

Evidence Amendment Bill

Government Bill

As reported from the Justice and Electoral Committee

Commentary

Recommendation

The Justice and Electoral Committee has examined the Evidence Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The bill would make a number of minor and technical amendments arising from the Law Commission's 2013 review of the Evidence Act 2006. The bill also seeks to improve the court processes for vulnerable witnesses by making changes to the Act relating to child witnesses and access to video record evidence. The bill would bring these changes into effect by:

- enabling more previous consistent statements to be admissible in evidence
- extending the privilege that currently applies to settlement negotiations and mediation in civil proceedings to include plea discussions in criminal proceedings
- placing restrictions and safeguards on defence counsel access to video records of witnesses' evidence in certain cases and making the unauthorised possession, use, and distribution of video record evidence an offence
- requiring that all parties are to be notified of the intention to give evidence about the sexual history of a complainant with any person other than the defendant; and
- introducing a legislative presumption that all witnesses under the age of 18 use alternative ways to give their evidence, such as by audio visual link.

This commentary covers the key amendments that we recommend to the bill. It does not cover minor or technical amendments.

Hearsay statements

Under the Act, hearsay statements in business records are automatically admissible because they are deemed inherently reliable. The bill recognises that eyewitness and victim statements contained in Police records are not inherently reliable, and amends section 16 to exclude them from the definition of “business record”.

We note that there are other types of Police records that are not inherently reliable and should also be excluded from the definition of “business record”. We recommend amending clause 7, which would amend section 16 of the Act, to extend the exclusion to Police records of hearsay statements of, or interviews with people with purported knowledge or information about, the circumstances of the alleged offending or the issues in dispute in civil proceedings.

Application to offer evidence or ask a question about the sexual experience of the complainant in sexual cases

Clause 16 would insert new section 44A to provide for a process for giving notice where a party proposes to offer evidence or question a witness about the sexual experience of the complainant with a person other than the defendant. The notice must be in writing, contain specified information, and be given as early as practicably possible before the trial.

Giving notice would encourage admissibility decisions about the evidence or question to be made before the trial. It would also ensure that all parties and the complainant are provided with a fair opportunity to respond to the evidence or question.

Providing an application

We were concerned that the wording of the clause appeared to require only the notice to be given before the trial, rather than the application itself. The intent of the bill is to encourage admissibility decisions to be made before the trial.

As an application needs to be made in every case, the requirement for a notice to be made prior to the application is duplicative. To remove this unnecessary duplication, we recommend amending clause 16, new section 44A(1), to refer only to an application. The requirements of the notice in 44A have become the requirements of the application.

To ensure that the application is provided in a timely manner, we consider that the application should be made no later than at a prescribed point in the pre-trial processes. We recommend replacing clause 16, new section 44A(5), to provide that application must be made when a case management memorandum or a trial callover memorandum is filed under the Criminal Procedure Act 2011, subject to the judge’s discretion.

Notice of application to the complainant

We considered that dispensing with the requirements of the application if the complainant is not prejudiced may be taken to mean that the complainant has a right of

reply distinct from the other parties. This is not the case. In practice, the complainant's response would be facilitated through the prosecution. We recommend amending clause 16, new section 44A(6) by removing reference to the complainant.

Video record evidence

Clause 30 seeks to prevent the misuse of video records. It would amend section 106 to provide the following:

- A party or lawyer is not entitled to be given a copy of a video record of any child complainant or any witness in a sexual or violent case. A party or lawyer may apply to the judge for the video record before it is presented as evidence. However, before granting the application, the judge must consider the interests of justice, the nature of the evidence, and the ability of the party to view or access the video's content.
- Any lawyer representing the Crown may be given a copy of the video record at any time for the purpose of providing legal advice to the Police before a charge is filed or for conducting the prosecution once proceedings have begun. Crown lawyers are subject to the same regulations for dealing with video records under the Act as other lawyers.
- Dealing with video records of evidence by parties and their lawyers, before these are offered in evidence, must be done in accordance with regulations made under the Act.

Clarification on duties and restrictions

We are aware that some of the duties in the Act and regulations relating to video records seem unclear. For example, although the bill would clarify the rules relating to video records for cases prosecuted or dealt with by the Crown, the full scope of duties applying to Crown prosecutors will still be unclear. We recommend amending clause 30, which would amend section 106, to clearly specify which duties and restrictions relating to video records apply to which parties and lawyers.

Right of defence to view video record to challenge its admissibility

We consider that there is some ambiguity about whether the defence can view a video record before the judge determines whether it is admissible as evidence. We recommend amending clause 30, section 106(3) to ensure that defendants or their lawyers are able to view video records to determine whether to oppose their admission.

