The New Zealand Psychological Society

Te Rōpū Mātai Hinengaro o Aotearoa

ALTERNATIVE RE-TRIAL AND TRIAL PROCESSES FOR CHILD WITNESSES IN NEW ZEALAND'S CRIMINAL JUSTICE SYSTEM

Issues Paper (Ministry of Justice, December 2010)

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SUBMISSION FROM THE NEW ZEALAND PSYCHOLOGICAL SOCIETY

The New Zealand Psychological Society commends the Ministry of Justice for producing this timely and far reaching consideration of the issues affecting child witnesses' evidence in the criminal justice system. A comprehensive review is timely given the now significant passage of time since the last major reforms affecting child witnesses: the 1989 Evidence Amendment Act. Since those reforms there has been a considerable body of research – much of it summarised in your Issues Paper – that provides endorsement of the benefits of these reforms, but that also reveal more that can be done.

According to Ashworth and Redmayne,[1] "the purposes of the criminal process are accurate determinations and fair procedures at all times." The Law Commission has defined that the "fairness at issue" is the matter of fair trial process.[2] The concept of fairness extends to the defendant, but also to any complainant and to society. This is especially relevant in relation to child complainants in sexual assault trials who are called upon to participate in a legal system that was essentially designed with adults in mind.

Despite the reforms introduced under the 1989 legislation, it is apparent that all of the potential advantages have not been uniformly applied. The most obvious example is that many applications for the use of alternative modes of evidence are being challenged by defence counsel, with the result that are not made available for some child witnesses.[3] [4] Anecdotal evidence from psychologists who write Modes of Evidence Reports suggests that this is especially the case in relation to pre-recorded videotaped evidential interviews of child witnesses, and use of CCTV for adolescents.

Questions

1. What is your view about the benefit in increasing the use of alternative ways of giving evidence?

We are convinced by the research evidence and our own observation of children giving evidence in court that alternative modes of evidence have, for most children, reduced their level of stress, thus promoting their recovery, and has lead to more full and accurate evidence as a result of improved recall. That stress and memory have an interaction for

[1] Ashworth, A., & Redmayne, M., (2005) *The Criminal process* (3rd edition), Oxford: Oxford University Press. (p. 26).

[2] Law Commission (2008) Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character Issues Paper

[3] Blackwell, S.J.Y. (2007) *Child Sexual Abuse on Trial*: Unpublished doctoral thesis. The University of Auckland

[4] Hanna et al., (2010) *Child witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for* Policy, Institute of Public Policy, Auckland University of Technology,

many children is revealed in the research by Saywitz and Nathanson (1993[5], 2003[6]) who concluded that certain characteristics of the courtroom context interfere with children's optimal testimony and increase children's perceptions of the stress of testifying.

Increasing the use of alternative ways of giving evidence by ensuring that more children do in fact give evidence by alternative modes will provide the benefits described above to a wider population of children; that is, more children will experience lower levels of stress and provide more full and accurate testimony.

We note that the Issues Paper defines a child as being up to the age of 18 years. In this submission we intend that *children* be read as referring to both younger children and adolescents. We make no distinction between children and adolescents because for different reasons they both benefit from alternative modes of giving evidence. For example, in our experience it appears that defence counsel, and perhaps some prosecutors and judges, do not believe adolescents require CCTV. Yet we do not accept there is justification for such a distinction, since teenagers may be more likely than younger children to understand the ramifications of their allegations and because of this may be particularly embarrassed and feel shamed by having to discuss their allegations in front of adults present in a courtroom. This may be particularly the case in sexual offence trials.

2. What do you believe would be the most effective approach to increase the use of alternative ways of giving evidence?

We are strongly in favour of legislation that sets out a presumption for alternative modes of evidence, including the playing of pre-recorded video interviews as evidence-in-chief, pre-recorded cross examination and re-examination, the use of CCTV, and the availability of a support person.

Use of pre-recorded video interviews as evidence-in-chief, pre-recorded cross examination and re-examination, and CCTV all serve to shield the child witness from the formality of the courtroom, including judge, jury and counsel, as well as from the accused. Those working within the criminal justice system may become habituated to the courtroom environment and as a result underestimate the impact of it on children. However, many child witnesses are likely to be overwhelmed by the formality of the courtroom, the presence of the many participants in the courtroom, combined with their lack of understanding of court procedure.

Our views of pre-recording of cross examination and re-examination are contained in response to question 4.

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[5] Saywitz, K. J., and Nathanson, R. (1993) Children's testimony and their perceptions of stress in and out of the courtroom *Child Abuse & Neglect, 17*, 613-622

[6] Nathanson, R., & Saywitz, K. J. (2003) The effects of the courtroom context on children's memory and anxiety *Journal of Psychiatry and Law, 31,* 67-98

3. What is your view on including the option of removing the defendant from the courtroom in section 105 of the Evidence Act?

We regard this as a redundant provision in the circumstances where alternative modes of evidence are more readily applied as a result of a presumption in terms of their favour. As we have argued above it is the courtroom itself that is found to be stressful for child witnesses in addition to the presence of the accused.

