

**Children and the Courts Conference  
National Judicial College of Australia  
5 November 2005**

**Expert Psychological Evidence  
in Child Sexual Abuse Trials in New Zealand**

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***INTRODUCTION***

It is common wisdom that an amalgam of social factors occurring in the 1960s/70s led to an increasing awareness of and reporting of sexual offences against children. This phenomenon occurred in most western countries including Australia, New Zealand, Canada, the United Kingdom, U.S.A. and some European countries. Cases involving allegations of offences against children began coming to the notice of the criminal courts in increasing numbers and in the mid to late 1980s some countries enacted reforms to provide for child complainants within the legal system. In 1976 the First International Congress on Child Abuse and Neglect was held at the World Health Organisation in Geneva. In New Zealand in 1985 the government established the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children.<sup>2</sup>

Research literature addressing the issues of the impact of sexual abuse on children and in particular on child behaviour relevant to giving testimony in Court began to be available in the mid-1970s. The research findings available since then underlined the fact that children's evidence in child abuse cases has some specific features. There are usually no witnesses, the alleged perpetrator is most likely to be someone with whom the child is in a dependent relationship, reporting of the alleged abuse is most often delayed and frequently incremental. In recognition of these difficulties most western jurisdictions made provision for expert evidence in such trials to assist the court and in particular juries to make informed decisions. However this has not been without controversy; there has been significant concern about the role expert testimony plays and in particular the possibility that experts may unduly influence outcomes in criminal trials.

In New Zealand in 1988 a package of reforms relating to children's evidence and expert evidence in criminal cases was introduced as part of the Law Reform (Miscellaneous Provisions) Bill. This omnibus bill affecting more than fifty different Acts was introduced into Parliament under urgency at the end of 1988 and passed into law in November 1989.

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<sup>1</sup> The author is indebted to Associate-Professor Fred Seymour for his review of this paper and to Dianne Cameron, Clinical Psychologist, for her helpful comments.

<sup>2</sup> Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children. October 1988.

Under this Bill, Sections 23C to 23I, relating to rules in cases involving child complainants were inserted into the Evidence Act, 1908, by section 3 of the Evidence Amendment Act, 1989, on 1 January 1990.<sup>3</sup> These reforms allowed for the use of videotaped child interviews, the use of CCTV or screens, judicial directions about special aspects of sexual abuse cases, and expert evidence.

The most important Court of Appeal decisions preceding the reforms of 1989 were *R v B* [1987]<sup>4</sup> and *R v Accused* [1989]<sup>5</sup>.

In *R v B* the Court of Appeal was asked to rule on the admissibility in a sexual offence case of a psychologist's evidence of an interview with a child complainant under the age of twelve years, and the outcome of "tests" conducted by the psychologist.

The evidence had been ruled inadmissible in the District Court because: (a) it was considered to be evidence on the ultimate issue and intended to usurp the function of the jury; (b) it was opinion evidence, based on hearsay; and (c) it was evidence led by the Crown to "bolster the credibility" of its principal witness.

The Court of Appeal<sup>6</sup> held that:

- (1) *"Evidence by an expert as to matters which are within the knowledge of the jury is generally inadmissible. To allow such expert evidence in such a case would be to defeat the purpose for which juries are used.*
- (2) *As child psychology grows as a science it might be possible for experts to demonstrate as matters of expert observation that persons subjected to sexual abuse demonstrate certain characteristics or act in peculiar ways which are so clear and unmistakable that they can be said to be the concomitants of sexual abuse. However what is sought to be given here as evidence falls short of demonstrating such a state."*

However McMullin J. (presiding) noted:

*"In the difficult and distressing field of child abuse, instances of which are coming to the notice of the Court in increasing numbers, there may be a case for the enactment of special statutory provisions for the admission of evidence of the kind sought to be given in this case. It is important that those who sexually abuse children should be brought to justice. But the effect of any such changes on the criminal law generally would have to be considered."*<sup>7</sup>

In the same decision, Casey J. suggested:

*"That there may be room for a psychologist to give expert evidence of her observation and testing of the complainant with a view to saying whether the complainant's condition and reactions are consistent with those of children of a corresponding age who have been sexually abused. The psychologist would need to describe the tests she undertook and the reaction of other children from her own experience and she may have recourse to recognised specialist literature to confirm her opinion."*<sup>8</sup>

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<sup>3</sup> See appendix I at end of this paper for sections 23C to 23I.

<sup>4</sup> *R v B* [1987] 1NZLR 862

<sup>5</sup> *R v Accused* [1989] 1NZLR 714

<sup>6</sup> see note 4

<sup>7</sup> see note 4

<sup>8</sup> see note 4

Subsequently in *R v Accused*,<sup>9</sup> the evidence of a psychologist on the consistency of a fourteen-year-old complainant's behaviour with an allegation of sexual abuse, was ruled inadmissible. Mc Mullin J. reiterated the need for the exhibited behaviours to,

*“demonstrate in an unmistakable and compelling way and by reference to scientific material that the relevant characteristics are signs of child abuse.”*<sup>10</sup>

The appeal was allowed because the expert evidence,

*“amounted to a powerful and almost unchallenged corroboration of the complainant's evidence, and went some distance to usurping the jury's function.”*<sup>11</sup>

### **THE 1989 AMENDMENT INTRODUCING A PROVISION FOR EXPERT EVIDENCE**

It is commonly accepted that the decisions, *R v B* [1987] and *R v Accused* [1989] led to the introduction of s.23G of the Evidence Act, 1908, which provides:

- (1) *For the purposes of this section, a person is an expert witness if that person is:*
  - (a) *a medical practitioner holding vocational registration in the speciality of psychiatry, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or*
  - (b) *a psychologist, registered under the Psychologists Act 1981, practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children.*
- (2) *In any case to which this section applies, an expert witness may give evidence on the following matters:*
  - (a) *the intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on:*
    - (i) *examination of the complainant before the complainant gives evidence; or*
    - (ii) *observation of the complainant giving evidence, whether directly or on videotape.*
  - (b) *the general development level of children of the same age group as the complainant:*
  - (c) *the question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is, from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.*

It is evident that the intent of legislation was to introduce a provision for expert evidence in child sexual abuse cases but:

1. to constrain the scope of their evidence about sexual abuse by requiring their evidence to be related to that given by others during the trial, and about whether the behaviour is consistent or inconsistent, that is no opinion on the ultimate issue (2)(c);
2. to prescribe who could give such evidence hence requiring the expert to have specific qualifications and experience 1(a) and (b); and
3. to preserve the scientifically objective character of such evidence hence reference to professional literature (2)(c).

