

**Paper for presentation at The Second International Conference on Children
exposed to Family Violence - London, Ontario 1997**

Child Witnesses in the Criminal Justice Jurisdiction in New Zealand

In New Zealand, 1989 was a year which saw wide ranging legislative reforms implemented for the benefit of child witnesses in the criminal jurisdiction. These reforms were the result of an investigative committee on the needs of children as victims of abuse in consequent legal appearances. The reforms came primarily in the form of amendments to the Evidence Act 1908. A new set of provisions ss.23C - 23I was inserted with the mechanics of their operation being the Evidence (Videotaping of Child Complainants) Regulations 1990. Not only was safety of child complainants an issue for these reforms, but also the need to 'turn the tide' from historical notions of children's capacity to tell the truth. Justice Hardie Boys, then sitting on the New Zealand Court of Appeal (now Governor General) stated:

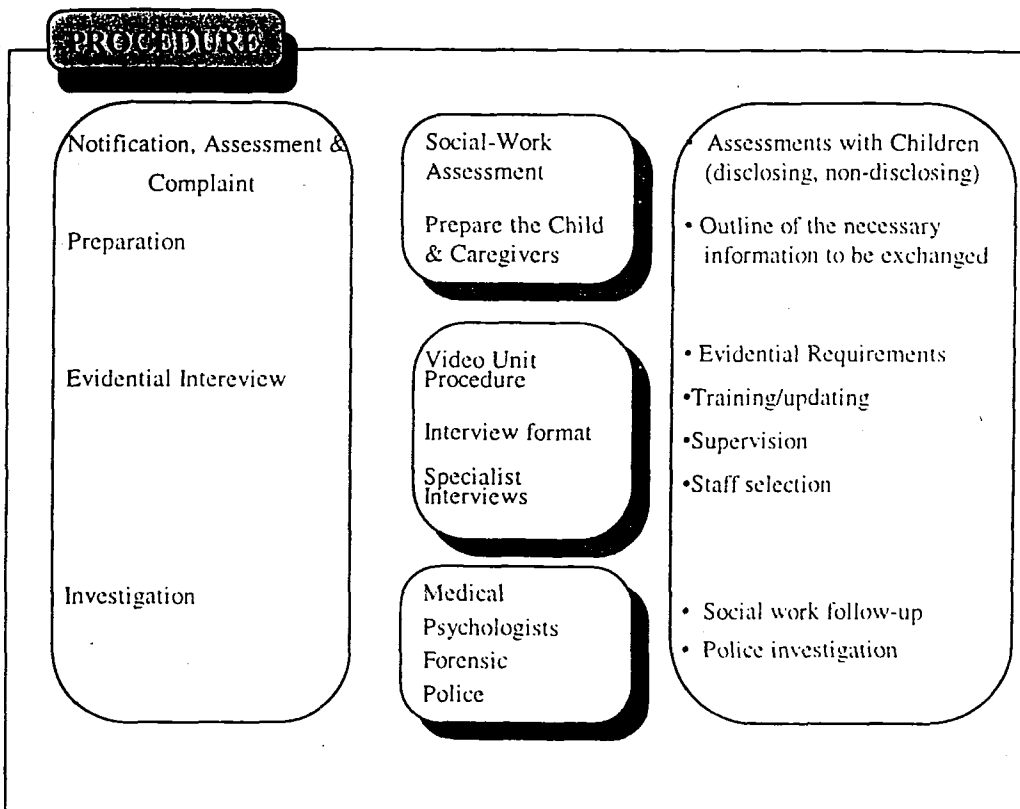
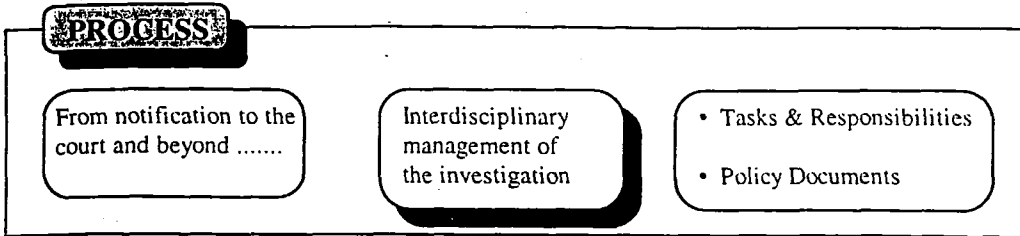
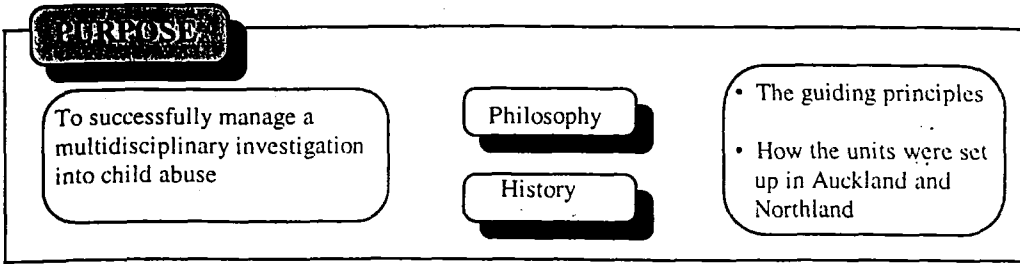
"Section 3 of the Evidence Amendment Act 1989 added to the principal Act new sections 23C - 23I, designed to facilitate the giving of evidence by child complainants and to do away with some discredited notions concerning the quality of their evidence".¹

