

**Reprint
as at 8 January 2017**



Evidence Amendment Act 2016

Public Act 2016 No 44
Date of assent 22 September 2016
Commencement see section 2

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Note

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.
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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Evidence Amendment Act 2016.

2 Commencement

This Act comes into force on the earlier of the following:

- (a) a date appointed by the Governor-General by Order in Council (and 1 or more orders may be made bringing different provisions into force on different dates);
- (b) 1 July 2017.

Section 2(a): this Act brought into force, on 8 January 2017, by the Evidence Amendment Act 2016 Commencement Order 2016 (LI 2016/293).

Part 1

Amendments to Evidence Act 2006

3 Principal Act

This Part amends the Evidence Act 2006 (the **principal Act**).

4 Section 4 amended (Interpretation)

- (1) In section 4(1), insert in their appropriate alphabetical order:

child witness, in relation to any proceeding, means a witness who is a child when the proceeding commences, and includes a child complainant but does not include a defendant who is a child

veracity has the meaning given in section 37

violent case means a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for,—

- (a) any of the offences listed in section 87(5)(b) of the Sentencing Act 2002; or
- (b) any other offence of a violent nature against a person

- (2) In section 4(1), definition of **lawyer**, replace “section 2 of the Law Practitioners Act 1982” with “section 6 of the Lawyers and Conveyancers Act 2006”.

5 Section 12A repealed (Rules of common law relating to statements of co-conspirators, persons involved in joint criminal enterprises, and certain co-defendants preserved)

Repeal section 12A.

6 Section 16 amended (Interpretation)

In section 16(1), replace the definition of **business record** with:

business record—

- (a) means a document—
 - (i) that is made—
 - (A) to comply with a duty; or
 - (B) in the course of a business, and as a record or part of a record of that business; and
 - (ii) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied; but
- (b) does not include a Police record that contains any statement or interview by or with an eyewitness, or a complainant, or any other person who purports to have knowledge or information about the circumstances of alleged offending or the issues in dispute in a civil proceeding

7 Section 22 amended (Notice of hearsay in criminal proceedings)

- (1) In section 22(2)(g), after “witness”, insert “; and”.
- (2) After section 22(2)(g), insert:

- (h) if section 19(1)(b) is relied on, why no useful purpose would be served by requiring the person to be a witness; and
- (i) if section 22A is relied on, why the 3 matters comprising the required threshold in that section are satisfied.

8 New section 22A inserted (Admissibility of hearsay statement against defendant)

After section 22, insert:

22A Admissibility of hearsay statement against defendant

In a criminal proceeding, a hearsay statement is admissible against a defendant if—

- (a) there is reasonable evidence of a conspiracy or joint enterprise; and
- (b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and
- (c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.

9 Section 27 amended (Defendants' statements offered by prosecution)

- (1) In section 27(1), replace “but not against a co-defendant in the proceeding” with “and is admissible against a co-defendant in the proceeding only if it is admitted under section 22A”.
- (2) In section 27(3), after “(hearsay evidence)”, insert “except section 22A”.
- (3) Repeal section 27(4).

10 Section 30 amended (Improperly obtained evidence)

In section 30(2)(b), replace “but also” with “and”.

11 Section 35 amended (Previous consistent statements rule)

- (1) In section 35(1), delete “or subsection (3)”.
- (2) Replace section 35(2) and (3) with:
 - (2) A previous statement of a witness that is consistent with the witness's evidence is admissible if the statement—
 - (a) responds to a challenge that will be or has been made to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness; or
 - (b) forms an integral part of the events before the court; or
 - (c) consists of the mere fact that a complaint has been made in a criminal case.

12 Section 37 amended (Veracity rules)

- (1) Replace section 37(3)(b) with:
 - (b) that the person has been convicted of 1 or more offences that indicate a propensity for a lack of veracity:
- (2) Replace section 37(5) with:
- (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying.

13 Section 38 amended (Evidence of defendant's veracity)

Replace section 38(2)(a) with:

- (a) the defendant has, in court, given oral evidence about his or her veracity or challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; and

14 Section 44 amended (Evidence of sexual experience of complainants in sexual cases)

After section 44(1), insert:

- (1A) Subsection (1) is subject to the requirements in section 44A.

