

Hon Andrew Little
Minister of Justice

Proactive release – Government response to the Law Commission Report: “The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006”

Date of reissue: 27 November 2019

Date of original issue: 10 October 2019

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	<p>Government response to the Law Commission Report: “The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006” <i>Cabinet paper</i> Office of the Minister of Justice</p>	<p>Some information has been withheld in accordance with the following sections of the OIA:</p> <ul style="list-style-type: none"> • 9(2)(f)(iv) to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials • 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty. <p>The original issue of this document withheld additional information in accordance with section 18(d) of the OIA.</p>
1a	<p>Government response to the Law Commission Report: “The Second Review of the Evidence Act 2006 Appendix 1 – Proposed responses to the Law Commission’s recommendations <i>Attachment to Cabinet paper</i> Office of the Minister of Justice</p>	<p>Some information has been withheld in accordance with the following sections of the OIA:</p> <ul style="list-style-type: none"> • 9(2)(f)(iv) to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials • 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty.
1b	<p>Government response to the Law Commission Report: “The Second Review of the Evidence Act 2006 Appendix 2 – Proposed Government response <i>Attachment to Cabinet paper</i> Office of the Minister of Justice</p>	<p>This document has been withheld in accordance with section 18(d) of the OIA. The Government response was tabled in the House of Representatives on 2 September 2019 and is available on the Law Commission website at www.lawcom.govt.nz/our-projects/second-review-evidence-act-2006</p>

No.	Document	Comments
2	<p>Government response to the Law Commission Report: “The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006”</p> <p><i>Cabinet (SWC) Minute</i></p> <p>Cabinet Office</p> <p>SWC meeting of 21 August 2019</p>	<p>Some information has been withheld in accordance with the following sections of the OIA:</p> <ul style="list-style-type: none"> • 9(2)(f)(iv) to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials • 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty. <p>The original issue of this document withheld additional information in accordance with section 18(d) of the OIA.</p>

In Confidence

Office of the Minister of Justice

Chair, Cabinet Social Wellbeing Committee

Government response to the Law Commission Report: “The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006”

Proposal

1. This paper seeks approval of the Government response to the Law Commission Report *The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006 (R142)* (the Report).
2. I am also seeking agreement to progress two of the Law Commission’s recommended changes to the Evidence Act 2006 (the Act) in the Bill giving effect to our recent decisions on improving the justice response to victims of sexual violence: the Sexual Violence Legislation Bill (the Sexual Violence Bill).
3. This paper also notes my intention to develop an Evidence Amendment Bill to make further amendments to the Act, for introduction in the second half of 2020, and to undertake a review of the Evidence Regulations 2007.

Executive Summary

4. The facts on which court and many tribunal proceedings are determined are proved by evidence: oral and written statements and physical exhibits. The rules relating to the admissibility and manner of giving evidence are therefore of vital importance. Most of the rules of evidence are contained in the Act.
5. The Law Commission has undertaken a review of the operation of the Act, and provided a comprehensive report setting out its findings. The Commission has concluded the Act is generally working well, but that some improvements could be made. Their Report makes 27 recommendations for further improvement to the rules of evidence. Most involve changes to the Act, including a number which relate to improving the rules of evidence in sexual and family violence cases.
6. This paper seeks agreement to our response to the Law Commission’s Report. I agree with the Law Commission that the Act is generally working well, but that some further improvements could be made to strengthen the way it works in practice. This includes ensuring it works better for certain groups - for example, complainants and witnesses in sexual violence and family violence cases. The proposed response notes we have already agreed to six of the recommendations in our recent decisions on improving the justice response to victims of sexual violence. These are being progressed in the Sexual Violence Bill being led by the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues). It also accepts a further twelve recommendations, two of which I propose also be included in the Sexual Violence Bill.
7. The response also notes the recommendations I propose we take more time to consider further, and signals that the Government will look to take forward an overall package of amendments to the Act via an Evidence Amendment Bill in 2020.

8. The response also signals a review of the Evidence Regulations 2007 to ensure, amongst other things, that they can accommodate modern methods of recording, storing and sharing information.

Background to the Law Commission's Report

9. The Law Commission is an Independent Crown Entity that promotes the systemic review, reform and development of New Zealand's law. It normally undertakes reviews based on referrals from the Minister responsible for the Law Commission.
10. 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. The principal purpose of these "operational reviews" is to check how the Act is working in practice.
11. The Law Commission's first review was published in 2013, which resulted in some minor amendments to the Act in 2016. 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 required the Law Commission to undertake a review of the rules of evidence as they relate to sexual and family violence cases.
12. The Law Commission published an issues paper in March 2018. It invited submissions from interested parties and the public, and subsequently met with a range of individuals and organisations, including practitioners, academics, government agencies, the judiciary and community groups. The Commission submitted its final report to me on 28 February 2019, and I presented the Report to the House of Representatives on 13 March 2019.
13. The relevant Cabinet Office circular CO (09) 1 sets out processes for responding to Law Commission reports.¹ It requires the Government to present a formal response to the House within 120 working days of the presentation of a Law Commission report. This means I am required to present the Government's response to the Report by 3 September 2019.

