

Society for the Reform of the Criminal Law

Conference March 19th - 23rd, 1989

(Seminar M3 : Dealing with domestic violence,
including child abuse)

CHILD ABUSE - K.V. BORICK

The need for Discipline

As I am already behind the deadline these notes for discussion are done on the run. I deal only with the topic of child abuse with an emphasis on child sexual abuse.

In these notes I distinguish between reform of the Criminal Law generally (fundamental reform) and reform in a more narrow sense meaning alteration, restoration or extension of existing law (cosmetic reform).

Little need be said about the existence of a real problem area. Nor is there any lack of endeavour in attempts being made to resolve the issues. I believe I would be safe in assuming delegates attending Seminar M-3 are well aware of the problems involved.

I start with the proposition that cosmetic reform has lacked discipline due to inadequate definition and poor "science".

Inadequate Definition:

A convenient starting point lies in the two words "child" and "abuse".

Depending on where you live in the world and your point of view, a "child" may be anywhere between - 8 months and 18 years. Even putting aside individual characteristics (e.g. the deaf, blind or mentally disabled) it is obviously ridiculous to attempt to compose either law or rules of evidence and procedure without relating both to the age of the "child". In my State (S.A.) the legislative reformers tend to ignore this issue and I suspect they are not alone.

The Criminal Law has no real difficulty coping with physical abuse in the sense of defining a crime, but what about psychological and emotional abuse? Assuming children have rights and parents have responsibilities over and above the essentially physical, can the Criminal Law remain aloof from tackling the problem of parental neglect? I venture to suggest that within three or four hundred years administrations which allow children to starve both physically and emotionally will be held to account. Perhaps we should make a small start by attempting to define precisely what "abuse" means.

Problems of definition are set against a complex jurisdictional background, particularly in those cases involving an allegation of child sexual abuse. In Australia the same factual situation can be dealt with either in the Criminal Court, the Family Court, the Children's Court of the Magistrates Court (and sometimes in the whole lot). Standards of proof vary enormously whilst the rules of

evidence and procedure range from the strict to the non-existent. We have reached the stage where it is almost impossible not to be "convicted" in the Family Court and, in the view of many earnest people, impossible to be convicted in the Criminal Courts. It is also obvious that the "paramount interests of the child" and the traditional rights accorded to an accused are in direct conflict with the family being the meat in the sandwich.

A factor contributing to the jurisdictional mess is the failure of the various Courts to define and understand their own role. This is evident in the criminal jurisdiction where a "therapeutic" element has been injected into both the investigative and trial process (including sentencing) and more so in the Family Court where custody and access disputes are decided not so much on the facts as they are on the social perceptions of judges lawyers and assorted experts.

N.B. (I should explain why I used the expression "impossible not to be 'convicted' in the Family Court".

In re M. a judge of the Family Court of Australia decided, in a case where there had been an allegation of child sexual abuse, that although the allegation was not proved, he had a lingering doubt and therefore all access, even supervised access, should be denied the father. The Full Court of the Family Court, by majority, upheld the decision. The Chief Justice

of the Family Court, in a minority judgement, said the risk should be quantified. The High Court of Australia upheld the majority decision. They said the trial judge did not really mean "lingering doubt". He meant "unacceptable risk" according to the High Court. The fact is the trial judge did use the words "lingering doubt" and in my view it was unhelpful for the High Court to not only avoid the issue but instead to supply us with a vague and unhelpful definition on an issue which they themselves said was incapable of definition.)

Poor "science":

The law in general and the Criminal Law in particular has long been held to ransom by so-called expert evidence. In no branch of the law has the problem been more acute than in the area of child abuse.

Take, for example, the reasons advanced by one so-called expert as his basis for condemning a husband :

- "1. Most sexual offenders deny the offence in South Australia.
2. Mr. X. has had a very close relationship with his daughter which was supported by his wife.
3. Mr. X. holds strong discriminatory attitudes to women, putting them down and ridiculing them.
4. Mr. X.'s use of denial and responsibility for the sexual abuse. He has also demonstrated irresponsibility in the marriage, financial matters and

being a full participant in family life.

5. Mr. X.'s response to this evaluation was 'Have I passed the test' rather than just describe what has happened. This suggests that he saw the interview as a test to convince me of his innocence. He's almost saying, did I give you the right answers.
6. Sleeping in the same bed as his daughter on access weekends does not acknowledge that there needs to be physical and emotional boundaries between parents and children, particularly female children ..."

This is probably the worst I have heard or read but it is by no means an isolated example.

The Chief Justice of the Family Court of Australia has been quoted as saying that one of the causes for burgeoning sexual abuse cases is the lack of an agreed methodology for validating such cases. I agree, and the reason for that lack lies in the fact that there is as yet no branch of specialized training based on an appropriate research programme which would entitle anyone to claim the capacity to draw the sort of inferences of the type set out above.

