Characteristics of Successful and Unsuccessful Appeals Against Conviction for Child Sexual Abuse

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The current study investigated (a) the effect of legislative reforms and amendments to judges' directions to juries in the success of appeals against conviction for child sexual abuse and (b) the role of delay between the offence(s) and the trial in these appeals. Appeals listed in the Victorian Court of Appeal in Australia between 2004 and 2014 were identified. Data were extracted for a number of variables including the appeal's success and the delay between the first offence and the trial. Of the 238 appeals identified, 118 (49.6%) were successful. Legislative reform showed the only significant difference between successful and unsuccessful appeals: There were more successful appeals than expected following legislative changes in 2006. Delay was raised as a ground for appeal in 11 of the 118 successful cases. Delay was associated with the ages of the victims and offenders, sex of the victims, and the victim–offender relationship. Overall, the results do not appear consistent with the goal of the reforms, which was to avoid appeals and retrials that may have occurred as a result of judicial error. Future research should determine whether the trend towards higher success of appeals is continuing, particularly in light of further legislative changes.

Key words: Appeal; child sexual abuse; delay; jury directions; legislative reform.

Despite greater understanding of the phenomenon in recent years, the prevalence of child sexual abuse (CSA) far outweighs the number of cases reported to the authorities (Ferguson, Horwood, & Woodward, 2000; Hardt, 2004). An examination of retrospective studies of adult survivors of CSA revealed that only 10–18% of cases were officially reported (London, Bruck, Ceci, & Shuman, 2005). Few children report abuse immediately; many wait months or years (Goodman-Delahunty, Cossins, & O'Brien, 2011; London et al., 2005; Smith et al., 2000), and it is not uncommon for victims to wait until adulthood before disclosing (Alaggia, 2005; Arata, 1998; Goodman-Brown, Edelstein, Goodman, Jones, & Gordon, 2003; Pipe, Lamb,

Orbach, & Cederborg, 2007). For example, in a community sample of New Zealand women, only 37% had reported CSA within 12 months of it occurring, whereas almost one quarter waited more than 10 years to disclose (Anderson, Martin, Mullen, Romans, & Herbison, 1993). The current study had two aims. The first aim was to investigate the effect of legislative reforms and amendments to judges' directions to juries (about delay) in the success of appeals against conviction for child sexual abuse. The second aim was to examine the role of delay between the offence(s) and the trial in these appeals.

Children and adults might delay reporting abuse for a variety of reasons that are not well understood (London et al., 2005). A

child may feel unable to complain due to threats of violence (Hanson, Resnick, Saunders, Kilpatrick, & Best, 1999), a fear of not being believed (Goodman-Brown et al., 2003), or concern that the family unit will be broken up (Alaggia, 2004). Age may also play a role, with younger children waiting for longer periods of time than older children (London et al., 2005; Smith et al., 2000; although see Arata, 1998). The relationship between the perpetrator and the complainant may also affect delay: Some studies have found longer delays if the perpetrator was a family member (Anderson et al., 1993; Arata, 1998; Goodman-Brown et al., 2003; Smith et al., 2000; although see Lamb & Edgar-Smith, 1994).

A recent study suggested that the association between child-perpetrator relationship and delay was different for males and females (Connolly, Chong, Coburn, & Lutgens, 2015). For females, delay to prosecution (the date the offence ended to when the prosecution began) was shortest if the perpetrator had access to the child through a family connection (e.g., neighbour or mother's boyfriend). For males, when the perpetrator was a community member, there was an average of 25 years delay. Similarly, Easton (2013) found that the average delay in disclosure for male victims was over 20 years. In historical CSA cases, particularly for male victims, the delay to disclosure and, ultimately, prosecution, can be very long indeed.

Delay can cause problems for the criminal justice system, where ensuring a fair trial is fundamental, and an expedient trial is expected. From the prosecution perspective, difficulties with delayed prosecutions of CSA include an inevitable loss of evidence (Shead, 2014) and a lack of corroboration (Kelly, Lovett, & Regan, 2005). This may result in reliance on the evidence of the complainant alone, putting the credibility of that witness at the forefront of the case (Cossins, 2010). For the accused, forensic disadvantage due to the delay may result [Quadara, 2014; Victorian Law Reform Commission (VLRC),

2009]. Significant delay may create difficulties in testing the evidence and raising a defence to charges where, due to the nature of the offending, the complaints lack specificity, and there is lack of physical evidence (Quadara, 2014).

