week where children have been notified on the grounds of ongoing sexual abuse of the child, within the child's own family or household. These figures are for the first quarter of 1984. They are continually increasing.

Incest is not a problem in isolation. It occurs when there are serious personal, relationship and social problems which at least one adult in the family or household does not know how to solve, and seeks to solve some of his/her problems by entering into a sexual relationship with a child, or two or more. Not only does this prove to be a really inadequate way of solving the initial problems, the incest itself causes a whole lot more problems.

Despite ongoing incest in a family, children and adults can appear to keep functioning, while at the same time, untold damage is being done to the children. When someone in the family or close to the family becomes courageous enough to tell someone else what is happening, intervention in itself can precipitate a state of crisis for the family. This does not mean we should not intervene. It does mean, however, that we should tread carefully. The secrecy of incest is powerful in maintaining an unhealthy but stable situation. Once the secret is out, each person in the family becomes vulnerable.

Although the statutory responsibility to investigate notifications and to protect children from further abuse lies with the workers from Department of Youth and Community Services, many other "helping" professions become involved, some sooner and some later, e.g. police officers, doctors and nurses, social workers, school counsellors, therapists, lawyers, magistrates and judges.

Incest cases create big problems for workers from all disciplines. As individuals we have problems coming to terms with our own feelings about what is happening to the child victim, and with our own feelings towards the offending adult. The problems for the workers increase as the case becomes a strange mixture of social work aimed at assisting all the needy people in the family, as well as investigation and gathering of evidence to be used in an adversary legal system. There are big problems for workers who have to simultaneously help and prosecute families, and for legal people who have to solve social problems in a legal setting.

It is absolutely essential that we welfare, health, police and legal and other "helpers" do not as the offender has done, solve our problems at the expense of the child victim.

Unfortunately, in some ways, to "protect the child" we expose the child to unnecessary further abuse.

Let me illustrate by presenting to you a story which is, in fact, a collection of bits and pieces from various cases we have been involved with, and I invite you to look for instances where we do further abuse the child and to consider seriously how we as the "helping" professionals can begin to protect children without further abuse.

Late one Friday afternoon (this is a popular time for difficult notifications) a school counsellor rang a local office of the Department of Youth and Community Services to say that she had a 10 year old boy with her, whom she had been seeing as a school behaviour problem for some months. That afternoon he had broken down and cried and told her that his uncle who lived at his place had been sexually abusing him since before he started school. At first it began as games under the shower and fondling at bed time but over the last few years had developed into anal intercourse. He had tried to tell his mother, but she didn't seem to want to hear about it.

Dad was hardly ever home, and young Bradley seemed to be frightened of his dad, who had a drinking problem. The school counsellor had a problem in that Bradley was frightened to go home. His uncle had told him that he would "know" if Bradley told anyone, and if he did tell, he would be sent away to a home for bad boys. In this case the school counsellor did notify. Many professionals see the confidentiality of the child's story as a top priority or will not break the confidentiality of another family member. When the YACS officer came to school to see Bradley, Bradley told his story for the *second* time that day. Two YACS officers took Bradley home. Mum was home, Uncle was home, and it seemed that Dad, who was Uncle's brother was away. No one was too sure where he was or when he was coming back.

The YACS officers wanted to find out what was actually going on, from, on the one hand, a purely assessment perspective (what is happening in this home to Bradley and possibly to his younger sisters?) and on the more difficult hand, from an evidence-gathering perspective. While seeking information and evidence, the YACS officers also needed to be supportive and non-judgmental to these adults. This was the first meeting of what would probably become a long worker-client relationship and it was essential to establish rapport and trust. Somewhere else in the hands of the YACS officers was the big problem of whether Bradley would be safe in that household that night and how about the young sisters — were they also being sexually abused?

As the long interview progressed, several points became clear. Mum and Uncle were living in a de facto relationship which in itself had big problems. All three children were being sexually abused to some degree but it was difficult at this stage to get precise details. Arrangements were made for Mum to accompany the children and one of the YACS officers to the Children's Hospital for medical examination and for a police officer from the Child Mistreatment Unit to meet them there. Fortunately for these children, the medical staff at this hospital were experienced in examining sexually abused children. The children were examined with concern and sensitivity and without instruments. There was unusually large

dilation of Bradley's anus, and the vaginas of both the little girls were inflamed.

The police questioned the children at the hospital, and for Bradley, that was the *third* time that day he had told his story. Fortunately, the doctor and hospital social worker had not asked too many questions, as it may well have been the *fourth* . Bradley will have to tell his story again and again to the many lawyers who will enter his life.

All three children were pretty tired by this late hour, but the long night was far from over. The police accompanied the YACS officer and the family back home so as to interview Mum and Uncle. There was enough evidence from this interview to give rise to serious concerns about the safety of the children in that house for the rest of the night. There was enough medical evidence for an appearance at children's court next Monday morning, but not enough evidence at this stage for an arrest of Uncle.

The Department of YACS does not have the power to remove uncles, even if Uncle were charged then and there, he would probably get bail, and if not, could appeal against a non-bail decision. The police did not have enough evidence to lock Uncle up. As there were no relatives or friends who could take the children, all 3 children were taken to a receiving home, perhaps for the weekend, perhaps for longer, depending on the court's decisions or lack of decisions.

As it turned out some six months later, Bradley aged ten, Louise aged six and Paula aged four, are still in the receiving home with nine other children whose short lives have held similar or other horrors and who are being "protected" by the Department and by the court system. Sexually abused children are difficult to place in a foster family, especially three at once, not only because they are so damaged, but because they can acquire sexually acting out behaviours which can over-test the patience and tolerance of the kindest and best intentioned families. It is felt that in these cases, that it is important to keep the children together. They have lost their home, their parenting (which is hardly ever ALL bad) their school friends and teachers, the kids in the street, and their personal space and possessions. At least they should not lose each other.

But let us return to the children's court on the Monday when the case first came to court, and let us take a few minutes to look at the adults who play major roles in deciding what is to happen to these children. Most important is the magistrate. Does he/she believe the statements made by the children to the police or YACS officer? Is Bradley more believable because he is ten years old than Louise is at six years old? Is it necessary to have an expert witness to say that a six year old does not lie about sexual abuse? Can you get such an expert witness anyway? Actually the Bradleys of this world are for some extraordinary reason more believable than their 14 year old female counterparts who have run away from repetitive situations of rape and are then labelled "uncontrollable". Is the medical evidence of inflamed genitals enough for the magistrate? At least in this case there is some medical evidence. How about cases where children are coerced into oral sex, or into masturbating adults?

There are usually three separate lawyers involved in the children's court, one for the child, one for the parents and one for the Department — a three-way adversary system. The lawyer for the child is usually a duty solicitor who finds out the facts of the case in the 5 minutes before the hearing, and in some cases is so unused to being focused on the needs of the child, that he/she actually takes instructions from the *parents*. The magistrate can exert some quality and quantity control over the choice of duty solicitors, but most don't. One family of 3 children has had 12 different duty solicitors in their many children's court appearances.

The lawyer for the parents is usually an ALAO lawyer. At one extreme the lawyer can be so experienced that he/she can convince magistrates to return children home for further abuse. At the other extreme the lawyer can be so inexperienced that the confused magistrate, not having enough information on the standard of parenting and care, defers on reaching a decision and keeps remanding the case at one, two or three months intervals.

The lawyer for the Department also works under severe time constraints. There is rarely time to consult with the YACS workers and to interview the witnesses before the hearing.

It is not uncommon for the consultation to take place during the actual hearing. In the country, while the generalist magistrate dons his/her children's court hat, the local police prosecutor, many of whom have little experience in children's law, represent the Department. If anyone needs truly expert help it is the child victim of incest in a small and usually conservative community.

One of the reasons for everyone's confusion is that all three lawyers do not have a clear idea of what evidence is required to establish a case. It varies from magistrate to magistrate and from time to time with the one magistrate. Some YACS officers will cross geographical court boundaries to obtain a magistrate who is better informed and more consistent. One magistrate, for a few months, decided that it was relevant to apply to his children's court, a provision from the *Justices' Act* which ruled out evidence older than six months, and then with a little help from an appeal, decided that it was no longer relevant. Meanwhile, there were big problems for the YACS officer who was bringing a seven months pregnant incest victim to court.

Anyway, why are we all sitting back, waiting for the magistrates to collectively reach a decision on what does constitute evidence for sexual abuse of children? Perhaps someone should be telling them. Perhaps we should be establishing a group of people with experience and expertise in this field to liaise with magistrates and to work out some common parameters and guidelines.

Ideally, YACS officers look to the children's court as a casework tool. It can provide a forum for putting forward the evidence for establishing a case, and for recommending decisions for the safety and protection of children. It can be a validation of parents' genuine undertakings to change their behaviour so that their children are safe. It

can provide workers and families with a legal framework and solutions which are in the best interests of the child.

YACS officers cannot look at the children's court to fulfil these roles in incest cases because the courts are too inconsistent, because confusion leads to endless and often unnecessary remands, and because the whole incest topic brings up in all the players a whole lot of unresolved emotions which get in the way of rational decision making. Multiple remands and recommendations made on an ignorance of what is best for the child have resulted in tragic consequences for children and their parents. While the children's court attempts to protect the child, adult courts deal with the accused. Let us take a few minutes to look at what happens to the child incest victim in the adult court system.

Bradley's uncle pleaded not guilty to various charges of sexual assault. Bradley took the stand, in the witness box, faced his uncle, and faced examination and cross-examination. There were three separate hearings altogether, and several adjournments on sound legal grounds. Adults find this sort of stress very difficult to deal with. For children, it is a prime example of yet another abuse — legal abuse. Children should not have to testify against the parent or parent figure in their lives. The child victim of incest is already wearing the adult's misplaced guilt, without the legal system endorsing that guilt by the very clear but unspoken statement: "You are the reason for HIM being put away".

Children should not have to pit their memories about far distant events against the clever cross examination skills of clever lawyers whose main and legitimate aim is to win for their clients. By the time some of these cases come to their final hearings, years can have elapsed since the original disclosure and many, many years since the first offence. One twelve year old girl actually had her testimony interrupted while a decision was handed down to stand over the case for seven months. If children do have to testify in court, once should be enough. While it is conceded that the legal processes themselves have set rules and set procedures often for very good reasons, it is also being suggested that we change the rules so as to protect the child witness from further abuse.

The present legal system is abusing the children, and for all that, is not even protecting the children from further abuse. Undertakings are being taken by offenders to stay away from the child victim, and parents are undertaking to protect their children from the offender. But, in many cases, these undertakings are totally unrealistic. We are dealing with highly dysfunctional adults who have extreme difficulty in setting limits on their own behaviour. We are actually setting some children up for further abuse. One teenage girl, whose step father was serving time for prolonged sexual abuse of all three children in the family, was actually before the children's court on a complaint of being exposed to moral danger because of her resulting promiscuous behaviour. Needless to say, while the step father was in prison none of the child victims received therapy. Neither, of course, did the offender, nor the mother who laid the complaint against her fifteen year old daughter. Sometimes it is different children we are setting up. One offender was let out on license after the sexual abuse of a child, lived with another family where he sexually abused a boy and a girl, was

granted bail, and went home to the same place. Of course, the option is to remove the children and take them before the children's court, but, as we have already seen, that option is often small comfort.

The problem of incest is not new. What is new is the expectations that we can do something about it — that we can protect the child from further abuse; that we can repair the emotionally damaged child; that we can treat the parent who offends and the parent who doesn't want to know about it; that we can rebuild child parent relationships from tatters; and that we can do all that with the back-up from the children's court and the criminal justice system. We are using old tools to break new ground and we are wondering why it is not working. It's time we stepped back a little to have a look at what we are doing, and began to look at new and creative ways of meeting this most delicate of society's problems.

INCEST: THE VICTIM AND THE LAW

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Introduction

This paper will be restricted to describing the ways in which the legal system itself constitutes part of the problem of incest. By incest I mean any sexual behaviour imposed on a young person or child by a male (rarely a female) taking advantage of his position of trust, responsibility and power within the family. Sexual behaviour covers a range of behaviour from snooping, peeping, kissing, fondling, verbal suggestions, cunnilingus, fellatio to penetration. Families can mean children with two parents, one parent, uncles, grandfathers and mother's boyfriend. It can be a one off event but it will more likely be an ongoing situation.

Clearly this is not the legal definition of incest. This is because the restriction of the legal definition to mean actual sexual intercourse only accounts for a small proportion of the total range of sexually abusive behaviours. Furthermore the sexual abuse of children in families often involves people who have the same type of trust, responsibility and power as parents do, for example uncles, *de facto's* and step parents.

I am speaking not only as an experienced worker in this area but also as a victim of an incest experience. To the extent that I appear emotional about this issue, I am and I make no apologies for it. It is through my definition and description of the problem that the victim's perspective will emerge. In the main I will argue that the legal system reaffirms the social order in which incest is embedded, that is patriarchy, and in that way maintains its destructive and shattering effect on women. In addition the practice and procedures which the legal system follows and upholds add further to the shattering of their lives.

Background

Decriminalization of incest is not being advocated, however. Incest is a social injustice, one for which the adult is fully responsible. The statutes have the effect of proscribing the behaviour and the relationship as wrong; to remove them from the statutes removes that proscription. Most victims experience some relief from the trauma of incest in knowing that they have been wronged and in having that belief formally validated by society through its laws.

The obfuscation technique of removing the legal sanctions removes also the political and social context of the act or behaviour and locates it in an individual context. This then opens the way for incest to cease being seen as exploitive and bad behaviour, and instead, to ascribe it as sick or mad behaviour. It flows nicely with the trend to remove criminality generally from crimes within the family and to designate that behaviour as an illness. In this process responsibility for behaving in an abusive and exploitive way is removed from the adult male and spread around to others as the dysfunctional family including the precocious and seductive

daughter and the absent and colluding mother. They can then all enter treatment, the assumption being they should all be cured.

I would like to digress to look at this assumption and what it means. Within this society the family is a set of relations that privileges men over women and children, that is, the father over the mother and child. If it "functions", it does so at the expense of women and children. The dynamics of incest rely on this construction of the family and until that construction alters in favour of women and children, incest will continue to occur. This is why "treatment" needs to incorporate restricting men's power in the family. Incest will continue to occur until the social relations in which it is embedded are changed. Until that happens, interventions at both the treatment and preventative level should be based on restricting men taking up the power they have in families.

The aims of most current interventions are to cure the man and reunite the family. I reject these aims on the basis that it is impossible to create a "new man" until the social relations of the family change. It is inappropriate then to have as a goal, the reunification of that family. What can be done however is to restrict men's option of taking up power so that the risk of incest reoccurring is reduced and so girls and women feel they can defend themselves.

There are four ways in which this can be achieved: through legal reforms; through behavioural changes in the individual; through empowering women and children by restoring the mother-daughter bond and improving the status of women; and finally by making the community more aware. So it is within this context and within that purpose that legal reform should be located. If the legal system is to assist in controlling the behaviour of the man, and to strengthen the children so they are less vulnerable, then reform is essential. As it currently operates the man's behaviour continues unchallenged while the child is forced to remain vulnerable and silenced. To right this balance then changes need to occur in the actual statutes, in the procedures and practices surrounding them and in the attitudes of those in the legal system.

The Statutes relating to Incest

The statutes themselves need changing to eliminate discrepancies and to introduce reforms that reflect the reality of incest rather than what the lawmakers have previously imagined was the reality. Even at the level of definition, we can see that currently exists is both incorrect and inadequate. Another discrepancy that surrounds the law, that illustrates the need for reform, is the discrepancy arising in the notion of consent. In ss. 67 and 78 (that is the carnal knowledge and incest sections) consent is now allowed as a defence, a stand I would support. The notion of consent when applied to the relationship between a child and an adult, especially where that relationship is overlaid with all the other issues that exist between a parent and a child, is ridiculous. But in ss. 61D-61G (the new sexual assault sections) the notion of consent is at issue. The onus is on the prosecution to prove the complainant did not consent. The victim is put in a position where her evidence will have to show this. So to avoid consent being at issue, ss. 67 and 78 should be used but the difficulty is that ss. 61D

and 61G cover behaviour that is sexually abusive but is not included in ss. 67 and 78, for example the indecent assault category. Sections 61D and 61G also allow for offenders who are not blood related but who occupy the same position of trust and power as a parent, e.g. step father or mother's *de facto*.

The victim is in the position of having to argue that she did not consent if ss. 61D or 61G are used or not getting it to court because the behaviour, while sexually abusive and committed by her father, did not involve sexual intercourse and so does not come under the carnal knowledge or incest statutes.

Another discrepancy which deserves particular mention is the requirement of s. 78 that the sanction of the Attorney-General must be obtained before a prosecution can be commenced. The effect of this sanction, I suspect, is that the charge is rarely used and other indictments are laid. The consequence is that incest remains hidden behind the veil of the more general sexual abuse statutes. Thus affirming the belief that families are safe places for children and that sexual abuse is only practiced by outsiders. It establishes that the family is inviolable and only able to be intruded open after the consent of the Attorney-General has been obtained. The reality that the vast majority of sexual assaults against children are committed by men in a position of trust and power over those children is obscured and is thus allowed to continue unchallenged.

The discrepancies in the law itself also have another effect that is on the number of cases that actually get to court as compared to the number of offences that are actually committed. The law is failing absolutely in even beginning to deal with this problem. If we accept the very moderate estimate that 10% of children are victims of incest, then in this state with its 1.5 million children, there are 150,000 children who are victims of incest. But it goes further than that when you consider that they are abused over a period of time. It is not inconceivable, in fact it is very moderate, to suggest that, allowing for 6 offences per child in one year, there are nearly 1 million offences committed in one year — of these probably less than 1,000 would end up in court. It certainly makes a farce out of the notion of justice. In the face of such inadequacy on the part of the legal system it becomes almost irrelevant to discuss the problems in the court room given it is only dealing with such a small number of actual offences committed. So the silence and denial continue, set up and maintained by the very system that is meant to ensure protection to the victims. Currently it is only protecting the offenders.

Problems in Procedure

The procedures within the law add to the problem and further ensure the victim is silenced. I would like now to describe some of these procedures. Perhaps one of the most off-putting aspects of reporting an incident or incidents of incest is the time that it will take to finally be heard. It is quite feasible for a child to give her statement to the police and still be waiting 18 months later for the trial to be heard. In that situation it is quite unrealistic to expect a child to remember the one or two incidents cited in

the indictment in the detail that is required. This is made more difficult when the context in which she presents her evidence is taken into account.

The children usually forget a lot of detail which to them does not seem important but is to the court. It allows defence counsel to undermine them. For example, the child in the committal might have said she was wearing a dress at the time of the alleged offence but in the trial might say she was wearing jeans at the time. Defence can then harass her about which was correct and use her confusion to undermine her credibility as a witness. In point of fact, the alleged offender has more than likely committed so many offences against her that she has worn jeans, shorts, skirts, bathing costumes, pyjamas and every other possible item of clothing that she possesses.

The time delay also prevents the child from resolving the emotional trauma she has experienced. The court appearances mean she relives the experience again in the courtroom. While waiting for the trial, the guilt the child is made to feel and feels for disrupting the family increases. It also allows more time for other people as well as the alleged offender to pressure the child to recant the allegation and further increases the child's guilt. The child is left out on a limb; she is made to suffer for having spoken out against a crime in which she is victim. While it continues to take so long to bring the case to court and while the legal procedures to keep the offenders separated from the child so they cannot pressure her into recanting her story are not used, then the legal system itself is failing to protect the child.

The failure to prepare the child for the court appearances is a further block she has to surmount. The Crown's failure to meet and establish a relationship with her prior to her court appearance makes it even harder in the courtroom. The Crown is potentially a friendly face, if they take the time to get to know her. Often the argument that the witness is being coached is used, however establishing a relationship with the child does not have to mean she has been coached. The failure, on the part of the Crown, to form a relationship with the child means she sees all the faces in the courtroom as intimidating and threatening. She doesn't know who in the room is on her side and who is not. This is made worse if the instructing officer fails to prepare the child for the trial. Many lawyers make the assumption that the child would not understand so don't explain the procedures or what to expect. Very few children have ever seen inside a courtroom, or know what roles people assume. Consequently children can appear in court quite unprepared for what is to happen. The impact of what does happen is felt by them for some months after the event. Children can understand court procedures, they can understand the different functions people perform, if adults care enough to take the time to explain, in language they can understand, what is going to happen. Given the child is the main witness, it is negligent and contradictory that the Crown fails to do this adequately before the court appearances.

Support should also be available for the child in her court appearances. In introducing the new sexual assault legislation (ss. 61A-61G), the Attorney-General recommended that it was desirable for a support person to be in court while the complainant was giving evidence. It

should be legislatively made mandatory in all cases relating to the sexual assault of children and not remain just a recommendation in relation to ss. 61A-61G. But it is not just a question of support being available, it is how that support person operates. Currently there is not provision for the support person to sit in the body of the court and he/she has to sit in the gallery. The witness ends up feeling as if she has no support anyway. The child is left alone to face a room full of middle-aged men, some of whom are wearing funny clothes, one of whom is her father, most of whom speak loudly and ask questions in what seem like angry voices. She feels alone, intimidated, and as if she is going to get into trouble. To top it all off, the one person she was told she could rely on is stuck up the back where she/he can't be seen anyway.

The mother is not in a position to be that support person. If she is giving evidence, she cannot be in the room while another witness gives evidence. If she is not giving evidence it would usually be because she is unable to support the child. It will only add to the child's distress if she is present. If the child is to be placed in the position of having to appear in court, and be subject to cross examination, then ideally the support person should be the child's counsellor: someone whom she trusts and who will help her deal with the experience afterwards.

The unsavoury conditions under which she gives her evidence are not restricted to the distance between her and her support person, but extend to the actual geography of the room, the waiting area, and who else is present in the court room at the time. She is made to give her evidence in front of the man she has accused. This is difficult enough for adult women, let alone for a child in relation to her father. Victims of incest already feel responsibile for disrupting the family and betraying the secret. Then, to have to give their evidence in front of the alleged offender only increases that guilt and fear. As a therapist I learnt long ago how damaging it was to make a child speak of the abuse in front of the angry father who has not yet taken responsibility for his behaviour.

