LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 26

THE EVIDENCE OF CHILDREN AND OTHER VULNERABLE WITNESSES

A discussion paper

The Law Commission welcomes your comments on this paper and seeks your response to the questions raised.

These should be forwarded to:
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by 6 January 1997

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Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Preface

THE LAW COMMISSION'S evidence reference is succinct and yet comprehensive:

> Purpose: To make the law of evidence as clear, simple and accessible as practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.
>
> With this purpose in mind the Law Commission is asked to examine the statutory and common law governing evidence in proceedings before courts and tribunals and make recommendations for its reform with a view to codification.

The evidence reference needs to be read together with the criminal procedure reference, the purpose of which is:

> To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

Both references were given to the Law Commission by the Minister of Justice in August 1989, shortly after the Commission published a preliminary paper on options for the reform of hearsay.

This is the ninth in a series of Law Commission publications on aspects of evidence law. Papers on principles for the reform of evidence law, codification of evidence law, hearsay evidence, and expert and opinion evidence were published in 1991, while papers on documentary evidence and judicial notice and on the law of privilege appeared in 1994. The Commission also published *Criminal Evidence: Police Questioning* (NZLC PP21) in 1992, a major discussion paper jointly under the evidence and criminal procedure references. This was developed into the report *Police Questioning* (NZLC R31, 1994). A further discussion paper dealing with the evidence of character and credibility will be published later this year.

The Commission's work on the evidence of children and vulnerable witnesses has been greatly assisted by consultation with legal practitioners, legal academics, judges, social scientists, psychologists and other specialists. The Commission would also like to thank the following, who provided comments on earlier drafts of this paper:

Toni Allwood (Rape Crisis National Office, Wellington), Wendy Miller Burgering (Strategic Policy and Resource Review Unit, Police National Headquarters) and Mark Copeland (Assistant Legal Adviser, Police National Headquarters), Catherine Coates (Analyst, Mental Health Services, Ministry of Health), Angela Cook (Senior Policy Analyst, Department for Courts), Fiona Coy (Senior Advisory Officer, Children and Young Persons Service), Emma Davies (Department of Psychology, University of Auckland), Dr Sabine Fenton (Director, Centre of Translation and Interpretation Services, Auckland Institute of Technology), James Johnston (Solicitor, Wellington), Lalita Kasanji, (Senior Analyst, Ethnic Affairs Service, Department of Internal Affairs), Richard Mahoney (Faculty of Law, University of Otago), Scott Optican (Faculty of Law,

University of Auckland), Dr Margaret-Ellen Pipe (Department of Psychology, University of Otago), Dr Erihana Ryan (Director of Area Mental Health Services, Healthlink South Ltd, Christchurch), Catherine White (National Interpreter Co-ordinator, Deaf Association of New Zealand), Chief Judge R L Young (District Court, Wellington), Dr Karen Zelas (Consultant Psychiatrist, Christchurch).

We are also grateful for the support from the Working Party on Child Witnesses and the assistance of Professor Graeme Kennedy, Department of Linguistics, Victoria University of Wellington. We emphasise, however, that the views expressed in this paper are those of the Commission and not necessarily those of the people who have helped us. The code provisions were prepared by Mr G C Thornton QC, legislative counsel. The Commission also acknowledges the work of several past and present members of its research staff, and in particular Susan Potter, Louise Delany, and Elisabeth McDonald, in researching, writing, and preparing this paper for publication.

This paper does more than discuss the issues and pose questions for consideration. It includes the Commission's provisional conclusions following extensive research and extensive preliminary consultation. It also includes a complete draft of the provisions on the evidence of children and vulnerable witnesses for a code and a commentary on them. The intention is to enable detailed and practical consideration of our proposals. We emphasise that we are not committed to the views indicated and our provisional conclusions should not be taken as precluding further consideration of the issues.

Submissions or comments on this paper should be sent to the Director, Law Commission, P O Box 2590, DX SP 23534, Wellington, by 6 January 1997 or by e-mail to Director@lawcom.govt.nz. We prefer to receive submissions by e-mail where possible. Any initial inquiries or informal comments can be directed to Elisabeth McDonald, Senior Researcher (Telephone: (04) 473 3453; fax: (04) 471 0959; E-mail: EMcDonald@lawcom.govt.nz).

Summary of views

- Under current law, all witnesses must be competent to give evidence. For children under 12, the court is under an obligation to test competence. The competence of any other witness may be challenged where it is at issue; for example, in the case of intellectual disability. The test for competence contains two limbs: a witness must have a sufficient level of understanding or intelligence to give a rational account of past events; and the witness must understand the nature and consequences of the oath (for children, the duty to speak the truth).
- Recent research indicates that even young children are able to give reliable (accurate and rational) evidence and that age alone cannot predict the quality of the evidence presented. Further, the current test of competence, in particular the requirement to understand the nature of a promise, can only assist in a minimal way with any decision on the accuracy of the witness's evidence. In order to increase the amount of relevant evidence, and allow the fact-finder to make an assessment of reliability and credibility, the Commission proposes abolition of the current competence requirement. Testimony which is unhelpful because of incoherence or because of communication difficulties which cannot be adequately overcome, may be ruled inadmissible on one of the general exclusionary grounds (for example, time-wasting). This proposal has implications for the administration of oaths, affirmations or declarations. (Chapter 2.)
- At present, child and mentally handicapped complainants in sexual cases are eligible to give evidence in alternative ways; for example, on closed-circuit television, from behind a screen or on a pre-recorded videotape. Their evidence may also be given at any preliminary hearing in writing or on videotape, and they need not appear in person or be cross-examined, except with leave of the court. (Chapter 4.)
- The Commission believes that giving evidence in alternative ways may assist all witnesses in appropriate cases, and will normally result in fuller and more reliable evidence being available to the fact-finder. The Commission proposes that in the case of child complainants, directions must be sought from the court on how the child will give evidence. In all other cases, the witness may apply to the court to give evidence in an alternative way, based on the needs of the individual. This procedure will apply in both civil and criminal trials, and will be available to defendants who give evidence. In the case of preliminary hearings, the Commission proposes that any prosecution witness who is required by the court to give evidence in person, may apply to give that evidence in an alternative way, based on individual need. Videotaped evidence which is presented at the preliminary hearing may or may not be shown at any later defended hearing. (Chapter 5.)

- To be consistent with the purposes of the evidence code, the Commission believes that in some cases it may also be appropriate to allow cross-examination to be pre-recorded on videotape. Witnesses who may apply to give evidence in this way will be child complainants (for whom assisting early recovery from trauma is also an important consideration) and any other witnesses for whom memory retention may be an issue, and who have also been permitted to give evidence in chief on videotape. A witness whose cross-examination has been pre-recorded may also be required to give further evidence at trial if necessary. They may then give the new evidence on closed-circuit television or from behind a screen. Cross-examination may also occur prior to any preliminary hearing for a witness who is required to give evidence in person, rather than in writing. (Chapter 5.)
- Witnesses may also be assisted in giving evidence by other mechanisms. For example, a support person, who sits near the witness to give emotional support and encouragement, may well assist the witness to give more helpful and complete evidence. The Commission recommends that all complainants have the right to one or more support persons while testifying, but the identity and conduct of the support persons will be controlled by the judge. All other witnesses may apply to use a support person. (Chapter 6.)
- Some witnesses may have communication difficulties, particularly difficulties in comprehension, which means they will be assisted in giving evidence by someone who can rephrase the questions put to them. The Commission believes that the code should provide for the appointment of experts to assist in this way, either by asking the questions themselves, or by advising counsel and the parties on the most appropriate way to communicate with the particular witness. (Chapter 6.)
- At present, an unrepresented defendant in sexual cases may not personally cross-examine a child or mentally handicapped complainant. In such cases, the court appoints another person to put the questions to the complainant. The Commission believes that in other cases it would assist in reducing stress for the witness, and therefore increase the quality of evidence heard, if the witness were not personally cross-examined by the defendant or opposing party. Such cases would include sexual cases involving adult complainants, cases involving child witnesses of violence (especially domestic violence), or any cases where the relationship between the witness and the unrepresented party would impact on the quality of the evidence given. This situation may equally arise in civil, especially family, and criminal proceedings. The Commission believes it should be open to any witness to apply to avoid personal cross-examination by an opposing party. (Chapter 6.)
- The other kind of communication assistance which is already available in New Zealand courts is that provided by an interpreter. In the criminal context, s 25(g) of the New Zealand Bill of Rights Act 1990 makes such assistance a right for a defendant. The Commission believes that any criminal defendant who is unable to sufficiently understand the proceedings should be entitled to free interpretation of the proceedings, including any relevant preliminary matters or documents. For any other witnesses, in civil or criminal proceedings, an interpreter should be available to assist communication with the court, but the cost of this service would normally be

met by the party calling the witness. The provisions of the Mäori Language Act 1987 which provide an entitlement for any witness to give evidence in Mäori are not affected. (Chapter 7.)

- The rights of a criminal defendant are an important consideration for any reform options. Most important in this context is the right to confrontation. In New Zealand it appears that the right to present a defence and the right to examine witnesses for the prosecution (ss 25(e) and (f) of the New Zealand Bill of Rights Act 1990), which together comprise the right to confrontation, do not include a right to face-to-face confrontation. To the extent that the Commission's proposals do not impinge on the right to cross-examine, but only suggest changing the way cross-examination is conducted (in terms of time and place), they do not breach the New Zealand Bill of Rights Act 1990 nor erode fairness to the defendant. (Chapter 8.)

Summary of questions

Chapter 2: Competence

1 Is abolition of the competence requirement desirable? If so, which approach should be followed?

2 Are there other implications of abolishing the competence requirement?

Chapter 4: Assisting witnesses to give evidence: recent changes

3 Does receiving evidence in alternative ways assist or hinder the rational ascertainment of facts? In particular, does the use of closed-circuit television or videotaped evidence, which allows out-of-court testimony, operate as a barrier to the assessment of witness credibility?

4 Are there any current difficulties with the use of alternative ways of giving evidence?

Chapter 5: Assisting witnesses to give evidence: proposals for reform

5 Are there any other factors relevant to establishing need? Are those listed appropriate?

6 Should a mandatory application be made for intellectually disabled witnesses?

7 Are the proposed disclosure requirements of pre-trial videotapes appropriate in all contexts?

8 Should a defendant in a criminal case be eligible to give evidence in an alternative way?

9 Should all prosecution witnesses be entitled to give evidence on videotape at a preliminary hearing?

10 Should pre-trial cross-examination be available in some circumstances?

11 What are the implications of allowing all witnesses to give evidence in alternative ways?

Chapter 6: Support for witnesses

12 Who should be entitled to have a support person with them while giving evidence? Should a witness be entitled to a support person even when giving evidence in alternative way?

13 What role should a support person take?

14 When might it be appropriate to allow a witness to have with them more than one support person?

15 Who should be entitled to have an intermediary? Who should act as an intermediary?

16 What role should an intermediary take? Should an intermediary be allowed to rephrase questions?

17 When should there be a bar on personal cross-examination by an unrepresented party?

Chapter 7: Communication

18 Who should be entitled to an interpreter during a proceeding? Who should bear the cost of providing an interpreter?

Chapter 8: Fairness to the defendant in a criminal case

19 Do any of the proposals in this paper impact unfairly on the rights of a defendant in a criminal case?

1
Introduction

1 MANY PEOPLE find giving evidence in court a difficult or even harrowing experience. The unfamiliar surroundings, the formality of the process and the combative nature of the adversarial trial may all contribute to a witness's feeling of unease. For some people, including very young children, people with disabilities, those from minority linguistic or cultural backgrounds, and complainants in sexual cases, giving evidence in court may be not only difficult, but virtually impossible. Such people are all "vulnerable" witnesses in the sense that, without special assistance, their evidence may never be satisfactorily heard. This paper discusses options to address the particular needs of witnesses (including defendants) which arise in the context of their involvement in legal proceedings and impact on their ability to give reliable (complete and accurate) evidence.

2 The evidence of people who are ruled incompetent because, for example, they cannot describe the difference between a truth and a lie, is also not heard. Evidence that is inadmissible on this basis is usually that of children or other vulnerable witnesses.

3 The aim of this paper is to consider reforming the rules of evidence which govern *who* may give evidence (the competence requirement) and *how* witnesses may be assisted to give evidence. The *how* inquiry concerns the kind of assistance that may be provided for children and vulnerable witnesses to enable their evidence to be heard; for example, videotaped evidence, or the presence of a support person. We also discuss the use of interpreters for those who need help to communicate effectively. The rationale for examining reform options in this area is the concern that the current competence test and the usual ways of giving evidence operate to reduce the amount of relevant and reliable evidence available to the finders of fact.

4 The Commission's review of the law of evidence in this area does not question the context in which the law operates – that is, the adversarial trial. It may well be that if another model of dispute resolution were used, participation would be less arduous, but this topic is beyond the scope of the reference.

5 This paper does not review all issues concerning children and vulnerable witnesses. Clearly, these witnesses may also be assisted by practices and procedures which do not require legislative authority: for example, more emphasis on preparation for trials; education of lawyers and judges concerning the needs of these witnesses, in particular, on how to question them; and, reduction of delays.[1]

PURPOSES OF EVIDENCE LAW RELEVANT TO THE EVIDENCE OF CHILDREN AND VULNERABLE WITNESSES

6 The Law Commission has identified several general purposes underlying the law of evidence[2] which should govern any proposals for law reform. These purposes include promoting the rational ascertainment of facts and procedural fairness.

The rational ascertainment of facts

7 In *Preliminary Paper No 13, Evidence Law: Principles for Reform*, the Law Commission concluded that a principal purpose of the trial is the rational ascertainment of facts.[3] Although it is not possible to control the accuracy of all the evidence presented in court, the law of evidence can "enhance rationality in the process of fact-finding at trial" by, for example, ensuring that relevant material can be brought before the court, filtering out irrelevant material, avoiding obvious prejudices and questioning unsafe assumptions.

8 The goal of promoting the rational ascertainment of facts has obvious implications for the rules and procedures which govern who gives evidence and how that evidence is given. Since excluding relevant evidence runs counter to this goal, the rationale behind any exclusionary rule must be closely scrutinised. For example, an intellectually disabled person may not be able to fulfil the present competence requirements because they cannot demonstrate an understanding of the concept of a promise. That person may nevertheless be capable of giving reliable evidence. The normal process

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1 Murray, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (The Scottish Office, Central Research Unit, Edinburgh, 1995).

> There is also a continuing need to keep judges and lawyers up-dated on emerging pyschological knowledge about child witnesses (iv).
>
> [I]ntensive efforts are required to reduce delays, to sharpen skills and to remedy the imperfections in the system that can interfere with the accuracy and effectiveness of all children's testimony (169).

Australia, Law Reform Commission, *The Use of Closed-Circuit Television for Child Witnesses in the ACT: Children's Evidence Research Paper 1* (ALRC, Canberra, 1992) para 7.87:

> There was, however, clear recognition by all groups involved that closed-circuit television was not a panacea that resolves all the difficulties facing child witnesses in their interaction with the court system. Important issues still revolve around the human aspects of that interaction, and foremost among these is the ability to communicate and use appropriate language with children, both in court and before the case reaches court.

2 *Evidence Law: Principles for Reform* (NZLC PP 13, 1991).

3 This is sometimes referred to as "truth finding", although this suggests the truth is able to be ascertained by a finder of fact, which may not be the case. For further discussion, see paras 33–38 in *Principles for Reform*, above n 2.

of giving evidence (orally in open court) may effectively reduce the amount of relevant material available to the fact-finder, by discouraging some individuals from participating, or it may compromise the reliability of that material.

Procedural fairness

Fairness to the defendant

9 Fair procedures in criminal cases are necessary in order to achieve just results. The public interest in not convicting the innocent is reflected in certain fundamental rights, recognised in international law and affirmed in the New Zealand Bill of Rights Act 1990. These include the right of silence, the privilege against self-incrimination, the presumption of innocence and the right to be present at the trial and to examine witnesses. Reform of the rules of evidence must take into account these rights and interests, even though they may need to be balanced at various points against the rights and interests of complainants and other witnesses.

Fairness to witnesses

10 In the context of procedural fairness for witnesses, two considerations are relevant: the reduction of the trauma associated with giving evidence and, for complainants, the promotion of recovery from the harm allegedly caused by the defendant.

11 Minimising stress on the complainant is currently recognised as a valid concern. It is specified as one of the factors the judge must consider when deciding how a child or mentally handicapped complainant in a sexual case may give evidence.[4] Trauma may be reduced by giving evidence behind a screen so that a witness cannot see the defendant, or on videotape, which may alleviate anxiety caused by waiting to be called to give evidence and having to give evidence in chief in court. Reducing stress or trauma is important in itself but it may well result in more reliable evidence being given. Sometimes it may make available vital evidence, without which the case could not proceed.

12 The promotion of recovery is recognised as important in the case of abused children. The United Nations Convention on the Rights of the Child, ratified by New Zealand in 1993, requires party states to "respect and ensure" the rights of each child within its jurisdiction, and in particular it requires the party states to "promote physical and psychological recovery and social reintegration of a child victim". While participation in the trial process may not positively aid recovery, the Commission believes that the rules should as far as possible not hinder the recovery process.

13 Although the case for the reforms proposed in this paper is most compelling in criminal trials, where the impact of testifying may be considerable, the provisions may also apply in civil cases, and to all witnesses, including defendants, who demonstrate the need for special treatment.

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[4] Section 23D(4) of the Evidence Act 1908.

2
Competence

INTRODUCTION

14 THE GENERAL RULE is that anyone who has relevant evidence to offer is "competent" (or eligible) to give evidence.[5] Traditionally, however, the evidence of some groups of witnesses has been considered untrustworthy.[6] As a result, rules about competence and how to test the competence of various witnesses have been developed at common law. The operation of these rules has led to the exclusion of relevant testimony.

15 The current concern about the competence requirement is that it operates as an exclusionary rule. As one of the purposes of the proposed evidence code is to promote the rational ascertainment of facts, the continued validity of rules which prevent the fact-finder hearing relevant evidence needs to be considered.[7]

16 This chapter discusses the New Zealand law of competence, especially as it relates to children and people with intellectual disabilities; it questions whether the law is operating effectively; and it poses options for reform.

THE CURRENT LAW

17 Everyone who gives evidence is presumed to be competent at the time that they swear an oath or make an affirmation, which is usually done immediately before they give evidence.[8] At common law, no evidence could be heard unless under oath. The evidence of a child could be rejected if the court concluded that the child could not understand the nature and consequences of an oath. The common law position was partially modified by s 13 of the Oaths and Affirmations Act 1957, which allows for unsworn evidence of a

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5 *Cross on Evidence* (Mathieson, New Zealand Looseleaf Edition, Butterworths, Wellington, 1996) para 7.1.

6 For example, children's testimony is thought to be untrustworthy because "children do not have adequate cognitive skills to either understand or accurately describe what they witnessed; children have no ethical sense and are prone to fabricate; and children have difficulty differentiating fact from fantasy". Ontario Law Reform Commission, *Report on Child Witnesses* (OLRC, Toronto, 1991) 3. These beliefs will be challenged later in this chapter.

7 The competence and compellability of other groups of witnesses, for example judges, juries and spouses, will be considered in the context of other research papers.

8 *Cross on Evidence*, above n 5, para 7.9. It also needs to be noted that "there is no rule of law or practice in [New Zealand] that the evidence of a very young child witness is inadmissible on the ground of tender age alone." *R v Accused (CA 245/90)* [1991] 2 NZLR 649, 653.

child under 12 to be admitted if a declaration is made.[9] However, before a child makes the declaration ("I promise to speak the truth, the whole truth, and nothing but the truth"), there should be inquiries to ascertain:

- whether the child is sufficiently intelligent to be capable of giving a rational account of what they have seen or heard; and
- whether they understand the duty of speaking the truth. This requires an understanding of the difference between truth and lies and an appreciation of the solemnity of the occasion.[10]

18 When the witness is over 12 "it is not the general duty of the judge to embark on an examination of fitness to give evidence on oath in the absence of some indication of possible incompetence."[11] If competence becomes a live issue,[12] for example, in the case of adults with a significant intellectual disability or mental disorder,[13] the test is "whether the person has a sufficient appreciation of the solemnity of the occasion, and a realisation that taking an oath involves more than the ordinary social duty to tell the truth."[14] It is unclear to what extent, if any, this inquiry differs from that undertaken in the case of young children.

How the test is administered

19 It has been accepted that a ruling on competence may be made prior to the trial, under s 344A of the Crimes Act 1961.[15] Competence should also be tested, or demonstrated, before the witness gives evidence at trial. In a criminal case this should take place in front of the jury[16] as it is of assistance to the jury in deciding how much weight to give to the witness's evidence.[17]

20 The trial judge usually takes an active role in questioning the witness to determine their competence. The Court of Appeal in *R v Accused* indicated that the test may be satisfied by a rather minimal approach directed at the duty to tell the truth, which may only indirectly reveal anything about the child's ability to give a rational account of past events:

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9 *Cross on Evidence*, above n 5, para 7.9.

10 *R v Accused,* above n 8, 652–653.

11 *Cross on Evidence*, above n 5, para 7.9.

12 The challenger, usually defence counsel, has the evidential burden of raising the issue, which then places the burden of proof on opposing counsel to show, on the balance of probabilities, that the witness is competent. *R v Yacoob* (1981) 72 Cr App Rep 313, 316–317.

13 People have been considered incompetent on the grounds of mental disorder as well as intellectual disability. Although traditionally the two conditions have not been clearly distinguished, they are regarded today as quite different. Intellectual disability is a permanent condition which usually originates pre-birth, in early childhood, or as a result of brain damage caused by injury or illness and is not regarded as treatable. Mental disorder, on the other hand, is an illness which usually develops in adolescence or adulthood rather than in childhood, is susceptible to treatment, often episodic in character, and from which there may be complete or at least partial recovery.

14 *Cross on Evidence*, above n 5, para 7.11.

15 *R v Accused*, above n 8, 652:

> The question of competency of a child to give evidence is a matter for the trial Judge, and if there is to be a determination before trial then it should take place in circumstances in which counsel are given full opportunity to participate.

16 Which includes an inquiry made on pre-recorded videotape or via closed-circuit television.

17 *R v P* (1992) 9 CRNZ 119, 125.

