

Departmental Disclosure Statement

Evidence Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

20 April 2015.

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Part One: General Policy Statement

The Bill makes a number of minor and technical amendments recommended by the Law Commission, following its 2013 review of the Evidence Act 2006 (the Act). The Law Commission's review was undertaken as part of a statutory requirement in the Act to monitor the operation of its provisions. The Government adopted all the Law Commission's recommendations except one. It made modifications to two of the recommendations.

The Bill also makes changes to the Act relating to child witnesses and access to video record evidence, to improve the court process for vulnerable witnesses.

Key changes to ensure the Act is up-to-date and working as intended include:

Admitting previous consistent statements

The Bill enables more previous consistent statements to be admissible. The fact of a complaint made in a criminal case, as well as statements that make up an integral part of events before the court, will be admissible in evidence. This addresses a gap and reflects the common law position before the introduction of the Act.

Privilege for plea discussions

The Bill extends the privilege which currently applies to settlement negotiations and mediation in civil proceedings to include plea discussions in criminal proceedings. The court will be authorised to order disclosure of a communication or document relating to a plea discussion that would otherwise be protected by privilege under certain circumstances. The extended privilege will enable full and frank plea discussions and encourage early disposal of cases, where appropriate.

Other minor and technical amendments

The Bill includes a number of minor and technical amendments to the Act to better reflect the policy intent, to correct a problem with how the provision is operating or to clarify a provision.

Key changes to improve the court process for vulnerable witnesses include:

Restrictions on video record evidence

The Bill places restrictions and safeguards on defence counsel access to video records of witnesses' evidence in sexual and violent cases, and of child complainants' evidence in all cases. The Bill also introduces offences in relation to the unauthorised possession, use and distribution of video record evidence. The aim of these amendments is to mitigate the risk that video records are inappropriately used.

Notice requirements for evidence of previous sexual history

The Bill adds a notice requirement in relation to the admissibility of evidence about the sexual history of a complainant with any person other than the defendant. The Bill requires all parties to be notified of the intention to lead such evidence. The scope, purpose and admissibility of the evidence will be determined pre-trial, reducing potential trauma for the complainant in the court process.

Presumption that child witnesses give evidence in alternative ways

The Bill introduces a legislative presumption that all witnesses under the age of 18 use alternative ways to give their evidence. This includes the use of pre-recorded evidence, as well as audio visual links, CCTV and the use of witness screens in court. The Bill also gives all child witnesses the right to a support person when giving evidence in court.

These changes help address the issue that contact with the court system can be traumatic for child witnesses. The impact of long delays before giving evidence at trial and inappropriate questioning during cross examination are particular problems for child witnesses.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>The 2013 Review of the Evidence Act 2006, Law Commission [NZLC R127] http://r127.publications.lawcom.govt.nz/</p> <p>Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy, Institute of Public Policy AUT University, 2010 http://www.ipp.aut.ac.nz/_data/assets/pdf_file/0020/119702/Child-Witnesses-in-the-NZ-Criminal-Courts-full-report.pdf</p> <p>Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system (issues paper) http://www.justice.govt.nz/publications/global-publications/a/alternative-pre-trial-and-trial-processes-for-child-witnesses-in-new-zealands-criminal-justice-system/publication</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Title: Child witnesses in the criminal courts: proposed reforms Authoring agency: Ministry of Justice Date: 23 June 2011 The RIS can be accessed on the Ministry of Justice website at http://www.justice.govt.nz/policy/regulatoryimpactstatements</p>	
2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES

Regulatory Impact Analysis was not required for the amendments recommended by the Law Commission because these would substantially re-enact the current law to clarify the legislative intent.

Regulatory Impact Analysis relating to child witnesses was undertaken in 2011 before the decisions were approved. A modification agreed to by Cabinet was too minor to require further analysis.

Regulatory Impact Analysis was not required for the access to video records proposal because the proposed amendments would have only minor impacts on businesses, individuals and not-for-profit entities.

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
See 2.3.2 above.	

