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Child Sex Abuse : *The New Zealand Perspective*

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Introduction

Although we cannot present with total certainty exact statistics for sexual abuse of children in each of our different jurisdictions, what is apparent within New Zealand is that there is an increase in the number of reports of child sexual abuse. This is evident by the increasing number of proceedings in both the Criminal and Family Courts.

This paper will discuss:

- i. Background issues; the diverse ethnic mix of New Zealand and how sexual abuse is defined by the Courts,
- ii. New Zealand's use of prevention education programmes to protect its children and increase public awareness of abuse,
- iii. Disclosure and the New Zealand interagency approach to disclosure, and
- iv. Evidence and the child.

This paper does not specifically address child sexual abuse in a commercial context.

Polynesian settlers arrived in Aotearoa ¹, or, New Zealand in approximately 950 AD. Although discovered by a Dutch navigator in 1642 it was only after the arrival of Captain James Cook in 1769 that Europeans began colonizing New Zealand.

Three hundred years later New Zealand has a population approaching 4 million people ². The 1996 census results provide the most recent and complete information concerning ethnicity. Europeans or Pakeha make up 79.6 %, of the population, New Zealand Maori 14.5%, Pacific Islanders 5.6% Chinese 2.2% and Indians 1.2%.

Analysis of the 1996 census results tells us that in 1996 there were 832,080 children under the age of 15 years living in New Zealand, i.e. 23 % of the population with a disproportionate number of children living in Maori and Pacific Island communities.

What is sexual abuse?

No statutory definition of child sex abuse exists in family legislation, nor is the term defined in the Crimes Act 1961, although a range of sexual offences involving minors is defined within the Crimes Act ³.

It is accepted, however, that sexual abuse of a child involves elements of exploitation and the abuse of power. Thomas J in the High Court in *S v S* ⁴ gives approval to the following definition,

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

1 The Maori name for New Zealand, which translates as the land of the long white cloud.

2 New Zealand Department of Statistics, 2001 Census, 3,792,654.

3 Crimes Act 1961 sections 128 -133 and 138 -142.

4 *S v S* [1993] NZFLR 657 per Thomas J.

Another definition which has found favour is

"The exploitation of a child for the sexual gratification of an adult." ⁵

Within the Family Court the standard of proof of child sexual abuse is on the balance of probabilities and not, as in the Criminal Court, beyond reasonable doubt. Section 23 of the Guardianship Act 1968 ⁶ states that the welfare of the child is paramount. Emphasis in the Family Court is on the harm done to the child and on the future safety of the child. There is no statutory requirement to prove who the offender is. If abuse has occurred whilst a child has been in the care of its parents it is immaterial that the name of the offender is unknown. The fact that abuse has occurred is enough for the Department of Child, Youth and Family Services ⁷ to become involved under s71 of the Children, Young Persons, and Their Families Act 1989 ⁸. The circumstances of the individual case, knowing whom the offender is, and whether a parent is involved in or has knowledge of the offending directly influences the Family Court's decision upon the most appropriate intervention in that particular case.

In the Criminal Court to invoke the sanction of the law the charge against a named offender must be proved beyond reasonable doubt. This means that to prove the charge there has to be sufficient evidence. The fact that a charge may not be laid does not mean that the offence did not occur. The issue of evidence will be discussed later in this paper.

Prevention Programmes

Parents routinely teach children "*stranger danger*". In reality however, most abuse is from a person known to the child. Not surprisingly it is a far more difficult task to teach a child to keep safe from abuse by someone known and trusted by him or her than it is to teach him or her about "*stranger danger*".

New Zealand has developed its own education programmes to increase public awareness. The objective being to protect its children by giving them skills and knowledge thus reducing the risk of harm occurring.

⁵ Le Page, Strickland and Chapman, paper, 9th Commonwealth Law Conference, 1990.

⁶ An Act which defines and regulates the authority of parents as guardians of their children, the power to appoint guardians and the powers of the Courts in relation to the custody and guardianship of children

⁷ The government agency that has legal powers to intervene to protect and help children who are being abused or neglected or who have problem behaviour.

⁸ An Act relating to children and young persons who are in need of care or protection or who offend against the law.

Two such programmes developed in New Zealand were *Safe before Five* and *Keeping Ourselves Safe (KOS)*. One of these programmes, *KOS*, was developed jointly by the Department of Education and the New Zealand Police Department.

Within *KOS* sexual abuse is defined as 'unwanted touching'. The focus within *KOS* is on the child, with the child deciding whether a touch is wanted or unwanted.