15 New section 44A inserted (Application to offer evidence or ask question about sexual experience of complainant in sexual cases)

After section 44, insert:

44A Application to offer evidence or ask question about sexual experience of complainant in sexual cases

- (1) An application under section 44(1) must comply with subsections (2) to (5) (as relevant) unless—
 - (a) every other party has waived those requirements; or
 - (b) the Judge dispenses with those requirements.
- (2) A party who proposes to offer evidence about the sexual experience of a complainant must make a written application and the application must include—
 - (a) the name of the person who will give the evidence; and
 - (b) the subject matter and scope of the evidence.
- (3) A party who proposes to ask any question about the sexual experience of a complainant must make a written application and the application must include—
 - (a) the name of the person who will be asked the question; and
 - (b) the question; and
 - (c) the scope of the questioning sought to flow from the initial question.

- (4) If any document is intended to be produced as evidence of the sexual experience of a complainant, the application required under subsection (2) must be accompanied by a copy of the document.
- (5) An application must be made and a copy of the application must be given to all other parties—
 - (a) as early as practicable before the case is to be tried so that all other parties are provided with a fair opportunity to respond to the evidence or question:
 - (b) unless a Judge otherwise permits under subsection (6), no later than when a case management memorandum (for a judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011.
- (6) The Judge may dispense with any of the requirements in subsections (2) to (5) if,—
 - (a) having regard to the nature of the evidence or question proposed to be offered or asked, no party is substantially prejudiced by the failure to comply with a requirement; and
 - (b) compliance was not reasonably practicable in the circumstances; and
 - (c) it is in the interests of justice to do so.

16 Section 45 amended (Admissibility of visual identification evidence)

- (1) In section 45(3)(b), (c), and (d) and (4)(a), (b), and (c), replace “person to be identified” with “suspect”.
- (2) In section 45(4)(e), replace “was reported” with “occurred”.

17 Section 46A repealed (Caution regarding reliance on identification evidence)

Repeal section 46A.

18 Section 50 amended (Civil judgment as evidence in civil or criminal proceedings)

After section 50(1), insert:

- (1A) Evidence of a decision or a finding of fact by a tribunal is not admissible in any proceeding to prove the existence of a fact that was in issue in the matter before the tribunal.

19 Section 51 amended (Interpretation)

- (1) In section 51(1), definition of **overseas practitioner**, replace paragraph (c) with:
 - (c) a person who is, under the laws of a country other than New Zealand or Australia, entitled to undertake work that, in New Zealand, is normally undertaken by a lawyer or a patent attorney.

- (2) In section 51(3), replace “given, or to be given,” with “to be given”.
- (3) Repeal section 51(6).

20 Section 54 amended (Privilege for communications with legal advisers)

- (1) In section 54(1), after “A person who”, insert “requests or”.
- (2) In section 54(1)(b)(i), after “the person”, insert “requesting or”.
- (3) After section 54(1), insert:
 - (1A) The privilege applies to a person who requests professional legal services from a legal adviser whether or not the person actually obtains such services.
- (4) In section 54(2), after “patent attorney,”, insert “requesting or”.

21 Section 57 amended (Privilege for settlement negotiations or mediation)

- (1) In the heading to section 57, replace “**or mediation**” with “, **mediation, or plea discussions**”.
- (2) After section 57(2), insert:
 - (2A) A person who is a party to a criminal proceeding has a privilege in respect of any communication or document made or prepared in connection with plea discussions in the proceeding.
 - (2B) However, the court may order the disclosure of the whole or any part of a communication or document privileged under subsection (2A) if the court considers that—
 - (a) the disclosure is necessary for a subsequent prosecution for perjury; or
 - (b) the disclosure is necessary to clarify the terms of an agreement reached, if the terms are later disputed or are ambiguous; or
 - (c) after due consideration of the importance of the privilege and of the rights of a defendant in a criminal proceeding, it would be contrary to justice not to disclose the communication or document or part of it.
- (3) In section 57(3)(c)(ii), after “proceeding”, insert “; or”.
- (4) After section 57(3)(c), insert:
 - (d) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.

22 Section 59 amended (Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists)

After section 59(1), insert:

- (1A) For the purpose of applying subsection (1)(b), there is no privilege under this section in relation to any communication or information (other than any previous medical record or other previous medical information about the person) that is made or obtained for the purpose of the examination or test or for the other purpose concerned.

23 Section 66 amended (Joint and successive interests in privileged material)

Replace section 66(2) with:

- (2) On or after the death of a person who has a privilege conferred by any of sections 54 to 57 in respect of a communication, information, opinion, or document, the personal representative of the deceased person or other successor in title to property of the deceased person—
- (a) is entitled to assert the privilege against third parties; and
 - (b) is not restricted by any of sections 54 to 57 from having access or seeking access to the privileged matter.

24 Section 79 amended (Support persons)

- (1) After section 79(1), insert:
- (1A) A child witness, when giving evidence in a criminal proceeding, is entitled to have 1 person, and may, with the permission of the Judge, have more than 1 person, near him or her to give support.
- (2) After section 79(2), insert:
- (2A) Subsections (1), (1A), and (2) apply whether the witness or complainant gives evidence in an alternative way or in the ordinary way.
- (3) Replace section 79(3) with:
- (3) Despite subsections (1), (1A), and (2), the Judge may, in the interests of justice, direct that support may not be given to a complainant or a child witness or other witness by—
- (a) any person; or
 - (b) a particular person.
- (4) In section 79(4), replace “complainant or other witness” with “complainant or a child witness or other witness”.

25 Section 90 amended (Use of documents in questioning witness or refreshing memory)

- (1) In section 90(1) and (2), replace “section 29 or 30” with “section 28, 29, or 30”.
- (2) After section 90(6), insert:
- (7) A previous statement of a witness that is consistent with a witness’s evidence is admissible if—

- (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
- (b) the statement provides the court with information that the witness is unable to recall.

26 Section 95 amended (Restrictions on cross-examination by parties in person)

Replace section 95(1) with:

- (1) A defendant in a sexual case, or a defendant in or a party to criminal or civil proceedings concerning domestic violence or harassment, is not entitled to personally cross-examine—
 - (a) a complainant, or a party who has made allegations of domestic violence or harassment:
 - (b) a child (other than a complainant) who is a witness, unless the Judge gives permission.

27 Section 102 amended (Application)

Replace section 102(a) with:

- (a) sections 107 to 107B (which relate to child witnesses in criminal proceedings):

28 Section 103 amended (Directions about alternative ways of giving evidence)

After section 103(4), insert:

- (5) This section is subject to sections 107 to 107B, which apply to child witnesses in criminal proceedings.

29 Section 106 amended (Video record evidence)

- (1) Replace section 106(2) with:
 - (2) A video record offered by the prosecution as an alternative way of giving evidence must be recorded and dealt with in compliance with any regulations made under this Act.
- (2) Replace section 106(3) with:
 - (3) A video record that is to be offered by the prosecution as an alternative way of giving evidence must be offered for viewing by a defendant or his or her lawyer before it is offered in evidence (including prior to any pre-trial consideration of admissibility), unless the Judge directs otherwise.
- (3) Replace section 106(4) with:
 - (4) A copy of a video record that is to be offered by the prosecution as an alternative way of giving evidence must be given to a defendant's lawyer unless sub-

section (4A) applies, or, if subsection (4A) does not apply, the Judge directs otherwise.

- (4) After section 106(4), insert:
- (4A) Subject to subsections (4B) and (4C), a defendant’s lawyer is not entitled to be given a copy of a video record under subsection (4) of—
- (a) any child complainant; or
 - (b) any witness (including an adult complainant) in a sexual case or a violent case.
- (4B) On the application of a defendant, a Judge may order that a copy of a video record or a part of a video record to which subsection (4A) applies be given to the defendant’s lawyer before it is offered in evidence.
- (4C) When considering an application under subsection (4B), the Judge must have regard to—
- (a) whether the interests of justice require departure from the usual procedure under subsection (4A) in the particular case; and
 - (b) the nature of the evidence contained on the video record; and
 - (c) the ability of the defendant or his or her lawyer to view the video record under subsection (3) and to otherwise access the content of the video record, including by way of a transcript of the video record.
- (5) In section 106(6), replace “If any party indicates that the party wishes to object” with “If the defendant indicates he or she wishes to object”.
- (6) After section 106(8) insert:
- (9) To avoid doubt, subsections (3) to (4C) do not apply to any lawyer representing the Crown who may be given a copy of a video record (which may or may not be offered as an alternative way of giving evidence) at any time for the purpose of providing legal advice to the Police before a charging document is filed and for conducting the prosecution once proceedings have commenced.