Overview of the Law Commission's conclusions and recommendations

14. As it did in its first review of the Act in 2013, the Law Commission has concluded the Act is generally working well, but some improvements are necessary and desirable. The Commission confirms the substantial codification of the law of evidence within the Act has been a success and that the Act has now largely "bedded in". Their recommended changes address practical issues that have arisen in the operation of the Act.
15. The Report makes 27 recommendations. Almost all of the recommendations involve amendments to the Act; some do not involve legislative change. Many of the recommendations are technical changes that would improve the Act's workability. These include changes that clarify the interpretation of existing provisions, or address issues of application. Other recommendations involve more substantive changes and I wish to consider these further. More time is needed for officials to fully assess the implications of

¹ Cabinet Office circular CO (09) 1 - Law Commission: Processes for Setting the Work Programme and Government Response to Reports.

these proposed changes, including their operational impacts and financial implications, and to undertake further consultation (if necessary) with key stakeholders.

16. The Report's recommendations include:
 - 16.1. Clarifying that a court may regulate its procedures for giving evidence in a manner that recognises tikanga Māori;
 - 16.2. 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;
 - 16.3. In family violence cases, entitling complainants to pre-record their evidence-in-chief and cross-examination in advance of the trial²;
 - 16.4. Requiring that judges must (rather than may) intervene when they consider questioning of a witness is unacceptable;
 - 16.5. Changing how evidence about previous convictions should be dealt with; and
 - 16.6. Reviewing and modernising the Evidence Regulations 2007.
17. 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.
18. To assist in the formulation of a Government response, the Report includes a draft bill which would give effect to its recommendations.

Proposed Government response

19. I propose that the Government response state the Government:
 - 19.1. Accepts the Law Commission's conclusions that the Act is generally working well, but that some improvements are necessary and desirable;
 - 19.2. Is progressing six of the Law Commission's recommendations, in whole or in part, as part of its recent decisions on improving the justice response to victims of sexual violence [SWC-19-MIN-0031 refers].

These recommendations are being progressed through the Sexual Violence Bill.

s9(2)(f)(iv)

- 19.3. Accepts twelve further recommendations, including that the Evidence Regulations 2007 be reviewed and modernised, and will include two of these recommendations in the Sexual Violence Bill;
- 19.4. Wishes to further consider the remaining recommendations;

² The Commission made similar recommendations in relation to sexual violence complainants in its 2015 report. We agreed to this change in our recent decisions on improving the justice response to victims of sexual violence.

- 19.5. Will develop an Evidence Amendment Bill to make agreed amendments to the Act, and will undertake a review of the Evidence Regulations 2007.
20. **Appendix 1** provides the full list of the Law Commission's recommendations, along with the proposed response - noting for each whether the recommendation a) has already been agreed and is being progressed b) should be accepted, or c) requires further consideration.
21. I propose to present to the House the attached Government response to the Law Commission's Report (**Appendix 2**).

Sexual Violence Bill

22. I propose to include two more recommended amendments to the Act in the Sexual Violence Bill. The proposed amendments are set out in paragraphs 25-37 below.
23. The Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues) agrees that it would be appropriate to include these amendments in the Sexual Violence Bill.
24. The proposed amendments were not included in the paper seeking Cabinet policy agreement to the Bill because officials had not, at that stage, had time to fully assess their implications.

Recommendation 5 – an amendment to section 44 of the Act so that it applies in civil (as well as criminal) proceedings

Section 44 currently only applies to criminal proceedings

25. Sections 44(1) and (3) of the Act limit the ability in sexual cases to offer evidence or ask any question about the sexual experience of the complainant. The purpose of these sections, and other provisions in section 44, is to protect complainants from irrelevant and unnecessarily intrusive questioning about their sexual history, and to prevent sexual history evidence being used to support erroneous assumptions about the complainant. Such assumptions might include, for example, that because a complainant has a particular experience or disposition in sexual matters, they are the kind of person who is more likely to have consented to sexual activity on the occasion at issue, or are less worthy of belief than other complainants.
26. Against these objectives, section 44 seeks to balance the defendant's right to a fair trial and the right to present an effective defence.
27. Under section 44(1), evidence and questioning relating to a complainant's sexual experience with any person other than the defendant is inadmissible, except with permission of the judge. The judge must not grant permission unless the proposed evidence or questioning satisfies the heightened relevance threshold in section 44(3): the evidence or questioning must be of such direct relevance that it would be contrary to the interests of justice to exclude it.³ Section 44A sets out the process by which an application is made to the judge prior to the trial for their permission under section 44(1).

