

Evidence Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill makes a number of minor and technical amendments recommended by the Law Commission, following its 2013 review of the Evidence Act 2006 (the **Act**). The Law Commission's review was undertaken as part of a statutory requirement in the Act to monitor the operation of its provisions. The Government adopted all of the Law Commission's recommendations except 1. It made modifications to 2 of the recommendations.

The Bill also makes changes to the Act relating to child witnesses and access to video record evidence, to improve the court process for vulnerable witnesses.

Key changes to ensure the Act is up-to-date and working as intended

Admitting previous consistent statements

The Bill enables more previous consistent statements to be admissible. The fact of a complaint made in a criminal case, as well as statements that make up an integral part of events before the court, will be admissible in evidence. This addresses a gap and reflects the common law position before the introduction of the Act.

Privilege for plea discussions

The Bill extends the privilege that currently applies to settlement negotiations and mediation in civil proceedings to include plea discussions in criminal proceedings. The court will be authorised to order disclosure of a communication or document relating to a plea discussion that would otherwise be protected by privilege under certain circumstances. The extended privilege will enable full and frank plea discussions and encourage early disposal of cases, where appropriate.

Other minor and technical amendments

The Bill includes a number of minor and technical amendments to the Act to better reflect the policy intent, to correct a problem with how the provision is operating, or to clarify a provision.

Key changes to improve the court process for vulnerable witnesses*Restrictions on video record evidence*

The Bill places restrictions and safeguards on defence counsel access to video records of witnesses' evidence in sexual and violent cases, and of child complainants' evidence in all cases. The Bill also introduces offences in relation to the unauthorised possession, use, and distribution of video record evidence. The aim of these amendments is to mitigate the risk that video records will be inappropriately used.

Notice requirements for evidence of sexual history

The Bill adds a notice requirement in relation to the admissibility of evidence about the sexual history of a complainant with any person other than the defendant. The Bill requires all parties to be notified of the intention to lead such evidence. The scope, purpose, and admissibility of the evidence will be determined pre-trial, reducing potential trauma for the complainant in the court process.

Presumption that child witnesses give evidence in alternative ways

The Bill introduces a legislative presumption that all witnesses under the age of 18 use alternative ways to give their evidence. This includes the use of pre-recorded evidence, as well as audio-visual links, CCTV, and the use of witness screens in court. The Bill also gives all child witnesses the right to a support person when giving evidence in court. These changes help address the issue that contact with the court system can be traumatic for child witnesses. The impact of long delays before giving evidence at trial and inappropriate questioning during cross-examination are particular problems for child witnesses.

Departmental disclosure statement

The Ministry of Justice is required to prepare a disclosure statement to assist with the scrutiny of this Bill. It provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2015&no=27>.

Regulatory impact statement

The Ministry of Justice produced a regulatory impact statement on 28 June 2011 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <http://www.justice.govt.nz/policy/regulatoryimpactstatements/regulatory-impact-statements>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Introduction

References in this explanatory note to the Law Commission's report are to its report titled *The 2013 Review of the Evidence Act 2006* (Report 127, February 2013).

Clause 1 is the Title clause.

Clause 2 provides that the Act comes into force on the 28th day after the date on which it receives the Royal assent.

Part 1

Amendments to the Evidence Act 2006

Clause 3 provides that the principal Act to be amended by this Part is the Evidence Act 2006.

Clause 4 inserts two new definitions, of child witness and violent case, into section 4 of the principal Act.

Clause 5 inserts *new section 4A* to provide for 2 transitional provisions set out in *new Schedule 1AA*.

Clause 6 repeals section 12A of the principal Act, which preserves the rules of common law relating to statements of co-conspirators involved in joint criminal enterprises as well as defendants' statements against co-defendants in some circumstances. The *new section 22A* in *clause 9* replaces section 12A.

