Barnardos

Submission to the Justice Select Committee on the Sexual Violence Legislation Bill

January 2020

Kia eke ai te hunga taitamariki
ki ngā rangi tūhāhā

Summary of recommendations

1. Barnardos strongly supports all the clauses in the Sexual Violence Legislation Bill. We further recommend the following:

   Amendments to the Evidence Act 2006

   a. Communication assistance should be 'opt-out' rather than 'opt-in' for complainants, witnesses and defendants under the age of 18. The Communication Assistant should be assigned as early as possible, preferably at the Evidential Video Interview (EVI) stage. Increased funding, resources and support for communication assistants must be provided.

   b. A presumption should be created in the Evidence Act that any complainant or witness who is a child will give evidence by the way of a video record made before the trial, or from an appropriate place outside the courtroom.

   c. Under 'judicial directions', a section be inserted providing that judicial direction be given where necessary or desirable to address relevant misconceptions about the effects of trauma on child victims/complainants/witnesses.

   Amendments to the Victims' Rights Act 2002

   d. The Bill should include a clause amending the definition of 'child' under s 4 of the Victims' Rights Act 2002 to read 'means a person under the age of 18'.

   e. Include a set of principles in the Victims' Rights Act 2002 reflecting the child's right to participation in line with international and domestic law.

   Changes to trial process

   f. Police and/or interviewers should be required by primary legislation to explain to victims giving evidence the purpose and significance of an EVI, the types of questions they are likely to be asked and why, how the EVI will be used throughout the justice process and who is likely to see it. Victims should then be given warning before the EVI is played in court and the opportunity to re-watch the EVI before it is played.

   g. A requirement should be included in the Bill that judges actively offer breaks to child complainant-witnesses when they show signs of fatigue and stress. For child witnesses, even if evidence is given in an alternative way, there should be visual cues for child complainant-witnesses to point to, so they can more easily indicate if they need a break.

   h. Pre-trial meetings between the judge and child complainant-witnesses should be mandatory, as step to better ensure children's participation in ways that minimise trauma and support them to feel more at ease in the court proceedings.

2. Barnardos further supports the recommendations made in Community Law o Aotearoa's submission on this Bill.

A. Introduction

1. Barnardos is Aotearoa New Zealand's national children's charitable NGO, working every day towards the vision of 'An Aotearoa New Zealand where every child shines bright'. We do this through our three ways of working: direct social services support through Barnardos Child and Family Services; supporting children in their early years through Barnardos Early Learning; and driving systems-level change for children and tamariki through our Advocacy.

2. Because of our mahi and kaupapa, Barnardos is well-placed to take a child-centred view of the Sexual Violence Legislation Bill (the Bill). This submission outlines our views and recommendations on how the Bill can be strengthened to support child survivors' wellbeing and reduce re-traumatisation of child sexual violence victims through the court system.

B. Barnardos' overall position on the Bill

3. Barnardos strongly supports this Bill and its intention to better promote the wellbeing of victims of sexual violence through improving their experience of the justice system. We applaud the government's effort to improve the justice system response and are pleased to see the cross-party support for the changes this legislation proposes.

4. We also urge that the broader, transformative work programme outlined in the Cabinet paper that gave rise to this Bill is promptly resourced and progressed.[1] We look forward to hearing more detailed plans to progress the work programme approved in the Cabinet Minute that approved the contents of this Bill.[2]

5. The UN Committee on the Rights of the Child (UNCRC) has long-called for states to take greater responsibility to protect children from the violence of secondary victimisation through the court.[3] All of the proposed amendments in the Bill are necessary and overdue changes; alongside the wider programme of work being undertaken, they will be critical to reducing trauma for victims and improving their experience of the justice system. We believe that they will help to ensure that those engaging with the justice system in this way are treated with greater dignity and in ways that promote and uphold their human rights.

6. However, Barnardos submits that children face particular barriers in their interactions with the justice system. The UNCRC has issued guidance to member states to remove any barriers, including discrimination, that children may face in accessing justice and in effectively participating in criminal proceedings. The UNCRC has also recommended that States pay particular attention to the rights of the child and the child's best interests in the administration of justice and ensure that children in contact with the justice system are treated in a child sensitive manner, taking into consideration their specific needs.[4]

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[1] *Improving the justice response to victims of sexual violence: Cabinet paper,* Office of the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues), meeting date 3 April 2019.
[2] SWC-19-MIN-0139, *Improving the justice response to victims of sexual violence: Cabinet Minute,* Cabinet Office, 3 April 2019.
[3] A/RES/69/194, *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice,* (2015): https://sustainabledevelopment.un.org/content/documents/2580safeguarding_the_rights_of_girls_in_the_criminal_justice_system.pdf
[4] Ibid.

