17

19 August 2005

# SUBMISSION ON THE EVIDENCE BILL



To the Justice and Electoral Select Committee

## Introduction

1 This submission is made by the Wellington Women Lawyers Association (WWLA), PO Box 118, Wellington.

2 We **wish** to appear before the Committee to speak to our submission.

3 WWLA has a membership of approximately 200 women lawyers who work throughout the Wellington region. One of the objects of the WWLA is to work for the reform of the law and its administration, and for the advancement of social policy, in order to promote and protect the interests of women.

4 Please note that these submissions do not necessarily reflect the views of all members of WWLA.

## Comments

5 WWLA supports the policy evident in the purposes listed in clause 6 of the Bill promoting fairness for all parties and witnesses in proceedings.

6 We are concerned that clause 40 of the Bill does not provide sufficient protection for complainants in sexual cases in respect of their sexual experience or reputation. If proceedings concerning sexual offences are to be fair to all parties as clause 6 indicates, this point requires further consideration by the committee.

7 Two sets of distinctions are made in clause 40: these are:

- between a complainant's sexual experience and a complainant's reputation in sexual matters; and
- between a complainant's sexual experience with a particular defendant and a complainant's sexual experience with persons other than the defendant.

8 WWLA has serious doubts as to whether a complainant's sexual reputation, as well as sexual experience with people other than the defendant, are ever relevant in determining the truth of allegations in a particular case. Yet it is our experience that in a significant number of cases judges continue to allow such evidence to be given and questions be asked about these issues.

9 It is clear that though women are particularly affected by sexual offending this is not exclusively the case. Our submissions below use the pronoun "she" when referring to the complainant to recognise the reality that women are predominantly affected by this. The "she" pronoun is also important for the purpose of these submissions because of WWLA's key concern that rules of evidence in relation to sexual offending have historically been based upon myths and stereotypes relating to women and sexual matters. We are concerned that the rules of evidence which are enacted by way of this Bill do not unintentionally continue to promote such myths and stereotypes into the 21st century.

*Evidence of sexual reputation and sexual experience with persons other than the defendant*

10 We note that the suggested amendment to the law in this area contained in the Law Commission's *Evidence Code*[1] draft clause 46(3),[2] has not been included in the Bill.

11 The Law Commission proposed that legislation should provide that no evidence can be given and no question can be asked of a witness relating to the reputation of the complainant in sexual matters for two specified reasons. These are for the purpose of supporting or challenging the truthfulness of the complainant and for the purpose of establishing the complainant's consent.

12 In respect of these two reasons (challenging the complainant's truthfulness or whether she consented) the Law Commission proposed that no discretion be left to judges to allow evidence regarding the complainant's sexual reputation. WWLA notes that in our experience judges still regularly take the view that the sexual reputation of women is relevant to these questions. We disagree and ask the committee to seriously consider whether clear restrictions on this type of evidence need to be put in place to protect complainants and ensure overall fairness in criminal trials.

13 WWLA is not aware of any evidence which indicates that any person's sexual proclivity (man or woman) assists to predict or assess whether they

---

[1] Law Commission, *Evidence, Report 55 – volume 2*, August 1999
[2] at page 124

will tell the truth or not about sexual matters. Nor are we aware of any evidence that this is indicative of whether any person (man or woman) will consent, or has consented, to sexual activity on any particular occasion.

14 Unless the committee is satisfied that there is evidence supporting these two points, fairness requires that clause 40 be amended in terms of the Law Commission's proposal in draft clause 46(3) *Evidence Code.*

15 WWLA also asks the committee to seriously consider limiting the possibility of judges allowing evidence of a complainant's sexual experience with persons other than the defendant in the same manner.

16 To allow the Bill to proceed in its current form the committee needs to be satisfied that evidence supports the proposition that what sexual activity someone (man or woman) has engaged in, in the past, with persons other than the defendant can indicate whether they are telling the truth regarding the defendant or whether they consented to the particular sexual activity at issue in a trial. WWLA is not aware of any evidence supporting this proposition. If the committee is not satisfied that this is correct, fairness requires that clause 40 exclude the possibility of such evidence being allowed by a judge.

17 WWLA notes that the draft clause 46(3) *Evidence Code* would still have permitted evidence of sexual reputation to have been ruled as admissible "for any other purpose" with the permission of the judge. This was said by the Law Commission to be necessary to permit a judge to allow evidence specifically about a complainant's reputation to lie about sexual matters including making false allegations of sexual assault.[3] WWLA suggests that this exception be specifically included in clause 40 of the Bill rather than a general provision which could be used in a manner not intended by Parliament to the detriment of complainants.

18 As well as amending clause 40 as suggested above, WWLA suggests that clause 40(2) and (3) of the current Bill be amended to refer to a judge's discretion to allow evidence of sexual reputation or of sexual experience with others for the specified reasons considered appropriate by the committee.

