

[AS REPORTED FROM THE JUSTICE AND LAW REFORM  
COMMITTEE]

*House of Representatives, 11 July 1989.*

Words struck out are shown in italics within bold round brackets, or with black rule at beginning and after last line; words inserted are shown in roman underlined with a single rule, or with single rule before first line and after last line.

[AS REPORTED FROM THE COMMITTEE OF THE WHOLE HOUSE]

*House of Representatives, 10 October 1989.*

Words struck out are shown in italics within double bold round brackets, or with double black rule at beginning and after last line; words inserted are shown in roman underlined with a double rule, or with double rule before first line and after last line.

[Clauses 76 to 80 of this Bill were formerly clauses 76 to 80 of the Law Reform (Miscellaneous Provisions) Bill: 122-2]

*Hon. W. P. Jeffries*

## EVIDENCE AMENDMENT

### ANALYSIS

Title	23E. Modes in which complainant's evidence may be given
1. Short Title and commencement	23F. Cross-examination and questioning of accused
76. Evidence of complainant in cases of sexual nature	23G. Expert witnesses
77. New heading and sections (relating to cases involving child complainants) inserted	23H. Directions to jury
<i>Rules in Cases Involving Child Complainants</i>	23I. Regulations
23c. Application of sections 23d to 23t	78. Disclosure in civil proceeding of communication to medical practitioner or clinical psychologist
23d. Directions as to mode by which complainant's evidence is to be given	79. Disclosure in criminal proceeding of communication to medical practitioner or clinical psychologist
	80. Transitional provision

No. 122—30

Price  
incl. GST \$2.20

## A BILL INTITULED

**An Act to amend the Evidence Act 1908**

BE IT ENACTED by the Parliament of New Zealand as follows:

**1. Short Title and commencement**—(1) This Act may be cited as the Evidence Amendment Act 1989, and shall be read together with and deemed part of the Evidence Act 1908 (hereinafter referred to as the principal Act). 5

(2) Sections 76 and 77 of this Act shall come into force on the 1st day of January 1990.

(3) Except as provided in subsection (2) of this section, this Act shall come into force on the date on which it receives the Royal assent. 10

**76. Evidence of complainant in cases of sexual nature**—(1) Section 23A of the principal Act (as substituted by section 2 of the Evidence Amendment Act (No. 2) 1985) is hereby amended by repealing subsection (1), and substituting the following subsection: 15

“(1) For the purposes of this section, ‘case of a sexual nature’ means proceedings in which a person is charged with, or is to be sentenced for, any of the following offences: 20

“(a) Any offence against any of the provisions of sections 128 to 142A of the Crimes Act 1961:

“(b) Any other offence against the person of a sexual nature:

“(c) Being a party to the commission of any offence referred to in paragraph (a) or paragraph (b) of this subsection: 25

“(d) Conspiring with any person to commit any such offence.”

(2) Section 23A (2) of the principal Act (as so substituted) is hereby amended by omitting the words “case involving sexual violation”, and substituting the words “case of a sexual nature”. 30

**77. New heading and sections (relating to cases involving child complainants) inserted**—The principal Act is hereby amended by inserting, after section 23B (as inserted by section 3 of the Crimes Amendment Act 1979), the following heading and sections: 35

*“Rules in Cases Involving Child Complainants*

**“23c. Application of sections 23D to 23I**—Sections 23D to 23I of this Act apply to every case where—

“(a) A person is charged with— 40

“(i) Any offence against any of the provisions of sections 128 to 142A of the Crimes Act 1961; or

“(ii) Any other offence against the person of a sexual nature; or

5 “(iii) Being a party to the commission of any offence referred to in subparagraph (i) or subparagraph (ii) of this paragraph; or

“(iv) Conspiring with any person to commit any such offence; and

*Struck Out*

10 “(b) The complainant is a child who, at the commencement of the proceeding, has not attained the age of 14 years.

*New*

“(b) The complainant has not, at the commencement of the proceeding, attained the age of 17 years.

15 “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  
20 under section 23E of this Act 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.

25 “(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 of this Act.

30 “(4) In considering what directions (if any) to give under section 23E of this section, 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.

35 “23E. **Modes in which complainant’s evidence may be given**—(1) On an application under section 23D of this Act, 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) of this section: 5
- “(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: 10
- “(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— 15
- “(i) The complainant cannot see the accused; but
- “(ii) The Judge, the jury, and counsel for the accused can see the complainant: 20
- “(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 *(a telecommunication)* an appropriate audio link: 25 30
- “(e) Where the Judge is satisfied that the necessary facilities and equipment are available, a direction that—
- “(i) The complainant give his or her evidence at a location outside the court precincts; and 35
- “(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) of this section. 40

“(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—

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“(a) In accordance with any rule of law relating to the admissibility of evidence; or

“(b) Pursuant to any discretion of a Judge to order the exclusion of any evidence.

*New*

“(2A) 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 or re-examination of the complainant is to be conducted.

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*Struck Out*

“(3) Where the complainant is to give his or her evidence behind a wall or partition, any questions to be put to the complainant by the Judge or counsel shall be given through a telecommunication link to a person, approved by the Judge, placed next to the complainant, who shall repeat the question to the complainant.