7. Barnardos believes that this Bill is a step in the right direction. However, this submission sets out several key recommendations for ensuring that children's specific needs and rights are reflected in the legislation guiding the interaction between child victims of sexual violence and the justice system. There were 1,350 people charged with a sexual offence in 2018/2019. More than half of these people were charged with an offence against a child under 16 years (52%; 705 people).[5] We believe that by incorporating these recommendations in the Bill, Aotearoa New Zealand's legislation in this critical area that affects large numbers of children will be strengthened regarding this particularly vulnerable group of children and tamariki. This is essential, in order to uphold and protect them and their rights, and recognises that as victims of sexual violence, even before interacting with the justice system, they have experienced trauma. Therefore, everything possible should be done to support and protect them when they are required to engage in what is an inherently stressful and potential re-traumatising process in the justice system.

8. Barnardos has read and supports the submission on this Bill made by Community Law. Though we have not elaborated on them in our submission, we would like to bring the Committee's attention to several points in particular which are outlined in Community Law's submission that Barnardos strongly supports, namely:
    a. That the protections that the Bill provides for sexual violence survivors are not also being extended to survivors of family violence. We believe that the same considerations in terms of re-traumatisation apply to both groups, and there is no principled reason to treat them differently;
    b. The recommendation that the entitlement to give evidence in alternative ways be extended to civil proceedings involving issues in dispute of a sexual nature; and
    c. The recommendation that the Bill includes a restriction on defence access to sexual violence complainants' confidential counselling and therapeutic records (or what has been termed a "sexual assault communications privilege").

9. Barnardos would like the opportunity to speak to our submission. We can be contacted via the contact details provided on the final page of this submission.

C. Barnardos' submissions on how the Bill should be strengthened in relation to children

Amendments to the Evidence Act 2006

Communication Assistance

10. Barnardos supports the widening of the definition of 'communication assistance' in the Evidence Act. However, we submit that this should go further for children. Courts should interact with children involved in a trial in a way that is tailored to their age, maturity, understanding and individual needs. This includes cultural needs, for example for tamariki and rangatahi Māori, ensuring that communications assistance is provided in a way that respects and upholds tikanga and te reo Māori is essential. For children with disabilities, too, for example, tailoring to individual

[5] https://www.justice.govt.nz/assets/Documents/Publications/summary-justice-statistics-tables-jun2019-v3.0.pdf

needs is also crucial. Although some children display signs of needing support with comprehending questions or expressing themselves, others with similar needs may go undetected.[6] In the *Evaluation of the Sexual Violence Court Pilot* report prepared by Gravitas for the Ministry of Justice (the Pilot), communication assistants involved in the Pilot advocated that children should receive communication support 'as a matter of course', to help them deal with both the adult setting and complex questions being asked of them using adult language.[7] This would mean that children can be sure of what is being asked of them and respond with more confidence and accuracy.

11. The Pilot also found that use of communication assistance for children reduced stress on child witnesses, increased the quality of evidence presented by the children and offered an opportunity to defence counsel to tailor their questions according to the child's age, maturity and specific needs, after consultation with the communication assistant.[8] This could go some way to addressing concerns of defence lawyers about the proposed obligation on judges to intervene in unfair questioning. If counsel for the defence has the ability to ensure that their questioning is tailored to the needs of the child witness prior to the child giving evidence, it is less likely to be disallowed by a judge.

12. To be effective, communication assistance must be assigned early. The evaluation of the court pilot suggests that communication assistance should be assigned at the EVI stage to work with police to make sure that complainants are able to communicate their experiences as accurately as possible. One communications assistant noted that police interviewers often don't have the expertise to deal with some high-needs individuals, which can result in a confusing of events, leading to difficulties during the cross-examination stage.[9] Assigning communications assistance early also gives the communications assistant and the child time to get to know each other, allowing the assistant to get a better understanding of the child's needs and contributing to the child feeling more at ease when disclosing information.

13. In the Pilot, communication assistants noted that although ideally every child would be provided with communications support, the service would need to be expanded considerable to ensure sufficient resources to allow this to happen.[10] In order to meet this increased demand of communication assistance that will occur through expanding its definition, more resources must be allocated to training, supporting and increasing the availability of communication assistants in courts.

