Student ID number - 27438694
FOR4001 – Assessment 1 Minor Essay – S2 2017

Word Count 1925

What reforms with regard to evidence have been made to improve the court experience for complainants of sexual offences?

The 2009 New Zealand Crime and Safety Survey estimated that only 7% of sexual offences were reported to the police.[1] There will be multiple complex reasons for the chronic underreporting of sexual violence that occurs not just in New Zealand, but worldwide. However, one reason often cited, is the fear of victims that the criminal justice system will be traumatic, disrespectful and lead to them being re-victimised, an ordeal that may be just too great and risk them further harm. In order to try and remedy this and improve the position of complainants at trial, whilst not compromising the rights of defendants, incremental changes have been made to laws and court processes over the last few decades. In 2015, the New Zealand Law Commission produced the 'Justice Response to Victims of Sexual Violence' report and made 82 recommendations for improvement.[2] These recommendations fall into three categories; proposals relating to court processes, alternatives to trial and social support for victims of sexual violence. The government has directed the Ministry of Justice to analyse the Law Commission's recommendations and are reported to be continuing to consider recommendations that require legislative change. As part of the Governments wider investment in sexual violence prevention and support of victims, several initiatives have already been commenced, these include; the Sexual Violence Court pilot, the Victims Code (launched in 2015, this code explains what victims can expect from the services provided by criminal justice agencies at each stage of the criminal justice process) and the recently announced funding from the Justice Sector Fund to enable the Institute of Judicial Studies to provide judicial education and deliver new guidelines for prosecuting sexual violence cases. This report will focus on the changes to court processes and procedures in New Zealand.

The Law Commission report made multiple suggestions on improving the court experience of complainants, including; enforcing a statutory time limit on hearing sexual violence cases, court facilities and the availability of information and support for complainants. Whilst these changes may significantly improve the court experience for complainants, they are outside the scope of this report regarding evidence. Attention will be focused on; methods of giving evidence, types of evidence including 'Rape shields' and cross examination.

Alternative methods of giving evidence

The Law Commission recommended that to lessen the trauma during trial, complainants of sexual violence should be entitled to give their evidence and be cross-examined in the alternate ways given under section 105 of the Evidence Act 2006. These alternate ways include; whilst in the courtroom but unable to see the defendant or some other specified person, from an appropriate place outside the courtroom using CCTV, or by a video record made before the hearing e.g. evidential video interview (EVI).[2,3] A direction on mode of evidence can be made on one of the grounds listed in section 103(3) of the Act.(See Appendix 1). These include, the psychological impairment of the witness, the trauma suffered by the witness, the witness's fear of intimidation and nature of the evidence that the witness is expected to give.[3] As well as reducing distress to the complainant, other possible advantages of pre-recording evidence are that it may increase the accuracy of evidence, because it is given sooner after the alleged events and in less traumatic circumstances, it may promote earlier resolution of cases because if the recorded evidence is weak the case may be discontinued at an earlier stage and if strong the accused may be more likely to plead guilty, it may also improve trial procedures as any evidence which is inadmissible can be edited from the tape.[4] Despite this, the Ministry for Women found that only two out of 14 complainants of sexual violence who were questioned reported they had been informed of the options regarding mode of evidence.[5] This may be because prosecutors feel the emotional impact of the complainant giving evidence in court is more likely to result in a conviction, although there appears to be no evidence currently to support this view.[6] Currently prosecutors in adult sexual violence cases are not required to apply for mode of evidence directions as they are in cases involving child witnesses, although guidance directs them to consider it. The Law Commission in the 2013 Review of the Evidence Act 2006 concluded that mandatory direction is not appropriate for adult sexual violence complainants, primarily because not all complainants will want or need alternative modes of giving evidence.[7] Instead the Commission recommended that prosecutors are encouraged to apply for mode of evidence directions. The 'Justice Response to Victims of Sexual Violence' report has furthered this proposing a requirement that prosecutors must consult with complainants on the mode in which they prefer to give evidence.[2]

Another issue is whether the complainant should also be able to record their cross-examination in advance of the trial. Giving evidence-in chief in response to questions from the prosecutor can help the witness gain confidence prior to cross-examination, however, if pre-recorded evidence is used for the examination-in-chief and then cross-examination occurs in court without this 'warm up', this could be more daunting for

the complainant.[4] Cross-examination is also covered under section 105 of the Evidence Act 2006 and the Law Commission recommended that complainants in sexual violence trials should also be allowed to have their cross-examination performed and recorded prior, in the presence of just the judge, the lawyers, the defendant, and the necessary court staff.[2,3]