> When the complainant was about to give evidence the Judge himself addressed several questions to her in the presence of the jury. He asked her age which she correctly gave to him. He asked if she knew what a promise was to which she replied she did and further that she understood what it was to promise to do something. The Judge then asked her if she knew what the truth was and what it is to tell lies. She then positively promised the Judge to tell the truth, and negatively promised him not to tell lies. Finally she promised not to tell anything which was not the truth and that she understood "all that". ... [T]he answers she gave to the questions were single words "yeah" or "nah" but always apposite to the questions posed by the Judge.[18]

21 The test of understanding the duty to speak the truth, and the s 13 provision for witnesses under the age of 12 to make declarations, are reflected in the Evidence (Videotaping of Child Complainants) Regulations 1990 (SR 1990/164),[19] which apply to videotaped interviews of child complainants in sexual cases (see further discussion in chapter 4).[20]

22 It appears that competence is currently tested only by an inquiry into whether the witness understands what truth is and what a promise means, which is followed by a promise to tell the truth. There seems to be no requirement, as a matter of practice, that a witness explain the difference between truth or lies; for instance, by giving a definition of truth. Further, it seems to be generally acknowledged that a judge cannot appropriately assess whether a witness has sufficient intelligence to give a rational account of past events.[21] On these points the Court of Appeal has held:[22]

> We are of the view that here in New Zealand where a child's evidence has always been received without the formality of oath-taking, but on a promise to tell the truth once it is established such a child has sufficient appreciation of the solemnity of the occasion, should be followed [*sic*] ... We think this practice is in accord with experience, and current opinion of professional educators and child psychologists ...
>
> Counsel argued that the Judge's questions were leading and that he did not test the respective children's powers of comprehension by seeking from them definitions of promise, truth, lies, etc. We think there is no substance at all to those complaints. People of all ages use words correctly to convey meaning in ordinary speech but at the time if

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18 Above n 8, 652.

19 These regulations have not been amended to make them explicitly applicable where an application is made under the statutory provisions to admit the videotaped evidence of a mentally handicapped adult. Section 23C(b)(ii) of the Evidence Act 1908, as amended by s 28 of the Summary Proceedings Amendment Act 1993, extended the availability of videotaped evidence to mentally handicapped adults in sexual cases.

20 Regulation 5(1)(c) provides:

> (1) The video shall show the following matters: ...
>
> (c) The interviewer –
>
> (i) determining that the complainant understands the necessity to tell the truth; and
>
> (ii) obtaining from the complainant a promise to tell the truth, where the interviewer is satisfied that the complainant is capable of giving, and willing to give, a promise to that effect ... .

Interviews under these regulations are conducted by a specialist interviewer rather than a judge or lawyer. The judge at trial determines competence and obtains a further promise to tell the truth for the purpose of the child's cross-examination and re-examination.

21 For example, see the Report of the Ontario Law Reform Commission, above n 6, 35, and the *Report of the Advisory Group on Video Evidence* (Home Office, London, 1989) (the "Pigot Report") para 5.4.

22 *R v Accused*, above n 8, 653.

> pressed sometimes cannot give very precise, or even adequate, linguistic definitions. We think these criticisms overlook that the questions are preliminary tests of capacity and competence before the substantive evidence of a child witness is embarked upon. It would be a damaging misjudgment in balance if a child witness were subjected to an emphatic test of general cognitive skills in the preliminary questioning on competence ...[23]
>
> [W]e do not think it is wise for the Judge at this stage to embark upon a lengthy interrogation seeking definition of words or concepts. There are safeguards. If the evidence appears as it unfolds to be unsatisfactory then the Judge, depending on other evidence in the trial, has statutory powers ... We think that a jury should be told that a child is not disqualified simply by reason of age alone and that there is no precise age which determines a child's competency. This depends on the child's capacity and intelligence, or understanding of the difference between truth and falsehood and on appreciation of the duty to tell the truth. As with all witnesses the jury are the sole judges of the credibility of a child who gives evidence.[24]

23 These comments from the Court of Appeal acknowledge contemporary research concerning the psychosocial capacity of young children, and support the view that the fact-finder is best placed to make decisions concerning weight and credibility.[25]

24 Notwithstanding this authority, there are still occasions when relevant testimony is excluded on the grounds that the witness is not able to demonstrate competence in a more sophisticated manner than that required by the Court of Appeal.[26] Further, there is a need to re-examine the continued appropriateness of a duty to test the competence of children under the age of 12. The next part of this chapter will therefore consider the following matters:

- why are children under the age of 12, and some adults, required to demonstrate an understanding of the duty to tell the truth in court?
- is there any current validity to the requirement to test whether a child has sufficient intelligence to give a rational account of past events?
- why is there a duty to test children under the age of 12?

Why test understanding of the duty to tell the truth?

25 Historically the religious significance of swearing an oath was viewed as a disincentive to lying under oath. While it was assumed that adults ordinarily knew and believed in the consequences of lying under oath, some witnesses, such as children, were tested for their appreciation of the consequences.

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[23] *R v Accused*, above n 8, 652.

[24] *R v Accused*, above n 8, 653.

[25] *A Private or Public Nightmare?* (Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, Wellington, 1988) (the "Geddis Report").

[26] For examples of cases where non-compliance with competency requirements was a ground for excluding evidence, see *R v Crime Appeal (CA 400/92 and CA 404/92)* (unreported, Court of Appeal, 29 March 1993, CA 400/92 and 404/92); *R v Ogden* [1985] 1 NZLR 344; *R v H* [1992] DCR 805; *R v W* (unreported, High Court, Wellington, 30 November 1992, T 91/92, Greig J); *R v S* [1993] 2 NZLR 142. For an example of a case involving a person with an intellectual disability, see *R v T* (unreported, High Court, Hamilton, 28 September 1994, T 1/93, Hammond J). The case was unable to proceed because the person was found to be incompetent, although the person had been found competent to give evidence by Penlington J in June of the same year. That trial resulted in a hung jury.

26 Today the religious consequences of lying under oath do not provide a significant disincentive for most people. The fact that a witness may make an affirmation, and the fact that the validity of the oath is not affected if the witness has no religious belief,[27] is legal recognition of this social reality. However, giving an oath or affirmation may still be viewed as an indication of the witness's moral commitment to telling the truth, and the existence of the offence of perjury provides a legal sanction against lying.

27 The current requirement that the court must test a young child's understanding of the duty to tell the truth may have been historically associated with a belief that children are more likely to lie than adults, or have more difficulty understanding the duty to tell the truth. These days it is recognised that children do lie and make allegations they know to be false, but there is no evidence to support any contention that children lie more than adults or that they are less capable of telling the truth.[28] Some psychologists even theorise that very young children are incapable of lying although it is more generally accepted that there is no correlation between age and honesty.[29]

28 Research indicates that by the age of three or four most children do understand the difference between truth and lies, although they may have difficulty articulating a definition, as do many adults. Children of five or six may also consider they know the meaning of terms such as "truth", "lie" and "promise", but their definitions may be different from adults, which may influence assessments of children's willingness or ability to tell the truth.[30] For instance, very young children tend to define inaccurate statements as lies regardless of the intention of the person making the statement.[31]

29 The important question to ask is whether this part of the competence test (appreciating the duty to tell the truth and promising to do so) can accurately predict whether the witness will give honest evidence.

30 As it is clear that not everyone who takes an oath or affirmation tells the truth, even when aware that lying on oath is an offence, understanding the importance of telling the truth cannot guarantee the truth will be told. Conversely, it does not follow that failing to make a promise, or failing to adequately articulate the nature of a promise, will result in the witness lying. Studies indicate that there is no correlation between understanding the meaning of the oath and speaking the truth in court.[32] Excluding the relevant evidence of a witness under this limb of the competence requirement seems to run counter to the goal of bringing all relevant evidence before the court

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27 Sections 4 and 5 of Oaths and Declarations Act 1957.

28 Geddis Report, above n 25, 6: "We are not aware of any evidence that demonstrates a correlation between age and honesty."

29 Morton, "When Can Lying Start?" in Davies and Drinkwater (eds), *The Child Witness – Do the Courts Abuse Children?* (British Psychological Society, Leicester, 1988) 35.

30 To illustrate the difficulty, we note that the concept of truth is ambiguous and its double meaning is revealed by examining its opposites – a falsehood and a lie. One may make a false statement without intending to deceive. See Parkinson, "The Future of Competency Testing for Child Witnesses" (1991) 15 Crim L J 186, 189.

31 Haugaard, Reppucci, Laird and Nauful, "Children's Definitions of the Truth and their Competency as Witnesses in Legal Proceedings" (1991) 15 Law and Human Behaviour 253, 257–258.

32 Ontario Law Reform Commission, above n 6, 37.

and ignores the ability of fact-finders to make decisions about weight and credibility, which they do constantly with regard to those who are presumed competent. In the words of the Advisory Group on Video Evidence:[33]

> A competence requirement is evidently only useful if by reference to the test which it imposes it is possible to ascertain whether a child is likely to subsequently give a truthful and accurate account. We have failed to find any evidence that the existing requirement achieves this.

31 It seems clear that requiring a witness to demonstrate an understanding of the duty to tell the truth, presumably to give meaning to their promise to tell the truth, does not help accurately predict whether a witness will tell the truth or will give reliable evidence.[34] Decisions about credibility are much more likely to be based on the totality of the witness's evidence, including their demeanour, and the evidence of other witnesses. It is therefore unclear why extracting a promise to tell the truth is so important.

32 To the extent that requiring a witness to swear an oath, make an affirmation or promise to tell the truth has a psychological and symbolic aspect and may increase the likelihood that they will tell the truth, it is a helpful practice. The practice may also mark the solemnity of the occasion, which might result in witnesses giving more truthful evidence. The solemnity of the courtroom may, however, cause witnesses, through fear or trauma, to offer *less* accurate or reliable evidence.[35] This issue is discussed in more detail in the following chapters.

33 If it is desirable to require witnesses to promise to tell the truth, then it is sensible to ensure that witnesses understand what that means. However, the *consequences* of a witness failing to adequately demonstrate an understanding of the importance of telling the truth need re-examination. At present, such a failure may lead to their evidence not being heard.

The requirement to test a child's ability to give a rational account of past events: is it valid?

34 The concern about the ability of a witness to give a rational account of past events seems to have been a response to the belief that young children and persons of "defective intellect"[36] cannot give accurate and reliable evidence. This belief has been challenged and discounted by much recent empirical evidence.[37] As already noted, it appears that this part of the competence requirement is rarely, if ever, tested directly. It seems to be accepted, certainly in jurisdictions where this issue has been recently debated, that judges are

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[33] Pigot Report, above n 21, para 5.11.

[34] For example, see Pipe and Wilson, "Cues and Secrets: Influences on Children's Event Reports" (1994) 30 Developmental Psychology 515, 523.

[35] Pigot Report, above n 21, para 2.17:

> It seems to us that ... the formality and solemnity of the courtroom context which are often thought to promote truthfulness by witnesses may actually have a deleterious effect on the fullness and accuracy of children's testimony.

[36] *Cross on Evidence*, above n 5, para 7.9. This phrase will be replaced in this paper with a reference to "intellectual disabilities".

[37] See Appendix.

not well placed to make an assessment of a witness's cognitive ability.[38] The Commission concludes that the only helpful and practical assessment of a witness's ability to give a rational account of past events is that made by fact-finders – that is, when the witness gives evidence and is questioned about it.

35 The possibility of a competence test which assesses communication ability is discussed under the reform options.

Why is there a duty to test young children?

36 The research shows that in certain situations, some witnesses may, because of their level of psychological development or intellectual disability, have more difficulty than others in perceiving, remembering or recounting evidence accurately.[39] There is reasonable agreement that children's memories can be reliable, but that with age the accuracy and comprehensiveness of their memories increase. But given that the evidence of adults of ordinary intelligence may also be unrealiable for many reasons, including the problems that all people have in accurately interpreting and remembering an event, it is difficult to know whether the evidence of children, for example, is less reliable *per se* than that of adults. Many factors, other than age alone, contribute to the quality of a witness's evidence.[40] On the one hand, the differences between children's and adults' evidence are not sufficient to justify the traditional distrust of children's evidence that is reflected in the requirement to test their competence. On the other hand, those difficulties do justify modifying some aspects of the trial procedures, particularly those relating to giving evidence, to enable children to give the best evidence they can. This paper will consider such modifications in chapters 4 and 5.

REFORM OPTIONS

37 Given the limited value of the current competence requirement, and the likelihood that it still operates to exclude relevant and possibly accurate evidence, it seems appropriate to consider reform.

38 Options for reform include:

1 revising the present competence test and testing only when the issue is raised;
2 abolishing the competence requirement.

Option 1: Revising the competence test and testing only when the issue is raised

39 This option includes revision of the competence test and the removal of the judge's duty to determine competence in the case of children under 12. The judge would only test a witness's competence – whether a child, a person

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[38] Pigot Report, above n 21; also *R v Accused*, above n 8, 653.

[39] See Appendix.

[40] For example, the length of time since the incident, the circumstances of the incident and the physical abilities of the witness (ie visual and auditory ability). See generally Loftus and Doyle, *Eye Witness Testimony* (2nd ed, Michie Co, Charlottesville, 1992).

with intellectual disability, or any other witness – if the issue were raised by counsel or if the judge felt it to be necessary. Competence could be challenged at any stage, as it is now, whether before trial, during the trial, and even after the witness begins testifying. In the case of videotaped evidence, it is still the judge at trial who would determine competency, although an interviewer may ask the same kinds of questions in order to assist the decision at trial.

40 A number of other countries have recently revised their competence tests. In Ireland it is provided, in relation to both children and people with "mental handicap", that:[41]

> Notwithstanding any enactment, in any criminal proceedings the evidence of a person under 14 years of age may be received otherwise than on oath or affirmation if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings.

41 In the Commission's view a test of this nature, which focuses on communication abilities, is preferable to one purporting to test intellectual development. A test of communication ability seems the only one capable of fulfilling its purpose. If the issue is raised, the judge will need to ask the child some questions which, even if not directly relevant to the proceedings, should provide a guide to their ability to communicate effectively on matters which are relevant to the proceedings.

42 Another possible formulation is that found in the California Evidence Code, section 701, which provides:

> (a) A person is disqualified to be a witness if he or she is:
>
> (1) Incapable of expressing herself or himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him [or her] ...

43 To similar effect, s 13(4) of the Evidence Act 1995 (Aust) provides:

> A person is not competent to give evidence about a fact if:
>
> (a) the person is incapable of hearing or understanding, or of communicating a reply to, a question about the fact; and
>
> (b) that incapacity cannot be overcome.

44 Subsection 13(3) provides that such a person may still be competent to give evidence about other facts.

45 The advantage of a revised test, in comparison with no test, may be that some kind of preliminary inquiry by the judge, particularly in front of a jury, will assist the jury's assessment of the witness, and discourage counsel's questions concerning capacity during cross-examination.

46 The use of a revised test may also promote court efficiency. It would allow judges to exclude in advance the testimony of a witness whose contribution to the decision-making process of the court is clearly likely to be unhelpful or time-wasting. However, such exclusion could also occur through reliance on the general discretion to exclude evidence[42] during an application under s 344A of the Crimes Act 1961.

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[41] Sections 27(1) and 27(3) of the Criminal Evidence Act 1992 (Ireland).

[42] As proposed for this code in *Evidence Law: Codification* (NZLC PP 14, 1991) 20: "In any proceeding, the court shall exclude evidence if its probative value is outweighed by the danger that this evidence [will] ... result in unjustifiable consumption of time."

Option 2: Abolition of the competence requirement

47 The second option is to abolish the requirement to test the competence of any witness. The result would be that all witnesses would be able to testify, subject only to the general provisions concerning admissibility. This approach has been recommended in several reports, namely *A Public or Private Nightmare?* (the "Geddis Report"),[43] by the Canadian Committee on Sexual Offences Against Children and Youths (the "Badgley Report"),[44] by the Law Reform Commission of Canada,[45] the Ontario Law Reform Commission,[46] as well as by commentators, including Wigmore,[47] McCormick,[48] and Paciocco,[49] and has been implemented in some states in the United States and in the Federal Rules of Evidence,[50] and in the United Kingdom.[51]

48 The Badgley Report recommended:

1 Every child is competent to testify in court and the child's evidence is admissible. The cogency of the child's testimony would be a matter of weight to be determined by the trier of fact, not a matter of inadmissibility.

2 A child who does not have the verbal capacity to reply to simply framed questions could be precluded from testifying.[52]

49 The Advisory Committee on the Federal Rules of Evidence[53] has stated (in relation to the general rule of competency):

> No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application ... A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility. [54]

50 The Law Reform Commission of Canada recommended the elimination of the common law grounds rendering a person incompetent to testify at trial, arguing:

> Because of the impossibility of stating and applying a standard of mental inconsistency that renders a witness incompetent to testify, it seems preferable simply to let the trier of fact take into account any such incapacity in assessing the weight to be given to the testimony. [55]

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43 The Geddis Report, above n 25, 16.

44 *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths* (Ottawa, 1984) (the "Badgley Report").

45 Law Reform Commission of Canada, *Report on Evidence* (Ottawa, 1975).

46 *Report on Child Witnesses*, above n 6.

47 *Wigmore on Evidence*, Vol 2, (Little Brown, Boston, 1940) para 509.

48 *McCormick on Evidence* (West Publishing Co, St Pauls, 1972) para 72.

49 Paciocco, "The Evidence of Children: Testing the Rules Against What We Know" (1996) 21 Queen's LJ 345, 393.

50 Federal Rules of Evidence (US), r 601.

51 Section 33A of the Criminal Justice Act 1988, as amended in 1991, provides that children under the age of 14 years must give unsworn evidence and removes any special inquiry into the competence of children. These changes implemented the recommendations of the Pigot Report, above n 21. See *Halsbury's Statutes*, Volume 17, 4 ed, 255.

52 Above n 44, 373.

53 This Committee provides commentary on the Federal Rules of Evidence.

54 Above n 50, commentary to r 601.

55 Above n 45, 88.

51 The Ontario Law Reform Commission took the position that:

> [N]o special competency examinations should be required of child witnesses. Providing the child promises to tell the truth ... the child ought to be permitted to give evidence.[56]

52 The Geddis Report concluded:

> It is our view that the competency test serves no useful function and should be abandoned. The weight to place on the child's testimony would be determined by the trier of fact. [57]

53 We agree with this strong body of opinion.

54 In the New Zealand context, the Commission believes the major advantages of abolishing the competence requirement are simplicity and consistency with the purposes of the law of evidence set out in chapter 1. Abolishing the competence requirement would ensure that an increased amount of relevant evidence is made available to fact-finders for their assessment of reliability and weight. No person – child or adult – would be required to be tested for competence in order to give evidence, and the judge would have no duty to test the competence of any prospective witness.

55 We recognise that problems may arise with the evidence of some witnesses, due to difficulties with communication and accurate perception and recall. However, the differences between adult witnesses generally and vulnerable witnesses may have been exaggerated. Where difficulties do exist, they may be more appropriately addressed by ensuring that procedures for giving evidence enhance reliability and effective communication, rather than simply excluding the evidence. (These procedures are discussed in the following chapters.)

56 We believe it is appropriate to retain the usual requirement to swear an oath or take an affirmation. It seems desirable that a child should make a declaration or promise to tell the truth, even if there is no competence requirement (*section 3(3)* of the draft code rules). Although there will normally be no inquiry into whether a child or any other witness understands the nature of a promise, it will remain open to the judge to make a preliminary inquiry, whether of their own initiative or at counsel's request, where it seems likely that a witness may not understand the nature of a promise.

57 It is envisaged that, where possible, a judge will impress upon a witness the importance of telling the truth, and explain what that means, in order to give meaning to the promise. Even if it is apparent that the witness may not adequately understand, the change to the current law proposed under this option is that the witness's evidence would still be admissible and the requirement to promise to tell the truth waived (*section 3(5)* of the draft code rules). This approach has been suggested by other law reform bodies:

> The [Ontario Law Reform] Commission further proposes that in the small number of cases in which the judge is of the opinion that the child does not understand the promise to tell the truth ... the judge shall nevertheless hear the evidence and may act on it, if at the end of the case, he or she is satisfied that it is reliable.[58]

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[56] Above n 6, 41.

[57] Above n 25, 6.

[58] *Report on Child Witnesses*, above n 6, 41.

58 Under this option a question about a witness's ability to understand the nature of a promise is ultimately for the fact-finder to consider when weighing up the evidence in the case. As is the current position in relation to affirmations and declarations, there would be no difference at law between the weight accorded to sworn evidence and that accorded to unsworn evidence (*section 3(5)* of the draft code rules).[59] The judge may also direct the jury that a witness may still be telling the truth even if they have not promised to do so.

59 An alternative under this option would be to follow the United Kingdom approach and require all children to give "unsworn" evidence, that is, without swearing an oath or making a promise to tell the truth. This would have no effect on the validity of the evidence.[60] Such an approach removes any need to inquire into the child's understanding of a promise and therefore abolishes the competence requirement as it relates to young children. However, as noted in the Pigot Report,[61] it seems possible that some jurors may be inclined to draw an inference that unsworn evidence is less reliable. The Advisory Group stated that:[62]

> [J]udges may find it helpful to admonish child witnesses to give a full and truthful account of what occurred in terms suitable to their age and understanding. This could be to the effect of "Tell us all you can remember of what happened. Don't make anything up or leave anything out. This is very important."

60 The abolition of the competence requirement was supported by 93% of judges and 56% of barristers in an evaluation of the then proposed amendment.[63]

Is abolition of the competence requirement desirable?
If so, which approach should be followed?

Implications of abolition of the competence requirement

Exclusion of incoherent evidence

61 If a child or any witness cannot communicate effectively, even if assisted, the judge may still exclude the evidence on one of the general grounds for exclusion, for example, that the evidence may mislead the court or jury or result in unjustifiable consumption of time.[64] In addition, it seems unlikely that counsel would call a witness who would be unable to communicate effectively with the court. The existence of the general exclusionary power means that a test of communication skills as proposed under Option 1 may not be necessary.

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59 Sections 4 and 13 of the Oaths and Declarations Act 1957.

60 That is, there is no effective legal distinction between sworn and unsworn evidence: see s 33A of the Criminal Justice Act 1988 (UK), as amended in 1991.

61 Pigot Report, above n 21, para 5.14.

62 Pigot Report, above n 21, para 5.14.

63 Davies, Wilson, Mitchell and Milson, *Videotaping Children's Evidence: An Evaluation* (Home Office, London, 1995) 11.

64 *Evidence Law: Codification* (NZLC PP 14, 1991) 20.