³ The Government has agreed in its recent decisions on improving the justice response to victims of sexual violence to amend section 44 to apply the same heightened relevance threshold for evidence of a complainant's sexual experience with the defendant, and for evidence of their sexual disposition. Sexual

28. Sections 44 and 44A only apply to criminal proceedings.

Extension of sections 44 and 44A to civil cases

29. In civil proceedings, there is no general mechanism for controlling the admissibility of sexual experience and sexual reputation evidence, although the Employment Relations Act 2000 and the Human Rights Act 1993 contain specific provisions controlling this evidence in sexual harassment proceedings.
30. However, there may be occasions outside these employment or human rights contexts where it would be appropriate to have a mechanism governing the admissibility of evidence or questioning relating to sexual experience or reputation - for example, in defamation proceedings involving allegations of sexual misconduct, and tortious claims arising from sexual assault.
31. I recommend section 44 be amended so that it applies in civil, as well as criminal, proceedings. Essentially, the same policy considerations apply in civil and criminal contexts. Erroneous assumptions are not limited to criminal cases and complainants have the same rights to respect and dignity in both settings. The need to protect alleged victims of sexual violence does not disappear because the context has shifted from criminal to civil proceedings.

Treatment of evidence of sexual reputation in certain civil cases

32. Section 44(2) imposes a complete ban on admitting evidence or questioning a witness in relation to the complainant's reputation in sexual matters. This reflects the policy position that a complainant's sexual reputation will never be relevant to whether a sexual crime has taken place.
33. This rationale applies equally to civil proceedings, but there may be some very rare cases where the specific context requires evidence or questioning relating to sexual reputation in order to preserve fair trial rights. One such context is in defamation cases where the alleged defamatory statements at issue concern the sexual reputation of the plaintiff, and evidence of sexual reputation may be relevant to the existing defence of 'truth' (that is, that the statement is not defamatory because it is true).
34. I propose that the restrictions on evidence and questioning about a complainant's sexual experience, disposition, and reputation in section 44 apply also to civil proceedings. I propose that there be a tightly-controlled exception to the complete ban in section 44(2) on evidence and questioning relating to sexual reputation for civil defamation cases where the alleged defamatory statements at issue concern the sexual reputation of the plaintiff, and where the evidence or questioning is of such direct relevance to the proceedings that it would be contrary to the interests of justice to exclude it. An application prior to trial for permission from the judge for the evidence or questioning would also be required.
35. Officials have not identified other situations where evidence or questioning relating to sexual reputation may be required to ensure the defendant's rights are maintained. I expect any further exceptions that might be required will be identified in submissions on the Sexual Violence Bill at its select committee stage. I seek Cabinet agreement to

disposition refers to a person's propensities, or preferences or desires that may not have manifested in behaviour (that is, as sexual experience) - for example, fantasies recorded in a personal diary.

authorise me, in consultation with the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues), to make decisions on whether there should be any further narrow, necessary exceptions to the complete ban on admissibility of sexual reputation evidence or questioning in civil proceedings.

Recommendation 6 – an amendment to section 44A of the Act to require an application under section 44 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.

36. 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. The proposed amendment to section 44A will clarify that such applications must provide these reasons, and will help ensure that parties have a fair opportunity to respond to the evidence or question.
37. This change is minor and largely technical, and would correct an apparent legislative oversight. It would reflect current practice and ensure consistency with other provisions in the Act.

I propose to develop an Evidence Amendment Bill for introduction in the second half of 2020

38. I have asked officials to undertake further policy work on the remaining Law Commission recommendations, and to develop an Evidence Amendment Bill to give effect to a package of amendments to the Act. This package will include the recommendations I am proposing we accept through this paper, plus any other changes agreed after the further policy work has been carried out. Development of the Bill will provide an opportunity to also consider any other potential changes to the Act beyond those recommended by the Law Commission.
39. I expect to be in a position to seek Cabinet agreement to proposals by mid-2020, with introduction of the Bill in the second half of 2020.
40. The policy work will be aligned with related initiatives such as the new family violence legislation that came into force on 1 July 2019, the Government response to the independent panel examining the 2014 family justice system reforms, and the work of the Joint Venture for Family Violence and Sexual Violence, Te Uepū Hāpai i te Ora – the Safe and Effective Justice Advisory Group, and the Chief Victims Advisor.