Judges provide directions to the jury to assist jurors in their assessment of the evidence, particularly where delay has resulted in significant disadvantage to the defence case, or doubt has been cast on the complainant's credibility. Despite acknowledging the need for clarity, many judges are wary of simplifying instructions to the jury in order to avoid being overturned on appeal (Najdovski-Terziovski, Clough, & Ogloff, 2008). This wariness can lead to highly detailed and lengthy directions, and, as a result, appeals against decisions are common (Victorian Law Reform Commission, 2009). It is a fundamental right to have a decision reviewed by a higher court (Charter of Human Rights and Responsibilities Act, 2006), and while the number of appeals against conviction might be a concern, the right to appeal is not questioned. Successful appeals can result in an acquittal for the accused, resentencing, or an order for retrial.

Legislative Changes

Historically, delayed complaints of sexual abuse have been viewed with some scepticism by the legal system. In the not-so-distant past, an allegation of sexual assault had to be made at the first opportunity or, unless there was evidence to the contrary, it was to be assumed either that the assault did not happen, or that the act was consensual (McDonald, 1994). Over the past 30 years, the law, known as the doctrine of recent complaint, has been abrogated by a number of countries including Australia, New Zealand, Canada, the United Kingdom, Ireland, and Europe (Lewis, 2006). However, given the entrenched beliefs surrounding sexual assault, it was regarded as necessary to discourage courts from drawing any conclusions from

delayed complaints, and several jurisdictions, such as Australia, Canada, and New Zealand, provided directions to that effect (Lewis, 2006). Unfortunately, in Australia at least, only marginal progress has been achieved since that time (Supreme Court of Victoria, 2012).

More recent legislative change in Australia, and specifically in the State of Victoria, has acknowledged the complex and unique nature of sexual assault and addressed outdated notions of victims of sexual assault. Among numerous other amendments, significant changes were made to two common law directions on the issue of delay provided to juries – that of the reliability of victims of sexual assault, and any forensic disadvantage suffered by the accused due to delay in reporting [Crimes (Sexual Offences) Act 2006; Crimes (Sexual Offences) (Further Amendment) Act, 2006]. Changes also allowed for alternative arrangements for giving evidence in court, such as the use of closed circuit television from a remote facility, thereby making the process less traumatic for all victims of sexual offences.

Further changes occurred as a result of the Uniform Evidence Act (Uniform Evidence Act, 2008) which addressed the view, and the direction to the jury, that the evidence of a child was inherently less reliable than that of an adult, abolished mandatory requirements for a common law warning on corroboration, and introduced reform that better reflected the contemporary psychological view of the memory of a child. It also retained the duty of the judge to sum up fairly and to direct the jury in such a way as to avoid the risk of a miscarriage of justice (VLRC, 2008).

Despite the significant changes to Victorian legislation in 2006 and 2008, concerns remained that the directions to juries were long and complex. For example, following a 20-day jury trial in Victoria, a judge spent, on average, six hours explaining matters and providing directions to the jury, compared to 106 minutes for a trial of the same duration in New Zealand, or 155 minutes for a trial in

Western Australia (Ogloff, Clough, Goodman-Delahunty, & Young, 2006). In response to a request for a review of directions in criminal trials, the VLRC (2009) concluded that errors in jury directions ‘have resulted in many retrials being ordered on appeal’ (p. 8).

The main aim of the current study was to compare CSA cases in which there was a successful appeal against conviction with those in which there was an unsuccessful appeal. Comparisons focused on whether cases were heard before the 2006 or the 2008 legislative reforms occurred and their individual characteristics (e.g., victim age and gender, perpetrator age, victim–perpetrator relationship, delay between the first offence and the appeal). Given that delay was an important feature of the 2006 legislative changes, our second aim was to examine the cases in which delay was raised as a ground for appeal. We also examined whether any case characteristics (e.g., victim age and gender, perpetrator age) predicted the delay between the first offence and the appeal.

As a way of background information, numbers of all sexual assault and CSA trials heard in Victoria are not readily available. However, of the 2865 people tried in *all* criminal trials from 2000–2007, just over half were convicted (VLRC, 2008). There were 538 appeals against conviction, of which approximately half (52%) were successful. Of the 18 appeals where an issue was raised in relation to directions on delay, only five were successful (28%). For sexual offence trials more specifically, there were 169 appeals against conviction; 114 of those appeals involved a child victim (67%). Of the 169 appeals, 64 were successful (38%); however, it is unknown how many of the successful appeals included CSA trials.

