

## Q & A

### **What is the Evidence Act 2006?**

The Evidence Act helps ensure that decisions made in court are fair by providing consistent rules for giving evidence. Prior to the introduction of the Evidence Act 2006 there was no definitive place to go for evidence law. Rather, the law was spread across a number of statutes including the Evidence Act 1908 and case law.

### **Why review the Evidence Act?**

Every five years the Act requires the Minister of Justice to ask the Law Commission to review how the Act is working. In 2012 the Minister of Justice asked the Law Commission to perform this review and the Law Commission delivered *The 2013 Review of the Evidence Act 2006* in February 2013.

### **Why does the Act need to be reviewed periodically?**

The aim of the 2006 Act was to simplify, clarify and draw together the laws of evidence into one statute, while also making the statute more accessible. As the Act contained such wide ranging changes to evidence law it was decided that the legislation should include a provision that requires the operation of the Act to be reviewed periodically. This would allow any issues with the new Act to be resolved.

### **What did the Law Commission find during the Review?**

The Law Commission found that the Act overwhelmingly meets its objectives and the needs of its users. However, it found a few areas where the Act is either not working as intended or there are problems with how it operates in practice. In order to rectify this, the Law Commission recommended 33 mostly technical amendments to the Act, which the Government intends to accept, with two in modified form. The Law Commission's report is available on their website at [www.lawcom.govt.nz/project/review-evidence-act-2006](http://www.lawcom.govt.nz/project/review-evidence-act-2006).

### **Does the Government agree with the Law Commission's findings?**

The Government accepts all of the Law Commission's recommendations for amendments to the Act, except two which are being accepted in modified form.

## **What other changes is the Government proposing?**

While not covered by the Law Commission review the Government has also approved a number of changes to make appearing in court less traumatic for victims of sexual violence and child witnesses.

The defence in sexual violence cases will need to give notice before a trial begins of their intention to use evidence about a victim's previous sexual experiences with someone other than the defendant. Currently, permission to introduce this evidence can be sought from the judge at any time during the trial.

Child witnesses will also be given the automatic right to a support person in court, there will be provision for extra guidance and training for lawyers and judges dealing with child witnesses, and there will be a presumption that child witnesses will give their main evidence through the video of their police interview.

The new presumption will mean that instead of children having to give their main evidence in person in court, the video of their initial interview with Police can be played, or they can give evidence via CCTV or from behind a screen. Giving evidence in court, often in front of the defendant, can be very difficult and this change will help protect child witnesses from being retraumatised by this experience.

A further change will help protect victims by limiting access to video records of the evidence of all victims in sexual and violent cases and of child victims in all cases. This is aimed at ensuring that sensitive video evidence is protected from falling into the wrong hands and is not used for inappropriate purposes. The restriction will provide another layer of protection for victims and help them feel secure in giving video recorded evidence, knowing that safeguards are in place.

## **What changes are being made to the 'without prejudice privilege'?**

Among the changes recommended by the Law Commission is extending the common-law 'without prejudice' privilege to include plea-discussions so that the contents of the discussion cannot be used later as evidence in court, encouraging the parties to speak freely. A plea discussion can lead to an agreement between the prosecutor and the defence where a defendant agrees to plead guilty to some charges in return for others being dropped.

Changes to criminal procedures under the Criminal Procedure Act 2011 are designed to encourage parties to resolve matters in dispute outside of court so that cases are ready to progress when they come before a judge or jury. Protection of privilege is necessary for full and frank plea discussions and this will help speed cases through the system for the benefit of all parties.

## **Cabinet made some decisions in 2011 to amend rules around children giving evidence that have never been enacted. What is happening to these?**

The Government has decided to rescind these decisions, which relate to the pre-recording of child witnesses' entire evidence, the introduction of intermediaries to question child witnesses, and the introduction of a new judicial direction relating to the demeanour of child witnesses when giving evidence.

### **Why are these decisions being rescinded?**

#### *Pre-recording of the entire evidence of child witnesses*

The Court of Appeal has now made clear its serious concerns about pre-recording the entire evidence of child witnesses, including cross-examination by the defence.

The full Court of Appeal decision can be found at:

<http://www.nzlii.org/nz/cases/NZCA/2011/303.html>

Concerns include that:

- complainants could end up having to give evidence twice if additional issues are raised during the trial
- the jury will not be present for cross-examination and therefore will be unable to assess the defendant's reaction to evidence as it is being given
- the defendant will not hear the prosecution's opening before cross-examining the child witness. They are generally entitled to hear the opening before taking any step in the trial so they know the charges against them and the evidence that will be presented
- counsel on both sides will have to prepare for the pre-recording of evidence as well as the trial itself so overall legal fees will be higher
- although pre-recording evidence would help get child witnesses out of the criminal justice system more quickly, the negative impact on a defendant's right to a fair trial could be significant.

Child witnesses will still be able to give their main evidence through the video of their police interview but will need to be cross-examined in person, though they may do this via CCTV or from behind a screen.

#### *Intermediaries*

An intermediary communicates questions to child witnesses in court in a manner more readily understood by children. However, the defendant's right to cross-examine witnesses could be undermined because their lawyer is not able to ask questions to the witness directly and so may not be able to cross examine them in the way they think necessary. The use of trained intermediaries is also an expensive option and the costs of implementing the proposal could be better spent providing other, more appropriate services for victims.

### *Judicial direction on demeanour*

Judicial directions can be confusing for jurors as it is not always understood that judicial directions are standard, and jurors can think that the judge is providing them clues as to their view of the case. The proposed direction would have advised jurors that they should not draw inference from the demeanour of child witnesses when they were giving evidence by an alternative mode, such as on video or via CCTV. There is concern about a direction that suggests demeanour is not relevant. If inference cannot be drawn from the demeanour of a witness then evidence would not need to be given in person and could instead be presented in written form.