62 A further issue may arise when a witness has already offered some evidence before it becomes apparent that the witness cannot continue to give coherent evidence. In such cases, the judge could warn the jury to disregard the later evidence (although it is unclear if this is sufficient protection for a defendant in a criminal case) or the jury could be discharged (creating further expense and delay). Under the current law challenges may be made during a witness's testimony, and this approach would continue.

63 Further, if the first part of the witness's evidence seems coherent but at a later stage deteriorates, the jury should be entitled to hear the "good" evidence and then to receive a direction from the judge as to why the rest of the evidence should not be relied upon. To do otherwise would mean the jury would not have all the necessary information to make a proper assessment of credibility. This approach is, of course, subject to the rules about the admissibility of evidence that cannot be tested by cross-examination; for example, when a witness is able only to give evidence in chief. The law on this topic is discussed in part in chapter 8, and will be the subject of further consideration in the Commission's review of witness questioning rules. It will remain possible, if there is an objection to the witness's evidence before he or she gives evidence, to hear the objection by way of a pre-trial application under s 344A of the Crimes Act 1961.

Use of expert evidence

64 Under the current law, expert evidence from psychologists and psychiatrists is admissible to show that the witness does not have the capacity to give reliable evidence. If the competence test is abolished, greater reliance may be placed by counsel on expert evidence to assist the jury with its assessment of the witness's credibility. Expert evidence concerned solely with the credibility of a witness, however, is usually excluded, and under the Commission's proposed rules on expert evidence it is envisaged that such evidence will still be regarded as suspect.[65]

65 The Commission considers that the proposed new rule on admissibility of expert evidence, based on "substantial helpfulness", will be a sufficient control on the quality of expert evidence as well as operating to exclude unreliable evidence and evidence which is valueless and time wasting. It appears to the Commission that judges will continue to take a cautious approach to the admissibility of this kind of expert evidence, even if the competence requirement is abolished, so that there is unlikely to be a demonstrable increase in the amount of expert evidence tendered to address issues of reliability or credibility.

66 It is possible that concerns about a witness's reliability which are now meant to be addressed in the context of the competence test will still be raised in the absence of the test, but will be presented at trial as relevant to credibility. For example, if a witness's ability to remember accurately over time is challenged during cross-examination, we believe this is a legitimate way to test a witness's capacity, rather than through a preliminary inquiry ill-designed for the task.

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[65] See the forthcoming Law Commission discussion paper: *Evidence Law: Character and Credibility*, chapter 4.

Section 23G of the Evidence Act 1908

67 The Commission proposes to repeal this provision which currently governs the admissibility of some expert evidence in respect of child and mentally handicapped complainants in sexual cases. The provision was enacted to ensure the admission of opinion evidence that the complainant's behaviour is consistent with sexual abuse.[66] A discussion of the operation of this section will appear in a revision of the Commission's work on opinion evidence.

Fairness to the defendant

68 The proposal that every person is eligible to give evidence is aimed at increasing the amount of relevant evidence before the court. The abolition of the requirement to test competence may cause concern for defendants in criminal cases, particularly in cases where vital evidence is given by child complainants. The only change of significance, however, is that a child's evidence is not ruled inadmissible solely on the grounds of a failure to make and understand a promise, as required under the current competence test. A defendant may still challenge the credibility and reliability of a child witness through cross-examination. The judge still has discretion to exclude the evidence of a witness who is unable to communicate with the court. A child who is inarticulate or uncommunicative to the point of being misleading or wasting time may have their evidence ruled inadmissible under the general exclusions.[67]

The oath or affirmation requirement

69 Abolition of the requirement to test competence has some implications for the present obligation of witnesses to swear, affirm, or promise to tell the truth. A review of the law governing oaths is, however, not central to this paper, and will be dealt with in more detail in the Commission's work on witness questioning rules.[68]

70 The abolition of the competence requirement means, however, that there will no longer normally be an inquiry into whether the witness understands the duty to tell the truth. As stated earlier, witnesses will be required to swear, affirm or (for children aged under 12) promise to tell the truth whether giving evidence on videotape or in court (*section 3(3)* of the draft code rules). The fact that a witness cannot understand the nature of a promise, will not affect the validity of his or her promise, and he or she will not be disbarred from being a witness on that ground alone. The requirement to promise to tell the truth may also be waived in these circumstances (*section 3(5)* of the draft code rules). Evidence showing the person's ability to understand such concepts may still be relevant to an assessment of the witness's credibility.

71 The Commission does not believe that there are substantive implications of this approach for the offence of perjury.[69] This offence currently also applies

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66 In response to cases like *R v B* [1987] 1 NZLR 362.

67 Above n 42.

68 General issues relevant to the oath or affirmation requirement have been under review by the Ministry (formerly the Department) of Justice.

69 Section 108 of the Crimes Act 1961.

to witnesses who are not competent (for example, who do not understand the nature of the oath). A consequential amendment would remove the reference to competence, but the section would still cover unsworn evidence, as it does currently.

Are there other implications of abolishing the competence requirement?

SUMMARY

72 The operation of the present competence rules does not accurately predict whether a witness will give honest or accurate testimony. A witness's ability to understand the duty to tell the truth provides no guarantee that the witness will tell the truth or intends to do so. However, to the extent that a witness's understanding of the need to tell the truth may increase the likelihood that they will tell the truth, the oath, affirmation or declaration may have a symbolic value. The most useful way of assessing credibility seems to be that undertaken by the fact-finder when making a verdict choice.

73 The ability of children and other groups of witnesses to give accurate evidence has in the past been underestimated. Difficulties for children and other groups of vulnerable witnesses, particularly those with intellectual disabilities and mental disorders, may relate as much to communication skills in the courtroom, including those of the interviewer and lawyer, as to other factors bearing more directly on reliability, such as capacities of perception, reasoning and recall. There seem to be no compelling reasons for requiring all young children's competency to be tested.

74 The second part of the competence requirement, requiring the ability to give a rational account of past events, is not currently tested in any direct way. The possibility that it assists in an assessment of communication skills is of little weight, given that a person who is unable to give coherent evidence would not normally be called as a witness.

75 On balance the Commission prefers the option of abolishing the competence requirement so that:

- more relevant information is available to the court;
- any concerns about reliability and credibility may be evaluated by the trier of fact; and
- any difficulties relating to communication abilities, psychological vulnerability or potential sources of unreliability may be addressed by assisting witnesses to give evidence more effectively and ensuring appropriate support.

3
Giving Evidence: the general rules and their implications for vulnerable witnesses

76 THE COMPETENCY REQUIREMENT concerns who may give evidence in court. In the next chapters we discuss *how* evidence is given in court. The ordinary rules governing how evidence is given are outlined in this chapter, followed by a discussion of the rationales of the ordinary rules and their implications for vulnerable witnesses. Chapter 4 sets out the statutory modifications which have been made to those rules, and options for change are proposed in chapter 5.

THE GENERAL RULES

77 In general, people who give evidence do so orally, in English, in the courtroom with all participants present and in sight of one another. This applies to preliminary hearings as well as criminal and civil trials. In criminal and civil trials, proceedings are normally open to the public.[70]

78 Parties in civil cases and the defendant in criminal cases are usually represented by a lawyer. Each party has the right to decide how to present their case, including which witnesses to call to give evidence. However, the complainant in a criminal case is not a party and is not represented by counsel. Complainants are witnesses for the Crown and are called by the prosecutor who appears on behalf of the Crown or the police.

79 If summoned by a party to proceedings to give evidence, a witness must normally do so. The witness goes into the witness box unaccompanied, swears or affirms that they will tell the truth, and usually gives evidence by responding to questions.[71] The witness first answers the questions put by the party in whose interests they were called – this is called "evidence in chief". The opposing party (or parties, if there is more than one) then has the right to cross-examine the witness. After cross-examination, the witness may be re-examined by the party who called them. A party to the proceedings, including the defendant in a criminal case, who is not represented by a lawyer, may examine, cross-examine and re-examine witnesses in person.[72] A judge may also ask questions of any witness.

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[70] Except in some specialist courts; for example the Family Court, and tribunals.

[71] Written statements of evidence are increasingly accepted in tribunals and in some civil cases.

[72] In sexual cases, however, an unrepresented defendant may not cross-examine a child or mentally handicapped complainant in person: s 23F(1) of the Evidence Act 1908.

RATIONALES OF THE ORDINARY RULES: ARE THEY CURRENTLY VALID?

80 The current rules of evidence reflect features of our trial process, in particular the adversary system and the use of juries.[73] The law of evidence is considered to serve the purpose of the trial process, including the pursuit of truth, party freedom and procedural fairness. The trial process is considered to assist truth-finding by allowing assessment of witness credibility in the court and under oath. The immediacy of oral presentation and confrontation is sometimes thought to be the best way of arriving at the truth.[74] In this context, the fact-finder (judge or jury) is arguably better able to make judgements about veracity by observing witness demeanour and consistency, especially under cross-examination and in the presence of the opposing party, in front of whom a witness, particularly a complainant, is supposedly less likely to lie.

81 Some of the historical reasons for giving evidence orally in person and in public no longer exist due to technological advancements; for example, it is no longer necessary for every participant to be in the same room in order to be seen and heard. The protections of the adversarial process, particularly for defendants in criminal cases, are, however, still considered important. Section 25 of the New Zealand Bill of Rights Act 1990 protects those features of the trial process which are aimed at promoting procedural fairness and truth-finding – for example, the right of a defendant to be present at the trial and to examine witnesses. We are not aware of any research which indicates whether or not these safeguards enable fact-finders to draw accurate conclusions about witness credibility and the reliability of evidence. To the contrary, allowing witnesses to give evidence only in the ordinary way may actually reduce the amount of reliable evidence and consequently hinder the truth-finding process.[75] The tension between the rights of a defendant in criminal cases and the rules about giving evidence will be discussed in more detail in chapter 8.

IMPLICATIONS FOR VULNERABLE WITNESSES

82 The rules governing how witnesses give evidence are intended to promote the rational ascertainment of facts. However, it is apparent that in the case of vulnerable witnesses these rules may actually hinder that process. Vulnerability in this sense may occur due to the characteristics of a witness, the relationship between the parties or the nature of the offence in a criminal case. As discussed earlier, it is the difficulty these witnesses may have in giving evidence in the ordinary way which may limit the amount of reliable evidence they can offer the court. For example:

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[73] *Cross on Evidence*, above n 5, para 1.3.

[74] Twining, *Rethinking Evidence: Exploratory Essays* (Basil Blackwell, Oxford, 1990) 183.

[75] Australia, Law Reform Commission, above n 1, para 7.23; the Geddis Report, above n 25, 23; Murray, above n 1, (iii):

> The fact that some of the younger children's evidence reached trial at all was a significant step forward. Both the prosecution and defence lawyers agreed that by using the provision a number of children gave evidence who would otherwise have been unable to speak.

- Some witnesses may be more affected than others by delays in the legal process. Extreme youth or old age,[76] intellectual disability or mental disorder may disadvantage witnesses in terms of their powers of memory and communication, and this in turn may have a bearing on how others judge their credibility.
- Witnesses with communication disabilities, or those who come from non-English speaking backgrounds, may be misunderstood or simply unable to convey important facts. Cultural judgments based on myths and stereotypes may also have implications for decisions about credibility; for example, decisions based on demeanour may be unreliable cross-culturally.[77]
- Complainants in sexual cases may be embarrassed giving evidence in open court or experience distress in doing so in front of the defendant, making them unable to give a full and coherent account and therefore affecting the amount and quality of evidence available to the fact-finder.

SUMMARY

83 The ordinary rules for giving evidence evolved in a cultural and technological context very different from that existing currently in New Zealand. This suggests a need to assess their current validity. For example, although the original purposes for requiring the witness's presence in the courtroom may still be regarded as important (for example, audibility and assessment of demeanour) the same purposes may now be satisfied by other means.

84 The difficulties posed by many of the traditional features of the trial process have been recognised in recent years by New Zealand law in relation to some groups of witnesses, such as complainants in sexual cases, particularly children. The resulting changes in the law are described in the next chapter.

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[76] Research indicates that young children's memory may be negatively affected by long delays. See for example, Poole and White, "Two Years Later: Effects of Question Repetition and Retention Interval on the Eyewitness Testimony of Children and Adults" (1993) 29 Developmental Psychology 844. See also Appendix.

[77] See chapter 5 of forthcoming Law Commission discussion paper, *Evidence Law: Character and Credibility*.

4
Assisting Witnesses to Give Evidence: recent changes

85 THIS CHAPTER DESCRIBES the statutory modifications which have been made in recent years to the general rules governing how witnesses may give evidence. It discusses the court's inherent jurisdiction in this area and whether the changes have advanced the aims of the law of evidence.

RATIONALES FOR STATUTORY CHANGE

86 The statutory modifications were introduced for several reasons, including the belief that:

- sexual abuse of children is a serious and widespread problem, and that barriers to prosecution and obtaining valid evidence from children ought to be minimised;[78]
- ordinary courtroom procedures may not allow children and some other groups of witnesses to give the best evidence they are capable of giving; and
- ordinary courtroom procedures may cause unnecessary distress or trauma for some groups of witnesses.[79]

ALTERNATIVE WAYS OF GIVING EVIDENCE: STATUTORY PROVISIONS

87 In the main, the modifications were designed for child and mentally handicapped complainants in sexual cases which are heard by a jury. More limited protections are available for adult complainants in sexual cases; for example, they do not usually have to appear in person at preliminary hearings (when the decision is made about whether the case should proceed to trial) but may give written evidence.[80]

88 Child complainants and mentally handicapped complainants in sexual cases may give their evidence at preliminary hearings in the form of a videotape and hence need not appear in person nor give a written statement.[81]

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78 Geddis Report, above n 25, 20.

79 Saywitz and Nathanson, "Children's Testimony and their Perceptions of Stress In and Out of the Courtroom" (1993) 17 Child Abuse and Neglect 613, 620–621. See also the comments of the Court of Appeal in *R v Lewis* [1991] 1 NZLR 409, 411.

80 Section 185C of the Summary Proceedings Act 1957.

81 Section 185CA of the Summary Proceedings Act 1957.

DECISIONS ON HOW EVIDENCE MAY BE GIVEN

89 Before any trial in cases of sexual offending, the prosecutor must, if the complainant is a child or mentally handicapped, seek a direction from the court on how the complainant's evidence is to be given.[82] The alternatives provided by statute include:

- the presentation at the trial of the videotaped interview shown at the preliminary hearing;
- the complainant giving evidence outside the courtroom by closed-circuit television;
- the complainant giving evidence by an audio link from behind a wall or partition; or
- the complainant giving evidence in court screened from the defendant by a screen or one-way glass.

90 The judge hears the prosecutor's application in chambers, not in open court, and must give each party an opportunity to be heard in respect of the application.[83] The parties may call any relevant evidence; for example, from a police officer working on the local sexual abuse team.[84]

91 The judge may call for and receive reports from any people they consider qualified to discuss the effects on the complainant of giving evidence, either in the ordinary way or in any of the alternative ways available.[85]

92 When considering what directions to give concerning the way the complainant will give evidence at the trial, which includes both examination in chief and cross-examination, the judge is required to have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the defendant.[86] On this point, the Court of Appeal stated in *R v Lewis*:[87]

> The broad purpose is clearly to ensure that the old technicalities of evidence and traditional approaches to the giving of evidence, even the contents of evidence in matters such as hearsay, shall not necessarily prevail against the desirability of getting at the truth and doing so by an effective machinery which enables children to give evidence without undue stress, while at the same time preserving the accused's rights to a fair trial.

93 Factors the court may take into account have included:[88] the age of the complainant; their personality; the witness's assessed ability to relate the evidence; the relationship between the complainant and the defendant; the nature of the charge; the importance of the evidence,[89] and any other matters

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82 The application is heard by a judge of the court in which the defendant has been committed for trial: s 23D(1) of the Evidence Act 1908.

83 Section 23D(2) of the Evidence Act 1908.

84 *R v Paikea* (unreported, High Court, Whangarei, 18 July 1991, T 23/91, Wylie J) 2–3:

> Section 23D(2) of the Evidence Act 1908 entitles the prosecutor (and of course defence counsel) to call any relevant evidence as part of the exercise of the opportunity to be heard in respect of the application.

85 Section 23D(3) of the Evidence Act 1908. Although the existing section refers to "modes", we prefer the use of the term "ways" for our recommendations; hence this term is adopted throughout the paper.

86 Section 23D(4) of the Evidence Act 1908.

87 *R v Lewis,* above n 79, 411.

88 This statement of relevant factors is taken from *R v W* (1990) 6 CRNZ 157, 158.

89 *R v Hauiti* (1990) 6 CRNZ 599, 602.

impacting on the witness when giving evidence and on the ability of the jury to assess the witness and their evidence.

Videotaped evidence

94 If the prosecutor requests that a videotaped interview be used at trial, the videotape must comply with the Evidence (Videotaping of Child Complainants) Regulations 1990. The judge is in any case obliged to view videotapes before they are shown at trial and may excise portions of them.[90] "Substantial but not slavish compliance with the regulations is required."[91] The witness must demonstrate on the videotapes an understanding of the obligation to tell the truth, and promise to do so.[92] The court must be able to assess the sufficiency of compliance from the videotapes.[93]

95 The regulations do not govern who may question the complainant or the questioning techniques that may be used but administrative guidelines do exist which outline how interviews should be conducted and by whom.[94] Most interviews are carried out by social workers and police officers who are specially trained.[95]

96 Defence counsel are entitled to cross-examine the interviewer about the manner in which the interview was conducted, including both the technical aspects and the effect which any particular questions or attitudes may have had on the complainant.

97 The courts appear to tolerate a certain degree of patient coaxing and even some leading questions in these videotaped interviews.[96] However, the court may not permit the videotaped interview to be used if the leading questions are persistent. Children should also not be offered inducements for talking.[97] Concerns may also be raised about allegedly contaminated interviews,[98] repeated interviews,[99] and the use of the same person to conduct interviews and therapy sessions with a child complainant.[100]

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90 Section 23E(2) of the Evidence Act 1908.

91 See *R v Crime Appeal*, above n 26, 7.

92 As required by the rules on competency (see chapter 2) and reg 5(1)(c) of the Evidence (Videotaping of Child Complainants) Regulations 1990 (SR 1990/164).

93 See for example discussion in *R v Crime Appeal*, above n 26, and *R v S* [1993] 2 NZLR 142.

94 Although guidelines have been in draft form for some years they have been widely circulated and applied. A final set of guidelines is now being developed jointly by the Police and New Zealand Children and Young Persons Service and are due for publication in June 1996: *Operating Guidelines for Evidential and Diagnostic Interviewing on Video Under the Evidence Amendment Act 1989*.

95 See joint policy directive from the Police and New Zealand Children and Young Persons Service: *Policy and Guidelines for the Investigations of Child Sexual Abuse and Serious Physical Abuse 1995/12*.

96 *R v Lewis*, above n 79, 411; *R v Crime Appeal*, above n 26, 13.

97 *R v Crime Appeal*, above n 26, 13.

98 *J v J* (1993) 10 FRNZ 269, 272.

99 In *R v H* (unreported, High Court, Wellington, 27 August 1993, T 34/93, Heron J) a number of diagnostic interviews had taken place prior to the psychologist advising the police that the child was "now able to participate in a further evidential video interview". A "diagnostic" interview is described as "a formal interview with a child where there are strong indicators of sexual abuse but the child has not said anything about sexual abuse to anyone"(2). In addition each child in *R v H* had participated in evidential interviews on no less than 10 occasions (5).

100 *R v Crime Appeal*, above n 26, 13–15.

WAYS OF GIVING EVIDENCE: INHERENT JURISDICTION

98 As well as these statutory modifications, the High Court has used its inherent jurisdiction to allow the witnesses who fall outside the statutory categories to give evidence in alternative ways.[101] The inherent jurisdiction has been used, for example, to assist a complainant in a sexual case who was just over the age limit, as well as a 19-year-old complainant who was profoundly deaf and had associated social problems.[102]

99 Although screens have been permitted quite often under the court's inherent jurisdiction, doubts had been expressed about the court's power to order the use of closed-circuit television or videotaped evidence.[103] However, the Court of Appeal has since made it clear that, at least in the case of child complainants alleging abuse, the court may allow videotaped evidence.[104]

100 Uncertainty remains concerning the *categories* of witnesses who may give evidence in alternative ways. There seems little difficulty for a person who falls just outside the age limit specified in the statutory provisions, but although the Court of Appeal approved the use of a screen in the case of a 30-year-old sexual abuse complainant, it held that this was an exceptional use of its power.[105]

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[101] See for example *R v Accused (T 4/88)* [1989] 1 NZLR 660, 667–668 and the more recent case of *R v Moke and Lawrence* [1996] 1 NZLR 263. Tompkins J in *R v Trenouth* (unreported, High Court, Auckland, 10 October 1995, T 132/95) found that "the court's inherent jurisdiction would enable the court to order that evidence in chief be given by the videotape of an interview, but it would in my view require exceptional circumstances to justify the adoption of that course" (3). In the case, he did not permit the use of videotaped evidence, finding no exceptional circumstances but did allow the child witness (not a complainant) to give his evidence by closed-circuit television.

[102] *R v Kaio* (unreported, High Court, Auckland, 12 March 1993, T 259/92, Robertson J) 2. The defence made no opposition to the order.

[103] See for example *R v Accused* above n 101, 667. But in *R v Accused, (CA 32/91)* [1992] 1 NZLR 257, 262 Cooke P stated:

> But I respectfully suggest also that Parliament may wish to legislate in this field. It seems likely that the limitation of s 23C and the following sections of the Evidence Act to child complainants did not represent a deliberate decision to exclude other child witnesses from the statutory protection. The point may have been simply overlooked.

In the same case Hardie Boys J agreed that the use of closed-circuit television would be within the court's inherent jurisdiction, but not videotaped evidence (271).

[104] *R v Moke and Lawrence*, above n 101. In *R v F* (unreported, Court of Appeal, 6 May 1996, CA 130/96) the Court of Appeal upheld the trial judge's refusal to exercise jurisdiction to view videotaped evidence of two non-complainant witnesses stating:

> [T]he present [case] does not involve any question of putting them for a second time through the trauma of a lengthy disclosure interview. Their proposed evidence does not bring them into conflict with their parents. No evidence has been brought before the Court regarding any stress that is likely to fall on them through requiring them to give evidence which ... is not going to involve any reference to sexual offending ...

