NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Evidence Amendment Bill

13/08/2014

SUBMISSION ON THE EVIDENCE AMENDMENT BILL

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Evidence Amendment Bill (the Bill). The Law Society's submission identifies some issues of principle, as well as clarity and workability, and makes recommendations as to how these issues may be addressed in the Bill.

Admissibility of previous consistent statements

2. Clause 12 provides for previous consistent statements to be admissible (new section 35(2)), where:

   a) 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

   b) the statement forms an integral part of the event (such as a 111 call); or

   c) the statement consists of the mere fact that a complaint has been made in a criminal case.

3. The Law Society supports the changes made by proposed new section 35(2)(b) and (c). In earlier submissions the Law Society had suggested that section 35 should be modified so that evidence of prior consistent statements could be given as recent complaint evidence in chief, even if it was not clear that the complainant's evidence will be challenged for inconsistency or recent invention. This was because arguments about whether evidence had been challenged on the grounds of inconsistency or recent invention prolonged trials and led to the evidence of previous consistent statements coming out only in re-examination, when the defendant was rarely in a position to respond adequately. To the extent that the proposed changes will allow prior consistent evidence to be given in chief where it is known the evidence of a complainant witness will be challenged, the change is supported as more readily allowing defendants to respond to the evidence in issue.

4. It may be desirable to revisit section 35(1) and the proposed section 35(2) to clarify when a prior statement is "consistent with" the witness's evidence – that is, whether the proposed prior consistent statement evidence essentially repeats what was stated in testimony in court, or whether evidence of prior statements which are not inconsistent with that testimony is admissible (see the distinction drawn by Elias CJ in *Hart v R*.)[1]

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1 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1, (2010) 24 CRNZ 924 at [10].

Recommendation

5. The Law Society recommends that consideration be given to clarifying when a prior statement is "consistent with" the witness's evidence.

Privilege for settlement negotiations, mediation and plea discussions

6. Clause 22(2) extends the section 57 "without prejudice" privilege to criminal proceedings to cover plea discussions: see proposed new section 57(2A). This is in accordance with a recommendation of the Law Commission.

7. The Law Society supports this change.

8. Proposed section 57(2B) (clause 22(4)) will nevertheless permit disclosure of all or part of the privileged material where the court considers that:

   (a) disclosure is necessary for a subsequent prosecution for perjury; or

   (b) disclosure is necessary to clarify 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.

9. There is a need for a principled exception to privilege, but the Law Society questions the limitation in the proposed section 57(2B)(a) to prosecutions for perjury. There is no good reason for including perjury but excluding such matters as offences against the course of justice (sections 116 and 117 of the Crimes Act 1961). It is submitted that the exception might be extended to a subsequent prosecution for any offence against the administration of law and justice (Part 6 of the Crimes Act 1961).

10. Proposed section 57(3)(d) provides an appropriate discretion to allow privilege for settlement negotiations or mediation to be overridden where there is sufficient reason.

11. Proposed section 57(2B)(c) should be amended by replacing "an accused" with "a defendant" to bring the provision into line with the terminology used elsewhere in the Bill and in the Criminal Procedure Act 2011.

Recommendations

12. The Law Society recommends that:

   (a) Proposed section 57(2B) be amended to permit disclosure for a subsequent prosecution for any offence against the administration of law and justice (Part 6 of the Crimes Act 1961);

(b) Proposed section 57(2B)(c) be amended by replacing “an accused” with “a defendant”.

Notice procedure for sexual experience evidence

13. Clause 16 proposes a new section 44A which will implement the Law Commission’s recommendation to require notice of an application for leave to lead evidence as to sexual experience of a complainant in a sexual case.

14. The grounds put forward by the Law Commission for change are strong, and the proposed amendment will be beneficial in allowing the issue of admissibility to be resolved, in most cases, before trial. The discretion in proposed section 44A(6) to dispense with such notice will preserve the flexibility needed to deal with cases where, for example, the issue could not reasonably have been anticipated.