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
The regulatory impact statements prepared in relation to the Evidence Amendment Bill provide analysis on the impacts relating to various policy proposals. Many of the policy changes are minor and technical improvements and corrections to the Evidence Act and, as such, do not lend themselves to a monetary assessment of costs and benefits.	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
The Ministry expects that compliance will be very high because the changes generally place obligations on the courts, government and lawyers (who are officers of the court).	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The Ministry's scan of international obligations has not identified any obligations that conflict with the policies contained in the Bill.
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Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Changes promoted through this Bill are not considered to have specific implications for Māori as individuals, communities or tribal groupings.
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Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by Crown Law, or a Bill of Rights Act 1990 section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon a Bill's introduction. Any such advice, or reports, will be accessible on the Ministry's website at:

http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
<p>The Bill introduces offences in relation to the possession and distribution of video record evidence.</p> <p>Clause 33:</p> <ul style="list-style-type: none"> • makes unauthorised possession of sensitive video record evidence an offence, liable on conviction to a fine of up to \$2,000 for an individual or up to \$10,000 for a body corporate; • makes unauthorised possession with the intention of copying, showing or supplying sensitive video record evidence an offence, liable on conviction to a term of imprisonment of up to 6 months for an individual or a fine of up to \$10,000 for a body corporate; and • makes the unauthorised copying, showing or supplying of sensitive video record evidence an offence, liable on conviction to a term of imprisonment of up to 6 months for an individual or a fine of up to \$10,000 for a body corporate. <p>Clause 35:</p> <ul style="list-style-type: none"> • introduces a new regulation making power to prescribe offences and fines for non-compliance with specified regulations governing video record evidence (e.g. the requirement that a lawyer must place a video record in a safe place). The offences will have a maximum penalty of a fine up to \$2,000 for an individual or up to \$10,000 for an organisation. 	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>The Bill introduces safeguards around the storage, access and use of sensitive video record evidence. Access to videos recording the testimony of child complainants and witnesses in sexual and violent cases will be limited to police premises, unless a judge orders otherwise. The Bill also introduces offences in relation to the unauthorised possession, copy or distribution of video record evidence [see 3.4 above].</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner was consulted on this proposal as part of the development of the Cabinet paper.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>Many of the policy changes in the Bill reflect the Law Commission's review recommendations. The Law Commission consulted widely during the development of its report, seeking public submissions and specifically inviting and receiving comment from the New Zealand Law Society, Auckland District Law Society and New Zealand Bar Association. Submissions were received from the judiciary, academics, legal profession, alternative dispute resolution groups, and the New Zealand Association of Psychotherapists.</p> <p>The policy changes relating to child witnesses respond in part to the AUT report <i>Child Witnesses in the New Zealand Criminal Courts</i> [see 2.1 above]. The Ministry of Justice released an issues paper seeking and receiving public submissions on possible options to reform the current treatment of child victims and witnesses in the criminal justice system.</p> <p>A range of government agencies and departments were also consulted during development of the various proposals agreed to by Cabinet and included in the Bill.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>The policy proposals contained in the Bill have been extensively consulted on with a working group from Police, Crown Law and the Public Defence Service, to ensure they are workable and balanced. The proposals were also tested with the Ministry's operational staff and with other agencies. The Bill was discussed and feedback given at the Departmental Prosecutors Forum.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>The Bill contains a number of minor amendments to privilege provisions:</p> <ul style="list-style-type: none">• The Bill extends the privilege which currently applies to settlement negotiation and mediation in civil proceedings to include plea discussion in criminal proceedings. Plea discussions are now commonplace in criminal proceedings. They have been formalised in the Crown Law Prosecution Guidelines 2010 and through the Criminal Procedure Act 2011. The extended privilege will enable full and frank plea discussions and encourage early disposal of cases, where appropriate.• The Bill makes it clear that the exemption from the privilege in s 59(1)(b), relating to information obtained by medical practitioners and clinical psychologists, applies to communications, observations and information collected or generated during a court-ordered assessment and does not affect the privilege that attaches to other medical records of the privilege-holder.• The Bill amends s 66(2) relating to joint and successive interests in privileged material, providing certainty that the provision relates to the personal representative of a deceased person and not a personal representative in any other capacity.	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill introduces a new regulation making power to prescribe offences and fines for non-compliance with specified regulations governing video record evidence (e.g. the requirement that a lawyer must place a video record in a safe place). The offences will have a maximum penalty of a fine up to \$2,000 for an individual or up to \$10,000 for an organisation.</p> <p>The Bill also removes the power to add a country to the Evidence (Recognition of Overseas Practitioners) Order 2008 by Order in Council. This removes reliance on an exhaustive list of countries for which legal privilege is recognised (through order in council). The Bill instead enables the courts to determine on a case-by-case basis whether the overseas practitioner is recognised as properly qualified to undertake the work.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO

