Government Response to the Law Commission report: *The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006*

Presented to the House of Representatives

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Introduction

The Government welcomes the Law Commission's report on its review of the Evidence Act 2006 (the Act).

The Government has carefully considered the Law Commission's report, *The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006,* and responds to the report in accordance with Cabinet Office circular CO (09) 1.

Background

Section 202 of the Act requires the Law Commission to review the operation of the Act every five years and report to the Minister of Justice on whether any changes are necessary or desirable.

In February 2017, the then Minister of Justice triggered the second five-yearly review of the Act's operation. In addition to directing the Law Commission to explicitly consider how certain provisions in the Act were working in practice, the Terms of Reference for the review also required the Law Commission to undertake a review of the rules of evidence as they relate to sexual violence and family violence cases.

The Law Commission published an issues paper on its review in March 2018. It invited submissions from the public and interested parties, and subsequently met with a range of individuals and organisations, including practitioners, academics, the judiciary, government agencies and community groups.

The Law Commission's final report was presented to the House of Representatives on 13 March 2019.

The Law Commission's recommendations

As it did in its first review of the Act in 2013, the Law Commission has concluded the Act is generally working well, but that some improvements are necessary and desirable to improve the way it works in practice.

The report makes 27 recommendations. Almost all of the recommendations involve amendments to the Act. Some do not involve legislative change, but rather provide for making more effective use of existing provisions in the Act, or judicial guidance in bench books.

Many of the recommended legislative amendments are technical changes that would improve the Act's workability. These include changes that would clarify the interpretation of existing provisions, or address issues of application. Other recommendations involve more substantive changes.

In response to the specific Terms of Reference set for the review, a number of recommendations are designed to improve the rules of evidence in sexual violence and family violence cases.

The recommendations include:

- Clarifying that the court may regulate its procedures for giving evidence in a manner that recognises tikanga Māori;

- In sexual cases, introducing tighter controls on admitting evidence of the complainant's previous sexual experience with the defendant and evidence of the complainant's sexual disposition;

- In family violence cases, entitling complainants to pre-record their evidence-in-chief and cross-examination in advance of the trial;

- Requiring that judges must (rather than may) intervene when they consider questioning of a witness is unacceptable;

- Changing how evidence about previous convictions should be dealt with; and

- Reviewing and modernising the Evidence Regulations 2007.

Other areas covered by the recommendations include: conviction evidence, the right to silence, unacceptable questioning, the conduct of experts, judicial directions on the impact of significant delay, and veracity evidence.

To assist in the formulation of a Government response, the Law Commission's report includes a draft bill which would give effect to its recommendations.

Government response

The Government thanks the Law Commission and acknowledges its work and thorough engagement with a range of interested parties on this fundamental aspect of the law.

As the Law Commission notes in its report, the facts on which court and many tribunal proceedings are determined are proved by evidence. The rules relating to the admissibility and manner of giving evidence are therefore of vital importance. Most of these rules of evidence are contained in the Evidence Act 2006.

The Government accepts the Law Commission's conclusion that the Act is generally working well, but that some improvements are necessary and desirable. The Government considers this includes ensuring that the Act works better for certain groups - for example, complainants and witnesses in sexual violence and family violence cases. The Government has made ending family violence and sexual violence a priority.

The Government has already agreed to progress or accepts the majority of the Law Commission's recommendations. The Government intends to give further consideration to the remaining recommendations, as part of developing an Evidence Amendment Bill that would make a package of amendments to the Act.

The Government is already progressing six of the recommendations, in whole or in part, as part of its recent decisions on improving the justice response to victims of sexual violence

These recommendations are:

- *Amending section 44 to clarify that (recommendation 3):*

    - sexual disposition evidence is only admissible with the judge's permission if it is of such direct relevance that it would be contrary to the interests of justice to exclude it; and

    - evidence of a complainant's reputation for having a particular sexual disposition is inadmissible.