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<sup>9</sup> see note 5

<sup>10</sup> see note 5 at 720

<sup>11</sup> see note 5 at 721

## **LEGISLATION INTO PRACTICE**

Section 23G(1)(a) and (b) seems straight forward in terms of professional registration of psychiatrists and psychologists. However there has been some difficulty in defining the term “with experience in the professional treatment of sexually abused children”. In *R v K*<sup>12</sup> the Court noted:

*“I consider also that experience for the purpose of s.23G(1) should be of a real and substantial nature. How much is sufficient to qualify the witness as an expert will depend on the circumstances of each case. Obviously, the numbers of children treated, the period over which the treatment occurred and when the experience took place, will all have a bearing on the judgement which has to be made.”*

Rodney Hansen J. ruled that the experience of the proposed expert was:

*“too narrowly based to constitute qualifying experience for the purpose of s.23G(1). Even if this were not so, I would have concluded that the experience he had was too limited and too remote in time to provide the necessary foundation of experience.”*<sup>13</sup>

Section 23G(2)(a) and (b) has for the most part been utilised in situations where complainants have had some degree of intellectual disability. The use of expert evidence in this area has not been contentious.

The main difficulties have occurred in relation to s.23G(2)(c) which refers to expert opinion as to whether the behaviour in evidence of the complainant child is “consistent” or “inconsistent” with behaviour of sexually abused children of the same age group as the complainant.

The main controversies and problems arising from use of s.23G(2)(c) have related to:

1. the concept that distressed or disordered behaviours in children have been viewed by some as “indicators” “diagnostic” of sexual abuse having in fact occurred;
2. the use of the terminology “consistent” and “inconsistent”;
3. the straying of expert evidence into the territory of the “ultimate issue” rule which still stands in New Zealand despite its abolition in other jurisdictions;
4. whether expert evidence in such cases reaches the threshold for expert evidence, i.e. whether the evidence to be given has “general acceptance” in the relevant scientific discipline<sup>14</sup>;
5. the significant variability in determination of what constitutes “common knowledge” and therefore what expert evidence is admissible and what is not.

These areas warrant further explanation.

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<sup>12</sup> *R v K*. High Court Auckland T.013385. 3 July 2002 [13]

<sup>13</sup> *R v K*. High Court Auckland. T.013385. 3 July 2002 at [14]

<sup>14</sup> The “Frye test” *Frye v United States* 293 F 1012 (1923).

## *Diagnostic indicators*

In relation to the “diagnostic” indicators, those of us working within this arena today in 2005 are aware that there is in fact no symptom, sign, behaviour or constellation of such that can be said to be absolutely indicative or diagnostic of sexual abuse having taken place.

Kendall-Tackett<sup>15</sup> and her colleagues reviewing a large body of literature in 1993 confirmed what was obvious, this being that there may be a number of likely causative factors for distressed or disordered behaviour on the part of children and there is no sexual abuse syndrome as such. This view has been supported in subsequent reviews.

The closest we may get to “diagnosis” of sexual abuse may be the presence of Posttraumatic Stress Disorder, wherein the content of the intrusive thoughts, nightmares, and “flashback” phenomena and the content or topography of the avoidance behaviours, may give a strong indication of the source of the trauma and/or distressed behaviour. For example if a child reports “flash backs”, distress and avoidance behaviour involving a specific event, a specific person, in a specific venue, all of these being consistent with the event alleged, then this would tend to support the notion that the event is the source of the trauma. However, it is this “diagnosis” within the context of expert evidence in child sexual abuse cases that has proved the most problematic in the New Zealand situation. This is because it has been extremely difficult for experts to give such evidence without straying into “ultimate issue” territory.

Similarly some types of sexualised behaviour in young children may be considered highly unusual, and if the topography of these reported behaviours is similar to the offences alleged, the sexualised behaviours may be considered highly suggestive of the sexual abuse alleged having taken place. However sexualised behaviour in a child, even if very unusual and age inappropriate, cannot be seen as absolutely “diagnostic” of sexual abuse having occurred. We know that some children who have been sexually abused will display sexualised behaviour, whilst others will not.

“Diagnosis” is largely an inappropriate term in the context of child sexual abuse. There is much variability in children’s response to child sexual abuse. We know that some children who have been sexually abused will display behaviours consistent with trauma and distress, whilst others will not. I have seen defence counsel use “disordered” child behaviour to suggest that the child is “bad”, “not reliable” and “not credible”. Similarly I have seen defence counsel suggest that because there is no evidence offered of disturbed, distressed or traumatised behaviour, the complainant child could not have experienced the events they have described to the Court.

We know that some children will tell a trusted person immediately some act of sexual abuse occurs whilst many do not. There are many obvious reasons for delayed reporting of complaints and yet this issue is raised repeatedly in child sexual abuse trials to discredit child complainants.

We know that some children may at some stage retract sexual abuse allegations they have made and that there may be many reasons this occurs, other than the obvious one – that they were untruthful in the first place.

We know that some children avoid the perpetrator of sexual abuse against them, whilst others repeatedly return to that person and, if they are a member of the family, may continue to love them despite the sexual abuse occurring.

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<sup>15</sup> Kendall-Tackett, K.A., Williams, L.M., and Finkelhor, D. 1993. Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies. *Psychological Bulletin*, Vol. 113(1), p.164-180.

### ***“Consistent/Inconsistent” terminology***

This brings us to the problems inherent in the wording of the statute specifically “consistent” and “inconsistent”. Given the variability of child response to sexual offending against them, it is easy to see that the “consistent/inconsistent” wording of s.23G(2)(c)<sup>16</sup> was doomed from the start. Whilst it may be said that many behaviours may be consistent with those of sexually abused children, it stands to reason – using this terminology, that no behaviours could be seen to be “inconsistent”.