Only one Australian state (New South Wales) has recorded whether successful appeals against sexual offence convictions were CSA trials. For trials held between 2001 and 2006, sexual assault appeals represented 27% of all conviction appeals (251 of 937 cases). Sexual assault appeals were successful

in 43% of cases. In just under 60% of the appeals, the principal victim was a child, and of the successful appeals, almost 70% involved a child victim. The success rate for child sexual assault appeals (50%) was significantly higher than that for those appeals involving an adult victim (32%). In over half of all successful appeals against sexual assault convictions, where directions to the jury were raised as grounds for appeal, almost 50% related to issues around forensic disadvantage caused by delay (Donnelly, Johns, & Poletti, 2011).

Method

Overview

A brief overview of the criminal appellate process in the Victoria is useful. The Court of Appeal hears appeals against convictions and sentences imposed by the County and Supreme Courts; all appeals by defendants convicted or sentenced require leave of the Court. Defendants must file an application for leave to appeal within 28 days of the date of sentence. Court of Appeal judges may grant leave to appeal on all grounds, grant leave to appeal on some grounds but refuse others, or refuse leave to appeal. Following the granting of leave to appeal, legal and technical discussions on the law are undertaken. In relation to an appeal against sentence, if the appeal is dismissed, the sentence may stand as is, or may be increased. If successful, the sentence may be reduced.

If an appeal against conviction is successful, the Court has a number of options. The accused may be acquitted of some charges and resentenced on the remainder. A lesser charge may be substituted for any like charge and the accused resentenced. There may be an order for a retrial, on all, or some of the charges, with the accused resentenced or acquitted of the remainder. Finally, the Court can set aside the conviction and enter an acquittal. It is a matter for the Director of Public Prosecutions, on further consideration

of the matter, whether a retrial takes place if it is ordered by the Court of Appeal, or the matter is taken no further. If an appeal against conviction is dismissed, the conviction stands.

Identification of Cases and Inclusion Criteria

We identified appeal cases from jury trials that involved a sexual assault or sexual abuse matter heard in the County Court of Victoria between February 2004 and December 2014 using the Australian Legal Information Institute (AustLII) database. The database contains the Court of Appeal reasons for decisions from cases heard since 1998 to the present day. Every case listed between the relevant dates was downloaded from the database, and the circumstances of the case were examined. Of the 3,653 cases listed, 634 cases involving sexual assault were identified, 159 (25%) of which involved adult victims only and were therefore excluded. Only cases that involved a child victim (that is, a person under the age of 18 years) when the offending commenced were retained.

From decisions in child sexual abuse cases, 475 appeals were listed. Of these, 204 were appeals against the sentence only and were excluded from the current analysis. Of the remaining 271 appeals against convictions (or conviction and sentence combined), 24 (9%) interlocutory appeals were excluded, as only one of the interlocutory appeal decisions recommended an ultimate outcome to the trial. Nine further cases were excluded as they were not appeals against conviction (two were appeals against the refusal of an application; one was an application for extension of time in which to appeal; one was a leave to abandon an appeal; one was an appeal against a Detention and Supervision Order; two were cases Unfit for Trial; one was an appeal against the refusal of bail; and the final one was a case of legal argument only). Therefore, there were 238 cases identified for analysis.

Procedure

Data for all cases were extracted from the Court of Appeal decisions. Each appeal against conviction was considered to be a separate case and was coded according to a number of categories. First, whether or not the appeal was allowed or dismissed was coded (allowed, dismissed) and, if allowed, whether the appeal was successful (successful, unsuccessful). For each case, the earliest date of the original offence, the date of trial, and the date of appeal were coded. The delay between the original offence and the date of trial was calculated. The date of the trial was used to categorise each case into a legislation category: Trials held between 1 January 2007 and 31 December 2009 were included in the ‘Post-2006 legislation’ category. Although law reform took place in 2006, it is unlikely that cases affected by the reforms would have reached the court until the beginning of 2007.¹ Trials held before 31 December 2006 were included in the ‘Pre-2006 legislation’ category. Trials held on 1 January 2010 and later were included in the ‘Post-2009 legislation’ category, as it is unlikely that the 2009 reforms would have reached the court until the beginning of 2010.