  This amendment will clarify that the current 'heightened relevance test' for evidence of sexual experience (that is, that such evidence is only admissible with the judge's permission if it is of such direct relevance that it would be contrary to the interests of justice to exclude it) also applies to evidence about a complainant's 'sexual disposition' (propensities, or preferences or desires that may not have manifested in behaviour – for example, fantasies recorded in a diary). It will also mean the absolute bar on the admissibility of evidence of a complainant's sexual reputation includes evidence of their reputation for having a particular sexual disposition.

  This will help further ensure that complainants are protected from irrelevant and unnecessarily intrusive questioning about their sexual history, and prevent sexual history evidence being used to support erroneous assumptions about the complainant. This will help to reduce the risk of further trauma to sexual violence victims as they move through the justice system. This will increase reporting of sexual violence, and help to reduce the high rates of attrition between the police investigation stage and trial in sexual violence cases.

- *Amending section 44 so that evidence of a complainant's sexual experience with the defendant (apart from the fact of that sexual experience) is only admissible with the judge's permission if it is of such direct relevance that it would be contrary to the interests of justice to exclude it (recommendation 4)*

  This amendment will extend the heightened relevance test for evidence of sexual experience (including sexual disposition) to the complainant's sexual experience with the defendant (apart from the fact of that sexual experience). The sexual history between a complainant and the defendant may well be relevant to a proceeding, but this will not necessarily be the case. The amendment will mean the relevance of the evidence will be actively considered by the judge in each case. This aligns with the notion that 'consent' is individual to each instance of sexual contact.

- *Requiring that judges must intervene when they consider questioning of a witness is unacceptable (recommendation 16)*

- *Expressly including in the Act the vulnerability of the witness as a factor the judge may consider when deciding whether the questioning of the witness is unacceptable (recommendation 17)*

Intimidating or otherwise improper questioning can reduce the quality of evidence given and negatively impact on a witnesses' mental wellbeing. Studies show that the main source of anxiety reported by sexual violence victims one year after the offence is giving evidence in court. The changes in recommendations 16 and 17 will help better protect all vulnerable witnesses, while retaining the judge's discretion to determine whether questioning is unacceptable.

- *Expressly providing that a judge may give a direction to address any juror misconceptions about sexual violence (recommendation 21, as it relates to sexual violence cases)*

- *Inviting the judiciary to develop sample judicial directions in relation to myths and misconceptions that jurors may hold in sexual violence cases, with the sample directions contained in a publicly accessible jury trials bench book (recommendation 22, as it relates to sexual violence cases)*

  Together, the changes in recommendations 21 and 22 will help support judges to correct assumptions or misconceptions that may lead to unfounded reasoning by juries in sexual violence cases. This might include, for example, that a complainant who dresses 'provocatively', or acts 'flirtatiously', or who drinks alcohol or takes drugs, is at least partially responsible for the offending.

These recommendations will be progressed through a Sexual Violence Bill.

The Government accepts twelve further changes recommended by the Law Commission

These recommendations are:

- *Repealing section 202 of the Act. Section 202 provides for periodic reviews by the Law Commission of the Act's operation (recommendation 1)*

  The substantial codification of the law of evidence that the Act involved has been successful, and the Act has largely bedded in and is generally working well. Any further issues can be addressed without the need for a statutorily-required full-scale review. This would not stop the Government referring a review of the Act to the Law Commission in the usual manner.

- *Amending section 44 (relating to evidence of sexual experience of complainants in sexual cases) so that it applies in civil (as well as criminal) proceedings (recommendation 5)*

  Extending the application of section 44 to civil proceedings will ensure that complainants/plaintiffs in civil proceedings are afforded the same protections as those in criminal proceedings:

  - evidence or questioning about their sexual experience (including sexual disposition) is subject to the same heightened relevance threshold as applies in criminal proceedings;

  - there is a ban on evidence or questioning about their sexual reputation.

- *In sexual violence cases, requiring an application to offer evidence or ask any question about the sexual experience of the complainant to include the reasons why the proposed evidence is of such direct relevance that it would be contrary to the interests of justice to exclude it (recommendation 6)*

  If a party applies to offer evidence or ask a question about the sexual experience of the complainant, the other party needs to know the reasons for the application to be able to respond to it. This amendment will clarify that such applications do need to provide these reasons, and will help ensure that parties have a fair opportunity to respond.