The acoustics of court rooms are usually bad, with the witness box situated in such a position that it is between the judge and the jury. It makes it very difficult for a child to be expected to speak loudly about intimate and frightening details in order to be heard by both at the same time. The child is probably sufficiently intimidated that she will speak even more softly than usual. Failure by the legal system to provide for her to give her evidence in a more suitable place further mitigates against her, and may make her appear unsure of her evidence. It is also quite possible that the chairs in the witness box will be adult size and thus will be too low for her. Consequently she will have to stand while giving evidence. This can often take some hours. This would not be tolerated, for example, when the alleged offender was in the witness box. The other difficulty about the conditions under which she appears in court is the inadequacy of witness rooms for children. The rooms tend to be bare and stark, with no toys or activities available. This only adds to the apprehension the child already feels.

In a way, these preceding complaints would be made redundant, if the justice system was able to make the innovative changes to court

procedure that have been instituted in other systems. In Israel, for example, they have introduced the practice of appointing a Youth Examiner. The Youth Examiner becomes the one able to speak on behalf of the child and give evidence on their behalf.

But is is not only the conditions under which the child has to give her evidence that give cause for complaint, but the requirements of evidence as well, most of which place quite unrealistic demands upon children. Perhaps one of the most difficult is the requirement that the child speak only of the offence as charged in the indictment. If, as is usually the case, there has been more than one incident, then the child finds it hard to understand the parameters of the indictment. Furthermore the child may not have been told by the Crown to remain with that one incident. If she goes outside the particular charge in giving evidence, the trial can be aborted. For example, if she replies, in answer to a question: "What did he do then?", "He mopped it up with a hankie like he always did", then the trial can be aborted because she has referred to incidents not cited in the indictment. The Crown must lay the ground in the beginning of the trial by stating that other offences will be referred to in order to prevent the trial from being aborted.

Another difficulty experienced by the child is the requirement that she speak in the first person. This is very difficult for an adult, let alone for a child. Often the child has to be continually reminded of this and such requests from the judge to speak in the first person will often be interpreted by the child as a criticism. A difficulty related to this requirement is the expectation that the child will take on the alleged offender's mode of speech and this can be particularly distressing if there also has been verbal abuse. (For example, having to repeat "I want to stick my big willie up your wee wee.") It is difficult for a child to have to report a conversation word for word from memory, especially when children try hard to forget such frightening incidents.

There is also a common belief that if the complainant delayed making a complaint soon after the incident under consideration, then she will have had time to fabricate the story. This dovetails nicely with the myth that children lie and make up stories to get back at their parents. Yet the nature of incest and the dynamics which operate, act precisely to ensure that the victim will not make a complaint soon after the incident but will keep quiet about it, often for years. This has been modified under ss. 61A-61G. The judge is now required, if defence raises it, to give a direction to the jury in relation to the lack of complaint, that there may be good reasons for the delay in making a complaint, and that the lack of complaint does not indicate that the allegation is false. But this requirement does not exist in the carnal knowledge and incest statutes, so that the defence in these cases can infer that she had time to fabricate the story. This cuts across the reality of incest, as it is precisely in these family situations that the silence becomes understandable, and the norm rather than the exception.

In addition there is the requirement of corroboration. This means that the child's evidence must be backed up by someone who fits the requirements of the court. This is someone who is able to take the oath and understand the meaning of the oath. If the child is affirmed the judge must

give a warning to the jury that it is dangerous to convict on the uncorroborated evidence of the child. Consequently, if the child gives unsworn evidence, and the judge gives the warning, the jury generally takes the hint and declares the accused "not guilty". This plays on the myth that children are unreliable witnesses who make up stories about incest. Yet in the experience of most people who work in this field, it is extremely rare for a child to fabricate stories about incest. The requirement of corroboration is generally interpreted by the child as their word not being good enough; they experience not being believed yet again.

Where corroboration is likely to come from the mother, then compellability is at issue as well. Before cross-examination of the mother takes place the judge is required to tell her that she does not have to answer if it is incriminatory of her husband. This has the effect of forcing her allegiance to her husband even more, and it reinforces her feelings of responsibility to her husband and her guilt if she speaks out. If compellability were removed in relation to incest, it may be that mothers would welcome the opportunity to speak out without fear of reprisal and blame from their husbands. Compellability acts to reaffirm the husband's power over his wife to suppress the allegation, and to make it difficult for mothers to adopt the protective stance toward their daughters, which society nevertheless expects them to adopt and maintain.

There is also the problem of what actually constitutes evidence. It seems at times that this is determined as much by myth as by the reality of incest. The court only looks at a narrow range of evidence and events. It does not consider behavioural indicators as relevant to the indictment. At the same time that the courts rule out behavioural evidence, psychiatry uses precisely that as evidence of a disorder. Why is it that the Crown is unable to present symptomatic behaviours as evidence of a disorder, that is, that the incest occurred?

Paradoxically, that same behaviour is used by the defence to undermine the allegations. For example, sexual acting out behaviour, which is a common reaction to having been sexually abused, is more often used against victims by defence counsel. Through the incestuous experience, victims learn to only relate to men sexually. They come to believe through this experience that men are only after sex and that they, the victims, are only good for sex. This behaviour also reflects the victims' low self esteem, feelings of self disgust and their inability to trust others. Yet is is turned around and used by the defence to incorrectly suggest that the victim, through her sexual promiscuity, must have seduced her helpless father. Alternatively, it is suggested, again incorrectly, that she was so promiscuous that any man could have been susceptible to her apparent provocation. This dovetails with the widely held belief that adolescent girls are little "Lolitas" out to seduce their unsuspecting and helpless dads, who are rendered incapable of resistance by the strength of their daughter's seductiveness.

Medical evidence is never affirmative, and is always presented in the context of only being consistent with the allegation. Of course, the first thing that is asked is if it is also consistent with masturbation or other

sexual play. Medical evidence can only prove the offence was committed, and not who committed it.

The court then only looks at a very narrow range of evidence, and rules out the notion of an ongoing abusive situation, and looks only at the most recent incidents. It is difficult to introduce the notion of a course of conduct on the part of the alleged offender. This denies the reality of the abuse where this has occurred over time and gives the court a false picture of what has actually taken place. It cuts across the child's notion of fairness and revenge. For example, it is unfair if you have been raped once a week for two years, not an unusual situation for some victims, to have him only charged on three out of the 104 actual incidents. Imagine the outcry if the North Shore rapist had only been charged with three out of his 39 offences. Yet that is the situation that faces most victims of incest.

Defence Tactics and Victim Blame

Then, of course, there are the tactics that the defence use in presenting their case, some of which are legitimate and some of which should be challenged, particularly those tactics that rely heavily on the myths that surround incest. Defence often paint the child as a precocious seductress. As I said earlier, this behaviour usually affirms that the abuse took place rather than that she seduced him. This line of defence remains unchallenged in the court because of the prevailing beliefs about women, in particular that women can only be virgins or whores and that adolescent girls are rampantly seductive. I wonder how often the precocious seducer is used as a line of defence when it is a boy who has been anally raped by his father.

The defence often seizes on evidence of other relationships that the victim may be having as an alternative explanation for the evidence presented. Having another relationship does not stop the incest from occurring. Defence often find some aspect of the child's behaviour with which to accuse them of only making the allegation out of revenge. While most victims do seek revenge, they usually attempt it by staying within the law and taking the matter to court. It is a hollow irony that that court then turns around and accuses them of being malicious and vengeful.

Another quite common tactic is to paint the alleged offender as having been quite strict with the girl because of his concern for her moral wellbeing. He is presented by the defence as a model parent and her allegations are then logically an attempt to get back at him for his strictness. It is probably true, in fact, that he is quite strict with her, because he is more than likely quite jealous when she starts to want to establish normal adolescent peer relations. His strictness is also often motivated by fear that the girl may disclose the incest as she develops a social network outside the family. Alleged offenders, therefore, often endeavour to secure their dominant position by socially isolating the members of the family from the outside world.

If a victim gets angry while giving evidence (and given the way they are treated and what they have suffered, they have every right to be in a rage), then this anger is used by the defence to make the point that she is

getting back at her father. The Crown never responds by questioning why anyone would go through this process just to get revenge. The court is one place where many victims feel that they can be righteously angry and where the wrong can be seen to be righted in a public way. To then have this justifiable anger used against the victim is an act of betrayal by the very system she has put her trust in.

There are indeed many contradictions in the current system, which do not seem to be challenged by the Crown. For example, where alleged offenders are painted as model parents, it is never asked how, then, the child of such a parent is vengeful, nasty and promiscuous.

Often the defence attempts to portray the girl as unreliable and of poor character, using, to support this, such things as behavioural disturbances. This is a misleading reversal of the situation as behavioural disturbances are a result of the abuse rather than the cause. If aberrant behaviour were a cause of the abuse then more boys than girls would be abused given that the ratio of boys presenting to child psychiatric services is 4 boys to every 1 girl. In incest, it is estimated that 4 girls are abused to every 1 boy.

It almost seems that, by allowing the defence to use such tactics in their case, judges are concerned that they may be censured by higher courts for overcontrolling or intervening too often, in the event of an appeal.

If the child has survived all this, and the jury retires to consider its verdict, they can be sure that the jury will take with it the same myths about incest that have been present through the entire legal process. Similary, in sentencing, the judge relies heavily on the myths about offenders, for example that they are deviant or sick. While the list of individual abnormalities put forward to explain the offender's behaviour is quite long, it is also at times quite contradictory. (e.g. that they are oversexed; that they are undersexed.) While no one would deny that some offenders are abnormal and have severe social problems, research shows that the bulk of them are normal men, the majority of whom are married, hold ordinary jobs and are from all classes and backgrounds. The only consistent point about offenders that emerges is that they are 10 times more likely to be male than female.

Another myth about the offender is that he was denied sex by his wife and that like all normal men he needed it and so was driven to commit incest. Research again challenges the belief that these men are enduring celibacy — most abusive fathers are in fact having sex with their wives. This myth rests on the assumption that incest is a sexual aberration. I do not hold to that assumption. Incest is a power problem with sex as the medium through which it is transacted, rather than a sexual aberration.

The abuse of the victim seems to go on and on and keeps happening in many different forums — the home, Y.A.C.S., the legal system. This is often used as an argument for not prosecuting, i.e. the notion it will be more damaging to intervene than not. While ill-considered or unskilled interventions can be harmful, this is no excuse for continuing to ignore the

situation, for leaving it unchanged, and for declining to develop competency.

Summing Up

What I have been trying to show is that the legal justice system is currently failing to deal with the problems of incest. What is more, the legal system itself constitutes part of the problem. The statutes, lawyers, judges, magistrates, police and juries are operating under the myths which have served to maintain the silence and oppression of the victims. The legal system does not currently recognise that it is dealing with children, not adults, and that these children have special needs. At present the legal system, in only picking up on one thousand of the potential one million incidents of incest, in then putting the victims through the mill, is deliberately covering up a massive social problem. If the same energy, time, money and resources were put into protecting the rights of children that are currently put into protecting the rights of the offenders we, the victims, would not be forced to endure the humiliation, fear and abuse that we currently undergo if we put our faith in the legal system and report incidents of incest. The system, as it currently operates, is making a mockery of the term justice. We have a malfunctioning and inadequate system — what are you going to do about it?

Footnote. I would like to thank Lesley Laing in helping with the preparation of this paper.

INCEST: "WHOSE BABY IS IT?"

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Introduction

About three years ago, I was asked to take part in a brief discussion of Incest on a well known daytime television programme. The arrangements were that a young woman had volunteered to talk in front of the camera about her personal experience in a sexual relationship with her father. I was then to answer some questions about the problems of incest. This occurred after a questionnaire published in the *Women's Weekly* had uncovered the very high incidence of incestuous experiences in the childhood of the women readers of the magazine.

The woman interviewed was seventeen years of age, married, seven months pregnant, and told her story in a flat, but anxious voice. She was not seen full face, but any close relative could have recognised her profile and her voice. As the interview progressed, it became clear that she was desperate for help, that her father had been sexually involved with her since childhood, and visited her in her married home, quite regularly. Her husband did not know of the nature of the relationship, and we realised she was not sure whose baby she was having. She presented her story as if it was happening to someone else, at first, and then seemed gradually, i.e. during the ten minute interview, to realise the enormity of her problem. I was not allowed to see or talk to her, but when I left the studio, she was still screaming and out of control.

On another interaction with broadcasting, I was asked to talk on radio about incest, as part of a regular time slot given generously by this station, to the Wayside Chapel. The first interview went well, but on the second occasion the interviewer became somewhat out of control, and started shouting that everyone who sexually violated a child, should be "six feet under the ground". The objectives of going to air on the matter had been to bring the subject into open discussion and so facilitate the provision of help to families affected. You may sympathise with me, that on both occasions the experience was counter productive, for the community as well as for all of the people concerned.

I am quoting these two episodes to demonstrate several points:-

1. The potential for violence that is uncovered with the discussion of incest.

2. That there is genuine, but mismanaged concern by many people for this problem.

3. No department or organisation in New South Wales has developed a service to provide sensibly for the various members of the family, and for the contingencies that arise.

This is true of Health Commission and medical private practitioners. Legal services are committed to identifying the wrongdoer and punishing. The church organisations seems as confused as the rest of us, and Youth and Community Services are overwhelmed. As Albert Solmit has said, "Too much reporting, and too little service".[1] It seems as though the incest issue is not just being ignored while the participants get into fearful difficulties, but is put, like an abandoned child, into the "too hard basket". So, whose baby is it? Perhaps, at this seminar we can reach a conclusion as to whether incest is a moral, ethical, legal, medical, or community problem, and make some positive steps towards formulating treatment processes that help the people affected.

It is not clear whether incestuous experiences are universally harmful. Clinicians, like myself, have the impression that they are, because the miserable feelings engendered are part of our everyday clinical experience. There is a significant group of people who express the view that childhood sexual experiences are good for children, and can be regarded as "good fun".[2] These protagonists make it clear that it is pleasureable for the adults involved, but they do not acknowledge the fact that, for the children, it violates basic trust between child and adult, and is particularly harmful in this way when the interaction occurs between parent and child. If, as claimed, the child enjoyed the experience one wonders why money is used as a bribe by the adult, as an alternative to violence or other forms of coercion.

Most child psychiatrists believe that the family system in which incestuous experience can occur, is as harmful to the child, or more so, than the actual sexual experience in their childhood. If the whole family system is at fault, then punishing the designated offender is not sensible. The identity of the adult involved determines the degree of emotional disturbance in the victim. By that I mean, brother/sister, or brother/brother sexual interactions produce the least emotional problems. When the offender is the father, the disturbance in the child is greater and when the mother is the abuser, there appear to be severe psychiatric problems in the child. The least harmful sexual interaction seems to be when the offender is a stranger, and that is provided the child is not seriously phsyically injured.

In all these experiences there is a loss of trust between the child and parent, particularly between the child and mother. One of the basic responsibilities of parenting is the protection of the young. When the child is abused, the response in the child is anger toward the mother for not preventing the occurrence, and on the part of the parent, guilt about the failure to protect the child. These feelings occur whether they could be realistically based or not. It seems as though humans cannot tolerate alientation from their parents at any age. In particular, damage to the

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1. A. J. Solmit. "Too Much Reporting & Too Little Service: Roots & Prevention of Child Abuse". G. Gebnur., C. J. Ross., & E. Zigler, (Eds)., in *Child Abuse: An Agenda for Action* (New York Oxford University Press, 1980).

2. *Tharunka* (University of N.S.W.) 13 Oct. 1983.

relationship between mother and daughter is unbearable. This matter is well stated in an article by Henry Giarretto.[3]

It has long been thought that there is a connection between childhood sexual experience and the adoption of prostitution as a way of life. It is not clear whether prostitution is "a bad thing". It has always been with us, and clearly therefore has an important function in society. For the prostitutes interviewed, the connection between the childhood sexual abuse and their profession is viewed as bad, because of the feeling of shame and loss of self esteem.[4] In my own experience, one of the most recent children I have seen, made it clear that she had learned to give sexual experiences in exchange for money, when she explained that her father gave her a dollar for each time she co-operates with him. She added quietly to herself, "And he still owes me $2.00".

Professor Masson's outcry against the psychoanalysts when he was working on the Sigmund Freud archives has explained, and highlighted, the position of traditional adult psychoanalysts in their attitude to incest.[5] I understand that Freud originally found a frequent connection between adult neurosis in women and their declared history of incestuous experience in their childhood. He called this the Seduction Theory, and abandoned it in favour of the concept that the description given by these women was in fact a fantasy. Thus, the exploration of fantasy in the patient rather than reality became important to the psychoanalysts.

It was the radiologist John Caffey, and paediatrician Henry Kempe who brought attention to the problems of child abuse. We are indebted to Henry Kempe for his definition of child sexual abuse, as follows:-

> The involvement of dependent developmentally immature children and adolescents in sexual activities that they do not fully comprehend, to which they are unable to give informed consent, or that violate the social taboos of the family roles.[6]

For the purpose of this paper (as well as for my own belief) I have to regard incest as unacceptable.

Sexual interaction between adults and children occur in most cultures, and are universally seen as wrong and shameful. In nearly all

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3. Henry Giarretto. "A Comprehensive Child Sexual Abuse Programme". *Journal of Child Abuse and Neglect* (1982) Vol. 6, No. 3, p. 263.

4. Mimi H. Silbut and A. M. Pines. "Sexual Child Abuse as Antecedent to Prostitution". *Journal of Child Abuse and Neglect* (1981) Vol. 5, No. 4, p. 407.

5. *See* J. Malcolm, "Annals of Scholarship, Psychoanalysis Troubles in the Archives" Parts 1 and 2. *New Yorker* 5 Dec. 1983 p. 59 and 12 Dec. 1983 p. 63; and J. N. Masson, "Freud and the Seduction Theory, A Challenge to the Foundations of Psychoanalysis" *Atlantic*, Feb. 1984, p.33.

6. H. Kempe, "Sexual Abuse, another hidden pediatric problem". Paper read before the Annual Meeting of the American Academy of Pediatrics, New York, 8 Nov. 1977.

societies incest is taboo. One of the reasons seems to be that incest produces children in a way which confuses the traditional family order. Generations cannot be clearly defined if parents are procreating with their own children. Henrika Cantwell points out that there is a powerful taboo against talking about incest.[7] In view of this fact, I am grateful to the organisers of this seminar.

Incidence

Incidence is of concern to clinicians like myself if the figures provide clues as to appropriate treatment approaches. The increasing reported incidence of all forms of child abuse should be a matter of considerable concern to all those involved with planning health and social services, and to every citizen.

In Australia, our birth rate has dropped so dramatically that the next generation is a treasured asset, not one to neglect and abuse. This is particularly so, in view of the histories of abused children, as establishing them as abusers of their own children, when they become parents. This contamination of behaviour from one generation to the next, occurs whether the abuse is physical or sexual.

Looking more specifically at the incidence of child abuse. I understand that at Montrose, the Sydney Metropolitan Child Protection Unit, they were receiving 1,000 cases reported per month for the first few months of this year, and of these, 3% were for sexual abuse. Compared with 1968-1972, when there were 28 reported cases of physical abuse over four years, this is a remarkable change. It indicates that child abuse has reached epidemic proportions, and is now the most serious paediatric problem. Its incidence is greater than any other single condition affecting our children, apart from chest infections, and most of those are easily treated.

The feminists take the view that in cases of incest the offender is almost always male and the victim almost invariably female. My experience suggests that although there is a preponderance of male over female offenders, and female victims outnumber males, that boys complain of sexual experience with even greater reluctance than female children, and that families where the mother is the offender are even less likely to seek any help, than families in which father/daughter incest occurs. In addition, the feminist approach to this matter is not often delicate enough to be helpful, except when long term physical separation of children from an abusive parent is essential.

The reluctance of mothers and daughters to report incest in the family may be understood, when it means losing not only the breadwinner, but also an important parent to other unaffected children. It is this argument that often determines the child victim's decision to sacrifice themselves, and the parent's refusal to accept the child's story when it is

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7. H. B. Cantwell. "Sexual Abuse of Children in Denver, 1979". *Journal of Child Abuse and Neglect* (1981) Vol. 5 No. 2, p. 75.

told. The Western Australian research states that in reported cases the ratio of girls to boys as victims is 9-1.

For 18 years I worked in a residential unit for severely disturbed children. Gradually the staff and I realised that although the children presented with a variety of strange and disturbed behaviour, many (not all) of them had been sexually and/or physically abused by one or both parents. The complaints which brought the children for help did not often indicate what had been happening to them.

For example, a girl of 12 was referred for rebellious behaviour in school, and for screaming out of her bedroom window at home. The family were involved with a skilled psychologist in a community centre, then a distinguished paediatric hospital, and finally at the residential unit for almost 2 years, before the child was able to trust the adults who were trying to help her sufficiently to reveal that her mother was sexually abusing her. When she resisted her mother's advances, she was beaten with a broom handle. When the patient in our care became strong enough to successfully resist the mother, and to try and gain some independence, the mother transferred her attentions to a younger sister. Efforts to gain adequate evidence for the protection of this younger child, quite failed. The mother was pronounced as not mentally ill by a psychiatrist, and we failed to prove absolutely the abuse of the younger child. The mother herself had been sexually abused as a child. She stated it was by the father. The matter which most distressed her was that her mother had forced her to make a statement about her father to a court, and so to have him punished.

I quote this case to demonstrate the degree of resistance that can be engendered by a family to maintain secrecy. Also that the mother's complaint was not against the father, but against her mother and the legal procedures.

To return to the size of the problem. If Montrose is getting referrals at about 36 per month, for sexual abuse, and if we can expect the same rate of abuse as occurs in the United States of America, where estimates by Giarretto are of 250,000 cases per year[8] by population we could expect 3,000 per year in Sydney. This means that the reported cases are about 10% of the American estimates. These are thought to be well under the level of actual occurrence.