Clause 7 amends section 16 of the principal Act, which defines certain terms for the purposes of subpart 1 of Part 2 of the Act (hearsay evidence). The definition of business record is replaced in order to exclude from the definition Police documents containing statements by or interviews with eyewitnesses or victims. A hearsay statement in a business record can be admitted without having to satisfy a reliability test, as business records are regarded as being inherently reliable for the purposes of being admitted as evidence.

Clause 8 amends section 22 of the principal Act, which relates to notices of hearsay in criminal proceedings. *New paragraphs (h) and (i)* are inserted in section 22(2).

New paragraph (h) requires that a party intending to offer a hearsay statement under section 19(1)(b) must give notice as to why no useful purpose would be served by requiring the person who supplied the information to be a witness. Section 19(1)(b) relates to cases where a person cannot reasonably be expected (having regard to the time that has elapsed since he or she supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he or she supplied.

New paragraph (i) requires that a party intending to offer a hearsay statement under *new section 22A* (hearsay statement admissible against a defendant where there is reasonable evidence that there was a conspiracy or joint enterprise) must give notice as to why the party thinks that the 3 matters comprising the required threshold in that section are satisfied.

Clause 9 inserts into the principal Act *new section 22A*, which relates to the admissibility of hearsay statements against a defendant. As mentioned, this new section replaces section 12A of the principal Act, which was intended as a temporary measure and preserved rules of common law relating to statements of co-conspirators, persons involved in joint criminal enterprises, and certain co-defendants.

New section 22A provides that a hearsay statement is admissible against a defendant if—

- there is reasonable evidence that there was a conspiracy or joint enterprise; and
- there is reasonable evidence that the defendant was a member of that conspiracy or joint enterprise; and
- the hearsay statement was made in furtherance of the conspiracy or joint enterprise.

Clause 10 amends section 27 of the principal Act, which relates to defendants' statements offered by the prosecution. The effect of the amendment is that evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against a co-defendant in the proceeding only if it is admitted under *new section 22A*.

A consequential amendment is made to section 27 to remove a reference to section 12A, which is repealed by this Bill.

Clause 11 amends section 30 of the principal Act, which relates to improperly obtained evidence, to give effect to the Law Commission's recommendation on section 30. The section requires the Judge to undertake a balancing exercise when determining whether to exclude evidence that was improperly obtained. Concern has been expressed over the lack of guidance as to how the balancing test should be applied and the relative weighting to be placed on different factors. The Law Commission explains the issue in its report as follows:

“One possible drafting issue, however, was highlighted by the Supreme Court in *Hamed*. Subsection (2)(b) requires the proportionality inquiry to be conducted via ‘a balancing process that gives appropriate weight to the impropriety’ *but* also takes proper account of the need for an effective and credible system of justice (emphasis added). The use of the word ‘but’ seems to suggest that an effective and credible system of justice is a counterpoint to the impropriety that points towards admissibility.”¹

¹ Paragraph 4.18, page 74.

The words “but also” in subsection (2)(b) are replaced by “and” so as to make it clear that the balancing process must give appropriate weight to the impropriety and, in addition, take proper account of the need for an effective and credible system of justice.

Clause 12 amends section 35 of the principal Act, which relates to previous consistent statements. Previous consistent statements are not admissible, except in the limited circumstances set out in section 35. A previous consistent statement is a statement made by a witness outside court that is consistent with his or her testimony in court. The current requirements for admissibility are that—

- the statement is necessary to respond to a challenge to the witness’s veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness (section 35(2)); and
- the circumstances relating to the statement provide reasonable assurance that the statement is reliable and the statement provides the court with information that the witness is unable to recall (section 35(3)).

The content of section 35(3) is moved to section 90 of the principal Act, as recommended by the Law Commission, and the content of section 35(2) is replaced by *new subsection (2)*. The new exceptions are—

- the statement responds to a challenge that will be made or has been made to the witness’s testimony, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness; or
- the statement forms an integral part of the event (such as a 111 call); or
- the statement consists of the mere fact that a complaint has been made in a criminal case.