Furthermore, we anticipate that there will be objection from other professional groups to this suggestion arising from the impact of such a measure on the ability of the defendant to retain the opportunity to instruct counsel.

4. Do you think pre-recording children's entire evidence should be the 'usual way' a child should give evidence?

Yes, as outlined above. We are aware that the pre-recording of children's evidence is permitted within the present legislative framework, and this has recently been utilised. However, for this to become more readily available we assume that there will need to be a legislated presumption in its favour, as already stated.

A further advantage of pre-recording children's entire evidence is in situations where there is a request for a retrial (when a jury cannot decide on the outcome of a trial, or other reason). Pre-recorded evidence may avert the need for their direct participation in the second trial. Some children at least will decline a request for participation in a second trial, for reasons of avoiding stress and/or believing that their evidence was not believed the first time (children, more than adults, are inclined to take an egocentric view of trial outcomes.

5. If so, when do you think would be the most appropriate time to pre-record a child's cross-and re-examination?

We are of the view that the most appropriate time to pre-record a child's cross-examination and re-examination is as soon as possible after the recording of the child's initial video-taped evidence and committal to trial.

6. What do you see as the important considerations in developing a process for editing videos/DVDs of a child's cross and re-examination?

Perhaps the most important consideration is that the jury gets as full evidence as possible so as to give an adequate explanation of the events alleged, and their context. That is, editing should in general be at a minimum. Where there are significant gaps in the evidence jurors may seek to "insert" their own sometimes erroneous assumptions.

We recognise however, that there may be reasons for the omission of some of a child's statements in response to either cross examination or re-examination. Such editing as would be required in these circumstances should proceed in the same manner that editing of videotaped evidence-in-chief is conducted currently; that is, defence and prosecution agree on edits, or where agreement is not reached there is judicial determination of the issue.

7. Do you believe judicial and legal professional training in effective communication with children would significantly improve the way children are questioned?

Training of judicial and legal professionals in effective communication with children is desirable. However, such training would be most likely to have a significant impact if the individuals receiving training were involved in trials with child witnesses on a regular basis. Such circumstances would arise for example if there were specialist judges for cases associated with child witnesses (e.g., child sexual abuse cases), and where a crown prosecutors' office is of sufficient size to allow for specialisation in their work.

We see it as a greater priority, however, that there be judicial training in recognition and intervention with questioning that is inappropriate and/or too difficult for the child witness. For example, training that leads to their noticing when a child witness is confused as a result of not understanding a question put to them. Note, this would apply where evidence is being given in the courtroom, on CCTV, or in pre-recorded cross examination and re-examination.

8. Do you believe consideration should be given to enabling judicial examination of child witnesses?

We do not see any significant advantages accruing from such a provision. Rather, we consider the priorities concerning the judiciary are in judges being equipped to provide greater guidance to children's testimony through judicial recognition of and intervention in instances of inappropriate questioning.

9. What do you see as the key benefits and risks of using intermediaries?

Eliciting the most complete, accurate and reliable evidence from child witnesses requires the person questioning or eliciting that information to have, (a) general knowledge of developmental differences, particularly in emotional, cognitive/intellectual, and language areas of functioning, and this child's developmental level in particular; (b) the ability to adopt a manner that facilitates engagement and trust in the child; (c) in-depth knowledge of the field of abuse – the breadth and depth of the possibilities and the effects such abuse can have on the victim; and (d) the trust and respect of the Court, including the Presiding Judge, and the respective prosecuting and defence lawyers.

These qualities would be present in a specialist group of intermediaries given appropriate selection, training and support. Questioning should be at a level that is readily understood by the particular child as a result of appropriate language, and confrontation present in some cross examination of children should be minimised. As a result of the use of competent intermediaries, both the quality of children's evidence and the level of children's stress should be better than is produced in the present system where cross examination and re-examination is conducted by practitioners whose background education and experience does not readily equip them with the above skill level. We recognise that there may be exceptions to this general statement.

A further advantage accruing from the use of intermediaries is that from the child's perspective, questions would come from one person only, beyond the specialist

interviewer who may have interviewed them for their initial videotaped evidence given as evidence-in-chief. Multiple interviewers (or examiners) may add to children's experience of stress, particularly where the child does not have the capacity to understand the reasons for multiple settings and multiple interviewers.

Risks include not having the capacity for a comprehensive and well resourced system for selection, training, ongoing supervision, and support. The result of poor planning and resourcing of intermediaries may be that such practitioners are not sufficiently competent to produce the anticipated advantages and/or intermediaries are not readily available throughout the country. It is recognised that to do this properly would be costly.

10. If intermediaries were to be introduced, what do you believe should be the extent of their role and who do you think would be best to undertake the role?

The appropriate role for an intermediary would include meeting the child prior to formal interview in order that an appropriate assessment could be conducted to inform the intermediary of the cognitive and language capacity of the child. Their role in the pre-recorded cross examination and re-examination would be to present to the child the questions from both prosecution and defence.