Review of the Evidence Regulations 2007

41. A review and modernisation of the Evidence Regulations is overdue. Amongst other things, they are not expressed in technology-neutral language and do not accommodate modern methods of recording, storing and sharing information.
42. Subject to passage of the Sexual Violence Bill, the Evidence Regulations will also need to be amended to prescribe procedural arrangements for the pre-recording and recording at trial of evidence in sexual violence cases [SWC-19-MIN-0031 refers].
43. s9(2)(f)(iv)

[REDACTED]

s9(2)(f)(iv)

44. s9(2)(f)(iv)

Consultation

45. I have consulted the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues) on this paper. The Under-Secretary supports the proposals in this paper.
46. The following agencies have been consulted on this paper: Crown Law; Police; the family violence and sexual violence Joint Venture Business Unit; Te Arawhiti; Te Puni Kōkiri; the Ministries of/for Social Development, Health, Pacific Peoples, Women, and Business, Innovation and Employment; Oranga Tamariki; Department of Corrections, Accident Compensation Corporation; Office for Disability Issues, Department for Prime Minister and Cabinet; and the Treasury.
47. These agencies will also be consulted as appropriate during development of the Evidence Amendment Bill and changes to the Evidence Regulations 2007.
48. The Law Commission has been consulted on this paper. The Law Commission considers this paper accurately reflects its position.
49. The Chief Victims Advisor has also been consulted on the paper and provided the following comment:
- “The Chief Victims Advisor supports the progression of these recommendations of the Law Commission by Government. They will improve the criminal justice system for victims of family violence and sexual violence and help to minimise re-victimisation during court processes. The Chief Victims Advisor also supports progressing recommendation 2 that evidence be given in a manner that recognises tikanga Māori, and recommends Māori are able to lead this work in partnership with the Crown based on Te Tiriti. This recommendation will benefit Māori victims who are over-represented in our criminal justice system.”
50. I am proposing we give further consideration to the Law Commission’s recommendation 2 that a new provision be inserted into the Act to clarify that the court may regulate its procedures for giving evidence in a manner that recognises tikanga Māori. I support this amendment in principle but consider further consideration of the potential operational impacts is required.
51. The Ministry of Justice has received some initial comments from the Chief Justice on the Law Commission’s report, and will continue to engage with the judiciary in its work on the proposed Evidence Amendment Bill and changes to the Evidence Regulations 2007.
52. The Law Commission consulted extensively in developing the recommendations in the Report. It invited submissions from the public, and met with a range of interested parties, including practitioners, academics, government agencies, the judiciary, and community groups.

Financial Implications

53. There are no financial implications from the proposals outlined in paragraphs 25-37.
54. Some of the other Law Commission recommendations - for example recommendations 12 and 13 - and any other changes to the Act, if agreed, are likely to have financial implications. Advice on this will be provided to Cabinet when policy approval for the overall package of legislative amendments is sought. s9(2)(g)(i)

Legislative Implications

55. Amendments to the Act to give effect to the proposals outlined in paragraphs 25-37 will be incorporated into the Sexual Violence Bill. s9(2)(f)(iv)
56. s9(2)(f)(iv)

Impact Analysis

57. The Treasury Regulatory Quality Team has determined that the decisions sought in this paper are exempt from the Regulatory Impact Analysis requirements on the basis that they have no or only minor impacts on businesses, individuals or not-for-profit entities.
58. The Regulatory Impact Analysis requirements will apply to future proposals to amend the Act and the Evidence Regulations 2007.

Human Rights

59. The proposed amendments to sections 44 and 44A of the Act relate to sexual violence and the experiences of complainants in court. Improving complainants' experiences of the justice system, and reducing sexual violence more broadly, assists the Government to meet human rights obligations.
60. Further changes to the Act will involve human rights and New Zealand Bill of Rights Act 1990 considerations. These will be considered in further advice to Cabinet when policy approval for the package of amendments to the Act is sought.

Te Tiriti o Waitangi

61. As noted above, I am proposing we give further consideration to the Law Commission's recommendation 2. I support this amendment in principle but consider further consideration of the potential operational impacts is required.
62. The over-representation of Māori in our criminal justice system, both as victims and perpetrators, will be a key consideration in development of legislative proposals. I am committed to ensuring this work reflects our obligations under te Tiriti o Waitangi to work with and protect Māori interests.

Gender Implications

63. Sexual violence and family violence are heavily gendered. According to the most recent *New Zealand Crime and Safety Survey*, in the last twelve months females made up 71 percent of the victims of sexual violence and suffered from 80 percent of sexual assault incidents. The number of sexual assault incidents per 100 females is almost four times higher than that per 100 males. Thirty four percent of females will experience one or more incidents of sexual violence at some point during their lives (compared to 12 percent of men). The proportion of female victims of family violence (71 percent) more than twice exceeds that of male victims (29 percent).⁴ The Government is committed to addressing these issues.
64. The proposed amendments to sections 44 and 44A of the Act have gender implications as they will predominantly affect women's experiences as complainants in court. While minor, the amendments will improve their experiences (as they will for complainants of other genders).
65. Further changes to the Act are likely to have gender implications - for example, further changes relating to sexual violence and family violence cases. Advice on this will be provided to Cabinet when policy approval for the overall package of legislative amendments is sought.