Child witnesses – alternative ways of giving evidence-in-chief

15. Clause 32 (new section 107) introduces a presumption that witnesses under 18 will use alternative ways to give their evidence including pre-recorded evidence, AVL, CCTV and witness screens in court. The judge, jury and lawyers must be able to see and hear the witness. The defendant must be able to see the witness unless the judge directs otherwise.

16. The terms of the proposed section 107(1) imply that the child witness in question is not the defendant, but this is nowhere explicitly stated. It is desirable that there be an explicit statement that section 107 will not apply to child defendants when giving evidence.

17. The Law Society supports the extension of alternative ways for children to give evidence, from child complainants to all child witnesses. The proposed sections 107 – 107B provide an effective method of achieving this.

18. Section 107A makes provision for a child witness who wishes to give evidence and to be cross-examined in court in the ordinary way, to do so with the permission of the court. The Law Society notes that there is a discretion in section 107A(1) for the party calling the witness to make the application for permission (the party calling the witness **may** apply ...). It is suggested that this unduly restricts the personal autonomy of the witness. It would be preferable to provide that the party calling the witness **must** seek an order from the court if the witness wishes to give evidence in court and be cross-examined. The judicial discretion in section 107A(3) is a sufficient safeguard against child witnesses unwisely pursuing this course.

19. The Law Society is concerned that the rights of the defendant to make fair answer to the charges may be unduly restricted by the terms of the proposed section 107B. It is clear that in many cases the defence will need to challenge the accuracy or veracity of child witnesses (for example on the basis of possible mistaken identification of a defendant). The current section 107 in relation to child

complainants provides a broad discretion to allow evidence-in-chief or under cross-examination to be given in a variety of ways. However the proposed section 107B provides only a choice between the mode of evidence selected by the party calling the witness and "giving evidence in the ordinary way" – that is, in person in court. In many, perhaps most, cases the witness's evidence will be given by video recording, and that will generally not involve any evidence under cross-examination. If there is to be any cross-examination, it will have to be "in the ordinary way".

20. This raises two problems. A judge may be reluctant to order that a witness appear "in the ordinary way" because of the possible detrimental impact on the witness. If so, the defendant's fair trial rights are compromised. If, however, an order is made, the witness is under the pressures that section 107 aims to eliminate.

21. The solution the Law Society proposes is to widen the options available to the judge where a party not calling the witness wishes, on proper grounds, to have an opportunity to cross-examine the witness and challenge her or his evidence. The party should be able to seek, and the judge order, that the witness give all her or his evidence – or be available for cross-examination – by way of one of the means listed in the proposed section 107(1)(a) (ii) or (iii) or section 107(1)(b) where this is desirable in the interests of justice and the judge is satisfied this would not be unduly stressful for the witness. This is similar to the discretion in the existing section 107.

22. The Law Society also notes that the use of alternative means of giving evidence may increase the quantum of preparation counsel need for trials. There is a specific concern with the "no copy" regime which may be established under the proposed amendments to section 106 (clause 30). These amendments are discussed below.

Recommendations

23. The Law Society recommends that:

    (a) Proposed section 107 be amended to include a statement that the provision does not apply to child witnesses who are defendants;

    (b) Proposed section 107A be amended to provide that the party calling the witness must seek an order from the court permitting evidence to be given in the ordinary way if the witness wishes to give evidence in court and be cross-examined;

    (c) Proposed section 107B be amended to enable the other party to seek, and the judge to order, that the witness give all her or his evidence – or be available for cross-examination – by way of one of the means listed in the proposed section 107(1)(a) (ii) or (iii) or section 107(1)(b) where this is desirable in the interests of justice and the judge is satisfied this would not be unduly stressful for the witness.

Restricting pre-trial access to video evidence

24. Clause 30 proposes changes to section 106 which would severely limit lawyers' access to video records of evidence of child witnesses or adult witnesses in sexual or violent cases prior to trial. Instead of the current position where counsel are given copies of the video record, counsel will have to apply to the judge for a copy, or be required to view the video under access conditions which would need to be negotiated with the party holding the record. This will impose a considerable burden on defence counsel in arranging access at times (for example at weekends or in the evenings) when counsel are preparing for the trial while continuing to run the rest of their practice.

25. In addition, a further practical difficulty arises where counsel needs to compare sections of video evidence as between the child complainant and another child witness. A copy will be provided to counsel of the video of the other witness but access to that of the child complainant must be by application. A comparison cannot readily be made where counsel does not have copies of all the relevant videos. In these circumstances the change of regime will produce a great number of pre-trial applications for copies of videos to be provided. The practical difficulties in counsel obtaining access and the volume of applications are likely to increase following enactment of the Bill's provisions that extend the ability to give evidence by video interview to child witnesses who are not complainants.

26. The Law Commission report which recommended a change be made[2] referred to no evidence that there was a problem with the existing section 106 regime. It simply stated that a submission recommending change had been received. There does not appear to have been any recognition of the possible practical difficulties that could ensue. The Law Society accepts there are good reasons why defendants should not be permitted to view such evidential interviews (although they should of course have access to transcripts of the interview). However no good reasons have been given for preventing lawyers from receiving copies. In view of the difficulties the proposed changes may cause for counsel (other than Crown counsel) with consequent effects on fair trial rights, the change is not justified.

27. The Law Society recommends that the proposed amendments to section 106(4A) not be enacted. Instead, the current section 106(4) procedure of providing copies of evidential videos should be continued, with a provision prohibiting a lawyer from showing to the party to the proceedings a video of the kinds listed in the proposed section 106(4A), or providing access to it or a copy of it. The Law Society submits that it must be presumed that lawyers will act within the law and in accordance with their professional obligations. This presumption and the offences for improper use of videos introduced in the proposed section 119(3A) (clause 33) provide a sufficient safeguard.

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2 NZLC R127, *The 2013 Review of the Evidence Act 2006,* paragraph 1.43.

Recommendations

28. The Law Society recommends that:

    (a) The proposed amendments to section 106(4A) not be made;

    (b) The current section 106(4) procedure be amended to include a provision prohibiting a lawyer from showing to the party to the proceedings a video of the kinds listed in the proposed section 106(4A), or providing access to it or a copy of it.

Child witnesses – enabling a support person to be in court

29. Clause 25 provides that a child witness is entitled to have a support person when giving evidence and may have more than one person, with the permission of the judge. Under proposed section 79(3) the judge may order that no support person be present, or that a particular person not be present as a support person.

30. The Law Society supports this amendment. The provision of support persons can be of very real assistance to child witnesses, and thus enable them to more accurately and freely give their evidence. The proposed power to exclude support persons or bar a particular person from acting as a support person is a necessary and desirable safeguard to prevent support persons seeking to influence the child witness's evidence.

Veracity

31. Clause 13 amends the section 37 veracity rules by removing the reference to dishonesty in section 37(3)(b). The definition of "veracity" in section 37(5) is amended, to remove the words "whether generally or in the proceeding".

32. The Law Society supports the amendments proposed as these will clarify the law. The grounds advanced for the change by the Law Commission are cogent. It will also more closely align the Evidence Act 2006 with the general approach of the courts to veracity issues: see the comments of the majority of the Supreme Court in *Hannigan v R*.[3]

Communications with legal advisors

33. Clause 21 amends the section 54 privilege by extending the privilege to a person who requests professional legal services from a legal adviser whether or not the person actually obtains such services.

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3 *Hannigan v R* [2013] NZSC 41, 2 NZLR 612, (2013) 26 CRNZ 502 at [138].

34. The Law Society supports this change as it both ensures the intention of the 2006 Act is carried through and avoids difficulties which have arisen in practice.

Privilege for medical practitioners and clinical psychologists

35. Clause 23 amends the section 59 privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists. The privilege attaching to the person's previous medical records is not affected but it is expressly provided that no privilege attaches to any communication or information that is made or obtained for the purpose of an assessment that is required by court order or other lawful authority.

36. The Law Society agrees that clarification of the law is desirable but considers this amendment does so in an undesirable way. Defendants are effectively required to provide information to the court-appointed psychiatrist or psychologist. Consistent with the privilege against self-incrimination, it is therefore desirable that privilege should attach to any discussion or information provided by the defendant to the psychiatrist or psychologist which might establish the defendant's guilt in relation to the offence(s) charged.

37. If that submission is not accepted, the section should be further amended to require that a defendant be expressly advised that any statements made touching on, or which might establish, the defendant's guilt in relation to the offence(s) charged may be included in the report made to the court, and that such a report will become admissible in evidence.

Recommendations

38. The Law Society recommends that:

    (a) Clause 23 be amended to provide that privilege attaches to any information provided by the defendant to the psychiatrist or psychologist which might establish the defendant's guilt in relation to the offence(s) charged;

    (b) Alternatively, that clause 23 be amended to require that a defendant be expressly advised that any statements made touching on, or which might establish, the defendant's guilt in relation to the offence(s) charged may be included in the report made to the court, and that such a report will become admissible in evidence.

Other minor amendments

Evidence of co-conspirators

39. The Law Society supports the repeal of section 12A and the enactment of proposed section 22A (clauses 6, 9), for the reasons given by the Law Commission. The proposed amendments to section 27 (clause 10) are a corollary to those changes and are also supported.

Improperly obtained evidence

40. The Law Society supports the proposed amendment to section 30(2)(b) (clause 11) as it will better reflect the balancing of interests which must take place without implying that a greater weight is to be given to the need for an effective and credible system of justice.

Visual identification evidence

41. The Law Society supports the changes to section 45 proposed by clause 17 for the reasons given by the Law Commission. The use of the term "suspect" as is proposed is appropriate.

Civil judgment as evidence in civil or criminal proceedings

42. The extension of section 50 (decision or finding of fact as evidence in proceedings) to tribunals proposed by clause 19 is desirable.

Use of documents to refresh memory not to include use of statements excluded as unreliable

43. Clause 26 proposes to amend section 90 so that statements which have been excluded under section 28 as unreliable may not be used as documents from which a defendant may refresh her or his memory. The Law Society supports this proposal which would remove an anomaly in the law.

Definition of business record

44. Clause 7 amends the definition of "business record" in section 16 for the purposes of the hearsay rule so as to exclude Police documents containing statements by or interviews with eyewitnesses or victims. The Law Society supports this proposal on the basis that Police records of this kind do not possess any intrinsic reliability and should therefore not be accorded the same status as other kinds of records covered by the section.

45. However, the Law Society questions the limitation of the proposed section 16(1)(b) to Police records containing any statement or interview by or with an ***eye***witness or victim (emphasis added). Police records may contain critical hearsay statements by witnesses who do not fall within the definition of an eyewitness or victim. If the concern underlying the proposed amendment is the potential for injustice because of an inability to cross-examine a critical witness or victim, the statute should

equally apply to other witnesses who might give critical evidence. The Law Society also notes that "eyewitness" is not defined in the Bill or the Act.

Recommendation

46. The Law Society recommends that

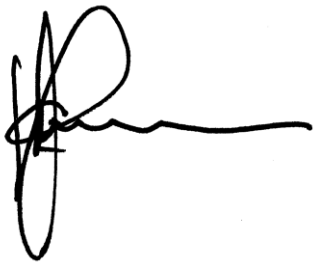
    (a) Clause 7 be amended so that it excludes Police documents containing statements by or interviews with witnesses or victims;

    (b) If the above recommendation is not accepted, that "eyewitness" be defined in the Act.

Extension on the limitation on cross-examination by a litigant in person

47. Clause 27 proposes to extend the operation of section 95 so as to prevent a litigant in person from personally conducting any cross examination of a child witness or a complainant in civil proceedings concerning domestic violence or harassment. The change is highly desirable, for the reasons given by the Law Commission, and the Law Society supports it.

48. The Law Society does not wish to be heard.



Chris Moore

President

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