The Evidence Amendment Act 1990 and the mechanics of that Act embodied in the Regulations (already mentioned) covered a wide sweep of needs for child witnesses. These began at the beginning of the notification of a disclosure of abuse and tried to track the child through to the conclusion of their complaint in the legal sphere. Necessarily with reforming legislation there are cracks or chasms which are discovered, and I will deal with these later in the paper.

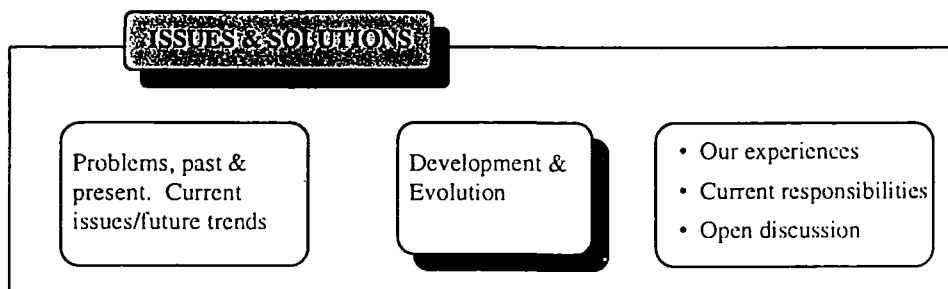
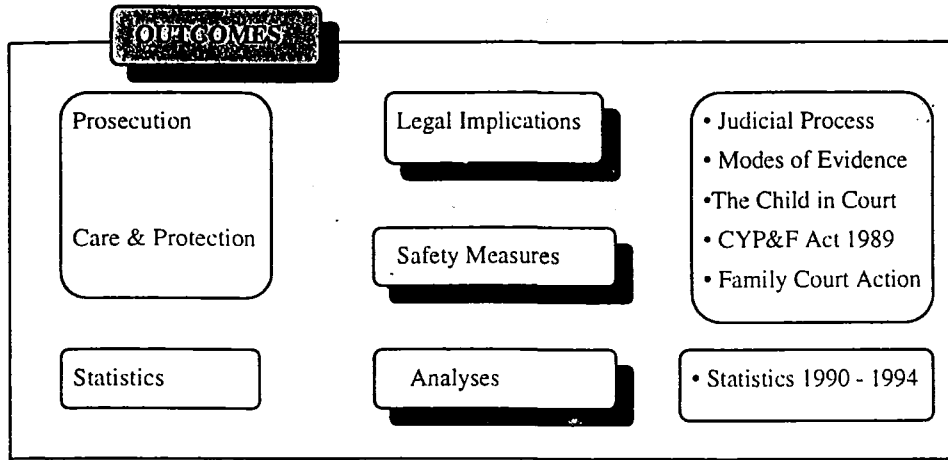
Briefly the major areas of reform are best followed by way of a flow chart, rather than narrative form. I will then deal with the major issues which arise from these procedures.

¹ R v S [1993] 2 NZLR 142, 144.