Robertson and Vignaux<sup>17</sup> have addressed the problems inherent in the terms “consistent” and “inconsistent”. They indicate quite properly that “consistent with” is simply the opposite of “inconsistent with”. Inconsistent is precise – it means that two events are inconsistent if they cannot possibly occur together. Anything which is not inconsistent is consistent.

One expert witness psychiatrist was asked under cross examination<sup>18</sup> what behaviours could be considered “inconsistent”. She replied to the effect that she had not thought of that. Reporting of this led to much derision of the expert. However it was the wording of the statute that was at fault, in my opinion, not the expert witness.

Perusal of files in trials where s.23G has been utilised over the last fifteen years indicates a wide variability of expert evidence. Some has been detailed,<sup>19</sup> in trials where the expert has been permitted to give evidence on a variety of child behaviours including child development, sexualised behaviour and delayed reporting. On the other hand in one trial the expert for the Crown was asked only whether the behaviours exhibited by the child complainant were consistent or inconsistent with that of children of the same age who had been sexually abused. Apart from giving evidence about her credentials and confirming having observed the evidence in court, the only expert evidence given was the word “consistent”.<sup>20</sup>

### ***The ultimate issue trap***

Perusal of Court of Appeal decisions indicates that many appeals have been allowed because the expert evidence trespassed into the area of “ultimate issue”.

There have been problems because wittingly or unwittingly some experts have slipped into expressing an opinion on the child’s credibility or whether the child had actually been sexually abused.<sup>21 22</sup> Legal counsel have not properly briefed experts<sup>23</sup> and have themselves been confused by the law in this area. In *R v Tait*<sup>24</sup>, whilst the appeal against conviction was dismissed, the Court noted:

***“The case demonstrates the importance of these expert witnesses being fully briefed as to the limits of their permissible evidence and of the Judge appropriately dealing with a situation where those limits are exceeded, whether it be in examination-in-chief, cross-examination or re-examination.”***

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<sup>16</sup> Section 23G(2)(c) Evidence Act 1908

<sup>17</sup> Robertson, B., and Vignaux, G.A., *Interpreting Evidence: Evaluating Forensic Science in the Courtroom*. John Wiley and Sons. p.56.

<sup>18</sup> *R v Ellis*. CA 274/93

<sup>19</sup> *R v K*, High Court AK T.013385.

<sup>20</sup> *R v F*, unreported case, personal communication.

<sup>21</sup> *R v B* [2003] 2NZLR 777

<sup>22</sup> *R v J* [2003] CA 51/03 [4 August 2003] CA

<sup>23</sup> *R v Tait* [1992] 2NZLR 666.

<sup>24</sup> *R v Tait* [1992] 2NZLR, p.671, line 9.

### ***Whether expert evidence is derived from a reliable body of knowledge***

There has been discussion of the apparent rigid approach evident in the pre-23G Court of Appeal decision that prompted the reform. Specifically the wording:

***“that persons subjected to sexual abuse demonstrate certain characteristics or act in peculiar ways which are so clear and unmistakable that they can be said to be the concomitants of sexual abuse.”***<sup>25</sup>

High Court and Court of Appeal decisions subsequent to the enactment of s.23G in 1990, have suggested that the approach of the Court in *R v B* and *R v Accused* was not as rigid as might be apparent. In *R v White*,<sup>26</sup> Pankhurst J. said:

***“Like Williamson J. in R v CS, I am doubtful whether the two Court of Appeal decisions should be read in a strictly literal manner. I prefer the approach taken by him that what is required is a sound scientific basis for the evidence in question, attained when the responsible majority in a particular discipline subscribe to the particular viewpoint. Seldom, I think, in relation to human behaviour is it able to be said that an indicator is specific to one cause and no other.”***

It has in recent years become accepted that experts giving psychological expert evidence should draw on relevant literature “from a reliable body of knowledge,” that has “general acceptance” within the discipline, as well as upon the “specialised knowledge” based on relevant experience. It is now accepted by many that in psychology in general and in relation to child sexual abuse specifically, there is a reliable body of knowledge. However, whilst most expert witnesses giving evidence pursuant to s.23G(2)(c) have done so with reference to literature and experience, a very small number who have taken a “hired gun” approach, have in my opinion selectively chosen literature to illustrate a particular point, and regrettably in a few cases, “have misrepresented” the literature they have cited. This phenomenon is not restricted to the field of psychology. However in the area of expert evidence about child sexual abuse this ‘hired gun’ approach has fuelled public comment and controversy that presents the discipline as divided.

### ***“Common knowledge”***

It is held that an expert cannot give evidence about a matter that is considered to be within the “common knowledge” of the jury. My experience, along with anecdotal evidence from others, suggests that definition of “common knowledge” in the complex area of child sexual abuse has been variable.

In some trials, judges have allowed expert evidence in the areas of delayed and limited reporting of sexual abuse by children, retractions and traumatic bonding. However other judges have excluded such expert evidence, maintaining that such information is within the general knowledge and understanding of jurors.

Anecdotal evidence has also suggested that many professionals working in the area (judges, lawyers, psychologists, psychiatrists) “normalise” their own professionally acquired knowledge of child sexual abuse and therefore consider it “common knowledge”. Some of these professionals may have accurate knowledge, whilst for others what knowledge they do have may be misinformed, having been shaped by media debates about sensationalist cases in this controversial area.

