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BRIEFING ON CHILD PROTECTION AND CRIMINAL JUSTICE SYSTEMS IN RELATION TO CHILD ABUSE CASES

a FACT briefing paper by Margaret Jervis

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1. What is wrong with the child protection system??

- In 1986 psychiatrists and social workers at Great Ormond Street Hospital [1] were criticised by the family division of the High Court for inducing false allegations of sexual abuse in families, using suggestive techniques and leading questions. The team was a national training resource for sexual abuse investigation. Countless families were destroyed but no action was taken to review training and practice.
- In 1988 the Cleveland inquiry [2] criticised paediatricians and social workers for using unsound diagnostic techniques, suggestive interview methods and play therapy techniques in investigations, on the presumption that a child had been abused. The report recommended joint working between police and social workers but no action was taken to review national training standards and practice.
- In 1990-91 allegations of 'satanic abuse' rings were made in Nottingham, Rochdale, Congleton, the Orkneys and elsewhere. Subsequent inquiries dismissed the allegations as being caused by the superimposition of social workers beliefs on children and vulnerable adults, using suggestive interviewing techniques, and the direct and indirect cross-contamination of allegations between social workers, foster carers and children. A Nottingham report describing and warning of the dangerous practices of the social workers was suppressed [3].
- In 1994 two nursery nurses in Newcastle were accused of serious sexual abuse in bizarre acts in the nursery and elsewhere. The charges were dropped because of insufficient and flawed evidence. A council appointed panel reviewed the evidence and found the pair guilty despite the acquittal. In a private libel action in 2002 the nurses were exonerated. The allegations were found to be based on flawed medical diagnosis and suggestive interviewing and information sharing, and a finding of malicious libel was made against the panel[4]. Despite the exposing of the flawed methods of investigation and inquiry, no action has been taken to rectify the identified mistakes.
- Between the late 1980s and the present day, thousands of parents were falsely accused of sexual abuse by adult children who believed they had 'recovered' memories of serious childhood abuse previously unknown to them or anyone else. The unsound theories and practices precipitating this dangerous outcome were widely used in NHS child and adolescent and adult mental health services and social services departments but no action was taken to review training and practice.
- Between 1992 and the present day thousands of teachers and care workers were falsely accused of sexually abusing child and adolescent care home residents decades before, following police trawling, suggestive investigation methods, cross-contamination and compensation incentives. A House of Commons Home Affairs Select Committee inquiry[5] warned that current

safeguards against injustice and miscarriage of justice in these cases were seriously inadequate and called for reform. The Government refused to act.

- These cases are a sample of the gross errors in the child protection system over the last twenty years that have resulted in thousands of innocent children, adults and families being damaged or destroyed by false allegations that were created or pursued as a result of errors by the investigative system.

1.1 Mistakes and flaws.

- A pattern emerges of the same mistakes being made repeatedly but applied to different groups of people accused. Thus it is contended that the mistakes, rather than being episodic, are endemic in the child protection system.

The flaws include:

  - A presumption of abuse histories in disturbed children and adults
  - A presumption of guilt in the accused
  - Suggestive interviewing beliefs and techniques
  - A failure of investigative objectivity
  - Direct and indirect contamination of evidence
  - Reliance on flawed theories and knowledge base
  - Use of unreliable expert evidence
  - Failure to independently monitor training and practice

- Unless these problems are identified and rectified on a national level, injustice will continue to recur putting innocent people at risk, endangering children who are not abused, preventing the correct identification of genuinely abused children and their abusers and wasting millions of pounds of taxpayers money.

1.2. Summary of the current child protection system.

- It is vital for the safety and well being of children that there is a child protection system with statutory responsibility for child welfare and the authority to investigate children at possible risk of ‘significant harm’, and undertake civil and criminal processes stemming from those inquiries. Although child protection is a multi-agency enterprise with an emphasis on ‘working together’, in practice the lead agencies are social services and the police. At present each local authority is required to oversee the establishment and running of inter-agency Area Child Protection Committees (ACPCs) responsible for local policy, co-operation and training. However, ACPCs are not creatures of statute and are unaccountable and unregulated.