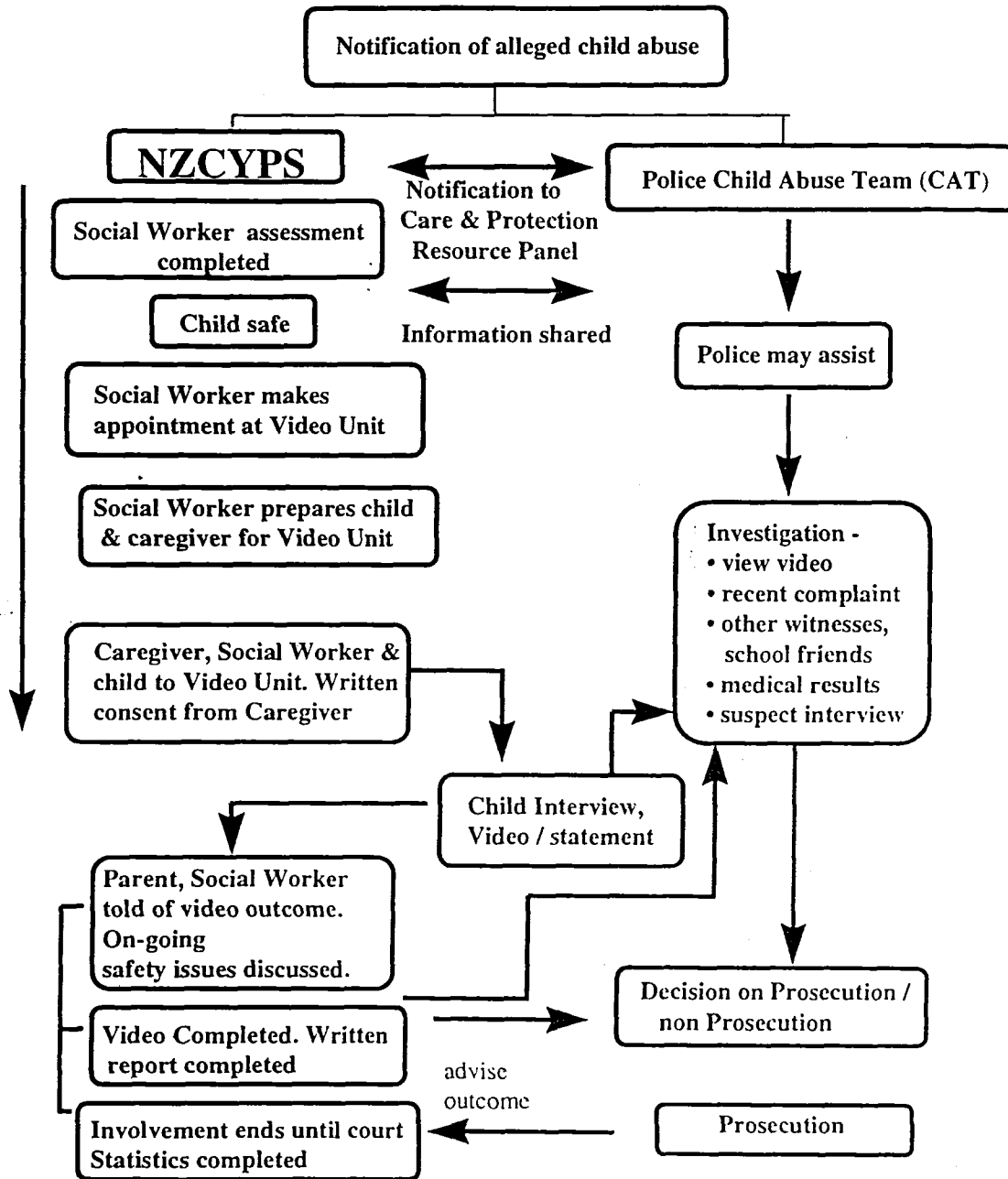
A New Zealand Model of Child Abuse



A New Zealand Model of Child Abuse Investigation (cont.....)