[105] *R v Daniels* (1993) 10 CRNZ 165, 168 (CA). The Court approved the use of a screen in the trial proceedings while stating that "it would only be in rare circumstances when such a procedure should be adopted in the case of a complainant of mature years".

IS THE USE OF ALTERNATIVE WAYS CONSISTENT WITH THE PURPOSES OF THE CODE?

101 Little research has been undertaken in New Zealand on the effects of the statutory modifications, although a small study was published as part of a pilot programme before the enactment of the recent reforms.[106] A questionnaire sent out by the Department of Justice on behalf of a subcommittee of the Courts Consultative Committee provided some information on the use of alternative ways but the opinions expressed were relatively impressionistic and not representative. In particular, little information is available from defence counsel or judges.[107] It seems clear, however, that significant use is now made of the provisions and that no major problems have arisen.

102 This impression is confirmed by a more recent and comprehensive study which found that the new provisions were frequently used and are now the norm rather than the exception.[108] The provisions were generally perceived as satisfactory by most professional groups. There was also general consensus "that the new procedures significantly reduced the trauma of testifying for the child witness, and this effect was not judged by any group – except the defence lawyers – to be at the expense of the quality or truthfulness of the evidence given".[109]

103 The Commission believes that the effects of giving evidence in an alternative way depend largely on how the evidence is given. For example, evidence may be more accurate if it is collected on videotape immediately following an alleged offence. Giving evidence from behind a screen at trial may reduce the witness's trauma so that greater disclosure occurs.

Rational ascertainment of facts

104 Giving evidence in an alternative way can promote the rational ascertainment of facts by enhancing reliability and facilitating communication. For example, using videotaped evidence addresses some of the difficulties that young child witnesses may have in remembering detailed information after a long delay.

105 One of the principal advantages of giving evidence by videotaped interviews is that the evidence is recorded while the memory is still fresh, usually some months before the trial.[110] Videotapes may also increase the reliability of evidence by reducing the number of interviews, thus lessening the impact of repeated questioning on the witness's recall of events.

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[106] Whitney and Cook, *The Use of Closed-Circuit Television in New Zealand Courts: The First Six Trials* (Department of Justice, Wellington, 1990).

[107] Report to the Courts Consultative Committee from the Working Party on Child Witnesses, *Child Witnesses in the Court Process: A Review of the Practice and Recommendations for Change: Appendices to the Main Report* (Department for Courts, Wellington, 1996) Appendices 4 – 6.

[108] Pipe, Henaghan, Bidrose and Egerton, "Perceptions of the Legal Provisions for Child Witnesses in New Zealand" [1996] NZLJ 18, 23.

[109] Pipe et al, above n 108, 26.

[110] Dixon, "'Out of the Mouths of Babes'... A Review of the Operation of the Acts Amendment (Evidence of Children) Act 1992" (1995) 25 Western Australian LR 301, 314; the Geddis Report, above n 25, 25; Ontario Law Reform Commission, above n 6, 84.

106 Young children, rather than adults, are more likely to find it difficult to communicate with the court. Children may respond better to questions when they are asked in a smaller, more intimate setting than a courtroom, which makes them feel more at ease. This usually occurs with videotaped evidence and closed-circuit television.[111] In the case of a videotaped interview, the interviewer may be a specialist in communicating with children, which could also increase the quality and reliability of the child's responses.[112]

107 In a recent evaluation of the use of videotaped evidence in the United Kingdom, court and child protection professionals (judges, barristers, police officers and social workers) responded to questionnaires sent out before and after the law come into effect.[113] The initial survey found that all groups thought the main advantage of the new system would be the reduction of stress for the children involved. Barristers were most concerned that false allegations would be less detectable. After experience of the Act, "three quarters of the judges polled believed that it was working in favour of the interests of children. Both groups continued to see the reduction of stress as the main advantage."[114] In addition, the majority of each profession agreed that "evidence given in court had more impact [on the jury] than a videotaped account, although all of the judges surveyed stated that open court was more stressful for the child."[115]

108 This survey did not evaluate the perceptions and experiences of either the children or jurors involved. Other studies do establish, however, that "children generally recall past events most accurately when subject to the least stress."[116]

109 In a recent Australian survey of judges and magistrates, it was found that 82.5% supported use of videotaped interviews.[117]

110 In the New Zealand study on the use of closed-circuit television, two witnesses out of the six studied were intellectually disabled. The study concluded that "[u]se of the equipment for intellectually handicapped persons was seen as appropriate, as it allowed concentration and focus that probably would not occur in the courtroom setting".[118] Professionals were positive about the use of closed-circuit television and felt the perceived advantages outweighed the perceived disadvantages. The study concluded that the use of closed-circuit television was fair to both the defence and prosecution, with children's evidence being more comprehensive.[119]

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111 Australia, Law Reform Commission, above n 1, 135.

112 In some cases the interviewer may need not only to be a specialist in communicating with children, but also in interpreting minority languages.

113 Davies et al, above n 63.

114 Above n 63, ii.

115 Above n 63, 13.

116 For example, see the Pigot Report, above n 21, para 2.17; Murray, above n 1, para 12.11.

117 Cashmore and Bussey, "Judicial Views of Witness Competence" (1996) 20(3) Law and Human Behaviour 313, 324.

118 Whitney and Cook, above n 106, 9.

119 Whitney and Cook, above n 106, 9.

111 Following the amendments to the Western Australian Evidence Act in 1992, which allowed children and other vulnerable witnesses to give evidence in alternative ways, the Western Australian Ministry of Justice surveyed jurors. The report, *Jurors' Responses to Children's Evidence Given by Closed-Circuit Television or with the Aid of Removable Screens,*[120] reached the following conclusions:

- Most jurors [did] not perceive closed-circuit television (CCTV) to be an impediment in reaching a verdict;
- Jurors [did] not find CCTV equipment distracting when it was working properly;
- Jurors who hear[d] evidence by CCTV which was working properly were likely to hear more clearly than jurors who heard evidence from a child witness speaking without amplification in the courtroom;
- Most jurors said it would *not* make it easier to reach a verdict if they saw the child in the courtroom. This applie[d] even to jurors who [found] it difficult to judge the size and/or age of a child witness giving evidence by CCTV. In other words, most jurors [were] satisfied with evidence being presented in a form other than by a witness in the courtroom;
- Most jurors understood Judges' explanations about the reasons for the use of CCTV and removable screens.[121]

The report also made recommendations about further steps which could be taken to improve the use of CCTV, as far as juries are concerned.[122]

112 The Australian Law Reform Commission's report, *The Use of Closed-Circuit Television for Child Witnesses in the ACT*, published in 1992, concluded:[123]

> When assessed in terms of the four aspects of its effect upon the participants who used it, the general response to closed-circuit television was favourable, and in some cases, very much so. First, it was seen as achieving both objectives – reducing the stress upon children as they testify, and increasing the likelihood that they would be forthcoming with their evidence. Second, in terms of the way the evidence via closed-circuit television is perceived, there was some concern about a change in impact but generally, closed-circuit television was reported, especially by magistrates, as providing a closer and clearer picture of the child. Third, closed-circuit television was generally seen as being fair. Most respondents denied that it infringed the rights of the accused to confront witnesses because the evidence was still able to be tested ... *In addition, magistrates quite clearly said in a number of cases that they doubted they would have obtained any evidence at all from children without the use of closed-circuit television.*[124]

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120 Results of a Survey of Jurors in Western Australia conducted Between November 1994 and February 1995 (Ministry of Justice, Strategic and Specialist Services Division, Western Australia, 1995).

121 Quoted from above n 120, 36.

122 The following are the recommendations from the Western Australian research:

> When CCTV or removable screens are used, jurors should be asked at the earliest convenient point whether any aspect of the equipment – such as reflections on television monitors or the placement of removable screens – is interfering with their ability to judge evidence.
>
> When CCTV is used, consideration should be given to showing jurors the separate room from which evidence is given – before the witness enters – so that jurors have a better understanding of the surroundings in which the witness is giving evidence. This may assist the minority of jurors who have difficulty with an image relayed by television. (Above n 120, 37).

123 Above n 1, para 7.55.

124 Above n 1, para 7.32 (emphasis added).

Does receiving evidence in alternative ways assist or hinder the rational ascertainment of facts?
In particular, does the use of closed-circuit television or videotaped evidence, which allows out-of-court testimony, operate as a barrier to the assessment of witness credibility?[125]

Procedural fairness

Fairness to the defendant

113 It should be possible to test credibility and reliability by way of cross-examination and ascertainment of demeanour even if evidence is given in an alternative way. The fact that the complainant may not be present in the same room as the defendant, or is behind a screen, does raise the concern that the lack of face-to-face confrontation may take away what some may view as an important deterrent to lying. There is, however, simply no empirical evidence that people are less likely to lie when faced with the person they are accusing and, from the point of view of promoting reliability, there is no basis to conclude that alternative ways of giving evidence detract from either the rational ascertainment of facts or procedural fairness. It might be considered that procedural fairness is affected if face to face confrontation is regarded as a right in itself, rather than a means of promoting reliability. This question is discussed more fully in chapter 8.

114 The Central Research Unit of the Scottish Office studied the use of closed-circuit television for child witnesses and sought the views of defendants in criminal cases.[126] The study concluded:

> None of the men believed that the use of the live television link had done anything to prejudice their case. Two prisoners who thought the whole process had been unfair said the injustice they felt had nothing to do with the provision. Indeed all of the men thought it was very appropriate that children should use the live television link since they believed it was harmful and frightening for children to appear in a large courtroom in front of a jury. All of the accused said the children would not have said what they did say if they had been facing them in open court.

Reduction of trauma

115 It is commonly accepted that children are more likely than other witnesses to be traumatised by giving evidence in court. Amongst reasons given are: children have a poor understanding of the legal system; the language used may not be easily comprehensible; proceedings are long and involve repeated questioning; and the child will have to relive the incident at the trial, which may be distressing if the original event was traumatic. As well, face-to-face

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[125] Australia, Law Reform Commission, above n 1, para 7.48.

> Participants, ... especially the magistrates, had little difficulty in assessing the demeanour of the witness via closed-circuit television. Some magistrates, in fact, believed that the close-up views of the screen made it easier than the child being in court.

[126] Murray, above n 1, para 10.29.

confrontation with the defendant is considered to be a significant cause of trauma for the child complainant. This common view is confirmed by respondents in the New Zealand survey cited earlier.[127]

116 Some studies support the view that testifying in court can be stressful for children, but also that it can be empowering for some.[128] It was found that children's observed emotional states were influenced more by whether they were able to use closed-circuit television when they wanted to than by whether they did in fact use it.[129] In other words, their control over the experience may be more significant to their well-being than the experience itself. The 1995 Scottish study also found a significantly decreased level of distress for child witnesses in criminal cases when they testified using closed-circuit television. They were much more likely to report "no fear" than those children who had to give evidence in court.[130]

117 Although it is not certain therefore whether children, or people with intellectual disabilities, are more likely to be stressed than other witnesses, it does seem that if a child is stressed or traumatised this will adversely affect his or her ability to give relevant and reliable testimony. Children may be unwilling to testify at all in front of the defendant, or the stress of the situation may make the child anxious or confused.[131] A child's stress or trauma may also affect the ability of jurors to accurately assess credibility.

118 Some of the alternative ways of giving evidence may reduce trauma and at the same time increase reliability because they change the behaviour of participants other than the witness. The Australian Capital Territory study found that using closed-circuit television altered the behaviour of lawyers and judges, in particular their approach to the child witness.[132] Lawyers were more supportive and magistrates intervened more often especially during cross-examination using closed-circuit television. It also slowed the process down and had the effect of reminding lawyers and judges that they were dealing with children.

119 While thorough research is lacking, it may be noted here that in the small New Zealand pilot study into the use of closed-circuit television the majority of people interviewed agreed that its use reduced the trauma the witness would have been likely to experience in court. It was also considered by some that its use allowed the prosecution to bring cases that would otherwise not have come to trial.[133]

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127 Pipe et al, above n 108, 18.

128 Goodman et al (eds), *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* (Monograph of the Society for Research in Child Development, vol 57, No 5, 1992) 115. See also Haralambie, "The Role of the Child's Attorney in Protecting the Child throughout the Litigation Process" (1995) 71 North Dakota LR 939, 971.

129 Australia, Law Reform Commission, above n 1, para 7.15.

130 Murray, above n 1, iv.

131 Cecchettini-Whaley, "Children as Witnesses after *Maryland v Craig*" (1992) 65 Southern Carolina LR 1993, 2013–2018.

132 Above n 1, para 7.24.

133 Whitney and Cook, above n 106, 14–15.

SUMMARY

120 Experience and research suggest that the benefits of using alternative ways of giving evidence outweigh the disadvantages. The New Zealand law changes appear to be useful reforms for those witnesses to whom they apply. For young children in particular they are well used. The changes promote the rational ascertainment of facts by, for example, allowing evidence to be recorded when it is freshest and hence most likely to be reliable and unaffected by subsequent events. The procedures allow relevant and useful evidence to be communicated effectively to the court where witnesses may otherwise be reluctant to be involved. For some witnesses the procedures also reduce distress or trauma at the time of trial, and may promote recovery, either by allowing the healing process to begin earlier or giving the witness some control.

121 The use of alternative ways of giving evidence does not erode the right to cross-examine but changes the way that cross-examination is conducted in some cases. Whether this impacts on procedural fairness for defendants in criminal cases depends on whether there is a right to face-to-face confrontation in a courtroom. This issue is discussed more fully in chapter 8.

Are there any current difficulties with the use of alternative ways of giving evidence?

5
Assisting Witnesses to Give Evidence: proposals for reform

INTRODUCTION

122 OPTIONS FOR EXTENDING the present provisions allowing alternative ways of giving evidence relate both to *who* may be eligible to give evidence in alternative ways and also *what* alternative ways ought to be available. This chapter discusses the following proposals for change:

- offering all witnesses, including defendants in criminal cases, the option of giving evidence in alternative ways in appropriate cases;
- the use of pre-trial cross-examination; and
- the admissibility of evidence in chief which is videotaped after the preliminary hearing.

ALLOWING *ALL* WITNESSES TO BE ELIGIBLE TO GIVE EVIDENCE IN ALTERNATIVE WAYS

123 Children and mentally handicapped witnesses can, under the current provisions, give evidence in alternative ways, but only if they are complainants in cases of sexual offending. We consider that many of the reasons for allowing children, or intellectually disabled adults, to give evidence in alternative ways apply irrespective of whether the witness is a complainant and whatever the nature of the crime alleged. These reasons include the possibility of memory deterioration, unfamiliarity with the courtroom environment, adverse reaction to stress and a lack of sophisticated communication skills.

124 Other people have very real disadvantages in carrying out many activities of daily living in relation to employment, education, transportation, communication and management of financial affairs. These disadvantages are likely to have implications for their ability to perform effectively as witnesses in the courtroom, although research specific to the legal context is limited. We consider that it is appropriate to allow more people to use the alternative procedures. There is widespread acceptance of the alternative ways of giving evidence, no major problems have arisen,[134] the disadvantages are minimal, and the benefits for people to whom the provisions presently apply are clear.

[134] See the New Zealand studies, above n 106, 107 and 108.

125 Categories of witness who could be at least considered eligible for extension of the alternative modes of giving evidence include people with communication disabilities (for example, deafness), people from linguistic and cultural minorities, elderly people and victims of traumatic offences such as sexual offending and violence, whether in the civil (eg, family court hearings) or criminal context. Many Australian jurisdictions list these kinds of characteristics as factors which are relevant to the decision about eligibility to use alternative modes.[135] However, there is no reason to think that most, or even many, members of one particular group are in fact vulnerable, or that any person should be regarded as vulnerable simply because they belong to a particular group.

126 The most important need of a witness who is hearing impaired or from a minority linguistic background is clearly communication assistance. Usually this involves the use of an interpreter.[136] Rules on communication assistance are discussed in chapter 7. However, for both deaf people and people from minority linguistic backgrounds the entitlement to provision of an interpreter alone may not be sufficient or even appropriate to overcome communication difficulties. Provision of an interpreter may not counteract problems resulting from feelings of alienation or shame, which may be more likely in people from some cultural backgrounds,[137] or the preconceptions and attitudes of other trial participants towards the witness.[138] In some such cases these problems may be partly alleviated by allowing evidence to be given from outside the courtroom, without the pressure or distress that may be associated with being in the courtroom.

127 For some people who are hearing impaired but not completely deaf, or who have partial but not full competence in the court language, an interpreter may also not necessarily be the most or only appropriate means of remedying communication difficulties. The witness may be able to give their evidence most effectively if enabled to do so directly without an interpreter, or with the interpreter in a supporting role, as long as he or she can give evidence in a more relaxed and unpressured environment than the courtroom itself. A partially deaf person who usually communicates by speech-reading may wish to do so in giving evidence but find that many features of the courtroom make speech-reading more difficult. The courtroom setting and decorum eliminate many visual cues used by deaf people who speechread, and many words are unfamiliar.[139] The effectiveness of hearing aids depends on such things as the acoustics of the particular room.

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[135] For example, Queensland legislation refers to intellectual impairment and cultural differences; Western Australia includes mental disability, cultural background, relationship to any party of the proceedings, nature of the subject matter of the evidence; Northern Territory and South Australia refer to the circumstances of the case or circumstances of the witness.

[136] Commonwealth Attorney-General's Department Report, *Access to Interpreters in the Australian Legal System* (Australian Government Publishing Service, Canberra, 1991) para 1.3.2.

[137] *Te Whainga i te Tika* (Government Printer, Wellington, 1986) 35 (in relation to Pacific Islands people).

[138] Australia, Law Reform Commission, *Multiculturalism and the Law* (ALRC 57, Canberra, 1992) para 10.43.

[139] In this case the ideal would be to support the person by an "oral interpreter" who mouths the speeches given in court by different people to the hearing impaired person. Smith, "Confronting Silence: the Constitution, Deaf Criminal Defendants and the Right to Interpretation During Trial" (1994) 46 Maine LR 87, 100–101.

128 Similarly, it may be preferable in some circumstances for a person from a minority language who speaks some English, even though not fully competently, to give evidence without an interpreter or with an interpreter in a supportive rather than principal role. For example, it may be difficult to find a professional interpreter in the relevant language or dialect,[140] or, given the inevitable complexities in translation, direct communication in English may be more effective. For this to be successful, however, the witness may need to be given every opportunity to be relatively unpressured, and this may be best achieved out of the courtroom environment, or even by means of a videotaped interview.[141]

129 Witnesses in cases involving sexual and violent offending, especially complainants, may experience distress in giving evidence in the courtroom in front of the defendant. This may involve actual psychological or emotional harm, and may mean that their ability to communicate their evidence is impaired. Justice Thomas has suggested that alternative modes of giving evidence, such as closed-circuit television, should also be available to adult victims of sexual offences:

> It is not suggested that a screen or television equipment should be used in every case of rape where an adult victim gives evidence. Rather, the use of these aids could be ordered by the Judge in his or her discretion where it is established that the victim's psychological and emotional condition could be further harmed by giving evidence in the presence of the accused or in the courtroom. The use of closed-circuit television, in particular, would permit the victim to give her evidence without undergoing this ordeal or depriving the jury of the opportunity to assess her evidence.[142]

130 Our proposals would enable adult witnesses who satisfy need-based criteria to give evidence in alternative ways. Counsel would be able to seek directions from the court on whether and how ordinary procedures could be modified (*section 18* of the draft code rules). The witness could also request this. Decisions would be made on the basis of the needs of the witness, rather than membership of any specific category such as intellectual disability, being Deaf,[143] or having a hearing impairment. The test would refer to the purpose of rational ascertainment of facts (that is, the promotion of reliable evidence and effective communication) as well as the desirability of minimising unnecessary distress. These goals would be balanced against the need to ensure the fairness of the proceeding, and, in particular, that a defendant in a criminal case has a fair trial.

131 It may not be appropriate to limit the availability of alternative ways just to witnesses who are "vulnerable" in the ways already discussed. Some witnesses,

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[140] Laster and Taylor, *Interpreters and the Legal System* (The Federation Press, New South Wales, 1994) 90–94.

[141] Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, Perth, 1991) 117–118.

[142] Justice Thomas "Was Eve Merely Framed; or Was She Forsaken?" (Part II) [1994] NZLJ 426, 427.

[143] A distinction made by the Deaf Association of New Zealand is that the word "deaf" is used as a general term for people with a hearing loss while the capitalised Deaf is used to describe those who identify as part of a distinct Deaf community with its own culture and language, for example, New Zealand Sign Language. Such people are usually born deaf or become so early in life.

for example those who are at risk of retaliation for testifying, should also be able to give evidence anonymously or in a safe environment.[144]

132 A statutory test to establish individual need should therefore refer to these factors:

- the age of the witness;
- the physical, intellectual, or psychological disability of the witness;
- the linguistic or cultural background of the witness;
- the nature of the proceeding or criminal offence; and
- the relationship of the witness to any party in the proceeding (for example, a complainant's relationship with the defendant in a criminal case).

133 When considering whether need is demonstrated and whether the witness may give evidence in an alternative way, the court should give regard to procedural fairness, reduction of stress on the witness, the preference of the witness, and any factor relevant to the rational ascertainment of facts.

134 So far as children are concerned, taking their preference into account is in keeping with New Zealand's obligations under the UN Convention on the Rights of the Child, and is supported by research which demonstrates the significance of a child having some control over process.[145] The Commission also believes that the preference of any witness is a relevant consideration in the exercise of the court's discretion. The witness's preference would, of course, be only one factor to be considered, and may be outweighed by other factors.

135 The considerations the court must have regard to in making a decision on whether a particular witness may give evidence in an alternative way will also provide the court with guidance as to which alternative way should be used. For example, a child complainant in a sexual case may most appropriately give evidence on videotape prior to the trial. By contrast, an adult complainant, who is primarily concerned about seeing the defendant, may be helped by the use of a one-way screen.

Are there any other factors relevant to establishing need?
Are those listed appropriate?

136 We propose:

- a mandatory application for directions about the way a child complainant will give evidence, whether the case is tried summarily or indictably,[146] and whatever the subject matter of the charge (*section 15* of the draft code rules); and

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[144] For example, Martin Bryant, charged with the deaths of 35 people in Tasmania, appeared in Hobart Magistrates Court by way of videolink from prison because of doubts over security: *The Dominion*, Wellington, Thursday 9 May, 1996, 5. The issue of witness protection will be discussed further by the Commission in our work on witness questioning rules.