Disability Perspective

66. Disabled women and children have a higher risk of experiencing family and sexual violence than non-disabled people, and face additional barriers accessing the justice system. The development of legislative proposals will consider how the rules of evidence can better support people with disabilities. This might include through alternative ways of giving evidence and procedural accommodations, and ensuring evidence is able to be provided and stored in fully accessible formats.

Publicity and proactive release

67. I intend to issue a media release when I present the Government response to the House, which I intend to do as soon as practicable after Cabinet agrees the response.
68. I propose to proactively release this paper within 30 business days, subject to any redactions as appropriate under the Official Information Act 1982 (including any Budget-related information).

⁴ *New Zealand Crime and Safety Survey*, Ministry of Justice, 2018.

Recommendations

I recommend that the Cabinet Social Wellbeing Committee:

The Law Commission's Report

1. **note** that on 13 March 2019 I presented the Law Commission's Report *The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006* (R142) (the Report) to the House of Representatives;
2. **note** that the Law Commission concluded the Evidence Act 2006 is generally working well, but that some improvements are necessary and desirable;
3. **note** that the Report makes 27 recommendations for reform, as outlined in Appendix 1, including:
 - 3.1 Clarifying that a court may regulate its procedures for giving evidence in a way that recognises tikanga Māori;
 - 3.2 In sexual cases, there should be tighter controls on admitting evidence of the complainant's previous sexual experience with the defendant and evidence of the complainant's sexual disposition;
 - 3.3 In family violence cases, complainants should be entitled to pre-record their evidence-in-chief and cross-examination in advance of the trial;
 - 3.4 Requiring that judges must (rather than may) intervene when they consider questioning of a witness is unacceptable;
 - 3.5 Changes to how evidence about previous convictions should be dealt with; and
 - 3.6 That the Evidence Regulations 2007 be reviewed.

The Government response to the Report

4. **note** that the Government has already agreed to progress some of the Report's recommendations in recent decisions on improving the justice response to victims of sexual violence [SWC-19-MIN-0031 refers], as outlined in Appendix 1;
5. **note** that I consider the Government response should state the Government:
 - 5.1 Accepts the Law Commission's conclusions that the Act is generally working well, but that some improvements are necessary and desirable, including ensuring that the Act works better for certain groups, such as complainants and witnesses in sexual violence and family violence cases;
 - 5.2 Is already progressing six of the Law Commission's recommendations, in whole or in part, as part of its recent decisions on improving the justice response to victims of sexual violence;
 - 5.3 Accepts twelve further recommendations, including that the Evidence Regulations 2007 should be reviewed and modernised, and will include two of these recommendations in the Sexual Violence Legislation Bill;

- 5.4 Wishes to further consider the remaining recommendations;
- 5.5 Will develop an Evidence Amendment Bill to make agreed amendments to the Act, and undertake a review of the Evidence Regulations 2007.
6. **approve** the attached proposed Government response to the Law Commission's Report *The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006* (R142);
7. **note** that the Government response must be presented to the House by 3 September 2019;
8. **invite** me to present the Government response to the House as soon as practicable;
9. **authorise** me to make any minor technical and editorial changes to the response before its public release;
10. **note** that I propose to release a media statement announcing the tabling of the Government response on the day that it is presented to the House of Representatives;

Sexual Violence Legislation Bill

11. **agree** that restrictions on evidence about a complainant's sexual experience, disposition, and reputation in section 44 of the Evidence Act 2006 apply in civil (as well as criminal) proceedings;
12. **agree** that there be an exception to the ban on evidence of the complainant's sexual reputation provided for in section 44(2) of the Evidence Act 2006 for civil defamation cases where the alleged defamatory statements at issue concern the sexual reputation of the plaintiff, and the evidence is so directly relevant to the proceedings that it would be contrary to the interests of justice to exclude it;
13. **authorise** me, in consultation with the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues), to make decisions on whether there should be any further narrow, necessary exceptions to the ban on admissibility of sexual reputation evidence in civil proceedings;
14. **agree** that section 44A of the Evidence Act 2006 be amended to require an application under section 44 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;
15. **agree** that the amendments proposed in recommendations 11-14 above be included in the Sexual Violence Legislation Bill;
16. **invite** me, in consultation with the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues), to issue drafting instructions to Parliamentary Counsel Office to give effect to recommendations 11-15;

Evidence Amendment Bill and review of Evidence Regulations 2007

17. **note** that I intend to develop an Evidence Amendment Bill to be introduced in the second half of 2020, as well as to undertake a review of the Evidence Regulations 2007 s9(2) s9(2)(f)(iv)

18. s9(2)(g)(i) [REDACTED]