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<sup>25</sup> see note 4

<sup>26</sup> *R v White* High Court, Christchurch, T20463, 26 April 2002

Despite the difficulties with the wording of the current statute, there is scope for its use to include expert evidence that is not diagnostic but educative. The purpose of that evidence would be to correct any erroneous beliefs that jurors may have. This evidence is sometimes called “counter-intuitive evidence”. As the Law Commission<sup>27</sup> indicated, such evidence:

*“is offered to show that behaviour a jury might think is inconsistent with claims of sexual abuse is not or may not be so; that children who have been sexually abused have behaved in ways similar to that described of the complainant; and that therefore the complainant’s behaviour neither proves or disproves that he or she has been sexually abused. The purpose of such evidence is to restore a complainant’s credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance.”*

In R v A<sup>28</sup> the Court noted,

*“Section 23G evidence may also be of benefit where the behaviour may seem counter-intuitive. An example of such evidence in this case was the evidence that the complainant still liked Mr A and sought him out. This may, to lay jurors, appear inconsistent with the behaviour of a child who had been sexually abused. Expert evidence may legitimately be led to counter this impression.”*

Glazebrook J. further noted in R v A,<sup>29</sup> in relation to child sexual behaviour:

*“Not all jurors will have had children. Some may have had children but who are no longer in the relevant age group. Even jurors with young children may not know what is and what is not normal sexual behaviour for that age group (or may not wish to say in case their child is considered abnormal).”*

It appears that the major opposition to expert evidence in child sexual abuse trials comes from defence counsel. One of the reasons for this is the advantage that accrues to the defence from an ability to exploit myths related to such issues as delayed reporting.

At the same time counsel will seek to have such expert evidence declared inadmissible citing assumption of juror “common knowledge” about the issue in question. In New Zealand, defence counsel continue to use issues such as delayed reporting, prior retraction, lack of disordered behaviour, presence of disordered behaviour, and continued contact with and affection for the accused as ways of discrediting child complainants. Rather than using expert witnesses, counsel tend to give evidence from the bar to juries during their closing addresses, raising or countering these issues. Not surprisingly the jury hears one version from prosecuting counsel and another from defence counsel.

Our current legislation in New Zealand also gives the Court the option of directions about the normative aspects of delayed complaints and the lack of need for corroboration of children’s evidence.<sup>30</sup>

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<sup>27</sup> Law Commission, Evidence. (Opinion and Expert Evidence). 1999

<sup>28</sup> R v A CA 123/04 [16 December 2004] at [112].

<sup>29</sup> see above note 28 at [112].

<sup>30</sup> See Appendix II

## **THE USE OF S.23G IN 2005**

Ultimately the provision within the Evidence Act 1908, for expert evidence in child sexual abuse trials has not been successful and is now rarely used, most counsel being concerned at the prospect of the leading of such evidence resulting in a mistrial or retrial. Some legal counsel and judges have never encountered its use in practice.<sup>31</sup> The absence of counter intuitive evidence has the capacity to result in significant undermining of child complainant credibility. As a result of there rarely being unequivocal medical evidence or eye-witnesses, most child sexual abuse trials in New Zealand rely almost solely on the credibility of the child complainant.

The Court of Appeal in *R v A*<sup>32</sup> observed that there have been comments in cases that some have taken as suggesting that s.23G evidence should not now be given. Glazebrook J. cited as an example, *R v Jarden*<sup>33</sup>, wherein the Court said:

*“We remark, in passing, that the bench as presently constituted, with its trial experience, has reservations about resort to s.23G in contemporary circumstances. It is not often invoked by the Crown, perhaps through recognition of the practical difficulties of staying within the permissible scope and because of the significant potential for unfairness should that not be achieved.”*

However Glazebrook J. noted in *R v A*, the Court’s view that in *R v Jarden*:

*“The Court was not going so far as to suggest that there was no longer a place for s.23G evidence. Section 23G evidence can always be given (provided it is relevant and kept within the bounds of the section.)”*<sup>34</sup>

and suggested that:

*“The Court, in making the remarks it did in Jarden at [30], was speaking in the context of the particular case where it was almost impossible for the s.23G evidence to be given (at least in the manner it was presented) without the expert expressing an opinion on whether abuse had occurred and commenting on the complainant’s credibility (which is not allowable).”*<sup>35</sup>

But on the other hand, an appeal was allowed in a case where the Crown led non-expert evidence describing sexualised behaviour on the part of the child complainant but did not call expert evidence to explain this to the jury. The Court considered this should have been called unless evidence of the complainant’s behaviour had been excluded by the judge.

*“The jury was not given any assistance from an expert witness and there was no comparative evidence of the behaviour of sexually abused children in the complainant’s same age group as envisaged by s.23G(2)(c).”*<sup>36</sup>

Currently in New Zealand the reality is that there is a perception that it has become too difficult and perilous to lead such evidence and counsel accordingly have for the most part abandoned the use of expert evidence in sexual abuse trials as allowed by s.23G. The statute and the other provisions for child witnesses have been the subject of much criticism by some members of Parliament<sup>37</sup> and some factions of society.<sup>38</sup> The views have been polarised. Of course such controversy has not been confined to New Zealand.

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<sup>31</sup> Personal communication.

<sup>32</sup> *R v A* CA 123/04 [16 December 2004]

<sup>33</sup> *R v Jarden* CA 51/03, 4 August 2003.

<sup>34</sup> see note 32 at [116] [30]

<sup>35</sup> see note 32 at [117]

<sup>36</sup> *R v G* (CA4141/03) 26 October 2004

<sup>37</sup> Hansard 10/05/05.

## **LAW REFORM PROPOSALS**

The Law Commission of New Zealand which is an independent, publicly funded, central advisory body, established by statute to undertake the systematic review reform and development of the law of New Zealand, considered issues surrounding children's evidence in the context of its work on the proposed Evidence Code. The Commission did not at that time identify any significant concerns about the way in which the law regarding children's evidence was and is operating.

The Law Commission was considered to be thorough. Having been instructed at the time of the initial reform in 1989 by the then Minister of Justice, Sir Geoffrey Palmer, the Law Commission spent a decade reviewing aspects of evidence law, publishing discussion papers<sup>39</sup> and sought the views of those involved in the justice sector, including a wide variety of community groups, academics, officials and members of the legal profession and the judiciary.

In 1999 the Law Commission published its report on evidence<sup>40</sup> and an evidence code<sup>41</sup> amalgamating the various aspects of the laws of evidence. The New Zealand government is at present reforming the entire Evidence Act and the Bill which has had a first reading before Parliament is now before a Select Committee. Section s.23G is to be repealed in its entirety. The Bill makes no provision for expert evidence in child sexual abuse cases, instead allowing for such evidence to be called in the same way as expert evidence in any other matter.