Disclosure of confidential information

Following a medical consultation for an allegation of sexual violence, the Medical Examination Record (MER) containing information relating to the alleged event will be disclosed to the court. However, the doctor may also have recorded other general health information, for example, details of past sexual history or sexual abuse. This information is not disclosed under medical privilege. However, in the context of a trial, some personal health information may be considered as evidential material and under the ordinary rules of disclosure require this material to be made available to the defence. The doctor may apply to the judge to withhold this part of their medical records. Section 69 of the Evidence Act 2006 allows judges to preserve the confidentiality of this information if it is thought there is more potential for harm by disclosing it, for example, harm to the complainant or harm to the public interest in maintaining confidential relationships between doctor and patient. (See Appendix 2) [3,8]

Rape Shield

A rape shield law limits a defendant's ability to introduce evidence or cross-examine complainants about their past sexual behavior. New Zealand's rape shield is contained under section 44 of the Evidence Act and states that 'in a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge'.[3] (Appendix 3) The Evidence Amendment Bill 2015 amended section 44 to regulate applications for permission, so that they must be submitted prior to trial.[9] This amendment is to provide reasonable notification to complainants to ensure they are prepared for difficult questioning.[10] New Zealand is one of the few jurisdictions where evidence of sexual history between the complainant and the defendant is allowed. Given that by law consent must be given at each separate sexual encounter, consideration has previously been given to making all evidence about the sexual experience of the complainant with any person, including the defendant, inadmissible except with the consent of the judge. However, the Law Commission deemed that sexual history with the defendant would almost always be deemed relevant.[11] Currently evidence of a complainant's sexual experience with the defendant only faces the normal relevance threshold under section 7 of the Evidence Act.[3]

Cross Examination

Given that in sexual violence trials the complainant is usually the main witness to the alleged offence, they often face lengthy cross-examination on their evidence by the defense counsel, challenging their credibility and reliability as a witness. The process of cross-examination is frequently reported as being unnecessarily disrespectful and unpleasant for complainants.[10] Cross-examination designed to humiliate, belittle or break a witness is not permissible.[2] Under Section 85 of the Evidence Act 2006 judges may disallow questions or direct witnesses not to answer any questions the judge considers are 'improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand'.[3] (See Appendix 4) Consideration has been given to including a reference to 'intimidating' questioning, but the Law Commission in its 2013 review of The Evidence Act 2006 made no recommendation to amend section 85.[3]

If an accused person wants to represent themselves, they cannot generally be prevented from doing so. In which case the defendant may be able to personally cross-examine the complainant about the alleged offence. This is however prohibited in sexual offence trials. Whilst the Evidence Act 1908 prohibited cross examination of a child complainant or a mentally disabled complainant in a sexual offence case by the accused personally, it was not extended to cover all complainants until this act was repealed and replaced by the Evidence Act 2006, section 95. (Appendix 5)[3]

Support

Section 79 of Evidence Act 2006 says that when giving evidence in a criminal proceeding a complainant is entitled to have one person near them to give them support and may with the permission of the judge have more than one person. (See Appendix 6)[3]

Delayed complaints or failure to complain

Jurors may have misconceptions about sexual violence that may influence their decisions. Judicial directions from a judge provide guidance to a jury about how it should approach the evidence put before it at trial and may be appropriate in sexual violence cases. Currently the only judicial direction in the Evidence Act 2006 that refers specifically to pre-existing attitudes about sexual violence is section 127. Introduced into the legislation in 1985, it provides for a direction on delayed complaints or failure to complain, recognizing that for many reasons including shame and shock, sexual assault victims often do not immediately inform someone about the offence. (See Appendix 7) [2,3]

Sexual Violence Court pilot

Following the Law Commission's recommendations, a two year specialist sexual violence court pilot was announced in 2016. This list of cases given priority within the District Courts will hear all Category 3 sexual violence cases proceeding to jury trial in Auckland and Whangarei. This court specialisation aims to recognise the uniqueness of sexual offence cases and its complainants, reduce delays and provide targeted support services that are integrated within the court system. This pilot does not present any law change to the current adversarial system of jury trial. The judges involved in this pilot will have received training in the complexities of sexual violence matters. [3, 12]

Incremental changes have been made to laws and court processes over the last few decades to improve the position of sexual violence complainants at trial in New Zealand. The 2015 Law Commission report 'Justice Response to Victims of Sexual Violence' made many proposals for improvement, some of which relate to court processes. Some initiatives based on these recommendations have already been put into motion, such as the Sexual Violence Court pilot. As of yet, no legislative changes have been made following the Law Commission's report. We will wait to see whether the government decides to implement major reform or opts to 'cherry pick' from this report, and what effect, if any, this will have on victims views of the criminal justice system for sexual violence and New Zealand, and if any significant improvement in reporting rates occurs.