Assessment of the true occurrence of sexual abuse is rendered more difficult by the way in which the families are treated under our present system. These arrangements provide such a horrific experience for the child victim that in my professional role I am prepared to break the law, as it stands, and refuse to report to the appropriate authority most future cases that come under my care. Few parents or relatives would wish their child to experience two years or more of questioning by a variety of professionals, appearance in court twice, and on each occasion to be subjected to cross examination in the form that most barristers would apply to an adult.

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8. H. Giarretto *op. cit.*

Possible Forms of Management

In order to make changes in the experiences meted out to child victims, the existing attitudes and procedures would have to change.

1. We need to discard the notion, that absolute proof of guilt by the suspected offender takes the first priority.

2. The interests of the child victim should be the first consideration, but the needs of all members of the family require understanding and acceptance.

3. The notion that adults are seduced by children, and that these affected children are themselves bad still lingers around. The children feel shame and guilt about the experience, but their helplessness and compliance with adult instructions is inevitable in the dependant preadolescent. The British Association for the Study and Prevention of Child Abuse and Neglect, have made some sensible though tentative suggestions.[9] These are:-
   1. Consideration should be given to facilitating interdisciplinary management and conferencing of cases of child sexual abuse and to promoting effective programmes of intervention.

   2. While the interests of the child should remain the first consideration, there should be a full interdisciplinary assessment of individual members of the family and the family as a group, followed by a case conference with the aim of identifying the needs for legal and therapeutic intervention. This would provide the basis for a co-ordinated plan to be worked out between the family and all the relevent professionals.

   3. Decisions about legal proceedings should be taken in the context of a general approach.

   4. It should be recognised that whatever changes may be recommended in future at a national level regarding the registration of child sexual abuse, (Department of Health & Social Security, 1980), or the development of specific procedures for the handling of the problem, such devices are no substitute for the concerted development of skills and diagnosis, assessment and treatment at a local level.

More detailed methods of therapeutic intervention are suggested by Professor Steward in a paper titled "Group Therapy: A Treatment of Choice for Young Victims of Child Abuse".[10] From a personal communication from her, I understand that she has a number of groups organised for

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9. BASPCAN July 1981. ISBN 0907776003. (Printed by "Northampton Industrial Commercial Workers Co-operative" Northampton, U.K.)

10. M. Steward, Berkley Medical School, California, U.S.A. Paper as yet unpublished.

children who have been either physically and/or sexually abused, with ages ranging from about 3 years to 12 years. The groups run for 6-24 months, and have as their objectives, the development of survival skills in a potentially hostile environment. Skills such as expressing thoughts and feelings in words. Helping the child to learn to say "NO". Letting the child experience caring from adults. The therapists are one male and one female to each group, and include some paediatric interns, psychologists, social workers and paediatric registrars. All therapists are themselves supervised weekly in a group by Professor Steward.

Mr. Heilpern, the Director of Youth and Community Services, has commented that the problem of child abuse must be handled at a community level as it has become too large for a single government department. I would agree, but nevertheless co-operation between the professional bodies and departments concerned is necessary for the protection of the child and to give the therapists some muscle when necessary. Henry Giarretto has outlined a community based programme in Santa Clara County, California, where the therapists are sometimes parents who originally came for help as offenders. This community based programme has developed and functions in much the same way as does Alcoholics Anonymous. It must gain support and co-operation from the police and the courts.

Conclusion

Incest and other forms of child sexual abuse have been with us a long time. Incest is not likely to go away, as long as families exist. Preventative methods as outlined by Finkelhor,[11] take a long time to be effective and we are not sure if there is a relationship between the non involvement of fathers in child care, and the incidence of male offenders in sexual abuse.

What we can influence is the behaviour of professional people after the matter has been uncovered. It is important for the future of the abused child that the medical and legal people involved, as far as possible, protect the child victim from the following:-

1. Harassment and guilt provoking inquisitions by police, doctors and mental health workers.

2. On the part of judges, magistrates and lawyers, it is important that they offer the child an opportunity to understand the gravity of legal proceedings without being intimidated in court, and verbally abused by cross examination.

3. It seems to be the responsibility of the law reformer to look closely at a legal system which at present sanctions and promotes the abuse in court of child victims.

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11. D. Finkelhor, "Sexual Abuse, A Sociological Perspective", *Journal of Child Abuse and Neglect* (1982) Vol. 6, No. 1, p. 95.

4. The lawmakers have a responsibility to consider carefully the full effects of uncensored pornography which has children as participants.

5. To protect the children from continuation of the sexual abuse. The recidivist nature of sexual offenders makes the matter very complex. In addition, the sexual experience for the child often creates in the child seductive behaviour which may be hard on other adult caretakers, such as foster parents.

It is important to realise that the causes of incestuous interactions in one family are not always the same as in another. Not all of the offenders are alcoholic, psychopathic, or psychiatrically ill, but some are. Not all of them are unemployed or "working class".[12] The possibility that there is an actual increase in the incidence of incest has to be considered. There have been social changes of great dimensions in the last two decades, including sexual permissiveness, the frequent changing of sexual partners, so that many children have step parents, and the increase in pornography.

One of the most positive social changes has been the increased freedom with which sexual matters can be discussed, along with a better and more tolerant understanding of sexual needs and behaviours. This means that it should be possible for a group of well motivated professional people of both sexes, to get together and formulate a number of alternative management procedures to help these families. It will require flexibility and the acceptance of some failures. We have some important advantages in our Australian culture in respect of attitudes to sexual behaviour. In general, we are unhampered by the puritanism of North America, and the constrictions of the British class system.

12. D. A. Batten, "Incest — A Review of the literature", *Medical Science Law Journal* (1983) Vol. 23, No. 4, p. 245.

PRESENTATION OF PAPER

Dr Sara Willams.

I agree with the previous speakers that sexual abuse of children, and in particular incest, is hugely unreported and for very sensible reasons. The experiences through which a victim, or alleged victim, has to go, in order to establish the guilt of the offender (and I don't know why that has to happen at all) is sufficiently horrific that few parents who know what would happen would be prepared to allow their child to have this experience. It is also a fairly frightening experience to appear on the media, on television or radio, and discuss this problem as I have stated in my paper (see p???).

Incest is a very difficult subject and I feel that anything that I have to say has been said by the previous speakers. In addition I have just read about the New South Wales Task Force, and I am delighted to see who is on the Task Force and I hope they will develop some methods of helping the families. It is complicated because help is needed not only for the offender and the victim, but also the victim's family and the offender's family.

In spite of being anecdotal, I would like to tell you about the child with whom I was recently involved, because the family's problems demonstrated important points. She was 9 years old and came because she was messing up in school, cheeky to her father, and undressing other kids in school. That should have given me some clues, but I was stupid and I didn't at first recognise her problems. I saw her a couple of times. Once alone, I saw the parents once together. In the second interview and the last five minutes (of what the psychiatrists call the 50 minute hour), the child was able to tell me about the sexual experiences with her father. She had previously told her sister. I taped the interview, having read all the literature which advises to record the first interview, so that the child does not have to say it all over again. I did that, and in the middle of the night remembered I should report it. So I reported.

I cancelled all my patients for the day of the court hearing and drove like crazy to get to the court. When I got there I wasn't allowed in, nor were any other females. This child, who had just had her tenth birthday, was in the witness box. She wanted me there because she saw me as a friend, but no friends were allowed in, but the father's father was allowed in, and he was busy glaring at her. He has been trying to intimidate her before and since. His last letter of intimidation was that when he died he would come back as a spirit and murder her mother, and that is a very frightening thing for a child to have to tolerate.

The child came out of the court a sobbing, howling mess, and she has not been able to get into good shape since.

That was just a magistrate's hearing. Then a year went by, while we waited for the case to come to trial, and she had to go over the whole thing again, and as the last speaker said, she was not allowed to repress, she was not allowed to forget. At the last minute the father pleaded guilty, so she did not have to repeat the performance in front of the judge and the jury,

but that was just luck. I had tried to get him to plead guilty, but the decision was made finally by his legal advisors.

Now, you can understand the father's family need treatment — not just the father, not just the girl, not just mother, because the mother and child are alienated from each other by this time. All the other speakers have said that we have to change the legal situation, but we also have to provide many more therapists and develop skills in people to help these families. I have been trying to look at alternatives. We had a visiting Professor from Berkeley, California, here recently called Margery Steward (see p.?? of my paper). She is the Professor of Psychology in the School of Medicine and runs a system of group therapy for children aged from about 3 up to 12, to provide them with survival skills in a hostile environment. That seemed to me a really very sensible thing to do. She uses interns, registrars and medical students. In the United States they use their medical students extensively for therapy, and it is a very good experience for the students, who come to graduation with a lot more skills than I think some of our medical students have. I don't want to discredit the Australian medical course — it is improving all the time — but it seems to me this is something I certainly didn't get in my training, and I would have been very grateful to have it.

Mr. Heilpern, the Director of Youth and Community Services, says that the number of referrals that have come in of all forms of child abuse are now so huge that it cannot be managed by a single department, and he sees it as a community problem. The person who seems to have developed a system of community help, is Henry Giarretto. His Santa Clara County Program runs like Alcoholics Anonymous, where they use parents and adults who were abused as children as therapists. It seems to me that that is a possibility, but again we must have very experienced people. We need very tolerant and caring people to supervise these forms of therapy. The therapists themselves need help because of "burn out". "Burn out" is a very real thing which emerges when professionals are working with such disordered families. The symptoms are subtle at first and do not appear to be related to work. The therapist becomes callous and uncaring or sometimes depressed and too emotional. The person bursts into tears, or develops unprovoked quarrels with husband or wife.

I hope that the Task Force will not only look at legal matters, but will look at a series of different forms of treatment. I respect the last speaker, but I just don't think that incest occurs only because of a patriarchal society. I have known a number of mothers who have sexually abused their children, but in thinking about this I wondered if it was because *they* were sexually abused in a patriarchal system. I will have to think about this carefully.

It is often difficult to identify the abuser in the family. The psychiatric disorders in the children, when mother is the abuser, are far greater than when it is father, and very serious. The other matter is, of course, that there are a number of boys who are sexually abused in their childhood, and they come forward even more reluctantly than the girls. I am not quite sure why. There seem to me some good reasons for that, but there is not time to

discuss them. Incest between siblings, generally is productive of much less emotional disturbance than if the abuser is a parent.

There are a lot of social changes, including the increase in pornography in which children are used. Have you ever been up to the Cross and searched out the pornography? I tried one evening, and they would not give it to me, but I had to get it through the friend of one of my children. Having obtained the material, I have never known what to do with it. It is really horrible. You cannot put it in the garbage bin because somebody might find it there, so it is still somewhere around my house. But it teaches people how to sexually involve children. The pictures are really unpleasant, and the children don't look as if they are having a good time at all. One magazine has a special section for fathers explaining the easiest method of sexually seducing a daughter under the age of ten years. I have no personal experience of pornographic video material, but I hope that we shall soon have sensible legislation to monitor and limit child pornography.

The other social change, apart from sexual permissiveness and a greater acceptance of discussing sexual behaviour, is that the psychiatrically ill people are not in hospital now. They are in a community and many of them cannot really function very well, and look after their children. This is not something that the adult psychiatric services do much about at all. Child psychiatrists like me try to do something, but there are so few of us. The presence of a psychotic adult in the family can present great problems to the developing children, both in terms of their vulnerability and in the sort of identifications the child may develop.

On the positive side there is much more discussion about sexual behaviour. It is not so secret, and we can listen to sex therapists, like Bettina Arndt. We are not bound by the sort of puritanism pervading North America, and we are not influenced by the class system that they have in Britain.

INCEST: A CRITIQUE OF THE ENGLISH CRIMINAL LAW REVISION COMMITTEE'S FIFTEENTH REPORT (1984)

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An offence once notoriously unmentionable, incest has become of more critical age[1]. Much evidence of incestuous child-abuse has been revealed over the past decade, and a variety of civil responses (especially family counselling) have been explored[2]. There has also been much agitation at the level of criminal law reform, with numerous inquiries into the rationale, scope, and operation of the offence[3]. The purpose of this paper is to review the recent recommendations of the Criminal Law Revision Committee,[4] an influental English agency whose views provide a backdrop to possible legislative change in New South Wales or other Australian jurisdictions. It will be argued that the C.L.R.C. recommendations are largely unsatisfactory, and less commendable than proposals advanced in the mid-seventies by the Royal Commission on Human Relationships[5] and other Australian inquiries.

The offence of incest in New South Wales is defined under s.78A of the *Crimes Act:*

> Whosoever, being a male, has carnal knowledge of his mother, sister, daughter, or grand-daughter, or being a female of or above the age of sixteen years, with her consent permits her grandfather, father, brother or son to have carnal knowledge of her (whether in any such case the relationship is of half or full blood, or is or is not traced through lawful wedlock) shall be liable to penal servitude for seven years.

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*Thanks are due to Ann Riseley and Christine Swift for research assistance, and to Rebecca Bailey and Matthew Goode for background discussion. This is not to imply anyone's agreement with the views I have expressed.

1 *see generally* L. Forer, "Incest", in S. H. Kadish (ed.), *Encyclopedia of Crime and Justice* (New York: Free Press 1983) Vol. 3 pp. 880-885; T. Honore, *Sex Law* (London: Duckworht 1978) pp. 79-80.

2 *see generally* J. Renvoize, *Incest: A Family Pattern* (London: Routledge & Kegan Paul 1982); Waterlow, "Child abuse and neglect: A sequel of incest", *Second Australasian Conference on Child Abuse, Conf. Proc.* 52-78 (1981); B. Justice and R. Justice *The Broken Taboo: Sex in the Family* (New York: Human Sciences Press 1979); D. Finkelhor, *Sexually Victimized Children* (London: Free Press 1979); Finkelhor, "What's wrong with sex between adults and children?", 49 *Amer. J. Orthopsychiat.* 692-697 (1979).

3 *see generally* Bailey and McCabe, "Reforming the law of incest" (1979) *Criminal L.R.* 749-761; Buddin, "Revision of sexual offences legislation: A code for N.S.W.?", 2 *Univ. N.S.W.L.J.* 117-151 (1977).

4 G.B., Criminal Law Revision Committee, *Fifteenth Report, Sexual Offences* (London: H.M.S.O., Cmnd. 9213, 1984) (hereinafter cited as C.L.R.C.).

5 Australia, Royal Commission on Human Relationships, *Final Report, Volume 5* (Canberra: A.G.P.S. 1977) (hereinafter cited as R.C.H.R.).

Notice that this offence does not cover step-parents and step-children or foster-parents and foster-children, but that under s.35 of the *Adoption of Children Act* an adopted child is deemed to stand in a natural relationship with his/her adoptive parents. It should also be mentioned that prosecution requires the consent of the Attorney-General.[6]

Little point would be served by making any detailed comparison of the New South Wales provisions with those of other jurisdictions throughout the world: What matters is not so much the variation in definition from place to place[8] but the policy underlying the criminal prohibition of incest. Viewed from this angle, the offence of incest is fundamentally problematical.[9] Incest is often cited as the classic example of an offence based on taboo rather than justifiable need.[10] In terms of Mill's famous principle of liberty, what secular harm to others warrants state invervention? Is it exploitation or abuse of those who are too young, disadvantaged or inexperienced to be able to give effective consent? If so, why not reflect this harm clearly and specifically by enacting appropriate offences of exploitation or abuse and by abolishing the offence of incest?

One ice-breaking response to these questions was given in 1975 in the Australian Attorney-General's *Report of the Working Party on Territorial Criminal Law*.[11]. Under cl.70 of the proposed Crimes Ordinance (A.C.T.) the offence of incest was confined to cases where the other party to sexual intercourse was a relative (within the relevant prohibited degrees of relationship) under the age of 18. In the opinion of the Working Party,[12] the harms primarily in issue were:

(1) subjection of the underage or weak to sexual intercourse;

(2) intra-family disruption of normal patterns of sexual development and interaction; and

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6 *Crimes Act* (N.S.W.), s.78F(1).

7 *Crimes Act* (N.S.W.), s.78F(2).

8 *see e.g.*, Scottish Law Commission *The Law of Incest in Scotland* (Edinburgh: H.M.S.O., Cmnd. 8422, 1981) pp62-65 (hereinafter cited as S.L.C.; Daugherty, "The crime of incest against the minor child and the States' statutory responses", 17 *J. Family Law* 93-115 (1978); A. H. Manchester,"Incest and the law", in J. M. Eekelaar and S. N. Katz (eds.), *Family Violence* (Toronto: Butterworths 1978) pp487-517; R.C.H.R. p222.

9 *see* H. Packer, *The Limits of the Criminal Sanction*(Stanford: Stanford Univ. Press 1968) pp312-316; N. Morris and G. Hawkins *The Honest Politician's Guide to Criminal Control* (Chicago: Univ. Chicago Press 1970) pp18-19.

10 see e.g., H. S. Becker, *Outsiders* (New York: Free Press 1963) pp10-12.

11 Australia, Attorney-General's Department *Report of the Working Party on Territorial Criminal Law* (Canberra: A.G.P.S. 1975) (hereinafter cited as W.P.T.C.L.).

12 Australia, Attorney-General's Department *Proposals for a New Criminal Law for the Australian Territories* (Canberra: A.-G.'s Dept. 1975) pp15-16.

(3) birth of defective or unwanted children.

Of these possible harms, only the first was considered sufficiently serious to justify the intervention of the criminal law, and this was seen as a harm which could adequately be countered by an offence of incest with a person under 18, and by offences designed specifically for the protection of mental defectives.[13] Given the stand thus taken against the idea of treating incest as an offence founded on morality rather than secular considerations of harm, cl.70 encountered strong opposition from several lobby groups, including the Roman Catholic Church.[14] Subsequently, the proposal lapsed after the demise of the Whitlam Government.(Territorial criminal law is now under fresh review, but it is rumoured that the revision project will steer clear of incest.)

A more extensive review of the law of incest was then recommended in the *Report on Rape and other Sexual Offences* by the Mitchell Committee in South Australia.[15] Four main recommendations were advanced:

(1) incest should cease to be a separate offence;

(2) for the offences of unlawful sexual intercourse and indecent assault, persons under the age of 18 should be deemed incapable of giving effective consent to acts performed with a parent or brother or sister;

(3) for the offences of unlawful sexual intercourse and indecent assault, a brother or sister should be deemed capable of giving effective consent where he or she is 18 or over or, in cases where the age difference between the parties is not more than 5 years, 14 or over; and

(4) except in special circumstances, victims should be spared the need to give evidence orally at committal proceedings.

Although these proposals were more far-reaching than those put forward in the *Report of the Working Party on Territorial Criminal Law*, they attracted little apparent opposition. The Mitchell Committee Report did provide the groundwork for legislative changes in relation to rape and other sexual offences in 1976 but the offence of incest was retained. Since then, no South Australian government has ventured near the topic.

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13 *Ibid.*

14 P. Durisch, "Incest issue still alive", *Sydney Morning Herald,* Mar. 31, 1976, p7.

15 South Australia, Criminal Law and Penal Methods Reform Committee *Special Report, Rape and Other Sexual Offences* (Adelaide: S.A.G.P. 1976) pp29-32, 44 (hereinafter cited as S.A.C.L.P.M.R.C.).

The direction taken in the Mitchell Committee's Report was pursued in 1977 by the Australian Royal Commission on Human Relationships.[16] The Commission urged seven main changes in the law:

(1) incest should cease to be an offence;

(2) where the defendant and his/her partner are members of the same family the age of consent for the offences of unlawful sexual intercourse and indecent assault should be 17;

(3) "members of the same family", for the purposes of the above recommendation, should include adoptive parents, guardians, foster-parents, step-parents and de facto husbands and wives;

(4) where the defendant and his/her partner are related as brother and sister the above-recommended age of consent for the offences of unlawful sexual intercourse and indecent assault should not apply if the age difference between the parties is no more than 5 years;

(5) child protection social workers should be used to help guard against repetition of abuse and otherwise to promote the best interests of child victims;

(6) a special tribunal should be created to decide whether or not a criminal prosecution is desirable in cases of sexual offences involving child victims; and

(7) trial procedures for sexual offences involving young people should be revamped so as to minimize the risk of occasioning distress to children who are required to give evidence.

The Commission's approach to the question of relevant harms thus had a dual focus: Keeping the scope of criminal liability within secularly justifiable bounds, and protecting children against further abuse or damaging experiences. In stressing this second aspect the Commission added much to the contribution previously made by the Mitchell Committee and, in exposing the need to protect child victims, opened up a relatively safe political avenue for future legislative reform.

These Australian assessments of incest laws contrast sharply with the conservative reports which have more recently emerged from the Scottish Law Commission and the English Criminal Law Revision Committee.

The Scottish Law Commission report in 1981[17] urged the retention and strengthening of existing incest laws. The more important recommendations were these:

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16 R.C.H.R. pp222-226.

17 S.L.C.

(1) incest should remain a separate offence;

(2) consanguinous relationships within the criminal prohibition should continue to include not only parents and children, and brothers and sisters, but also grandparents and grandchildren, great-grandparents and great-grandchildren, uncles and nieces, and aunts and nephews;

(3) illegitimate children should be covered by the offence to the same extent as legitimate persons;

(4) sexual intercourse between an adopted child and an adoptive parent should be covered by the offence of incest;

(5) a step-parent who has sexual intercourse with his/her step-child should be liable not for incest but for a distinct offence;

(6) if any person over the age of 16 is in a position of trust or authority in relation to a child under the age of 16 and is a member of the same household, it should be an offence for that person to have sexual intercourse with the child;

(7) incest and related offences should carry a maximum sentence of life imprisonment if tried upon indictment in the High Court, 2 years if tried on indictment in the Sheriff Court, and 3 months if tried summarily in the Sheriff Court; and

(8) provision should be made to require a court, before sentencing anyone convicted of any of the above offences, to obtain a social enquiry report about the offender's circumstances and to take into account that report and any other information before it which is relevant to his/her character and condition.