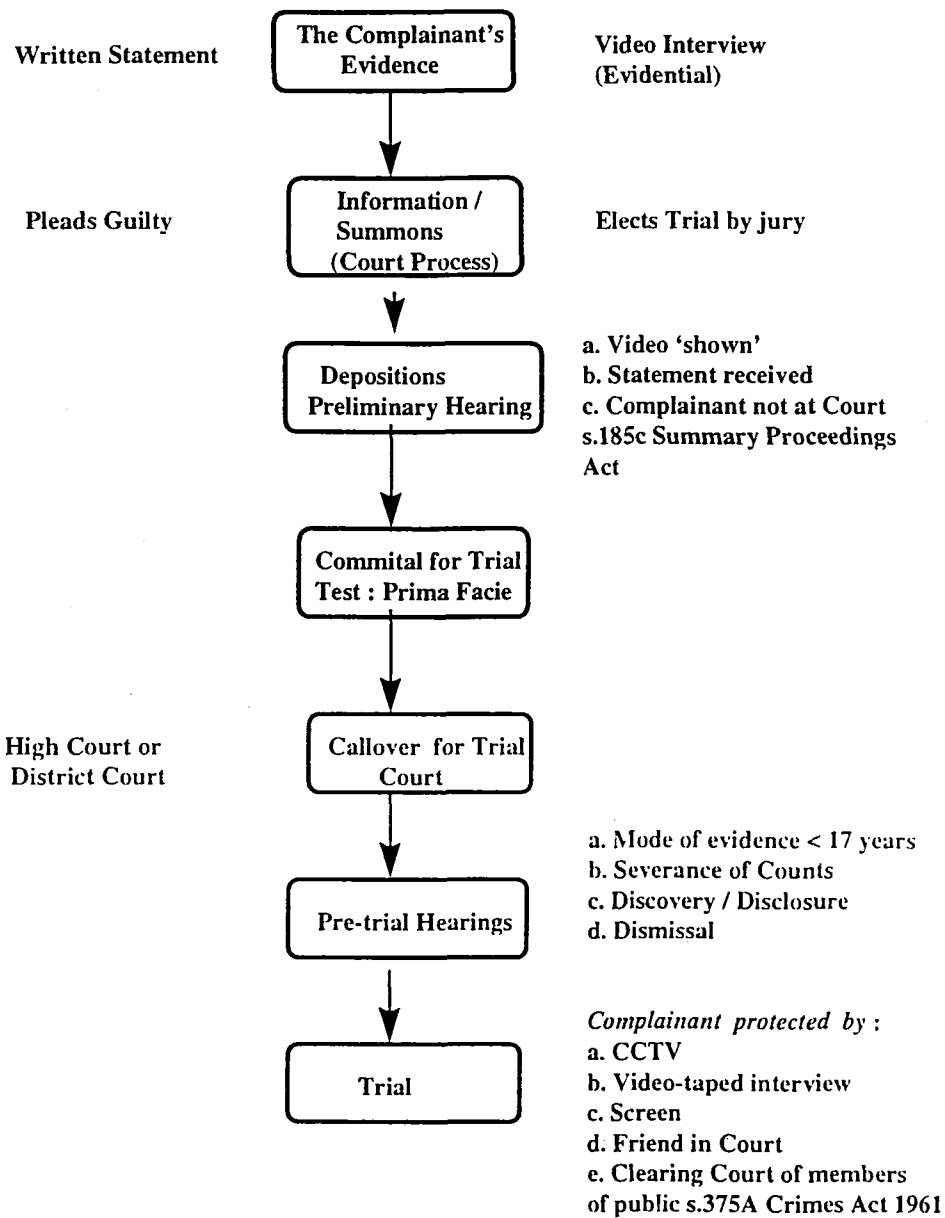


Evidential Interview Process Outline



1995 CAVU

Cases of a Sexual Nature (New Zealand)



1995 CAVU

The Major Issues

1. The Interviewing and Competency Requirement

Regulation 5 of the Evidence (Videotaping of Child Complainants) Regulations 1990 (the mechanics of this amendment) provides for the specialist interviewer to conduct an evidential interview with the child complainant. In New Zealand, these interviewers are specialists in the field of child behaviour and psychology and are usually professional child psychologists or social workers employed by the Children and Young Persons Service (CYPS) and trained in this type of interviewing by this Service with regular supervision.

With regard to child witnesses, competency involves the essential issue of children being permitted to give evidence, given their tender years and the basic question of whether they have sufficient intellectual development to give a rational account, and at the same time understand the binding obligation to tell the truth. The test of competency could well be said to be a 'hurdle' over which children must jump, before a court will hear their testimony.

The legislative reforms addressed this competency issue directly and provided a new route, that of the specialist interviewers, which provided a much smaller hurdle. The requirement of Regulation 5(1)(c)(i) allows the interviewer to, in effect, be put into the shoes of the judge. The child complainant now provides their evidence-in-chief by way of videotaped evidential interview and not orally before the court. Wylie J stated in regard to this reform:

*"These new rules of evidence relating to child complainants represent a radical departure from previously accepted principles. While their purpose is not to be frustrated by mere formalism and undue adherence to technicalities I hope the day has not come that the elementary concept that evidence must be given with a sense of understanding and solemnity is to be discarded."*²

Thus it is in the majority of cases that it is the interviewer who ascertains on videotape that the child understands the difference between truth and lies and can promise appropriately to tell the truth (known as the truth, lies and promises test), with the Judge either verifying this competence after viewing the videotaped evidence, or by making sure by an informal talk with the child prior to testimony.

2. Evidence-in-Chief by way of Videotaped Interview

The reforms provide for further protection of the child witness in that their appearance at court is limited. Depositions hearing and trial hearing have the benefit of the evidential videotaped interview. This tape (or tapes) can be the subject of a pre-trial application by both prosecution and defence as to

² *R v MEF* [1992] 2 NZLR 372, 377.

its inclusion as evidence or that some parts of the tape need editing. The trial judge can then exercise their judicial discretion as to any excision of the tapes. Further any arguments about the issue of competency can be decided before the trial by viewing by the judge.

3. Modes of Presentation of Child Witnesses/Complainants

Sections 23D and 23E of the Evidence Amendment Act provide for this. Section 23D provides that pre-trial applications may be made asking for directions on the appropriate mode by which a child will give their evidence i.e. whether they will be liable to cross examination. The normal mode of giving of evidence by the complainant (ie in the presence of the accused and the jury) is not excluded by this provision, and should not be departed from where such departure is not warranted.³ Subsections (2) and (3) assist the Judge in his or her decision as to the mode or process of a complainant giving evidence.

This latter provision of the section does pose a dilemma for the Judge in that it is not necessarily a clear cut decision with regards to each child complainant, as each child will view the court process in a different way, and be affected in a different way.

*"It would be a grave mistake to see the availability of technology as a panacea to the difficulties child complainants may face when giving evidence. This giving of evidence is not just an event in isolation; it is part of a process which begins from the moment the alleged offence occurs"*⁴

Thus the only guidance for the judge in deciding the appropriate mode in which a child complainant's evidence is to be given, is that they must have regard to the two fundamental protective edicts: (i) to minimise the stress on the complainant; and (ii) to ensure a fair trial for the accused.

At the initial stages of implementation of these reforms there was much debate between Justices as to the question of deviating from the normal mode of giving evidence in cases involving children, however the Court of Appeal seems to have opted for a liberal approach to the provision of alternative modes of giving evidence. The Court stated:

*"The broad approach is clearly to ensure that the old technicalities of evidence and traditional approaches to the giving 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 of a fair trial."*⁵

The other point to note about the provision s.23D is that subsection (3) permits the judge to receive any report from persons he or she feels are qualified enough to make recommendations as to the mode by which child complainants give their evidence. There is no qualifying of that person's credentials

³ *R v W* (1990) 6 CRNZ 599, 600-601 per Tompkins J.