Authorised for lodgement

Hon Andrew Little

Minister of Justice

RELEASED BY THE MINISTER OF JUSTICE

Appendix 1 – Proposed responses to the Law Commission’s recommendations


Key	Already agreed	Accept	Requires further consideration
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Chapter	Recommendation	Response	Rationale
1	1 Section 202, which provides for periodic reviews of the operation of the Evidence Act 2006, should be repealed.	Accept	The substantial codification of the law of evidence that the Evidence Act involved has been successful. The law is no longer considered novel, and the Act has largely 'bedded in'. In addition, the Law Commission has twice reviewed the Act and concluded that it is generally working well. Any further practical issues that arise in future can be monitored by the Ministry of Justice and further amendments can be made without the need for a statutorily-required full-scale review.
2	2 A new provision should be inserted into the Act to clarify that the court may regulate its procedures for giving evidence in a manner that recognises tikanga Māori, provided this is not inconsistent with the provisions of the Act or another enactment.	Requires further consideration	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. s9(2)(f)(iv) [REDACTED] The proposed change may have operational impacts, and the potential to increase costs for the courts and the parties to proceedings.
3	3 Section 44 should be amended to clarify that: • 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.	Already agreed	Agreed as part of recent Cabinet decisions on improving the justice response to victims of sexual violence.
3	4 Section 44 should be amended so that evidence of a complainant’s sexual experience with the defendant is only admissible with the judge’s permission if it is of such direct	Already agreed	Agreed as part of recent Cabinet decisions on improving the justice response to victims of sexual violence.

		relevance that it would be contrary to the interests of justice to exclude it. There should be an exception for evidence of the fact the complainant was in a sexual relationship with the defendant: this evidence should continue to be admissible subject to sections 7 and 8 of the Act.		
3	5	Section 44 should be amended so that it applies in civil (as well as criminal) proceedings.	Accept (in a modified form)	Extending the application of section 44 to civil proceedings will ensure complainants/plaintiffs in civil proceedings are afforded the same protections as those in criminal proceedings.
3	6	Section 44A should be amended to require an application under section 44(1) (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.	Accept	This change is minor and largely technical and would correct an apparent legislative oversight. It would better give effect to the purpose of section 44A.
4	7	Section 49 should be amended so that conviction evidence is admissible in a criminal proceeding as presumptive proof the person convicted committed that offence. A party should be able to seek to rebut the presumption by proving on the balance of probabilities that the person convicted did not commit the offence.	Requires further consideration	Would move the Act away from a 'conclusive proof' rule, with the ability 'in exceptional circumstances' 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. Requires further examination to fully assess the operational implications.
4	8	Section 49 should be amended to clarify that the admissibility of conviction evidence or rebuttal evidence is subject to its exclusion under any other provision of the Act, including section 8. The amendment should also clarify that a challenge to the admissibility of conviction evidence cannot be made on the basis the presumptive effect of the conviction gives rise to unfair prejudice.	Requires further consideration	Linked to Recommendation 7 above.
4	9	Section 49 should be amended 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.	Requires further consideration	Linked to Recommendation 7 above.
4	10	Section 47, which governs the use of conviction evidence in civil proceedings, should be amended to align with the recommendations in relation to section 49.	Requires further consideration	Linked to Recommendation 7 above.

5	11	Section 32 should be amended to clarify that a judge may not draw an inference that a defendant is guilty from their pre-trial silence.	Accept	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. The proposed amendment will expressly prevent a judge in a judge-alone trial from likewise drawing an inference of guilt. The amendment will simply align the rule for judges in judge-alone trials with the current rule for juries.
9	12	The Act should be amended to entitle a complainant in a family violence case to give their evidence in chief by way of a video record made before the hearing, regardless of when the video was recorded, unless a judge makes an order to the contrary.	Requires further consideration	<p>Most submitters and all judges who were consulted supported this proposed change during consultation by the Law Commission.</p> <p>This has recently been agreed for complainants in sexual violence cases, and the Act was 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).</p> <p>Extending the presumption to all evidence in chief (regardless of when the video record was recorded) will have further operational implications for the courts, Police, Crown Law and prosecutors, defence lawyers, and others.</p>
9	13	The Act should be amended to entitle a complainant in a family violence case to have their cross-examination pre-recorded, unless a judge makes an order to the contrary.	Requires further consideration	<p>This is likely to have significant operational implications for the courts, Police, Crown Law and prosecutors, defence lawyers, and others (much more so than for the pre-recording of evidence in chief).</p> <p>s9(2)(g)(i)</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
9	14	<p>In all family violence cases, the prosecutor should be required to make reasonable efforts to:</p> <ul style="list-style-type: none"> - ensure the complainant is informed about the alternative ways of giving evidence (section 105) and the ordinary way of giving evidence (section 83); and - ascertain the complainant's views on their preferred mode 	Accept	Cabinet recently agreed a similar amendment for sexual violence complainants: 'to create a right for sexual violence complainants to be consulted on whether they wish to give evidence in alternative ways'.