Regulation-making powers

We note that some regulations about creating, using, and storing video records are outdated, unclear, or do not reflect the full range of the circumstances that video records are used in. We recommend amending clause 35, section 201, to ensure that the Act contains the necessary regulation-making powers to create the required regulations.

Amendments progressed through Order in Council

The supporting amendments to the regulations could be progressed through the Order in Council process to allow the details and consequential amendments to be fully worked through. We recommend amending clause 2 of the bill to specify that the Act comes into force by Order in Council, and no later than 1 July 2017, so that changes to the regulations would come into effect at the same time as the bill.

Directions about the way child complainants are to give evidence

Clause 32, which inserts new sections 107, 107A, and 107B, gives effect to the presumption that child witnesses give evidence in alternative ways, while ensuring that the defendant, judge, jury, and lawyers can see and hear the evidence given. A party other than the party intending to call the child witness may apply to the judge for a direction that the child is to give evidence in the ordinary way, subject to considerations specified by the bill. We consider that the party should also be able to apply for direction that the child witness is to give evidence in a different alternative way, not just in the ordinary way. We recommend amending clause 32, which would amend new section 107B(1), to allow a party (other than the party calling the child witness) to apply for a direction that the witness is to give evidence, or any part of his or her evidence, in the ordinary way or in a different alternative way.

Offences for improper handling of video records of evidence

Clause 33 sets out three new offences relating to video records of child complainants or complainants in sexual or violent cases. The offences do not apply to dealing with a video record in accordance with the Act or regulations.

The intent of the offences is to create sanctions for improper handling of sensitive video records of evidence. It is not to further restrict or criminalise otherwise lawful possession and use, for instance by decision-making bodies with legislated powers to call for evidence outside the ambit of the Act. We recommend amending clause 33, which would amend section 119, to prohibit possessing, copying, showing, or supplying video records other than in accordance with *any* applicable Act or regulations.

Access to video records of evidence outside criminal or family court cases

We were concerned that some bodies, such as tribunals, have powers to call and consider video record evidence but are not subject to the regime prescribed by the Act and regulations. Because there are no specific rules governing access to, and use of, video records outside criminal and family court proceedings, we make a number of recommendations to ensure a clear and broadly uniform regulatory approach to prevent misuse of video records.

We recommend inserting new clause 33A, which would insert new section 119A(1), to prohibit the Police from releasing a video record of evidence to parties to proceedings outside criminal or family courts unless the relevant body orders it.

We also recommend inserting new clause 33A, which would insert new section 119A(2) and 119B, to provide that the body may order release of the video record only if it would not jeopardise any pending criminal trial, and it is in the interests of justice to do so. If the body does order release of the video record, we recommend inserting new clause 33A, which would insert new section 119A(3) and (4) to provide that the body must also determine the form of disclosure, in the interests of justice.

Finally, we recommend inserting new clause 33A, which would insert new section 119A(5) so that video records released in these cases must be dealt with according to supporting regulations made under the Act.

Consequential amendments

Schedule 1 details transitional provisions. Because we have recommended that the bill be passed by Order in Council, the transitional provisions no longer work. This is because the commencement date is not known so parties to proceedings will not know if their hearing will take place after commencement. We recommend amending the bill to remove Schedule 1.

Clause 37 and Schedule 2 of the bill provide the right to appeal, with leave, against a decision to make or refuse to make a pre-trial witness anonymity order. Schedule 2 also inserts a new regulation that provides that the Police may only show video records of evidence showing child complainants or witnesses in sexual or violent cases to specified persons on premises controlled or agreed to by the Police.

Because of earlier recommendations we have made, regulations about video records would be made through Order in Council and come into effect at the same time as the bill. We consider that it would be more efficient for these regulations to address the provisions set out in clause 37 and Schedule 2. We recommend deleting clause 37(2) and Part 2 of Schedule 2.

Appendix

Committee process

The Evidence Amendment Bill was referred to the committee on 2 July 2015. The closing date for submissions was 13 August 2015. We received and considered 12 submissions from interested groups and individuals. We heard three submissions.

We received advice from the Ministry of Justice.

Committee membership

Jacqui Dean (Chairperson)

Jacinda Ardern

Chris Bishop

Marama Fox

Peeni Henare

Jono Naylor

Alfred Ngaro

Denis O'Rourke

Metiria Turei

Hon Louise Upston

David Clendon replaced Metiria Turei for this item of business.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Amy Adams

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~~Schedule 1~~

19

~~New Schedule 1AA inserted~~

~~Schedule 2~~

20

~~Amendments to other enactments~~

Schedule 2

22

Amendment to Act

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Evidence Amendment Act **2015**.

2 Commencement

~~This Act comes into force on the 28th day after the date on which it receives the Royal assent.~~ 5

2 Commencement

This Act comes into force on the earlier of the following:

- (a) a date appointed by the Governor-General by Order in Council (and 1 or more orders may be made bringing different provisions into force on different dates): 10
- (b) **1 July 2017.**

Part 1 Amendments to Evidence Act 2006

3 Principal Act

This Part amends the Evidence Act 2006 (the **principal Act**).