- *Clarifying that a judge may not draw an inference that a defendant is guilty from their pre-trial silence (recommendation 11)*

  The Act already requires the judge to direct the jury it may not draw an inference of guilt from a defendant's pre-trial silence. This change will align the rule for judges in judge-alone trials with the current rule for jury trials.

- *In all family violence cases, requiring prosecutors to make reasonable efforts to ensure the complainant is informed about the various ways of giving evidence, and to ascertain the complainant's views on their preferred way of giving evidence (recommendation 14)*

  This has recently been agreed for sexual violence cases. The recommended change will help ensure family violence victims know of the alternative ways of giving evidence, and can communicate their preference. This will help to empower them, and potentially allow them to give evidence in a way that is less traumatic for them.

- *Requiring experts in civil (as well as criminal) proceedings to comply with applicable rules of court relating to the conduct of experts, and inviting the Rules Committee to consider amending the Criminal Procedure Rules 2012 to provide for this (recommendations 18 and 19)*

  Currently, these rules of court only mandate conduct in civil cases. While compliance with these rules in criminal cases is largely already occurring in practice, this change will clarify that it is required in law. It will align the rules relating to the conduct of experts across civil and criminal proceedings.

- *Providing that in family violence cases, counsel should consider whether a written statement for the jury addressing myths and misconceptions about family violence can be jointly agreed between the parties (recommendation 20)*

  The recommendation does not require a legislative change. It would assist in preventing damaging myths and misconceptions, such as that a victim would no longer be at risk of further violence if they simply leave the relationship, which can affect trial outcomes and the experiences of complainants.

- *The repeal of section 37(3)(c) of the Act (recommendation 24).*

  This section sets out matters the judge may consider when deciding whether the evidence proposed to be offered about a person's veracity is "substantially helpful". It has been rendered redundant by a 2016 amendment to the definition of "veracity" in the Act.

- *Amending section 38(2)(a) to clarify that the phrase "given oral evidence about" qualifies the phrase "challenged the veracity of a prosecution witness" (recommendation 25)*

  This is a minor amendment which will clarify the interpretation of section 38(2)(a). It will clarify that the challenge to the veracity of a prosecution witness needs to be given in oral evidence.

- *Amending the Act so that the admissibility rule in section 22A (relating to co-defendants' statements) applies to any statement made by a defendant, whether or not it is a hearsay statement (recommendation 26)*

  Submissions from both defence and prosecution perspectives supported this recommendation. The Law Commission concluded that there is no principled basis for limiting this section to hearsay statements.

- *That the Evidence Regulations 2007 should be reviewed and modernised (recommendation 27)*

  As the Law Commission has noted, amongst other things the Evidence Regulations are not expressed in technology-neutral language and do not accommodate modern methods of recording, storing and sharing information.

  Subject to passage of the Sexual Violence Bill, the Evidence Regulations also need to be amended to prescribe procedures for the pre-recording and recording at trial of evidence in sexual violence cases.

  The Government intends to undertake a review of the Evidence Regulations.

The Government intends to progress two more recommended changes to the Act via the Sexual Violence Bill

These are recommendations 5 and 6 (as outlined above).

The Government wishes to further consider the remaining recommendations

These recommendations are:

- *A provision clarifying that a court may regulate its procedures for giving evidence in a manner that recognises tikanga Māori (recommendation 2)*

  The courts already do this to a certain extent using their inherent and implied powers – for example, by enabling karakia to be observed in the courtroom. The proposed amendment would make this an express power. The Government supports this recommendation in principle but considers further consideration of the potential operational impacts is required.