- Deep and justified concerns about child abuse have given rise to, what can be called, ‘the child protection community’. This is not a formally recognised entity, but one that nevertheless exerts considerable influence on the statutory

agencies. It includes national charities, self-help groups, childcare consultants and commentators, independent therapists and social workers, academics and university departments. They may act as expert witnesses at trials and provide risk assessments in civil processes. But this expertise is too often self-appointed and unquestioned.

- Sadly, a considerable proportion of those involved in child protection have a corrupting and malign effect within and beyond the system. Their political agendas and ideologies go unchallenged because the child protection environment is often amenable to, and tolerant of, their views. They are child abuse lawyers, 'abuse survivor' groups, 'recovered memory' therapists, searchers for satanic ritual abuse and abuse theorists, who assiduously promote the idea that the vast majority of child abuse allegations are true. They are implicated in the rise of the false allegations industry – those, often motivated by compensation, who make untrue allegations knowing they are likely to be believed in the present climate of fear.
- The child protection system has serious flaws and problems. The actions of the childcare investigators often cause family break-up and tragedies for children and adults put through inappropriate questioning. Thousands of distressed, innocent people are totally bewildered by the processes to which they are subjected. Theories are promoted, beliefs put into practice and training undergone in child protection work relatively free of any kind of scrutiny. In the absence of forensic evidence, police and social workers condone situations where therapists act as investigators and encourage clients to create 'therapeutic narratives' as evidence of abuse. Child play therapy methods, including 'anatomically-correct' dolls, are used to elicit 'disclosures' of abuse from very young children. Medical experts give testimony to a judicial system and juries lacking the professional knowledge to understand and challenge them.
- Although local authorities and other agencies are engulfed in official guidance about legal and bureaucratic 'working together' procedures, astonishingly there is no code of practice or guidance document that prescribes the way in which investigations of child abuse are carried out in practice. Consequently, there is nothing tangible to challenge when someone believes that they have been subject to an unfair or badly conducted police investigation or social services inquiry. In effect the system is unregulated, and provides no meaningful evidence of its operational approach or the consequences of its mistakes. Data from *Parents Against INjustice (PAIN),* collected in the 1980s and 1990s, showed that 88% of its cases arose because of 'perceived' abuse rather than any empirical evidence or a direct allegation from a child. The source of referrals and reliability of the evidence upon which investigations are based, and the quality and content of the training and knowledge base of child welfare experts, are issues about which the authorities should be seriously concerned. There is a lack of research into the influence of the perceptions,

personal agendas and belief systems of care workers, medical consultants, investigators and prosecutors, upon the outcome of cases.

1.3. Why is the child protection system fundamentally flawed?

- Twenty years ago sexual abuse was a known but peripheral concern of the child protection system. The reversal of this trend was laudable, if based on reliable evidence and investigation. Unfortunately, this was not the case. Projections of a massive hidden well of sexually abused children were based on speculation and unsound theories with suggestive interviewing techniques spawning false examples on which to substantiate the speculation and generalise. Nevertheless the ideas took hold in the child protection system through repetition and the spreading of the flawed theories and practices. Eventually the media, public and the government took the assertions at face value, so that an expectation of massive sexual abuse discovery prejudiced investigations, prosecutions and trials. This was made worse by publicising unverifiable statistics from sources appearing to compete on increasing and exaggerating the incidence and level of abuse.
- Expert evidence in courts was dangerously compromised. Many of the experts relied on the same unproven theories and assumptions, diagnostic symptoms and techniques as the practitioners were using. Thus validation was a circular process lending a dangerous patina of respectability to poor judgment.
- Social services departments were infused with concerns about the rights of women and children. These concerns were valid, but overlain with ideological precepts deriving from a particular feminist view which dictated that all men were potential sexual abusers. This bias fostered unsound practice and precluded any political will to review safety.
- The absence of a reliable knowledge base encouraged the development of conspiracy theories about widespread paedophile rings and networks. These ideas were uncritically accepted and acted upon, resulting in the false allegations of satanic and ritual abuse. In Nottingham an inquiry panel dissected mass allegations of a satanic abuse ring. It found they were rooted in the prejudices of the social workers who had imposed their ideas on the children and vulnerable adults unwittingly, and that the semblance of corroboration in the stories resulted from the contamination of foster carers as intermediaries instructed by the social workers. The report warned that unless action was taken to stem these theories and methods gross injustice would occur and mentioned workers in children’s homes as being likely targets. Due to pressure from the social workers involved the report, as was previously stated, was suppressed so that the lessons of national significance were not learned and taken on board[6].
- At the same time as satanic abuse conspiracies were being aired, it was postulated that networks of paedophile rings were operating in children’s