⁴ Heneghan, Taylor and Geddis, 'Child Sexual Abuse (III): Child Witnesses and the Rules of Evidence (1990) NZLJ 425, 428

⁵ *R v Lewis* (1990) 6 CRNZ 350, 411.

(as in s.23G dealing with expert witnesses). Thus the New Zealand judiciary have accepted such assistance from a wide ranging number of people whose experience and qualifications are equally wide ranging. In *R v Hauiti*⁶ the guidance of a Social Worker was taken; in *R v N*⁷ the guidance of a primary school teacher who specialised in drama and who also held herself out to be a counsellor of sexual abused children. These are just two examples of the extremes of credentials provided by those approached and accepted by judges as providing guidance in the matter of modes.

Section 23E gives the judge a choice of how the child may give evidence from the provision of a number of options provided. The choice of mode for a child giving evidence is innovative, and comes from the motivation of assisting children tell their story in a safe and supportive environment. These modes are: by pre-recorded videotape; behind a two-way glass screen; behind a wall partition in the courtroom or through closed circuit television in a room other than the court room where the accused is present.

These different modes of giving evidence are designed to protect the child witness from further unnecessary stress and the mode of closed circuit television is the most often chosen from the options provided.

*"The aim of closed circuit television is to reduce the stress on child witnesses and thereby improve the quality of their evidence by removing them from direct physical confrontation with the defendant, and depending on the particular set-up used, also removing the child from the courtroom. At the same time the rights of the accused or other parties to a fair trial must be maintained."*⁸

Thus the right to cross examination is not removed, and is in fact strictly adhered to by the provisions of s.23E(3) and (4). Subsection (3) gives the Judge the discretion to direct the manner in which cross examination or re-examination can be conducted, but does not give any further guidance as to how this is to be achieved. Subsection (4) identifies only one option to assist in this, and that is that questions can be put to the child complainant through the medium of the accused's counsel, or if the Judge decides the interests of the child warrant, questions can be asked by an appropriate third party. Section 23F provides further protection in that the judge has a further discretion to disallow any questions on cross examination if the question/s appear to be "intimidating or overbearing" in light of the child's age and demeanour.

4. Expert Evidence

Section 23G identifies who may be classified as an expert witness in cases of child abuse. Such a person must be either a child psychiatrist or child psychologist (s.23G(1)).

⁶ *R v Hauiti* [1990] 6 CRNZ 599

⁷ *R v N* Unreported High Court Christchurch T59/91 12 March 1992.

⁸ Cashmore & Cahill, "Closed Circuit Television and the Child Witness: Achieving Its Object" (1991) LSJ 57.

This qualification is limited to registered child psychologists. This is an inhibiting classification and does not include child therapists, social workers or counsellors who work in this field and are regarded as having relevant expertise in the area of child abuse. This will be discussed later in this paper.

Section 23G(2) nominates the matters on which expert witnesses can attest:

- (a) intellectual attainment, mental capability and emotional maturity of the child complainant;
 - (b) the general developmental level of children of the same age group;
 - (c) whether or not the complainant's behaviour (taken from evidence already given in the proceedings) is consistent or inconsistent with that of sexually abused children of the same age group.
- Further the section states that opinion may be based on the expert witness's professional experience, or relevant scientific literature.

In *R v Ellis* (No.3) Williamson J, while considering an application under s.23E(2) regarding the presentation of certain videotapes of child complainants' evidence, made mention of the nature of section 23G. His Honour said:

*"First, Counsel for the accused has submitted that there is a need for all the tapes to be produced as part of the evidence so that the expert psychiatrists can have a basis for opinions expressed pursuant to s.23G.... It is argued that the behaviour and demeanour of children during the interviews will be a significant part of such assessment. The development of the child's evidence is also claimed to be in that category. On the other hand Counsel for the Crown points to the limited nature of s.23G and to the fact that in most cases psychiatrists do refer to material other than that contained within the evidence itself for the opinions upon which they rely. On this point I consider that the merits lie with the Crown's argument and that playing of all the tapes is not an essential prerequisite for the psychiatrists to properly give an opinion under s.23G."*⁹

In essence s.23G has both lowered the threshold and changed the basis of the tests previously set in case law regarding limiting opinion of expert witnesses.

The Ellis Case: A testing of these new provisions

Background

In November 1991 in Christchurch, New Zealand, a three and a half year old child disclosed that he had been sexually abused by a child care worker in the creche which he attended. His parents contacted the creche supervisor at the Christchurch City Council (the operators of the creche) and a formal complaint was then made. This was the beginning of one of the largest Australasian cases of child sexual abuse. One hundred and eighteen children who had attended the creche were

⁹ *R v Ellis* (No. 3) 3 NZLR 335, 337-8.

interviewed by the Children and Young Persons Service specialist interviewers and the police Child Protection Unit in Christchurch grew from one officer to sixteen.