References

1. The Ministry of Justice [Internet]. Research and Data, Survey Results, Sexual Violence. Published by the Ministry of Justice, New Zealand [Updated 07/09/2016; cited 01/09/2017]. Available from: https://www.justice.govt.nz/justice-sector-policy/research-data/nzcass/survey-results/results-by-subject/sexual-violence/#reported

2. Law Commission [Internet]. Justice Response to Victims of Sexual Violence, Criminal Trials and Alternative Processes, Report 136. Published by the Law Commission, Wellington, New Zealand. December 2015 [Cited 01/09/2017]. Available from: http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R136-The-Justice-Response-to-Victims-of-Sexual-Violence.pdf

3. Parliamentary Counsel Office, New Zealand Legislation [Internet], Evidence Act 2006. Reprint as at 14th July 2017 [Cited 01/09/2017]. Available from: http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393916.html

4.Victorian Law Reform Commission [Internet]. Sexual Offences: Law and Procedure Discussion Paper. Published by The Victorian Law Reform Commission, 25/10/2001 [Cited 01/09/2017]. Available from: http://www.lawreform.vic.gov.au/sites/default/files/Final%2BSexual%2BOffences_0.pdf

5.Kingi V, Jordan J. Responding to sexual violence: Pathways to recovery. Published by The Ministry of Women's Affairs, Wellington, New Zealand. October 2009 [cited 01/09/2017). Available from: http://women.govt.nz/sites/public_files/responding%20to%20sexual%20violence%20attrition-pdf.pdf

6. Victorian Law Reform Commission [Internet]. Sexual Offences: Final Report. Published by The Victorian Law Reform Commission, 2004 [Cited 01/09/2017]. Available from: http://www.lawreform.vic.gov.au/sites/default/files/FinalReport_0.pdf

7. Law Commission [Internet]. The 2013 Review of the Evidence Act 2006, Report 127. Published by the Law Commission, Wellington, New Zealand. February 2013 [Cited 01/09/2017]. Available at: http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R127.pdf

8. MEDSAC manual for the Medical Management of Sexual Assault, Police, law and court work, Disclosing medical information [Internet]. Published by MEDSAC, Auckland, New Zealand, 2013 [Cited 01/09/2017). Available from: https://medsac.org.nz/

9.New Zealand Parliament, Evidence Amendment Bill 2015 [Internet]. Published by New Zealand Parliament, 2 Jun 2015 [Cited 01/09/2017]. Available from: https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/51PLLaw22181/evidence-amendment-bill-2015-bills-digest-no-2218

10.Sinclair B. New Zealand's rape shield and the need for law reform to address substantial harm: When politics and the law must address social injury. 2016. Available from: http://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/6312/paper_access.pdf?sequence=2

11.Law Commission [Internet] Evidence, Report 55 - Volume 1: Reform of the Law. Published by the Law Commission, Wellington, New Zealand. August 1999 [Cited 01/09/2017]. Available from: http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R55%20v1.pdf

12. New Zealand Law Society [Internet] Sexual violence courts to be trialed. Published by the New Zealand law Society 20/10/2016. Available from: https://www.lawsociety.org.nz/news-and-communications/latest-news/news/sexual-violence-courts-to-be-trialled

Appendix 1

Evidence Act 2006
103 Directions about alternative ways of giving evidence
(1) In any proceeding, the Judge may, either on the application of a party or on the Judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.

(2) An application for directions under subsection (1) must be made to the Judge as early as practicable before the proceeding is to be heard, or at any later time permitted by the court.

(3) A direction under subsection (1) that a witness is to give evidence in an alternative way, may be made on the grounds of—
(a) the age or maturity of the witness:
(b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
(c) the trauma suffered by the witness:
(d) the witness's fear of intimidation:
(e) the linguistic or cultural background or religious beliefs of the witness:
(f) the nature of the proceeding:
(g) the nature of the evidence that the witness is expected to give:
(h) the relationship of the witness to any party to the proceeding:
(i) the absence or likely absence of the witness from New Zealand:
(j) any other ground likely to promote the purpose of the Act.

(4) In giving directions under subsection (1), the Judge must have regard to—
(a)the need to ensure—
(i)the fairness of the proceeding; and
(ii)in a criminal proceeding, that there is a fair trial; and
(b)the views of the witness and—
(i)the need to minimise the stress on the witness; and
(ii)in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
(c)any other factor that is relevant to the just determination of the proceeding.

(5) This section is subject to sections 107 to 107B, which apply to child witnesses in criminal proceedings.

Section 103(5): inserted, on 8 January 2017, by section 28 of the Evidence Amendment Act 2016 (2016 No 44).