According to the Scottish Law Commission, retention of a separate broad offence of incest was justified on a variety of grounds, namely protection of members of the family, maintenance of family solidarity, risk of birth of deformed, defective or unwanted children, and general public opposition to abolition.[18] In placing reliance on the last of these grounds, the Commission endorsed the highly controversial proposition that "part of the function of the criminal law must be to promote and maintain generally accepted standards of behaviour, thereby reflecting the public interest in preserving an ordered and stable society".[19]

The English Criminal Law Revision Committee's *Fifteenth Report*[20] deviates in a number of respects from its Scottish forbear but the line is far

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18 *op. cit.*, pp8-12.

19 *op. cit.*, p10. *See generally* H.L.A. Hart *Law, Liberty and Morality* (Stanford: Stanford Univ. Press 1963).

20 C.L.R.C.

different from that urged in the Australian inquiries. The C.L.R.C.'s major recommendations are as follows:

(1) incest should be retained as a separate offence;

(2) it should remain the offence of incest for a man to have sexual intercourse with his daughter, granddaughter or mother, and for a woman to have sexual intercourse with her father, grandfather or son;

(3) liability for incest should extend to sexual intercourse between an adoptive parent and an adopted child;

(4) it should remain the offence of incest for a brother and sister to have sexual intrcourse with each other, but not when both have reached 21;

(5) a separate offence of unlawful sexual intercourse with a step-child should be created but there should not be a more general offence of unlawful sexual intercourse with a person under one's trust or authority;

(6) daughters, granddaughters and sons under 21 should be exempted from liability for incest;

(7) trial for the above offences should be on indictment only and punishable with 7 years' imprisonment except for an offence against a girl under 13 in which case the maximum sentence should be life imprisonment; and

(8) prosecution should be conditional upon the consent of the Direector of Public Prosecutions.

Underlying these recommendations is a purported commitment[21] to the policy proclaimed by the Wolfenden Committee that the function of the criminal law in the field of sexual offences is:

> to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence [22]

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21 G.B., Criminal Law Revision Committee *Working Paper on Sexual Offences* (London: H.M.S.O. 1980) p2.

22 G.B., Committee on Homosexual Offences and Prostitution, *Report* (London: H.M.S.O. Cmnd. 247, 1957).

Nonetheless, the discussion of relevant harms in the C.L.R.C.'s treatment of incest lacks persuasion, and the proposals of the Committee suffer from overreach and underreach in a number of significant respects. What precisely are those legislatively dysgenic tendencies and how might they be avoided here?

Secular Criminal Harm or Taboo?

In advocating that the offence of incest should be retained, the C.L.R.C. takes as a starting point the position that "incestuous relationships are wholly undesirable for the individual and for society and potentially harmful with possible long-term psychological consequences for those involved and their families.[23] This opening gambit not only echoes the conventional moral hostility against incestuous relationships but does so in remarkably sweeping and uncritical terms. An initial qualification which needs to be stressed is that it makes little sense to speak generally of the harm resulting from incestuous relationships; so much depends on the particular category of relationship and the age of the victim (e.g., in the case of young victims, there is an obvious risk of severe physical harm). Moreover, to say that incestuous relationships are "wholly undesirable" glosses over the incestuous practices of leading figures throughout history,[24] and takes insufficient account of the controversial "positive incest" school of psychiatry which holds that incestuous experiences can be beneficial;[25] as Lois Forer, a distinguished American judge, has recently observed, it is unrealistic to view incest from any morally absolute perspective:

> The fragmentary information on the exogamous marriage practices of preliterate tribes, the lack of information on marriage practices among vast numbers of literate societies, and the existence of many recorded instances of incest fail to support any theory of a universal incest taboo or a belief that incest is universally regarded with horror. . . .
>
> Decriminalization of acts not injurious to other persons is a widespread trend in the Western world. Statutes prohibiting drunkenness, drug use, and extramarital and deviate sexual relations between consenting adults have been repealed in many jurisdictions, and the penalties have been drastically reduced in others. Many authorities on sex education predict that laws against incest, too, will be abolished. They suggest that the victims of incest have not been damaged by the experience and there is no biological basis for what they call an 'ingrained prejudice' against incest. Some studies even assert that incest is healthy and normal behaviour. . . .[26]

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23 C.L.R.C. p64, citing the Policy Advisory Committee.

24 *e.g.*, as is at least commonly alleged, Cleopatra, Pope Alexander VI, Lord Byron, and Phar Lap.

25 *see* de Mott, "The pro-incest lobby", 13(10) *Psychology Today* 11-18 (1980).

26 Forer, "Incest", pp881, 884.

Putting aside the ingrained prejudice apparent in the C.L.R.C.'s starting assumption, is the risk of birth of defective or deformed children sufficient to justify retention of incest as an offence? In the opinion of the C.L.R.C., this risk was not enough in itself to warrant the intervention of the criminal law. The reason, as stated by the Policy Advisory Committee assisting the C.L.R.C., is much the same as that given previously in the Australian inquiries:

> Society does not yet prohibit sexual intercourse in other circumstances in which there is a high genetic risk of abnormality in the offspring of a relationship, for example with hereditary diseases such as Huntington's chorea; and we are very anxious about the implications of any proposal that it should.[27]

Here the C.L.R.C. seems on safe ground. However, no response is made to the argument of the Scottish Law Commission that the position of relatives is materially different from that of strangers:

> [A] prohibition of sexual intercourse and marriage with certain near relatives is a very slight infringement of liberty. There are many other potential marriage partners in the world. A prohibition of any intercourse or marriage by a person carrying certain harmful genes would be a serious restriction of liberty.[28]

Is this counterargument sound? One reply is D. J. West's point that, if avoidance of genetic risk (or the risk of unwanted children) is the relevant harm, it would be more logical to criminalize neglect of contraception rather than sexual relations.[29] Nonetheless, it has been suggested that "social and practical considerations" preclude the possibility of making criminal liability depend on the presence or absence of contraception or sterilization.[30] Perhaps this contention is untenable, but even if it is accepted, why should criminal liability be imposed for merely taking a genetic risk rather than for causing the actual harm of bringing a defective or deformed child into the world? To this it has been replied that criminal liability should not depend on the accident of conception or the failure to have an abortion.[31] However, this is a glib response which disregards the fact that many serious offences are defined in terms of causing harm as opposed to merely taking a risk and that liability for any offence of causing harm depends on the fortuity of the relevant harm in

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27 C.L.R.C. p65. *See also* S.A.C.L.P.M.R.C. p30.; R.C.H.R. p224.

28 S.L.C. p12.

29 D. J. West, "Adult sexual interest in children: Implications for social control", in M. Cook and K. Howells (eds.), *Adult Sexual Interest in Children,* (London: Academic Press 1981) pp251-269, at p267.

30 G.B., Criminal Law Revision Committee, *Working Paper on Sexual Offences,* p42.

31 S.L.C. p11.

fact being caused. For instance, liability for murder or manslaughter depends on death resulting from the injury inflicted by the defendant and whether or not death actually results may easily depend on factors beyond the defendant's control (e.g., the brilliance or otherwise of a surgeon).

The primary reason for keeping the offence of incest, according to the C.L.R.C., is the protection of the young and vulnerable against sexual exploitation within the family.[32] If this is so, however, why not simply proscribe unlawful sexual exploitation of an underage or disabled person? Such an approach would not be adequate, maintains the C.L.R.C., because an additional kind of harm is involved:

> There is also a special dimension, the violation of the role of the family, which adds to the harmful consequences of incest. A child who suffers abuse at the hand of a stranger can expect comfort and protection from his or her family; incest victims often have no one to whom to turn — those who should support have been the cause of suffering.[33]

This rationalization is unconvincing. To begin with, incest often occurs after the disintegration of the family support system; as the Royal Commission on Human Relationships observed:

> It is clear . . . that the majority of families in which incest occurs are already disturbed, and the incestuous behaviour appears to be a symptom, rather than a cause, of the disturbance. Imposing criminal sanctions on one of the overt signs of disruption may not alleviate the distruption itself.[34]

Second, to the extent that incest may be a cause rather than a symptom of family disturbance or collapse of support, why treat this as more than a factor in aggravation of sentence for unlawful sexual intercourse?[35] Compare the situation in the context of non-sexual assaults upon children. Vicious or repeated non-sexual assault upon a child by a member of the same family also seriously violates the role of the family by jeopardising the chance of any support being provided by the protagonist (or other members of the family implicated in the abuse). Yet here the offence is treated as aggravated assault, not forcible violation of the family.

Another secular harm stressed by the C.L.R.C. is impairment of a child's development and his or her capacity to form normal emotional and social relationships.[36] However, this consideration rests on an empirical

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32 C.L.R.C. p66.

33 *op.cit.*

34 R.C.H.R. p224. *See also* H. Maisch, *Incest* (London: Andrew Deutsch 1973).

35 Buddin, "Revision of sexual offences legislation," p138.

36 C.L.R.C. p66.

assumption the validity of which is presumed without question in the Report. Is the assumption valid? As David Finkelhor has indicated in a highly provocative paper, the incidence and extent of impairment from incestuous relationships is uncertain:

> A . . . very common argument says that sexual encounters with adults are clearly damaging to children. Children are frightened and disturbed by them. They are the source of sexual problems in later life. There is clinical evidence that this is true, at least in many cases, and this is probably the most popular argument against sex between adults and children. . . .
>
> [However], it is based on . . . an empirical foundation that is far from absolutely established. It is indisputable that some children are harmed by their childhood sexual encounters with adults, some severely so. But what percentage? From clinical reports we cannot tell. The number of cases that do not come to clinical attention is very large, and it is possible that a majority of these children are not harmed.
>
> The unreliability of this line of argument will become increasingly apparent, as the ranks of those who claim to have had positive child-adult sex experiences become publicized. Inevitably, they will, since our culture has maintained the unrealistic assumption that such relationships do not exist. Because of some of the inherent difficulties of empirical research into this kind of question, it may be some time before a definitive scientific conclusion is reached. In the meantime, the argument that sex between adults and children is bad solely on the empirical grounds that it harms the children will become more and more controversial.[37]

There is of course much evidence to suggest that incestuous victimization, especially in the major category of father-daughter incest, can cause severe harm in later life;[38] this evidence now includes the results of Gordon Waterlow's valuable and disturbing study of the etiology of child abuse in 950 cases handled at the Fairfield District Hospital.[39] However, for present purposes, and without denying the gravity of the subsequent harm which can occur, there seems no need to enter into further speculation: Whatever the psychological or other harmful effects of incestuous experiences during childhood, parent-child incest would fall within offences of unlawful sexual conduct with a person deemed incapable of giving an effective consent (as under the proposals of the Mitchell Committee and the Royal Commission on Human Relationships).

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37 Finkelhor, "What's wrong with sex between adults and children," pp693-694. *See also* Bailey and McCabe, "Reforming the law of incest", p755.

38 *see e.g.*, Renvoize, *Incest: A Family Pattern*, p142-165.

39 Waterlow, "Child abuse and neglect: A sequel of incest".

Another argument invoked by the C.L.R.C. in support of retaining incest as a separate offence is that social agencies need "the back-up of the law" in order to terminate a relationship which is damaging to one or more members of a family.[40] This is a factor frequently mentioned in the literature,[41] but it is difficult to understand why an offence of incest is necessary for this purpose. An alternative course would be to equip social agencies with a power to terminate a dangerous relationship by means of an injunction, and to provide for the sanction of contempt in the event of disobedience.[42] Contrary to the impression conveyed by the C.L.R.C. Report, the range of possible civil options is not exhausted by that of using a care and custody order to terminate a relationship by removing a child from the home.[43] Moreover, injunctive remedies directed against the source of abuse would not produce the unsatisfactory result of placing the victim under detention whilst leaving the abuser untouched.[44]

A final consideration relied upon by the C.L.R.C. is public antipathy to change. In the opinion of the Committee, incest between father and daughter at all ages should remain an offence because:

> There is a clear public antipathy to such incest at any age . . . any relaxation of the criminal law in this area would . . . be a cause of widespread concern.[45]

Politically expedient as this position may be, it abandons the principle that state interference with individual liberty should be based, not on popular morality or majority feelings of revulsion or disgust, but on secular considerations of harm.[46] Here the C.L.R.C. Report departs from the Committee's earlier professed allegiance to that principle,[47] and no attempt is made to justify the departure.

In any event, why need the limitation or the abolition of the offence of incest be a cause of widespread or politically suicidal public concern? The prime concern is likely to be that, by removing or limiting the incest prohibition, the state will thereby convey the impression that the practice

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40 C.L.R.C. p66.

41 *see e.g.*, Justice and Justice, *The Broken Taboo: Sex in the Family*, p268; J. L. Herman and L. Hirschman, *Father-Daughter Incest* (Cambridge, Mass.: Harvard University Press 1981) pp168-169; Daugherty, "The crime of incest against the minor child and the States' statutory responses", p101.

42 *cf.* D. J. West, "Adult sexual interest in children", p268.

43 C.L.R.C. p66.

44 *cf. op. cit.*

45 *op. cit.*, p67.

46 *see generally* Hart, *Law, Liberty and Morality.*

47 *see* G.B., Criminal Law Revision Committee, *Working Paper on Sexual Offences*, p2.

of incest is now morally permissible. The response of the honest and yet surviving politician might well proceed on a number of fronts. First, there is the point that, if the incest taboo is as deep-seated as is commonly proclaimed, the criminal law serves only the most marginal role in preserving the taboo.[48] Second, incest would not become open slather but would remain subject to the civil prohibitions against consanguinous relationships which are imposed under the law of marriage.[49] Third, the criminal prohibition against incest could be replaced by civil proscriptions, backed by an injunctive remedy, as discussed earlier; this approach would be less drastic and yet would help to avoid creating the impression that incestuous relations have been legalized. Fourth, it should be stressed that the statistics to hand show that father-daughter incest is now far and away the most prevalent type of case prosecuted,[50] that father-daughter incest falls within other offences (whether existing or as proposed by the Mitchell Committee and the Royal Commission on Human Relationships), and that the main thrust of legislative change is to do away with idle moralizing and to concentrate on more demonstrably useful ways of protecting the young and vulnerable.[51] Finally, if it be thought necessary to maintain the stronger symbolic trappings which go with having an offence against incest, consideration should be given to making incest an exclusively symbolic offence. This could be done by preserving the existing statutory proscription and by limiting prosecution and punishment to the operation of the internal disciplinary systems of churches and other lawful associations. Under this approach, incest would become essentially an ecclesiastical offence, its original status in English law.[52]

To sum up, although the C.L.R.C. puts forward a variety of grounds for maintaining a separate offence of incest of the kind which now exists under s.78A of the *Crimes Act,* these grounds represent more of an apology for criminalizing the incest taboo than a forthright appraisal of secular harm. As a matter of secular harm, it is very difficult to justify retention of the criminal prohibition against incest as such. What does seem justifiable is the aim of protecting the young or disadvantaged from sexual abuse or exploitation and, as recommended by the Mitchell Committee and the Royal Commission on Human Relationships, this is an aim within the province of offences of unlawful sexual conduct with a person who is unable to give an adequately informed and voluntary consent.

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48 Bailey and McCabe, "Reforming the law of incest", p756; Hart, *Law Liberty and Morality,* pp67-68; J. Andenaes, *Punishment and Deterrence* (Ann Arbor: Univ. of Michigan Press 1974) pp19-20.

49 Packer, *The Limits of the Criminal Sanction,* p316.

50 *see* S.A.C.L.P.M.R.C. pp31, 64-66; C.L.R.C. p64; Williams, "The neglect of incest: A criminologist's view", (1974) 14 *Medicine Sci. Law* 65-66.

51 *see generally* Justice and Justice, *The Broken Taboo: Sex in the Family;* R.C.H.R. pp222-226.

52 *see generally* Bailey and Blackburn, "The Punishment of Incest Act 1908: A case study of law creation", (1979) *Criminal L. R.* 708-718.

Scope and Definition of Offences Relating to Incestuous Conduct

The proposals of the C.L.R.C. on particular questions of scope and definitiion of incest-related offences[53] are suspect in three main respects:

(1) the range of relationships covered is not sufficiently wide to give full protection to all children at risk of suxual abuse from adults in a position of authority or control over them;

(2) the age of consent for brother-sister incest is high (21) and parent-child incest is an offence irrespective of age; and

(3) the range of incestuous conduct proscribed is confined to sexual intercourse yet other forms of sexual conduct can also be the means of serious abuse or exploitation.

Although adopted children and step-children under 21 would be protected under the changes in English law recommended by the C.L.R.C. (as noted earlier, adopted children are now covered by the offence of incest in N.S.W.), nephews, nieces, foster children, *de facto* adoptive children, and children under the care of an adult with whom they are living would not receive the same protection. Is this discrimination warranted? Perhaps it is if the central policy aim is to protect the role of the legal family but, as argued previously, this is an unsatisfactory rationale. From the more obviously justifiable standpoint of protection of the young and vulnerable from abuse, what should the position be? Offences of unlawful sexual intercourse with a person under the standard age of consent probably cover the worst instances of abuse involving children in all categories, but since older children can also be overborne by the abusive exercise of parental or custodial authority,[54] there is a strong case for extending the criminal law to cover them as well. If so, what range of older children should be covered?

This question is not answered adequately by the C.L.R.C. Report. To begin with, it is said that "we have received little evidence to suggest that the offence of incest in England and Wales should be extended to cover [uncle-niece and aunt-nephew] relationships.[55] Yet surely there are enough known instances of seduction of young nieces to provoke concern and, from the standpoint of power, influence and opportunity, it can hardly be denied that uncles and aunts often act as parent-substitutes. As regards foster children, de facto adopted children, children of one of the parties to a "common law" relationship, or young persons living in the same household as an adult, the C.L.R.C. gives three reasons against extending the protection provided under existing offences:

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53 C.L.R.C. pp67-71.

54 *op. cit.*, p67; Bailey and McCabe, "Reforming the law of incest", p760.

55 C.L.R.C. p68.

(1) some of these relationships are too transitory to form the basis of a criminal offence;

(2) an offence of unlawful sexual intercourse with a person under 18 or 21 by someone living in the same household and occupying a position of trust or authority would be difficult to define with the degree of precision required for the criminal law; and

(3) it would be an absurd and unacceptable anomaly to make it an offence to have sexual intercourse with a foster or de facto adopted child over 16 when it is legally possible to marry such a child.

However, these reasons seem dubious. The first is questionable because children in transitory relationships are often likely to be insecure and hence vulnerable to abuse by parent-substitutes. Second, the contention that a suitable offence might not be definable with sufficient precision is difficult to accept given that apparently successful attempts have been made in other jurisdictions.[56] Third, why is it anomalous to impose criminal liability upon a foster parent who has sexual intercourse with a foster child under 18 and to whom he or she is not married? To say that the parties could lawfully marry if they mutually so desire seems merely to point to an avenue of exemption from liability which is available in exceptional cases; likewise, seduction of a girl under 17 by a schoolteacher is not unlawful sexual intercourse under s.73 of the *Crimes Act* (N.S.W.) if the schoolteacher takes the preparatory step of marrying the girl.

The C.L.R.C. proposal that brother-sister incest cease to be an offence where both parties are 21 or more would do much to avoid the harshness which can now arise.[57] Nonetheless, if the prime object of criminal proscription in this area is to protect the powerless or immature against sexual abuse, what justification is there for selecting 21 as the age of consent? Why not 18, the age of majority, as recommended in the *Report of the Working Party on Territorial Criminal Law?*[58] Alternatively, why not 18 except where the age difference between the parties is no more than 5 years?[59] These questions are not discussed in the C.L.R.C. Report; reliance is placed upon committee votes and pronouncement, not explicit analysis of competing approaches. Any attempt to set age limits will of course be arbitrary to some extent, but it is at least possible to arrive at limits based on an informed assessment of the degree of sexual maturity and independence typically possessed within different age groups in the

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56 *e.g.*, France, Sweden, Michigan. *See further* G.B., Criminal Law Revision Committee, *Working Paper on Sexual Offences*, p5; Manchester, "Incest: Time for a change in the law", 131 *New L.J.* 1278-1279, p1279 (1981); Bailey and McCabe "Reforming the law of incest", p762; Buddin, "Revision of sexual offences legislation", pp139-140; *Community Welfare Act* (S.A.), s.92(1).

57 *see e.g.*, Zellick, "Incest", 121 *New L.J.* 715-716, p715 (1971).

58 W.P.T.C.L. cl.70.

59 *cf.* S.A.C.L.P.M.R.C. p32; R.C.H.R. p255.

community. Here it seems most unlikely that the assessments made in the Australian inquiries are wide of the mark. What is primarily in issue is whether the law should be restricted in such a way as to preclude criminal liability in the case, for instance, of the 20-year-old brother and the submissive, inexperienced 18-year-old sister. One answer, it may be suggested, is not to treat exceptional cases like this as the basis for a farreaching criminal rule but to cover them by means of a less drastic solution. This could be done by providing an appropriate injunctive or other civil remedy to enable state intervention against a domineering brother, or sister, where one party is under 21.

A similar approach might help to reduce the controversy surrounding age limits for incest between parent and child. The recommendation of the C.L.R.C. — that incest between parent and child should remain an offence at all ages[60] — is controversial because, as we have seen, it violates the principle that sexual relations between consenting adults are their own affair. However, the alternative of making parent-child incest an offence only if the child is under 18 [61] is also problematical because it precludes liability where, to take the type of case usually cited, a father maintains a coercive relationship with a daughter who, although over 18 or even 21, is dependent upon him for economic or psychological support or is trapped in some role of subjugation.[62] Again, rather than covering the exceptional kind of case by a sweeping criminal prohibition, the less drastic course would be to restrict criminal liability to a relatively clear-cut and typical category of abuse — parental intercourse with children under 18 — and to provide injunctive or other civil remedies capable of controlling sexual oppression by a parent whatever the age group of the victim.

These suggestions, it may be added, are not without practical relevance. Consider the following editorial comment by *The Guardian*[63] on *Bedford's* case:[64]

> How many years for a taboo?
> With all the certainty that only an Appeal Court Judge would dare to display, Lord Justice Cumming-Bruce dismissed an appeal this week from a 52-year-old man who is serving a two-year sentence for incest. The man, who had only seen his 23-year-old daughter once in the 20 years before they met, fell in love and set up home together, had planned to return to his daughter but both promised their sexual relations

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60 C.L.R.C. p67.