[145] Australia, Law Reform Commission, above n 1, para 7.15:

> The main finding concerned the significance of children's wishes in relation to the use of closed-circuit television. Children's observed emotional state was *influenced more by whether they were able to use closed-circuit television when they wanted to than by whether they did or did not use it*. [Emphasis in original.]

[146] See *Palmer v Attorney-General* [1992] 3 NZLR 375, 384 for a reference to the need to remove any doubt on the availability of alternative ways of giving evidence in summary proceedings.

- a discretionary application for all other witnesses, including defendants in criminal cases (*section 16* of the draft code rules).

137 On the face of it, this reduces the protection for intellectually disabled complainants because an application on their behalf in sexual cases will no longer be mandatory. The Commission believes that this approach is sustainable because:

- the distinction between child complainants and all other witnesses is clear and easy to draw;
- the identification of intellectually disabled witnesses may not always be straightforward, and a mandatory requirement may impose an unrealistic burden on the parties;
- dealing with intellectually disabled people and children as one group is inappropriate; and
- the capacities of people with intellectual disabilities vary significantly and should be assessed according to individual need, not as members of a group.

Should a mandatory application be made for intellectually disabled witnesses?

138 We recognise that extending the availability of videotaped evidence to a greater number of witnesses will have some resource implications, at least in the short term. We consider, however, that the effects of the proposal are likely to be gradual, and that decisions on applications in the initial stages need to take into account the availability of equipment. We consider that in the long run efficiency gains may be made from using videotapes more frequently as a means of recording and presenting evidence.

139 The proposal that all witnesses may apply to give evidence in alternative ways, highlights the need to clarify an issue which has already surfaced in cases involving videotaped evidence. To what extent should counsel be obliged to inform the opposing party that a videotape has been made but is not intended to be used in evidence? Should opposing counsel be able to produce those videotapes for their own evidential purposes – even if not made in conformity with regulations?[147] We propose that either regulations or general rules of disclosure should make explicit the obligation of the prosecution in criminal cases to advise the defence of any videotapes made but not intended to be produced as evidence,[148] as is now required for videotapes which are intended as evidence.[149] The judge should have the discretion, in the interests of justice, to allow videotapes to be offered in

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147 For judgments where these questions have arisen, see *R v Ellis (No 2)* [1993] 3 NZLR 325 and *R v Ellis (No 3)* [1993] 3 NZLR 335. In the second decision, Williamson J held (338) that although the Crown was not obliged to produce videotapes on which it did not rely, "[t]he obligation on the Crown is rather to make available to the defence such material so that the defence can then determine whether or not to use that material ... in cross-examination of the Crown witnesses". However, in the case of tapes not made in conformity with regulations, Williamson J held in *Ellis (No 2)* (330) that they could not be admitted, "until any contradicting matters are put to the particular child and his or her answer known".

148 This disclosure should be timely: see the Commission's recommendations in *Criminal Procedure: Part One Disclosure and Committal* (NZLC R14, 1990).

149 See reg 13 of the Evidence (Videotaping of Child Complainants) Regulations 1990 (SR 1990/164).

evidence even if not in conformity with regulatory or other requirements. This should also enable opposing counsel to apply for any videotapes to be admitted for their own purposes. We envisage that videotapes made by a defendant in a criminal trial, or in civil matters, but not relied on in evidence, would be subject to normal rules relating to privilege[150] and criminal discovery (*section 19* of the draft code rules).

Are the proposed disclosure requirements of pre-trial videotapes appropriate in all contexts?

140 Finally, we wish to emphasise that our proposal that all witnesses may apply to give evidence in alternative ways includes defendants in criminal cases who elect to give evidence. While envisaging that it would be unusual for a defendant to testify out of court,[151] we do not see any difficulty with allowing an application on the same need-based criteria as would apply to other witnesses.

Should a defendant in a criminal case be eligible to give evidence in an alternative way?

Use of alternative ways in preliminary hearings

141 Currently, child complainants and mentally handicapped complainants in sexual cases may give their evidence at preliminary hearings on videotape.[152] For reasons discussed in paras 101–102 and 123–131, we believe that any witnesses who demonstrate relevant need should be able to give evidence in one or more of the alternative ways, even at a preliminary hearing. For practical purposes, however,[153] an application to give evidence in an alternative way will not normally be necessary before a preliminary hearing. If the Commission's proposals in *Criminal Procedure: Part One Disclosure and Committal*[154] are implemented, prosecution evidence would usually be given in the form of a written statement, and personal attendance of a witness for cross-examination would only take place if leave is given by the court on particular grounds. It is envisaged that the court would consider an application to give evidence in an alternative way at the same time as an application to cross-examine a witness at the preliminary hearing. An application will also be required if the rules on cross-examination of witnesses at the preliminary hearing remain unchanged.

142 We propose that s 185CA of the Summary Proceedings Act 1957 be amended so that videotaped evidence of *any* witness may be admitted at the preliminary hearing, as long as the videotape has been made in the prescribed

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150 Under the Commission's proposals, videotapes or briefs of evidence made in contemplation of civil litigation would be privileged: *Evidence Law: Privilege* (NZLC PP23, 1994) chapter II.

151 For an example, see above n 144.

152 Section 185CA(1)(b) of the Summary Proceedings Act 1957 and see para 88.

153 For example, because not every case will proceed to a jury trial.

154 NZLC R14, 1990, chapter VIII.

manner and form. This will not mean that the videotape is automatically admitted at a later jury trial – an application will still need to be made.

143 The Commission believes that this approach is sustainable because of its consistency with the policy of the code and with the Commission's work in the criminal procedure area. Most witnesses will not give evidence at a preliminary hearing on videotape, but where a videotape has been made it seems desirable to use it, in preference to a written statement.

Should all prosecution witnesses be entitled to give evidence on videotape at a preliminary hearing?

PRE-TRIAL CROSS-EXAMINATION OF SOME WITNESSES

144 There are difficulties with the cross-examination at trial of a child whose evidence in chief is presented in the form of videotaped interview. The trial may occur some considerable time after the interview was recorded. Such delay can affect a child witness in several ways and may reduce the reliability or amount of evidence the child is able to give at the trial.[155] These difficulties may be reduced if cross-examination could take place *before* trial in a relatively unpressured environment. The *Report of the Advisory Group on Video Evidence* in the United Kingdom in 1987 recommended that cross-examination may be videotaped before trial.[156] These recommendations were not adopted in the United Kingdom but appear to have been implemented in Scotland.[157] Pre-trial cross-examination is also possible in Western Australia.[158]

145 The Commission believes that the availability of pre-trial cross-examination on videotape in a limited range of cases is consistent with the purposes of the evidence code. Pre-trial cross-examination will decrease trauma and stress for most child witnesses. It allows a child's participation in the proceedings to end at an earlier stage so that counselling and support can focus on recovery, rather than trial preparation. Pre-trial cross-examination means

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[155] See, for example, Goodman and Clark-Stewart, "Suggestibility in Children's Testimony: Implications for Child Sexual Abuse Investigations" in Doris (ed), *The Suggestibility of Children's Recollections* (American Psychological Association, Washington DC, 1991) 97–98.

[156] Pigot Report, above n 21, 69–70, especially recommendations 4, 7 and 8.

[157] Section 33 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 provides that if a child is to give evidence the court may appoint a commissioner to take the evidence of the child in some circumstances. Proceedings before the Commissioner are to be recorded by a videorecorder (s 33(2)); and the defendant shall not, except by leave of the commissioner, be present in the room but entitled "by such means as seem suitable to the commissioner to watch and hear the proceedings" (s 33(3)).

This section does not specify whether the commissioner also cross-examines the child (or that the defendant's counsel may do so) with the effect that no further cross-examination may take place. It seems safe to conclude, however, that this was the intention of the legislature, because the provision closely reflects cl 1 of the draft statute in the Scottish Law Commission's *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Scottish Law Commission, No 125, Edinburgh, 1990) and the report clearly envisages that cross-examination would be completed at the pre-trial stage (16–17).

[158] See paragraph 150.

that evidence will be fresher and therefore likely to be more accurate and reliable. This is of particular importance in the case of children or witnesses who are subject to a greater degree of memory loss than the average person. All these points indicate an increased likelihood that fuller and more accurate evidence will be available to the court. It may be that the quality of evidence generally would be improved if all witnesses' evidence were recorded on videotape close to the time of the incident. However, at the present time, procedural and resource issues would probably preclude such a broad application of this proposal.

146 We propose that pre-trial videotaped cross-examination may be undertaken for two groups of witnesses:

- child complainants who have given evidence-in-chief on videotape;[159] and
- any witnesses (in civil or criminal cases, and including defendants in criminal cases) whose evidence in chief the court has directed be given on videotape *and* who are shown to have an inability to retain and recall information over time.

147 We propose that the application for pre-trial cross-examination be made at the same time as the application for using alternative ways to give evidence in chief (*sections 15* and *16* of the draft code rules). The considerations would be the same, but with a preliminary enquiry into likely memory loss in the case of witnesses other than child complainants (*section 20(2)(b)* of the draft code rules). In the course of hearing an application for pre-trial cross-examination, the court must give each party an opportunity to be heard and may call for and receive a report from any person to advise on the effect on the witness of being cross-examined in any particular way. As with the application to give evidence in chief in an alternative way, the court must ensure the fairness of the proceeding and, in particular, ensure that a defendant in a criminal case has a fair trial.

148 If the application is successful, the pre-trial hearing would be held as soon as possible, taking into account the need for adequate preparation time for the defence or opposing party. The hearing may be held in chambers, but could be held at any appropriate private venue,[160] and the only persons present would be the judge, the parties, lawyers, the witness and any support persons. In the case of child complainants, the defendant would not physically be in the same room as the complainant, but would observe proceedings by a one-way mirror and audio link, or closed-circuit television. Other witnesses may apply to be cross-examined without any particular party being physically present. The witness would give evidence in chief, either in response to the prosecutor or by presentation of a pre-recorded videotape (*section 21(1) – (4)* of the draft code rules).

149 The opposing party's lawyer would then cross-examine the witness who could also be re-examined. The entire proceedings would be recorded on videotape for playing at the trial. As provided in Western Australia, the opposing party would have the right to conduct further cross-examination at trial; for example, if new evidence required this. This would be a decision made by

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[159] The Pigot Report recommended pre-trial cross-examination should be available for child complainants in jury trials in cases of violent and sexual offences, and offences of child cruelty and neglect: above n 21, para 2.37.

[160] For example, in the witness's home or hospital room.

the judge, in the interests of justice. This could be carried out at a further hearing or at the trial itself as appropriate (*section 21(5)–(7)* of the draft code rules).

150 There have been recent assessments of the operation of the Western Australian provisions, including s 106I (1)(b) which provides that the whole of the child's evidence (examination in chief and cross-examination) may be taken at a videotaped pre-trial hearing. An article outlining the use of this process, published in December 1995,[161] stated that at that time there had been seven cases in which pre-trial cross-examination had been conducted.[162] The advantages of this method of presenting a child's evidence have been listed as:

- the ability to take a young child's evidence while it is still relatively fresh;
- the child can, at an earlier stage, put the events behind them and get on with life;
- any counselling or therapy that may be necessary, but which has to be postponed in order to avoid tainting the child's evidence, can begin at an earlier stage;
- where an appeal against conviction is successful and a new trial ordered, the child's evidence may be able to be presented in the form of the same videotape and the child may not need to appear at all at the re-trial;[163] and
- inadmissible evidence may be excluded ahead of time by appropriate judicially-supervised editing of videotapes.

151 The Commission invites comment on the merits of this process for use in New Zealand.

Pre-trial cross-examination and fairness to the defendant

152 The Commission believes that a scheme involving pre-trial cross-examination may be implemented without significant impact on the rights of defendants to a fair trial but, as with any new procedure, the implications need to be closely monitored.

153 Pre-trial cross-examination will not erode the right to cross-examine, it merely means the cross-examination will be done at an earlier time. Any fairness issues therefore relate to what the implications of timing are for both parties. Fair and effective pre-trial cross-examination requires full disclosure of the prosecution case at an early stage. If full and early criminal disclosure occurs, and the court retains a discretion to order further cross-examination at trial in the interests of justice, then the timing of the cross-examination should not impact unfairly on a criminal defendant.

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[161] Dixon "'Out of the Mouths of Babes ...'," above n 110.

[162] Resulting in 5 convictions, 1 acquittal and 1 hung jury: Dixon, above n 110, 314.

[163] In the event that a new defence counsel opposes the use of the videotape on the ground that they wish to ask the child witness additional questions, the trial judge may allow those additional questions to be dealt with at a second pre-trial hearing convened for that purpose. This would avoid the possible tactical advantage to the defence of the child having to be put through the ordeal of another trial – a prospect that may mean a re-trial becomes impossible where the child witness is very young or particularly traumatised.

Obviously for any witness who may be traumatised by the trial process, a re-trial in which a videotape of their previous evidence can be used is very advantageous.

154 Pre-trial cross-examination may also mean earlier disclosure of some elements of the defence case.[164] In line with the proposals contained in our report on *Criminal Procedure: Part One Disclosure and Committal*, the Commission believes this should be acceptable in the context of increased pre-trial disclosure.

155 In the case of child complainants, the defendant will not be physically present, and other witnesses may apply for the defendant to be absent. This again raises the right to face-to-face confrontation, dealt with in chapter 8. In brief, the Commission believes that its proposal is consistent with the current formulation of this right.

Should pre-trial cross-examination be available in some circumstances?

ADMISSIBILITY OF EVIDENCE IN CHIEF VIDEOTAPED AFTER PRELIMINARY HEARING

156 Section 23E(1)(a) of the Evidence Act 1908 allows videotaped evidence to be admitted at trial only if it has been shown at the preliminary hearing. The section precludes the use of videotaped evidence in chief where the need for it arises or becomes apparent after the preliminary hearing. Other jurisdictions do not limit the use of videotaped interviews at trial to videotapes made before and shown at the preliminary hearing, and the Commission sees no advantage in retaining this requirement.

SUMMARY

157 Our proposal is that the availability of alternative ways of giving evidence should be extended to other witnesses regardless of the nature or subject matter of the proceeding. We believe this will promote the rational ascertainment of facts, without detracting from the right of parties to test the reliability of the evidence.

158 We consider the proposal that pre-trial cross-examination be available in some instances is a sensible advance on current practice, and is consistent with the purposes of the evidence code. The practical implications of this proposal need further consideration, and the Commission particularly welcomes comments on them. We are aware that attempts are being made to address concerns about trial delays through case management. However, it may be unrealistic to expect that a fast-track procedure will be available in all cases that need it, or that a fast-track procedure will prevent all delays that occur in getting the case to trial.

What are the implications of allowing all witnesses to give evidence in alternative ways?

[164] NZLC R14, 1990, 49–50.

6
Support for witnesses

INTRODUCTION

159 THIS CHAPTER EXAMINES several ways of assisting witnesses which may be used instead of, or in addition to, the alternative modes discussed in the previous chapters. These ways of assisting witnesses also promote the principles discussed in chapter 1. They may increase the amount and reliability of relevant evidence by reducing the witness's distress. In some cases, they may result in evidence being heard which would not have been available without such assistance. The options canvassed in this chapter are:

- the use of support persons;
- the use of intermediaries; and
- a bar on personal cross-examination in some cases.

SUPPORT PERSONS

160 In New Zealand it seems to be general practice to allow children, and on occasion adult complainants of sexual offending, to have support persons with them when they give evidence in court, although there is no specific statutory authority for this.[165] A support person may be close to the witness while they are giving evidence in order to provide emotional support,[166]

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[165] Most of the cases which mention support persons (*R v Ellis (No 2)* [1993] 3 NZLR 325; *R v Honana* (unreported, High Court, Rotorua, 8 March 1993, T 65/92, Fisher J); *R v Paparahi* (1993) 10 CRNZ 213) concern s 375A of the Crimes Act 1961 which limits those who may be present when a complainant gives evidence. These cases confirm that people whom the complainant wishes to be present may usually stay, subject to the court's inherent jurisdiction.

[166] The Law Reform Commission of Western Australia in their *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, Perth, 1990) describes the role of support persons in the following way:

> "Support" can, of course, cover a wide range of activities. At its minimum it would usually involve accompanying a child to court and sitting near him or her either in court (or in a monitor room) when he or she is giving evidence. In the United States, where some very young children have given evidence, the support person has been the child's mother who has held the child on her lap while the child was questioned. The role of the support person is to give the child some emotional security in a strange situation, thereby enhancing the child's ability to withstand the ordeal of giving evidence. This is valuable for both child and prosecution. It is not the part of a support person to coach or prompt the child in what he or she has to say, but the role should not preclude a gentle encouragement to "tell the judge what happened" when a child seems to freeze, or giving a soothing pat to a distraught witness. Experience will obviously determine acceptable limits to such support and provide guidelines for support persons (para 4.83).

and it is this role that we envisage for support persons in our proposal rather than that of a "McKenzie friend".[167] We believe that it is important for support persons to be seen by the witness they are supporting. In the case of child witnesses, physical contact may also be appropriate. Support persons would not normally speak to the witness while giving evidence, except perhaps to give encouragement. It is essential to acknowledge that support people may not coach a witness in the witness box, nor during any breaks in cross-examination. In any individual case the judge would be able to ensure procedural fairness by directing the support person on the nature of their role, and to remove any support person where appropriate.

161 Little research has been done on the effects on vulnerable witnesses of having support persons with them. It seems unlikely that the presence of support persons could either hinder the rational ascertainment of facts or detract from fairness to the defendant. It is argued that the fact-finding function of the trial is "measurably enhanced" by allowing a supportive adult to accompany a child witness giving evidence in the courtroom.[168] In a recent Australian study 93% of judges and magistrates were in favour of allowing a support person in court.[169] A support person could be particularly important for witnesses with disabilities or from a minority culture.

162 Some jurisdictions explicitly allow vulnerable witnesses to have support persons. For example, the legislation in Western Australia provides: "A child who is under the age of 16 years is entitled, while he or she is giving evidence in any proceeding in a Court, to have near to him or her a person who may provide the child with support".[170] Persons who are declared "special witnesses" may also have support persons.[171]

163 We consider it useful to include a provision giving a presumptive entitlement to a support person for *all* complainants, subject to the court's discretion to withdraw permission. This would further the aims of evidence law by assisting

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[167] This term derives from *McKenzie v McKenzie* [1970] 3 All ER 1034, where it was held that an unrepresented litigant was entitled "to have a lay friend in Court to assist by giving advice and taking notes; but the friend may not act as an advocate": Garrow and Turkington, *Criminal Law in New Zealand* (Looseleaf Edition, Butterworths, Wellington, 1991) S 354.4. See also *Mihaka v Police* [1981] 1 NZLR 54.

[168] Myers, "Steps Towards Forensically Relevant Research" in Goodman, Taub et al (eds), *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* (Monographs of the Society for Research in Child Development, 1992, Vol 5, No 5) 143.

[169] Cashmore and Bussey, above n 117, 324.

[170] Section 106E of the Evidence Act 1906 (WA).

[171] Section 106R(3) of the Evidence Act 1906 (WA) provides:

> The grounds on which a person may be declared a special witness are that if the person is not treated as a special witness he or she would in the Court's opinion –
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> (a) by reason of mental or physical disability, be unlikely to be able to give evidence, or to give evidence satisfactorily; or
>
> (b) be likely –
>
> (i) to suffer severe emotional trauma; or
>
> (ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily,
>
> by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the Court considers relevant.

the witness's confidence in giving relevant evidence, and does not appear to detract in general from procedural fairness, although a factor relevant to the exercise of the court's discretion would be fairness concerns in a particular case. For example, a respected public figure acting as a support person may operate to bolster the credibility of the witness unfairly so that regard needs to be given to the genuineness of the request.[172] We propose that any other witness, including a defendant in a criminal case who elects to give evidence, may ask the court's permission to have a support person with them while they give evidence, even when giving evidence in an alternative way. Permission would be granted at the court's discretion. We do not suggest codifying the relevant considerations, but it is envisaged that they would be similar to those taken into account in the decision on whether a witness may give evidence in an alternative way (*section 9(1)* and *(2)* of the draft code rules).

Who should be entitled to have a support person with them while giving evidence?
Should a witness be entitled to a support person even when giving evidence in an alternative way?

164 It would be up to the judge in the individual case to decide on what role the support person could take in the particular circumstances, depending, for example, on the age of the witness, the nature of the proceedings or offence, and the relationship between the witness and the defendant in a criminal case. For example, it may be appropriate for a support person to have a young child who is a witness on their lap, whereas in other cases there would be much less physical contact. Sometimes a support person may encourage the witness to speak by talking to the witness, but this may not be appropriate in every situation (*section 9(3)* of the draft code rules).

165 In the Scottish study, the following recommendations about the use of support persons were made:[173]

1 The identity of the support person for the child should be agreed between the parties and be known to the child before the trial.
2 Support persons should receive written guidance on their role with particular reference to the extent of permitted communication with the child, whether or not any comfort can be provided, whether they should interrupt the questioning in the event of an error by counsel.
3 The person accompanying the child should have the facility to alert the judge in the event of any problem arising for the child while giving evidence, technical or otherwise.

These recommendations seem appropriate within the New Zealand context.

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[172] In *R v V* (1988) 3 CRNZ 423, counsel for the defendant was concerned that the presence of the psychologist, at the complainant's request, would lend credibility to the complainant. Hillyer J held that the psychologist could be present, as complainants in sexual cases have "a right to say who should be in court, and that a Judge should not exclude such a person unless there were compelling reasons for doing so ... If for example the person requested was to be disruptive of the proceedings, or was menacing the accused, a Judge could decide he should not be allowed in Court" (424).

[173] Murray, above n 1, 151.

What role should a support person take?

166 Although the physical layout of most courtrooms will mean that a witness will normally be able to have only one support person near them while giving evidence, the physical accommodation of more than one support person may be allowed if notice is provided. Other friends, family members or whänau, will usually be present only in the public gallery. One exception is the child witness who may want both parents near them, but a number of support persons around the witness may either be intimidating for other participants, or unfairly influence assessments of credibility.

When might it be appropriate to allow a witness to have with them more than one support person?