Of the children interviewed three categories evolved:

- (i) children who disclosed no abuse at the interview/s;
- (ii) children who disclosed abuse, but where police, parents or the child concerned chose not to proceed through the court process;
- (iii) children who disclosed abuse by Peter Ellis and 'others' and who proceeded as complainants.

Peter Ellis was charged in March 1992, and in November of the same year four of his co-workers at the same creche were also charged. The charges were laid jointly under the New Zealand Crimes Act with Ellis initially facing 45 charges involving 16 complainants. The charges included multiple counts of sexual violation, indecent assault and the doing, or inducing, of indecent acts on children under the age of twelve years. Three of his co-workers were charged with 4 counts of indecent assault and one worker with three indecency charges. There was no medical evidence indicating trauma.

One of the longest depositions (preliminary) hearings ever held in New Zealand was held in the District Court in Christchurch. It lasted eight weeks and at the end of this time a prima facie case was established for all five offenders. However on pre-trial applications, some two months later, one accused was discharged, and the 3 remaining co-accused (all women) were discharged by the trial judge because of three main reasons :

- (i) insufficient evidence against them;
 - (ii) there was a real potential for prejudice;
 - (iii) the unavoidable delay in a trial could result in hardship to the complainants, who would have to give evidence twice, and to the accused who would have to wait until after the Ellis trial.
- However it should be noted that Justice Williamson took this action stating that none of the three reasons would be sufficient in itself for discharge:

"Considered in combination, however, I am of the view that they oblige me to allow this application."¹⁰

Trial

The trial at High Court lasted six weeks, with Ellis facing trial on twenty nine charges involving eleven children. He was convicted on the evidence of six children on sixteen charges of such offences as putting his penis in the mouths of three and four year old children, both at the creche and at an unknown address; of touching the anus or vagina of children with his or an associate's penis; of touching the vagina or anus of children with his hand; of forcing children to masturbate him and of urinating on children's faces. The prosecution chose not to put any allegations to trial which could be

¹⁰ *R v Ellis High Court Christchurch T9/93.*

construed by the court and public as being 'bizarre' in their nature, however this did not prevent the media making headlines from such allegations.

Ellis was sentenced to ten years imprisonment.

Appeal

In 1994 the New Zealand Court of Appeal upheld all convictions bar three because of retraction of her evidence by one child complainant. His sentence of ten years remained.

Effect of Reforms

So how then did the reforming legislation work with this case? Were the provisions helpful in their basic objective of furthering the protection of child complainants? The basic answer to these questions is an affirmative given the appeal judgment. The two major areas that were attacked by Ellis in that appeal and by supporters of Ellis in the media, highlights areas of concern for the future.

1. *Credibility of the Evidential Interviewers*

An aspect of the achilles heel of the reforming legislation was a major target for the appeal court and the media: to challenge the manner in which that interview was taken and the interviewing practices of those in charge - that the mode and manner of the interviews with the child complainants were in fact contaminating by the interviewer's own views of this case.

As previously set out, the interviewers of children in what are termed 'evidential interviews' are those whose skills fall within the category of what is called 'technical expertise', and this expertise can be the focus of both prosecution and defence cases, particularly as the law now requires neither corroboration of children's evidence, nor an open caution in the absence of corroboration.

In *R v H (1993)*¹¹ Heron J outlines the importance of evidential interviews and the role of the interviewer at page 5-6:

"I cannot overlook the considerable evidential advantage which the legislature has conferred on the prosecution by this procedure of evidence in chief by video. It presents the jury with the evidence which subject only to cross examination and re-examination remains in that form. It can never be changed...Further the video is available to the parties and the jury to see the manner and style of interviewing and the way in which the revelations occurred and their intrinsic credibility. The sexual abuse guidelines themselves emphasise the techniques of interviewing, both in respect of evidential interviews and diagnostic interviews."

¹¹ *R v H (High Court Wellington T 34/93) Unreported 27th August 1993, 5-6.*

2. *Truth/Lies and Promise Test in the Hands of the Interviewers*

The New Zealand Evidence Amendment Act 1989 does not specify the way in which a videotape is to be prepared, or the way in which the interviews recorded are to be conducted. The Regulations give the rules pursuant to section 23I Evidence Act, but nowhere within the Act or Regulations are the qualifications and skills necessary for interviewers specified. There is a general presumption that the interviewer has the ability to judge whether the child complainant has the requisite understanding of truth, lies and a promise as stated in Regulation 5 (1)(c). Hardie Boys J stated in *R v Seth* (1992):¹²

"The Court must recognise the underlying assumption that the interviewer will be sufficiently trained and competent not to proceed further unless she [the interviewer] makes the requisite determination."

The answer of the Court of Appeal was to validate both of these issues. Mention however must be made of the power of the media response to this case which again highlights cracks in this reforming law.

3. *Media Response/Backlash*

In New Zealand the media backlash from the Ellis case has been extreme. There are two major groups in Christchurch who have promoted the view that contamination and lack of credibility of the child complainants have been responsible for a miscarriage of justice in the Ellis case. These groups maintain that the children's testimonies were contaminated by the very system that validated their experience. Such groups have media attention and focus and on average have some sort of extensive publicity, e.g. television documentaries, radio interviews, newspaper articles, talk-back radio, every six weeks.

The effects of this on the children abused by Ellis is far reaching and devastating, as public opinion grows in favour of the miscarriage of justice view. Public perception of Ellis has changed from seeing him as a disgusting paedophile to a victim of a climate of hysteria and professional and parental obsession with sexual abuse.

The groups formed as a result of his conviction have maintained a high media profile with little by way of rebuttal being allowed in this public forum. The main reasons for this lack of balance have been the issues of protection and the realities of survival for families in recovery. The children and their families' identities have necessarily been protected by suppression orders from the courts. However, parents, families and friends have been frustrated that those speaking out on their behalf against this vicious backlash have been largely ignored by the media.

¹² *R v Seth* (CA 105/92) Judgment 26 November 1992, 16.

An additional complicating factor in the media backlash is that articles intermingle two major types of sexual abuse cases: those involving current sexual abuse of children where they testify to events in their present memory (Ellis) and those of cases involving allegations, based on recovered memories, of abuse that occurred some years ago.

This blurring of the two different types of sexual abuse cases has caused great confusion in the minds of the general public and a growing unwillingness to accept the full extent of sexual abuse in our society. This perception will undoubtedly affect not only future juries' views, but also the likelihood of victims laying criminal charges.

This appears to me to bring into focus that the legal system is still failing to provide a positive and protective environment for child and adult witnesses who have also suffered sexual abuse, when they seek validation of their experiences through the criminal justice system.

A Positive Result: More Protection of Children in Child Care Facilities

As a consequence of the Ellis case the New Zealand Government implemented a policy within all child care facilities that there be (1) physical alterations to every kindergarten and child care creche to ensure full protection from child abuse; and (2) that a prevention of child abuse process be developed by every centre as a pre-requisite of registration.

*The New Zealand Law Reform Commission's Thoughts for Reform*¹³

1. Competence requirement: the Judge, the Interviewer?

An option suggested is that the competence test be removed from both these positions for children under the age of 12. The *"judge would only test a witness' competence - whether a child, a person with intellectual disability, or any other witness - if the issue were raised by counsel or if the judge felt it to be necessary."*¹⁴

The test therefore would be taken on the communication abilities of the child, rather than the developmental understanding.

*"The advantage of a revised test [as stated above], 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".*¹⁵

¹³ New Zealand Law Commission Preliminary Paper 26 The Evidence of Children and Other Vulnerable Witnesses 1996 at page 11 para 39.

¹⁴ Ibid, para 43

¹⁵ Ibid, para 45.

Another option regarding the test for competency of child witnesses is that of total abolition of the necessity for it. *"The result would be that all witnesses would be able to testify, subject only to the general provisions concerning admissibility."*¹⁶ Further the Commission states that a major advantage of this abolition would be an outcome of simplicity and consistency with the laws of evidence.

The Commission has on balance preferred the second option: that of abolishing the competency test because: (i) more relevant information is available to the court (ii) any concerns about reliability and credibility may be evaluated by the trier of fact; and (iii) 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.¹⁷

2. Different Modes by which Children may give their Evidence

The Law Commission fully canvassed the options available to child witnesses and formed the view that *"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 the courtroom"* and this is automatically excluded when dealing with children.¹⁸ Further, the Commission formed the opinion that the alternative modes of the reform legislation were regarded as all as providing the necessary safety for children and would not be changed in any foreseeable time.

3. Cross-examination of Child Complainants Pre-recorded on Videotape

The Commission believes that in certain circumstances this mode by which cross-examination can take place is appropriate for child complainants. The reasoning *"include the possibility of memory deterioration, unfamiliarity with the courtroom environment, adverse reaction to stress and a lack of sophisticated communication skills."*¹⁹

4. Presence of a Support Person During the Giving of Testimony

The Commission recommends a softer approach in defining and addressing the needs of a child witness:

¹⁶ Ibid page 12 para 47.
¹⁷ Ibid page 17 para 75.
¹⁸ Ibid page 30 para 121.
¹⁹ Ibid page 31 para 123.

*"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."*²⁰

The Commission recommends that the discretion of the judge be the controlling factor in this recommendation.²¹

The Cracks/Chasms and Problems Remaining:

As a consequence of nearly seven years of operation, the reforms embodied in the Evidence Amendment Act 1989 and Regulations 1990 have been tested. The Law Commission has critiqued the reforms and made suggestions for improvement and modification in the legal arena. The Ellis case has also been a major testing of the provisions and as a result of the appeal the amendments has stood their ground. However there are still the cracks and perhaps chasms that can be seen. These are not necessarily apparent from within the legal structure of the statutory provisions, but rather they are apparent to the people who seek full protection from it. These difficulties can only be identified by those who have gone through the system - the children and their support families.

There appear to be five main areas which need to be addressed if parents and children are to feel supported through the court process.

The Difficulties Identified

- (i) Parents and children were confused as to the legal process and needed to be kept informed.
- (ii) Children (and parents) felt that no one represented them in the criminal court. The prosecution was acting for the State.
- (iii) Police needed someone to be able to explain the investigation process and assist parents in their ongoing conversations with children.
- (iv) Interviewers felt compromised by not having an independent person to validate their handling of disclosure interviews.
- (v) Children (and parents) needed a way to reply when attacked by the supporters of the offender/s, and the media.

A Suggested Solution

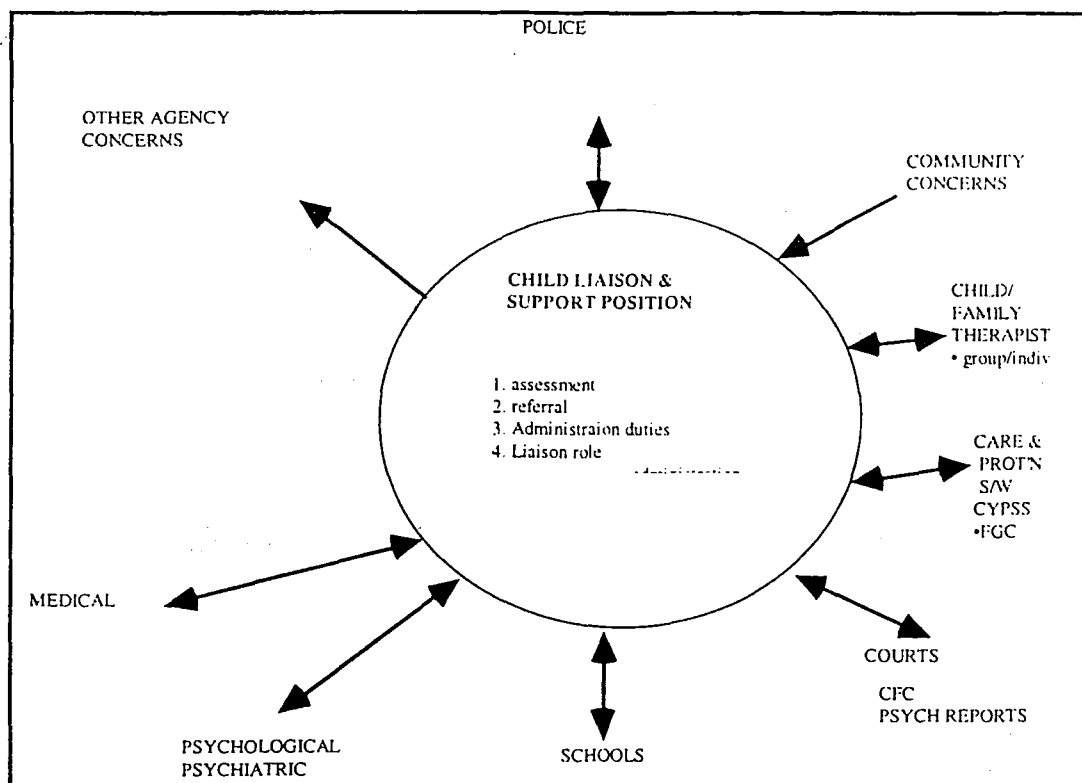
The writer suggests that an interdisciplinary approach with a central role be established which focuses on the child victims and ascertains their needs for counselling and support and ensures appropriate referrals. Further this role would enable referral reports to be gathered and a plan of action developed for the furtherance of assistance to the child, while at the same time acknowledging the role of the non offending parent in the ongoing protection and support of their children.

²⁰ Ibid page 44 para 166.

²¹ Ibid page 43 para 164.

Objectives of a Child Liaison and Support Position

- to develop and implement a comprehensive and coordinated nationwide programme of early intervention and assessment services for all children involved in any way in child abuse. Such a programme would be multi-disciplinary and inter-agency.
- to act as the primary assessment and referral base for all children referred by police or other agencies as having been abused.
- to refer and liaise closely with all major agencies involved in working with women and children victims of child abuse.
- to develop and implement an ongoing monitoring programme for each child which will (i) measure the effectiveness of the referrals in place for that child; (ii) ensure that the child's paramount welfare is not compromised by any such referral.
- to facilitate community education programmes to highlight understanding of children's needs in situations of child abuse.



Child Liaison & Support Position Role

1. Assessment and Referral.
2. Liaison with Service Providers.
3. Conflict resolution and negotiation with service providers.
4. To provide comprehensive compilation of reports from service providers to authorities ie courts.
5. To maintain privacy and confidentiality of all assessments and reports.

6. To establish a 'tagging' system to effect child liaison and support role and maintain guidelines of 5. This would involve co-operation with police involved in child abuse investigations. They would ascertain the safety of the children with regard to the circumstances of the investigation.
7. To establish and implement monitoring of all service provision.
8. To administer the position of child liaison and support and provide ongoing evaluation of programme according to processes established.

Conclusion

The legal reforms implemented in New Zealand seven years ago do work. They protect child victims of abuse to a high level and the recommendations by the New Zealand Law Commission provide further protection under this system. But the law can go just so far alone. The society in which those laws operate needs to involve itself fully protect the children. A multi-disciplinary approach may achieve an even higher success in the process of protection, coupled with a societal increase in the awareness of the devastating reality of child abuse today.