Clause 13 amends section 37 of the principal Act, which relates to the veracity rules, by removing a reference to dishonesty in subsection (3)(b). The Law Commission’s report recommended this change to leave the courts free to consider on the facts of individual cases whether the circumstances of prior offending really are substantially helpful in assessing veracity.

This clause also amends section 37(5) by deleting the words “whether generally or in the proceeding” from the definition of veracity. The Law Commission’s report recommended this change so that there is no rule that prevents a party from offering evidence contradicting or challenging a witness’s answers given in response to cross-examination directed solely to truthfulness.

Clause 14 amends section 38 of the principal Act, which relates to evidence of a defendant’s veracity, to clarify in subsection (2)(a) that evidence about a defendant’s veracity may be offered by the prosecution in a proceeding only where the defendant has, in court, given oral evidence about his or her own veracity or challenged the veracity of a prosecution witness. This change was recommended in the Law Commission’s report.

Clause 15 inserts a *new section 44(2A)* into the principal Act, to make an application under section 44(1) for permission to offer evidence or question a witness about the sexual experience of the complainant subject to a notice requirement in *new section 44A*.

Clause 16 inserts a *new section 44A* into the principal Act to provide 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. This provision is modelled on the notice requirement for hearsay evidence in section 22 of the principal Act, as was recommended in the Law Commission's report. The notice must be in writing and contain certain information, including a description of the evidence to be given or the question to be asked. If a document is intended to be produced in evidence, a copy of the document must be attached to the notice. Notice must be given 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 proposed to be offered or asked. An application under section 44(1) cannot be made unless the notice requirements have been complied with, or every other party has waived the requirements, or a Judge dispenses with the requirements. Matters a Judge must consider before dispensing with the notice requirements are listed in *new section 44A(6)*.

Clause 17 amends section 45 of the principal Act, which relates to the admissibility of visual identification evidence. Section 45 details the procedure that must be followed by an enforcement agency when obtaining visual identification evidence.

The section refers to the "person to be identified". That expression reflects the original Evidence Bill, which contemplated a procedure that would relate to persons other than alleged offenders. The Bill was changed and enacted with a definition of visual identification evidence that refers only to the defendant. Section 45 is amended by replacing references to the person to be identified with references to a suspect, as recommended by the Law Commission. The term suspect is regarded as more appropriate than defendant in this context because identification occurs prior to charges being filed.

Another issue dealt with by this clause is that section 45(4)(e) gives as a good reason for not following a formal visual identification procedure that the identification occurred soon after the offence was reported. This provision is amended by replacing the reference to the reporting of the offence with a reference to the occurrence of the offence, as recommended by the Law Commission. The effect of this amendment is that the identification must occur soon after the offence occurs.

Clause 18 repeals section 46A of the principal Act, which relates to judicial warnings about identification evidence. The substance of section 46A is relocated as a subsection of section 126, as recommended by the Law Commission. *See clause 34* for the related amendment to section 126.

Clause 19 amends section 50 of the principal Act, which relates to the use of a civil judgment as evidence in civil or criminal proceedings. Section 50 provides that a finding of fact in an earlier civil proceeding cannot be used to prove the existence of a

fact in issue. For the purpose of section 50, a proceeding is a proceeding conducted in a court, but not in a tribunal. This could allow a finding of fact by a tribunal to be used to prove a fact in issue. *New subsection (1A)* is inserted to extend the application of section 50 so that a decision or finding of fact made by a tribunal is not admissible to prove the existence of a fact that was in issue in the tribunal, as recommended by the Law Commission.

Clause 20 amends section 51 of the principal Act, which defines certain terms used in subpart 8 of Part 2 of the Act, principally to remove the ability to specify countries by Order in Council for the purpose of the definition of overseas practitioner. As recommended by the Law Commission, the term overseas practitioner is amended to include 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. *Subclauses (1) and (3)* give effect to this recommendation.

The definition of information in section 51(3) is amended, as recommended by the Law Commission. The current definition includes a statement of fact or opinion given orally or in a document. This definition is amended to ensure that the privilege applies only to evidence that is given in response to a request for information and not to documents in existence at the time the information is requested.

