



13.8.2015

Submission to the Parliament on the Evidence Amendment Bill.

### Introduction

1. This submission, focusing on the need for the presumption that child witnesses give evidence in the alternative be extended to victims of sexual cases has been prepared by the Wellington Community Justice Project.
2. The Wellington Community Justice Project (WCJP) ([www.wellingtoncjp.org](http://www.wellingtoncjp.org)) is a student-led organisation at Victoria University of Wellington. The project, formed in 2010, has twin aims: to improve access to justice and legal services in the community; and to provide law students with an opportunity to gain practical experience. It pursues these goals by establishing community-based volunteer projects and working with other organisations that have similar goals.
3. The research for this submission was carried out by students Fady Girgis (LLB/ BSc) and Vivian Tan (LLB) as part of volunteer work for the project.

## WCJP Submission: Evidence Amendment Bill 2015

### *I Introduction*

This submission concerns the Evidence Amendment Bill 2015 that follows the recommendations proposed by the Law Commission in the 2013 report. The focus of this submission is on the new provision that relates to the giving of evidence by child witnesses.

Under ss 107A and 107B of the Bill, a child witness will be presumed to give evidence in an alternative way unless they wish to give evidence in the ordinary way and unless the Judge is satisfied that they fully appreciate the likely effect of doing so.

While the Wellington Community Justice Project (WCJP) welcomes the incoming changes, including this one, it is believed that ss 107A and 107B can be extended to cover witnesses involved in cases of sexual offending as well.

### *II Nature of Sexual Violation Cases*

Sexual violation cases are recognised as being amongst the most heinous of crimes. Sexual violation is not only a physical assault but is also an attack on an individual's personal autonomy and sense of security. A number of recent studies, funded by the Ministry of Womens' Affairs, the New Zealand Law Foundation and the Law Commission have confirmed that sexual violation victims are amongst the most vulnerable in the justice system.<sup>1</sup>

It is well established by New Zealand and international research that subjecting complainants to the ordeal of court proceedings is not only a traumatising experience, there is also a risk of re-victimising of the complainant in a way that is repugnant to our society.<sup>2</sup> It can therefore be seen that allowing sexual complainants to give evidence in alternative ways would lessen effects of the trauma and aftermath of the offence.

Although it is available for sexual case victims to make applications to the court to give evidence in alternative ways, this is not an adequate measure to deal with the issue. It may be more difficult for adult witnesses to give evidence in an unconventional method on the basis of trauma alone.<sup>3</sup> This is because adult witnesses are presumed to be able better handle the ordeals of court proceedings.

Many victims may find themselves under pressure from the prosecution or other parties to testify in court in favour of having a greater chance of conviction. Furthermore, the process itself of having to

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<sup>1</sup> Ministry of Justice *New Zealand Crime and Safety Survey 2009: Main Findings Report* (December 2010).

<sup>2</sup> Elizabeth McDonald and Yvette Tinsley "Evidence Issues" in *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279.

<sup>3</sup> Jeremy Finn, Elizabeth McDonald and Yvette Tinsley "Identifying and Qualifying the Decision-Maker: The Case for Specialisation" in *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 221 at 251.

make such an application may be too difficult for some, especially in light of their recent experiences as victims. What is more troubling is the lack of information many sexual case victims have regarding even the possibility of giving evidence in alternative ways. A presumption in favour of giving evidence in the “alternative way” would therefore, alleviate the burden on sexual case victims and improve the quality of their evidence.<sup>4</sup>

### *III Legislative Changes Required*

If Parliament saw fit to grant child complainants and witnesses the presumption that they will give evidence in alternative ways, it would not be too great an extension to include sexual case victims in such a class. Like children, sexual case victims are extremely vulnerable. It would be an arbitrary distinction to deny sexual case complainants the presumption simply based on the fact that they’re over the adult threshold. In many cases, this may only be a difference of weeks or days.

It may be argued that if Parliament allows sexual case victims the presumption to give evidence in alternative ways, it may lead to other categories of victims being allowed such privilege. The concern is that it might compromise the justice system and rights of an accused to a fair trial.

However, this would not be the case. This is because giving evidence in alternative ways does not compromise any judicial proceeding or an accused’s right. Testimony is still shown to all the interested parties, including the accused. Such guidelines and safeguards are already in place under the presumption for child complainants.

Furthermore, we recommend that such a presumption be restricted for child witnesses and complainants and sexual case victims only. Restricting the presumption to those two categories is justified by the vulnerability of the class of persons in contrast to a broad brush application that may require further technical definitions as to the types of witnesses who are vulnerable enough for this presumption to be applied. The vulnerability faced by sexual case victims is unique in nature extends beyond mere physical harm.

### *IV Impact of Reform*

This recommendation would encourage more sexual case victims to come forward and provide a safety net to those who are dissuaded from reporting offences due to the fear of humiliation during cross examination.<sup>5</sup>

One of the many disincentives facing sexual victims is the extending of their ordeal through the judicial system. By allowing sexual case victims the presumption that they will given evidence in alternative ways, Parliament would be lightening the burden on sexual case victims and the challenges they face.

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<sup>4</sup> Yvette Tinsley and Elisabeth McDonald “Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges” (2011) 42 VUWLR 705 at 717.

<sup>5</sup> Ministry of Justice *New Zealand Crime and Safety Survey 2009: Main Findings Report* (December 2010) at 139.

## *V Possible Challenges*

There are evidential challenges relating to pre-recorded evidence where the witness takes a longer time to give testimony. In this case, the testimony will have to be edited and shortened for use in Court.

In New Zealand, editing of video records for cases concerning child witnesses is common. However, it is important to note that a child's video interview evidence is incomparable to that of adult witnesses as children tend to give shorter and less detailed responses. In this aspect, the use of chronological summary may be helpful to assist the editor; lawyers also have the ability to point out particularly important segments within the video to as to reduce court time.<sup>6</sup>

Moreover, as more evidence interviews are used, the New Zealand Police can develop protocols to better address the issue of the length of video evidence and how it can be effectively reduced without compromising the quality of evidence.

There are also concerns as to whether or not the alternative way of giving evidence hinders the course of justice and the accused's right to a fair trial.

Case law has however shown the contrary. In *R v Mussa*,<sup>7</sup> it was stated that allowing [an adult] complainant in a rape case to give evidence from behind a screen does not deprive the accused person of the right to a fair trial.

Although live testimony is favoured over a pre-recorded testimony, more research is required in that aspect. In light of the available research, WCJP is of the opinion that it will not be difficult for the jury to assess the demeanour of a witness giving evidence through a video recording or CCTV.<sup>8</sup>

It has been recognised that evidence by video link has not previously been seen as having an adverse effect on the ability to assess credibility,<sup>9</sup> and that this difficulty exists even when a witness gives evidence ordinarily. For example, a jury may think that a complainant is less credible because he or she does not display the emotional behaviour that is expected of a complainant, which is independent of the method of giving evidence.

Therefore, jury perception cannot be a strong enough ground to limit this presumption to child witnesses.

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<sup>6</sup> Yvette Tinsley and Elisabeth McDonald, above n 3, at 733.

<sup>7</sup> *R v Mussa* [2010] NZCA 123 at [48].

<sup>8</sup> Yvette Tinsley and Elisabeth McDonald, above n 3, at 735.

<sup>9</sup> Elisabeth McDonald and Yvette Tinsley, above n 1, at 283.

## *V Conclusion*

For the reasons above, the WCJP strongly recommends that the presumption that child witnesses give evidence in alternative ways be extended to adult victims of sexual cases also.