The proposed provision<sup>42</sup> is:

### **s.22 Admissibility of expert opinion evidence**

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.**
- (2) An opinion by an expert is not inadmissible simply because it is about -**
  - (a) an ultimate issue to be determined in a proceeding; or**
  - (b) a matter of common knowledge**
- (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied upon only if that fact is or will be proved or judicially noticed in the proceeding.**

Subsections 4 and 5 related to experts' opinion about sanity. The Bill has duplicated the Australian legislation in relation to clause (2)(a) and (b).

The issue of children's evidence is addressed by Clause 121<sup>43</sup> which deals with the giving of judicial directions in relation to children's evidence. In general, evidence given by children is to be treated in the same way as evidence by adults in the absence of expert opinion to the contrary. However in a case tried before a jury, there is provision for a special direction to be given in respect of evidence given by children under the age of six years.

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<sup>38</sup> Justice and Electoral Committee. Report on Petition 2002/55 of Jane Lynley Hood, Dr Don Brash and 802 others, 8 August 2005

<sup>39</sup> Law Commission. Preliminary Paper 26; Miscellaneous paper 13; The Evidence of Children and Other Vulnerable Witnesses.

<sup>40</sup> Law Commission. Evidence Report 55, Vol 1.

<sup>41</sup> Law Commission. Evidence Report, Vol. 2.

<sup>42</sup> The Evidence Bill (2005) s.22

<sup>43</sup> Evidence Bill 2005 – see Appendix III

The Bill also includes the provision for judicial directions about delayed complaints in sexual cases.

Therefore within the Bill as it stands, the “common knowledge” rule has been abolished, as has the “ultimate issue” rule. These have been replaced with the “substantial helpfulness” rule as embodied in s.22(1) of the Bill. Case law suggests that judges have been applying the substantial helpfulness rule for some time.<sup>44</sup>

The Evidence Bill’s fundamental principle is that all relevant evidence is admissible unless there is some policy reason to exclude it, for example on the grounds of irrelevancy, if its probative value is outweighed by its prejudicial effect, or if it would needlessly prolong a proceeding.

It is my view that there will be much debate about the proposed expert evidence provision or lack of it in the new Bill. It appears to open up the scope of evidence that may be given. I am aware, having perused Australian publications, that there has been mixed reaction to the effects of abolition of the ultimate issue rule and common knowledge rule in Australia.<sup>45</sup>

Unlike the current legislation, the Bill puts forward no statutory definition of an expert in the context of child sexual abuse cases. There are major difficulties with this but discussion of those is not within the scope of this paper except to say that some factions believe that only fulltime researchers should be permitted to give such evidence, whilst others are of the view that competency in research methodology, reading of the literature, as well as experience in working with children who have been sexually abused, are necessary qualifications.

### ***THE CURRENT JURY RESEARCH***

Since February 2004, I have been the principal researcher in a project that has the support of some members of the New Zealand judiciary, the cooperation of the Ministry of Justice, and funding by the New Zealand Law Foundation.

The research project is a study in forensic psychology in two parts:

Part 1 is a preliminary study which will act as a context and background to Part II. Specifically Part I involves: An analysis of the social, psychological and legal history that lead to the 1989 Amendment to the Evidence Act 1908, now contained in s.23G, that is expert psychological evidence in child sexual abuse trials; and an analysis of the impact of those law changes, and expert psychological evidence on child sexual abuse trials in the years 1990-2004 by way of examination of trial transcripts and Court of Appeal Judgments.

Coincidentally it is noted that the Justice and Electoral Committee suggested in August 2005 that,

***“The Justice and Electoral Committee of the next parliament examine the operation from 1990 of the 1989 amendments to the Evidence Act 1908 relating to rules in sexual abuse cases involving child complainants, and the role of experts in the consideration of the evidence from such children, bearing in mind the risk that professional thinking can be affected by evolving theories, and make appropriate recommendations in its consideration of the Evidence Bill.”***<sup>46</sup>

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<sup>44</sup> See R v Decha-lamsukan (1993) 1NZLR 141 147-8 (CA)

<sup>45</sup> Australian Law Reform Commission, 2005, Discussion Paper 69, Opinion Evidence.

<sup>46</sup> Justice and Electoral Committee. Report on Petition 2002/55 of Lynley Jane Hood, Dr Don Brash and 807 others, 8 August 2005, Pg. 2.

Part I of the research is intended to answer the following questions:

What has been the impact of law changes on sexual abuse trials and outcomes for children (1989-2004)? For example, what has been the purpose of expert witness testimony? Has it been used by both defence and prosecution? What type of expert psychological evidence has been given? Was it accurate in terms of the literature at the time? How was the expert evidence challenged? Was the expert evidence within the confines of 23G or did it exceed this? Did judges unduly limit the evidence of the expert witness? What expert evidence was given pursuant to other sections of the Evidence Act? What trends are evident in terms of use of expert psychological evidence?

Part II of our study involves an examination of juror knowledge and beliefs relevant to child sexual abuse trials and the type and impact of expert psychological testimony in these trials. It includes an investigation of the general knowledge, understanding, and beliefs of finders of fact (jurors) about the impact of sexual abuse on child victims, leading to answers to the questions as to whether and what expert psychological evidence may be necessary or useful in child sexual abuse trials.

It is intended that Part II will answer the following questions:

Is expert psychological evidence necessary in sexual abuse trials? What are the beliefs of jurors about child sexual abuse? Do myths about child sexual abuse still prevail? Does the average juror have a sufficient everyday knowledge base without expert evidence? Does a juror in the course of a trial learn about aspects of child behaviour consistent with that of children who have been sexually abused? Do jurors learn accurately from experts during the course of a trial? What is the impact of expert psychological evidence on a juror? What are the implications of these findings for law changes and for the decisions of judges in respect of the admissibility of expert psychological evidence?

