



25 February 2011

Claire Norris  
Ministry of Justice  
PO Box 180  
Wellington 6140

By email: [claire.norris@justice.govt.nz](mailto:claire.norris@justice.govt.nz)

**Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system**

Thank you for inviting the New Zealand Law Society (Society) to comment on the Ministry of Justice's Issues Paper on *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system* (Issues Paper). The Society's comments have been prepared with the assistance of its Criminal Law Committee.

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

The Society is strongly in favour of increasing the use of alternative ways for child witnesses to give evidence.

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

Greater use of pre-recorded evidence, where possible, is desirable. The increased use of giving evidence by CCTV could be investigated.

It is noted that the Issues Paper does not seem to take into account the increased discretion of the Courts to order that evidence be given by video link from a different location under the Courts (Remote Participation) Act 2010. It may be desirable for this discretion to be used more widely.

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

The option of removing the defendant from the courtroom might be an acceptable option, but only if there are CCTV facilities available for the defendant so that the defendant can see and hear the evidence. The defendant's right to a fair trial may not be compromised by the removal of the defendant from the courtroom, provided there is a firm judicial direction to the jury that no adverse inferences are to be drawn from that removal. Without that there is a real risk of prejudice.

Regardless of judicial direction, the defendant must be able to see and hear the proceedings.

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

Yes, it should be the usual, but not mandatory, method of proceeding. For example, there may be a 17 year old child witness who wishes to give evidence and be cross-examined in Court and this should be permissible.

As discussed below, there needs to be an opportunity to cross-examine the child once the wider circumstances are known and client instructions are available. Alternatively, there should be discretion at a later point to ask supplementary questions with leave of the Court, to avoid possible injustice resulting from a lack of effective cross-examination.

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

The earlier the evidence can be recorded, the more likely it is to be complete and detailed. Thus it is desirable, where possible, for both examination and cross-examination to take place as early as possible, and to be recorded as early as possible. Shortly after disclosure has taken place would be an appropriate time.

The difficulty comes with cases where the witness's evidence may be the subject of challenge or potential cross-examination on a matter which would not readily be anticipated until reasonably close to the time of the trial. For example, the witness may give evidence of having witnessed an offence, and have given a description of the alleged offender. If the witness later gives evidence of having recognised the defendant as the alleged offender (in some form of identification parade or photo identification), there might well be questions to be asked about the identification process, and the reliability of the identification, because of any discrepancies between the two bodies of identification evidence. Clearly questions about that can only be asked after the identification process has taken place.

One possibility that might be considered is to adapt the process used in Denmark in cases where an allegation is made against an offender whose identity is not then known. The State appoints a lawyer as the nominal representative of the unknown offender, and that lawyer can then take part in the questioning of complainants and witnesses, as a method of assuring the complainant's or witness's account is subject to a degree of challenge. The recorded interview is then admitted in evidence at the trial. While it might be thought this would not in every instance adequately preserve the defendant's right to challenge the prosecution case, it might well be that such a process could give rise to a presumption that the evidence had been subject to challenge. The defence would then need to satisfy the Court that a second or subsequent cross-examination of the witness was necessary in the interests of a fair trial.

Another possibility is the established system operating in Western Australia. This could be reviewed to assess whether it offers a working model of value.

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

The editing of videos/DVDs must preserve the accuracy of the record.

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

Yes.

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

No. Leaving aside the issue of the extent to which judges are currently trained in the art of examination and cross-examination of child witnesses, there must be a very real risk that a judge sitting without a jury, who questions the witnesses, may miss points of importance.

There is also a real chance that juries might attach undue weight to the particular form and substance of the judge's questions, and the replies to those questions, which they might not attach to questions asked by lawyers of other witnesses and the answers to such questions.

***Question 9: What do you see as the key benefits and risks of using intermediaries?***

There is a considerable body of overseas evidence that can be drawn on. Most of this suggests that the use of intermediaries does not unduly interfere with legitimate trial approach of counsel. There is some chance that legitimate lines of examination and cross-examination might be hindered by intermediaries, but it is more likely that the use of intermediaries will lead to the giving of clear evidence, with less stress on child witnesses and complainants.

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

The Society is attracted to the view that the intermediary should be the person who puts into suitable language the questions tendered by counsel. This would allow the intermediary the right to determine the nature of the questions, rather than the lawyer doing so. However, there should be an overriding discretion for the trial judge to require the intermediary to put questions in a particular form, if it can be demonstrated by counsel that this is necessary. A higher threshold should be maintained for this.

***Question 11: Do you believe more emphasis should be put on prioritising Court cases involving child witnesses?***

Yes. Even if the evidence is pre-recorded it is important for children that trials concerning their evidence are resolved as quickly as possible, particularly where they are the complainants. This aids their recovery when they have been victimised. Such prioritisation needs to continue through to appeals, for the same reason.

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

Yes.

***Question 13: Are you supportive of any of these further options for enhancing the experience of child witnesses in the criminal justice system?***

It would be highly desirable that child witnesses have a support person with them, provided that it can be ensured that the support person will not affect the child's evidence.

The use of a narrative mode of giving evidence would be highly desirable, provided some of the difficulties identified as to avoiding disclosure of inadmissible matters etc can be dealt with. If there is a wider use of recorded evidence, it is likely that, with appropriate interviewers and intermediaries, a narrative account can be given but still scrutinised in a way that allows the trial of fact both to comprehend the full nature of the evidence and to appreciate the strength of any challenges made to it.

***Question 14: Do you have any other ideas or options that you believe we should consider?***

We have no further comment to add.

The Society hopes that the above comments are of assistance to the Ministry of Justice. If you wish to discuss any matters raised in this letter please contact the Criminal Law Committee convener, Jonathan Krebs, through the Criminal Law Committee secretary, Rhyn Visser by phone (04) 463 2962 or email [rhyn.visser@lawsociety.org.nz](mailto:rhyn.visser@lawsociety.org.nz).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm  
**President**