4 Section 4 amended (Interpretation)

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- (1) In section 4(1), insert in their appropriate alphabetical order:

child witness, in relation to any proceeding, means a witness who is a child when the proceeding commences, and includes a child complainant but does not include a defendant who is a child

veracity has the meaning given in **section 37**

10

violent case means a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for,—

- (a) any of the offences listed in section 87(5)(b) of the Sentencing Act 2002; or
- (b) any other offence of a violent nature against a person

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- (2) In section 4(1), definition of **lawyer**, replace “section 2 of the Law Practitioners Act 1982” with “section 6 of the Lawyers and Conveyancers Act 2006”.

5 New section 4A inserted (Transitional provisions)

After section 4, insert:

4A Transitional provisions

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The transitional provisions set out in **Schedule 1AA** have effect according to their terms.

6 Section 12A repealed (Rules of common law relating to statements of co-conspirators, persons involved in joint criminal enterprises, and certain co-defendants preserved)

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Repeal section 12A.

7 Section 16 amended (Interpretation)

In section 16(1), replace the definition of **business record** with:

business record—

- (a) means a document—
 - (i) that is made—
 - (A) to comply with a duty; or
 - (B) in the course of a business, and as a record or part of a record of that business; and

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	(ii) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied; but	
	(b) does not include a Police record that contains any statement or interview by or with an eyewitness or a victim	5
	<u>(b) does not include a Police record that contains any statement or interview by or with an eyewitness, or a complainant, or any other person who purports to have knowledge or information about the circumstances of alleged offending or the issues in dispute in a civil proceeding</u>	10
8	Section 22 amended (Notice of hearsay in criminal proceedings)	
(1)	In section 22(2)(g), after “witness”, insert “; and”.	
(2)	After section 22(2)(g), insert:	
	(h) if section 19(1)(b) is relied on, why no useful purpose would be served by requiring the person to be a witness; and	15
	(i) if section 22A is relied on, why the party thinks that the 3 matters comprising the required threshold in that section are satisfied.	
9	New section 22A inserted (Admissibility of hearsay statement against defendant)	
	After section 22, insert:	20
22A	Admissibility of hearsay statement against defendant	
	In a criminal proceeding, a hearsay statement is admissible against a defendant if—	
	(a) there is reasonable evidence of a conspiracy or joint enterprise; and	
	(b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and	25
	(c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.	
10	Section 27 amended (Defendants’ statements offered by prosecution)	
(1)	In section 27(1), replace “but not against a co-defendant in the proceeding” with “and is admissible against a co-defendant in the proceeding only if it is admitted under section 22A ”.	30
(2)	In section 27(3), after “(hearsay evidence)”, insert “except section 22A ”.	
(3)	Repeal section 27(4).	
11	Section 30 amended (Improperly obtained evidence)	35
	In section 30(2)(b), replace “but also” with “and”.	

12 Section 35 amended (Previous consistent statements rule)

- (1) In section 35(1), delete “or subsection (3)”.
- (2) Replace section 35(2) and (3) with:
- (2) A previous statement of a witness that is consistent with the witness’s evidence is admissible if the statement— 5
- (a) responds to a challenge that will be or has been made to the witness’s ~~testimony~~ veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness; or
 - (b) forms an integral part of the events before the court; or 10
 - (c) ~~includes~~ consists of the mere fact that a complaint has been made in a criminal case.

13 Section 37 amended (Veracity rules)

- (1) Replace section 37(3)(b) with:
- (b) that the person has been convicted of 1 or more offences that indicate a propensity for a lack of veracity: 15
- (2) Replace section 37(5) with:
- (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying.

14 Section 38 amended (Evidence of defendant’s veracity) 20

Replace section 38(2)(a) with:

- (a) the defendant has, in court, given oral evidence about his or her veracity or challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; and

15 Section 44 amended (Evidence of sexual experience of complainants in sexual cases) 25

After section 44(21), insert:

- (2A1A) ~~An application under subsection~~ Subsection (1) is subject to the notice requirements in **section 44A**.

