CRIMINAL LAW REFORM COMMITTEE

REPORT ON THE POSITION OF YOUNG WITNESSES IN CASES INVOLVING A SEXUAL OFFENCE

PRESENTED TO THE MINISTER OF JUSTICE

JANUARY 1977

WELLINGTON
NEW ZEALAND

THE POSITION OF YOUNG WITNESSES IN CASES INVOLVING A SEXUAL OFFENCE

1. In 1975 the then Minister of Justice referred to the Committee the question whether a special procedure, namely, the Israeli statutory Youth Interrogator scheme or any scheme analogous to that, ought to be adopted for the hearing of young persons as witnesses as to sexual offences.

2. The Israeli scheme provides that no child under 14 years may be heard as a witness without the permission of the Youth Interrogator. Where permission is withheld, the Interrogator gives evidence in place of the child, protecting the child against the assumed danger to his or her mental health from exposure to court proceedings.

3. Advocates of such reform in New Zealand and other countries claim that serious psychological harm may be done to a child who is required to give evidence of an alleged sexual offence in court among strangers and in unfamiliar circumstances and after perhaps a considerable effluxion of time during which he might have tried to forget the experience. We recognise that claim as being of central importance in the Minister's reference and have sought by various means to test its validity.

4. In the course of our enquiries into the New Zealand and Israeli experiences of child witnesses as to sexual

offences we gave lengthy and close consideration to the questions of pretrial testing of the veracity of such persons' statements and the likely effects of any substantial changes to the law on the existing rights of the accused.

5. We do not at present recommend any change in the law or procedure relating to the evidence of a child witness, or relating to the position of a person accused of a sexual offence at whose trial a child may be required to give evidence.

6. We have reached the conclusion that it is necessary that a child witness appear before the court and be exposed to cross-examination. We are unable to reach any safe conclusion as to the likely harmful effects upon the child. We are not aware of any reliable scientific research done on that issue. Most of the published material appears to present the views of what adults thought children ought to feel. None of the professional persons who discussed the issue with us was able to provide evidence that harm commonly resulted from the court experience as opposed to the sexual experience.

7. We consider that a properly planned and organised programme of research should be undertaken over a period of years to ascertain what actual effect giving evidence has upon children. We recognise that the nature of that programme and the best agencies to undertake it are matters for decision by others.

8. We do not find the Israeli scheme or any analogous system acceptable; firstly because it is not yet shown that children need the protection it offers, and secondly because such a system is seen by us as substantially

eroding the accused's traditional evidentiary safeguards. We are not impressed by the claim that under the Israeli scheme the accused's position is guarded by the Interrogator's skill as a detector of lies and other misleading information in children and by the requirement that the Interrogator's evidence (which he gives in court on the child's behalf) be corroborated. We think that an Interrogator would no more be able to detect whether a child is telling the truth than would an experienced child psychiatrist. There is evidence that the latter can have considerable difficulty in making such a determination. With respect to the corroboration requirement, under the Israeli system the testimonial "corroboration" of young witnesses to a sexual offence is also given in court by the Interrogator.

9. Although a Youth Interrogator might have a strictly limited value as a pretrial tester of the veracity of a child, that advantage is cancelled by a subsequent court's (and especially a jury's) probable natural inclination to be less than cautious about accepting evidence knowing that the child witness has "passed the test" of credibility conducted by an "expert" interrogator of children. In that way the accused could be disadvantaged. Because Israel does not have trial by jury, this possible injustice is less apparent there than it would be in a Supreme Court trial in New Zealand.

10. Possible procedural reforms: We considered certain other possible procedural reforms of a less major kind. We comment on these below.

(1) Limitation on the right to cross-examine

We think that any restriction on the amount or nature of cross-examination would unjustifiably prejudice the accused.

(2) Conduct of the trial

(a) The Judge to have the child witness sitting in a chair outside the witness box:

(b) Neither the Judge nor counsel to wear wigs or gowns:

(c) The child's evidence to be taken in shorthand rather than on a typewriter:

(d) The child's evidence to be taken in the Judge's room or at some other place less solemn and forbidding to a child:

(e) The public to be excluded from the Court.

At this stage we have no recommendation to make on these suggestions. Most of us were impressed by the view of a senior Social Welfare worker, with whom we discussed them, that formality is likely to lead to a greater degree of truthfulness on the part of the child than informality. That person's court experience also confirmed the suspicion of the majority that most children are not intimidated by the formality of the surroundings, and that once they begin to give evidence their attention is focussed on counsel asking questions and on the answers they are giving.

