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Ruth Fairhall
General Manager, Courts and Justice Services Policy
Ministry of Justice
Wellington, 6011

By email: Ruth.Fairhall@justice.govt.nz

Dear Ruth,

Re: Law Commission recommendations: improving the justice response to sexual violence

Introduction

Thank you for seeking views from the New Zealand Law Society's Criminal Law Committee on the Law Commission's 2015 recommendations that:

a) the "Legal Services (Quality Assurance) Regulations 2011 should include experience and competence requirements applicable to defence counsel who appear in sexual violence trials on a legal-aid basis" (r 26);[1]

b) the "Evidence Act 2006 should provide that an adult complainant in a sexual violence case is entitled to give their evidence in chief in one or more of the alternative ways set out in section 105 or in the ordinary way set out in section 83" (r 3);[2] and

c) the "Evidence Act 2006 should include a provision to the effect that complainant witnesses in sexual violence cases may pre-record their cross-examination evidence in a hearing prior to trial, unless a judge makes an order to the contrary" (r 5).[3]

Confidential consultation

The Law Society is concerned that the legal profession and other stakeholders have not been adequately consulted about the Law Commission's recommendations. The Commission's 2015 report was prepared on a tight timetable that precluded public consultation and the Commission therefore did not have the benefit of feedback from the profession on what training might be needed and what form that training should take for example. These recommendations will be of considerable interest and importance to the criminal bar and legal aid lawyers in particular, and if they are to proceed there will need to be proper engagement and discussion with the profession.

Notwithstanding that the Commission's 2015 report is in the public domain, the Ministry has asked for the Law Society's views on the recommendations on a confidential basis. These recommendations have therefore been considered by the Law Society's Criminal Law Committee,

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1 *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes,* NZLC R136, December 2015 – Recommendation 26 (r 26).
2 Ibid, recommendation 3 (r 3).
3 Ibid, recommendation 5 (r 5).

whose members are senior and experienced criminal and legal aid practitioners (with current and previous prosecutorial experience), and the committees' comments are set out below.

The Law Society's preferred approach to consultation is for open consultation. Open consultation provides an opportunity for full input from the profession and makes for better policy and legislation. Early, informed consultation with those working in the field helps to ensure effective and workable reforms and an effective justice system. The Law Society considers that public consultation with relevant stakeholders including the legal profession will be needed if the government decides to proceed with the Commission's recommendations.

Recommendation 26 – specialist training and competence requirements

The committee agrees that some form of specialist training for defence counsel, including legal aid counsel, who appear in sexual violence trials, may be helpful and appropriate. Such training may help minimise the risk of oppressive or inappropriate questioning of vulnerable witnesses, whilst ensuring the defendant is able to mount an effective defence. However, there is no explanation as to what further experience requirements would be required beyond the current experience requirements for category 3 offending. There is also no explanation as to how or why having a further experience requirement for these cases would "achieve a consistent approach to the conduct of sexual trials and avoid unnecessary trauma".[4]

For the reasons set out in the Law society's previous correspondence of June 2017,[5] the committee considers that specialist training should be encouraged, rather than being made a mandatory prerequisite for appointment as legal aid counsel in sexual violence trials. This could be achieved without any amendment to the current Legal Services (Quality Assurance) Regulations 2011 (the Regulations). The New Zealand Law Society's Continuing Legal Education body is an appropriate avenue for the facilitation of training programmes and is currently providing training in Auckland in regard to the Sexual Violence Court Pilot.

As noted in the Law Society's previous correspondence, if r 26 is introduced as a *mandatory* requirement on legal aid counsel, "this would inevitably reduce the number of legal aid practitioners available to undertake sexual violence trials and would therefore affect the defendant's right to choose his or her own counsel."[6] We note the Ministry have highlighted this concern in their background document provided to the Law Society however, given the increased complexities and sensitivities with sexual violence trials, we consider that the number of lawyers able to undertake these trials should be encouraged not discouraged. Any such training should therefore remain voluntary.

Further, the committee understands this recommendation would be limited to those counsel appearing on legal aid. As noted in the Law Society's previous correspondence, if the recommendation proceeds, it would be piecemeal since r 26 does not cover privately instructed (non-legally aided) counsel. While that is the same as with all legal aid requirements it may have a unique effect in sexual violence cases.

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4 Ministry of Justice, background information *Pre-recording evidence*, at [2].

5 Letter to MoJ *Legal aid defence counsel – training and competence requirements in sexual violence trials,* 2 June 2017 (attached).