The number of victims was recorded (scale variable), along with the sex of the victim(s) (male, female, both), and the age of the victim(s). If more than one victim was named, the average age of all victims was calculated. The sex of the offender was recorded (male, female) and the age of the offender. Where the offending took place over a period of time, the age of the offender was averaged. Where there were male and female complainants, both genders were recorded. The relationship between the child and the offender was coded as Parent (biological, step-parent, adopted parent, or foster parent), Non-parental relative (brother, cousin, uncle, grandfather), Access through family connection (mother’s boyfriend, neighbour), Access through community connection (teacher, spiritual leader, scout-leader), or Stranger (see Connolly et al., 2015). For multiple complainants, where the relationship

crossed categories – for example, daughter and daughter’s friend (Parent and Access through family connection) – the case was categorised according to the closest relationship as this would have had most influence on the conviction. The number of offences was recorded along with the severity of each offence (Rape, Incest, Sexual penetration, Indecent assault, and Indecent act).

Where multiple appellants were involved, these were recorded as separate appeals. For example, where there were two appellants from one case, and each had different grounds of appeal and different outcomes, these were coded separately. Outcomes of cases were coded as Resentenced all (where a lesser charge was substituted), Resentenced some, Lesser charge substituted, New trial, Acquitted all, and Acquitted some. In cases in which a retrial was recommended, or an acquittal of all charges resulted, the successful reasons for appeal were also coded.

All cases were coded by the first author. Twenty cases were coded by an independent coder; inter-rater reliability was excellent as 97% of the codes were consistent. Discrepancies between coders were resolved through discussion.

Results

Successful Appeals

Of the 238 appeals against conviction, 118 (49.6%) were successful. Figure 1 shows the number of cases that had their appeals allowed or refused at each stage. A new trial was recommended in 89 of the 118 cases (75.4%). In 14 of the cases the accused was acquitted of all charges (11.9%). The remaining 15 cases (12.7%) had multiple outcomes – for example, the acquittal of some charges and resentencing on the remainder, or resentencing on some of the charges with a lesser charge substituted.

Table 1 and Table 2 show demographic information for cases that had successful and unsuccessful appeals. Table 1 displays

Figure 1. Outcome of appeals against conviction. Of the 89 cases that were awarded new trials, 83 had a new trial only, 3 included resentencing on some charges, 1 included resentencing on some charges and acquittal on some charges, and 2 included acquittal on some charges. Of the 15 cases that involved resentencing, 1 was resented on all charges (with lesser charges substituted), 9 were resented on some charges and acquitted on some charges but did not have a new trial, 4 were resented and recommended for new trial, and 1 was acquitted on some charges, had a lesser charges substituted, and was resented on some charges.

continuous variables, and Table 2 displays categorical variables. For each variable, a comparison was made. Independent samples *t*-tests were conducted for continuous variables, and chi-squared analyses were conducted for categorical variables. The only significant difference between the successful and unsuccessful cases was legislation category. Examination of the standardised residuals revealed that more cases than expected had successful appeals in the Post-2006 legislation category, $z = 2.04$, $p = .041$.

To explore the impact of legislative reform on the number of appeals and their success further, we examined the number of

appeals finalised, per year, between 2004 and 2014. Table 3 shows that the number of appeals finalised, and decisions made by the Court of Appeal, peaked in 2011 with 46 decisions being made, and the highest number of retrials being ordered. Percentage rates for successful appeals (retrials and/or acquittals on one or more charges) ranged from 31.5% to 62.5% over this time period.

Delay

We first examined cases in which delay was successfully raised as a ground for

Table 1. Case characteristics for successful and unsuccessful appeals (continuous variables).

Case characteristic	Successful appeal $N = 118$ cases			Unsuccessful appeal $N = 120$ cases			Statistics
	Mean (SD)	Range	Missing data (N cases)	Mean (SD)	Range	Missing data (N cases)	
Number of victims	1.76 (1.65)	1–12	2	1.53 (1.15)	1–7	2	$t(232) = 1.21$, $p = .228$
Victim age at time of offence (years)	11.07 (3.23)	4–17	11	10.70 (3.34)	3–16	6	$t(219) = 0.82$, $p = .412$
Victim age at time of trial (years)	23.32 (12.34)	6–59	21	21.82 (11.26)	5–57	21	$t(194) = 0.89$, $p = .374$
Delay (years)	12.43 (12.63)	1–49	18	11.33 (11.27)	1–45	16	$t(202) = 0.66$, $p = .511$
Perpetrator age (years)	34.03 (9.90)	15–58	56	34.66 (11.36)	14–63	56	$t(124) = 0.33$, $p = .742$
Number of previous trials	1.18 (0.52)	1–4	2	1.09 (0.29)	1–2	2	$t(183) = 1.59$, $p = .115^a$

Note: Delay = delay between the first offence and the trial.