homes. This idea was related to the satanic abuse claims insofar as the rings were alleged to be victim feeders into the satanic networks. However, it quickly became a self-standing assertion attracting widespread acceptance outside the hardcore of believers in satanic abuse.

- By this time, joint training initiatives inspired by the Cleveland recommendations had led to the police being affected by similar beliefs and practices common among social workers. Government guidelines[7] emphasised the paramount welfare of the child (though accusers were adults) and this became interpreted as uncritical belief in allegations.

1.4. Trawling, Waterhouse and multiple agency failures.

- The police trawling operations followed. The investigations replicated the mistakes identified in the sexual and satanic abuse multiple inquiries; actively searching for further victims and offenders, with direct and indirect contamination creating a circular semblance of corroboration known as ’similar fact’. Many of the accusers had a criminal background, having been in children’s homes that were the former ‘approved’ schools, and had drug and alcohol histories making them vulnerable to suggestion and incentives such as compensation rewards and the mitigation of offences.
- It stands to reason that because sexual abuse exists, some genuine complaints were uncovered. However, because the investigations had no means of sifting reliable from unreliable allegations, genuine complaints prejudiced the innocent by association, while even people not directly accused became tarnished by association with the innocent accused.
- It is worth noting that despite the large number of retrospective police trawls implicating hundreds of care workers and teachers, not one mooted paedophile ring or network has been detected. Rather the sheer volume of complaints collected through flawed methods has prejudiced a large number of individuals resulting in unsafe convictions and many more dropped charges, where people are left tainted with careers ruined and without the possibility of redress and a definitive clearing of their names.
- Unhappily, the Waterhouse inquiry8 in North Wales exacerbated injustice in police trawls. Instituted following a police trawl, resulting in a number of convictions and subsequent media publicity alleging a cover up of a wider paedophile ring, its terms of reference were constrained by the presumption of the safety of all the previous convictions. Consequently it failed to examine the roots of the problem and accepted many unsubstantiated claims at face value. Thus, while it rejected the claims of a paedophile ring, it rubber stamped trawl operations igniting further large scale operations which have resulting in further suspect convictions.
- It should be noted that just as sexual abuse exists, there are instances of two or three paedophiles working in concert. However these bear no relation to the

phantom rings predicted by the sexual abuse conspiracy theories, nor are they similar to internet child pornography networks.

- These failures jeopardize genuinely abused children as well as innocent people. For instance, in the Victoria Climbie inquiry[9], gross signs of abuse were systematically overlooked by multiple agencies. The case is reminiscent of the Jasmine Beckford case[10] twenty years earlier that resulted in a detailed public inquiry and stringent recommendations. In the Ian Huntley case, independent contemporaneous reports of sexual abuse of minors were overlooked and not acted upon by the police and social services, though such cases are those that provide a body of reliable evidence.

1.5. System failure and group think.

- Inquiries into the existence of Weapons of Mass Destruction in Iraq identified core failings in intelligence agencies across the world. In particular, there was an uncritical acceptance of 'group think', where unfounded assumptions of fact were taken for granted, with a failure to examine the reliability of uncorroborated witnesses. A similar pattern has developed in the child protection system, but as it has developed over twenty years, it is deeply embedded and resistant to change.
- Inquiries and court cases, that have recognised the errors in the cases in hand, have not been equipped with the brief to examine the roots and extent of the problems which have been replicated and exacerbated over the last twenty years and the child protection system has become a juggernaut propelled by its own momentum. The system has failed to heed or learn the lessons from the large number of false allegations, despite the fact that it is a methodological necessity in science and knowledge to understand the false in order to recognise the truth.
- It is a shocking and shameful fact that despite the growth of a reliable body of research and knowledge into the methods used by sexual abuse investigators over the last twenty years, in addition to a knowledge existing prior to this which has been pre-empted, the same mistakes in training and practice are still apparent, while not one investigator has been brought to account for their failings.
- The child protection system has failed to develop adequate procedures to sift true from false allegations of abuse. Past experience has demonstrated that unless the totality of the historical development of sexual abuse investigation theory and practice is examined, errors will be regarded as isolated and atypical.
- Truths that have not been incorporated into the investigative systems include these.
    - People do lie about sexual abuse for all sorts of reasons.