		of evidence.		
9	15	Section 106(4)–(4C) should be amended so 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.	Requires further consideration	Sections 106(4)–(4C) were added to the Act in 2016. The proposed amendment would reverse restrictions in relation to videos of vulnerable complainants in particular cases. s9(2)(g)(i) (Note the Act 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).
10	16	Section 85(1) should be amended to require the judge to intervene when they consider questioning of a witness is unacceptable.	Already agreed	Agreed as part of recent Cabinet decisions on improving the justice response to victims of sexual violence.
10	17	Section 85(2) should be amended to include the vulnerability of the witness as a factor the judge may consider when deciding whether the questioning of the witness is unacceptable.	Already agreed	Agreed as part of recent Cabinet decisions on improving the justice response to victims of sexual violence.
11	18	Section 26 should be amended so that experts in both civil and criminal proceedings are required to comply with the applicable rules of court relating to the conduct of experts.	Accept	The Report notes the principles governing the conduct of experts in criminal proceedings are possibly well-enough established in case law, but explicitly stating these principles/obligations in a code of conduct would make them clear and accessible.
11	19	The Rules Committee should be asked to consider amending the Criminal Procedure Rules 2012 to include rules that mirror the rules relating to expert witnesses in the High Court Rules 2016.	Accept	Linked to Recommendation 18 above.
12	20	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. In appropriate cases, a joint statement should be admitted by consent under section 9.	Accept (Does not require a legislative amendment)	Does not impose a requirement that a written statement be provided, only that counsel should be encouraged to consider using agreed statements admitted under section 9 to address myths and misconceptions about family violence, where appropriate. Any written statement would require the consent of all parties to be admitted under section 9. Does not require an amendment to the Act.
12	21	The Act should be amended to expressly provide that a judge may give a direction to address any juror misconceptions about sexual or family violence.	Requires further consideration (for family violence)	Already agreed for sexual violence cases as part of recent Cabinet decisions on improving the justice response to victims of sexual violence.

			cases) (Already agreed for sexual violence cases)	Would expressly allow the judge to consider whether to give a direction in the case before the court. The Law Commission has also suggested that recommendation 21 (if agreed) should not come into effect unless and until recommendation 22 is agreed, and the sample directions have been developed and made publicly available.
12	22	<p>Sample judicial directions should be developed to address myths and misconceptions that jurors may hold in sexual and family violence cases. As a starting point, directions should be developed to address the following myths and misconceptions:</p> <ul style="list-style-type: none"> - A complainant who dresses ‘provocatively’ or acts ‘flirtatiously’ is at least partially responsible for the offending. - A complainant who drinks alcohol or takes drugs is at least partially responsible for the offending. - “Real rape” is committed by strangers and/or sexual violence by a partner or acquaintance is less serious. - It is not rape unless the offender uses force and/or the complainant suffers physical injuries. - A victim of family violence can avoid future violence by leaving the relationship. <p>The sample directions should be contained in a publicly accessible jury trials bench book rather than in the Act itself. Sufficient funding should be provided to the Institute of Judicial Studies to enable the directions to be developed and maintained. If this recommendation is not accepted, the directions could be included in the Evidence Regulations 2007.</p>	<p>Requires further consideration (for family violence cases) (Already agreed for sexual violence cases, subject to the judiciary’s agreement) (Does not require a legislative amendment)</p>	<p>The Government has already agreed to invite the judiciary to develop, publish, and periodically review judicial directions in relation to sexual violence cases [SWC-19-MIN-0031 refers].</p> <p>The Government would likewise need to invite the judiciary to respond to the recommendation with respect to family violence cases.</p> <p>s9(2)(g)(i)</p> 
13	23	Section 122 should be amended 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.	Requires further consideration	This proposed change 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 proposed change is partly in response to the Supreme Court decision of <i>CT v R</i> and would clarify that the scope of section 122(2)(e) is limited 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. Officials consider this change requires further consideration to fully assess the implications.
14	24	Section 37(3)(c) should be repealed.	Accept	Section 37(3)(c) 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.
14	25	Section 38(2)(a) should be amended to clarify that the phrase "given oral evidence about" qualifies the phrase "challenged the veracity of a prosecution witness".	Accept	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.
15	26	The Act should be amended 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.	Accept	The Law Commission concluded there is no principled basis for limiting section 22A to hearsay statements, and all submissions (which included both defence and prosecution perspectives) were supportive of the proposed change.
17	27	The Evidence Regulations 2007 should be reviewed and updated. Separate evidence rules or regulations should be developed for military proceedings.	Accept	A review and modernisation of the Regulations is overdue. Amongst other things, they 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 Regulations will need to be amended in any case to prescribe procedures for the pre-recording and recording at trial of evidence in sexual violence cases (and, if recommendations 12 and 13 are agreed, in family violence cases).