Behavioural training is a key component of this programme. Children are encouraged to use their own feelings to differentiate between the wanted or unwanted touch. *KOS* does not limit touch to hand touching alone and children are also taught that there are parts of their body that are private to them. Unless there is a valid reason such as a medical reason, that private part of their body should not be touched by another person. Children are encouraged to *keep themselves safe* and not rely on adults to indicate what is or is not appropriate.

The actual success of such programmes, however, is difficult to ascertain.

" It is unclear if increased knowledge levels translate into appropriate behaviours in high risk situations and therefore a reduction in the likelihood a child will be victimized. Ethical issues around simulating a potentially abusive situation, combined with the fact that most abusers select children known to them have made it exceedingly difficult to assess a child's ability to generalize and demonstrate his or her ability to use prevention concepts effectively." ⁹

One study which evaluated the *KOS* programme highlighted the fact that regardless of whether a parent had been abusive or not young children saw their parents as safe people who would protect them. ¹⁰Children believed that inappropriate or "bad" touch was painful and were reluctant to believe that it could happen in their family. The concept that someone known and trusted could touch them inappropriately caused confusion to children.

A recommendation that there is a need to educate parents and involve them in programmes as well as to

"further refine developmentally appropriate information with concrete instructions and role-plays to facilitate children's ability to conceptualize abuse and to reduce the incidence of common misconceptions."

⁹ C C M Woolley, T C M Gabriels, Children's Conceptualisation of Sexual Abuse Prevention as Taught by "Keeping Ourselves Safe", *The Australasian Journal of Disaster and Trauma Studies* Volume 1999 - 1 .

¹⁰ F Briggs, Child Protection programmes: Can they protect young children? *Early Child Development and Care* , 1991.

was made in the paper “Children's Conceptualization of some child sexual abuse prevention concepts as taught by ‘Keeping Ourselves Safe’, a New Zealand Prevention Programme”.¹¹

Disclosure and the New Zealand Inter-Agency Approach

Disclosures of sexual abuse or suspicions of abuse may come from a variety of sources such as a parent, teacher, doctor, family friend, or even a nurse.

Suspicions of abuse may arise because of behavioural changes in a child as opposed to an actual disclosure to an adult or a professional. Reluctance to disclose to a parent may be for fear of the parent's reaction or because the child is loathe to reveal a secret they have been told to keep. Alternatively the child may disclose the abuse to a teacher, doctor, family, friend or not at all.

The trauma caused by sexual abuse on children is evident in the increasing numbers of adults who are now disclosing abuse that occurred many years before. The damaging effects of sexual abuse on a child may be best summarized by the three words; emotional, sexualizing and behavioural.

The following list is recognized as possible indicators of sexual abuse;

- Poor concentration
- Changed eating habits
- Running away
- Bed wetting, soiling oneself, not wanting to be alone, nightmares,
- Fear of being touched
- Sudden change in personality i.e. anxious depressed withdrawn
- Reluctance to change for sports
- Excessive masturbation
- Frequently washing oneself
- Regressive behaviour i.e. thumb sucking
- Sexual knowledge beyond what would be expected for the age of the child
- Undue interest in sex and sexual play

¹¹ C C M Woolley, T C M Gabriels, Children's Conceptualisation of Sexual Abuse

¹²Prevention as Taught by ‘Keeping Ourselves Safe’, The Australasian Journal of Disaster and Trauma Studies Volume 1999 - 1

- Reluctance to be with a particular adult or place
- The wearing of many clothes
- Weepiness for no apparent reason and
- Preoccupation with an adult's private parts.¹²

It is important to note however that the nature and severity of the symptoms of abuse differ depending on the child's age and stage of development.

Other disclosures may come from government agencies or organizations. Importantly Child Youth and Family Services (NZCYPS) have developed a multi disciplinary approach to the reporting of child abuse. The Amendment Act 1995 reflected this change in approach and amended the Children, Young Persons, and Their Families Act 1989.

Section 7(2) of the Act, now emphasizes an alternative to mandatory reporting of child abuse by developing a multi disciplinary approach to reporting based on targeting education programmes and *negotiating interagency protocols*. The Act was also amended to give a greater emphasis on the welfare and interests of the child which are to be considered paramount.¹³

The change from mandatory reporting to voluntary reporting had been the subject of much public debate which has continued. Amendments to the Act in 1995 gave the Director General of Social Welfare new duties to raise public awareness and to develop protocols for reporting abuse. These protocols represent a co-operative approach to child abuse management throughout the country. However joint ventures can be potentially costly with each agency focused on its own internal structure.