*Evidence of sexual experience with the defendant*

19 WWLA believes that evidence of sexual experience with a defendant is seldom relevant to whether the complainant consented on a particular occasion. An assumption underlying the contrary view is that past sexual experience indicates a propensity by the complainant to act in particular ways.

---

[3] para C212 at page 127

20 WWLA is not aware of any evidence that past sexual experience, even with one particular person, is a likely indicator of whether a person (man or woman) will consent to sexual activity on a particular occasion or whether they are telling the truth about what happened on a particular occasion. In our view such evidence still tends to be brought to prejudice the complainant.

21 By way of comparison we note that in clause 39(3) of the Bill a list of factors is provided which a judge may consider when assessing the admissibility of propensity evidence concerning a defendant. WWLA believes that such issues are equally relevant to assessing what is in effect propensity type evidence of a complainant's sexual experience even with the defendant. A similar list should be added to clause 40(3) to clarify that complainants are to be assessed on the same basis as defendants in respect of this type of evidence. WWLA is not aware of any evidence that indicates that women should be dealt with in respect of propensity type evidence differently from others. We ask the select committee to give serious consideration as to the reasons why this difference is promoted in this Bill and to make the changes suggested.

22 We also suggest a further amendment to the Bill which requires a judge to advise a jury prior to them considering their verdict that just because a complainant may have consented to sexual activity with the defendant on previous occasions does not mean that she/he consented on the occasion in dispute. This will not only provide protection for complainants but as well promote the important social policy that all sexual encounters should be consensual. In doing so the Bill will help ensure that myths and stereotypes about women do not persist in our criminal justice system.

*Defence of belief on reasonable grounds that complainant consented to sexual violation (either rape or unlawful sexual connection)*

23 It is a defence to sexual violation if a defendant believes on reasonable grounds that a complainant consented to the sexual activity (see s 128(2)(b) and s 128(3)(b) Crimes Act 1961).

24 The types of evidence discussed above are not only raised by defendants to challenge the truthfulness of a complainant and whether she consented but also to support a claim by a defendant that he believed on reasonable grounds that she consented.

25 WWLA has previously noted that sexual offending is the only type of offending where even if a person is harmed and did not consent to the activity resulting in the harm the person who caused the harm (however serious) can successfully defend the charge on the basis of their own

belief that the complainant was consenting. Attached in appendix 1 is an extract from our submissions last year to the Law and Order Select Committee. The safety mechanisms suggested by WWLA limiting this defence were not accepted by that committee.

26 It is important that evidence of a complainant's sexual experience and reputation is limited so that defendants cannot make unfair use of this defence by bringing such evidence before the court and on the basis of that evidence implying that because of complainant's past conduct he had a reasonable belief she was consenting.

27 We note the commentary from the Law Commission in this regard *Evidence Code*:[4] "*....a point that may have been overlooked ..... the fact that a complainant has had a sexual encounter with a defendant does not necessarily indicate the complainant's consent, or the defendant's reasonable belief in consent, on the occasion in question*." (emphasis added)

28 Clause 6 of the Bill suggests that a purpose of the Bill is to ensure proceedings are fair to all parties and witnesses. WWLA's view is this will not be achieved with a general test of "direct relevance" as a legislative means of limiting this type of evidence. Our experience is that some judges still too readily permit this evidence which is distressing for complainants and as is discussed below low conviction rates result. Unless there is evidence from officials or others that support the present generality of clause 40 WWLA suggests this clause needs substantial amendment to provide more detailed guidance for judges and juries.

*Consequences of not limiting evidence that is allowable in respect of a complainant's previous sexual experience or reputation in sexual matters*

29 This type of evidence under discussion also, in WWLA's view, continues to have an impact upon the low conviction rates for sexual offences against women.

30 The Ministry of Justice does not provide figures for conviction rates in respect of sexual offending separate from other offences. But for violent offences (which include most sexual offences) the web-site says: violent offences are the least likely to result in conviction, with 53% of prosecutions for such offences resulting in conviction in 2000. Anecdotal evidence from judges is that conviction rates for sexual offences are much lower than this at around 40%.

---

[4] para C210 at page 125

31 A recent House of Lords decision (*R v A* [2001] UKHL 25) recognised the "*absurdly low conviction rates in rape cases*".[5] Further, Lord Hope of Craighead recognised the low rates of complaints reported. He said:[6]

> "The prevalence of sexual offences, especially those involving rape, which are not reported to the prosecuting authorities indicates a marked reluctance on the part of complainants to submit to the process of giving evidence at any trial. The rule of law requires that those who commit criminal acts should be brought to justice. Its enforcement is impaired if the system which the law provides for bringing such cases to trial does not protect the essential witnesses from unnecessary humiliation and distress."