The methodology for this part of the study which has been running since May 2005 involves post trial interviews of ninety jurors. It was envisaged that the juror interviews would comprise three groups. The first group is comprised of jurors who have heard a child sexual abuse trial where there has been no expert psychological evidence, (n = 30). The second group is comprised of jurors who have heard a child sexual abuse trial where there has been expert psychological evidence, (n = 30). The third groups comprised of jurors who have served on a trial that had no child complainants and did not involve sexual abuse or sexual offences, (n = 30).

In order to achieve a geographic spread of New Zealand jurors' knowledge and beliefs, nine courts throughout the country were selected to be in the sample pool. This has resulted in a larger total sample than previously envisaged (between 100 – 150). Individual judges have been approached by the researchers for permission to include specific trials in the research. It is envisaged that there be twenty-two to twenty-seven trials covered, depending on the availability of trials where expert psychological evidence has been led.

All jurors are interviewed utilising a standardised interview protocol. Detailed discussion of methodology is necessarily the subject of another paper.

At this point we have conducted juror interviews in six of nine centres and envisage completing data collection by February 2006. Analysis of data will be both qualitative and quantitative.

Preliminary results indicate that many jurors exhibit a considerable lack of knowledge in many of the areas related to child sexual abuse. Most have expressed a desire for expert psychological evidence to assist them in these areas and for some developmental information that would assist them to give context to child complainant evidence.

We are also experiencing what is termed “the CSI phenomenon”.<sup>47</sup> Jurors having watched such programmes which feature instantaneously available, highly technical and scientific forensic evidence want such evidence in child sexual abuse cases. One juror thought DNA and eye-witness evidence would be necessary to convict in child sexual abuse cases.

Interview of jurors serving on control group trials and those trials involving allegations of sexual offences against children has proceeded well.

Unfortunately as a consequence of the dearth of trials including expert psychological evidence, we are having difficulty obtaining a sample of jurors who have heard such evidence. Despite our decision to extend data collection for that specific group through to June 2006, we believe we are unlikely to achieve the numbers we had originally envisaged for that group.

We are planning that the data from our research will be collected and analysed in time to make further substantive submissions to the Select Committee when it hears these in the first half of 2006. We also plan to publish our results to professionals working with the Criminal Court system in New Zealand.

### ***THE WAY FORWARD?***

The Law Commission had proposed a rule for court-appointed experts in both civil and criminal proceedings.<sup>48</sup> According to the Commission, the rule was in keeping with a trend throughout the common law world for greater judicial control of proceedings. The most significant proposal put forward would have enabled the court to appoint expert witnesses in criminal cases with defence approval. However submissions to the Law Commission were divided along professional lines: there was strong support for the proposal from non-legal professionals, while legal practitioners treated the proposal with distrust and saw it as a judicial “descent into the arena”. Therefore the Law Commission withdrew the recommendation.

However, there appears to be world trend to an inquisitorial system such as that employed in France and other European countries. It is noted that the report of the Select Committee on the petition related to R v Ellis has recommended that the Justice and Electoral Committee of the new Parliament:

***“enquire as to whether the evolution of the trial process in the Family Court into an inquisitorial type hearing may not be a pointer to a better way of determining criminal guilt in allegations of sexual abuse by vulnerable children.”***<sup>49</sup>

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<sup>47</sup> CSI is a television series featuring forensic scientists

<sup>48</sup> The Law Commission Evidence (Opinion and expert evidence) para 88/89/90

<sup>49</sup> Justice and Electoral Committee. Report on Petition 2002/55 of Lynley Jane Hood, Dr Don Brash and 807 others. 8 August 2005, page 3.

My view, seen as naïve by some, is that an expert giving expert psychological opinion evidence in a child sexual abuse case should be giving the same evidence to the Court, whether they be instructed by prosecution or defence. Certainly this is the ethical obligation of the expert witness and is reflected in the New Zealand High Court Rules Code of Conduct.<sup>50</sup> As in the New Zealand and Australian Family Court, it is possible to have independent court-appointed expert witnesses whose methodology and evidence can be open to scrutiny by way of cross-examination and/or critiquing by other similarly qualified professionals.

## **CONCLUSIONS**

In conclusion, New Zealand has had a provision for expert evidence in child sexual abuse cases since the 1989 amendment to the Evidence Act 1908. It has not been successful for a number of reasons and it is timely that it be reviewed and reformed.

Expert evidence in relation to child sexual abuse is currently used rarely in New Zealand criminal trials. I believe this may be to the detriment of child complainants whose presentation and behaviour is not put in relevant context for finders of fact.

Expert evidence in child sexual abuse trials is, I believe, needed to correct:

- (1) the over-reliance on child complainant credibility by introducing information on contextual issues such as child development and aspects of child response to sexual abuse;
- (2) common myths about child sexual abuse which, according to my preliminary results, are alive and well.

I leave the last word to the Law Commission:

***“The purpose of such evidence is to restore a complainant’s credibility from a debit balance because of jury misapprehension back to a zero or neutral balance.”***

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<sup>50</sup> High Court Rules. Code of Conduct for Expert Witnesses – see appendix IV

## APPENDIX I

### EVIDENCE ACT 1908

#### *Rules in cases involving child complainants*

Heading: inserted, on 1 January 1990, by section 3 of the Evidence Amendment Act 1989 (1989 No. 104).

#### **23C Application of sections 23D to 23I**

Sections 23D to 23I apply to every case where –

- (a) a person is charged with –
  - (i) any offence against any of the provisions of sections 128 to 142A of the Crimes Act 1961; or
  - (ia) any offence against section 144A of the Crimes Act 1961; or
  - (ii) any other offence against the person of a sexual nature; or
  - (iii) being a party to the commission of any offence referred to in subparagraph (i) or subparagraph (ia) or subparagraph (ii); or
  - (iv) conspiring with any person to commit any such offence; and
- (b) either –
  - (i) the complainant has not, at the commencement of the proceedings, attained the age of 17 years; or
  - (ii) the complainant is of or over the age of 17 years and is mentally handicapped.

Section 23C: inserted, on 1 January 1990, by section 3 of the Evidence Amendment Act 1989 (1989 No. 104).

Section 23C(a)(ia): inserted, on 1 September 1995, by section 8(5) of the Crimes Amendment Act 1995 (1995 No. 49).