16 New section 44A inserted (~~Notice of evidence of~~ Application to offer evidence or ask question about sexual experience of complainant in sexual cases) 30

After section 44, insert:

44A ~~Notice of evidence of~~Application to offer evidence or ask question about sexual experience of complainant in sexual cases

- (1) ~~In a sexual case, no application may be made under section 44(1) to offer evidence or ask any question about the sexual experience of a complainant unless—~~ 5
- (a) ~~the party proposing to—~~
 - (i) ~~offer the evidence has complied with the requirements of **subsections (2), (4), and (5)**; or~~
 - (ii) ~~ask the question has complied with the requirements of **subsections (3) and (5)**; or~~ 10
 - (b) ~~every other party has waived those requirements; or~~
 - (e) ~~the Judge dispenses with those requirements.~~
- (1) An application under section 44(1) must comply with **subsections (2) to (5)** (as relevant) unless— 15
- (b) every other party has waived those requirements; or
 - (c) the Judge dispenses with those requirements.
- (2) A party who proposes to offer evidence about the sexual experience of a complainant must ~~provide every other party with a written notice stating~~make a written application and the application must include—
- (a) ~~the party's intention to offer the evidence; and~~ 20
 - (b) the name of the person who will give the evidence; and
 - (c) the subject matter and scope of the evidence.
- (3) A party who proposes to ask any question about the sexual experience of a complainant must ~~provide every other party with a written notice stating~~make a written application and the application must include— 25
- (a) ~~the party's intention to ask the question; and~~
 - (b) the name of the person who will be asked the question; and
 - (c) the question; and
 - (d) the scope of the questioning sought to flow from the initial question.
- (4) If any document is intended to be produced as evidence of the sexual experience of a complainant, the notice required under **subsection (2)** must be accompanied by a copy of the document. 30
- (5) ~~The requirements of **subsections (2) to (4)** (where relevant) must be complied with as early as practicable before the case is to be tried so that all other parties and the complainant are provided with a fair opportunity to respond to the evidence or question.~~ 35
- (5) An application must be made and a copy of the application must be given to all other parties—

- (a) as early as practicable before the case is to be tried so that all other parties are provided with a fair opportunity to respond to the evidence or question:
- (b) unless a Judge otherwise permits under **subsection (6)**, no later than when a case management memorandum (for a judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011. 5
- (6) The Judge may dispense with any of the requirements in **subsections (2) to (5)** if,—
- (a) having regard to the nature of the evidence or question proposed to be offered or asked, ~~neither the complainant nor any~~no party is substantially prejudiced by the failure to comply with a requirement; and 10
- (b) compliance was not reasonably practicable in the circumstances; and
- (c) it is in the interests of justice to do so.
- 17 Section 45 amended (Admissibility of visual identification evidence)** 15
- (1) In section 45(3)(b), (c), and (d) and (4)(a), (b), and (c), replace “person to be identified” with “suspect”.
- (2) In section 45(4)(e), replace “was reported” with “occurred”.
- 18 Section 46A repealed (Caution regarding reliance on identification evidence)** 20
- Repeal section 46A.
- 19 Section 50 amended (Civil judgment as evidence in civil or criminal proceedings)**
- After section 50(1), insert:
- (1A) Evidence of a decision or a finding of fact by a tribunal is not admissible in any proceeding to prove the existence of a fact that was in issue in the matter before the tribunal. 25
- 20 Section 51 amended (Interpretation)**
- (1) In section 51(1), definition of **overseas practitioner**, replace paragraph (c) with: 30
- (c) a person who is, under the laws of a country other than New Zealand or Australia, entitled to undertake work that, in New Zealand, is normally undertaken by a lawyer or a patent attorney.
- (2) In section 51(3), replace “given, or to be given,” with “to be given”.
- (3) Repeal section 51(6). 35
- 21 Section 54 amended (Privilege for communications with legal advisers)**
- (1) In section 54(1), after “A person who”, insert “requests or”.

- (2) In section 54(1)(b)(i), after “the person”, insert “requesting or”.
- (3) After section 54(1), insert:
- (1A) The privilege applies to a person who requests professional legal services from a legal adviser whether or not the person actually obtains such services.
- (4) In section 54(2), after “patent attorney,”, insert “requesting or”. 5
- 22 Section 57 amended (Privilege for settlement negotiations or mediation)**
- (1) In the heading to section 57, replace “or mediation” with “, mediation, or plea discussions”.
- (2) After section 57(2), insert:
- (2A) A person who is a party to a criminal proceeding has a privilege in respect of any communication or document made or prepared in connection with plea discussions in the proceeding. 10
- (2B) However, the court may order the disclosure of the whole or any part of a communication or document privileged under **subsection (2A)** if the court considers that— 15
- (a) the disclosure is necessary for a subsequent prosecution for perjury; or
- (b) the disclosure is necessary to clarify the terms of an agreement reached, if the terms are later disputed or are ambiguous; or
- (c) after due consideration of the importance of the privilege and of the rights of an ~~accused~~ defendant in a criminal proceeding, it would be contrary to justice not to disclose the communication or document or part of it. 20
- (3) In section 57(3)(c)(ii), after “proceeding”, insert “; or”.
- (4) After section 57(3)(c), insert:
- (d) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation. 25 30
- 23 Section 59 amended (Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists)**
- After section 59(1), insert:
- (1A) For the purpose of applying subsection (1)(b), there is no privilege under this section in relation to any communication or information (other than any previous medical record or other previous medical information about the person) that is made or obtained for the purpose of the examination or test or for the other purpose concerned. 35