Cosmetic Reform:

This conference is concerned with "investigating crime and apprehending suspects; police powers and citizens' rights". In the area of child abuse the Criminal Law has suddenly been confronted with a situation which has confounded it.

We have not yet adequately defined the crime, let alone found a satisfactory technique for investigating it. If the family, and its component parts, parents and children are to be adequately protected, the law, and in particular the Criminal Law, is going to have to adapt.

I believe the way in which the law will have to adapt in this area is of critical importance to one of the questions I was invited to address - "How can the criminal law be reformed generally?" In passing, it is worth noting the Criminal Law has always had trouble within the traditional family (e.g. rape in marriage; domestic violence, incest) let alone coping with what I would describe as the eroded family.

Before dealing with fundamental reform however, it is necessary to note the difficulty occasioned by the current experimentation masquerading as reform.

Take a standard child sexual abuse case: A father is alleged to have placed his finger in his four year old daughter's vagina. Daughter describes act with use of forensic dolls after prior interrogation from mother and grandmother. There is disputed physical evidence of penetration. Rape Crisis Centre, Department of Community Welfare, police, lawyers and a bevy of experts become involved. Father vehemently denies allegations and blames a vindictive wife aided and abetted by Women's

Shelter workers. Police lay information but no case to answer found at committal. D.C.W. brings proceedings for care and control in Children's Court as a tactical move. Family Court eventually denies father access on the basis of a lingering doubt. The politicians set up a task force and everybody else heads off for another seminar.

There then follows endless chatter about specialised training for police and prosecutors, video taping of interviews, corroboration, victim's rights, expert evidence and so on. About the only thing everybody agrees on is that the process of the law has probably done more harm than good to the family involved.

My conclusion is that given the current climate cosmetic reform is producing more problems than it resolves.

Fundamental Reform:

Before we start talking about the reform of the Criminal Law generally, ought we not first of all to clarify what it is we require of our Criminal Law ?

I do not think the traditional answers given to this question are particularly helpful or relevant, unless we perceive the Criminal Law to be a necessary evil divorced from the mainstream and oblivious to social reality.

Do we continue to solemnly put someone on trial for child abuse, reach a verdict and then walk away from the mess ?

Or should we not have the humility to sit down with the family lawyers and invite them to help us develop a Criminal Law which will inspire in those who come into contact with it a little more confidence than the decisions of our courts are presently accorded ?

It is at this point I invite you to look at the significance of the inclusion of this topic at this conference, and in its allocation to a day devoted to the police and the community and a discussion as to the dichotomy between public order and private rights. It is a topic that could fit just as easily into the second day "Police Investigation, Interrogation and the right to silence" (e.g. should the right to silence be maintained when the alleged victim is the child of the accused), or the third day "Stop Search Seizure and Surveillance" (e.g. how do you enforce surveillance in the family home).

I suspect the topic owes its allocation to these facts; the police don't know what to do; the community is confused; if child abuse is as prevalent as some would have us believe public order should certainly prevail over private rights and to a growing perception that the Criminal Law is not providing the protection to children that it should.

So, in this setting I invite discussion as to what it is we require of the Criminal Law. If we are prepared to trample on the presumption of innocence in the fight against

public corruption, should we not also be prepared to trample on it in the fight against private corruption ?

My opinion is that we have got into this trouble because we shifted away from this paramount principle without due consideration of the consequences.

My belief is that we have come to a red alert. It is time to stop and to look carefully where we are going.

Should the Criminal Law be involved in the family at all ? Does the answer lie in the development of a true Family Law which directs its attention to the rights and responsibilities of parents to their children rather than to their own matrimonial causes ?

The criminal justice system took a long time to adjust to the view that the victim is entitled to due process as well as the accused. I think it is now recognized that the substantive law and the rules of evidence and procedure are but part of a whole "system". The difficulty is that every aspect of the system is dependent on the key principle, the presumption of innocence, and that principle is causing some inconvenience. That is particularly evident as we develop the rights, civil and otherwise, of victims of crime. It seems to me this law is developing around an assumption of guilt, it is indeed inherent in the word "victim". In dealing with child abuse and domestic violence the civil courts have all but totally

abandoned the presumption. Faced with this growing impatience by the failure of the criminal justice system to protect children (and wives) criminal lawyers are facing a huge dilemma.

If we stick to our principles we might find ourselves regarded by the rest of the community as at best irrelevant to or at worst the enemy of the family. If we abandon principle the criminal justice system as we know it collapses.

I hope you agree the issue requires a most careful and disciplined approach. I appreciated the aims of this Society are more philosophically orientated than practical but I trust our discussions this week will assist to clarify the direction of our future endeavour.