- Children and adults may come to state and believe false sexual abuse histories through explicit or implicit suggestion and incentives.
- Genuine sexual abuse is reported in entirety and not through gradual or progressive disclosure which results in unreliable testimony.
- The history of the source of an allegation and the influences on it and an inquiry into alternative explanations are necessary to weigh up its prima facie reliability.
- Expert evidence may be contaminated with the same assumptions driving the investigators.
- The influences of common investigators and other third parties need to be independently assessed in an investigation where similar allegations are made.

2. What is wrong with the criminal justice system in child abuse cases?

- Simultaneously with the rise of concern about child sexual abuse, safeguards against wrongful prosecution and conviction have been eroded. In part this is entirely predictable, since many of the same unfounded presumptions that have blighted the investigation process have become imported into the courts. However, there have also been specific measures implemented to maximise prosecutions and convictions - a trend which shows no sign of abating.

2.1. The decision to prosecute.

- Criminal prosecutions depend on two factors, the public policy test and the evidential test. The policy test is only to be applied if the evidential test is passed and this depends on whether in the opinion of the Crown, a conviction is more likely than not. Thus the soundness of the test depends on the judgement of the prosecution as to the reliability of the evidence gathered by the investigators, and the reliability of the trial process in sifting true from false claims. If either or both of these facets are compromised, then so is justice. However, the public policy test places further pressure on these constraints, since it is generally public policy to prosecute all sexual abuse cases and there is intense political pressure to do so.

2.2 Evidential reliability.

- The Crown Prosecution Service works closely with the investigative process in large scale operations such as police trawls. However, rather than providing a gate-keeping function, this process has in practice allowed the police to temper the evidence to the demands of the prosecution and trial process. This is possible because, unlike cases where there is independent evidence of the crime taking place, these cases depend on what people say

to the police many years after the alleged crimes have been supposedly committed. Thus oral testimony that supports or corroborates an alleged offence may be introduced without the possibility of it being objectively tested.

- In some cases this defective process can be overtly detected through analysis of evidence added and contradicted over the period of the investigation. In any other type of investigation this would be seen as the hallmark of unreliable evidence. However, because both the investigators and prosecutors have adopted the defective doctrine of ‘gradual disclosure’ peculiar to the reporting of sexual abuse allegations, it is seen both as acceptable and an indication of veracity. It is therefore contended that the recognition of the unreliability of ‘gradual disclosure’ would drastically foreclose the production of wrongful prosecutions.

2.3. Trial safeguards.

- Prior to 1990, long delayed reports of sexual abuse were unlikely to be prosecuted unless corroborated. The police would be reticent in charging a person in other circumstances because of the staleness and paucity of evidence. Furthermore, historical reports to the police were relatively infrequent. However, that is not to say prosecutions did not occur. Contrary to current belief, sexual offenders, both domestic and institutional, have a very high rate of admission; and an admission properly sufficed for conviction.
- Corroboration depended on independent evidence tending to confirm the reports. Where two witnesses alleged similar offences, the evidence had to be both independent of collusion and contamination and ‘strikingly similar’ to be corroborative and tried on the same indictment. These were legal rules introduced on the basis of the long experience in the courts of the dangers of wrongful conviction on uncorroborated testimony of sexual crimes.
- Again contrary to popular belief, defendants could be convicted on uncorroborated sworn testimony, but juries would be subject to a stern warning by the judge on the dangers of so doing. When historical uncorroborated reports started to appear in the courts in the late 1980s, judges would still give the mandatory direction. In practice this did not preclude rightful or wrongful conviction, it simply made it less likely and consequently acted as a brake to prosecutions.
- When the first wave of historical prosecutions were brought in the early 1990s, there was a welter of legal argument about whether, notwithstanding the warning, it was safe to bring such cases to trial. However, the rule became that it was for the defence to prove on the balance of probability that a fair trial was not possible because of the delay.