Cabinet Social Wellbeing Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Government response to the Law Commission Report: “The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006”

Portfolio Justice

On 21 August 2019, the Cabinet Social Wellbeing Committee:

Law Commission report

1. **noted** that on 13 March 2019, the Minister of Justice presented the Law Commission’s report *The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006* (R142) (the Report) to the House of Representatives;
2. **noted** that the Law Commission concluded the Evidence Act 2006 is generally working well, but that some improvements are necessary and desirable;
3. **noted** that the Report makes 27 recommendations for reform, as outlined in Appendix 1 to the submission under SWC-19-SUB-0102, including:
 - 3.1 clarifying that a court may regulate its procedures for giving evidence in a way that recognises tikanga Māori;
 - 3.2 in sexual cases, there should be tighter controls on admitting evidence of the complainant’s previous sexual experience with the defendant and evidence of the complainant’s sexual disposition;
 - 3.3 in family violence cases, complainants should be entitled to pre-record their evidence-in-chief and cross-examination in advance of the trial;
 - 3.4 requiring that judges must (rather than may) intervene when they consider questioning of a witness is unacceptable;
 - 3.5 changes to how evidence about previous convictions should be dealt with;
 - 3.6 that the Evidence Regulations 2007 be reviewed;

Government response

4. **noted** that the government has already agreed to progress some of the Report’s recommendations in recent decisions on improving the justice response to victims of sexual violence, as outlined in Appendix 1;

5. **noted** that the Minister of Justice considers that the government response should state that the government:
 - 5.1 accepts the Law Commission's conclusions that the Evidence Act is generally working well, but that some improvements are necessary and desirable, including ensuring that the Act works better for certain groups, such as complainants and witnesses in sexual violence and family violence cases;
 - 5.2 is already progressing six of the Law Commission's recommendations, in whole or in part, as part of its recent decisions on improving the justice response to victims of sexual violence;
 - 5.3 accepts twelve further recommendations, including that the Evidence Regulations 2007 should be reviewed and modernised, and will include two of these recommendations in the Sexual Violence Legislation Bill;
 - 5.4 wishes to further consider the remaining recommendations;
 - 5.5 will develop an Evidence Amendment Bill to make agreed amendments to the Evidence Act, and undertake a review of the Evidence Regulations 2007;
6. **approved** the government response to the Law Commission's report *The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006* (R142), attached to the submission under SWC-19-SUB-0102;
7. **noted** that the government response must be presented to the House by 3 September 2019;
8. **invited** the Minister of Justice to present the government response to the House as soon as practicable;
9. **authorised** the Minister of Justice to make any minor technical and editorial changes to the response before its public release;
10. **noted** that the Minister of Justice proposes to release a media statement announcing the tabling of the government response on the day that it is presented to the House;

Sexual Violence Legislation Bill

11. **agreed** that restrictions on evidence about a complainant's sexual experience, disposition, and reputation in section 44 of the Evidence Act apply in civil (as well as criminal) proceedings;
12. **agreed** that there be an exception to the ban on evidence of the complainant's sexual reputation provided for in section 44(2) of the Evidence Act for civil defamation cases where the alleged defamatory statements at issue concern the sexual reputation of the plaintiff, and the evidence is so directly relevant to the proceedings that it would be contrary to the interests of justice to exclude it;
13. **authorised** the Minister of Justice, in consultation with the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues), to make decisions on whether there should be any further narrow, necessary exceptions to the ban on admissibility of sexual reputation evidence in civil proceedings;
14. **agreed** that section 44A of the Evidence Act be amended to require an application under section 44 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;

15. **agreed** that the amendments set out in paragraphs 11 to 14 be included in the Sexual Violence Legislation Bill;
16. **invited** the Minister of Justice, in consultation with the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues), to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above decisions;

Evidence Amendment Bill and review of Evidence Regulations 2007

17. **noted** that the Minister of Justice intends to develop an Evidence Amendment Bill to be introduced in the second half of 2020, as well as to undertake a review of the Evidence Regulations 2007 s9(2)(f)(iv) [REDACTED]
18. s9(2)(g)(i) [REDACTED]

Gerrard Carter
Committee Secretary

Present:

Rt Hon Jacinda Ardern
Hon Kelvin Davis
Hon Grant Robertson
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Andrew Little
Hon Dr David Clark
Hon Stuart Nash
Hon Iain Lees-Galloway
Hon Jenny Salesa
Hon Damien O'Connor
Hon Tracey Martin (Chair)
Hon Willie Jackson
Hon Aupito William Sio
Hon Poto Williams
Jan Logie, MP

Officials present from:

Office of the Prime Minister
Office of the Minister for Social Development
Office of the Chair
Officials Committee for SWC

Hard-copy distribution:

Minister of Justice