The objective of protocols, however, is to promote a consistent and comprehensive approach to the protection of children. NZCYPS encourages voluntary reporting through developing protocols for individuals, community organizations and government services.

The following are examples of some protocols which have been developed.

A national protocol was agreed by **Crown Health Enterprises and NZCYPS**¹⁴ outlining Crown Health Enterprises child abuse reporting guidelines. All privacy restrictions placed on health professionals are overridden by relevant sections in

¹² P Hanlon and G Nation, Expert Evidence in Sexual Abuse Cases New Zealand Law Society Seminar, 1997, 52.

¹³ Section 6 Child, Young Persons and Their Families Act 1989.

¹⁴ CHE the old name for Area Health Boards and health services.

the Children, Young Persons, and Their Families Act 1989¹⁵ which protects any person reporting suspected child abuse in good faith from civil criminal or disciplinary proceedings. This reduces the need for applications for exemptions from restrictions placed on disclosure under the Health Act 1956 the Privacy Act 1993 and the Health Information Privacy Code 1994.

Health workers may therefore release information to NZCYPS or to the New Zealand Police without fear of disciplinary action.

Some essential practice guidelines are outlined such as:

- Except where there are immediate concerns for a child's safety no decisions or actions are to be made by any health professional in isolation.
- Information volunteered by a child should be accurately recorded but no in depth interview attempted with the child.
- Appropriate cultural input should be obtained.
- Consideration be made for a support person to be contacted for the child or young person.
- In principle parents or caregivers should be informed about a referral to NZCYPS or the New Zealand Police.
- NZCYPS should be notified in all cases of suspected child abuse.

Guidelines and procedures exist also for the management of child sexual abuse for **Doctors in General Practice**.¹⁶ Doctors for Sexual Abuse Care (DSAC) who are specifically trained in the area of child sexual abuse supply these guidelines. The role of the General Practitioner in management of child abuse is seen as awareness, consultation, referral, follow up and finally prevention by providing pamphlets books and education.

The Ministry of Education, the New Zealand School Trustees Association and NZCPYS agreed upon another national protocol. This includes guidelines on the reporting procedures for child abuse in schools and early childhood education services and for procedures and policies when dealing with allegations of child abuse against a member of staff. There is an acknowledgement that Boards of Trustees have a responsibility to provide a safe environment catering for the physical and emotional well being of its students.

15 Sections 15 and 16 of the Act.

16 Family Physicians.

Guidelines and protocols exist also for voluntary organizations such as Barnados and Children's Health Camps.

The Police and NZCYPS agreed upon national protocols. These protocols outline accepted practice between the Police and NZCYPS on the basis of a joint approach for the investigation of abuse. These practices have worked well to date.

The following guidelines were given to Police Officers;

- That the sexual abuse of a child is a criminal act.
- Appropriate intervention is the key to ending the destructive consequences of abuse.
- Interagency co ordination is essential.
- Joint planning and action is necessary as the investigation may involve the Family Court, Youth Court, Criminal Court, and child protection.
- Only experienced staff should undertake Child abuse investigations.
- There needs to be recognition of and sensitivity to cultural differences.¹⁷

Each Police District established a Child Abuse Team and investigations into child abuse are given high priority. It is the Officer in Charge of the Child Abuse Team who is responsible for reporting the case to NZCYPS so that a consultation regarding appropriate investigation can occur. Each report of abuse is to be investigated and should a child recant a full investigation is to continue. At the conclusion of any investigation NZCYPS may decide to call a family meeting which may or may not require input from the Police.

From Disclosure to Court - Evidence and the Child.

Once raised, the allegations of abuse may end up being used in Criminal or Family Court proceedings. New Zealand Courts recognise the vulnerability of

¹⁷ New Zealand Children and Young Persons Service, Breaking the Cycle; Interagency Protocols for Child Abuse Management, 1996.

child complainants. This recognition has brought about the development and use of video units throughout the country.

The Evidence Amendment Act 1989 was passed to allow for evidential interviewing of complainants. Video Units are co-operatives between the New Zealand Police Force and NZCYPS. Children are recorded being interviewed by specialist interviewers. In many cases the child is then able to give compelling and admissible evidence but at the same time is protected from the trauma of giving evidence in Court. A child is defined under this act as a person under 17 years of age at the time of the laying of the information.

The two types of interviews used are the diagnostic and the evidential interview. The objective of the diagnostic interview is to investigate whether abuse has occurred. Evidential interviews are for use mainly in the Criminal Court.