24 Section 66 amended (Joint and successive interests in privileged material)

Replace section 66(2) with:

- (2) On or after the death of a person who has a privilege conferred by any of sections 54 to 57 in respect of a communication, information, opinion, or document, the personal representative of the deceased person or other successor in title to property of the deceased person— 5
- (a) is entitled to assert the privilege against third parties; and
 - (b) is not restricted by any of sections 54 to 57 from having access or seeking access to the privileged matter.

25 Section 79 amended (Support persons) 10

- (1) After section 79(1), insert:

(1A) A child witness, when giving evidence in a criminal proceeding, is entitled to have 1 person, and may, with the permission of the Judge, have more than 1 person, near him or her to give support.

- (2) After section 79(2), insert: 15

(2A) Subsections (1), **(1A)**, and (2) apply whether the witness or complainant gives evidence in an alternative way or in the ordinary way.

- (3) Replace section 79(3) with:

(3) Despite subsections (1), **(1A)**, and (2), the Judge may, in the interests of justice, direct that support may not be ~~provided~~given to a complainant or a child witness or other witness by— 20

- (a) any person; or
- (b) a particular person.

- (4) In section 79(4), replace “complainant or other witness” with “complainant or a child witness or other witness”. 25

26 Section 90 amended (Use of documents in questioning witness or refreshing memory)

- (1) In section 90(1) and (2), replace “section 29 or 30” with “section 28, 29, or 30”.

- (2) After section 90(6), insert: 30

(7) While giving evidence, a witness may consult a previous statement of his or hers that is consistent with the witness’s evidence if—

- (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
- (b) the statement provides the court with information that the witness is unable to recall. 35

27 Section 95 amended (Restrictions on cross-examination by parties in person)

In section 95(1), after “case or a”, insert “civil or criminal”.

Replace section 95(1) with:

- (1) A defendant in a sexual case, or a defendant in or a party to criminal or civil proceedings concerning domestic violence or harassment, is not entitled to personally cross-examine— 5
- (a) a complainant, or a party who has made allegations of domestic violence or harassment:
- (b) a child (other than a complainant) who is a witness, unless the Judge gives permission. 10

28 Section 102 amended (Application)

Replace section 102(a) with:

- (a) **sections 107 to 107B** (which relate to child witnesses in criminal proceedings): 15

29 Section 103 amended (Directions about alternative ways of giving evidence)

After section 103(4), insert:

- (5) This section is subject to **sections 107 to 107B** which apply to child witnesses in criminal proceedings. 20

30 Section 106 amended (Video record evidence)

(1A) Replace section 106(2) with:

- (2) A video record offered by the prosecution as an alternative way of giving evidence must be recorded and dealt with in compliance with any regulations made under this Act. 25

(1) Replace section 106(3) with:

- (3) A video record that is to be offered as an alternative way of giving evidence must be offered for viewing by all parties or their lawyers—
- (a) before it is offered in evidence, unless the Judge directs otherwise; and
- (b) must be dealt with in accordance with any requirements set out in regulations made under section 201. 30

(1) Replace section 106(3) with:

- (3) A video record that is to be offered by the prosecution as an alternative way of giving evidence must be offered for viewing by a defendant or his or her lawyer before it is offered in evidence (including prior to any pre-trial consideration of admissibility), unless the Judge directs otherwise. 35

- (2) In section 106(4), delete “in a proceeding”.

- (3) In section 106(4)(a), after “unless”, insert “**subsection (4A)** applies or”.
- (2) Replace section 106(4) with:
- (4) A copy of a video record that is to be offered by the prosecution as an alternative way of giving evidence must be given to a defendant’s lawyer unless **subsection (4A)** applies, or, if **subsection (4A)** does not apply, the Judge directs otherwise. 5
- (4) After section 106(4), insert:
- (4A) Subject to **subsections (4B) and (4C)**, a party or their defendant’s lawyer is not entitled to be given a copy of a video record under **subsection (4)(a)** of—
- (a) any child complainant; or 10
 - (b) any witness (including an adult complainant) in a sexual case or a violent case.
- (4B) On the application of a party defendant, a Judge may order that a copy of a video record or a part of a video record to which **subsection (4A)** applies be given to the lawyer representing that party the defendant’s lawyer before it is offered in evidence. 15
- (4C) When considering an application under **subsection (4B)**, the Judge must have regard to—
- (a) whether the interests of justice require departure from the usual procedure under **subsection (4A)** in the particular case; and 20
 - (b) the nature of the evidence contained on the video record; and
 - (c) the ability of the party or their defendant or his or her lawyer to view the video record under **subsection (3)** and to otherwise access the content of the video record, including by way of a transcript of the video record.
- (4D) If a Judge orders that a copy of a video record or a part of a video record be given to a lawyer under **subsection (4B)**, the copy must be dealt with in accordance with subsection (4)(b). 25
- (4A) In section 106(6), replace “If any party indicates that the party wishes to object” with “If the defendant indicates he or she wishes to object”.
- (5) After section 106(8), insert: 30
- (9) Subsections **(3)**, **(4)**, and **(4A) to (4D)** do not apply to any lawyer representing the Crown who—
- (a) may be given a copy of a video record (which may or may not be offered as an alternative way of giving evidence) at any time for the purpose of providing legal advice to the Police before a charging document is laid and for conducting the prosecution once proceedings have commenced; and 35
 - (b) must deal with the video record in accordance with any requirements set out in regulations made under section 201 concerning the custody or re-