Overseas experience suggests that intermediaries would be those from a background in child psychology, speech and language therapy, special education and forensic interviewing. All would need specialist training, accreditation, and ongoing supervision.

11. Do you believe more emphasis should be put on prioritising cases involving child witnesses?

Yes, we strongly support such a provision. Considering the normal life span, it is not uncommon that a child's engagement with an allegation brought before a court could cover a considerable portion of their life. For example, a child who makes a disclosure at eight years old, and waits two years for the process from disclosure to initial investigation to videotaped evidence to charges being laid to the trial, has spent a fifth of their life engaged with this issue, and a quarter of the life for which they have memory. For some, the time of involvement with allegations and being a witness results in their life being experienced as "on hold" for a significant time of their life.

A further advantage relates to memory and recall for evidential purposes. There is strong evidence that traumatic or negative experiences generally appear to be better remembered over longer delays,[7] although this may be at the expense of accuracy in relation to

[7] Fivush, R. (2002) The development of autobiographical memory In H. L. Westcott, G. M. Davies & R. H. C. Bull (Eds.), *Children's testimony: A handbook of psychological research and forensic practice* (pp. 35-68) Chichester: John Wiley & Sons.

Gordon, B. N., Schaaf, J. M., Ornstein, P. A., & Baker-Ward, L. (1995) Clinical implications of research on memory development. In T. Ney (Ed.), *True and false allegations of child sexual abuse: Assessment and case management* (pp. 99-123). New York: Brunner/Mazel, Inc.

peripheral details.[8] That is, peripheral information is not as well remembered in arousing (unpleasant, fearful) events[9] [10]. However, children are most commonly cross-examined about peripheral details.[11]

12. If so, do you believe a legislative requirement is the best way of achieving this?

Yes, we believe this to be the only way. Adjournments are common in the present circumstances and appear to be the result most often of court overload, and defence counsel seeking adjournments.

13. Are you supportive of any of these further options for enhancing the experience of child witnesses in the criminal justice systems?

Automatic right for all child witnesses to have a support person while giving evidence: Yes, for the principle reason of reducing stress and therefore potential harm to those witnesses who are not complainants (conferring on them the same opportunities as complainant child witnesses).

The use of a narrative style of testimony when giving evidence–in-chief: Our preference would be for a presumption in favour of the pre-recorded videotaped interview being presented as evidence-in-chief. Such interviews routinely allow for a narrative style of testimony. However, where evidence-in-chief is not presented via pre-recorded videotape, we support the proposal that children be permitted or encouraged to present their evidence in narrative style.

Providing supportive environments for children giving evidence out of the courtroom: We support this. An appropriate model for such a space is the interview rooms of the current Evidential Video Units. We also strongly endorse the need for waiting areas at court away from the defendant and the defendant's friends and family.

Specialisation in child witness cases: A specialist jurisdiction that deals specifically with cases involving child witnesses is supported in this submission. However, we recognise that this could have high practical and resourcing implications. Specialist Judges and specialist

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Bernstein, D. (2002). Tunnel memories for autobiographical events: Central details are remembered more frequently from shocking than from happy experiences. *Memory & Cognition, 30*, 1010-1020.

Fivush, R., Sales, J., Goldberg, A., Bahrick, L., & Parker, J. (2004) Weathering the storm: Children's long-term recall of Hurricane Andrew *Memory, 12*, 104-118

[8] Brown, D.A., Salmon, K. & Pipe, M-E (1999) Children's recall of medical experiences: The impact of stress. *Child Abuse & Neglect*, 23, 209-216.

[9] Brown, J.M. (2003). Eyewitness memory for arousing events: Putting things into context. *Applied Cognitive Psychology* 17, 93-106

[10] Christianson, S-A. &Loftus, E.F. (1991) Remembering emotional events: The fate of detailed information *Cognition and Memory* 5, 81-108

[11] Blackwell, S.J.Y. (2007) *Child Sexual Abuse on Trial*: Unpublished doctoral thesis. The University of Auckland

prosecution units may be a more attainable outcome of reform, and would assist in reducing some of the identified problems in present practice.

14. Do you have any other ideas or options that you believe we should consider?

We support there being a judicial direction concerning children's demeanour. There is strong research support for the conclusion that the truth or accuracy of children's evidence (or indeed the evidence of adults) is not related to their demeanour.[12] Children may appear calm and dispassionate when giving evidence, or at the other extreme display overt distress by for example, crying. Neither extreme relates directly to truthfulness. Yet, some jurors believe that if children are not tearful and/or distressed, then they have not been victimised as alleged.[13]

[12] Vrij, A., Akehurst, L., Brown, L., & Mann, S. (2006). Detecting lies in young children, adolescents and adults. *Applied Cognitive Psychology, 20* 1225-1237

[13] Blackwell, S.J.Y. (2007) *Child Sexual Abuse on Trial*: Unpublished doctoral thesis. The University of Auckland