32 Throughout this decision the five Law Lords discussed the unfairness of past practices in our courts around the questioning of women (mainly) about their previous sexual experience. For example, Lord Slynn of Hadley says:[7]

> "In recent years it has become plain that women who allege that they have been raped should not in court be harassed unfairly by questions about their previous sex experiences. To allow such harassment is unjust to the woman; it is also bad for society in that women will be afraid to complain and as a result men who ought to be prosecuted will escape."

33 The Canadian Supreme Court discusses the myths about women which have resulted in some of our current evidence rules for sex cases is *R v Seaboyer* [1991] 2 SCR 577.

34 Women are not protected by legislation that contributes to, or at least does not assist to change, low rates of complaints made and low rates of conviction, in relation to sexual offending.

35 WWLA considers the issues of low level of complaints made and low conviction rates need to be addressed by changes to the Bill in relation to questioning of complainants about their previous sexual experience or reputation. If there are good reasons for allowing women to continue to be subjected to such questions without other than a general limit, which our experience suggests is sometimes applied in accordance with myths and stereotypes about women, these need to be stated by officials or others who support the Bill in its current form.

36 If there are not good reasons for continuing past practices our rules of evidence need to be brought into the 21st century and provide fairness for complainants in respect of sexual offending.

---

[5] per Lord Steyn at para 27
[6] at para 92
[7] at para 1

## Appendix 1

### Section 128A – matters that do not amount to consent

(1) The new section 128A lists matters that do not amount to consent to sexual connection.

(2) WWLA supports the inclusion in this section of the new matters contained in what will become sub-sections 128A(3), (4) and (5).

(3) We agree with AWLA's and WCG's submissions that the Bill should make clearer that in some circumstances (sub-sections 128A(3) to (7)) consent should be deemed not to be given.

(4) We understand that the matters (that do not amount to consent) listed in the new section 128A will apply to both rape and unlawful sexual connection as these are defined in sub-sections 128(2) and (3).

(5) However the matters listed in section 128A only apply to the issue of consent where this is only one of the two mental elements that must be proved in both rape and unlawful sexual connection cases. This first mental element (which section 128A applies to) is concerned with the complainant's state of mind ie whether he or she consented to the sexual activity.

(6) The second mental element relates to the accused's state of mind. This is whether she or he believed on reasonable grounds that the complainant was consenting to the sexual activity. This second mental element is provided for in sub-sections 128A(2)(b)(ii) and 128A(3)(b) for rape and unlawful sexual connection respectively.

(7) Because section 128A applies only to the issue of consent (from a complainant's point of view) there is no similar guidance in the Crimes Act relating to assessing the accused's mental state at the time of the alleged offending.

(8) WWLA considers it is important for Parliament to provide guidance in the Crimes Act in relation to what can amount to a reasonable belief in consent by an accused. This is important because under section 128, which covers the most serious sexual offending, charges can fail even if a prosecution proves the physical elements of the offence as well as that the complainant did not consent to the sexual activity, if the accused is found to have a belief on reasonable grounds that the complainant was consenting.

(9) Limits on an accused's belief that a complainant was consenting to sexual activity have been enacted in other jurisdictions. An example is the Canadian Criminal Code (CCC). Section 273.2 of the CCC provides:

> **273.2** It is not a defence to a charge under section 271, 272 or 273 that the *accused believed that the complainant* consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from the accused's
> *(i) self-induced intoxication, or*
> (ii) recklessness or wilful blindness; or
>
> (b) the accused did not take reasonable steps, in the circumstances known *to the accused at the time, to ascertain that the complainant was consenting.*

(10) WWLA strongly supports the inclusion in the Crimes Act of a requirement that where an accused raises the issue of belief on reasonable grounds that the complainant was consenting, the accused needs to show that he or she took reasonable steps to ascertain that the complainant was consenting to the activity. (See s 273.2(b) above.)

(11) The Committee may also consider it is desirable to include in the Bill matters that cannot form a reasonable basis for a belief a complainant was consenting. This could include the two matters provided for in the CCC as well as some of the matters already present in section 128A. WWLA asks the Committee to consider in particular sub-section 128A(1) as a matter which cannot reasonably and justly form a basis for a belief in consent that allows an accused to escape conviction for serious sexual offending.

(12) A draft provision to be inserted in the Bill which in WWLA's view would deal effectively with these issues is:

> Add a new section 128AA:
>
> 128AA **Belief in consent not a defence in some circumstances**
>
> (1) It is not a defence to a charge under section(s) 128 [*plus any other appropriate offences eg 131, 134, 135 and 138* ] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose
>
> (i) from the accused's self-induced intoxication; or
>
> (ii) from the accused's recklessness or wilful blindness; or

(iii) because the complainant did not protest or offer physical resistance.

(2) It is not a defence to a charge under section(s) 128 [*plus any other appropriate offences eg 131, 134, 135 and 138*] that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where the accused did not take reasonable steps to ascertain that the complainant was consenting.