~~turn of copies of video records, or prohibiting or restricting their copying.~~

(5) After section 106(8) insert:

(9) To avoid doubt, **subsections (3) to (4C)** do not apply to any lawyer representing the Crown who may be given a copy of a video record (which may or may not be offered as an alternative way of giving evidence) at any time for the purpose of providing legal advice to the Police before a charging document is filed and for conducting the prosecution once proceedings have commenced.

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31 Cross-heading above section 107 replaced

Replace the cross-heading above section 107 with:

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Giving of evidence by child witnesses

32 Section 107 replaced (Directions about way child complainants are to give evidence)

Replace section 107 with:

107 Alternative ways of giving evidence by child witnesses in criminal proceedings

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(1) A child witness, when giving evidence in a criminal proceeding, is entitled to give evidence in 1 or more alternative ways so that—

(a) the witness gives evidence in 1 or more of the following ways:

(i) by a video record made before the hearing of the proceeding:

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(ii) while in the courtroom but unable to see the defendant or some other specified person:

(iii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere:

(b) by use of any appropriate practical and technical means the Judge, the jury (if any), and any lawyers can see and hear the witness giving evidence, in accordance with any regulations made under section 201:

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(c) the defendant can see and hear the witness, unless the Judge directs otherwise.

(2) If a video record is shown as a child witness's evidence in chief, the witness is entitled to give the other parts of his or her evidence, including any further evidence in chief, in 1 or more other alternative ways.

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(3) To avoid doubt, section 106 applies to a video record offered as an alternative way of giving evidence under this section.

(4) Any party intending to call a child witness must provide every other party and the court with a written notice stating the 1 or more alternative ways in which the witness will give his or her evidence.

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- (5) ~~The notice required in **subsection (4)** must be given when a case management memorandum or a trial callover memorandum is filed under the Criminal Procedure Act 2011, or at a later time permitted by a Judge.~~
- (5) Unless a Judge permits otherwise, the notice required under **subsection (4)** must be given no later than when a case management memorandum (for a judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011. 5
- (6) If a party has given notice under **subsection (4)** and it is no longer possible or desirable for the witness to give evidence by the means stated in the notice, the party may file an amended notice but must do so as early as practicable before the case is to be tried. 10
- (7) This section is subject to **sections 107A and 107B.**
- 107A Application by party calling child witness for witness to give evidence in ordinary way**
- (1) Despite **section 107**, if a child witness indicates his or her wish to give evidence or any part of his or her evidence in the ordinary way under section 83, the party calling the witness may apply to a Judge for a direction that the witness be permitted to do so. 15
- (2) ~~An application made under **subsection (1)** must be made when a case management memorandum or a trial callover memorandum is filed under the Criminal Procedure Act 2011, or at a later time permitted by a Judge.~~ 20
- (2) Unless a Judge permits otherwise, an application under **subsection (1)** must be made no later than when a case management memorandum (for a judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011. 25
- (3) The Judge—
- (a) may direct that the witness give evidence or any part of his or her evidence in the ordinary way, if satisfied that the witness fully appreciates the likely effect on him or her of doing so; and
- (b) before giving a direction, may call for and receive a report, from any person considered by the Judge to be qualified to advise, on the effect on the witness of giving evidence in the ordinary way or any alternative way. 30
- (4) When considering whether to give a direction under this section, the Judge must have regard to— 35
- (a) whether the interests of justice require a departure from the usual procedure under **section 107** in the particular case; and
- (b) the matters in section 103(3) and (4).