61 *see e.g.,* W.P.T.C.L. cl.90; S.A.C.L.P.M.R.C. pp31-32; Card, "Sexual relations with minors", (1975) *Cr. L.R.* 370-380, pp375-376.

62 *see generally* Herman and Hirschman, "Father-daughter incest", 2 *Signs* 735-756 (1977); Ward, "Rape of girl-children by male family members", 15 *A.N.Z.J. Crim.* 90-99 (1982); Mitra, "Father-daughter incest", 146 *J.P.* 312-313 (1982).

63 *The Guardian,* June 27, 1979, p14.

64 143 *J.P.* 478 (1978).

> would stop. Lord Justice Cumming-Bruce was unimpressed. The pledge, he suggested, "reveals a naivety of the frailties of human nature." Perhaps so. But should the judge and his two colleagues not have taken into account other considerations?
>
> Unlike most offences of incest, the charge did not involve a minor. The dangers of dependent, immature children indulging in sexual activities which they may not fully understand and to which they are unable to give informed consent are all too obvious . . . But the woman in this case was 23. Her sexual relationship with her father did not begin until she was a mature woman. Even for a man involved with a young daughter, prison is hardly the most suitable place for treatment. To enforce it in this week's case is a travesty of justice. . . . Prison in such cases is not needed to enforce the social taboo. What was needed, surely, was help and therapy.

Beyond age limits, what range of sexual conduct should be encompassed by offences relating to incestuous behaviour? The present law in England, New South Wales and many other jurisdictions focuses solely on acts of sexual intercourse and no change in this regard is seen as necessary by the C.L.R.C.:

> The Policy Advisory Committee have advised us that some indecent acts other than sexual intercourse, especially if repeated over any length of time, can perhaps be as harmful as sexual intercourse, and that they represent just as much an abuse of the familial relationship as acts of sexual intercourse. In their opinion, however, it might be difficult to justify a widening of the law (beyond the protection we recommend should be afforded to children under 16 against gross indecency) to penalise indecent acts within the prohibited relationships unless there is a clearly perceived and generally accepted case for it. Neither they nor we consider that such a case has yet been made out.[65]

Accepting that a law reform committee should hesitate before expanding an area of criminal liability where angels have always feared to tread, the position taken by the C.L.R.C. is not only reactionary but also self-inflicted. It is reactionary in two notable ways:

> (1) an extensive body of professional opinion to the contrary is brushed aside;[66] and

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65 C.L.R.C. pp71-72.

66 *see* R.C.H.R. p225; S.A.C.L.P.M.R.C. p32; Canada, Law Reform Commission, *Working Paper 22, Sexual Offences* (Ottawa: Law Reform Commission of Canada 1978) p31; Daugherty, "The crime of incest against the minor child and the States' statutory responses", p96; Hughes, "The crime of incest", 55 *J. Cr.L.Crim.P.S.* 332-331, p330 (1964). *Note also* s.25-02 Texas Penal Code.

(2) a significant possible risk of harm to children over 16 is recognized but left in limbo.

More importantly, the stance of the C.L.R.C. on the rationale for having a separate offence of incest made it virtually impossible for the Committee to recommend that a broad range of sexual acts be covered. By committing itself to the view that violation of the role of the family is one of the main reasons for maintaining the criminal prohibition against incestuous sexual intercourse,[67] the Committee then had to ask whether sexual acts other than intercourse would also damage the role of the family, and here the empirical evidence is inconclusive. However, that uncertainty is of little relevance if the central rationale is taken to be the protection of immature or powerless persons against abuse or exploitation in situations where they are unable to give a meaningful consent: What matters then for the purpose of prescribing criminal liability is the sexual abuse or exploitation of those who cannot give a meaningful consent, not any consequential damage which might, but need not, ensue from that abuse or exploitation. If so, it is difficult to see why any protection afforded to children against incestuous relationships should not extend to indecent acts as well as to sexual intercourse and this is the approach recommended by the Mitchell Committee and the Royal Commission on Human Relationships.

Responses to Incest and the Prevention of Further Harm

A spectacularly regressive feature of the C.L.R.C. Report is the limited interest shown in developing means of preventing the infliction of further harm after an offence relating to incest has been discovered.[68] Certainly, the Report does recognize that there is a serious problem:

> Both we and the Policy Advisory Committee consider that the intervention of the criminal law should be as limited as possible in practice and principally directed to ending the [incestuous] relationship and protecting any younger children in the family. The institution of criminal proceedings and the punishment of those involved may cause added distress to, and even harm, the very persons whom the law is seeking to protect.[69]

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67 C.L.R.C. p66.

68 *See generally* Renvoize, *Incest: A Family Pattern;* Justice and Justice, *The Broken Taboo: Sex in the Family;* Lloyd, "The management of incest: An overview of three interrelated systems — the family, the legal and the therapeutic", (1982) *J. Social Welfare* 16-28; I. Cooper, "Decriminalization of incest — New legal-clinical responses", in J. M. Eekelaar and S. N. Katz (eds.), *Family Violence* (Toronto: Butterworths 1978) pp518-527; R.C.H.R. pp222-226.

69 C.L.R.C. p72.

However, the response proposed — continued reliance on the exercise of prosecutorial discretion by the Director of Public Relations — goes only a short distance. The following matters require fuller consideration:

(1) the efficacy and limits of controls on prosecutorial discretion;

(2) the desirability of jail as a sentence for offences relating to incest;

(3) the need to protect child witnesses; and

(4) the utility of confining action against incest to the civil jurisdiction except where civil measures have been tried without success.

The C.L.R.C. Report pins much faith on the D.P.P.'s capacity to minimize the risk of causing further harm to incest victims and their families:

> We are satisfied that his policy has been successful in preventing unnecessary prosecutions and we hope that in reaching his decisions he will continue to have particular regard to the possible adverse effects of a prosecution and to whether other measures are available to deal with the offender. Not only is this preferable from the offender's point of view; it may also be in the best interests of the child by avoiding the break-up of the family for which he or she might otherwise feel responsible.[70]

Yet is this faith justified?

An initial reservation is that the selection of cases for prosecution remains uncontrolled by any process of independent testing and that the criteria employed by the D.P.P. have been criticized as inarticulate and unreliable;[71] a better guarantee would be provided if prosecutions were screened by a special tribunal, as recommended by the Royal Commission on Human Relationships.[72] The main objection, however, is that the D.P.P. solution provides too little, too late. First, the role of a D.P.P. is to screen cases for prosecution rather than to initiate and administer programs of counselling, therapy or protection, and hence the degree of amelioration possible depends very much upon the extent to which such programs are already in place. Where appropriate civil programs of care and prevention are understaffed or non-existent, as is often the position, a D.P.P. may be left with no option but to prosecute and thereby inflict misery on offender and family, or to deny consent to prosecution and thereby cast the fate of victim and family to the wind. Second, considerable

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70 *op. cit.*, pp72-73.

71 Manchester, "Incest: Time for a change in the law", p1279.

72 R.C.H.R. pp226, 217-218.

distress can be caused as a result of police action before the decision whether or not to prosecute is made. As has been observed of the U.S. experience:

> Most police officers . . . use an adversary approach when conducting an interview with a child-victim because it is an approach with which they are familiar. The police officer also employs this approach because the child victim must convince the officer that an offence has been committed. Furthermore, the officer must determine the victim's potential effectiveness as a courtroom witness.
>
> This conviction-oriented approach to the interview is often psychologically damaging to the victim. Because police seek sufficient evidence to convict the father, an officer often will attempt to elicit from the victim every detail of the offence. The victim must verbalize the extremely personal details of the offence to complete strangers. Such an interview can be extremely painful in a case of incest where a strong emotional bond may exist between victim and offender. Thus, the interview can magnify the severe nature of the act and increase the child's feelings of guilt and shame.[73]

Admittedly, much has been done through training and the creation of special sexual offence squads to alleviate this problem.[74] However, whatever can be achieved from this quarter, the role of the police is still likely to be seen by many child victims as prosecution-oriented. What might be done in response?

The answer given by the Royal Commission on Human Relationships was that the police automatically should refer all reported cases of sexual offences against children to a community welfare agency.[75] Progressive as this step is, why not go further and give child victims the option wherever possible of speaking with community welfare staff initially rather than going through a full police interview? Accustomed as we may be to the idea that the police should ask their questions first and leave other social agencies to help afterwards,[76] young victims of incestuous relations are in an unusually precarious position and this should provoke lateral thinking.

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73 Kirkwood and Mihaila, "Incest and the legal system: Inadequacies and alternatives", 12 *Univ. Calif. Davis L.R.* 673-699, pp681-682 (1979). *See also* Lloyd, "The management of incest: An overview of three interrelated systems — the family, the legal and the therapeutic", p21; Giarretto, "Humanistic treatment of father-daughter incest", 18 *J. Humanistic Psychology* 59-76, pp62-63 (1978).

74 *see e.g.,* Australia, National Health and Medical Research Council (1981), *Statement on the Care of the Child Victim of Sexual Abuse* (Canberra: A.G.P.S. 1981) pp85, 87 (hereinafter cited as N.H.M.R.C.); Renvoize, *Incest: A Family Pattern,* pp177-183.

75 R.C.H.R. pp226, 217.

76 *see e.g.,* S.L.C. pp35-36.

Turning next to sentencing, the C.L.R.C. Report speaks only of jail, the recommendation being that, for incest with a girl under 13, the maximum term should be life imprisonment and, for other offences, 7 years. What is missing from the Report is an examination of the utility or otherwise of jail in the particular context of incest-related offences.

The standard criticism, as elaborated by Ingrid Cooper, is this:

> The principal purpose of the law prohibiting incest is to protect children from the trauma of early sexual relations with close relatives and to protect their families from the pathology that results from it. Since the majority of cases are never discovered and do not reach a court, this protective goal is seldom fulfilled. In those cases where the father is incarcerated, the protective function of the law is accomplished, but not without a series of negative consequences of such severity that one must conclude that the law actually causes more harm to the family than it alleviates. Incarceration causes both economic and psychological hardship to the family which is broken up regardless of any potential for restructuring family roles and protecting the children. Despite his incestuous relationship with his daughter, in many cases the father provides emotional and financial support for his family which, in his incarceration, is frequently forced to undergo the difficult experience of living on welfare. The abandoned wife is left to undertake all of the tasks involving child rearing. The anxiety and guilt frequently experienced by the accusing daughter when she exposes her father, whom she often loves, is greatly exacerbated by his imprisonment which deprives these feelings of an opportunity for resolution. By going to prison the father loses his family, friends and job, and has little or no opportunity to gain insight into his behaviour. Utilizing the criminal court in cases of incest ensures only that further incest does not occur for the period the father is incarcerated. There is no evaluative or support system built into the criminal court that ensures that the individual needs of the family members receive attention and, if necessary, treatment.[77]

The recommendations of the Scottish Law Commission more adequately take these factors into account. First, the maximum term of imprisonment for incest and related offences would be reduced to 2 years for an offence tried summarily. Second, social enquiry reports would become a mandatory aid in sentencing, thereby facilitating recourse to non-custodial sentences.[78]

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77 Cooper, "Decriminilization of incest", p522.

78 *e.g.*, probation subject to a condition that the defendant undergo a treatment program.

Mention should also be made of the innovative Child Sexual Abuse Treatment Project established in 1971 in Santa Clara County, California. This project operates in close conjunction with the criminal justice system and an exceptionally high rate of success has been claimed for the various rehabilitative programs it provides.[79] Although the very high success rate claimed has been questioned,[80] the project nonetheless stands as an admirable example of what can be achieved by using non-punitive measures in addition to or in lieu of jail.

What protection should be given to young victims of sexual offences when they are called upon to give evidence at trial? This question is not addressed by the C.L.R.C. Report.

The ordeal through which a child can be put has been the subject of a great deal of concerned comment. One critic is Joyce Spencer:

> The defense attorney does everything possible to discredit the victim as a witness ... Since the victim already feels that something is wrong with her, this reinforces her negative and confused feelings about herself. It is rare during the trial for a child to reveal all; if she does want to reveal all, legal procedures prevent it. This often compounds her feelings of guilt. Perhaps the most important aspect of the trial for the child is that, usually, she, and she alone, has the burden and responsibility of sending her father or father-surrogate to jail. If she has not had the opportunity in a counselling situation to express her conflicted feelings, her sense of guilt will be exacerbated. The impact of the trial on the child victim is sensitively depicted by Maya Angelou in her autobiography. After such a trial, she withdrew and stopped talking for almost a year.[81]

Hopefully, such an experience has become much less typical with the development of improved counselling services and crisis centres,[82] but even

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79 Giarretto, "Humanistic treatment of father-daughter incest", pp71-22. *See also* Renvoize, *Incest: A Family Pattern*, pp171-172; Lloyd, "The management of incest", pp24-25; Kiersh, "Can families survive incest?", 6 *Corrections Magazine* 31-38 (1980).

80 R. S. Kempe and C. H. Kempe, *Child Abuse* (London: Fontana 1978); Summit and Kryso, "Sexual abuse of children: A clinical spectrum", 48 *Amer. J. Orthopsychiat.* 237-251 (1978).

81 Spencer, "Father-daughter incest: A clinical view from the corrections field", 57 *Child Welfare* 581-590, pp588-589 (1978). *See also* Maya Angelou, *I Know Why A Caged Bird Sings* (New York: Bantam 1971); Schultz, "The child sex victim: Social, psychological and legal perspectives", 52 *Child Welfare* 147-157 (1973); K. MacFarlane, "Sexual abuse of children", in J. R. Chapman and M. Gates (eds.), *The Victimization of Women* (Beverly Hills: Sage 1978) pp81-109, pp97-102.

82 *see e.g.*, South Australia, Attorney-General's Department, Office of Crime Statistics, *Research Report No. 1, Sexual Assault in South Australia* (Adelaide: S.A.G.P. 1983) pp7-9.

so there remains the question of what might be done to improve court procedures. In response to this question, the Royal Commission on Human Relationships advanced three main proposals:[83]

> (1) Except in special circumstances, victims of sexual offences should not be required to attend committal proceedings;
>
> (2) where the victim is required to give evidence at commital proceedings, the magistrate should allow the child protection service to remain in court and, if necessary, to comfort or fortify the child, and power should be conferred to order that a defendant (but not his lawyer) remain outside court during the taking of the victim's evidence; and
>
> (3) a flexible pre-trial conference procedure should be introduced with a view to avoiding unnecessary distress during the trial.

Numerous questions of detail thereby arise, and debate might well be entered on the strengths and weaknesses of these and other possibilities.[84] The function of the Royal Commission, however, was to place such issues prominently on the agenda rather than to attempt any definitive resolution of them. As regards the present law, some headway has been made against the undertow of committal proceedings.[85] Trial procedures could be modified further so as to deflect other harsh currents away from child witnesses, but there are strict limits to this if the rights of an accused are still to be respected and upheld.[86] By contrast, if incest and related conduct were primarly a matter of civil jurisdiction, proceedings could be relatively informal and less combative.

This leads into the larger issue whether state intervention against incest should be confined to civil jurisdiction except where civil measures have been tried unsuccessfully.[87] Without attempting any blueprint for such an approach, and recognising the extensive use already made of Child Protection Panels under the South Australian *Community Welfare Act,*[88] suppose a system based on the following key elements:

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83 R.C.H.R. pp219-220.

84 *e.g.*, summary trial. *See further* G.B., Criminal Law Revision Committee *Working Paper on Sexual Offences, p45.*

85 *see e.g., Crimes Act* (N.S.W.), s.409A(3), enacted in 1981; *Justices Act* (S.A.), s.106(6a), enacted in 1976.

86 *see generally* Canada, Law Reform Commission, *Working Paper 22, Sexual Offences,* p33; R.C.H.R. p219.

87 *cf.* Renvoize, *Incest: A Family Pattern;* Lloyd, "The management of incest"; Justice and Justice, *The Broken Taboo: Sex in the Family;* Cooper, "Decriminalization of incest"; R.C.H.R. pp226, 217-218.

88 *see e.g.*, South Australia, Department of Community Welfare, *1982-83 Annual Report* (Adelaide: S.A.G.P. 1983) pp24-25.

(1) a mandatory requirement that a person with reason to suspect that a child is the victim of incest should report that suspicion to a child protection service or the police;[89]

(2) referral of all cases involving incest to a child protection service for investigation and, where necessary, further action;[90]

(3) conferral of jurisdiction upon a child protection tribunal to hear and determine applications for remedial orders of care, rehabilitation or non-custodial preventive restraint;[91]

(4) provision of a temporary holding order power, exercisable by child protection officers in emergencies before an order can be obtained from the child protection tribunal;[92] and

(5) restriction of criminal prosecution for incest-related offences to cases where a determination has been made by the child protection tribunal that the defendant has breached a care, rehabilitation, or prevention order.[93]

The policy behind such an approach is essentially that urged by the Law Reform Commission of Canada:

> The criminal law and the criminal process are notoriously weak in dealing with family problems. This is true even in situations involving general prohibitions such as cases of family assault of which assault in marriage and child abuse are two examples. In fact, it has been found that the intervention of criminal law has, in some cases, further aggravated the situation by making it less accessible to other, more supportive forms of intervention.
>
> Incestuous behaviour in the family rarely occurs in isolation from other problems. Recognition of this fact is vital to any discussion of the manner in which incest should be treated. It is also important to recognize that there are other forms of socially unacceptable sexual behaviour between family members. Any of these may be the cause or the effect of other family difficulties. A re-evaluation of incest as an offence cannot, therefore, take place in the context of criminal law

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89 *see e.g.*, Australia, Law Reform Commission, *Report No. 18, Child Welfare* (Canberra: A.G.P.S. 1981) pp291-294, 302-305; A. Sussman and S. J. Cohen, *Reporting Child Abuse and Neglect: Guidelines for Legislation* (Cambridge, Mass.: Ballinger 1975); *Community Welfare Act*, (S.A.), s.91.

90 R.C.H.R. pp226, 217.

91 *cf. op. cit.*, pp217-218.

92 *see* Australia, Law Reform Commission, *Report No. 18, Child Welfare*, pp305-306.

93 *cf.* R.C.H.R. p218; *Report*, N.H.M.R.C. p87.

> alone. It must first and foremost take place in the context of family law.
>
> In the latter area of law, we agree that many family disturbances should firstly be a matter of social and psychological treatment, secondly a matter of regulation by family and child welfare law, and only thirdly a matter of criminal law.[94]

This approach is not discussed in any detail in the C.L.R.C. Report. Resort to civil alternatives, it is proposed, should be governed by the exercise of the D.P.P.'s discretion, a limited solution criticized above. It is also contended that offences against incest should be retained because social agencies need the back-up of the law in this area.[95] Does this further consideration have any weight? Putting aside the possibility that the back-up required might well be supplied by means of civil remedies together with the law of contempt (as discussed earlier), the contention of the C.L.R.C. is hardly inconsistent with an approach which expressly preserves criminal prosecution as an ultimate weapon. However, are there other relevant factors?

The Scottish Law Commission also rejected the suggestion that reliance be placed on civil measures as an alternative to criminal prosecution. In doing so, it relied on three grounds:[96]

> (1) a conflict of interests might arise if an outside agency became involved while police enquiries were still in progress and the interests of the prosecution must continue to have priority;
>
> (2) alternatives to prosecution are taken adequately into account as a matter of prosecutorial discretion; and
>
> (3) threat of prosecution may be essential to ensure that a defendant persists with a remedial program and yet the decision to prosecute cannot, and should not, be delayed for longer than is necessary and, once a defendant has been advised of a decision not to prosecute, that decision is irrevocable.

Are these grounds solid? Ground (1), it may be argued, begs the question of whether the interests of the prosecution should still be given priority; vexing as this question is, it needs to be explained why, bearing in mind the position in many areas of corporate regulation, civil enforcement should not come first.[97] Ground (2) attracts criticisms that have already

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94 Canada, Law Reform Commission, *Working Paper 22, Sexual Offences,* p31.

95 C.L.R.C. p66. *See also* references note 41 *supra.*

96 S.L.C. pp35-36.

97 *see also* Lloyd, "The management of incest", p27, for another curious location of the criminal cart before the civil horse. As regards the priority of civil measures in the contest of corporate regulation, *see generally* K. Hawkins, *Environment and Enforcement* (Oxford: Clarendon Press 1984); Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions," 56 *Southern California Law Review* 1141-1246, pp1211-1213 (1983).

been mentioned in relation to the D.P.P. solution. And ground (3) raises a difficulty which seems far from insuperable (e.g., in cases where the limitation period has expired, the law of contempt could be adapted so as to provide any necessary back-up).

A deeper question is whether a criminal conviction is needed to make rehabilitation work. Henry Giarretto, director of the Child Sexual Abuse Treatment Program in Santa Clara, has maintained that it is:

> In most cases the authority of the Criminal Justice System seems necessary in order to satisfy what may be termed as expiatory factor in the treatment of the offender and his family. It appears that the offender needs to know unequivocally that the community will not condone incestuous behaviour. The victim and her mother also admit to deriving comfort from knowledge of the community's clear stand on incest. Family members, however, will do their best to frustrate the system if they anticipate that the punishment will be so severe that the family will be destroyed.[98]

Without denying the therapeutic significance of expiation or clear allocation of responsibility, must we inflict the mark of Cain? The view expressed by Giarretto is far from conclusive because it may be possible to achieve the same ends by less drastic civil means (e.g., imposition of responsibility in a hearing before a child protection tribunal, and provision of a remedial program conducive to expiation through special effort on the part of the defendant).

Conclusion

No area of the criminal law is more under the influence of taboo than offences relating to incest. This influence should be challenged from at least two directions. First, there is the traditional libertarian objection that offences should be based not merely on popular morality but on the footing of substantial secular harm. From this standpoint, there seems no justification for retaining incest as a separate offence. On the other hand, offences of unlawful non-consensual sexual intercourse need to be revised so as to reflect the realities of incestuous relationships and to provide adequate protection to those who are incapable of giving meaningful consent. Second, there is the increasingly-voiced concern that a moralistic approach is counterproductive, especially when stigmatically upheld by the criminal law. From this perspective, the prevention of harm from incestuous relationships is best achieved by remedial programs administered as an alternative to jail or in lieu of prosecution.