14. **Recommendation 1**: automatically assign communication assistance to any complainant, witness and defendant under the age of 18, with a provision to allow the child to apply to the Judge to waive the right to communication assistance.

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[6] Lambie, Ian, *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand*, (Office of the Prime Minister's Chief Science Advisor, 2020): https://cpb-ap-se2.wpmucdn.com/blogs.auckland.ac.nz/dist/6/414/files/2020/01/What-were-they-thinking-A-discussion-paper-on-brain-and-behaviour-in-relation-to-the-justice-system-in-New-Zealand-updated.pdf

[7] *Evaluation of the Sexual Violence Court Pilot*, Report prepared by Gravitas Research and Strategy Limited for the Ministry of Justice, (2019): https://www.districtcourts.govt.nz/assets/Uploads/2019_Publications/Sexual-Violence-Court-Pilot-Evaluation-Report-FINAL-24.7.19.pdf

[8] Ibid.

[9] Ibid.

[10] Ibid.

This will create an 'opt-out' rather than an 'opt-in' approach to communication assistance for child witnesses, with the effect of reducing trauma on the witness, eliciting more accurate and articulate evidence and assisting in the smooth running of the Court. The Communication Assistant should be assigned as early as possible, preferably at the EVI stage, in order to develop a relationship with the child, and should be present at all points that a child is giving evidence throughout the trial, whether in the ordinary or an alternative way. The widening of the definition must also be implemented in practice with increased funding, resources and support for communication assistants.

Alternative ways of giving evidence

15. Barnardos is supportive of the provisions of the Bill around alternative ways of giving evidence. We note that child complainants and propensity witnesses in a sexual assault will now be dealt with under the new clauses 106D-106J, which mirror the existing provisions for child witnesses in clauses 107-107B of the Evidence Act. However, we suggest that child witnesses in sexual assault cases should have a strong presumption in favour of giving evidence either by pre-recorded video or from an appropriate place outside the courtroom, for example via CCTV, rather than while in the court room screened off from the defendant.

16. Grounded in the expertise and insights of Barnardos social workers who have supported child witnesses through the court process, we strongly advise that for a child who has been the victim of sexual violence, giving evidence from within the courtroom can be highly traumatic, even when the accused is behind a screen. The process of giving evidence and being cross-examined is a difficult and often scary process for any child. The knowledge that their alleged abuser is in such close proximity whilst going through the process can make it a traumatic one and mean it much harder for the child to give their evidence in a logical and coherent way.

17. **Recommendation 2**: create a presumption in the Evidence Act that any complainant or witness who is a child will give evidence by the way of a video record made before the trial, or from an appropriate place outside the courtroom. If the complainant or witness is a child who indicates their wish to give evidence or any part of their evidence from within the court room, whether unable to see the defendant or in the ordinary way, the prosecution must apply to the Judge under s106E to do so.

Judicial directions

18. Barnardos supports clause 16 of the Bill requiring judicial directions to address common myths and misconceptions about sexual violence. Everyone involved in sexual violence cases, including the jury, should receive adequate and up-to-date information about rape myths. We see this as an area where judicial training is vital, as judges are only required to give directions that they deem "necessary or desirable" and this allows for significant subjectivity.

19. A further issue raised by Barnardos social workers who have supported tamariki in their interactions with the justice system is the lack of understanding by the court about the effects of trauma on child complainant-witnesses. A strong evidence base exists showing that trauma can have complex effects on children's' behaviour, cognition and emotional responses in a way that can impact their ability to give evidence.[11] The effects of trauma can be displayed in various ways,

[11] "Research shows that when children are exposed to negative experiences like neglect, mental illness in the household, trauma or abuse at a young age, the brain's ability to build circuits that allow different regions of the brain to

which to an audience untrained in the effects of trauma may perceive as 'guilty' or 'untruthful' behaviour. It is important that everyone involved in sexual violence cases, especially the jury, should receive information about how the effects of trauma might display when they child is giving evidence.

20. **Recommendation 3**: Under 'judicial directions', include a section providing that judicial direction be given where necessary or desirable to address relevant misconceptions about the effects of trauma on child victims, and the effects this can have on the recollection of events, the giving of evidence and emotional response. Everyone involved in sexual violence cases, including the jury, should receive adequate and up-to-date information about the effects of trauma on a complainant or witness.