107B Application by any other party for child witness to give evidence in ordinary way or different alternative way

- (1) Despite **section 107**, if a party is calling a child witness to give evidence, any other party may apply to a Judge for a direction that the witness give evidence or any part of his or her evidence in the ordinary way under section 83 or in a different alternative way under **section 107**. 5
- (2) An application for a direction under **subsection (1)** must be made as early as practicable before the case is to be tried, or at a later time permitted by a Judge.
- (3) Before giving a direction under this section, the Judge— 10
- (a) must give each party an opportunity to be heard in chambers; and
 - (b) may call for and receive a report, from any person considered by the Judge to be qualified to advise, on the effect on the witness of giving evidence in the ordinary way or any alternative way.
- (4) When considering whether to give a direction under this section, the Judge must have regard to— 15
- (a) whether the interests of justice require a departure from the usual procedure under **section 107** in the particular case; and
 - (b) the matters in section 103(3) and (4).

32A New cross-heading above section 119 inserted

After section 118, insert: 20

Offences and requirements for disclosure of video records in proceedings other than under section 106 or in Family Court proceedings

33 Section 119 amended (Offences)

~~After~~Before section 119(31), insert: 25

- (3A1AA) A person who is in possession of a video record of any of the types specified in **section 106(4A)**, other than as permitted by ~~this~~an Act or any regulations ~~made under section 201~~, commits an offence and is liable on conviction,— 25
- (a) in the case of an individual, to a fine not exceeding \$2,000;
 - (b) in the case of a body corporate, to a fine not exceeding \$10,000. 30
- (3B1AB) A person who is in possession of a video record of any of the types specified in **section 106(4A)** with the intention of copying, supplying, or showing the video record, other than as permitted by ~~this~~an Act or any regulations ~~made under section 201~~, commits an offence and is liable on conviction,— 35
- (a) in the case of an individual, to a term of imprisonment not exceeding 6 months;
 - (b) in the case of a body corporate, to a fine not exceeding \$10,000.

~~(3E1AC)~~ A person who copies, supplies, or shows a video record of any of the types specified in **section 106(4A)**, other than as permitted by ~~this~~^{an} Act or any regulations ~~made under section 201~~, commits an offence and is liable on conviction,—

- (a) in the case of an individual, to a term of imprisonment not exceeding 6 months;
- (b) in the case of a body corporate, to a fine not exceeding \$10,000.

33A New sections 119A and 119B inserted

After section 119, insert:

119A Requirements for disclosure of video records in proceedings other than under section 106 or in Family Court proceedings

(1) Unless **subsection (2)** applies, the Police must not disclose a copy or a transcript of any video record to which this section applies to parties in any proceedings other than—

- (a) criminal proceedings (disclosure of which is provided for in section 106); or
- (b) Family Court proceedings (disclosure of which is provided for in regulations made under section 201).

(2) A Judge or judicial officer may order disclosure of a video record to the parties, if he or she is satisfied that—

- (a) the disclosure will not prejudice any criminal proceedings for which the video record may be offered as evidence; and
- (b) it is in the interests of justice to do so after considering the matters in **section 119B**.

(3) If a Judge or judicial officer makes an order for disclosure, he or she must, subject to **subsection (4)**, give directions for the way in which disclosure is to be made, which may include the Police providing the parties with—

- (a) a copy, a transcript, or a summary of the video record;
- (b) an opportunity to view the video record;
- (c) access to 1 or more extracts or parts of the video record by any of the means in **paragraphs (a) and (b)**.

(4) A Judge or judicial officer may make a particular direction for the way in which disclosure is to be made, if he or she is satisfied that the direction is in the interests of justice after considering the matters in **section 119B**.

(5) A video record that is disclosed in proceedings under this section must be dealt with in compliance with any regulations made under section 201.

(6) To avoid doubt, this section applies to the exercise of existing powers to order the production and disclosure of evidence, and does not create a new power to do so.

(7) For the purposes of this section,—

proceedings means proceedings in any court or tribunal, other than the proceedings listed in **subsection (1)(a) and (b)**

video record means a video record of an interview with a witness it is intended may be offered by the prosecution as evidence in a criminal proceeding.

119B Matters Judge or judicial officer must consider before ordering disclosure of video record or giving direction for disclosure

The matters that a Judge or judicial officer must consider for the purposes of **section 119A(2)(b) and (4)** are—

(a) the extent to which the video record is relevant to the proceedings before them; and

(b) the likely extent of harm to the witness whose evidence is contained in the video record from disclosure of that record; and

(c) the nature of the criminal proceedings for which the video record may be or has been offered as evidence; and

(d) the availability of other means of obtaining the evidence; and

(e) the public interest in protecting the privacy of witnesses; and

(f) any other matter that the Judge or judicial officer considers relevant.

34 Section 126 amended (Judicial warnings about identification evidence)

After section 126(2), insert:

(3) If evidence of identity is given against the defendant in any criminal proceeding and the defendant disputes that evidence, the court must bear in mind the need for caution before convicting the defendant in reliance on the correctness of any such identification and, in particular, must bear in mind the possibility that the witness may be mistaken.