Clause 21 amends section 54 of the principal Act, which relates to the privilege for communications with legal advisers. Section 54(1) relates to the privilege in respect of professional legal services provided to a person. The current provision attaches privilege when the legal services are obtained. Initial communications with a legal adviser that do not result in legal services being obtained do not attract privilege under section 54(1). *New subsection (1A)* is inserted into section 54 to cover initial communications, whether or not legal advice is actually obtained, as recommended by the Law Commission.

Clause 22 amends section 57 of the principal Act, which relates to the privilege for settlement negotiations and mediation in civil proceedings, to give effect to recommendations of the Law Commission. *New subsections (2A) and (2B)* are inserted.

New subsection (2A) extends the privilege so that a person who is a party to a criminal proceeding has a privilege in respect of any communication or document the person has made or prepared in connection with plea discussions in the proceeding.

New subsection (2B) enables a court to order disclosure on any of the following grounds:

- when there is a subsequent prosecution for perjury:
- where and to the extent necessary to clarify the terms of an agreement reached, if the terms are later disputed or are ambiguous:
- in circumstances where, after due consideration of the importance of privilege and of the rights of the accused in a criminal proceedings, it would be contrary to justice not to admit the evidence.

Section 57(3) is amended by inserting *new paragraph (d)*, which provides that the privilege under section 57 does not apply if the court considers that, in the interests of justice, the need to disclose a communication or document made or prepared in connection with a settlement negotiation or mediation outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiation or mediation.

Clause 23 amends section 59 of the principal Act, which relates to the privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists. Section 59(1)(b) provides that the privilege does not extend to any court-ordered treatment or examination. There is uncertainty about the scope of this provision and whether it could be used to remove privilege in relation to all of a person's medical records, once he or she has submitted to court-ordered assessment. This aspect of the section is clarified, as recommended by the Law Commission.

New subsection (1A) is inserted, which ensures that, when a court or other lawful authority requires a person to undergo some kind of medical assessment, the privilege of the person's previous medical records is not affected. The effect of this subsection is that there is no privilege under section 59 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 assessment.

Clause 24 amends section 66 of the principal Act, which relates to joint and successive interests in privileged material. A personal representative of a deceased person can assert privilege against third parties in respect of privilege that was held by the deceased person. As it currently stands, section 66(2) raises some uncertainty about personal representatives and whether the privilege is restricted to the personal representative of the deceased person, or extends to a wider class of personal representatives. Section 66(2) is replaced with a provision that ensures that the privilege can be asserted only by the personal representative of the deceased person, as recommended by the Law Commission.

Clause 25 inserts a *new section 79(1A)* into the principal Act to provide that a child witness is entitled to have a support person when giving evidence and may have more than 1 support person with the permission of the Judge. A *new section 79(2A)* is also inserted to clarify that subsections (1) to (2), including the *new subsection (1A)*, apply whether a complainant or witness covered by those subsections gives evidence in an alternative way or in the ordinary way. Section 79(3) is also amended to provide that a Judge has a discretion to direct that support not be provided to a child witness. Section 79(4) is also amended so that, as with other witnesses, the name of a support person for a child witness must be disclosed to all parties as soon as practicable.

Clause 26 amends section 90 of the principal Act, which relates to the use of documents in questioning witness or refreshing memory, to exclude the use of a document excluded under section 28. Currently, section 90 excludes the use of documents to question a witness or refresh the witness's memory if the documents are excluded under section 29 (statements influenced by oppression) or section 30 (improperly obtained evidence). Section 28, which deals with the exclusion of unreliable statements,

is a companion measure to sections 29 and 30 and should be covered by section 90 as well, as recommended by the Law Commission.

New subsection (7) is inserted. The new subsection relocates in section 90 the substance of section 35(3), as recommended by the Law Commission.