^aDegrees of freedom were corrected as equal variances could not be assumed.

appeal; these cases are displayed in Table 4. Delay was raised in 11 cases; of these cases, nine resulted in a new trial, and two resulted in an acquittal of all charges. Table 4 shows that the errors made in directions on delay relate to the subtleties and nuances of the directions given to lay jurors. Two cases referred to directions that could have been understood as comments, which a jury would be free to disregard, rather than a warning. One appeal was brought by the Director of Public Prosecutions rather than the accused.

We next examined whether any of the case characteristics were associated with the delay between the first offence and the trial (regardless of whether the appeal was allowed or not). The relationships between delay and continuous variables (victim age, offender age, number of victims) were examined using Pearson correlations; group differences in delay [sex of victims(s), relationship category, most severe offence] were examined using analysis of variance (ANOVA).

Delay was significantly correlated with the age of the victim, $r = -.202$, $p = .005$; the older the victim, the shorter the delay. Delay was also correlated with the age of the offender, $r = -.368$, $p < .001$; the older the offender, the shorter the delay. Delay was not significantly related to the number of victims in the case, $r = .120$, $p = .088$.

There was a significant association between sex of victim(s) and delay, $F(2, 200) = 8.44$, $p < .001$, $\eta_p^2 = .078$. Table 5 shows the descriptive statistics. Bonferroni-corrected post hoc tests revealed that cases involving male victims had a longer delay than cases involving female victims, $p < .001$. There was also a significant association between relationship category and delay, $F(4, 197) = 5.46$, $p < .001$, $\eta_p^2 = .100$. Post hoc tests showed that cases involving an offender connected through the family had a shorter delay than cases involving a parent, $p = .021$, and cases involving an offender connected through the community, $p = .001$. Cases involving a stranger also had a shorter

Table 2. Case characteristics for successful and unsuccessful appeals (categorical variables).

Case characteristic	Successful appeal <i>N</i> = 118 cases		Unsuccessful appeal <i>N</i> = 120 cases		Statistics
	%	<i>N</i> cases	%	<i>N</i> cases	
<i>Sex of victim(s)</i>					
Male	13.8		11.9		$\chi^2(1, N = 228) = 4.35, p = .113^a$
Female	81.9		87.3		
Male and female	4.3		0.8		
Missing data		2		2	
<i>Sex of perpetrator(s)</i>					
Male	98.3		99.1		— ^b
Female	1.8		1.8		
Male and female	1.8		0		
Missing data		0		0	
<i>Relationship</i>					
Parent	45.0		46.2		$\chi^2(3, N = 225) = 2.93, p = .402^c$
Non-parental relative	12.6		11.8		
Family connection	23.4		29.4		
Community connection	17.1		10.1		
Stranger	1.8		2.5		
Missing data		7		1	
<i>Most severe abuse</i>					
Level 2	54.2		53.9		$\chi^2(1, N = 234) = 0.21, p = .886^d$
Level 4	1.7		0.8		
Level 5	44.1		45.4		
Missing data		0		1	
<i>Type of appeal</i>					
Conviction only	61.9		60.8		$\chi^2(1, N = 238) = 0.03, p = .870$
Conviction and sentence	38.1		39.2		
<i>Legislation category</i>					
Pre-2006 legislation	24.3		34.9		$\chi^2(2, N = 217) = 13.02, p = .001,$ Cramer's <i>V</i> = 0.245
Post-2006 legislation	45.9		22.6		
Post-2009 legislation	29.7		42.5		
Missing data		7		14	

Note: Parent = biological, step, adopted, foster; Family connection = person connected through the family; Community connection = person connected through the community. Level 2 abuse includes incest, rape, sexual penetration of a child under the age of 12 years, and maintaining a sexual relationship; Level 4 abuse includes sexual penetration of a child aged between 12 and 16 years when under the care or supervision by the accused. Level 5 abuse includes indecent assault, sexual penetration of a 12–16-year-old, gross indecency, an indecent act on a child under the age of 16 years, sexual penetration of a 16- or 17-year-old under the care or supervision of the accused.

^aCases involving both male and female perpetrators were excluded from the chi-square to ensure that all cells had expected cell frequencies 5 and above. ^bA chi-square analysis could not be conducted as only two cells had an expected cell frequency above five. ^cCases involving strangers were excluded from the chi-square to ensure that all cells had expected cell frequencies 5 and above. ^dCases involving Level 4 abuse were excluded from the chi-square to ensure that all cells had expected cell frequencies 5 and above.