35 Section 201 amended (Regulations)

(1AA) After section 201(g), insert:

(ga) prescribing the ways in which video records may be dealt with, including the custody or return of video records, or prohibiting or restricting their copying;

(1AB) After section 201(h), insert:

(ha) prescribing requirements for viewing video records of evidence by defendants, their lawyers, and expert witnesses, including where and when viewing can take place;

- (1) After section 201(i), insert:
- (ia) regulating the destruction of video records:
 - (iab) prescribing offences for non-compliance with regulations relating to the use of video records of evidence and any transcripts of such evidence, with a maximum penalty of,—
 - (i) in the case of an individual, a fine not exceeding \$2,000:
 - (ii) in the case of a body corporate, a fine not exceeding \$10,000:

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36 ~~New Schedule 1AA inserted~~

~~Before Schedule 1, insert the **Schedule 1AA** set out in **Schedule 1** of this Act.~~

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Part 2

Revocation and amendments to other enactments

37 Consequential amendments and revocation

- (1) Amend the Criminal Procedure Act 2011 as specified in **Part 1 of Schedule 2**.
- (2) ~~Amend the enactment specified in **Part 2 of Schedule 2** as specified in that Part.~~
- (3) The Evidence (Recognition of Overseas Practitioners) Order 2008 (SR 2008/202) is revoked.

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Schedule 1
New Schedule 1AA inserted

s 36

Schedule 1AA
Transitional provisions relating to amendments made by Evidence 5
Amendment Act 2015

s 4A

- 1 Notice of evidence of sexual experience of complainant in sexual cases**
- (1) If a party intends to seek the permission of the Judge to offer evidence or ask a question about the sexual experience of the complainant at a hearing that will take place after the commencement of **section 44A**, the party must comply with **section 44A(5)** whether or not the section has commenced. 10
- (2) A Judge has the power to exercise the powers under **section 44A**, before the commencement of that section, in relation to any hearing that will take place after the commencement of the section. 15
- 2 Alternative ways of giving evidence by child witnesses in criminal proceedings**
- (1) If a party intends to call a child witness at a hearing that will take place after the commencement of **sections 107 to 107B**, the party must comply with **section 107(5)**, and any party intending to make an application under either **section 107A(1) or 107B(1)** must comply with **section 107A(2) or 107B(2)** respectively, whether or not any of those sections have commenced. 20
- (2) A Judge has the power to exercise the powers under **sections 107 to 107B**, before the commencement of those sections, in relation to any hearing that will take place after the commencement of those sections. 25

Schedule 2

Amendments to other enactments

s 37

Part 1

Amendment to Act

5

Criminal Procedure Act 2011 (2011 No 81)

After section 217(2)(j), insert:

- (ja) making or refusing to make a pre-trial witness anonymity order under section 110 of the Evidence Act 2006:

Part 2

Amendments to legislative instrument

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Evidence Regulations 2007 (SR 2007/204)

Replace regulation 20(b) and (c) with:

- (b) subject to **regulation 20A**, to allow any of the following persons to know the case against them: 15
- (i) a person suspected of having committed an offence to which the video record relates:
- (ii) a defendant to any charge filed in relation to which the video record may be used in evidence:
- (c) subject to **regulation 20A**, to allow any lawyer representing any person referred to in **paragraph (b)** to view it: 20
- (ca) subject to **regulation 20A**, if a lawyer is not permitted to be given a copy of a video record under **section 106(4A)** of the Act, to allow that lawyer or an expert to view it, and to do so on multiple occasions if requested by that lawyer, for the purposes listed in regulation 32(1). 25

After regulation 20(g), insert:

- (ga) for the purposes of training or reviewing the performance of any person who is training as or is an interviewer of any of the types of persons specified in **section 106(4A)** of the Act:

After regulation 20, insert:

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20A Limited places where working copy of video record of evidence may be viewed

The Police may only show a working copy of a video record to which **section 106(4A)** of the Act applies to a suspect, a defendant, or a lawyer representing a suspect or a defendant, or, if **regulation 20(ca)** applies, to an expert—

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Evidence Regulations 2007 (SR 2007/204)—*continued*

- (a) on premises under the control of the Police; or
- (b) on other premises agreed to by the Police.

In regulation 29, after “section 106(4)(a) of the Act”, insert “or by order of a Judge under **section 106(4B)** of the Act”.

Schedule 2
Amendment to Act

s 37

Criminal Procedure Act 2011 (2011 No 81)

After section 217(2)(j), insert:

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(ja) making or refusing to make a pre-trial witness anonymity order under section 110 of the Evidence Act 2006:

Legislative history

27 May 2015
2 July 2015

Introduction (Bill 27–1)
First reading and referral to Justice and Electoral Committee