Regulation 5 of the Evidence (Videotaping of Child Complainants) Regulations 1990 requires that the child be shown as understanding the difference between right and wrong and is seen promising to tell the truth. This regulation must be satisfied before the evidential video interview can become admissible evidence.

The competence and integrity of the interviewer is important. Interviewers are required to develop rapport with the child letting the child disclose information at his or her own pace. They are also required to assess the developmental stage of the child and ask 'age appropriate' questions. The length of the interview depends on the child's age and comfort which is judged by the interviewer and a colleague who is observing. The recommended maximum number of interviews is three with duration being 60 to 90 minutes. By using a video recording not only is the child's disclosure recorded but also the methodology of the interviewer.

What is important is that there is no undue questioning of the child which would result in further stress for the child. Despite some failings evidential videotaping has many successful features. Overall improvements to evidential videotaping of child complainants could be made however with more time and money being spent on the preparation of child and a better understanding of a child's language and perception of time and place.

Anatomically detailed dolls are used in the interview only if the use of body diagrams and ordinary dolls cannot clarify what has happened. Their use remains controversial.

"Unlike the American system, New Zealand has a highly standardized interviewing procedure conducted by trained evidential interviewers" which:

Captures the child's earliest statement of events;

Prevents the rehearsal or repetition of the interview of the child by video recording the initial interview and as a result, obviates the need for re-interviews by various agencies

Permits later criticism of the interview during a trial process and an objective analysis by the jury of such criticisms." ¹⁸

It should not be overlooked that the giving of children's evidence through the use of videotaped interviews can create risks for the defendant. The interviews themselves are usually conducted in situations where assumptions are made that abuse occurred. The objective of this interview is to obtain the child's evidence in chief without cross-examination by the interviewer and it can be noted without any attempt to investigate alternative explanations.

Expert evidence can be called in a criminal trial of the child's level of development and ability to describe correctly events that have occurred to them. The Evidence Amendment Act 1990 brought in specific provisions relating to child complainants allowing psychiatrists and psychologists to give evidence on a number of points relating to child complainants in sexual cases.

New Zealand does permit the child to be cross-examined by way of closed circuit television. This has been successful although this right is sometimes challenged by defence lawyers resulting in the child being re-interviewed by another professional in order to assess the effect on the child to be cross-examined in the Court. It is important to remember, however, that there must be a balancing act between recognizing the powerlessness of the child and the rights of the accused.

The fact that an evidential video has been taken does not mean that it will be submitted as evidence. If the evidential video interview does not meet the requirements of Regulation 5 of the Evidence (Videotaping of Child Complainants) Regulations 1990 it may still be admissible as evidence in the Family Court as under section 28 of the Guardianship Act 1968 the Family Court can receive evidence as it sees fit. Section 28 of the Guardianship Act 1968 states...

" The Court may receive any evidence that it thinks fit, whether it is otherwise admissible in a Court of law or not. "

¹⁸ P Hanlon and G Nation, Expert Evidence in Sexual Abuse Cases New Zealand Law Society Seminar, 1997, 38.

Family Court proceedings can relate directly to custody and access applications and allegations of sexual abuse by one parent before or after separation, during access, by the ex partner's new partner, or, they can relate to care and protection proceedings. There is always the possibility that false allegations are made. When a parent is falsely 'fixated' upon this possibility then the Court will consider changing custodial arrangements.

The Family Court has always actively discouraged children from providing evidence against the other parent. Accordingly where allegations of child sex abuse have been made in proceedings under the Guardianship Act 1968 and the Children Young Person and Their Families Act 1989 it is accepted practice for the Family Court to obtain access to the video and allow specialist report writers, such as psychologists, to view the video in order to assist the Court in ascertaining the truth of such allegations.

Because the welfare of the child is the paramount consideration in proceedings in the Family Court the Court has developed a pragmatic approach to allegations of sexual abuse.

Conclusion

Article 19 of the United Nation Convention on the Rights of the Child to which New Zealand is a signatory states;

" 1. Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement." ¹⁹

¹⁹ N Karunaharan, ed, Family Law Statutes, Butterworths, Wellington, 1996, 579.

New Zealand's approach to child sexual abuse is one of education and inter agency co-operation in reporting investigating and recording. An awareness of the inherent vulnerability of the child by the Courts has seen the focus on the reduction of trauma to the child and the development of a standardized approach to interviewing procedure.

What remains apparent, however, is that regardless of where we live or what methods we use to deal with the problem of child sexual abuse we cannot underestimate the long term impact of it on our young.

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