- *Amending section 49 to provide that conviction evidence is admissible in criminal proceedings as presumptive proof the person convicted committed that offence (rather than conclusive proof, as is the case currently), with a party being able to seek to rebut the presumption by proving on the balance of probabilities that the person convicted did not commit the offence (recommendation 7)*

- *Clarifying that the admissibility of conviction evidence or rebuttal evidence is subject to its exclusion under any other provision of the Act, including section 8 (recommendation 8)*

- *Amending section 49 to require a party to a criminal proceeding who wishes to offer rebuttal evidence to inform the judge before doing so and indicate the nature of the evidence they propose to offer (recommendation 9)*

- *Amending section 47, which governs the use of conviction evidence in civil proceedings, to align it with the recommendations in relation to section 49 (recommendation 10)*

  These changes would move the Act away from a 'conclusive proof' rule, with the ability in exceptional circumstances for a party to seek to prove a person did not commit the offence for which they were convicted, to a 'presumptive proof' rule, where a party is able to seek to rebut the presumption by proving on the balance of probabilities that the person convicted did not commit the offence.

  These recommended changes require further examination to fully assess the operational implications.

- *Providing for a presumption that complainants in family violence cases are entitled to have their evidence-in-chief and cross-examination pre-recorded (recommendations 12 and 13)*

  The Government has recently agreed to progress such an amendment to the Act for complainants in sexual violence cases. The Act was also amended in 2018 to add section 106A, which provides that family violence complainants are entitled to give their evidence in chief by a video record in certain circumstances (including that the video is recorded by Police no later than two weeks after the alleged incident).

  Extending the presumption to all evidence in chief, regardless of when the video record was recorded, and providing that complainants are also entitled to have their cross-examination pre-recorded will have further operational implications for the courts, Police, Crown Law and other prosecutors, defence lawyers, and others. These implications require further consideration to ensure that the benefits outweigh the costs.

- *Providing that any video record that is to be offered as an alternative way of giving evidence must be given to the defendant's lawyer before it is offered in evidence, unless the judge directs otherwise (recommendation 15)*

  This proposed amendment would reverse restrictions added to the Act in 2016 in relation to videos of vulnerable complainants in particular cases. The intent of these provisions is to prevent copies of the video record being provided to the defendant in cases where that would be inappropriate. Note the Act already provides that all video records must be offered *for viewing* by a defendant or his or her lawyer, unless a judge directs otherwise, and copies given to the defendant's lawyer, except in certain cases (the videos of vulnerable complainants in particular cases noted above).

  Further consideration of this recommendation is needed to assess the operational implications, such as secure and accessible storage of the video records.

- *Amending the Act to expressly provide that a judge may give a direction to address any juror misconceptions about family violence (recommendation 21, as it relates to family violence)*

- *Inviting the judiciary to develop sample judicial directions in relation to myths and misconceptions that jurors may hold in family violence cases, with the sample directions contained in a publicly accessible jury trials bench book (recommendation 22, as it relates to family violence)*

  In relation to sexual violence cases, the Government has already agreed to progress a similar amendment to the Act, and to invite the judiciary to develop sample judicial directions.

  This recommendation will require further consideration to assess the financial implications. Additional funding is likely to be required to allow the Institute of Judicial Studies to develop, publish and update the sample directions. Bench books are not currently publicly accessible, primarily due to funding constraints.

- *Amending section 122 to clarify that its scope is confined to concerns about the reliability of the evidence and does not encompass fair trial concerns arising from a defendant's inability to check and challenge the allegations (recommendation 23)*

  This proposed amendment relates to section 122(2)(e) of the Act, which requires a judge to consider giving a reliability warning about the evidence of a defendant's conduct alleged to have occurred more than ten years ago.

  The Law Commission considers the Supreme Court decision of *CT v R* raises the possibility that evidence can be considered unreliable solely because of delay related prejudice, and consequently could be seen to suggest that it is dangerous to convict without corroborating evidence. The Law Commission recommends clarifying the scope of section 122 (as above) to address this.

  The Government considers this change requires further consideration to fully assess the implications.

The Government intends to develop a Bill that will give effect to a package of amendments to the Evidence Act

The Bill will give effect to the recommended changes the Government has accepted, plus any further amendments identified in the course of the further policy work.

Work on developing the Bill will also consider relevant findings and recommendations from the Safe and Effective Justice: Hāpaitia te Oranga Tangata programme, including the work of the Te Uepū Hāpai i te Ora - the Safe and Effective Justice Advisory Group, and the Chief Victims Advisor.