

10 May 2021

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By email: rita.jury@justice.govt.nz

Tēnā koe Rita

Re: Proposed repeal of section 202 Evidence Act 2006 (review mechanism)

Thank you for your email of 5 May 2021, inviting comment from the New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) on a proposal to repeal section 202 of the Evidence Act 2006. Section 202 currently provides for five-yearly reviews of the Act by the Law Commission.

Background

In its second review of the Act, the Law Commission recommended repealing section 202,¹ and the government subsequently accepted that recommendation. The Commission's reasons for the recommendation included the fact that the Act is now largely 'bedded in' and the ongoing operational cost to the Commission conducting the reviews is high.²

The Ministry is now considering including the repeal of section 202 in a forthcoming Statutes Amendment Bill, on the basis that the section is considered unnecessary and the responsible Minister is able to refer any substantive and operational matters relating to the Act to the Law Commission for review at any time. You have asked for the Law Society's response by 5pm today.

Law Society response

Given the short time provided, we were only able to canvass the views of the relevant Law Society committees (Criminal Law, and Civil Litigation and Tribunals committees, comprised of senior and experienced criminal and civil litigators) rather than the profession generally.

Some committee members supported the proposed repeal of section 202, but the majority supported the retention of the section albeit with an extension from five-yearly to ten-yearly review. This latter option was the position taken by the Law Society in 2018, as discussed below.

During the second review of the Act, the Law Society supported retaining section 202,³ noting that a regular review "is very useful and allows for developments in caselaw to be monitored", but given

¹ Law Commission: *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006*, Report | Pūrongo 142, 28 February 2019.

² *Ibid*, at [1.44] - [1.53].

³ NZLS submission, *Evidence Act second review*, 21 June 2018. Accessed here: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0003-123447-I-LC-Evidence-Act-Review-21-6-18.pdf>

the factors set out in the Commission's Issues Paper (at [1.44]) the Law Society supported the extension of the current five-yearly review period to every 10 years.

Although the Act is largely operating well, the recent review showed that issues still arise requiring attention. Retaining the review mechanism (on a 10-yearly basis) would ensure the Act is kept under active consideration and would allow for new issues to be addressed as circumstances, technology and attitudes change. Technology in particular is changing the way evidence is gathered and delivered in court, and this may impact the laws of evidence in ways not currently foreseen.

The Law Society is sympathetic to the concern regarding the operational cost to the Commission, but suggests that future reviews of the Act would not necessarily need to be conducted by the Commission and could, for example, be conducted by the Ministry.

We hope these comments are helpful but if you have any questions or would like to discuss the issues, please contact the committees via our Senior Law Reform and Advocacy Advisor, Amanda Frank (amanda.frank@lawsociety.org.nz).

Nāku noa nā,

A handwritten signature in black ink, appearing to be 'Herman Visagie', written in a cursive style.

Herman Visagie
Vice-President