INTERMEDIARIES

167 Failures in communication can occur in the courtroom as a result of such factors as the youth of a witness, intellectual disability, cultural background, or physical disability. Difficulties for child witnesses are well documented.[174] We consider that in appropriate cases intermediaries could usefully assist communication between the witness and the court.

168 The definition of intermediaries varies according to the statutory function assigned to them. The Western Australia legislation which provides for the assistance of "communicators" states:

> The function of a person appointed under this section is, if requested by the Judge, to communicate and explain –
>
> (a) to the child, questions put to the child; and
>
> (b) to the Court, the evidence given by the child.[175]

169 By contrast, an equivalent Irish section provides that questions, but not responses, may be put through an intermediary.[176] The Criminal Evidence Act 1992 (Ireland) also provides that witnesses under the age of 17 or with a mental handicap may have intermediaries. The court may, on the application of the prosecution or the defence, if satisfied that justice requires it, direct that questions be put to the witness through an intermediary. The questions are put either in the words used by the questioner or so as to convey to the witness in a way appropriate to their age and mental condition the meaning of the questions being asked.

170 A provision for a limited kind of intermediary is already included in the current Evidence Act 1908, but this applies only to complainants in sexual cases who are children or mentally handicapped. Section 23E(4) provides that where a witness is to give evidence from out of court by closed-circuit

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[174] For a general discussion in relation to children, see Brennan and Brennan, *Strange Language – Child Victims under Cross-Examination* (2nd ed, Riverina Murray Institute of Higher Education, 1988).

[175] Section 106F(2) of the Evidence Act 1906 (WA).

[176] Section 14 of the Criminal Evidence Act 1992 (Ireland).

television or from behind a partition by audio link, the judge may direct that questions be put to the witness through a person approved by the judge. This provision, however, does not allow the intermediary to rephrase the questions or to interpret the witness's answer.[177]

171 If the categories of witness who may give evidence in alternative ways are extended, as suggested in the previous chapter, the application of s 23E(4) to other people should be considered. Further, the need for intermediaries may not be confined to those situations where evidence is given in an alternative way.

172 The Commission believes that witnesses should be able to use intermediaries whenever their assistance is necessary to enable the witness to understand the questions put to them in court. We propose that in any case where the rational ascertainment of facts would be assisted by use of an intermediary, the judge should have a discretion to direct that one be provided. The judge should also have a discretion as to who may act as intermediary. In many cases communication difficulties can be best addressed by lawyers and judges being sensitive to the characteristics of particular witnesses, but in some cases the assistance of a specialist intermediary may be more effective (*section 11* of the draft code rules).

Who should be entitled to have an intermediary?
Who should act as an intermediary?

173 We further propose that an intermediary may rephrase questions to assist witness comprehension. Intermediaries will have special skills to enable them to communicate with those few witnesses who have real difficulties understanding questions put to them in court. In order for these witnesses to give reliable evidence it seems important that provision is made for the use of intermediaries rather than rely on counsel to ask questions in an appropriate manner. However, we do not suggest that intermediaries should interpret the witness's response to the court. It is envisaged, however, that an intermediary will ask questions in order to elicit a clear and unambiguous response from the witness.

174 Although the current provision does not allow an intermediary to rephrase questions put to a witness, we believe that it is consistent with the principles of evidence law that an intermediary may do so.

175 The use of intermediaries must be subject to procedural fairness. It would be a part of the judge's role to give guidance to the intermediary on how they are to perform their function in a particular case and to oversee the

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[177] The characteristics of an intermediary are discussed in *R v Accused* (unreported, High Court, Wellington, 5 March 1993, T 91/92, Neazor J) 5.

> She is professionally experienced and has no therapeutic obligation to or bond with the child. . . . I think it would be going too far to say the intermediary must not "jolly along" the child to answer . . . so long as the intermediary is responsibly and fairly putting the questions as asked, careful supplementary comments or requests to the child to attend or answer would not be objectionable. *If it seems that the child does not understand the question the intermediary will understand that it will be for counsel to rephrase it or approach the matter from some other angle*. [Emphasis added.]

fairness and accuracy of rephrased questions. It is envisaged that an intermediary will take an oath. An intermediary who makes a wilfully misleading or false statement will be subject to a criminal sanction (*section 11(4)* of the draft code rules).

What role should an intermediary take?
Should an intermediary be allowed to rephrase questions?

176 An alternative mechanism for assisting witnesses with communication difficulties in this sense would be the appointment of an expert witness to advise the court and counsel on the most appropriate way to question such witnesses. This may address concerns under the previous proposal, such as lack of party control over the interpretation of the questions which are put to the witness by an intermediary. If a witness has communication difficulties, as well as comprehension difficulties, then an interpreter should be provided (see chapter 7). An intermediary would not explain the witness's response – for example, that a witness because of cultural differences or intellectual disability may say "yes" when they really mean "no". This kind of explanation would be provided, if at all, by an expert witness. The Commission seeks views on the best way to address the needs of these witnesses, so that the most reliable evidence may be presented in court.

PERSONAL CROSS-EXAMINATION

177 Section 23F of the Evidence Act 1908 provides that a defendant in a sexual case is not entitled to personally cross-examine child or mentally handicapped complainants. This issue does not often arise, as people charged with sexual offences are usually represented by a lawyer. If a defendant is unrepresented, however, their questions must be stated to a person approved by the judge, who then repeats them to the complainant. The rationale for this provision is that a child complainant in a sexual case may become very distressed if questioned by the defendant, because the defendant may be related to the child,[178] and because of the intimate nature of what must be disclosed.

178 These factors may, however, be relevant in other situations. For example, in most cases where a child is a witness, or for women complainants in sexual cases, the defendant will be known to the witness or in a position of authority over the witness.[179] It will be distressing for a witness to be cross-examined personally by an unrepresented party whenever there has been an intimate relationship between them; for example, in custody cases, domestic protection cases, or any family proceedings where there has been sexual, physical or emotional abuse.

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[178] As discussed by the Law Reform Commission of Victoria, *Discussion Paper No 12: Sexual Offences Against Children* (Melbourne, 1988) 44.

[179] The latter was suggested by Justice Thomas in "Was Eve Merely Framed", above n 142, 426:

> The physical proximity of the victim to her assailant, the hated cause of her distress, is too close for it to be otherwise. Asking the questions directly when challenging the complainant's version of the incident imposes an intolerable burden upon even an adult woman and the slender defences which she will have erected to cope with the trauma.

179 In the United Kingdom, the Pigot Report recommended:[180]

> [D]efendants who are charged with sexual or violent offences and offences of cruelty and neglect should be prohibited by statute from carrying out in person the cross-examination of witnesses who are under the age of 14 or, in the case of sexual offences, under 17, whether at a preliminary hearing or at a trial on indictment in open court.

180 The Commission believes that there are good reasons for offering protection from personal cross-examination by an unrepresented party in these situations. However, a complete bar on personal cross-examination can be expensive and provides inadequate protection. Although current law provides for another person to cross-examine the complainant, it is unclear who pays for this assistance. It is also questionable what protection the bar offers if the defendant, or party, must still be in court to state the questions, and if the appointed person is their friend. For these reasons the Commission feels that the use of an alternative way of giving evidence, such as closed-circuit television, may be more valuable in the case of cross-examination by unrepresented parties. Although use of such alternatives as closed-circuit television would mean the defendant was personally asking questions of the witness, there would be a greater sense of physical separation and therefore more security and comfort for the witness.

181 We propose to continue the absolute bar on personal cross-examination by defendants of child complainants in sexual cases but that bar will not be extended to adults. All other witnesses, including the intellectually disabled, may apply to the court to declare an unrepresented party ineligible to personally cross-examine them. The relevant criteria for this decision will be those used for a decision about alternative ways of giving evidence, and will include considerations of procedural fairness and efficiency, in particular fairness to the defendant in criminal proceedings (*section 13* of the draft code rules).

182 It is envisaged that the factors considered relevant when making a decision that there should be no personal cross-examination, will also be taken into account by the judge when deciding *who* should be appointed to ask the questions of the witness. Although the judge may ask the questions, this could prove difficult in terms of the physical layout of the court, and the kind of control the defendant or party may wish to retain over the phrasing of the questions. The Commission welcomes views on this point.

When should there be a bar on personal cross-examination by an unrepresented party?

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[180] Above n 21, 70.

7
Communication

183 A BASIC PREREQUISITE for giving evidence is that the witness and the court must be able to understand each other. Difficulties may arise due to hearing or speech impairment, or because the witness does not speak English fluently. To enable effective communication, assistance, usually in the form of an interpreter, should be available when needed. This chapter discusses when this need may arise, and how to provide for such a need in legislation.

THE PRESENT LAW

184 The common law provides that a defendant in a criminal proceeding is entitled to have an interpreter (both to give evidence and to ensure understanding of the proceedings).[181] The rights of a criminal defendant under s 24 of the New Zealand Bill of Rights Act 1990 include the right to free interpretation assistance "if the person cannot understand or speak the language used in court" (s 24(g)), as well as the right to be informed in detail of the nature and cause of the charge (s 24(a)). In some cases the exercise of these rights will mean the court will also pay for the cost of translating lengthy briefs of evidence,[182] as "the reference to the language being used 'in court' [s 24(g)] does not restrict the application of the section to the actual trial, but can include the production of hand up briefs of evidence at the depositions stage".[183] Other witnesses (in criminal or civil proceedings) do not have a similar entitlement but the judge has a discretion to allow an interpreter.[184]

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[181] *Kunnatu v The State* [1993] 4 All ER 30 (PC) applying *R v Lee Kun* [1916] 1 KB 337, 340–341.

[182] *Alwen Industries Limited and Karwong v The Collector of Customs* (unreported, High Court, Auckland, 24 April 1996, M 1402/95, Robertson J). In this case it was argued that "because of the volume of the charges and the complexity of the allegations, the mere provision of an oral translation at the trial will not be sufficient to enable the applicants to 'meaningfully instruct' counsel, nor for them 'meaningfully to be present' in court" (3).

[183] Above n 182, 9.

[184] *Re Fuld, Hartley v Fuld (Fuld intervening)* [1965] 2 All ER 653; *Re Trepca Mines Ltd* [1959] 3 All ER 798. Although these cases concern civil proceedings, there is no reason to limit availability to this kind of proceedings. The Employment Court recently considered on appeal whether the Employment Tribunal's failure to provide and pay for an interpreter meant there was a breach of natural justice under s 27 of the New Zealand Bill of Rights Act 1990. Judge Colgan, in dismissing the appeal on this ground, held there was no breach, but "the position may be otherwise ... where the proceedings are penal in nature and may result in a loss of liberty": *Zinck v Sleepyhead Manufacturing Company Ltd* (unreported, Employment Court, Auckland, 8 December 1995, AEC 130/98; A 153/94) 11.

185 In this context, the provisions of the Mäori Language Act 1989 apply, and any witness has a right to an interpreter.[185] The judge (or any other person presiding over the proceedings) must ensure that a competent interpreter is available.[186]

PROPOSED AMENDMENTS TO THE PRESENT LAW

186 The Australian Law Reform Commission concluded that if a party or witness requires the assistance of an interpreter there should be a presumption in favour of granting the request.[187] This is consistent with the principles of equality before the law and equal access to the law. The Evidence Act 1995 (Aust) provides:[188]

> A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

187 We propose a statutory entitlement to an interpreter for all witnesses who require this form of communication assistance. This entitlement should be qualified, in line with the Australian approach, so the court would have some discretion to rule that communication assistance is not required where the witness has adequate English language competence. The focus should be on the ability of the witness both to understand the questions put to them, and to communicate answers in such a way that the fact-finder will understand the witness's evidence. In addition, the code will confirm the unqualified right of a criminal defendant to an interpreter both to give evidence (where applicable) and to have the court proceedings interpreted for them (*section 12* of the draft code rules).[189]

188 It is clear that an entitlement to an interpreter for all witnesses on a need basis has cost implications. The Commission accepts that, in keeping with fairness to a criminal defendant, interpretation costs to enable a defendant to understand the proceedings should be borne by the court, not the defendant.[190] Interpretation costs for a defence witness will be paid for either by legal aid or by the defendant. In civil cases, the party calling the witness will bear the cost, as happens currently.

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[185] Section 4(1) of the Mäori Language Act 1989. Legal proceedings are defined by reference to proceedings conducted in the courts listed in the First Schedule and include District Courts, High Courts, the Court of Appeal and the Family Courts.

[186] The payment of interpreters' fees is regulated by the Witnesses and Interpreters Fees Regulations 1974 (SR 1974/124), although some interpreters consider the levels specified inadequate. The fees compensate the interpreter for time spent "attending" to provide an oral translation into English from any other language or from English into any other language. Interpreters may also be compensated for travelling time, and there are allowances for overnight stays and meals. The regulations do not appear to envisage compensation for time spent in preparation. It is not clear whether the regulations would permit communication assistance where the witness's native language is English but the witness has a communication disability. The fee payable for attending is $14 for each hour or part of the hour, provided that the fee in respect of any day shall not be less than $41.00 nor more than $95.50 (Schedule A (2)).

[187] *Multiculturalism*, above n 138, para 1.29.

[188] Section 30 of the Evidence Act 1995 (Aust).

[189] See s 24(g) of the New Zealand Bill of Rights Act 1990, as applied in *Alwen Industries*, above n 182.

[190] *Alwen Industries,* above n 182, 14.

189 The provision of adequate interpretation services is fundamental to ensuring that a statutory right has meaning, and raises issues of appropriate training and competence as well as the organisation of services. It is now generally recognised that court and legal work is a specialised form of interpreting. Disadvantages of using interpreters with no or inadequate training include inaccuracy, bias, a lack of confidentiality, insensitivity to cultural differences and a lack of understanding of the interpreter's role.[191] Specialist training for legal and court interpreters has become available in New Zealand only recently, at the Auckland Institute of Technology. Interpreters can also be accredited at a professional level by examination from the Australian National Accreditation Authority for Translators and Interpreters.[192] Information is lacking on how many interpreters with specialist training are currently available.

Who should be entitled to an interpreter during a proceeding?
Who should bear the cost of providing an interpreter?

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[191] For an account of issues relevant to the role, training and competency of interpreters, see Laster and Taylor, *Interpreters and the Legal System*, above n 140. A recent New Zealand publication is also useful: Kasanji, *Let's Talk: Guidelines for Government Agencies Hiring Interpreters* (Department of Internal Affairs, Wellington, 1995).

[192] This is an accreditation of general interpreting skills and does not indicate the candidate's knowledge of legal systems and terminological competence.

8
Fairness to the defendant in a criminal case

INTRODUCTION

190 A GUIDING PRINCIPLE behind the reform of evidence law is procedural fairness, particularly as it relates to the rights of a defendant in a criminal case. This chapter discusses the "right to confrontation" in a criminal case, as other procedural fairness issues have been dealt with in earlier chapters.[193]

THE RIGHT TO CONFRONTATION

191 Allowing witnesses to give evidence from behind a screen, from out of court, or by videotaped evidence may be seen to be contrary to a defendant's right to confront their accusers. A bar on personal cross-examination of a witness by an unrepresented defendant may also be seen to restrict this right. An understanding of the substance and limits of the right to confrontation under New Zealand law is essential for any discussion on whether this right is restricted by the proposals contained in this paper.

Substance of the right to confrontation

192 No New Zealand statute explicitly refers to "confrontation" in relation to the rights of a defendant. Section 376 of the Crimes Act 1961 provides only that a defendant has a right to be present at his or her trial.

193 The Court of Appeal in *R v Accused*[194] considered whether "confrontation" as found in common law or s 376 required a face-to-face meeting between the defendant and the complainant. This case, which predated both the 1989 amendments to the Evidence Act 1908 and the New Zealand Bill of Rights Act 1990, was concerned with the question whether the court could, in its inherent jurisdiction, permit the use of screens. The majority held:

> Neither the Crimes Act nor any other statute prescribes how the Courtroom is to be arranged or furnished. The real question is whether by the common law or natural justice or fundamental concepts of adversarial criminal procedure – and those three possible sources of rights are not materially distinguishable for present purposes – the accused has a right that the witness testifying orally should be able to see the accused. Since a witness cannot be compelled to look at the accused, and may even be unable to do so if blind or of defective vision, the definition of such a right presents some difficulty. Counsel for the accused in this case did not, as we understood them, go quite to the length of contending that the defendant is entitled to an opportunity of influencing the testimony of a witness by gaze or demeanour.

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[193] See, for example, issues relating to removal of the competence requirements in para 68.

[194] *R v Accused*, above n 101, 664.

> It is human nature to be less likely to speak ill of a person to his or her face, though how far the perceived presence of the accused would go to restrain a witness who would otherwise be prepared to lie on oath in the witness box is more difficult to dogmatise about. Witnesses giving evidence against an accused need not and often do not look at him or her. The psychological implications are therefore not clear-cut, but the tradition of our legal system is that Judge, jury, witnesses and accused are all present in the sight of one another. As a general practice that is not in question, but there are a few classes of witnesses to whom special considerations apply. Child witnesses in sexual abuse cases are among these.

194 The Court of Appeal discussed the relevance of the United States "confrontation" cases which establish a limited right to face-to-face confrontation, based on the Sixth Amendment. In his judgment, McMullin J stated:[195]

> ... unlike the Sixth Amendment, s 376 gives, as the common law before it gave, a defendant only a right to be present at his trial, which is not necessarily a right to confrontation. ... [C]onfrontation may be a part of presence but to the extent that it is not synonymous with presence it is not something which a defendant is entitled to as of right under s 376. None of the reported English cases mention confrontation nor is it given as the reason why a defendant is entitled to be present at his trial.

195 McMullin J went on to state a distinction that has been acknowledged in later case law, a distinction which the Commission believes is a useful one:[196]

> Confrontation in the sense of being in the presence of one's accusers is one thing; but confrontation merely to afford the opportunity to glower at and thereby intimidate the witness is another.

196 It seems that prior to the New Zealand Bill of Rights Act 1990, no common law right to face-to-face confrontation existed in New Zealand.

197 Section 25 of the New Zealand Bill of Rights Act 1990 provides:

> Minimum standards of criminal procedure –
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: ...
> (e) The right to be present at the trial and to present a defence:
> (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution ...

198 There has been limited judicial comment on the scope of s 25(e) and (f). The leading case on s 25(f) is *R v L*,[197] in which the Court of Appeal ruled admissible at trial a sworn statement by a rape complainant who had committed suicide between the preliminary hearing and the trial. The Court of Appeal, while noting that "a defendant has a fundamental right to have the evidence against him given in Court and there to be subject to cross-examination,"[198] went on to hold:

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[195] *R v Accused,* above n 101, 670, quoting a paragraph from *R v Lee Kun* [1916) 1 KB 337, where Lord Reading CJ said:

> The reason why the defendant should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the defendant means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings (341).

[196] *R v Accused,* above n 101, 672.

[197] *R v L* [1994] 2 NZLR 54.

[198] *R v L,* above n 197, 61, quoting *R v Dagg* [1962] NZLR 817, 820. *R v L* was followed in *R v Petaera* [1994] 3 NZLR 763.

> [N]either the specific legislation nor the Bill of Rights guarantee elevates the opportunity to cross-examine into an absolute right to confront and question the witness at the trial itself. On the contrary both s 184 [of the Summary Proceedings Act 1957] and s 3 [of the Evidence Amendment Act (No 2) 1980] proceed on the premise that testimony may be admitted at the trial even though the witness is not available for cross-examination. And in terms of s 25 of the Bill of Rights the right to examine the witnesses for the prosecution applies "in relation to the determination of the charge". It is directed to the overall process and is not tied to the actual trial itself. It is of some significance in this regard that the right of a defendant under the Sixth Amendment to the American Constitution "to be confronted with the witnesses against him" is satisfied by the opportunity of cross-examination at the time the previous evidence was given (*State of Ohio v Roberts* 448 US 56 65 L Ed 2d 597 (1908)).

199 This case confirms the position prior to the New Zealand Bill of Rights Act 1990, that there is no right to face-to-face confrontation, nor even an absolute right to question the witness at the trial itself.

200 We conclude that there is no right to face-to-face confrontation. The proposals in this paper therefore do not diminish the defendant's right to confront their accusers in the sense of being present at trial and cross-examining those testifying for the prosecution. We believe that the procedural safeguards provided by the right to confrontation (testing the witness's evidence) can still be achieved without the defendant and witness being present in the same room.

Do any of the proposals in this paper impact unfairly on the rights of a defendant in a criminal case?

DRAFT LEGISLATION AND COMMENTARY

PART 5
THE TRIAL PROCESS

1 Definitions

In this Part

child means a person under the age of 17 years;

child complainant means a complainant who is a child when the proceeding commences;

communication assistance includes oral interpretation or written translation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who does not have sufficient understanding of the proceeding or has a communication disability;

cross-examination means the questioning of a witness by a party other than the party who called the witness;

evidence in chief means evidence given by a witness in the course of examination in chief;

examination in chief means the questioning of a witness by the party who called the witness except where that questioning consists of re-examination after cross-examination;

intermediary means a person appointed by a court under section 11 to explain to a witness questions put to the witness;
interpreter includes a person who provides communication assistance to a defendant or a witness;

proceeding means a proceeding conducted by a court or tribunal that has authority by law to hear, receive, and examine evidence in New Zealand, and, in the case of a criminal proceeding, a proceeding commences when a complaint is made, an information laid, or a defendant who has been arrested without warrant is first brought to court and a charge sheet filed, and in the case of a civil proceeding, a proceeding commences when the statement of claim is filed;

re-examination means the questioning of a witness by the party who called the witness that is conducted after cross-examination, but does not include further examination in chief conducted with the leave of the court;

sexual case means a criminal proceeding in which a person is charged with
(a) an offence against any of the provisions of sections 128 to 142A of the Crimes Act 1961; or
(b) any other offence against the person of a sexual nature; or
(c) being a party to the commission of an offence referred to in paragraph (a) or (b); or
(d) conspiring with any person to commit any such offence;

videotape means a recording on any medium from which a moving image may be produced by any means, and includes an accompanying sound track;

witness means a person who gives evidence in a proceeding.

Definitions

C1 When the code is finalised these definitions are likely to be relocated to a general section containing all the definitions.

C2 The definition of **child** is the same as in s 23C of the Evidence Act 1908.

C3 The definition of **child complainant** also reflects existing statutory evidence law. A complainant must be under the age of 17 at the commencement of the proceeding rather than at the beginning of any trial.