Table 3. Total number of appeals against conviction 2004–2014.

Year	Appeals finalised (<i>N</i>)	Successful appeals		Retrials (<i>N</i>)
		(<i>N</i>)	(%)	
2004	19	6	31.5	4
2005	17	8	47.0	8
2006	17	8	47.0	7
2007	17	9	52.9	6
2008	14	8	57.1	5
2009	18	8	44.4	7
2010	24	15	62.5	12
2011	46	27	58.7	20
2012	26	12	46.1	4
2013	22	9	40.9	9
2014	18	8	44.4	7
Total	238	118	49.6	89

Note: Successful appeals include retrials and/or acquittal on one or more charges.

delay than cases involving an offender connected through the community, $p = .037$. There was no significant effect of the most severe offence on delay, $F(2, 199) = 0.72$, $p = .489$.

Discussion

Approximately half (49.6%) of the appeals against conviction in CSA trials that were listed in the Victorian Court of Appeal between 2004 and 2014 were successful. This figure is comparable to that found for CSA appeals listed in NSW between 2001 and 2006, in which 50.3% succeeded (Donnelly et al., 2011). Unfortunately, it is not possible to compare the current results to other Victorian data as there is no specific information available on the success rate of CSA appeals, but it would appear that the number of successful CSA appeals is higher than that of sexual assault trials as a whole (38%) in Victoria.

Of the successful CSA appeals in the current study, 75% resulted in an order for retrial. A high success rate in appeals that

result in retrials is an undesirable outcome for all parties to the proceedings, as well as the community, particularly if it results from technical rather than substantive issues. Regardless of the outcome of a further trial, a high rate of retrials has the capacity to damage public confidence in the criminal justice system and result in court delays. The accused has the right to be confident that the jury will be instructed correctly and that the trial will be conducted once; witnesses should expect to give evidence on one occasion, unless exceptional circumstances exist (VLRC, 2008), and the jury should be able to comprehend the directions given to them.

An examination of the reasons for successful CSA appeals for trials heard after the 2006 legislative reform indicated that approximately 10% ($N = 9$) of the appeals were related to deficiencies in directions to the jury around delay in disclosure, and the impact that this may have had on the accused. While this number appears low, it must be recalled that only five cases raising similar issues were successful in the study examining trials between 2000–2007 conducted by the VLRC (2009). It would appear, therefore, that while representing only a small number, appeals where directions on delay are raised as an issue are greater in CSA cases than appeals in criminal matters generally.

In the current study, where an appeal was successful on the issue of delay, it can be seen that delay ranged from nine to 47 years, thus necessitating specific directions from the judge. More specifically, several successful appeals referred to difficulties with the warning about forensic disadvantage to the accused, and, in particular, the possibility that the jury may have understood the words of the judge as a comment, rather than a direction. Two cases included the judge's referral to forensic disadvantage for *both* prosecution and defence, rather than focusing solely on the disadvantage for the accused. Finally, in one further case, the judge merely exhorted jurors to scrutinise the evidence with great care rather than requiring them to consider

Table 4. Descriptions of successful appeals in which grounds for appeal included an error in relation to delay.

Case	Delay at trial (years)	Age of complainant at first incident (years)	Relationship	Nature of error	Outcome
NJB v. Q (2004)	39	7	Stepfather	The judge failed to give an appropriate warning that it would be dangerous to convict on the evidence of the complainant alone. The charge may have caused confusion.	New trial
KJ v. Q (2005)	25	6	Biological father	The warning about forensic disadvantage was not given in the required unmistakable and firm voice, nor was it adequately outlined why the warning should be given.	New trial
Taylor v. Q (2008)	20	12	Scout master	It was assumed at trial that s61 of the Crimes Act 1958 applied in the form in which it was before the commencement of the amendments made by the Crimes (Sexual Offences) (Further Amendment) Act (2006), and the constraints on the obligation of the judge to give a common law warning now had no application. The warning about forensic disadvantage was so diluted by reference to an irrelevant circumstance as to fail to achieve the purpose that it had to serve. The judge said that both the prosecution and defence cases were, or may have been, impaired by delay. This deprived it of any great force.	New trial
RW v. Q (2008)	27	11	Extended family	The judge's warning about forensic disadvantage was inadequate because it amounted to no more than a direction to proceed carefully. The warning did not adequately deal with the serious forensic disadvantage faced by the accused.	New trial
GVV v. Q (2008)	12	8	Stepfather	The warning to the jury was deficient as it was diluted by reference to forensic disadvantage to the prosecution as well as the accused. The forensic disadvantage of the accused must be highlighted in its own right.	New trial
WB v. Q (2009)	35	9	Biological father	The jury were instructed in unequivocal terms that the impact of the delay on the accused's ability to defend the charge depended on whether a complaint had been made. There was a real danger that the jury may have been misled if they	New trial