Clause 27 amends section 95 of the principal Act, which relates to restrictions on cross-examination by parties in person. Section 95 sets out restrictions on parties to the proceedings cross-examining complainants and child witnesses. The current wording makes it unclear if the provision relates to criminal proceedings only, or also to civil proceedings relating to domestic violence or harassment. This clause amends section 95 to apply it to both criminal and civil proceedings involving domestic violence or harassment, as recommended by the Law Commission.

Clause 28 amends section 102(a) of the principal Act to include a reference to *new sections 107 to 107B* to provide that sections 103 to 106 are subject to the new sections.

Clause 29 inserts a *new section 103(5)* into the principal Act to provide that the general provisions in section 103 relating to alternative ways of giving evidence are subject to the specific provisions in *new sections 107 to 107B* applying to child witnesses in criminal proceedings.

Clause 30 amends section 106(3) of the principal Act to provide that viewing of video records of evidence by parties and their lawyers before these are offered in evidence must be done in accordance with any regulations made under section 201. This clause also amends section 106(4)(a) to refer to a new exception to the requirement that a lawyer be given a copy of a video record of evidence, where the evidence is of a child complainant or any witness (including an adult complainant) in a sexual case or a violent case. The exception is provided for in *new subsections (4A) to (4D)*. If the exception applies, a party may apply to a Judge for an order that a copy is to be given to their lawyer. *New section 106(4C)* sets out the matters a Judge must have regard to when considering such an application. If a Judge orders that a copy of a video record of evidence be given to a lawyer, it must be dealt with in accordance with regulations made under section 201. This clause also inserts a *new section 106(9)* that allows any lawyer representing the Crown to be given a copy of a video record (that 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. Crown lawyers are subject to the same rules for dealing with video records as other lawyers who must act in accordance with regulations made under section 201.

Clause 31 replaces the cross-heading above section 107 of the principal Act so that it refers to child witnesses rather than child complainants only.

Clause 32 replaces section 107 of the principal Act with *new sections 107 to 107B*. *New section 107* provides that in criminal proceedings a child witness is entitled to give evidence in 1 or more alternative ways. The witness can give evidence by the means listed or by any appropriate practical and technical means so long as the Judge,

the jury (if any), and any lawyers can see and hear the witness giving evidence, in accordance with regulations made under section 201. The defendant must also be able to see the witness, unless the Judge otherwise directs. *New section 107* also provides that if a video record is to be 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. To avoid doubt, *new section 107(3)* states that section 106 applies to the video record. *New section 107(4)* provides for notice to be given by any party intending to call a child witness to every other party. The notice must be in writing and must state the 1 or more alternative ways in which the child witness will give his or her evidence. The notice 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. An amended notice may be filed in certain circumstances. *New section 107* is subject to *new sections 107A and 107B*.

New section 107A provides that if a child witness indicates his or her wish to give evidence in the ordinary way, the party calling the witness may apply to a Judge for a direction that he or she be permitted to do so. The application 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. A Judge may give such a direction if satisfied that the witness fully appreciates the likely effect on him or her of doing so. Before giving a direction, the Judge may call for a report on the effect on the witness of giving evidence in the ordinary way or any alternative way. When considering an application, the Judge must have regard to certain matters set out in *new section 107A(4)*.

New section 107B allows any other party to apply for a direction that a child witness give evidence in the ordinary way (rather than by an alternative way under *new section 107*). The application must be made as early as practicable before the case is to be tried, or at a later time permitted by the Judge. The Judge must hear from the parties in chambers and may call for a report on the effect on the witness of giving evidence in the ordinary way or any alternative way. The matters a Judge must have regard to when considering the application are set out in *new section 107B(4)*.

Clause 33 amends section 119 of the principal Act to provide for 3 new offences relating to the possession, copying, supply, or showing of video records of the types specified in *new section 106(4A)* other than as permitted by the Act or regulations made under section 201. A person who is in possession of such a video record made for the purpose of section 106, other than as permitted by the Act or regulations made under section 201, commits an offence and is liable upon conviction to,—

- in the case of an individual, a fine not exceeding \$2,000;
- in the case of a body corporate, a fine not exceeding \$10,000.