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*New*

“(3) Where the complainant is to give his or her evidence in the mode described in paragraph (b) or paragraph (d) of subsection (1) of this section, 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.

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“(4) 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) of this section that the Judge thinks fit.

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“(5) 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 ground of any failure to observe strictly all the terms of the direction.

*Struck Out*

**“23F. Cross-examination and questioning of complainant—**(1) Notwithstanding section 354 of the Crimes Act 1961, the accused shall not be entitled in any case to which this section applies to cross-examine the complainant. 5

“(2) Nothing in subsection (1) of this section nor any direction given under section 23E of this Act shall affect the right of counsel for the accused to cross-examine the complainant. 10

“(3) No direction given under section 23E of this Act shall affect the right of the Judge to question the complainant.

“(4) Where the complainant is being cross-examined by counsel for 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. 15

*New*

**“23F. Cross-examination and questioning 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. 20

“(2) Nothing in subsection (1) of this section nor any direction given under section 23E of this Act shall affect the right of counsel for the accused to cross-examine the complainant. 25

“(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. 30

“(4) No direction given under section 23E of this Act 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, 35

*New*

having regard to the age of the complainant, intimidating or overbearing.

“23G. **Expert witnesses**—(1) For the purposes of this section, a person is an expert witness if that person is—

5 “(a) A medical practitioner registered as a psychiatric specialist under regulations made pursuant to section 39 of the Medical Practitioners Act 1968, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or

10 “(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.

15 “(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—

20 “(i) Examination of the complainant before the complainant gives evidence; or

“(ii) Observation of the complainant giving evidence, whether directly or on videotape:

25 “(b) The general development level of children of the same age group as the complainant:

30 “(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.

35 “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 of this Act, 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) of this section 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 of this Act applies.

“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 23b to 23h of this Act or as may be necessary for the due administration of those provisions.”

5     **78. Disclosure in civil proceeding of communication to medical practitioner or clinical psychologist—**

(1) Section 32 (1) of the Evidence Amendment Act (No. 2) 1980 is hereby amended by omitting the words “a registered medical practitioner shall not”, and substituting the words “no registered medical practitioner and no clinical psychologist shall”.

10 registered medical practitioner and no clinical psychologist shall”.

(2) Section 32 (2) (b) of the Evidence Amendment Act (No. 2) 1980 is hereby amended by inserting, after the words “a registered medical practitioner”, the words “or a clinical psychologist”.

15 psychologist”.

(3) Section 32 (3) of the Evidence Amendment Act (No. 2) 1980 is hereby amended by repealing the definition of the term “protected communication”, and substituting the following definitions:

20     “ ‘Clinical psychologist’ means a psychologist registered under the Psychologists Act 1981 who is engaged in the diagnosis and treatment of persons suffering from mental and emotional problems; and includes any person acting in a professional character on behalf of the clinical psychologist in the course of the treatment of any patient by that psychologist:

25     “ ‘Protected communication’ means a communication to a registered medical practitioner or a clinical psychologist by a patient who believes that the communication is necessary to enable the registered medical practitioner or clinical psychologist to examine, treat, or act for the patient:”.

30     **79. Disclosure in criminal proceeding of communication to medical practitioner or clinical psychologist—**

(1) Section 33 (1) of the Evidence Amendment Act (No. 2) 1980 is hereby amended by omitting the words “a registered medical practitioner shall not”, and substituting the words “no registered medical practitioner and no clinical psychologist shall”.

40     (2) Section 33 of the Evidence Amendment Act (No. 2) 1980 is hereby amended by repealing subsection (3), and substituting the following subsection:

“(3) In subsection (1) of this section, ‘protected communication’ means a communication made to a registered medical practitioner or a clinical psychologist by a patient who believes that the communication is necessary to enable the registered medical practitioner or clinical psychologist to examine, treat, or act for the patient for— 5

“(a) Drug dependency; or

“(b) Any other condition or behaviour that manifests itself in criminal conduct;—

but does not include any communication made to a registered medical practitioner or a clinical psychologist by any person who has been required by any order of a Court, or by any person having lawful authority to make such requirement, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or other purpose.” 10 15

(3) Section 33 (4) of the Evidence Amendment Act (No. 2) 1980 is hereby amended by inserting, before the definition of the term “drug dependency”, the following definition:

“‘Clinical psychologist’ means a psychologist registered under the Psychologists Act 1981 who is engaged in the diagnosis and treatment of persons suffering from mental and emotional problems; and includes any person acting in a professional character on behalf of the clinical psychologist in the course of the treatment of any patient by that psychologist.” 20 25

**80. Transitional provision**—Section 76 of this Act shall not apply in respect of any hearing or other proceeding that has commenced before the (*commencement of this Act*) 1st day of ((October 1989)) January 1990; and in respect of any such hearing or other proceeding, section 23A of this Act (as substituted by section 4 of the Evidence Amendment Act (No. 2) 1985) shall continue to apply as if this Act had not been enacted. 30