Neither of these objections has been answered cogently in the recent *Fifteenth Report* of the English Criminal Law Revision Committee, largely because the Committee appears to have been unable to detach itself from

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98 Giarretto, "Humanistic treatment of father-daughter incest", p74. *See also* Mitra, "Father-daughter incest", pp313-314; Manchester, "Incest and the law", p506.

the incest taboo. By contrast, the Australian inquiries of the mid-seventies broke the spell, and the proposals which emerged from those inquiries survive as a starting-point for legislative and administrative changes today.

Ultimately, the most threatening thing seems neither the horror surrounding the topic of incest nor the distrust of new civil techniques of social control, but the demand on scarce community welfare resources should the phenomenon of incest be brought out more into the open.[99] If this becomes the last taboo, however, at least some worthwhile progress will have been made.

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99 *see* N.H.M.R.C. p84; Renvoize, *Incest: A Family Pattern,* pp176-177.

PRESENTATION OF PAPER

Brent Fisse

Let me begin with a brief note about my dubious credentials as a speaker on this topic. I have been invited to this seminar, I suspect, because of the notoriety I attracted as one of the authors of the 1975 Commonwealth Attorney-General's *Report of the Working Party on Territorial Criminal Law*. One of the proposals contained in that Report, as many of you are doubtless aware, was that the offence of incest in the ACT should be limited to sexual intercourse with a relative under the age of 18. That proposal proved to be somewhat controversial. I received a number of abusive letters and telephone calls and, as far as the public display of reaction was concerned, let me instance an example of the hostility. One of the leading politicians of the time, Mr Fairbairn (the former Minister for Defence) asked the following question of Mr Whitlam in the House of Representatives: "Who was the twisted mind responsible for this draft of the Working Party on Territorial Criminal Law? Are there no depths of degradation to which this government will not descend?" Well, you now have before you that twisted mind and, perhaps much worse, the serpent-windings of my written thoughts on the topic after almost a decade of further intellectual and moral degeneration.

Let me speak briefly to my perhaps excessively long paper. The general thrust is that the most recent law reform enquiry into incest-related offences, namely the Fifteenth Report of the Criminal Law Revision Committee in England earlier this year, is profoundly unsatisfactory and ought not to be taken as a model for reform in New South Wales or other Australian jurisdictions. Rather, I urge that the starting point today should be the recommendations of various Australian law reform enquiries during the mid-seventies. I have already mentioned the Attorney-General's *Report of the Working Party on Territorial Criminal Law* in 1975, the other enquiries of note being the Mitchell Committee enquiry in 1976 on rape and other sexual offences and, above all, the Royal Commission on Human Relationships which reported in 1977.

In my paper I make three main points.

The first is that it is exceptionally difficult to justify retention of a separate offence of incest as now provided under s.78A of the New South Wales *Crimes Act*. Unless we accept the illiberal and hence highly controversial proposition that a legitimate function of the criminal law is to enforce merely popular morality, we have to look for some sufficient secular harm as the basis for any criminal proscription. The difficulty with the offence of incest is that it rests essentially on mere taboo and not on any sufficient secular harm. The main kind of secular harm stressed in this recent law reform enquiry, the Fifteenth Report of the English Criminal Law Revision Committee, is that of violation of the role of the family. This is put forward as the secular harm that justifies retaining a separate offence of incest along the lines of s.78A of the New South Wales *Crimes Act*. The relevant passage in the Report goes as follows:

> A child who suffers abuse at the hand of a stranger can expect comfort and protection from his or her family; incest victims

> often have no one to whom to turn — those who should support have been the cause of suffering.

However, this rationalization lacks persuasion. One consideration, and this was stressed by the Royal Commission on Human Relationships in 1977, is that incest is typically a symptom rather than a cause of family disintegration. But there is another consideration which seems to be sufficiently weighty by itself. Non-sexual offences of assault have just as serious a disintegrating effect within the family and yet how do we treat non-sexual assaults? We treat the violation of the role of the family in that context merely as a circumstance of aggravation. In other words, we do not make that factor the basis for creating a special offence of, say, "forcible violation of the family". What is plainly justified is the creation of appropriate offences of unlawful sexual intercourse or sexual interference with underage persons, the secular harm here being the abuse or exploitation of those who are incapable of giving a meaningful consent. This is the approach recommended by the Mitchell Committee in 1976 and also stressed by the Royal Commission on Human Relationships in 1977. I firmly support it.

The second main point in my paper is that the recommendations of the Criminal Law Revision Committee do not attempt in any coherent way to cover the harm of sexual abuse or exploitation of persons who are unable to give a meaningful consent.

There are three points I would like to summarize in this regard. First, the Criminal Law Revision Committee advocates retention of the offence of incest in the case of parents and children irrespective of the age of the child and despite the fact that effective consent can easily be given in cases where the child has reached 18 or, if that is a controversial proposition, say 21. Here, as under s.78A of the New South Wales *Crimes Act,* we see the patent overreach of the criminal law.

The second point is that the Criminal Law Revision Committee approach, like that under s.78A of the New South Wales *Crimes Act,* does not cover uncle and niece, or aunt and nephew incestuous relationships; nor does it cover incestuous relations between a *de facto* husband and the child of his *de facto* wife. What is needed here is an offence of the kind recommended by the Scottish Law Commission in 1981, namely an offence of sexual abuse by a person in a position of trust or authority over a person under the age of 18, the age of majority. There are numerous examples of this kind of offence around the world, for example, in Michigan, France, and Sweden.

Finally as far as coverage is concerned, the Criminal Law Revision Committee recommendations, again like the provision of s.78A of the New South Wales *Crimes Act,* are confined to sexual intercourse. As Gillian Calvert has stressed in her paper, other serious forms of incestuous abuse can and often do occur. What I would urge is the adoption of an extended definition of sexual intercourse, along the lines of the extended definition of sexual intercourse recently adopted in New South Wales in the recent sexual assault amendments to the *Crimes Act.* Beyond that, I would suggest the inclusion of additional kinds of sexual interference or abuse

that, in the case of persons under 16, are now covered by the offence of indecent assault.

The third and final main point in my paper is that we should move away from the punitive criminal model of social control which still largely prevails in the area of incest and place much more reliance on a rehabilitative civil model. I review a number of proposals in the paper and time doesn't permit me to go through all of them. Let me mention two.

First, I advocate less reliance upon gaol as a sentence. Every effort should be made to introduce therapeutic and other civil methods of disposition for the offender and his family. This could be done as a condition of probation, as recommended by the Scottish Law Commission in 1981. I would also mention that this approach has been adopted in the Santa Clara Child Sexual Abuse Treatment Project referred to by Sara Williams. This project, the Director of which is Henry Giarretto, has been in operation now for over a decade and, although it has been criticized in some respects, the general view is that it has been a conspicuous success.

A second proposal is that, at the preliminary stage of investigation and screening of incest cases, civil community welfare intervention should come first, with police enquiries and prosecution confined to cases where a civil approach is demonstrably inadequate to cope with the problem. This is essentially the approach recommended almost a decade ago by the Royal Commission on Human Relationships.

The proposals I have just referred to are animated by the concern echoed throughout much of the literature, and discussed sensitively by our speakers at this seminar, that the criminal law frequently works in a harsh or stifling way which causes serious and it would seem quite unnecessary further harm and distress to young victims of incestuous relationships.

To conclude, the most threatening thing in this area seems neither the horror surrounding the topic of incest nor the distrust of new civil techniques of social control, but the demand on scarce community welfare resources should the phenomenon of incest be brought out more into the open. However, if this becomes the last taboo, at least some worthwhile progress will have been made.

DISCUSSION PAPER

HELPING THE INCEST VICTIMS

Dr. W. Gordon Waterlow,
Consultant Paediatrician,
Chairperson, Child-at-Risk,
Management Committee, Fairfield District Hospital.

In 1967 I was involved with the management of a family in which a girl had been sexually abused by father, uncle and brother.[1] Our management at that time was disastrous, including gross systems abuse, and we quite failed to provide any help or safety for the girl who remained at home until she finally ran away. I am gladdened to see the papers of Brian Rope and Sandra Heilpern addressing *inter alia* our systems abuse of incest victims. I am saddened though that it is now 17 years later, with disappointing progress in the interim.

The importance of the position adopted by Finkelhor[2] and Arkes[3] is that the prohibition of adult — child sex, based on inability to validly consent, *is not contingent upon proof of a harmful outcome.* Adoption of this position ought to render attaining the safety of the child and the recovery of the dysfunctional family much less difficult, once the implications have been thought through. If we are to really think through the problem of informed consent we may even be able to understand that the adult criminal justice system is alien and damaging to the child and a totally inappropriate place for them to be.

I quite agree with Brian Rope that when pre-pubertal children are talking about what adults have done to them sexually the children tell the truth. It is high time that we accepted that and ceased exposing children to a repeated inquisition. It is not, for me, a tenable position to say that the inquisition for the child must continue in order to serve the interests of justice, when that inquisition is such a barbarous assault on a defenceless and dependant being.

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1. W. G. Waterlow "Child Abuse and Neglect: A sequel of Incest". *Second Australasian Conference on Child Abuse, Conf. Proc.* (1981) pp.52-78.

2. D. Finkelhor "What's wrong with sex between adults and children? Ethics and the Problem of Sexual Abuse". *Amer. J. Orthopsychiat* (1979) 49, pp692-697.

3. H. Arkes "The question of Incest and the Properties of Moral Argument". Conference on Childhood Sexual Abuses. Chicago, 1978.

PRESENTATION OF DISCUSSION PAPER

Dr Gordon Waterlow

I would just like to make several simple points, in addition to my paper, about what I would like to see us able to do.

There is a point at the beginning of serious discussion about any problem when emotive sessions have a considerable amount of value. This is a fairly emotive session, and there has been some emotion-raising so I might, right at the start, raise it just a little higher. Within the last few months I have been involved in giving evidence in cases where the last court appearance has been two years after the first court appearance. I think that is monstrous for the child who was six at the start of the court appearance and who was eight at the last court appearance two years later. If we cannot do better than that we should be ashamed of ourselves.

I am also appalled that children within the same age group have been asked questions in court about sperm in the vagina as to how did I know it was not dog sperm? I find that an absolutely obscene sort of question to be asked in relation to 6 and 8 year old girls.

I am also appalled by questions asked of young children in court, which I have witnessed, in establishing their truthfulness by asking them do they know about the tooth fairy, and when they do describe what we all know about the tooth fairy and how money appears under the pillow somebody in the court will say, "Well, now how can you possibly believe a single word that a child says who believes in this sort of fairy tale."

I think that the grounds stated by Finkelhor and Arkes that sex between children and adults is always wrong, because sexual interaction should always be with consent and children *ipso facto* are unable to give informed consent is where we should start. We should accept that, and I also take Arkes' point that, if you accept that, whether any demonstrable harm comes out of the actions is irrelevant. It is enough that there is convincing evidence that a large number of children are in fact harmed, and are still suffering harm as adults later, and that they did not and were not able to give valid consent. We must accept that.

What we want legal processes for are to ensure that this kind of sexual assault of children *has* to stop. Once we have awareness that it is occurring we need a process by which we can ensure that it stops. That children are freed from it, that they are placed (and by that I don't mean placement) and they are allowed to develop in an area when and where they are free from sexual assault. They are able to live and grow in peace. For that you very often need coercive management. That is what I expect to happen. I am not a legal person, I am a paediatrician. I state that is what I want. All I want the legal profession to do is to work out how we are going to do that. That is your problem, but that is what is wanted.

I certainly take the point that it is no use for us to continue to talk about it being the family's place to instruct children about such matters as sexual behaviour, and that the family is the place to which you as a child

complain when there are problems, when it is the self same family and the people in it who are abusing you.

We do need outside lines of communication as part of the practical things that we can do. Apart from consciousness raising in our society about the problem, it is also absolutely essential that children are able to tell somebody outside their family what is going on, and to tell them what the problem is and will someone, for God's sake, stop it. We must develop easily seen, clear lines where a child can complain, and the other thing which is absolutely vital when we do that, is that action must be guaranteed. At the time that a child *does* say something, does surface with material about sexual assault, they are making a desperate throw and very often for them it is their only chance. It is the *only* time that they are going to have enough courage to be able to say anything for many, many years, and if they *do* say something and if they *do* shout out, if they *do* vocalize it, and then we do *not* stop it and we do *not* put them in a place of safety (by that I don't again necessarily mean take them away) but *ensure* for them that the activity is stopped, then we again have done them a terrible disservice. We have condemned them again to years and years of misery. I well know from the families that I have dealt with that it has often taken another 20 years before people are able to vocalize the material again.

NSW CHILD SEXUAL ASSAULT TASK FORCE, 1984

TERMS OF REFERENCE

A. The Task Force shall:—

(i) Examine and make recommendations related to health, welfare, police, education and legal services involved in dealing with child sexual assault with a view to formulating appropriate policies and procedures.

(ii) Examine and make recommendations on training of personnel who are involved with victims of child sexual assault within health, education, welfare, police and legal systems.

(iii) Investigate and make recommendations on strategies to prevent or alleviate the incidence of child sexual assault.

(iv) Examine NSW laws relevant to the sexual assault of children and make appropriate recommendations consistent with the maintenance of the existing rights of suspects and accused persons relating to:—

(a) reporting of child sexual assault;

(b) investigate procedures upon reporting of child sexual assault;

(c) the substantive and procedural law relating to prosecution, trial and disposition of cases of child sexual assault.

(v) Recommend mechanisms to monitor the implementation of the Government's Child Sexual Assault policies and programs.

B. The Task Force shall bear in mind the interests and rights of the child, the accused and the community.

C. The Task Force shall report to the Government within five months.

MEMBERSHIP

Helen L'Orange, Director, Women's Co-ordination Unit (Chairperson).

Brian Rope, Officer-In-Charge, Child Mistreatment Unit, NSW Police Department.

John Gavahan, Regional Social Worker, Department of Health.

Moira Carmody, Co-ordinator, Sexual Assault Centre, Westmead Hospital.

Bruce Hawker, Legal Project Officer, Department of Youth and Community Services.

Jan Schier, Operations Manager, Central Metropolitan Regional Office, Department of Youth and Community Services.

Dr. Sandra Egger, Deputy Director, Bureau of Crime Statistics, Attorney-General's Department.

John Andrews, Legal Officer, Criminal Law Review Division, Attorney-General's Department.

Megan Latham, Legal Officer, Solicitor for Public Prosecutions (Executive Officer).

Paul Byrne, Commissioner, NSW Law Reform Commission.

Jill Calvert, Dymphna House.

Dr. Ferry Grunseit, Director of Casualty, Royal Alexandra Hospital for Children.

Mr. Richard Chisholm, Senior Lecturer, University of N.S.W., Law School.

A representative nominated by the Minister for Education.

Helen Boynton, Special Projects Officer, Women's Co-ordination Unit.

ISSUED: 25 June, 1984

NEWS RELEASE

The Premier. Mr. Neville Wran today announced the establishment of a Child Sexual Assault Task Force to report to the Government by the end of the year.

"Children who have been sexually assaulted by members of our society including members of their own families warrant the primary concern of my Government.

"A recent survey conducted by the Women's Co-ordination Unit in my Department on sexual assaults found that one third of all victims were children," he said.

"An incest phone-in conducted by Dymphna House (a counselling service for incest victims) in February this year received 400 calls in 3 days from incest victims and their families."

Although much was being done by various departments and authorities it was now appropriate to focus on the development of integrated and co-ordinated procedures and programmes to implement the Government's policies.

Mr. Wran said the Government had therefore decided to establish a Child Sexual Assault Task Force. The 15 member Task Force would be given 5 months to:

- Examine and make recommendations related to health, welfare, police and legal services involved in dealing with child sexual assault with a view to formulating appropriate policies and procedures.
- Examine and make recommendations on training of personnel within health, welfare, police and justice systems who are involved with victims of child sexual assault.
- Investigate and make recommendations on strategies to prevent or alleviate the incidence of child sexual assault.
- Examine NSW Laws relevant to sexual assault of children and make appropriate recommendations consistent with the maintenance of existing rights of suspected and accused persons relating to:
  - — reporting of child sexual assault;
  - — investigate procedures upon reporting of child sexual assault;
  - — the substantive and procedural law relating to prosecution, trial and disposition of cases of child sexual assault.
- Recommend mechanisms to monitor the implementation of Government's Child Sexual Assault policies and programmes.

The Premier said the 15 member Task Force would be chaired by Ms Helen L'Orange, Director of the Women's Co-ordination Unit in my Department.

"The Task Force will be asked to bear in mind the interests and rights of the child, the accused and the community. It is expected to engage in broad community consultation and work through a sub-committee structure," he said.

It was anticipated that the Government would receive a report from the Task Force by December, 1984, and that Cabinet would consider matters raised by the Task Force early in 1985.

"The implementation of a co-ordinated Government Program in Child Sexual Assault is a high priority for my Government. I am determined that we will reduce the suffering of children," Mr. Wran said.

PRESENTATION OF DOCUMENTS

Helen L'Orange
Director, Women's Co-ordination Unit.

Colleagues, I refer you to the Terms of Reference and membership of the Task Force, and the Premier's Press Statement on it.

This seminar is very welcome as part of the long haul towards both the alleviation of the incidence of child sexual abuse and reforms in our procedures and laws. The Task Force is also part of that long haul. I am very determined that the Task Force will be effective and that it will produce an integrated co-ordinated set of policies and programmes for the N.S.W. Government to consider. The Premier has undertaken that Cabinet will consider the report of the Task Force early in the New Year. All the papers and comments from this seminar will be part of the Agenda of the first meeting of the Task Force on 4 July 1984.

I am a brave woman. I am particularly brave when it comes to advocacy on behalf of women and children. By this time next year New South Wales will have integrated and co-ordinated policies in this area. I look to everyone here to contribute to the development of those policies and their associated programmes and to advocate for their implementation.

DISCUSSION PAPER

IMPLICATIONS OF THE LONG TERM EFFECTS OF SEXUAL MOLESTATION IN CHILDREN

A summation from a paper presented to the judiciary of California by Herb Seal, M.A., Social Psychologist and Sexologist. (P.O. Box 8, Felton, CA95018, U.S.A.)

Seven hundred and five (705) victims of molestation including 484 incestuous cases were analyzed over a fifteen year period by a therapist who had treated all of the persons in group therapy or individual therapy. Nine percent were treated in New Zealand, 26% in Australia and 64% in the U.S.A. Some of the consequences are:

(1) Late sexual maturing, i.e. not having sexual experience during adolescence, or if she does, having extreme repulsion to it.

(2) Reticence to talk about sex, particularly her own feelings about sex.

(3) Avoidance of sexual encounters even though married or in a usually approved sexual relationship.

(4) Deeply buried anger against anyone who has authority over him/her. Both pronouns used because little boys abused tend to have this in common with little girls.

(5) Feelings of repulsion about sexuality.

(6) Resistance to therapy. When partner insists the sexually abused person usually breaks with the partner.

Ultimate consequences to date are 52 deaths ... from fast acting cancer, brain tumors and suicide, all at an age from 12 to 25 years before their actuarial time would indicate. An attempt is being made to follow through on all cases possible since the incidence of psychosomatic symptoms is very high (more than half have had prolonged disturbances of a psychogenic nature).

Since there is no way of using controlled experimental procedures we must rely on the reported life-history of the victim who has often kept secret the molestation episode for 10 to 30 years. Given the possible distortion of memory or even memory suppression of a painful event the cumulative findings should convince any practitioner that too early sexual encounters, no matter if no violence was used, is harmful to most children. The law has tended to give a mild slap on the wrist to offenders, even repeated ones, unless physical damage was done to the victim. My opinion is that all offenders should be placed on long term probation conditional on treatment from a qualified therapist. Having sexual desire for young children (pedophilia) is not a crime. Doing something with a child is! A sex therapist can more adequately deal with that difference than most other equally well trained therapists.

Victims may need professional counselling but it is my observation that some very good counselling is done by other victims who share their experience and mutually help each other to get out the anger and hate, the hurt and the betrayal in a caring supportive way. Talk therapies alone do not help excorsize the deep seated feelings that molestations occasion.

Now that the "conspiracy of silence" has been broken by a few women empowered by the Feminist Movement the story of what young women have had to endure, frequently with no one believing their story. Males are even more reluctant to divulge their sexual abuse since they feel it compromises their masculinity. (90 males and 615 females comprise this population sample.) The most common molester is an older male relative with father or step-father 158 times, uncle or grandfather 131 times, and cousin or brother 173 times. Strangers accounted for 152. With males the ratio is reversed ... 76% of the males molested by a stranger (68) while 24% of the molestations were done by someone in his intimate social network, older cousin being the most comon perpetrator. Only in two instances was the father the perpetrator.

As a therapist who works with body/mind therapies (Gestalt, Bioenergetics, Psychodrama, Hypnotherapy, etc.) I have noted several indices which correlated with a molestation episode. They occurred with enough frequency that there should be some exploration by a therapist if these symptons are in evidence:

(1) Breathing difficulties (sexual behaviour has its own breathing patterns and if sex is initiated too early in the child's life the breathing may be linked to fear or shame and will cause breathing difficulties as an adult.)

(2) Eating difficulties (if oral sex was done this is very prevalent.) Eating preferences may be affected. One woman could eat nothing that had even the slightest hint of fishy smell from having to taste semen as an eight year old.

(3) Genital anaesthesia, a closing off to the feelings connected with sex.

(4) Recurring nightmares particularly if the molestation occurred in a dark or semi-dark place.

(5) Lowered self esteem, or lack of any self esteem with an incapacity to stand up for one's self.

(6) A whole variety of emotional problems from knots in the stomach causing indigestion to migraine headaches (very common with incest victims) to insecurity about one's personal worth.