(continued)

Table 4. (Continued)

Case	Delay at trial (years)	Age of complainant at first incident (years)	Relationship	Nature of error	Outcome
Morrow v. Q (2009)	9	16	Teacher	thought that the danger did not exist because they accepted that the complaint had been made to the child's mother. The judge erred by describing his direction on forensic disadvantage as 'comments' (which the jury are free to disregard, rather than a direction, which they must follow). The imperative words are that the jury must be 'directed' to take the forensic disadvantage into consideration.	New trial
ADG v. Q (2011)	47	4	Brother	The verdicts in the case were unsafe and unsatisfactory. The jury ought to have entertained a reasonable doubt as to guilt. The complainant's delay in making her allegations against the accused rendered the trial unfair.	Acquitted all charges
Greensill v. Q (2012)	30	8	Teacher	No direction was given concerning any forensic disadvantage suffered as a result of the delay. A submission was made during the trial that no direction was necessary. Although this ground of appeal relating to lack of direction on delay was not successful, the Court considered that the forensic disadvantage suffered by the accused underscored the unsafe and unsatisfactory nature of the convictions.	Acquitted all charges
Burke v. Q (2013)	17	11	Uncle	The way the judge informed the jury that there may have been good reasons why a child might delay a complaint could have been regarded as a direction at law, rather than a comments upon the particular facts of the case.	New trial
FJL v. Q (2014)	38	10	Stepfather	Director's appeal. The judge erred in his conclusions as to the degree of forensic disadvantage both individually and cumulatively arising from deficiencies in the evidence. He failed to adequately address the procedural alternatives to a stay available to minimise the prejudice to the respondent.	New trial

Table 5. Mean delay between first offence and trial displayed by category.

Category	<i>N</i> cases	Delay (years)	
		Mean	<i>SD</i>
<i>Sex of victims</i>			
Male	29	19.59	14.56
Female	168	10.34	10.93
Male and female	6	16.50	12.39
<i>Relationship</i>			
Parent	92	13.21	11.85
Non-parental relative	25	12.32	10.43
Family connection	52	7.02	10.15
Community connection	28	17.50	13.71
Stranger	5	1.20	0.45
<i>Most severe abuse</i>			
Level 2	110	12.45	11.72
Level 4	2	13.50	6.36
Level 5	90	10.50	11.59

Note: Parent = biological, step, adopted, foster; Family connection = person connected through the family; Community connection = person connected through the community. Level 2 abuse includes incest, rape, sexual penetration of a child under the age of 12 years, and maintaining a sexual relationship; Level 4 abuse includes sexual penetration of a child aged between 12 and 16 years when under the care or supervision by the accused. Level 5 abuse includes indecent assault, sexual penetration of a 12–16-year-old, gross indecency, an indecent act on a child under the age of 16 years, sexual penetration of a 16- or 17-year-old under the care or supervision of the accused.

the dangerousness of convicting the accused due to delay. These grounds for appeal reflect the level of scrutiny a direction may be subjected to, which includes the tone of voice used to give the direction.

For jurors to complete their role, they need to be given clear, understandable directions that they are able to apply. However, if judges are wary of simplifying the directions due to a perceived risk of a successful appeal should they do so (Najdovski-Terziovski et al., 2008), then ‘tinkering’ with the wording of directions may be unlikely to have a great impact. Much work has been undertaken to resolve the issue of the high rate of appeals and retrials, particularly from sexual

assault trials, and a number of legislative reforms have been undertaken in recent years.

In the current study, legislation category was the only variable that showed a significant difference between successful and unsuccessful appeals: There were more successful appeals than expected between 2006 and 2009 – that is, after the 2006 legislation was enacted. Later changes to legislation with the introduction of the Evidence Act 2008 did not affect the number of successful appeals. Even allowing for a lag between the legislation coming into force and new matters being listed for appeal, this finding does not appear consistent with the goal of the reform, which was to avoid appeals and retrials that may have occurred as a result of judicial error. Indeed, more appeals were successful after 2006, rather than fewer.