6 Ibid, at p 3.

Sexual violence cases can be some of the most difficult for counsel involved in the case and often form the greatest percentage of appeals due to counsel error. As such, these cases are subject to heightened scrutiny. If specialist training requirements are made mandatory on top of these current factors, there is a real risk that some senior and competent counsel will simply choose not to practice in sexual violence cases. The committee also considers that if such additional training is required, then at a minimum, an associated review of remuneration for sexual violence cases, to the equivalent of category 4 (for the purposes of legal aid), is necessary. In this regard, the Committee acknowledges the Ministry is currently undertaking a review of legal aid.

Further, practising criminal lawyers should not necessarily be constrained by additional training requirements where they have already demonstrated sufficient experience and competence to act as a professional advocate in accordance with the Regulations.

The committee does not propose to comment further on r 26 beyond the comments above and that outlined in the Law Society's previous correspondence on this recommendation.

Recommendations 3 and 5 – pre-recording of examination in chief and cross-examination

R 3 and r 5 provide that there should be a statutory presumption that complainants in sexual violence cases are entitled to give their evidence in an alternative way including by having their examination in chief and cross-examination pre-recorded, unless a Judge makes an order to the contrary. The committee notes that section 105 of the Evidence Act 2006 (the Act) already permits the pre-recording of cross-examination, as confirmed by the Court of Appeal in *M v R.*[7]

The committee acknowledges the helpful background information provided by the Ministry which highlights the approach to pre-recorded evidence in Australia and the United Kingdom. We also acknowledge the recognised benefits for complainants in sexual violence cases, which are understandably very difficult and distressing.

However, the committee considers that pre-recording evidence, particularly cross-examination, for complainants in sexual violence cases should remain available on a case by case basis and not via a statutory presumption. The Law Society recently made a submission to the Law Commission on the 2nd Evidence Act review.[8] In that submission it was noted, in regard to complainants, that:[9]

> "The Law Society supports the approach taken by the Court of Appeal in M v R. The pre-recording of cross-examination should be a matter for the discretion of the judge, and should only be used in very compelling cases. The Law Society does not see a compelling case for a presumption in favour of pre-recording of cross-examination for any witnesses, including a complainant. Although a propensity witness may in fact be a complainant in another case, various protections can be put in place for that propensity witness, such as screens etc."

As for all vulnerable witnesses, the Law Society acknowledged:[10]

> "…the issues that arise in respect of vulnerable witnesses but does not support an entitlement to have all evidence from vulnerable witnesses pre-recorded in advance of a criminal trial. The starting

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7 *M v R* [2011] NZCA 303.

8 NZLS submission on the 2nd Evidence Act Review found here: https://www.lawsociety.org.nz/__data/assets/pdf_file/0003/123447/l-LC-Evidence-Act-Review-21-6-18.pdf

9 Ibid, at q 34, p 18.

10 Ibid, at q 35, p 18.

> point for a criminal trial remains that the tribunal of fact sees a witness in real time and has an ability to assess that witness. A significant issue is the difficulty that arises with ongoing Police disclosure, which is very common and can even occur in serious trials only a matter of hours prior to the start of the hearing. If late disclosure occurs and the relevant witness has already been cross-examined, there does not appear to be any practical solution other than to recall the witness for further cross-examination. Any provisions which may force a defendant to disclose otherwise privileged aspects of their defence prior to trial and thereby give the prosecution time to alter its case to "answer" the defence case prior to trial, significantly impact on a defendant's right to a fair trial."

The committee agrees with these comments and whilst complainants in sexual violence cases (similar to child witnesses) should be eligible to have their evidence pre-recorded, we remain of the view that the prosecutor should have to apply on a case by case basis rather than via a statutory presumption. Judges should continue to decide on a principled basis whether evidence in chief or cross-examination should be presented by way of pre-recorded video interview and/or the pre-recording of evidence. The committee acknowledges that some Australian states, including Western Australia, allow sexual violence complainants to have their evidence (including cross-examination) pre-recorded however, our understanding is that this is not a statutory presumption but rather at the discretion of the Judge following an application by the prosecutor.[11]

The committee's principle concerns with pre-recorded cross-examination are addressed in more detail below.