Molestation of a child between the ages of three to seven may develop a sado-masochistic component as an adult. The victim may only be able to climax if she is humiliated, whipped, or otherwise hurt. Even though no overt violence was used on the child the power of the perpetrator may be inferred by the victim. One of the more subtle effects is the unwillingness of the victim to "wholly give herself" in the sexual

encounter. It is not that she knowingly withholds, it is just that there is no pleasure to her to do so. As important as touching is in sexual relations she may do the bare minimum necessary to have sex, but deep inside will feel "unclean", "bothered", or "vaguely uncomfortable". She may not even associate this feeling with the earlier molestation.

An area fraught with highly charged emotional attitudes is the data that suggests that some incestuous relationships were perceived as positive. This was not data from the 705 but from a university population sample of 1978 students who wrote their life history as a requirement for a course in Marriage and Family Life. Eighty nine (89) reported incest as part of their childhood experiences and 33 assessed the experience as positive ("it is O.K. to be sexual", "parents did it but hid it"). Professionals have discounted most reports which clients give that tells of enjoying the experience as being too young to adequately assess the event.

Much more research is needed if we are to understand the causes of adult/child sex. There is practically no information on pedophilia and even less on children's sexual attitudes or feelings. Adults have presumed to speak for children and usually from some belief system that may or may not acknowledge a child's sexuality. First priority should be to keep all children from being "at risk" and since that risk is greater at home then the so-called "stranger danger" it is imperative that this secret crime becomes more into public awareness and that children be protected from long term negative consequences.

PRESENTATION OF DISCUSSION PAPER

Jenny David

Mr. Seal asked me if I would just say very briefly some points that he wanted to make through his paper and was unable to do so.

He wanted to say that his views are based on his treatment in therapy over the last 15 years of 705 victims of child sexual molestation, not necessarily incestuous. Out of those 705 victims he has found that the consequences to the children were similar throughout three countries that he has worked in — New Zealand, Australia and America. He categorizes in his paper some of the physical and emotional consequences that he found to be present in nearly all of the victims that he has treated. From all this he concludes that sexual encounters that occur too early in a child's life, even if they don't involve additional violence of any description, are harmful to most children. Mr. Seal says that the law has tended to give a mild slap on the wrist to offenders, even repeated ones, unless there is physical damage done to the victim whereas he thought that all offenders should be placed on long term probation conditional upon treatment from a qualified therapist.

He said that for victims he found the most successful counselling was from their own peers who had also been involved in sexual abuse that this was more effective than what he called "qualified talk therapy".

He has found that of the vast majority of his incidents or of his victims it was the adult male and an underage female that were involved. It was 615 out of the 705 cases. He said he had treated only 90 male victims and he found that male victims were more reluctant to divulge their sexual abuse than female victims. He thought it went too deeply into their concept of their masculinity and therefore he thought that the incidence of male victimization was most probably much higher than is indicated on current figures.

For female victims he found that strangers only accounted for 152 of the 615 cases that he has treated but he said for male victims it was the other way around. Seventy-six per cent of the male victims had been molested by strangers and only 24% by known older males of which an older cousin was the most common perpetrator. He asks that more research be done to understand the causes of adult/child sexual abuse. He said that the first priority should be to keep all children from being at risk. He thought that this could be achieved partly by increasing public awareness of this crime and also by encouraging people to listen to children who came to them tentatively with this problem.

Mr. Seal said the only incest he would like to see decriminalized is that between brother and sister where there is no coercion by a stronger older brother or sister. He advocated the use of a youth examiner similar to the Israeli model to interview the child and then give evidence on behalf of the child in court.

DISCUSSION

John Andrews, Criminal Law Revision, NSW Attorney-General's Department.

The Criminal Law Review Division has for some time been looking at possible amendments to the law relating to the giving of evidence both in and out of court by alleged victims of incest who are children. A number of issues have been identified which will obviously have to be addressed by the Child Sexual Assault Task Force which was announced by the Premier on Monday as Helen L'Orange has just said. Various speakers this evening have identified a number of areas in which it is claimed that the criminal justice system exacerbates the trauma suffered by a child who finds himself or herself a victim of sexual assault. When the accused happens to be a close relative the problems will obviously be considerably greater. Papers given at this seminar have identified the following as being some of the factors particularly damaging to a child.

Firstly, the child is required to re-tell an incident or series of incidents relating to extremely sensitive subject matter to various helping professionals, such as doctors, lawyers, police and social welfare workers who may or may not be particularly well trained in handling such delicate and potentially damaging matters.

Secondly, the child is in a disadvantaged position because of an inability to recall events in the form required by the legal process. Because of these disadvantages a child may not appear a credible witness.

Thirdly, although members of the community may find courts intimidating this will be especially so for children. The physical aspects of the court, the dress and behaviour of the participants, not to mention the legal procedures all contribute to a sense of ill being. The mystique becomes the terror.

Fourthly, the child may often find himself or herself alone in the court without any person being present who is able to give comfort or support. This isolation will be compounded by the fact that the only person the child may know is the accused.

Fifthly, delays in finally disposing of an offence may result in a child having to endure extended periods of anxiety and worry. This is not only due to the anticipation of further court proceedings, but also because of the continuing relationship with the accused. A number of measures have been suggested in attempts to overcome these undesirable factors, ranging from the exclusion of the accused whilst the evidence of the child is given, to the allowing of the evidence of the child to be taken on video tape and played to the jury without the child witness being present. It should be noted that the terms of reference of the Task Force require that any recommendations are consistent with the maintenance of existing rights of suspected and accused persons. The particular rights of accused persons which may be infringed by proposals such as these include the right of the accused to cross examine and the right of the accused to be present when evidence is given in court. Similar principles are present in the American Constitution

which recognizes (as well as a right to due process), the confrontation right, which by the 6th Amendment provides:

> That in all criminal prosecutions the accused shall enjoy the right to be confronted with witness against him.

The purpose of this is to enable the evidence of the witness to be tested by cross-examination.

The research undertaken by the Criminal Law Review Division has indicated that there are a number of means which could go a long way towards minimising the trauma experienced by the child witness whilst at the same time maintaining the existing rights of suspected and accused persons. Some of these proposals are as follows:

Firstly, the original statement of the child could be recorded on video-tape and played to a person who is being interviewed in respect to an alleged offence. Confronting an accused at an early stage with the full significance of the case against him may encourage an admission of guilt and thus save the child from any further contact with the criminal system.

Secondly, the recording of a child's statement on video-tape would minimise the number of times the child would have to re-tell the incident to various persons involved.

Thirdly, consideration could be given to the use of this video-tape as evidence at the committal proceedings.

Fourthly, to overcome the feeling of loneliness, isolation etcetra which a child must feel at court, a person of the child's choice could be given a statutory right to be present.

Fifthly, the child's evidence could be received by way of written statement at the committal. Recent amendments to the *Justices Act* now permit this procedure to take place.

Sixthly, a method could be devised of allowing the accused to see the child give evidence while not subjecting the child to the immediate physical presence of the accused. For example, a one-way screen may be able to be devised behind which would sit the accused linked to his counsel by sound. Questions could then be put to his counsel by the accused. Alternatively the evidence being given could be simultaneously played on close circuit television to the accused who is present in another room and again linked by sound to his counsel.

Seventhly, the normal formal surroundings of the courtroom could be made less formal when the child is required to give evidence, and

Finally, cases involving children as alleged victims could be given priority in listing and committal for trial so that the matter can be disposed of as quickly as possible.

In conclusion, whilst the terms of reference of the Task Force recognize that there are fundamental rights of the accused which must be maintained I believe that means can be devised which will at the same time minimise the trauma experience by alleged victims of sexual assault who are children. These are obviously matters to which the Task Force will have to direct its attention over the next five months.

Julie Stewart, Women's Legal Research Centre.

At the Women's Legal Resources Centre we have been working in the area of incest since the centre opened. The first case was a family law matter where a school counsellor was concerned about a student who refused to go on access with her father and was concerned about the safety of her younger twin sisters. She herself had been a victim of her father's abuse including full sexual intercourse for years. As a result of talking to Family Court counsellors and lawyers I found out that the unsubstantiated allegations in affidavits were insufficient to persuade the court to deny access to abusive fathers — a conviction for the offence would perhaps be more persuasive.

Further research indicated that convictions were rare. Reporting was rare, certainly, but frequently when police were in fact reluctantly involved, a large number of cases would not be "accepted". I got the impression that this category was greater than those "accepted" and that reports were rejected, no charges were proceeded with, because of so-called evidentiary problems. (This impression needs to be researched.) Those "rejected" cases returned to the family with or without YACS supervision. In other words when a decision to involve the police was made, quite a drastic step for families, it was often futile.

Clearly when incest is reported, the victim wants it to stop and expects the State to make it stop. When such cases are dropped by the police for what may be spurious excuses, or mistaken belief about the law, or an underestimation of the child's capacity to give evidence or because they exercise their personal discretion, there is nothing to stop the offender continuing to abuse the victim or other children in the family, or progress on to another family.

We call upon the Government and particularly the Women's Co-ordination Unit (since this is a women's issue) to commission its Task Force to thoroughly investigate police procedures and practice, and to develop a policy which leaves police and Youth and Community Services district officers in no doubt about the realities of sexual abuse within the family and what to do about it.

As Gillian Calvert pointed out incest isn't an isolated one-off accidental slip, the result of unbridled male lust. It is behaviour that involves all forms of sexual stimulation of the male forced on the child by threats or by offering rewards. The culmination of full sexual intercourse, anal or vaginal, seems to occur after years of other forms of sexual abuse. However, there are numerous cases of girl children as young as 2 or 4 years who have horrific injuries to their vaginas and rectums because of their father's rape of them.

I said this is a women's issue, and I think you only need to ask women in their 40s and 50s who still feel the anger and constrain themselves from killing the offender. In my experience men are reluctant to accept that incest occurs with such frequency. They are loath to accept that

perpetrators are not sick but appear normal and are usually considered "good fathers". We ask the question, why is it that the majority of perpetrators (98%) are men and the majority of their victims young girl children usually dependent on them for love and security? We say that men know what they do and do it with total disregard for the feelings and well-being of their girl children. They do it because it is something to do with what the culture demands of men in terms of their "masculinity". The long term, perhaps permanent, damage (and I think that is the "secular harm") to women must be recognized. Typically women who were child victims of incest have low self esteem, a sense of powerlessness; they experience difficulty in forming relationships and with their sexuality. Many women who are addicted to drugs and alcohol have a history of sexual abuse as children. girls who are forced to run away from their families, either because they are not believed or because nothing is done to stop the abuse are usually picked up by the police, charged with being "uncontrollable" and institutionalized.

Current cases make the point: A thirteen year old girl who had been sexually assaulted by her step-father over many years who had finally reported the abuse to the police was told by a district officer to stay at home. Pressure was exerted on her by her parents to change her evidence. She ran away several times and has now been placed in an institution. Another girl, a victim of sexual abuse by her father and a family friend, somewhat younger was also placed in the same institution. She was sexually assaulted by the other kids (also all victims of sexual abuse) in that institution, the place of safety.

We demand that the Government investigate that incident and that it account for the fact that some Youth and Community Services endorsed foster parents are reported as sexual abusers, and that there is no therapeutic short-term, medium-term or long-term accommodation programme for girls to run away from intolerable family life. Small wonder that such girls may turn to prostitution to survive.

We ask that the Government provide ongoing adequate funding to Dympna House, and for therapeutic crisis, short-term and medium-term accommodation for girls.

We ask that policewomen be trained to interview victims and that that interview be video-taped and later used in evidence.

We demand that the criminal sanctions remain and that police intervene in interests of safety of children just as we ask that police intervene in domestic violence situations for the protection of women.

We demand that children as witnesses be supported at the time of making their statement and when giving evidence in court, even when the court is closed. I question the power of that magistrate to exclude Dr. Williams and yet include other people in the court room.

We ask that the Attorney-General expedite hearings and trials, that he instruct his Crown Prosecutors to meet with witnesses in advance of trials to prepare them and to assure them what will be required of them.

We would resist the notion that the trauma of the courtroom is too much for a victim and therefore a reason for not prosecuting, especially when the perpetrator can be and is seduced to plead guilty. Rather we ask that judges control the conduct of barristers and that barristers be educated to comprehend the trauma that has already been endured.

Julia Taperell, Family Court Counsellor

I wanted to ask the panel if they could respond to the idea that any changes in the legislation that may be made, presumably from the discussion that has already been held, would be based on the idea that some form of outside personnel or outside authority would be able to intervene in the family and take control over certain decisions in that family. For example, whether a child is to be removed or not, because sometimes when professional helping people try to intervene they find that perhaps one parent says OK but the other parent does not. It is often very difficult. You must have some form of legal authority to intervene in that family and say: "You as a family can no longer make your own decisions and there is some outside agency who will step in and make the decision for you as to whether your child will be removed or not or placed somewhere else". At what point do individuals lose control over their own family decisions, and at what point does the community assume that control?

Sandra Heilpern

The officers of the Department of Youth and Community Services and police officers do have provisions under the present *Child Welfare Act* and the future *Community Welfare Act* to remove children if it is believed they are in immediate danger. We don't have the right to keep children away from their parents for ever and ever. That decision is made by the magistrate at the Children's Court. Does that answer your question?

Julia Taperell

But we know from experience that often children are returned home when there is still an element of risk. Who is the judge of the element of risk?

Sandra Heilpern

We can only keep children outside the home on our own decision if it is a crisis situation. The final decision is a legal one and that decision is reached on the rules of evidence and on the magistrate's opinion which is based on the reports and evidence before the magistrate. It is a court decision, and certainly it is part of the problem that there are such discrepancies from one court to another or even within one court. There are no rules.

Brian Rope

I think also that one of the problems is that you can have situations where you may have evidence in respect of one child, but you have a gut feeling in relation to the sexual abuse of all the others in that family, but

there is no way at law within our present legislation that you can do anything about that. Ray Platz is here from Queensland, and they are very fortunate in Queensland that they have an extension of our *Child Welfare Act* that if they have any concern that another child in that family has been similarly abused, though they do not have any evidence at that time, they can intervene on behalf of the child. It is a very grey area, and I can appreciate what you said earlier: "At what stage do you step in?" and especially where there is dissension in the family and there is no common ground. It becomes a problem at all stages.

I think those particular sections will no doubt be reviewed by the Task Force as part of their overall intervention, especially in sexual abuse matters. Physical abuse you have something to see. Nine times out of ten in sexual abuse cases there is nothing to see, no physical evidence to say it has been occurring.

Brent Fisse

To make a very brief point without professing a very detailed knowledge of this. There is an extensive and useful review of this problem in a recent report of the Australian Law Reform Commission, the Report on Child Welfare (1981), which looks at the various State laws and makes a number of recommendations including provision for temporary intervention orders where the police or community welfare representatives have to act in a rush and do not have time to go through the normal application procedures for court approval.

Dr. Sara Williams

The other issue is one of alternative care — when you take the child away from the parents where do you put it? Who is going to look after the child? These children who have been sexually abused are extremely seductive. Very often then recreate the family scene in the foster parent's household. As somebody already mentioned, some foster parents sexually abuse their children. Here you really do have a seductive child. When children once have had this sort of incestuous experience many of them seem to have a need to demonstrate that other parents will behave towards them as their own parents did. It makes them feel safe, but it provides a huge problem in alternative care.

I am glad to hear from other people what they think about alternative care, but it was on this count that Professor Steward developed her programme to keep the children in the family and make *them* cope with the hostile environment, make *them* say "No" to propositions, make *them* like to be loved and cared for and not be abused. That makes some sense to me. It would not be safe in every family.

Gillian Calvert

I think there are particular problems in leaving the child in the family and asking them to be the ones to say no. While I think the children do need to learn that their bodies are their own and that they do have the right to say no, I think that when you are in a situation where you are a child that

has already been abused to be expected to then turn around to say no and to tell someone that it has happened again is unrealistic. My experience has been that whenever a child has been left in those situations inevitably that child has been reabused. I have some doubts about the last suggestion that Dr. Williams made.

In relation to what was previously said from the Family Court Counsellor. I think that legal changes do need to be made. Brian Rope and Sandra Heilpern have both said something about that, but you can have all the legal changes you like and unless you change attitudes and beliefs you are probably not much farther ahead. There needs to be a lot of attitude change in community education and awareness, in addition to the legal changes.

Marion Brown, Women's Legal Resources Centre, Lidcombe.

There is one thing that concerns me with this recent discussion and the focus on removing the child and the problems associated with finding alternative care, and that is the problem of leaving other children in a potentially abusive situation. It seems to me a much more radical direct solution to think about removing the perpetrator rather than pulling the children out one by one. Perhaps I mean that it would be much quicker and a much more successful road of intervention if we could look at removing or controlling (if it is possible to control) a perpetrator in a family environment rather than singling out the children. I think that this is also an important aspect in making a public demonstration of the fact that it is, in fact, the perpetrator and the perpetrator's behaviour that is not socially acceptable, and that *they* are the people that should be singled out for special treatment. *They* are the people that need to be isolated. You could fill a book with stories of children who have been removed from an abusive home who have just been shunted off to be abused somewhere else. Obviously people here recognize that that is an enormous problem and there are not many resources to deal with it. So, why not look at removing perpetrators and then moving in with support systems to assist the women and children that remain in that home?

Dr. Sara Williams

What if it is the mother who is the perpetrator, what do you do then? Do you remove her and leave other children unparented? Not one solution is going to help every family. You need a whole series of alternatives.

Marion Brown

Certainly. But I would argue that at the moment there is quite a scope for creativity if people are brought before the court and they are convicted, and the magistrate or judges then have the option to sentence. They have got the resources, limited and inadequate though they may be, of the Probation and Parole Service. They have got the ordinary provisions in the *Crimes Act* that allow people to be placed on recognizances and to enter into bonds. I think that that sort of controlled supervision is something that could be much more exploited in dealing with perpetrators.

That brings up a real problem. The real question of how many perpetrators actually come to court to be dealt with in the first place, and I think it is important to recognize that that process is often traumatic for children. But in our experience it is not always as negative and as detrimental as people here are concerned about. In fact, our experience has been that if there is adequate support and counselling provided to the victim before becoming involved in the actual court processing, and if they are fully informed of the process and what is likely to be expected of them and what is likely to happen to them, then seeing the father who has brutally abused children over a period of years can be actually very beneficial in reconstructing that young girl's perception of herself as the wronged person, as the person who was in fact betrayed and abused, and that in seeing her father actually dealt with by the State was one of the most constructive and beneficial things that was able to happen to her after years of systematic and pretty horrific physical and emotional abuse.

Sandra Heilpern

If I could just answer part of your first question. I think it is a myth that I would like to dispel, that incest is the only problem in an incest family. If you remove the perpetrator you still leave a lot of the problems of the very complicated family dynamics that created the problem in the first place. The single Mum may tend to seek out a mate who will repeat the pattern. I don't think the problem is removed with removing the perpetrator, although it may remove the immediate problem, but not with every case. I think the second part of the answer is that that is a law reform problem and that there are not provisions in the present legal system. It is a two tiered system as you know. The children's court protects the child, and virtually its only alternative is to remove the child. The criminal courts, of course, deal with the offender and it isn't until you get more relaxed rules of evidence and more relaxed ways of establishing cases in the grown ups' courts that you can start dealing with perpetrators in a realistic way to protect the children, or change the children's court procedure so that we can remove the parent.

Marion Brown

I would not profess for a moment that the situation as it stands is by any means adequate. It is obviously also not being used in a great many instances when children do finally speak out because they want it to stop. What mechanisms do we have available at the moment to stop it? It is not impossible. It can be done — has been done. Thirteen convictions only though there may be, there were convictions. I have not any statistics on it, and, of course, anybody who has tried to do any work in the area will come up against the continual frustration of the fact that there is not a great deal of material.

I would like to pick up a point in Mr. Fisse's paper that came through towards the end of his summary, and that is the option of moving towards a civil sanction and moving out of the criminal sanction. Through the work that we have been involved in I would be very hesitant to opt for that sort of action. If nothing else, for the pragmatic considerations of the problems that people in the civil arena are already faced with in qualifying for legal

aid and getting the resources and the representation around a case as difficult an as problematic within a family as this sort of thing is. This does not take into consideration the compensation available to people if conviction is obtained through the criminal Injuries Compensation provisions. But pragmatic reasons apart, the biggest and most disturbing thing for us in the field is to realise that most perpetrators when profiled or psychologically assessed come up as normal average pillars of the community, the sort of people you would like to invite around to dinner. Not only do they appear normal, average reasonable people, but they also present as that, and they present as very affronted at the fact that anybody thinks that there is anything wrong with their behaviour. Their accusers are their kids, and they are their property and they are entitled to abuse them in whatever manner they feel fit in the secrecy of their own home. I think it is really important, old-fashioned or romantic as it may seem, for society to stand behind the statement that this sort of abuse is not accepted in the street, and that it is not accepted in the home either. It is not socially acceptable behaviour and it needs to be identified as that. We are already finding it difficult to try and persuade these people that this is not an accepted form of behaviour; without the sanction of the criminal law and the sort of force it musters it would be impossible. I would feel very ambivalent about protecting the interest of the accused or facilitating welfare intervention, and sacrificing the status and the resources of the criminal law in that form.

Brent Fisse

I certainly agree with a great deal of what the last speaker said. Taking the vexed question of the extent to which we should move more towards a civil approach, at least in the first instance, and diminish our reliance upon the criminal process, it seems to me that there is no ideal solution. But if we stick to the criminal law, and if we rely upon it as heavily as we do at the moment, rather than using a civil track as the front line of attack, I think we are going to retain a lot of the problems we now have.

Let me instance a couple of problems. One problem is the limited extent to which people are prepared to report occurrences of incest because if they report it there is a risk of prosecution, conviction and guilt, and there are all sorts of obvious incentives against reporting under those circumstances. Another problem that we have at the moment is in relation to the various evidentiary and procedural requirements of the criminal law which do make life tough for child witnesses when they have to front up to trial. If we want to bring the problem of incest out more into the open, if we want more perpetrators brought into the justice system and dealt with and subjected to various controls of the kind that you have urged so persuasively, and if we want to relax evidentiary and procedural requirements, then we do have to get away from the criminal process. It seems to me essential to have a civil approach at least as a primary line of attack. However, let us by all means keep the criminal law as a back up.