A person who is in possession of a video record made for the purpose of section 106, other than as permitted by the Act or regulations made under section 201 and with the intention of copying, supplying, or showing the video record, commits an offence and is liable upon conviction to,—

- in the case of an individual, a term of imprisonment not exceeding 6 months:
- in the case of a body corporate, a fine not exceeding \$10,000.

A person who copies, supplies, or shows a video record made for the purpose of section 106, other than as permitted by the Act or regulations made under section 201, commits an offence and is liable upon conviction to,—

- in the case of an individual, a term of imprisonment not exceeding 6 months:
- in the case of a body corporate, a fine not exceeding \$10,000.

Clause 34 inserts *new subsection (3)* into section 126 of the principal Act, which relates to judicial warnings about identification evidence. This amendment is mentioned in the note about *clause 18*. *New subsection (3)* contains the substance of section 46A of the Act, which is being relocated here because it is a companion measure to section 126.

Clause 35 inserts a *new section 201(ia)* into the principal Act to allow regulations to be made prescribing offences for non-compliance with regulations relating to the use of video records of evidence and any transcripts of such evidence. Regulations may provide penalties of,—

- in the case of an individual, a fine not exceeding \$2,000:
- in the case of a body corporate, a fine not exceeding \$10,000.

Clause 36 and *Schedule 1* insert into the principal Act a *new Schedule 1AA* containing 2 transitional provisions to,—

- if a hearing will take place after the commencement of *new section 44A*, require a party to comply with the timing requirements in *new section 44A(5)* and allow a Judge to exercise the powers under that section, whether or not the section has commenced:
- if a hearing will take place after the commencement of *new sections 107 to 107B*, require a party to comply with the timing requirements in *new sections 107(5), 107A(2), and 107B(2)* and allow a Judge to exercise the powers under those sections, whether or not those sections have commenced.

Part 2

Revocation and amendments to other enactments

Clause 37 and *Schedule 2* revoke or amend enactments as specified in that clause and that schedule.

Hon Amy Adams

Evidence Amendment Bill

Government Bill

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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

Part 1

Amendments to Evidence Act 2006

3 Principal Act

This Part amends the Evidence Act 2006 (the **principal Act**). 10

4 Section 4 amended (Interpretation)

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 15

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 20

5 New section 4A inserted (Transitional provisions)

After section 4, insert:

4A Transitional provisions

The transitional provisions set out in **Schedule 1AA** have effect according to their terms. 25

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)

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
 - (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

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
 - (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:

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
- (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**”.

- (2) In section 27(3), after “(hearsay evidence)”, insert “except **section 22A**”.
- (3) Repeal section 27(4).
- 11 Section 30 amended (Improperly obtained evidence)**
In section 30(2)(b), replace “but also” with “and”.
- 12 Section 35 amended (Previous consistent statements rule)** 5
- (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—
- (a) responds to a challenge that will be or has been made to the witness’s testimony, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness; or 10
- (b) forms an integral part of the events before the court; or
- (c) includes the mere fact that a complaint has been made in a criminal case.
- 13 Section 37 amended (Veracity rules)** 15
- (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:
- (2) Replace section 37(5) with:
- (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying. 20
- 14 Section 38 amended (Evidence of defendant’s veracity)**
- 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 25
- 15 Section 44 amended (Evidence of sexual experience of complainants in sexual cases)**
- After section 44(2), insert:
- (2A) An application under subsection (1) is subject to the notice requirements in **section 44A**. 30
- 16 New section 44A inserted (Notice of evidence of sexual experience of complainant in sexual cases)**
- After section 44, insert:

- 44A Notice of evidence of 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—
- (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
 - (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—
- (a) the party’s intention to offer the evidence; and
 - (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—
- (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.
- (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.
- (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 party is substantially prejudiced by the failure to comply with a requirement; and
 - (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)**
- (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) 5**
- Repeal section 46A.
- 19 Section 50 amended (Civil judgment as evidence in civil or criminal proceedings) 10**
- 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.
- 20 Section 51 amended (Interpretation) 15**
- (1) In section 51(1), definition of **overseas practitioner**, replace paragraph (c) with:
- (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”. 20
- (3) Repeal section 51(6).
- 21 Section 54 amended (Privilege for communications with legal advisers) 25**
- (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”.
- 22 Section 57 amended (Privilege for settlement negotiations or mediation) 30**
- (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. 35

- (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—
- (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 in a criminal proceeding, it would be contrary to justice not to disclose the communication or document or part of it.
- (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.
- 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.
- 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—
- (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)**
- (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:
- (2A) Subsections (1), **(1A)**, and (2) apply whether the witness or complainant gives evidence in an alternative way or in the ordinary way. 5
- (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 to a complainant or a child witness or other witness by— 10
- (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”.
- 26 Section 90 amended (Use of documents in questioning witness or refreshing memory) 15**
- (1) In section 90(1) and (2), replace “section 29 or 30” with “section 28, 29, or 30”.
- (2) After section 90(6), insert:
- (7) While giving evidence, a witness may consult a previous statement of his or hers that is consistent with the witness’s evidence if— 20
- (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. 25
- 27 Section 95 amended (Restrictions on cross-examination by parties in person)**
- In section 95(1), after “case or a”, insert “civil or criminal”.
- 28 Section 102 amended (Application) 30**
- Replace section 102(a) with:
- (a) **sections 107 to 107B** (which relate to child witnesses in criminal proceedings):
- 29 Section 103 amended (Directions about alternative ways of giving evidence) 35**
- After section 103(4), insert:
- (5) This section is subject to **sections 107 to 107B** which apply to child witnesses in criminal proceedings.

30 Section 106 amended (Video record evidence)

- (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 5
 - (b) must be dealt with in accordance with any requirements set out in regulations made under section 201.
- (2) In section 106(4), delete “in a proceeding”.
- (3) In section 106(4)(a), after “unless”, insert “**subsection (4A)** applies or”.
- (4) After section 106(4), insert: 10
- (4A) Subject to **subsections (4B) and (4C)**, a party or their lawyer is not entitled to be given a copy of a video record under subsection (4)(a) of—
- (a) any child complainant; or
 - (b) any witness (including an adult complainant) in a sexual case or a violent case. 15
- (4B) On the application of a party, 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 before it is offered in evidence.
- (4C) When considering an application under **subsection (4B)**, the Judge must have regard to— 20
- (a) whether the interests of justice require departure from the usual procedure under **subsection (4A)** in the particular case; and
 - (b) the nature of the evidence contained on the video record; and
 - (c) the ability of the party or their 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. 25
- (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).
- (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.

31 Cross-heading above section 107 replaced

Replace the cross-heading above section 107 with:

Giving of evidence by child witnesses

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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:

(ii) while in the courtroom but unable to see the defendant or some other specified person: 15

(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: 20

(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. 25

(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. 30

(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.

(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 35

party may file an amended notice but must do so as early as practicable before the case is to be tried.

- (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

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- (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.

- (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.

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- (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

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(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.

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- (4) When considering whether to give a direction under this section, the Judge must have regard to—

(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).

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107B Application by any other party for child witness to give evidence in ordinary 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.

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- (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—

(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.

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- (4) When considering whether to give a direction under this section, the Judge must have regard to—

- (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).

33 Section 119 amended (Offences)

After section 119(3), insert:

- (3A) 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 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 fine not exceeding \$2,000:
 - (b) in the case of a body corporate, to a fine not exceeding \$10,000.
- (3B) 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 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.
- (3C) 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 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.

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)

After section 201(i), insert:

- (ia) 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:

36 New Schedule 1AA inserted

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

Part 2

5

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. 10
- (3) The Evidence (Recognition of Overseas Practitioners) Order 2008 (SR 2008/202) is revoked.

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

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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”.