C4 The definition of **communication assistance** is new in New Zealand law. It is wider in meaning than the concept of interpretation or translation, and is sufficiently general to encompass current and future forms of assistance appropriate to all communication needs.

C5 "Communication disability" is not defined in this paper, but its ordinary meaning is adequate to include all those who are hearing impaired, as well as those who can hear well but who have difficulty speaking. No specific reference is made to the Mäori language in this definition because the relevant code provisions are subject to the Mäori Language Act 1987. A person who wishes to speak Mäori in court is able to do so (and to receive assistance from an interpreter) without any reference to this code, given s 4 of the Mäori Language Act 1987 which states that any party or witness has a right to speak Mäori in legal proceedings whether or not they are able to understand or communicate in English.

C6 The terms **cross-examination**, **evidence in chief**, **examination in chief** and **re-examination** are intended to codify what is currently meant by them.

C7 The definition of **intermediary** extends s 23E(4) of the Evidence Act 1908 which allows the judge to direct that in some circumstances questions may be put to a complainant through an approved person, although the term "intermediary" is not used in that statutory provision.

C8 The definition of **interpreter** has been included to clarify this role under the provisions of the code, which focus on the broader phrase "communication assistance".

C9 The definition of **sexual case** is that presently found in s 23C of the Evidence Act 1908, and will also appear in the draft rules in *Evidence Law: Character and Credibility* (forthcoming).

C10 The definition of **videotape** is wide so as to include what is currently meant by videotapes and also any means of recording available in the future which preserves both visual and sound images.

C11 The definition of **witness** is intended to cover any person who gives evidence, including parties in civil proceedings and defendants who elect to give evidence in criminal cases.

Division 3 – Competency of witnesses

2 Who may give evidence

Any person is eligible to give evidence.

Division 4 – Oaths and Affirmations

3 Witnesses to give evidence on oath or affirmation

(1) A witness in a proceeding must take an oath or make an affirmation before giving evidence.

(2) A witness is to take an oath or make an affirmation in accordance with the appropriate form prescribed in the regulations or in a similar form.

(3) A witness who is under the age of 12 years may give evidence without taking an oath or making an affirmation but must, before giving evidence, promise to tell the truth to the court and promise not to tell any lies.

(4) An affirmation and a promise under this section have the same effect for all purposes as an oath.

(5) Notwithstanding subsections (1) and (3), a witness may give evidence without taking an oath or making an affirmation or promising to tell the truth, with the leave of the court, and that evidence may be taken as if that evidence had been given on oath.

(6) A person who is called only to produce a document or thing to a court need not take an oath or make an affirmation before doing so.

Section 2

C12 This section abolishes the common law rule that a person must be competent before he or she can be a witness and give evidence. The provision ensures that no person, whether on the grounds of their age, intellectual disability, or mental disorder, or on any other ground, may be disbarred from giving evidence on that ground alone. This section is also intended to abolish the duty to test the competence of children under 12, and any existing formulations of the competence test are no longer to be considered good law. In the case of witnesses whose testimony is unhelpful because of incoherence for example, the court may still exclude that evidence under the general exclusionary provisions in the code. A witness may give unsworn evidence, or without promising to tell the truth, and the evidence will still be admissible and have the same legal effect as sworn evidence. (See also *section 3(5)*).

Oaths and Affirmations

C13 This division reflects the current law, found in the common law and in the Oaths and Declarations Act 1957, with some minor changes as indicated. The inclusion of the rules in this form is largely for completeness. The Commission is still working on the content of these rules as part of its research into witness questioning rules.

Section 3

C14 Section 13 of the Oaths and Declarations Act 1957 permits witnesses under the age of 12 to make a promise, or declaration to tell the truth, rather than swear an oath or make an affirmation. The significant change under this provision is that a witness may not be required to swear an oath, make an affirmation, or promise to tell the truth, but will still be able to give evidence. When a witness does not promise to tell the truth, for instance, and it may be apparent that they do not understand the nature of a promise, the judge should explain the significance of the occasion to the witness and may also advise the jury that the witness may still be telling the truth even if they have not promised to do so.

4 Intermediaries and interpreters to act on oath or affirmation

(1) A person must either take an oath or make an affirmation before acting as an intermediary or an interpreter in a proceeding.

(2) An intermediary and an interpreter must take the oath or make the affirmation in accordance with the form prescribed in the regulations or in a similar form.

(3) An affirmation made under this section has the same effect for all purposes as an oath.

5 Choice of oath or affirmation

(1) A person who is to be a witness or an interpreter or an intermediary in a proceeding may choose whether to take an oath or make an affirmation.

(2) The court is to inform the person of this right to choose.

(3) The court may direct a person to make an affirmation if

(a) the person refuses to choose whether to take an oath or make an affirmation; or

(b) it is not reasonably practicable for the person to take an appropriate oath.

6 Requirements for oaths

(1) It is not necessary for a religious text to be used in taking an oath.

(2) The fact that a person has no religious belief, or does not have a religious belief of a particular kind, at the time the person takes an oath does not affect the validity of the oath for any purpose.

Section 4

C15 Interpreters must currently give oaths or affirmations before fulfilling their function, although there is no present statutory provision to that effect. This provision therefore codifies that position, and extends it to the role of intermediary provided for in this code. It is envisaged that there will be different oaths relevant to each role. The oath for an intermediary, for example, would include a promise not to mislead the witness (see *section 11(4)*).

Section 5

C16 *Subsection 5(1)* reflects s 4(1) of the Oaths and Declarations Act 1957 which provides an entitlement as of right to make an affirmation instead of an oath. *Subsections (2)* and *(3)* contain provisions similar to s 23(2) and (3) of the Evidence Act 1995 (Aust).

Section 6

C17 *Subsection (1)* is taken from s 24(1) of the Evidence Act 1995 (Aust). *Subsection (2)* replaces s 5 of the Oaths and Declarations Act 1957.

Division 5 – General rules for giving evidence

7 Court may control questioning of witnesses

A court may give directions about

(a) the way in which a witness is to be questioned; and

(b) the production and use of documents and other things in connection with the questioning of a witness; and

(c) the order in which parties may question a witness; and

(d) the presence and conduct of any person in connection with the questioning of a witness.

8 Ordinary way of giving evidence

(1) The ordinary way for a witness to give evidence is

(a) orally in English except where communication assistance is provided; and

(b) in a courtroom in the presence of

(i) the judge, or in a jury trial the judge and jury; and

(ii) any parties to the proceedings and their counsel; and

(iii) in a criminal proceeding, the defendant; and

(iv) any members of the public who may wish to be present.

(2) This section applies except where this Code or any other law provides for or enables evidence to be given in written form or otherwise contrary to subsection (1).

General rules for giving evidence

Section 7

C18 A draft rule concerning the court's control of witness questioning is included here as it is an appropriate place within the code provisions. The content of this rule may be revised following further work by the Commission on witness questioning rules.

Section 8

C19 The rules on the "ordinary way of giving evidence" contrast with those set out in Division 6 on alternative ways of giving evidence. In providing that a witness gives evidence "orally", it is recognised that in many circumstances, particularly in civil proceedings, the offering of evidence in written form is common and its use may increase. In keeping with current practice, this section anticipates the introduction of evidence in written form, but does not codify a right to introduce evidence in this way. Evidence given "orally" does, however, include that given by a witness who reads a prepared brief, or who has it read to him, or where the evidence is "taken as read".

9 Support persons

(1) A complainant is entitled, while giving evidence, to have a person or persons near him or her to give emotional support, but the court may, in the interests of justice, direct that emotional support may not be provided to a witness by any person or by a particular person.

(2) Any other witness may apply to the court to have a person near him or her to give emotional support while giving evidence.

(3) The court may give directions regulating the conduct of a person providing support to a witness.

10 Examination of witnesses

Unless the court directs otherwise,

(a) a witness first gives evidence in chief; and

(b) after giving evidence in chief, the witness may be cross-examined by all other parties who wish to do so; and

(c) after all parties who wish to do so have cross-examined the witness, the witness may be re-examined.

Section 9

C20 *Section 9* provides a statutory entitlement for complainants to have a support person, or persons, near them while giving evidence, whether or not they are giving evidence in the ordinary way. *Subsection (1)* makes clear that the entitlement to a support person is not absolute, however, and may be withdrawn at the court's discretion. The court may rule that a witness may not have a *particular* support person, or *any* support person. Although the provision permits a complainant to have more than one support person, it is envisaged that this will only happen in exceptional cases – for example, a child complainant who would like both parents to be near.

C21 *Subsection (2)* provides that other witnesses may apply to have a support person with them while giving evidence, which would include a defendant in a criminal case who elected to give evidence. It is envisaged that the court would consider the same kinds of factors relevant to the use of alternative ways of giving evidence when making a decision whether to allow support persons for witnesses other than complainants. A support person cannot take the role of a McKenzie friend – that is, provide assistance in court to an unrepresented litigant.

C22 *Subsection (3)* is intended to allow the judge to give directions on such matters as the extent of physical contact between witness and support person. It may, for example, be appropriate for a young child to sit on the lap of the support person, but for other witnesses it may not be appropriate for there to be such close contact. With very young witnesses the court may also allow the support person to encourage the witness to speak.

Section 10

C23 These general rules on witness examination may be revised following additional research into witness questioning rules.

11 Intermediaries

(1) The court may appoint a person as an intermediary to explain to a witness questions put to the witness if the court considers that such an appointment will help the witness understand the questions put to him or her.

(2) An intermediary must be a person who, because of training, knowledge, experience, or relationship with the witness, has skills that facilitate the witness's understanding of questions put to him or her.

(3) The court may appoint an intermediary on the application of the witness, a party to the proceeding, or on its own initiative.

(4) A person appointed under this section as an intermediary who, while performing or purporting to perform the functions of an intermediary, wilfully makes any false or misleading statement to the witness commits an offence and is liable to (penalty to be inserted).

Section 11

C24 This section expands the current provision in s 23E(4) of the Evidence Act 1908 and applies to all witnesses, not just those who are child complainants in sexual cases. It applies whether or not the witness is giving evidence in an alternative way. This section also provides that a suitably qualified intermediary may explain questions that have been put to the witness by counsel or the court. The court retains a discretion as to who should act as an intermediary – for example, it may be inappropriate in some cases to appoint another witness as an intermediary.

C25 Examples of where an intermediary may be useful:

- an intermediary may be aware that a child is unlikely to have understood a long sentence containing embedded grammatical structures and several negatives;
- an intermediary would realise that an intellectually disabled person may be likely to respond affirmatively to a leading question (in cross-examination), regardless of what the person actually thought, and would rephrase the question appropriately.

C26 The intermediary will not be able to rephrase the witness's response for the court, as is allowed by equivalent provisions in other jurisdictions. If the court cannot understand the response of a witness, the witness will be asked by the court to respond again in an attempt to clarify the meaning.

C27 The main difference between the role of an intermediary and that of an interpreter is that an intermediary assists if there are communication difficulties even when the witness speaks the official court language (English), while an interpreter will assist communication if difficulties arise because the witness does not understand or cannot communicate in the same language as the court (for example, the Deaf). Communication assistance for some witnesses may also be provided by an expert, who would advise counsel and the court on how to question the witness effectively.

C28 "Wilfully" in *subsection (4)* means intentionally and with knowledge.

12 Communication assistance

(1) A defendant in a criminal proceeding is entitled to communication assistance in accordance with this section and the regulations to enable that defendant to understand the proceeding and to give evidence if the defendant elects to do so.

(2) Communication assistance may be provided to a defendant in a criminal proceeding on the application of the defendant or on the initiative of the court.

(3) A witness in a civil or criminal proceeding is entitled to communication assistance in accordance with this section and the regulations to enable that witness to give evidence.

(4) Communication assistance may be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the court.

(5) Communication assistance need not be provided to a defendant in a criminal proceeding if the court considers that the defendant can sufficiently understand the proceeding and, if the defendant elects to give evidence, can sufficiently understand questions put to them and can adequately respond.

(6) Communication assistance need not be provided to a witness in a civil or a criminal proceeding if the court considers that the witness can sufficiently understand questions put to them and can adequately respond.

(7) The court may direct what kind of communication assistance is to be provided to a defendant or a witness.

(8) Subsections (5), (6) and (7) are subject to section 4 of the Mäori Language Act 1987.

(9) A person who, while providing communication assistance to a witness, wilfully makes any false or misleading statements to the witness or to the court, commits an offence and is liable to (penalty to be inserted).

Section 12

C29 This section codifies and extends the common law. Unlike all other rules in this part, it applies to defendants in criminal cases who do not give evidence as well as to those who do. Under common law and s 24 (g) of the New Zealand Bill of Rights Act 1990, a defendant has an absolute right to assistance in having their evidence communicated to the court and also to understand court proceedings. Witnesses who are not defendants, however, may too have communication assistance only at the discretion of the court, although this is usually given. The costs of interpretation and translation of court proceedings for a defendant in a criminal case will be borne by the Crown. In all other cases, the cost will usually be borne by the party calling the witness.

C30 *Subsection (3)* anticipates that regulations will be required to give full effect to this section. Regulations may be helpful on such matters as:

- what communication assistance may be funded by the State and to what level;
- what qualifications for those giving communication assistance, such as interpreting services, would be desirable or essential;
- ethics; and
- forms of communication assistance; that is, acceptable technological equipment for interpretation/translation as these become available.

C31 *Subsections (5)* and *(6)* make it clear that the entitlement to communication assistance is not an absolute one. This is essential given that it could be argued that a particular witness understands English sufficiently to make obtaining an interpreter of a relatively obscure language unnecessarily costly. This qualification does not apply if the Mäori Language Act 1987 is the relevant statute. *Subsection (8)* therefore makes clear that the whole section is to be read subject to that Act. However, the Mäori Language Act 1987 does not give a specific entitlement to defendants to *understand* proceedings, so in this respect *section 12* is wider. A Mäori defendant who does not understand English will be entitled to communication assistance under the provisions of *section 12*, and where the Mäori Language Act 1987 gives a Mäori speaker an unqualified right to speak Mäori, *subsection (8)* makes clear that s 4 of the Mäori Language Act 1987 takes precedence.

C32 *Subsection (7)* anticipates that different witnesses will require different forms of communication assistance. In some instances, for instance, a witness whose second language is English and whose oral skills are not fully developed, may prefer to give their evidence in English (rather than have an interpreter) but in a written form. The court may agree that this is likely to result in more accurate evidence.

C33 "Wilfully" in *subsection (9)* means intentionally and with knowledge.

13 Restrictions on cross-examination by unrepresented party

(1) Notwithstanding section 354 of the *Crimes Act 1961,* a defendant in a sexual case is not entitled to personally cross-examine a child complainant.

(2) A witness in a civil or criminal proceeding may apply to the court for an order directing that a party to the proceeding who is not represented by counsel must not personally cross-examine the witness.

(3) An application may be made on one or more of the following grounds:
- (a) the age of the witness;
- (b) the physical, intellectual, or psychiatric disability of the witness;
- (c) the linguistic or cultural background of the witness;
- (d) the nature of the proceeding;
- (e) the relationship of the witness to the unrepresented party;
- (f) any other ground likely to promote any of the purposes of the Code.

Section 13

C34 This section is a much broader version of the present provision in s 23F of the Evidence Act 1908, which applies *only* to child complainants and mentally handicapped complainants in sexual cases. This section provides for an absolute bar on cross-examination of all child complainants by unrepresented defendants in criminal cases.

C35 In addition, the court has discretion to disallow personal cross-examination in all other cases. This requires the witness to make an application on grounds set out in *subsection (3)*. The grounds are the same as those relevant to applications for alternative ways of giving evidence (see *section 16*). It is envisaged that as a matter of practice, counsel will inform any witness that the other party or the defendant is unrepresented, but there will be no notice requirement.

C36 "Age of the witness" is intended to include those who are elderly as well as young people. "Intellectual disability" is equivalent to the term used in the Evidence Act 1908 – "mentally handicapped" – and is used because that appears to be the term most generally used in New Zealand at the moment. "Psychiatric disability" is intended to cover not only those people suffering from long-term effects of mental illness, but also those in the acute phase of any illness. "Linguistic background" means anyone who speaks any language other than English – the language of the court system. The phrase "cultural background" is less capable of precise definition, but is intended to capture those witnesses who because of their cultural background may, for instance, be particularly ill-equipped to face the defendant and give their evidence.

C37 *Paragraph (3)(d)* refers to "the nature of the proceeding". This factor could affect the court's decision on any application in several ways. For example, a criminal case involving an alleged sexual or violent offence may be one where an application may be more likely to be granted. *Paragraph (3)(e)* – "the relationship of the witness to the unrepresented party" – is intended to capture those situations where a prior relationship of some kind, especially one involving unequal power, existed between the witness and the unrepresented party (which would include the defendant in a criminal trial). For example, if a woman is required to give evidence against her partner in a sexual case, or in family proceedings, she may be unable to do so at all if personally confronted by someone who had subjected her to physical and emotional abuse.

C38 *Paragraph (3)(f)* allows the judge to base a decision on an application on grounds not precisely anticipated by the code provisions, but justified by the purposes of the code.

(4) When considering an application, the court must
  (a) ensure the fairness of the proceeding and, in a criminal proceeding, that the defendant has a fair trial; and
  (b) have regard to
    (i) the need to minimise the stress of the complainant or witness; and
    (ii) the need to, in the case of a child complainant, promote the recovery of the complainant from the alleged offence; and
    (iii) any other factor that is relevant to the just determination of the proceedings.

(5) This section does not affect the right of the court to question a witness or of counsel representing a defendant or other party in a proceeding to cross-examine a witness.

(6) If the court makes an order under this section, the unrepresented defendant or party may cross-examine the witness by having his or her questions put to the witness by the judge or a person appointed by the court for the purpose.

14 Disallowance of intimidating cross-examination

[Section 23F(5) of the Evidence Act 1908, which disallows intimidating cross-examination in certain sexual cases, is to be subsumed in a general section of the Code that makes broader provision for disallowing intimidating cross-examination.]

C39 *Subsection (4)* identifies those factors which the court must consider in deciding on an application. Particular emphasis is given to ensuring fairness of the proceeding and, in a criminal proceeding, that the defendant has a fair trial.

C40 The need to promote the recovery of the child complainant will be relevant only in criminal trials. This factor does not suggest that the court itself has the role of promoting recovery of complainants from alleged offences: that would obviously be unrealistic, and the court's direct function in this regard is best seen as confined to not hindering the complainant's recovery. The words "promote the recovery" are appropriate here however, given they imply that the court must have regard to the need to achieve this goal, although it is not itself expected to achieve it.

C41 *Subsection (5)* carries forward the provisions contained in s 23F(2) and (4) of the Evidence Act 1908, but is drafted to include application to civil proceedings.

C42 *Subsection (6)* allows for the questions of an unrepresented party to be put to the witness by the judge or any other person appointed by the court. In considering whom to appoint, the judge should have regard to the factors in *subsections (3)* and *(4)*. It may not be appropriate, given the particular case, for a friend or relative of the unrepresented party to ask the questions. If the judge asks the questions of the witness, consideration will need to be given to the control that the unrepresented party has over the process, and how the questions are to be communicated to the judge.

Section 14

C43 There will be a general provision dealing with misleading or intimidating questions which will replace s 23F(5) of the Evidence Act 1908. This provision is being considered in the context of the general rules on witness questioning.

Division 6 – Alternative ways of giving evidence

15 Directions about way child complainant is to give evidence

(1) In a case in which there is a child complainant, the prosecutor must apply as early as practicable to the court to which the defendant has been committed for trial, or in a summary case to the court which is to try the case, for directions about the way in which the complainant is to give evidence at the trial.

(2) When considering an application under this section, the court must
   (a) ensure the fairness of the proceeding and that the defendant has a fair trial; and
   (b) have regard to the wishes of the complainant and to
      (i) the need to minimise the stress of the complainant; and
      (ii) the need to promote the recovery of the complainant from the alleged offence; and
      (iii) take into account any other factor that is relevant to the just determination of the proceeding.

Division 6 – Alternative ways of giving evidence

Section 15

C44 This provision carries forward in an extended form s 23D of the Evidence Act 1908 which provides that a prosecutor must apply for directions as to how the evidence of a child complainant or a mentally handicapped complainant in a sexual case is to be given. This provision alters the current law in several ways:

- applications will not be mandatory with regard to "mentally handicapped" witnesses;
- applications will be mandatory for all child complainants, not only those where a sexual case is involved;
- the provision explicitly applies to summary as well as indictable proceedings.

C45 The phrase "as early as practicable" is intended to ensure that the question of how the witness is to give evidence is dealt with as soon as possible. Timeliness is particularly important in the case of applications to offer videotaped evidence, where one of the purposes is to obtain fresh evidence from witnesses who may be more susceptible to memory loss. Applications for pre-trial cross-examination, under *section 20*, should generally be made at the same time. Applications may be made prior to a preliminary hearing in indictable proceedings where the witness has been required to testify in person.

C46 *Subsection (2)* sets out the factors to which the court must have regard in making its decision. These are the same as those in *section 13* for applications to disallow direct cross-examination by an unrepresented party or defendant, with the addition that the court must have regard to the wishes of the child complainant. This is in keeping with New Zealand's obligations under the United Nations Convention on the Rights of the Child, and is supported by research that suggests it is better for a child to feel they have some control over the process.

16 Other applications for directions about alternative ways of giving evidence

(1) An application for directions about the way in which a witness is to give evidence in a civil or criminal proceeding may be made by the witness or by any party to the proceeding.

(2) An application for directions must be made to the court that is to hear the proceeding as early as practicable before the proceeding is to be heard; but the court may accept and deal with an application for directions at some later time.

(3) An application may be made on the grounds of
- (a) the age of the witness;
- (b) the physical, intellectual, or psychiatric disability of the witness;
- (c) the linguistic or cultural background of the witness;
- (d) the nature of the proceeding;
- (e) the relationship of the witness to any party to the proceeding;
- (f) any other ground likely to promote any of the purposes of the Code.

(4) When considering an application under this section, the court must
- (a) ensure the fairness of the proceeding and, in particular in a criminal proceeding, that the defendant has a fair trial; and
- (b) have regard to the wishes of the witness and
  - (i) the need to minimise the stress of the witness; and
  - (ii) the need to promote the recovery of the complainant from the alleged offence; and
  - (iii) take into account any other factor that is relevant to the just determination of the proceeding.

17 Procedure for applications for directions about alternative ways of giving evidence

(1) The court must hear in chambers every application for directions about the way in which a witness is to give evidence and must give each party an opportunity to be heard concerning the application.