Anything that I am saying is consistent with insisting upon the responsibility of the offender. According to many of the views expressed in the literature, it has to be brought home to the offender that he or she is

responsible. That is one point that has to be made. As regards the unwanted nature of various forms of incestuous behaviour, particularly with young children, I hope everything I am saying is entirely consistent with laying it on the line that such behaviour is prohibited.

But if we are hoping to bring the perpetrators out into the open, and if we are trying to deal with the problem of incest effectively, the more we rely upon the criminal law then, as I see it, the less we are likely to succeed.

Gillian Calvert

In relation to that whole issue I think that, in fact, you have to use both and that both need to be reformed. I have tried doing therapy by itself and that didn't work. I tried doing just the legal approach, it didn't work either. It seems to me that I have a lot more success with these families when I combine the two so that we end up with a combined authoritiative and supportive approach. I think there needs to be reform within the legal system so that children are not being damaged. I think there also needs to be reform within the welfare system so that we can adequately meet the needs.

I would also like to suggest that there are, in fact, other ways that we can increase the reported rate of the incidents of incest other than taking it out of the criminal code or not having that as its first step. For example, there are a lot of programmes being developed in America where a group of drama workers visit schools and through the medium of drama actively encourage kids to start reporting and talking about the sorts of things that are happening in their homes. So I think there are other more effective ways on increasing the reportage, rather than just being frightened that if we continue with the criminal path to this whole area that it just drives the problem underground. I disagree with you about that.

Brian Rope

Who speaks for the child in that situation, who is going to act on their behalf? It is acceptable if we have a guardian *ad litem* system where somebody is appointed to independently act for the child. The argument earlier was the difference between criminal standards of proof and civil standards of proof. Children should not have to be stigmatized and labelled by being put in institutions, but the unfortunate thing is that we have nothing in our legal structure where we can, in fact, protect children. We do need reform because why should the kid be labelled? I think it was a very important point of a friend of mine in Queensland. There was a girl who had been having intercourse with her father for four years. Nothing was done. Everybody knew about it, but when she turned 17 she got tied up with some of her school friends and stole a few things out of a shop. In fact, she was very silent and then she said this: "It was alright with society for my dad to screw me for four years but because I steal a Violet Crumble bar I am a criminal." To me one of the most important things, whether you send the man to gaol or not, is the accountability, the "responsibility" as Brent Fisse said. That must be established before you can start anything.

Geoffrey Little, Sergeant of Police, Waverley.

I would like to get away from the legal welfare ramifications of the discussion as it has been led so far, and refer to the preventive side of things; the educational aspect of how do you prevent this from happening and how do you become aware of it as soon as possible. It seems to me that we are dealing too much with the other end — after it has already happened. How do we stop it from happening? It has to be agreed that pursuing the preventive aspect is far more desirable than the naturally very important follow up and this does not in any way demean the importance of following up. I was in the Police School Lecturing Section for a number of years, now called the Safety Advisory Section, and I would like to make a few comments and invite some responses. Is the education system or is it not geared to raise these matters to a level where children will complain to teachers for a start? Is the education system obliged in some way or another to bring this matter up amongst youngsters?

The reason I mention that is because recently on television we have had anti-litter commercials about "Doing the Right Thing". How many children have responded to that theme putting rubbish in the garbage bin as opposed to dropping it on the ground? It has had a very strong effect on a lot of children including my own and a man couldn't step out of line at all with respect to what he could do with his rubbish because straight away my 8 year old would say: "What about doing the right thing?". A very strong impression is created on children's minds with respect to rubbish. How much more important is it to engender this same social conscience about incest?

The Police School Lecturing Section took years and years to start talking about drugs in schools, long after the actual problem was identified and was being aired publicly, because we were too afraid to compound the notion in some kids' minds that drugs were something good. That was why it wasn't brought up earlier, but eventually we established some sort of drug programme starting at first year high school.

I used to talk to pre-schoolers, and we used to talk about crossing the road safely, and that you also have to be careful of strangers. These terrible strangers that might take you away and offer you sweets and the like, but, of course, we possibly should have been telling them about some of their fathers. I would like to know why we cannot extend this whole subject of family interference, as well as strangers, to the pre-schoolers? Why can't we encourage the pre-schoolers to say: "Miss Smith, just as I know I shouldn't be throwing rubbish on the ground, also my daddy shouldn't be doing naughty things to me. The policeman told us what daddy shouldn't be doing to us, as he told us what the man up the street shouldn't be doing to us". Now, who has got the guts to start this ball rolling along? I want to know where does it start? Who is prepared to exert the will to make it more difficult for perpetrators to carry out this very sad and very demeaning act upon children?

Being a father it worries me very much that my children may have been involved in some way or another. My children have been telling me from time to time about "Mr Brown up the road" who does terrible things to children and I ask what is anyone doing about it and I heard that it

happened like six months ago! So there is a real reluctance in the community to report these people for sexual deviance. We are talking to pre-school children about "stranger-danger", why can't we bring this up so far as the family connection is concerned? Who are they going to report it to and who is going to start the ball rolling?

Dr Sara Williams

Talking about prevention I have a feeling that incest has been around for so long, I think as long as families exist that we are likely to have some incest, but one of the preventive methods, of course, is to treat the victims of incest because practically *all* of the offenders, the parents who have committed these offences, have themselves come from a very disordered family and have been the victims of incest or sexual abuse themselves in their own childhood. I think it is not just enough to treat the family and it is not just enough to remove the offender. Usually he is told to get out, if it is a man anyhow. But one has to look at two things, firstly the deprivation that exists if you lose one or both parents and secondly, that we do need treatment facilities for all of these different people in the family, they all need help, particularly the victims.

I have thought about school education quite a lot. Do you think the Parents' and Citizens' Associations would agree to a programme about incest? I am serious about it. Would parents agree to us going into schools and teaching about incest?

Brian Rope

I think Geoffrey Little partly answered the question himself. It took the schools so long to even accept the Safety Advisory Section giving lectures on drugs, let alone the invasion of the sanctity of the private home and to talk about your dad who might be screwing you tomorrow. Two years ago I even mentioned about children being taught in pre-school that their body was a very personal thing and nobody had a right to touch it and I was howled dowm then. It was a big thing two years ago. To me that is not sex education. I think it is a very proper and appropriate thing and it is being taught in America. That is where they are teaching the children to use this scream, and it is not a stranger doing it, it is dad!

Gillian Calvert

I agree as long as we have families under the current social arrangement incest will exist. It seems to me therein lies your answer about how can we stop it? Stop families! Regardless of that, I think there are things that we can do, that really can help to give children some defence against incest. We cannot stop it happening but what we can do is empower children and women and the community to speak out against it, to say that it is not OK and that "Yes, we, as children, do have a right to our bodies". I said in my paper that there are four ways that you can do that (p?). The last one that I talked about was community education. Until we have a comprehensive education programme for the community, and that includes the community of professionals: legal, police, and so on, then we are really doing the kids of our country a disservice.

Bill Challis, Probation and Parole Service

I wish I had spoken before our previous speaker. I would like to say that to my understanding the main problem of incest is not fathers and daughters as we have heard at this seminar but brothers/sisters. That is what I would think would be the major incest problem, but, of course, we are more concerned as adults with the parent/child or the guardian/child problem.

I don't wish to sound critical of the concept of the Task Force which is soon to be convened, because I am not, but I wonder if this is going to foreshadow more legislation which may only add further confusion to the already existing complexities. We already have a new *Sexual Offences Act,* and we have the *Crimes Act* which covers assault, indecent assault and also carnal knowledge which includes additional penalties for perpetrators who are in positions of trust such as parents or teachers, etc. But by introducing more law, and I caution the Task Force about this, are we just going to make the situation more complex? We are going to have greater problems with interpretation and application than we have with the laws now. Would we be better off with a more enthusiastic enforcement of the existing statutes, or with simplification of the prosecution?

Perhaps the community knowledge and attitudes are more important than looking at what new laws we can introduce.

Brian Rope

I think Brent Fisse answered a part of this, and that is just having one offence of a combined s61(d) (unlawful sexual intercourse) and incest s78(a) or even s73. How long is it since anybody went to gaol for life for carnal knowledge of a girl under 10? How long is it since anyone, in fact, went to gaol for more than two years for that same offence? What I am saying is that probably we have too many offences. All that the various sections do is categorize terms of imprisonment, and if you had one overall section as proposed by Brent Fisse you would get rid of half of those problems. He refers to those under 18. Should you have a special one for children under 10 years? The majority of these offences occur under 12 years, and by the time a child is 12 they are having personal development education lessons at school. They then find out what has been happening for the last 5 or 6 years is not right, so they speak out about it. Some don't, but a majority of them do, or a majority of them go searching for somebody they can talk to. It would be far better to create a "hotline" where these kids know that they can contact somebody and that they are going to be believed.

Gillian Calvert

I agree that there needs to be more enthusiastic application of the law not only from the legal point of view but from the welfare angle as well. In relation to the brother/sister versus father/daughter incest, in the survey we conducted father/daughter incest came out as the main category but I also suspect that brother/sister incest occurs a lot more. Whether it is incest in the sense that it is an imposition and it is abusive, as opposed to mutual

sexual exploration, I do not know. There has not been enough research done into this area to draw absolutely hard and fast conclusions about it.

Dr Sara Williams

The materials that I have read and personal experiences show that brother/sister incest produces much less emotional trauma in the participants. They feel a bit guilty about it, but it does not break the trust between parent and child. It is the breaking of the trust between parent and child that is the harmful part of the incest, not just the sexual experience, unless, of course, it is physically painful and dangerous. The breaking of trust between the active parent and the child which also disrupts the relationship between the child and the other parent, because the other parent is viewed as having not protected the child. I do not know whether anybody would agree with that, but that has been my clinical experience and reading the literature it seems to be the same. I would agree with Sandra Heilpern that it is not just the actual incestuous experiences that is harmful, but it leaves a very damaged and disorganized family who need a lot of help in all sorts of different ways. I think the rationalization that "I am a good guy" and "an important member of the community", is a rationalization to cover up the awful feelings of guilt, and is also damaging. I think that offenders do know that it is wrong. There is a great deal of recidivism amongst offenders as somebody who sexually assaults a child is likely to repeat the act. I think physical violence to children can be more frequently a one-off thing than sexual abuse of children.

Gillian Calvert

I agree with Sara Williams on the issue of trust. I think the betrayal of the trust of the parent/daughter relationship is really quite damaging, and that absolute sense of betrayal that you feel as a victim. You know your own parent who was meant to care for you, protect you and nurture you has really been incredibly damaging to you. I think that that is one of the things that creates the sort of effects that we see all the time in women who have been victims of incest.

The other thing that I have experienced as a clinician is that when non-mutual brother/sister incest does occur it tends to be incredibly violent and sadistic, in fact, much more so that a lot of father/daughter incest. I suspect that is because the only way in which the brother can secure control of the victim is through binding her or beating her or being physically intimidating. I think the other thing too is that they do not have the normal adult control and power in relation to the victim that the father does. My experience as a clinician has been that brother/sister incest can be fine and that it can be a mutualy sexually exploring thing. On the other hand I have also seen some women who have really awful effects because the relationship between the brother and sister was so abusive. Again, I would say I do not think we know enough about it to be able to make really hard and fast statements.

In relation to the notion that these families intend to be incredibly damaged and dysfunctional, I find that rather scarey in that one figure I

have come across is that *1 in 6* families are incestuous. Does that mean we have one family in six that are that incredibly disturbed? I do not think that you can isolate the family from the society, and you have to recognize that within the family we are not all free and equal beings. The father clearly has more power than the child, he has more rights, more access to money, etc, etc, and so on. I find this defused notion of *"the* family" quite distressing, as it does very much remove the responsibility of committing the act away from the offender and shift it to other members of the family eg, the mother who colludes, or the child who is sexually provocative, and so on. In my work I have found the notion of the dysfunctional family quite difficult, and I do that speaking as a family therapist.

Dr Paul Hutchins, Child Abuse Physician, Royal Alexandra Hospital for Children

I think that we are already in the process of increased community education. More children are already telling their teachers, and their neighbours, and perhaps other relatives that something is happening in the families that the children themselves know is wrong. Already there are more children who want it to stop.

We have all been talking about changes in the law which will take a while even if the Task Force is acted on immediately. We are talking about changes in services which we all accept are inadequate, and we are talking about changes in education whether it is the policeman going along and talking about "Daddy-danger" not "stranger-danger" and your body is your own, or putting that on a hoarding in front of every school. Children are already becoming more aware because their parents are becoming more aware, newspapers have already had series on sexual abuse, physical abuse, the way children are treated. The women's movement is already an accepted part of life and has produced many changes in our awareness. We have to do something to satisfy the needs of these children. I wonder whether the only thing is going to be with a very much wider knowledge with perhaps obligatory reporting by teachers when a child says "I think my daddy is doing the wrong thing. What do you think Miss Smith?", that the teacher does not know who to tell, and if they have been to this seminar they will realize there are not too many services to tell anyway. We have to support those people.

What is the panel's response to feeling, in a slightly desperate way, that the only thing is to make the problem so public, so well known that society will be so aware that in some way it imposes its own feedback and its own control? The problem is those million incidences of child sexual abuse that never get to court. Are there things we can do now to help those children who are coming forward, and can we begin to guide the professionals who deal with them in a much more informal, much less intense way than most of us who are at this seminar?

Brent Fisse

It seems to me that some progress has been made in South Australia with the setting up of Child Protection Panels, and with emphasis being placed upon mandatory reporting by teachers and others of incidences of

child abuse. The problem in South Australia is certainly coming out into the open to a much greater extent than before, and it is coming out into the open without throwing children or anyone else to the wolves. There is a constructive ongoing civil programme of trying to deal effectively with incestuous and other problems within families. The relevant legislation is the *Community Welfare Act* under which the Child Protection Panels have been set up.

Dr Paul Hutchins

Could I comment on the South Australian experience. At a recent paediatric conference in Adelaide a paper was presented on the use of parent supports or, in a sense, "grannies" supporting other children and using parent aids to support parents in families where the children were not being looked after. When I asked the person who was setting those up how many cases of sexual abuse the parent's aid was being able to deal with, I think they had just had their first one. People are groping in the field of physical abuse that we really feel we know so well. In regard to the Child Protection Panels that you mentioned, perhaps there could be a more local level with support for the families themselves on an informal basis. We do not know what to tell other normal people who provide better family models.

Brian Rope

I think one of the first things we have got to do is to start educating people working in the field. For example, in the country last week a teacher was having a great battle in a small country town because he did not know how he could face the father of this child. The child had said "Don't tell Dad", so he knew that the offence was being committed, but he could not cope with his own problem of how, in a small country town, he was going to be able to face that guy. If we can't face people directly and we can't cope with our own feelings, how are we going to help kids? I think the number one priority is teaching ourselves first, and then we may be able to teach the parents, and then we may be able to change the law.

Gillian Calvert

I think regardless of how you do it, the one thing we do know is that it is going to cost a hell of a lot of money, and it seems that the government is a little reluctant to give people who are interested in doing that, the money to do it.

Peter Lisberg, Youth and Community Services

I am a crisis care worker. In seminars like this it is fairly easy to create a few carpets where we can sweep things under and say: "Look at all these problems. We can't live with them therefore we can't cope with the main problem."

It seems that people have agreed that there are two sets of laws. There is a *Child Welfare Act* which over the last ten years has been re-written. We were expecting it yesterday, we have been for the last ten

years. There is also the *Crimes Act*. Because of the way the *Crimes Act* operates we are reoffending against children and that has to be changed. We then come back to the dysfunctional families and the way they show their dysfunction is that they may be perfectly normal — as was said earlier "People who you would invite home for dinner", but we go in there and do something and they crumble, they fall apart. If we go in there and do something and don't do it right, don't do the proper thing at the time, we shouldn't have gone in in the first place. If we go in there, it is important that we are the people with the statutory responsibility to go in and do something. It is important that we have people like Dr Sara Williams (and there aren't too many of her around). We need people, we need professionals to deal with the cases we get, we need appropriate places to place the children once we get them. We have not got them.

Gillian Calvert

That all takes money, and it is very difficult to get money out of this Government. We are finding it extremely difficult to get funding for Dympna House which is a centre set up to support incest victims and their families. We are finding it very difficult to get funding for a medium term accommodation refuge for young girls between the ages of 12 and 18 who are currently having to go back into the Y.A.C.S. institution system.

I agree something needs doing. It needs doing quickly and we need money to do it. These families require a lot of time, a lot of effort, and a lot of staffing resources. It is not cheap. Incest is not cost/effective.

Dr Sara Williams

I do think that the last speaker had a point, apart from saying there is not enough of me around! Thanks.

I was hoping that the professors of paediatrics would be here who are responsible for training. "Action for Children" wrote to the Chancellors of the universities and the Professors and the Deans of the medical schools and the Professors of the Departments of Psychology to try and indicate that we had a very poor supply of trained psychologists, psychiatrists and social workers who could work in this sort of area. Social workers are better trained than anybody else. Psychologists and the doctors graduate with not enough training in this area and I think we should direct our efforts to telling them so. There are a lot of doctors who are *not* getting a lot of work but child psychiatrists are up to their ears in work. I am booked up until the end of September, i.e. for 3 months ahead. You can understand how that is a ridiculous situation. I am 64. I retired four years ago. So there really is a huge need for help, and I am not saying it is only from the child psychiatrists. I respect all the other workers in the field, but we do need a lot of people who have had different sorts of training who can work in this area, and we need supervisors for the workers. The advantage of child psychiatrists is that with Medicare, treatment is free for anybody in the community. Distressed families can expect, under Medicare, to come and be treated without having to pay.

Gillian Calvert

I think there is a real reluctance within the professional community to take up this issue and deal with it. I approached an agency which specializes in child and family psychiatry last week to look at setting up a particular program to deal with incest victims. The answer was that we don't have the resources and we don't think it is a priority. What can you say? It is a priority, and I have figures that can back it up? I think that that is part of the community education that needs to take place. We need to tell people. Incest happens and it happens far more than we have ever suspected, and we are going to have to do something about it because we have a lot of damaged kids and a lot of damaged adults walking around because we didn't do something about it many years ago.

Jan Spratt, Department of Youth and Community Services

I am in charge of one of the residential units where I have 12 sexually abused children at the moment. I would like to comment on one of the problems that I see very much in attitudes over this. Where a child has been badly sexually abused you are then constantly pressured by solicitors acting for the parents saying how very much the parent wants to see the child. This becomes a tremendous problem when the child is obviously saying that they don't want to see the parent. People seem to feel that the perpetrators of the sexual abuse have every *right,* and I think a lot of this goes back to the feeling of ownership and possession of women and children.

The other thing is that I agree that there are not nearly enough resources nor child psychiatrists. We have been very fortunate in the people we find to help us. In fact, I know the waiting list for appointments is very long and I also know that last week we had to turn away six children — this is rather frightening because you wonder where else they go. I think that if we could lift the uncles and the other people who do these things it would make it a lot easier, because when the child does come into care that in itself is traumatic no matter how careful or good and kind we are.

The other thing is when you bring in daddy and uncle or auntie, who insist on visiting. In some cases, of course, this is what we are working at, in restoring the child and patching these relationships up, then the amount of supervision and the amount of care that has to go into that visit is also quite incredible. I agree with you there is no way you can cut costs when you are supervising a visit between a very damaged child and very damaged parent.

Gillian Calvert

I guess the problem that I would like to come back to is how I concluded my talk, and that is what are you going to do? Because I think every one of us has to individually take responsibility for this problem. It is a community problem and no matter where you are whether you are in a church, whether you are in the legal profession, whether you are in the home, whether you are in the education system, or whatever, there is something that you can do. I would like all of you to consider what it is that you are going to do to deal with this problem of incest.

Sandra Heilpern

I would like to say I agree with a lot of the ideological statements that have been made at this seminar, but on a purely practical level we do have limited resources, and we do have a limited law system to work under. Although the resources are limited, and that is not a problem you and I can solve immediately, I think it is a shame when the legal system has been set up to deal with problems that didn't exist when it was set up. The way the system operates now is just re-abusing children, so I look to the law reformers to please do something about that quickly.

Dr Sara Williams

I seem to have said all I can think of saying really. I came to ask the law reformers to do something about changing the system for children giving evidence in court. That is what I came about, but there is a huge shortfall in facilities. It is all very well to report these matters to Youth and Community Services but it is *impossible* for them to deal with the number of cases they get referred and to handle them all adequately, and I think we have to look to other ways of handling the problem. I don't know all the answers. I would like us *not* to think that one simple way of handling the problem is going to work. We are going to have to have a range of alternative forms of management and help.

Brian Rope

I just think listening at this seminar that the community and too many professionals do not not know the law that exists in our State. This causes them to have unrealistic expectations of those people that have statutory responsibilities, like the Department of Youth and Community Services and the police, about what can be done when a child makes a complaint. Because it is so complex the Police Department and the Youth and Community Services Department cannot perform as they would like, but with Helen L'Orange's Task Force I can see a glimmer of hope for early next year that we can come up with a good package that will ameliorate a lot of the problems that we have now.

Brent Fisse

First of all, there is a great deal that can sensibly and usefully be achieved by way of law reform, but I agree, as I said in the conclusion to my paper, that the problem of community welfare resources really looms large. It is the most significant problem. Secondly, as far as the question of resources is concerned, I would like to adhere to the view I expressed before — progress is being made in South Australia contrary to the suggestion made a few moments ago. In the latest report of the Department of Community Welfare in South Australia for 1982/1983 some statistics are set out. The claim is that there was a 44% increase in the number of cases reported to the Child Protection Panels, that of these cases 573 cases were confirmed, the majority of cases (59.5%) were physical maltreatment, 23.4% involved sexual abuse, 11.2% children who were at risk, and so on. The report also documents the increased funding that has been made available in South Australia so perhaps we might even get Mr Wran to speak with John Bannon about the matter.

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