105 Alternative ways of giving evidence
(1) A Judge may direct, under section 103, that the evidence of a witness is to be given in an alternative way so that—
(a)the witness gives evidence—
(i) while in the courtroom but unable to see the defendant or some other specified person; or
(ii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or
(iii) by a video record made before the hearing of the proceeding:

(b) any appropriate practical and technical means may be used to enable the Judge, the jury (if any), and any lawyers to see and hear the witness giving evidence, in accordance with any regulations made under section 201:
(c) in a criminal proceeding, the defendant is able to see and hear the witness, except where the Judge directs otherwise:
(d) in a proceeding in which a witness anonymity order has been made, effect is given to the terms of that order.

(2) If a video record of the witness's evidence is to be shown at the hearing of the proceeding, the Judge must give directions under section 103 as to the manner in which cross-examination and re-examination of the witness is to be conducted.

(3) The Judge may admit evidence that is given substantially in accordance with the terms of a direction under section 103, despite a failure to observe strictly all of those terms.

Appendix 2

Evidence Act 2006
69 Overriding discretion as to confidential information
(1) A direction under this section is a direction that any 1 or more of the following not be disclosed in a proceeding:
(a) a confidential communication:
(b) any confidential information:
(c) any information that would or might reveal a confidential source of information.

(2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
(b) preventing harm to—
(i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
(c) maintaining activities that contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the Judge must have regard to—
(a) the likely extent of harm that may result from the disclosure of the communication or information; and
(b) the nature of the communication or information and its likely importance in the proceeding; and
(c) the nature of the proceeding; and
(d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
(e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
(f) the sensitivity of the evidence, having regard to—
(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
(ii) the extent to which the information has already been disclosed to other persons; and

(g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.

(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

Appendix 3

Evidence Act 2006
44 Evidence of sexual experience of complainants in sexual cases
(1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.

(1A) Subsection (1) is subject to the requirements in section 44A.

(2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.

(3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

(4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1).

(5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.

(6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

Section 44(1A): inserted, on 8 January 2017, by section 14 of the Evidence Amendment Act 2016 (2016 No 44).

Appendix 4

Evidence Act 2006
85 Unacceptable questions
(1) In any proceeding, the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.

(2) Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to—
(a)the age or maturity of the witness; and
(b)any physical, intellectual, psychological, or psychiatric impairment of the witness; and
(c)the linguistic or cultural background or religious beliefs of the witness; and
(d)the nature of the proceeding; and
(e)in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

Appendix 5

Evidence Act 2006
Section 95 amended (Restrictions on cross-examination by parties in person)
(1) A defendant in a sexual case, or a defendant in or a party to criminal or civil proceedings concerning domestic violence or harassment, is not entitled to personally cross-examine—
(a) a complainant, or a party who has made allegations of domestic violence or harassment:
(b) a child (other than a complainant) who is a witness, unless the Judge gives permission.

Appendix 6

Evidence Act 2006
79 Support persons
(1) A complainant, when giving evidence in a criminal proceeding, is entitled to have 1 person, and may, with the permission of the Judge, have more than 1 person, near him or her to give support.

(1A) A child witness, when giving evidence in a criminal proceeding, is entitled to have 1 person, and may, with the permission of the Judge, have more than 1 person, near him or her to give support.

(2) Any other witness, when giving evidence in any proceeding, may with the permission of the Judge, have 1 or more support persons near him or her to give support.

(2A) Subsections (1), (1A), and (2) apply whether the witness or complainant gives evidence in an alternative way or in the ordinary way.

(3) Despite subsections (1), (1A), and (2), the Judge may, in the interests of justice, direct that support may not be given to a complainant or a child witness or other witness by—
(a)any person; or
(b)a particular person.

(4) A complainant or a child witness or other witness who is to have a support person near him or her while giving evidence must, unless the Judge orders otherwise, disclose to all parties as soon as practicable the name of each person who is to provide that support.

(5) The Judge may give directions regulating the conduct of a person providing or receiving support under this section.

Section 79(1A): inserted, on 8 January 2017, by section 24(1) of the Evidence Amendment Act 2016 (2016 No 44).
Section 79(2A): inserted, on 8 January 2017, by section 24(2) of the Evidence Amendment Act 2016 (2016 No 44).
Section 79(3): replaced, on 8 January 2017, by section 24(3) of the Evidence Amendment Act 2016 (2016 No 44).
Section 79(4): amended, on 8 January 2017, by section 24(4) of the Evidence Amendment Act 2016 (2016 No 44).

Appendix 7

Evidence Act 2006
127 Delayed complaints or failure to complain in sexual cases
(1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.

(2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.