One explanation may be that, despite the reform, the task of directing the jury remains an area of difficulty for the judiciary, and the changes may not have significantly reduced the level of detail or length of time taken to explain the law to the jury. It may also be that the legislative reform in 2006, and the perceived less favourable position for the accused, may have encouraged greater scrutiny of the decisions. The complexity of the law has resulted in an intensive searching for error in the transcript of the judge’s charge to the jury (VLRC, 2009), where not only each word, but the tone of voice and the forcefulness with which the words were spoken can be scrutinised in order to establish whether there is any basis for appeal.

Delay and Case Characteristics

Consistent with previous research, a number of associations were found between delay and case characteristics in the current study. We found considerable delays between the date of the first offence and the date of the trial. On average, the delay between the first offence and the trial was 12 years; almost 25% of cases experienced a delay of more than 20 years between the first offence date

and the trial. Trials involving male victims had significantly longer delays than those involving female victims, which is consistent with past findings (Easton, 2013; Hershkowitz, Lanes, & Lamb, 2007; Lamb & Edgar-Smith, 1994). Males in the current study waited almost twice as long (nearly 20 years) as females for the matter to come to trial. It is possible that it took longer for cases involving males to come to trial as they took longer to disclose the abuse than female victims; males typically wait longer to disclose because of feelings of shame and guilt, confusion about their sexuality, and fear of being labelled homosexual (Dorahy & Clearwater, 2012; Romano & De Luca, 2001).

Delay was also associated with the victim-perpetrator relationship: There were shorter delays between the offence and trial in cases involving a connection through the family than for cases involving a parent or a person connected through the community. It is possible that these delays were associated with disclosure: Children's concerns that they would not be believed may have been exacerbated by the social status of members of the community, such as teachers or spiritual leaders; therefore, it took them longer to disclose the abuse (Connolly et al., 2015). Similarly, children abused by family members may have delayed disclosure due to concerns about not being believed or damage to the family group (Goodman-Brown et al., 2003; Hershkowitz et al., 2007).

Consistent with previous research, delay was significantly correlated with the age of the victim (Hershkowitz et al., 2007; Kogan, 2004; Smith et al., 2000): the older the victim, the shorter the delay between the first offence and the trial. This was not unexpected as younger children are less likely to understand that the abusive behaviours are wrong (Schaeffer, Leventhal, & Asnes, 2011) and are therefore more likely to delay reporting due to a lack of knowledge.

In the current research we are concerned with appeals against conviction for child sexual abuse cases, many of which were

prosecuted many years after the offending. Only a small number of victims report abuse to the authorities (London, Bruck, Wright, & Ceci, 2008), and those that do make a report may differ from CSA victims as a whole. Those cases that are successfully appealed may differ from those that are not appealed.

Limitations

As an archival study of legal cases, the current study has a number of limitations. First, many cases had missing data, which may have affected the results. For example, the age of the perpetrator was not provided in almost 50% of the cases. Although the missing data reduced the power of the statistical analyses, it was evenly spread over the cases in which the appeal was successful and those in which the appeal was unsuccessful. Therefore, any missing data should have had only minimal impact. Also, no causal inferences could be made as the data are correlational.

A further possible limitation is that the study only included child sexual abuse trials arising from the County Court in Victoria. However, child sexual abuse is not unique to Victoria, and there is no reason to believe that the characteristics described in the current data set would not generalise to other states and countries with similar legal systems.

In relation to the effect of legislative changes, there are no comparative data from other types of studies to bolster our conclusion that the increase in successful appeals was due to the legislative changes. There is no other research that we are aware of that has examined this area.

Conclusion

In conclusion, in addition to the low rate of prosecution of child sexual abuse cases, and a low rate of conviction, the rate of successful appeals against conviction was fairly high. When appeals were successful, retrials were recommended in the majority of cases, which, regardless of the outcome, may threaten community confidence in the criminal justice

system, and place a further impediment in the way of victims coming forward.

Disclosure Statement

No potential conflict of interest was reported by the authors.

Note

1. In case the reforms took longer to reach the court, a second categorisation was used in which trials held between 1 January 2008 and 31 December 2010 were categorised as 'Post-2006 legislation'. Trials held between 1 January 2011 and 31 December 2014 were categorised as 'Post-2009 legislation'. Trials held on 31 December 2007 and earlier were categorised as 'Pre-2006 legislation'. This second method of categorisation had no impact on the results; the same patterns were found.

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