Section 23C(a)(iii): words inserted, on 1 September 1995, by section 8(6) of the Crimes Amendment Act 1995 (1995 No. 49).

Section 23C(b): substituted, on 1 September 1993, by section 28 of the Summary Proceedings Amendment Act 1993 (1993 No. 47).

#### **23D Directions as to mode by which complainant's evidence is to be given**

- (1) Where, in any case to which this section applies, the accused is committed for trial, the prosecutor shall, before the trial, apply to a Judge of the Court by or before which the indictment is to be tried for directions under section 23E as to the mode by which the complainant's evidence is to be given at the trial.
- (2) The Judge shall hear and determine the application in chambers, and shall give each party an opportunity to be heard in respect of the application.
- (3) The Judge may call for and receive any reports from any persons whom the Judge considers to be qualified to advise on the effect on the complainant of giving evidence in person in the ordinary way or in any particular mode described in section 23E.
- (4) In considering what directions (if any) to give under section 23E, the Judge shall have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused.

Section 23D: inserted, on 1 January 1990, by section 3 of the Evidence Amendment Act 1989 (1989 No. 104).

#### **23E Modes in which complainant's evidence may be given**

- (1) On an application under section 23D, the Judge may give any of the following directions in respect of the mode in which the complainant's evidence is to be given at the trial:
  - (a) where a videotape of the complainant's evidence was shown at the preliminary hearing, a direction that the complainant's evidence be admitted in the form of that videotape, with such excisions (if any) as the Judge may order under subsection (2);
  - (b) where the Judge is satisfied that the necessary facilities and equipment are available, a direction that the complainant shall give his or her evidence outside the courtroom but within the Court precincts, the evidence being transmitted to the courtroom by means of closed circuit television;
  - (c) a direction that, while the complainant is giving evidence or is being examined in respect of his or her evidence, a screen, or one-way glass, be so placed in relation to the complainant that –
    - (i) the complainant cannot see the accused; but
    - (ii) the Judge, the jury, and counsel for the accused can see the complainant;
  - (d) where the Judge is satisfied that the necessary facilities and equipment are available, a direction that, while the complainant is giving evidence or is being examined in respect of his or her evidence, the complainant be placed behind a wall or partition, constructed in such a manner and of such materials as to enable those in the

courtroom to see the complainant while preventing the complainant from seeing them, the evidence of the complainant being given through an appropriate audio link:

- (i) the complainant give his or her evidence at a location outside the Court precincts; and
  - (ii) that those present while the complainant is giving evidence include the Judge, the accused, counsel, and such other persons as the Judge thinks fit; and
  - (iii) that the giving of evidence by the complainant be recorded on videotape, and that the complainant's evidence be admitted in the form of that videotape, with such excisions (if any) as the Judge may order under subsection (2).
- (2) Where a videotape of the complainant's evidence is to be shown at the trial, the Judge shall view the videotape before it is shown, and may order excised from the videotape any matters that, if the complainant's evidence were to be given in person in the ordinary way, would be excluded either –
- (a) in accordance with any rule of law relating to the admissibility or evidence; or
  - (b) pursuant to any discretion of a Judge to order the exclusion of any evidence.
- (3) Where a videotape of the complainant's evidence is to be shown at the trial, the Judge shall give such directions under this section as the Judge may think fit relating to the manner in which any cross-examination of the complainant is to be conducted.
- (4) Where the complainant is to give his or her evidence in the mode described in paragraph (b) or paragraph (d) of subsection (1), the Judge may direct that any questions to be put to the complainant shall be given through an appropriate audio link to a person, approved by the Judge, placed next to the complainant, who shall repeat the question to the complainant.
- (5) Where the complainant is to give his or her evidence at a location outside the Court precincts, the Judge may also give any directions under paragraph (c) or paragraph (d) of subsection (1) that the Judge thinks fit.
- (6) Where a direction is given under this section, the evidence of the complainant shall be given substantially in accordance with the terms of the direction; but no such evidence shall be challenged in any proceedings on the grounds of any failure to observe strictly all the terms of the direction.

Section 23E: inserted, on 1 January 1990, by section 3 of the Evidence Amendment Act 1989 (1989 No. 104).

### **23F Cross-Examination and question of accused**

- (1) Notwithstanding section 354 of the Crimes Act 1961, but subject to the succeeding provisions of this section, the accused shall not be entitled in any case to which this section applies to cross-examine the complainant.
- (2) Nothing in subsection (1) nor any direction given under section 23E shall affect the right of counsel for the accused to cross-examine the complainant.
- (3) Where the accused is not represented by counsel, the accused may put questions to the complainant (whether by means of an appropriate audio link or otherwise as the Judge may direct) by stating the questions to a person, approved by the Judge, who shall repeat the questions to the complainant.
- (4) No direction given under section 23E shall affect the right of the Judge to question the complainant.
- (5) Where the complainant is being cross-examined by counsel for the accused, or any questions are being put to the complainant by the accused, the Judge may disallow any question put to the complainant that the Judge considers is, having regard to the age of the complainant, intimidating or overbearing.

Section 23F: inserted, on 1 January 1990, by section 3 of the Evidence Amendment Act 1989 (1989 No. 104).

### **23G Expert witnesses**

- (1) For the purposes of this section, a person is an **expert witness** if that person is –
  - (a) a medical practitioner holding vocational registration in the speciality of psychiatry, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or
  - (b) a psychologist registered under the Psychologists Act 1981, practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children.

- (2) In any case to which this section applies, an expert witness may give evidence on the following matters:
- (a) the intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on –
    - (i) examination of the complainant before the complainant gives evidence; or
    - (ii) observation of the complainant giving evidence, whether directly or on videotape:
  - (b) the general development level of children of the same age group as the complainant:
  - (c) the question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is, from the expert witness's professional experience or from his or her knowledge of the professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

Section 23G: inserted, on 1 January 1990, by section 3 of the Evidence Amendment Act 1989 (1989 No. 104).