(2) The court may call for and receive a report from any person considered by the court to be qualified to advise on the effect on the witness of giving evidence in the ordinary way or any alternative way.

Section 16

C47 This section allows any witness, including a defendant in a criminal case, to apply to the court for a direction that they may give evidence by one of the alternative ways (set out in *section 18*). It applies to civil and criminal proceedings. There is no obligation or duty on the part of counsel to apply for such a direction on the behalf of any witness. The considerations are the same as for *section 13*, with the addition of having regard to the preference of the witness. It is envisaged that an application may also be made on the basis that a witness needs protection; for example, an anonymous informer may need to give evidence out of court. Normally an application will not be made before a preliminary hearing unless the witness is required to give evidence in person. An application may then be made to give evidence in an alternative way, including an application for cross-examination to be held prior to the preliminary hearing.

Section 17

C48 The procedure contained in this section for applications for directions on how witnesses may give evidence reflects the present law.

18 Alternative ways of giving evidence

(1) After considering an application for directions about the way in which a witness is to give evidence, the court may direct that the evidence of the witness is to be given either in the ordinary way or in an alternative way so that

(a) the witness gives evidence

(i) while in the courtroom but unable to see the defendant or specified party or witness; or

(ii) from an appropriate place outside the courtroom; or

(iii) by a videotape made before the hearing of the proceeding, and

(b) any appropriate practical and technical means enable the judge, the jury (if any), and counsel to see and hear the witness giving evidence as provided in the regulations; and

(c) in a criminal proceeding, the defendant is able to see and hear the witness, except when the court directs otherwise.

(2) In the case of a direction that evidence in chief is to be given by a videotape, the court may direct that any cross-examination or re-examination is to be conducted in a pre-trial hearing in accordance with section 20.

(3) The court may admit evidence that is given substantially in accordance with the terms of a direction under this section despite a failure to observe strictly all of those terms.

Section 18

C49 This section provides that the court must give directions, after an application, on how a witness may give evidence in examination in chief, cross-examination and re-examination. A court may also order that a witness give evidence in the ordinary way, but there is no presumption to that effect.

C50 *Paragraphs (1)(a)–(c)* recognise that ways of giving evidence which are not in the ordinary way achieve their purpose by allowing either spatial or temporal separation. It allows for the use of new technology. Note the wide definition of "videotape" for this purpose. For the foreseeable future, any alternative ways of giving evidence allowed by the court under this code will be those presently in use. Regulations may specify them in more detail.

C51 In criminal cases, the defendant will usually be entitled to see any prosecution witness except, for example, when the court has allowed a witness to give evidence anonymously (*paragraph (1)(c)*).

C52 *Subsection (3)* provides that although counsel and other trial participants have the duty to produce evidence such as videotapes in conformity with the court's directions, the court will have a discretion to admit evidence which does not strictly conform to its directions. This is discussed in more detail in relation to *section 19(5)*.

19 Videotaped evidence

(1) In a criminal proceeding tried on indictment, the videotaped evidence of a witness that is to be offered in evidence at the trial may be the same videotape that was offered in evidence at the preliminary hearing.

(2) A videotape offered as evidence must be recorded in compliance with the regulations.

(3) A videotape that is to be offered in evidence in a proceeding must be viewed in chambers by the court and by all parties to the proceeding before it is offered in evidence unless the court directs otherwise; and all parties must be given the opportunity to make submissions with regard to the admissibility of all or any part of the videotape.

(4) The court may order to be excised from a videotape offered as evidence any material that, if the evidence were given in the ordinary way, would or could be excluded in accordance with this Code.

(5) The court may admit a videotape that is recorded and offered as evidence substantially in accordance with the terms of a direction under this Division and the terms of regulations referred to in this section despite a failure to observe strictly all of those terms.

Section 19

C53 *Subsection (1)* incorporates a change to the present law. A videotape used in evidence in chief may be the same one as presented at the preliminary hearing, or it may have been made afterwards. This may be helpful where it is initially thought that a witness will be able to give evidence in the ordinary way but the witness's ability to do so is later put in question.

C54 *Subsection (5)* contains a provision similar to *subsection 18(4)*. Current case law requires "substantial but not slavish" compliance with the regulations. One substantial breach recognised by the courts is the failure to test the witness's competence – that is, to ensure that she understands the nature of a promise and makes a promise to tell the truth. Given that the code abolishes the competence requirement, there is no longer any need to make this inquiry, so a failure to test competence will no longer be treated as a substantial breach. Breaches of witness questioning rules, for example inappropriate leading questions, should be viewed as substantial. Breaches that have been viewed as not substantial, so that the tape was still admitted, include:

- the interviewer failing to identify herself;
- not making clear the reasons for the breaks in recording; and
- not specifying all the required details in the accompanying certificate.

C55 In applying this section the court should also be satisfied that admitting the evidence in breach of any direction or regulation is in keeping with the purposes of the code.

20 Pre-trial cross-examination and re-examination

(1) If a court has directed that the evidence in chief of a witness is to be given by means of a videotape, the court may, on the application of any party to the proceeding or of the witness, direct that any cross-examination or re-examination of the witness is also to be recorded on videotape before the proceeding and given in evidence.

(2) The court may give a direction under this section in respect of
  (a) a witness who is a child complainant; and
  (b) any other witness, if the court considers that the age of the witness or the intellectual or psychiatric disability of the witness is likely to result in a greater possibility of the memory of the witness fading before the trial than would ordinarily be the case.

(3) An application under this section must be made to the court that is to hear the proceeding at the same time as the application for directions about the way in which the evidence of the witness is to be given, but if the court considers that the interests of justice require it, the court may accept and deal with an application at a later time.

(4) The court must hear every application in chambers and must give each party an opportunity to be heard concerning the application.

(5) The court may call for and receive a report from any person considered by the court to be qualified to advise on the effect on the witness of being cross-examined or re-examined in the ordinary way or by videotape or in some other way described in section 18.

(6) When considering an application under this section, the court must
  (a) ensure the fairness of the proceeding and, in particular, in a criminal proceeding, ensure that the defendant has a fair trial; and
  (b) have regard to the wishes of the witness and
    (i) the need to minimise the stress of the witness; and
    (ii) the need to promote the recovery of a child complainant from the alleged offence; and
    (iii) take into account any other factor that is relevant to the just determination of the proceeding.

Section 20

C56 Explicit provision for pre-trial cross-examination is new in New Zealand law, and for this reason the provisions are relatively detailed. It is expected that they will be used relatively infrequently, at least as experience in their use develops. Allowing child complainants to be cross-examined before the trial will serve a wider range of purposes than those which relate to adults. The only policy purpose to be achieved by allowing pre-trial cross-examination is determining whether the reliability of the witness's evidence is likely to be improved: hence specific reference to the issue of memory fade. In other respects the criteria and procedures are similar to those set out for applications for directions on ways of giving evidence.

21 Procedure for pre-trial cross-examination and re-examination

(1) If the court directs that the cross-examination and re-examination of a witness are to be conducted at a pre-trial hearing of the proceeding, the hearing is to be conducted in the presence only of the judge, any counsel, the defendant or other parties (subject to subsections (2) and (3)), and such other persons as the judge permits.

(2) In the case of a criminal proceeding, the defendant must not be present when a witness who is a child complainant is cross-examined or re-examined but must, from within the courtroom or elsewhere, be able to see and hear the witness by any appropriate means and be able to communicate with his or her counsel.

(3) In any proceeding other than one referred to in subsection (2), the court may direct that the witness should be separated from other parties but in such a way that other parties should be able to see and hear the witness and communicate with counsel.

(4) Pre-trial cross-examination and re-examination are to follow evidence in chief of the witness, given either orally or by showing a videotape of evidence in chief, and the cross-examination and re-examination are to be recorded on videotape and may be offered as evidence at the hearing of the proceeding.

(5) A witness who has been cross-examined in a pre-trial cross-examination is not to be subject to further cross-examination unless the court so orders on the application of a party to the proceeding on the grounds that further cross-examination is desirable in the interests of justice.

(6) If the court orders that a witness may be further cross-examined, the court must direct whether the cross-examination and any re-examination is to take place during the proceeding, in which case the court is to direct the way in which the examination is to take place, or at a further pre-trial hearing under and subject to the requirements of this section.

(7) Where the court so directs, more than one hearing may be held under this section for the purposes of any further cross-examination or re-examination under this section.

Section 21

C57 This section sets out the detail on how pre-trial cross-examination is to be carried out. These provisions may be better placed in regulations, although this section does contain some important substantive law matters.

C58 At the pre-trial hearing, the witness may either give evidence in chief in person, which may be recorded on videotape for use at the trial, or a pre-recorded videotape may be played. The witness will then be cross-examined on that evidence, and the cross-examination and re-examination will be recorded on videotape for use at the trial.

C59 There is provision for further cross-examination of the witness, either at the trial, or at another pre-trial hearing. If at trial, the witness will usually be cross-examined by use of an alternative way; for example, closed-circuit television. Further cross-examination can be ordered in the interests of justice, but it is envisaged that this will usually occur only in the case of new evidence which could not reasonably have been available at the earlier date. Further cross-examination will not be available; for example, where counsel has held back information in an attempt to force a witness to testify in court.

C60 Cross-examination may also occur prior to a preliminary hearing, when the complainant or witness is required to testify. An application for early cross-examination will usually be made at the same time as an application to have the witness testify in person at a preliminary hearing. A witness who is able to give evidence on videotape may also be cross-examined on videotape prior to such a hearing.

[TO BE LOCATED ELSEWHERE]

Directions to jury

[Section 23H of the Evidence Act 1908 may be preserved in a modified form in a provision of more general application.]

Regulations

The Governor-General may make regulations by Order in Council prescribing all matters that are required or permitted by this Code to be prescribed or are necessary or convenient to be prescribed for giving effect to the purposes of this Code and in particular

(a) prescribing the procedure to be followed, the type of equipment to be used, and the arrangements to be made, where the evidence of a witness is to be videotaped;

(b) providing for the approval of interviewers, or classes of interviewers, for witnesses who are child complainants in sexual cases, and providing for such approvals to be proved by production of certificates in the prescribed form;

(c) prescribing the form of certificate by which an interviewer is to formally identify a videotape;

(d) providing for the consent of witnesses to be videotaped and specifying who may give consent on behalf of witnesses who are children;

(e) prescribing the uses to which any videotape recordings may be put and prohibiting their use for other purposes;

(f) providing for the safe custody of videotape recordings intended to be offered as evidence;

(g) providing for the preparation of transcripts of videotape recordings and for their uses and safe custody;

APPENDIX

Psychological studies on the reliability of children's testimony

A1 MUCH RESEARCH HAS BEEN UNDERTAKEN in relation to aspects of children's memory. For accounts which attempt to condense the information see: J R Spencer and Rhona Flin, *The Evidence of Children: The Law and the Psychology*;[199] Lucy S McGough, *Child Witnesses: Fragile Voices in the American Legal System*;[200] the Ontario Law Reform Commission, *Report on Child Witnesses*;[201] and Stephen J Ceci and Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*.[202]

A2 It is generally agreed that what any person remembers is partly reconstructed; that is, memory depends in part on knowledge and other sources of information in addition to that recorded when an event was first experienced. Many theoretical analyses treat memory as involving three stages. Processes involved with each stage will influence how accurately and completely any witnessed event will later be recalled. First is the acquisition stage when information is encoded in memory. During this stage, processes relating to perception, attention and understanding may influence which information is encoded (or recorded) in memory and how well is it encoded.

A3 Second is the retention stage, the period of time that passes between the event and the eventual recollection of a particular piece of information. Memories may change simply as a function of time, especially following very long delays, but also, for example, as a result of similar, intervening experiences, rehearsal of the event,[203] and exposure to other information about the event.

A4 Third is the retrieval stage, during which a person recalls the information about the event. Recall is influenced by the cues available to retrieve the memory; for example, as provided by questions, or physical cues such as photographs or reinstatement of the original context of the event, as well as the social context in which the person is asked to recall the information. The accuracy and comprehensiveness of *any* person's recall therefore depends on the nature of the event to be remembered, the intervening time interval and the occurrence of other, related events, why the person is asked to recall their memories, and by whom, and the kinds of retrieval cues provided at the time of recall.

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[199] 2nd ed, Blackstone Press, London, 1993.

[200] Yale University Press, New Haven, 1994.

[201] Above n 6.

[202] American Psychological Association, Washington DC, 1995.

[203] For instance, thinking and talking about it.

A5 It is generally agreed that the memories of both adults and children are fallible. Adults, like children, may be mistaken in their perceptions and confused in their memories. The appropriate question to ask is whether children are predictably *less* reliable than adults. Although much of the research on this topic is focused on different questions and some findings conflict, common themes are apparent.

A6 For many memory tasks, such as those which involve recognition, even quite young preschool children are as reliable as adults.[204] Memory is not a simple function of age, and a combination of children's knowledge, skills and social factors influence children's memories and their ability to recall past events. There is also reasonable consensus that children's abilities to recall and communicate develop with age. Although preschool children can recall accurate details about personally experienced events over a period of years,[205] most writers consider that the memories of young children (that is from preschoolers up to the age of 12) are more vulnerable to fading than older children and adults.[206] But if, when information is initially acquired,

- the child has a superior knowledge of the subject matter; or
- the event is personally significant;[207] or
- the actions are central and familiar to the child,

then children's memories may be enhanced, and any developmental disadvantages overcome.[208]

A7 Children may, however, have difficulty ordering complex and less familiar events, or be unable to recall the exact date of events, or have difficulty estimating distance or speed. These difficulties can be overcome by asking a child to position events in time in relation to an important event in the child's life, such as a birthday, and by asking a child to give relative estimates of things such as speed or height; for example, by asking a child to compare the height of the suspect with the height of the interviewer. It must be remembered that adults sometimes have the same difficulties and prefer to give relative estimates.

A8 Children's memories are also affected by the intervention of factors present when the child is recalling memories. Factors such as delay, stress, the interviewing technique, the presence of a support person, the perceived status of the interviewer in relation to the child, and the environment in which questioning takes place may all influence the recall process.

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[204] "[I]t is clear that children – even preschoolers – are capable of accurately recalling much that is forensically relevant": Ceci and Bruck, above n 202, 235.

[205] Goodman and Bottoms (eds), *Child Victims, Child Witnesses Understanding and Improving Testimony* (The Guildford Press, New York, 1993) 21. See also Firush and Shukat, "Content, Consistency and Coherence of Early Autobiographical Recall" in Zoragoza, Graham, Hall, Hirschman and Ben-Porath (eds), *Memory and Testimony in the Child Witness* (Sage Publications, California, 1995).

[206] For a recent summary, see McGough above n 200, chapter 4. Note also that although there is some evidence that younger children may forget more quickly than older children, sometimes older children may forget more over time than younger children, perhaps in part because they remember more in the first instance.

[207] It must be remembered that adults also pay more attention to events or details which have personal significance.

[208] Like adults, children may have difficulty answering questions about peripheral detail. In some instances, however, children will provide details which adults would have overlooked. This is because "what is central and what is peripheral in any given situation are entirely in the eye of the beholder, irrespective of the beholder's age": Spencer and Flin, above n 199, 302.

A9 These findings are relevant to interviewing techniques; for example, children who are asked to freely recall an event are generally regarded as being as accurate as adults, but they report less information, partly because of less developed communication skills. The younger the child, the less spontaneous they will be and therefore the less detail will be reported. There appear, therefore, to be age differences in quantity but not quality of freely recalled details. All witnesses, but children in particular, remember more details than they spontaneously report. Children may therefore require more assistance than adults to recall all they know; for example by the use of cued questions.

A10 Unfortunately, this need for assistance can increase the risk of distortion, and much recent research has focused on the topic of suggestibility.[209] It seems fair to conclude from recent research that although the accuracy of both adults and children can be affected by leading or suggestive questions,[210] the ability to resist the influence of external suggestion increases with age.[211] Suggestibility should, however, be distinguished from compliance. Children may change their account of an event not because their actual memory of the event has altered or become confused but because they wish to comply with an adult in authority's suggestion or because they interpret an adult's repeated questioning as an indication that their first response was judged "wrong".[212]

A11 Research indicates that whether children are more susceptible to suggestive information than adults probably depends on the interaction of age with other cognitive and social factors.[213] A child (and also many adults) will be less open to suggestion if:

- the event is familiar, or personally significant;
- the information is central to the event from the child's perspective;[214]
- there is minimal delay between the event and the reporting of it;[215]
- the interviewer is skilled;[216]
- the interview surroundings are supportive;

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[209] For a comprehensive summary of recent research, see Doris (ed), *The Suggestibility of Children's Recollections* (American Psychological Association, Washington DC, 1991).

[210] See for example Spencer and Flin, above n 199, 303; research referred to by the Ontario Law Reform Commission, *Report on Child Witnesses*, above n 6, 14–16. Also Bruck, Ceci, Francover and Barr, "'I Hardly Cried When I Got My Shot!' Influencing Children's Reports About a Visit to Their Pediatrician" (1995) 66 Child Development 193.

[211] Ceci and Bruck, "Suggestibility of the Child Witness: An Historial Review and Synthesis" (1993) 113 Psychological Bulletin 403.

[212] Spencer and Flin, above n 199, 308–306; McGough, above n 200, 71–73.

[213] See for example Goodman and Schwartz-Kennedy, "Why Knowing a Child's Age is Not Enough: Influences of Cognitive, Social and Educational Factors on Children's Testimony" in Dent and Flin (eds), *Children as Witnesses* (John Wiley & Sons, Chichester, 1992) 30.

[214] A child will be less suggestible concerning central events, but more suggestible concerning peripheral detail. The same trend has been observed in relation to adults. The results of some studies have caught some researchers by surprise. They demonstrate that young children regard some details of an event as central which older children and adults would not. Foley, "Differentiating Fact from Fantasy: The Reliability of Children's Memory" (1984) 40 Journal of Social Issues 33, 33–36.

[215] This is also true for adults: see Loftus and Davies, "Distortions in the Memory of Children" (1984) 40 Journal of Social Issues 51, 63.

[216] Interviewing techniques may reduce the risk of suggestion, for example, by emphasising to the child that he or she is not expected to know all the answers and that the child may say "I don't know".

- the child does not perceive the interviewer as an authority figure who must be obeyed or pleased;[217]
- the child is not embarrassed about the information they are asked to recall;[218] and
- the event is salient or distinctive.

A12 Many of these factors would also operate to reduce the suggestibility of an adult witness.

RELIABILITY OF THE TESTIMONY OF PEOPLE WITH INTELLECTUAL DISABILITIES

A13 It is difficult to make generalisations about the ability of witnesses with intellectual disabilities to give reliable evidence. People with very limited intellectual and behavioural capacities may be perfectly truthful and capable of accurately remembering what they saw or what happened to them.[219] In contrast, there may be some people at the upper end of the relevant intellectual and behavioural scale who are not good witnesses because they have forgotten important facts or they are unwilling or unable to tell the truth.

A14 Research suggests that even people with moderate and severe intellectual disabilities can communicate accurately when the situation is a natural one: for example, one that involves a clear reason for communicating, a logical consequence of communicating, and familiar objects or tasks.[220] However, there is some evidence that people with intellectual disabilities are more acquiescent than other people,[221] and that they are more likely to answer "yes" if questions are framed in such terms that they can only answer "yes" or "no".[222] Questioning

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[217] Spencer and Flin, above n 199, 306. Powerful social rules may operate on the child; for example, the desire to please the adult, to terminate the interview as soon as possible, and a belief that the adult knows best or has superior knowledge.

[218] Goodman and Schwartz-Kennedy, above n 213, 31.

[219] Bull and Cullen, "Witnesses Who Have Mental Handicaps", unpublished paper, 4 March 1992, 7. This is a paper by two psychologists for the purpose of informing Scottish Procurators Fiscal (prosecutors who interview suspects and witnesses) on the effective interviewing of people with mental retardation. See also Ashton and Ward, *Mental Handicaps and the Law* (Sweet and Maxwell, London, 1992) 87; Hoggett, *Mental Health Law* (3rd ed, Sweet and Maxwell, London, 1990) 150.

[220] Bray, Biasini and Thraser, "The Effect of Communicative Demands on Request Making in the Moderately and Severely Mentally Retarded" (1983) 4 Applied Research in Mental Retardation 13.

[221] That is, they are more likely to respond "yes" to a question regardless of its content: Rosen, Floor and Zisfein, "Investigating the Phenomenon Acquiescence in the Mentally Handicapped" (1974) 20 British Journal of Mental Subnormality 56; Sigelman et al, "Surveying Mentally Retarded Persons: Responsiveness and Response Validity in Three Samples" (1980) 84 American Journal of Mental Deficiency 479.

[222] Sigelman et al, "When in Doubt Say Yes: Acquiescence in Interviews with Mentally Retarded Persons" (1981) 19 Mental Retardation 53; Sigelman et al, "Asking Questions of Retarded Persons: A Comparison of Yes-No and Either-Or-Formats" (1981) 2 Applied Research in Mental Retardation 347. These studies were conducted to determine how people with mental retardation respond to survey questions. The second study by Sigelman et al was conducted with a small sample, and questions were restricted to a few highly subjective topic areas. See also Perlman, Ericson, Esses and Isaacs, "The Developmentally Handicapped Witness: Competency as a Function of Question Format" (1994) 18 Law and Human Behaviour 171.

techniques may therefore be a cause of distortion in answers rather than memory deficits in the person being questioned.[223]

A15 The reliability of witnesses with mental disorders, in contrast to those with intellectual disabilities,[224] will depend on several factors. The evidence of a person whose illness is in remission or well controlled will be no more or less reliable than a witness with no mental illness. The nature and severity of mental disorders vary considerably, and the symptoms of many have no implications for reliability. The ways in which reliability may be affected will depend on the nature of the illness. For example, some people in an acute phase of a mental illness such as schizophrenia may have delusions or hear voices. At that time, their grasp on reality may be poor, and they may be unable to differentiate between fact and fantasy. People affected by mood disorders may be impaired in other ways – thinking may be slowed and concentration or motivation lacking, even though they may be able to accurately remember information about past events. Alternatively, during mania, lack of inhibitions, poor judgement and overvaluing of their own opinions and insight will also impact on the reliability of their evidence.

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[223] Bull and Cullen, above n 219, 9–20, 25.

[224] See distinction made previously in footnote 13 above.

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