- This presumption that a fair trial was possible was based on two assumptions: that the prosecuting authorities would apply safeguards in gathering reliable evidence and that the corroboration warning would act as a brake to weak prosecutions and trial evidence. But neither of these safeguards was to remain. The circular reasoning of the prosecution authorities has already been explained. On top of this, political pressure resulted in the statutory abolition of the mandatory corroboration warning in the Criminal Justice and Public Order Act 1994[11].
- A further erosion occurred in two Law Lords decisions concerning 'similar fact' evidence and the danger of collusion and contamination[12]. This meant that a much lower standard of similarity of offences could be tried together and be regarded as mutually corroborative, regardless of the opportunities for collusion and contamination prior to and during the investigative process. These developments had a disastrous effect on the whole system. As more cases were prosecuted there were more convictions and thus more cases would be pursued because of the likelihood of a conviction.

2.4. The defence hurdle.

- Retrospective sexual abuse trials are presented as a loose-fitting prosecution narrative. The evidence may be vague, but includes graphic and lurid descriptions of sexual acts which may have an unsettling and convincing effect on juries. The innocent defendant effectively has to prove that contemporaneously, completely unknown events did not take place and prove an alternate motive for making false allegations. In the context of the court drama, this is very difficult to do and places an unrecognised and unfair burden on the defendant.]
- If convicted, the defendant then has to provide new evidence in order to gain the prospect of overturning the conviction on appeal. Where the evidence of the crime rests solely on oral testimony of the complainant, this is an almost insuperable burden.
- The Criminal Cases Review Commission has highlighted retrospective sexual abuse cases, both domestic and institutional, as those causing particular concern. However, unless measures are taken to improve the gate-keeping of reliable evidence with a rethink of the current safeguards and legal rules concerning these cases, the prospect of overturning cases remains slight. The House of Commons Select Committee Report highlighted some of these concerns in institutional cases, though the regularity and safety of the much larger number of retrospective domestic convictions - which may also be subject to the same and distinct, but equally prejudicial, problems - remains unexamined.

3. Children's evidence in the courts.

- There are far fewer abuse trials where children are complainants than those involving retrospective complaints made by adults. This is despite the fact that

there are special measures to make the giving of evidence of children easier. The reasons for this are unclear. One point made by child abuse professionals is that it is difficult for children to report abuse contemporaneously. This however should be less of a problem since the late 1980s, with the setting up of Childline and the general awareness of sexual abuse and knowledge of the sympathetic responses. Furthermore, parents and carers are now more alert to signs of abuse and forensic evidence, such as the presence of semen on bedding and nightclothes, would provide powerful, contemporaneous corroboration of such crimes.

- Another argument put forward is that reports are prevalent, but that children cannot overcome the evidential hurdles necessary for a prosecution despite the special measures. It is certainly true that many children's video interviews are rejected by the Crown Prosecution Service, as being evidentially insufficient. However, this may be a function of the reliability of evidence, rather than the actuality of the crimes. It is known, for instance, that many false accusations of child abuse are made during parental custody disputes, while others may be a product of social services intervention and foster care.
- One salient point to be considered is that the child protection system rarely acknowledges the existence of false allegations and the effect on the children and families concerned. Consequently, there has been concerted pressure to lower the evidential hurdles for children. Now it is possible not only, to present a video recorded interview with the child as evidence, but also to pre-record cross examination. Children may also be 'interpreted' through 'intermediaries', presenting yet another problem of evidential reliability[13].
- The effect of these recent changes in court rules has yet to be assessed, but even under the previous regulations problems have emerged in many cases that have gone to trial.