Sections 23G(1)(a): substituted, on 1 July 1996, by section 143(1) of the Medical Practitioners Act 1995 (1995, No. 95)

### **23H Directions to jury**

Where a case to which this section applies is tried before a jury, the following provisions shall apply in respect of the Judge's directions to the jury:

- (a) where the evidence of the complainant is given in any particular mode described in section 23E, the Judge shall advise the jury that the law makes special provision for the giving of evidence by child complainants in such cases, and that the jury is not to draw any adverse inference against the accused from the mode in which the complainant's evidence is given:
- (b) the Judge shall not give any warning to the jury relating to the absence of corroboration of the evidence of the complainant if the Judge would not have given such a warning had the complainant been of full age:
- (c) the Judge shall not instruct the jury on the need to scrutinise the evidence of young children generally with special care nor suggest to the jury that young children generally have tendencies to invention or distortion:
- (d) nothing in paragraph (b) or paragraph (c) shall limit the discretion of the Judge to comment on –
  - (i) specific matters raised in any evidence during the trial; or
  - (ii) matters, whether of a general or specific nature, included in the evidence of any expert witness to whom section 23G applies.

Section 23H: inserted, on 1 January 1990, by section 3 of the Evidence amendment Act 1989 (1989 No. 104).

### **23I Regulations**

The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

- (a) prescribing the procedure to be followed, the type of equipment to be used, and the arrangements to be made, where the evidence of a complainant is to be given by videotape:
- (b) providing for the approval of interviewers or classes of interviewers in such cases, providing for the proof of any such approval to be by production of a certificate and prescribing the form of that certificate, and prescribing the form of certificate by which the interviewer is to formally identify the videotape:
- (c) providing for the consent of the complainant to being videotaped, and specifying who may give consent on behalf of the complainant:
- (d) prescribing the uses to which any such videotapes may be put, and prohibiting their use for any other purposes:
- (e) providing for the safe custody of any such videotapes:
- (f) providing for such other matters as are contemplated by any of sections 23D to 23H or as may be necessary for the due administration of those provisions.

Section 23I: inserted, on 1 January 1990, by section 3 of the Evidence Amendment Act 1989 (1989 No. 104).

**APPENDIX II**  
**EVIDENCE ACT 1980**

**23AB Corroboration In Sexual Cases**

- (1) Where any person is tried for an offence against the person of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the Judge shall not be required to give any warning to the jury relating to the absence of corroboration.
- (2) If, in any such case, the Judge decides to comment on the absence of any evidence tending to support any other evidence, no particular form of words shall be required.

Section 23AB: inserted, on 9 January 1986, by section 3 of the Evidence Amendment Act (No 2) 1985 (1985 No. 161).

Section 23AB(1): expression substituted, on 1 September, 1995, by section 8(3) of the Crimes Amendment Act 1995 (1995 No. 49).

**23AC Delay In Making Complaint In Sexual Cases**

Where, during the trial of any person for an offence against any of sections 128 to 144A of the Crimes Act 1961 or for any other offence against the person of a sexual nature, evidence is given or a question is asked or a comment is made that tends to suggest an absence of complaint in respect of the alleged offence by the person upon whom the offence is alleged to have been committed, or to suggest delay by that person in making any such complaint, the Judge may tell the jury that there may be good reasons why the victim of such an offence may refrain from or delay in making such a complaint.

Section 23AC: inserted, on 9 January 1986, by section 3 of the Evidence Amendment Act (No. 2) 1985 (1985 no. 161).

Section 23AC: expression substituted, on 1 September 1995, by section 8(4) of the Crimes Amendment Act 1995 (1995 No. 49).

**APPENDIX III**  
**THE EVIDENCE BILL 2005**

- 21 Judicial directions about children's evidence:
- (1) In a criminal proceeding tried with a jury in which the complainant is a child at the time when the proceeding commences, the Judge must not give any warning to the jury about the absence of corroboration of the evidence of the complainant if the Judge would not have given that kind of a warning had the complainant been an adult.
  - (2) In a proceeding tried with a jury in which a witness is a child, the Judge must not, unless expert evidence is given in that proceeding supporting the giving of the following direction or the making of the following comment:
    - (a) instruct the jury that there is a need to scrutinise the evidence of children generally with special care; or
    - (b) suggest to the jury that children generally have tendencies to invent or distort.
  - (3) Despite subsection (2), if, in a proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:
    - (a) even very young children can accurately remember and report things that have happened to them in the past, but, because of development differences, children may not report their memories in the same manner or to the same extent as an adult would:
    - (b) this does not mean that a child witness is any more or less reliable than an adult witness:
    - (c) one difference is that very young children typically say very little without some help to focus on the events in question:
    - (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than older children or adults:
    - (e) thus the reliability of the evidence of very young children depends crucially on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish open questions aimed at obtaining information from leading questions that put words into their mouths.
  - (4) This section does not affect any other power of the Judge to warn or inform the jury.

## APPENDIX IV

### Fourth Schedule – Code of Conduct for expert witnesses

Rule 330A

#### **Duty to the Court**

1. An expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise.
2. An expert witness is not an advocate for the part who engages the witness.

#### **Evidence of expert witness**

3. In any evidence given by an expert witness, the expert witness must –
  - (a) Acknowledge that the expert witness has read this Code of Conduct and agrees to comply with it;
  - (b) State the expert witness' qualifications as an expert;
  - (c) State the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise;
  - (d) State the facts and assumptions on which the opinions of the expert witness are based;
  - (e) State the reasons for the opinions given by the expert witness;
  - (f) Specify any literature or other material used or relied on in support of the opinions expressed by the expert witness;
  - (g) Describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.
4. If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.
5. If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

#### **Duty to confer**

6. An expert witness must comply with any direction of the Court to –
  - (a) Confer with other expert witness;
  - (b) Try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses;
  - (c) Prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.
7. In conferring with another expert witness, the expert witness must exercise independent and professional judgement and must not act on the instructions or directions of any person to withhold or avoid agreement.

Clerk of the Executive Council.

HCRSch.4.1 History This Schedule was inserted by the High Court Amendment Rules 2002, R 25 and Schedule 2, effective 1 July 2002.