Disclosure issues

The Court of Appeal in *M v R* noted concerns around the issues with disclosure including that pre-recording should not take place before full disclosure has been made.[12] The committee agrees with this observation. If pre-recording takes place before full disclosure has been made, the defence may lose the opportunity to question a complainant on relevant aspects of the prosecution's case which are only subsequently disclosed to the defence. Although the Law Commission noted that this is a practical problem which could be addressed in the design and operation of the processes for pre-recording,[13] in the committee's experience, defence counsel often receive substantive new disclosure right up until trial, sometimes more than 12 months after the charge has been laid. This also includes late third-party disclosure including counselling notes, CYFS reports for example, which are often common features in sexual violence cases. Some disclosure (such as ESR evidence) can substantially change the defence theory of the case.

Further, evidential decisions on the part of the prosecution can often be made right up to the last minute before trial and Crown Charge notices may be amended and received late. Therefore, the 'stage in the pre-trial process' when pre-recording could be undertaken could only be at the point that the case is 'ready for trial' i.e. when all disclosure is complete and all pre-trial arguments have been dealt with.

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11 Although the Court's discretion in South Australia is extremely constrained – see Evidence Act 1929, section 13A.

12 Above n 7, at [35].

13 Above n 1, at [4.71].

Impact on defendant's rights

The Court of Appeal in *M v R* said:[14]

> "Fourthly, a very relevant "fair trial" factor is that the jury would not be present for the cross-examination. Defence counsel would lose the ability to tailor his or her cross-examination depending upon the reaction of the particular jury to it. The jury would also lose the significant benefits arising from a live cross-examination of the key witness. At best they would get to view a split screen, with the witness on one side, the cross-examiner on the other. They would not be able to choose where they looked. They would not be able to assess the accused's reaction to the evidence as it was being given. We appreciate the accused would be in court as the videoed cross-examination was played, but by then the accused's reaction might well be staged, not spontaneous."

The committee agrees with these observations and also notes that there may be occasions when the complainant may not come up to brief during the trial. If the evidence of the complainant is pre-recorded, including cross-examination, it allows the prosecution an opportunity to "tidy up" their trial opening address and the charges that are presented to the jury, which can have impact on the overall trial. If pre-recording of cross-examination were to take place, one solution could be to not permit any further changes to the Crown Charge Notice after the pre-recording has taken place. Any applications for dismissal under section 147 of the Criminal Procedure Act 2011 would then take place in the presence of the jury.

It is also arguable that the defence may be prejudiced by not hearing the Crown opening address before being required to cross-examine the complainant. Further, there may be flow on effects to the trial itself if a defendant is not satisfied with the way pre-trial cross-examination has been conducted and seeks to change representation. We note the Ministry's observation that this does not seem to be a significant concern in the international models however, if the new lawyer has to apply to have the complainant recalled or is left to run with the previous counsel's theory of the case, this will inevitably have significant effects on the complainant, the rights of the defendant and the trial itself.

Further, the Committee notes the background document at para 16 where it is stated, in the context of proposals for the pre-recording of evidence, that "the defendant is entitled to be present, but not necessarily in the room". The Committee has significant concerns with any such proposal, as any restraint on the right of the defendant to be physically in the same room as her or his lawyer while trial evidence is given would be in breach of their fundamental rights under the New Zealand Bill of Rights Act 1998.

Overall, the committee is significantly concerned that presumptive pre-recording of cross-examination will erode defendants' right to silence and fair trial rights.

Other considerations

The committee notes that one of the stated benefits in the background material provided is that there is "earlier resolution of cases (for example, through early guilty pleas or charges dropped as the parties understand the quality of the prosecution cases sooner)"[15] and that in the United

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14 Above n 7, at [38].

15 Ministry of Justice, background information *Pre-recording evidence*, at [14].

Kingdom there has been an increase in earlier guilty pleas when cross-examination has been pre-recorded.[16]

While earlier guilty pleas may well be beneficial to the complainant, it is noted that the cited increase in guilty pleas in the United Kingdom is only after the complainant has been cross-examined. Therefore, the present significant benefit that complainants obtain where defendants plead guilty before trial (i.e not having to be cross-examined at all) will be lost. We consider that the proposals could, potentially, lead to an increase in the total number of complainants in sexual cases who are subjected to cross-examination.

Conclusion

We hope these comments are helpful to the Ministry. If you have any questions or wish to discuss this submission, please contact the convenor of the Law Society's Criminal Law Committee (Steve Bonnar QC) through the secretary to those committees, Amanda Frank (amanda.frank@lawsociety.org.nz / ddi 04 463-2962).

Yours sincerely

Tiana Epati
Vice President

16 Ibid, at p 5.