3.1. Video recordings and the Memorandum.

- Video recordings were permitted to replace the giving of live evidence by children in the amended 1988 Criminal Justice Act14. These were interviews with the police, governed by guidelines in the Memorandum of Good Practice[15], which aimed to eliminate suggestive practices and leading questions. The fact that many cases have failed at a preliminary stage suggests that the police have in many cases been operating correctly. However, a significant number of video recordings are admitted at trial where the Memorandum guidelines are breached and it is left for the jury to decide whether the evidence is reliable.
- This absence of mandatory force to the Memorandum guidelines exposes innocent defendants to the risk of grave injustice. Furthermore the flawed doctrine of 'gradual disclosure' is also applied to children allowing incremental, contradictory and inconsistent evidence to be seen as reliable. Juries are not given detailed explanations as to the meaning and significance of the Memorandum guidelines, and are arguably not able to understand the

significance of suggestion and confabulation. This is an area where research, as to the understanding of jurors and the public at large, is vital given the misconceptions already endemic in the child protection system.

- This is not to say that children cannot be reliable witnesses and resistant to suggestion. However, children's evidence is a sensitive matter and in these cases juries may be readily swayed by emotion with defence barristers reluctant to cross-examine for fear of giving the impression of being oppressive.
- The Memorandum has been superseded by new guidelines termed 'Best Evidence', but these are also open to discretion so that the problems previously identified have continued.

3.2. Medical evidence.

- Children's cases are those where medical evidence is most likely to be a factor in the case. In many cases a positive finding by a medical expert may be the pivot on which the case rests. However, over the years it has become apparent that both descriptive and photographic evidence can be grossly misleading, with many natural genital variations occurring, that are wrongly attributed to sexual abuse. Furthermore, many experts will say that non-specific findings are not indicative but 'consistent' with sexual abuse. This finding has no probative value, since it also means that the findings are consistent with no abuse. However, this evidence may mislead a jury into thinking either positive signs have been found, or that it is for a defence expert to produce evidence disproving abuse, thus reversing the burden of proof.
- As has been seen in physical child abuse cases and cot death cases, expert medical evidence may be highly prejudicial. The same considerations apply to child sexual abuse medical evidence and it is an area where the courts need to apply more stringent standards of admissibility. One glaring example was exposed in the Newcastle nursery nurses libel case. The paediatrician, Camille San Lazaro, had been widely praised as a leader in her field and had given evidence uncontradicted in numerous trials and family court cases in the Northeast. At the libel trial, her practice was found to be fundamentally flawed[16]. It was on the basis of her findings that the allegations began to mushroom, indicating that the medical examiner may be responsible not just for importing bias to the trial, but also contributing to inappropriate suggestion.

3.3. Pre-trial therapy.

- Therapy with children who are, or are thought to have been sexually abused, is problematic because of the problems identified elsewhere in the document. However, the therapist will automatically assume the child has been abused. So one of the main dangers evidentially, pre-trial, is that an untrue story will become rehearsed and resilient to cross examination, and that children may be encouraged to confabulate in the belief that further hidden experiences are being revealed. Unfortunately, Government guidelines for pre-trial therapy

have drawn upon unsound theories and practices of play therapy, that have a track record of inducing false allegations. Consequently, even though it is stressed that nothing of evidential significance should be discussed with children in pre-trial therapy, there is no current way of monitoring whether therapists are unwittingly suggesting and reinforcing false allegations.

- One way of monitoring practice is to video record therapy sessions. It should be noted that it was only when the video records of the Great Ormond Street Hospital therapy sessions were demonstrated in the High Court in 1986, that the grossly unreliable practices were exposed. These video recordings had not been intended for court use but for training. Since that time however, video recordings of therapy sessions with children, thought to be sexually abused, are rarely made, despite the fact that the conduct of these sessions may have grave importance for criminal and family court proceedings.

4. What needs to be done?

- There is a need for the safety of the entire process, from prosecution to appeal, to be reviewed in the light of the effect of child protection investigation methods on abuse cases. It is necessary to inquire into the development of the reliability of the theories and practices used in the child protection system and criminal justice system, taking into account the broad range of knowledge and experience of false allegations. A judicial inquiry would be unable to span such a broad remit, so it is recommended that a Royal Commission be set up to examine the proposition:
- The question to be asked is; to what extent are the Child Protection System and Criminal Justice System effective in; sifting of true from false allegations of abuse; providing objective investigation; weighing the evidential reliability of testimony; and ensuring the safeguard of a fair trial?

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