Amendments to the Victims' Rights Act 2002

Definition of 'child'

21. Children have unique developmental needs which the court-room and justice system context does not generally handle well or support. For children with additional needs such as children with disabilities, recognising this is even more necessary. For Māori tamariki and rangatahi, the system is likely to be further alienating from a cultural perspective. Children's development needs continue beyond the age of 14[12], which has been acknowledged in the Evidence Act, where 'child' includes any person aged 18 and under. In its 2016 concluding observations on New Zealand, the UN Committee on the Rights of the Child recommended that New Zealand address the inconsistencies in domestic legislation concerning the definition of the child, suggesting that several definitions be raised to extend their scope to all children under the age of 18,[13] consistent with Article 1 of the UN Convention on the Rights of the Child (CRC).

22. **Recommendation 4**: Barnardos recommends that the Bill amend the definition of 'child' under section 4 of the Victims' Rights Act 2002 to read 'means a person under the age of 18', to ensure consistency across the legislation affecting victims as they go through the court process, and to explicitly ensure every child in this context the protections of the CRC.

Upholding children's rights

23. One of the guiding principles of the CRC is a child's right to be heard (Article 12 CRC), including their ability to participate in judicial proceedings in an age-appropriate manner in line with their best interests and evolving capacities. In all cases involving child victims or witnesses, measures and safeguards should be implemented to protect them from intimidation, reprisals or secondary victimisation that may occur while participating in the justice process.[14]

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communicate and process information can be impeded. If those circuits are weak, the development of executive function needed to regulate behavioural control, impulse control, which allow children to focus and follow directions, can be hindered." – Mader, Jackie, *How trauma or stress can effect a child's brain development,* The Hechinger Report (June 2018).

[12] Lambie, Ian, *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (see above n 6).

[13] CRC/C/NZL/CO/5, Concluding Observations on the fifth periodic report of New Zealand (2017), https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NZL/INT_CRC_COC_NZL_25459_E.pdf

[14] Penal Reform International, *Protecting children's rights in criminal justice systems: a training manual and reference point for professionals and policy makers*, (2013), at 61: https://cdn.penalreform.org/wp-content/uploads/2013/11/Childrens-rights-training-manual-Final%C2%ADHR1.pdf

24. Consistent with Article 12 CRC, to which New Zealand is a States Party, it is important for children to feel empowered to participate fully in the trial process. For this to happen they must have information about the process explained to them in a way consistent with their age and developmental needs. This includes from the EVI stage (information about the role of the EVI and how it works), and right throughout the trial. Research has found that people who are better prepared and informed about the complaint and justice system process have a more positive and less stressful experience.[15] This is true for children as well as adults. To ensure that officials at all stages of the justice process are guided by Article 12 CRC, a set of principles should be included in the Victims' Rights Act 2002 guiding the practical behaviours that will ensure that this right is upheld.

25. **Recommendation 5**: Include a set of principles in the Victims' Rights Act 2002 reflecting the following:

    a) Wherever the Act provides for something to be explained to a victim, that every reasonable effort is made to communicate in a way appropriate to their age, developmental needs and culture;
    b) Close co-operation between different professionals should be encouraged in order to obtain a comprehensive understanding of the child, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation;
    c) Every child or young person must be given reasonable opportunities to freely express their views on matters affecting them;
    d) That any views that the child or young person expresses on matters affecting them (either directly or through a representative) must be taken into account;
    e) That if a child or young person has difficulties in expressing their views or being understood (for example, because of their age or language, or because of a disability), support must be provided to assist them to express their views and to be understood;
    f) That every child or young person must be given reasonable assistance to understand the reasons for the proceedings or process, the options available to the decision-maker, and how these options could affect them; and
    g) That the decision, the reasons for it, and how it will affect them must be explained to the child or young person in a way that ensures their understanding.

26. These principles are in line with international law,[16] and all (apart from b) are already enshrined in New Zealand's domestic law in the Oranga Tamariki Act 1989.[17] The Oranga Tamariki Act stipulates that these principles must apply in all court proceedings involving a child. Including these principles within the Victims' Rights Act will create consistency across domestic legislation as to how children's rights are upheld in relation to their interactions with the New Zealand Justice System to avoid discrepancies at the system-wide level.

[15] *Improving the justice response to victims of sexual violence: victims' experiences,* Report prepared by Gravitas Research and Strategy Limited for the Ministry of Justice, (2019), at 4: https://www.justice.govt.nz/assets/Documents/Publications/Improving-the-justice-response-to-victims-of-sexual-violence-victims-experiences.pdf

[16] Penal Reform International, *Protecting children's rights in criminal justice systems: a training manual and reference point for professionals and policy makers,* (above n 14).