(3) Presence of parents: Permitting or requiring parents or guardians to be present when children are giving evidence.

We think there is no universal rule that ought to be applied. Some children seem to want or need the reassurance of their parents' presence, but others find it an inhibiting factor. We think that this is a matter that has to be left for determination by the court in each case.

(4) Delays: Undue delays between depositions and trial to be eliminated.

We think that such delays probably worry children even more than adults, and that any effort to reduce anxiety is to be encouraged.

11. We gave this topic careful consideration at four meetings. At one meeting we were fortunate to have the opportunity of discussing many aspects of the subject with Mr G.C. Kent, a senior law practitioner with some professional experience of child witnesses, and with Miss M.S. Eccles, an officer of the Social Welfare Department, who is currently working with the Auckland Magistrate's Court.

12. Written materials considered by the Committee included papers prepared by Mr J.C. Pike, our former Secretary, and Associate Professor B.J. Brown, a member of the Committee. The latter dealt with the possible application of the pretrial veracity-testing function of the Israeli Youth Interrogator to New Zealand. Mr Pike ranged much more widely and, in addition to describing and evaluating the Israeli scheme, he dealt in some detail with the existing New Zealand law and police practice in prosecutions involving child witnesses, with available medical evidence for and against the psychological harm assertion, and with the likely effect of an Israeli-type scheme on the accused's right to conduct a pro se defence.

13. Other material examined or referred to included a letter addressed to the Committee by Mr L.G. Anderson, formerly Director of the Child Welfare Division, in response to the Committee's invitation to comment on how a child could be affected by a sexual assault and subsequent court appearance and how the effects of the trial could be mitigated; the Israeli Law of Evidence Revision

(Protection of Children) Law 1955 as amended in 1962; and an article on the Israeli scheme by Justice Reifen in 49 Journal of Criminal Law, Criminology and Police Science 222. Two members who had entered into correspondence with Israeli lawyers were able to draw on the latter's practical experience of the Israeli legislation.

14. Attached to this Report as an Appendix is a brief summary of the salient provisions of the Israeli Law of Evidence Revision (Protection of Children) Law, 1955, as amended in 1962.

15. Conclusion and recommendation

(i) We do not at present recommend any change in the law or procedure relating to the evidence of a child witness or relating to the position of a person accused of a sexual offence at whose trial a child may be required to give evidence [paragraph 5].

(ii) We recommend that research be undertaken over a period of years to ascertain the actual effect that giving evidence has upon children [paragraph 7].

R.C. Savage
Chairman

January 1977

MEMBERS:
Mr R.C. Savage Q.C. (Chairman)
Associate Professor B.J. Brown
Professor I.D. Campbell
Mr W.V. Gazley
Inspector R. McLennan
Mr P.G.S. Penlington
Mr K.L. Sandford
Mr P.B. Temm Q.C.
Mr D.A.S. Ward
Ms P.M. Webb
Mr P.J. Cullen (Secretary)

APPENDIX

SUMMARY OF LAW OF EVIDENCE REVISION (PROTECTION OF CHILDREN) LAW, 1955, AS AMENDED IN 1962

(a) No child under 14 years, who is the victim of an alleged offence against morality (i.e. any of the offences specified in the Schedule to the Statute), or a witness to it, or suspected of committing it, may be heard as a witness at the trial of a person charged with the offence without the permission of the Youth Interrogator [s.2]. This rule also applies to pretrial examination of a child [s.4], except for questions put to the child at or soon after the commission of the alleged offence [s.4(1)], or questions put by the child's parents, guardian, or other person in loco parentis [s.4(2)]. No person may be present at the examination of a child by the Interrogator without the latter's permission [s.5]. The presence or participation of a child in police investigation operations may occur only in accordance with the Interrogator's directions [s.7].

(b) Where the Interrogator's permission for the child to be heard as a witness is withheld, the Interrogator appears in court to be examined and cross-examined on the statements made by the child [s.9].

(c) Youth Interrogators are appointed only after consultation with a panel comprising a juvenile

court judge, an expert in mental hygiene, an educator, an expert in child care, and a senior police officer [s.3].

(d) Evidence as to an offence against morality taken and recorded by an Interrogator and any minutes or report of an examination as to such an offence taken by an Interrogator are admissible [s.9].

(e) Where evidence has been so referred to the Court, the Interrogator may be asked to re-examine the child on a particular point, but he may refuse to do so if he considers that further questioning is likely to cause psychological harm [s.10].

(f) A person shall not be convicted on evidence by a Youth Interrogator unless it is supported by other evidence [s.11].