[17] Oranga Tamariki Act 1989, s 11.

Changes to trial process

Improving practice around EVIs

27. The *Improving the justice response to victims of sexual violence* report found that victims' understanding around the purpose and significance of their EVI was poor and that several victims believed that this had impacted on their trial.[18] The Ministry of Justice Report *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* released in 2019 revealed that for every 100 sexual violence incidents reported to the Police, only 31 made it to court, 11 resulted in a conviction and 6 went to prison.[19] If these attrition rates are to be addressed, victims of sexual violence must be supported to provide the best evidence that they can at trial. If victims are not informed of the importance of their EVI in providing evidence at the trial, the types of questions that they will be asked during the interview, and why and how the EVI will be used, they may be disadvantaged later when their EVI is presented as evidence in court.

28. Other victims in the *Attrition and progression* report talked about the trauma they experienced when their EVI was played in court with no prior warning.[20] Given the long time-frames often experienced by victims in having their cases heard in court, it is likely that a victim will have recorded their EVI months or years prior to trial. Having such sensitive content played for a court without warning, especially if they have not been informed that the EVI would be used as evidence in the trial resulted in re-victimisation for some victims included in the report.

29. **Recommendation 6:** Police and/or interviewers should be required by primary legislation to explain the purpose and significance of and EVI, the types of questions they are likely to be asked and why, how the EVI will be used throughout the justice process and who is likely to see it. Victims should then be given warning before the EVI is played in court and the opportunity to re-watch the EVI before it is played.

Breaks during the giving of evidence

30. The Pilot found that whilst most complainants are aware of their right to request a break during evidence and how to request one, that 'vulnerable' witnesses often will not do so, due to a lack of confidence or fear.[21] A complainant in Auckland who reported giving evidence in court for at least three hours recalls being told that she could request breaks when she needed them. However, she found it uncomfortable to do so.[22] Barnardos social workers have observed that children giving evidence can become visibly distressed during the process of giving evidence (including during an EVI) when steps are not taken to provide the child with a break.

31. The current practice of judges in giving breaks during evidence varies, with some judges actively offering the witness breaks, whilst others wait for the witness to request one. Barnardos suggests that where the witness is a child, there should requirement for judges to actively offer the witness a break where they show visible signs of fatigue or distress.

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[18] *Improving the justice response to victims of sexual violence: victims' experiences,* (see above at n 15).
[19] Ministry of Justice, *Attrition and Progression: Reported sexual violence victimisations in the criminal justice system*: https://www.justice.govt.nz/assets/Documents/Publications/sf79dq-Sexual-violence-victimisations-attrition-and-progression-report-v1.0.pdf
[20] Above n 15.
[21] *Evaluation of the Sexual Violence Court Pilot,* (above n 7).
[22] *Evaluation of the Sexual Violence Court Pilot,* at 64, (above n 7).

32. Child witnesses may also struggle to communicate or to vocalise their needs. In other settings, use of visual cues have proven effective in communicating with children. In the Whangarei pilot court, a system was developed where a complainant-witness appearing via CCTV was able to point to a sign on the table in order to request a break, avoiding the need to vocalise the request.[23] By placing visual cues in-front of children when they are giving evidence (including during EVIs) which they are able to point to would ensure that children are given the opportunity to communicate their needs in a way appropriate to their age and development.

33. **Recommendation 7:** Include a requirement that judges actively offer breaks to child complainant-witnesses when they show signs of fatigue and stress. For child witnesses, even if evidence is given in an alternative way, there should be visual cues for child complainant-witnesses to point to if they need a break.

Compulsory pre-trial meetings with the Judge

34. In the Sexual Violence Court Pilot, stakeholders suggested that pre-trial complainant witness meeting should be compulsory for all sexual violence cases, based on the positive feedback by complainants and the benefits observed by those dealing directly with the complainants.[24] Complainants reported that meeting the judge in person prior to trial makes complainants feel valued in the justice system and mitigates feelings of anxiety or intimidation from being in such a formal and unfamiliar environment.[25]

35. **Recommendation 8:** Include in the Victims' Rights Act a right for child victims to a pre-trial meeting with the judge. Pre-trial meetings between the judge and child complainant-witnesses should be mandatory, as step to better ensure children's participation in ways that minimise trauma and support them to feel more at ease in the court proceedings.

Contact details for anything relating to this submission

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[23] Ibid.
[24] Ibid, at 90.
[25] Ibid, at 54