30 Cross-heading above section 107 replaced

Replace the cross-heading above section 107 with:

Giving of evidence by child witnesses

31 Section 107 replaced (Directions about way child complainants are to give evidence)

Replace section 107 with:

107 Alternative ways of giving evidence by child witnesses in criminal proceedings

- (1) A child witness, when giving evidence in a criminal proceeding, is entitled to give evidence in 1 or more alternative ways so that—

- (a) the witness gives evidence in 1 or more of the following ways:
 - (i) by a video record made before the hearing of the proceeding:
 - (ii) while in the courtroom but unable to see the defendant or some other specified person:
 - (iii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere:
 - (b) by use of any appropriate practical and technical means the Judge, the jury (if any), and any lawyers can see and hear the witness giving evidence, in accordance with any regulations made under section 201:
 - (c) the defendant can see and hear the witness, unless the Judge directs otherwise.
- (2) If a video record is shown as a child witness's evidence in chief, the witness is entitled to give the other parts of his or her evidence, including any further evidence in chief, in 1 or more other alternative ways.
 - (3) To avoid doubt, section 106 applies to a video record offered as an alternative way of giving evidence under this section.
 - (4) Any party intending to call a child witness must provide every other party and the court with a written notice stating the 1 or more alternative ways in which the witness will give his or her evidence.
 - (5) Unless a Judge permits otherwise, the notice required under subsection (4) must be given no later than when a case management memorandum (for a judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011.
 - (6) If a party has given notice under subsection (4) and it is no longer possible or desirable for the witness to give evidence by the means stated in the notice, the party may file an amended notice but must do so as early as practicable before the case is to be tried.
 - (7) This section is subject to sections 107A and 107B.

107A Application by party calling child witness for witness to give evidence in ordinary way

- (1) Despite section 107, if a child witness indicates his or her wish to give evidence or any part of his or her evidence in the ordinary way under section 83, the party calling the witness may apply to a Judge for a direction that the witness be permitted to do so.
- (2) Unless a Judge permits otherwise, an application under subsection (1) must be made no later than when a case management memorandum (for a judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011.
- (3) The Judge—

- (a) may direct that the witness give evidence or any part of his or her evidence in the ordinary way, if satisfied that the witness fully appreciates the likely effect on him or her of doing so; and
 - (b) before giving a direction, may call for and receive a report, from any person considered by the Judge to be qualified to advise, on the effect on the witness of giving evidence in the ordinary way or any alternative way.
- (4) When considering whether to give a direction under this section, the Judge must have regard to—
- (a) whether the interests of justice require a departure from the usual procedure under section 107 in the particular case; and
 - (b) the matters in section 103(3) and (4).

107B Application by any other party for child witness to give evidence in ordinary way or different alternative way

- (1) Despite section 107, if a party is calling a child witness to give evidence, any other party may apply to a Judge for a direction that the witness give evidence or any part of his or her evidence in the ordinary way under section 83 or in a different alternative way under section 107.
- (2) An application for a direction under subsection (1) must be made as early as practicable before the case is to be tried, or at a later time permitted by a Judge.
- (3) Before giving a direction under this section, the Judge—
 - (a) must give each party an opportunity to be heard in chambers; and
 - (b) may call for and receive a report, from any person considered by the Judge to be qualified to advise, on the effect on the witness of giving evidence in the ordinary way or any alternative way.
- (4) When considering whether to give a direction under this section, the Judge must have regard to—
 - (a) whether the interests of justice require a departure from the usual procedure under section 107 in the particular case; and
 - (b) the matters in section 103(3) and (4).

32 New cross-heading above section 119 inserted

After section 118, insert:

Offences and requirements for disclosure of video records in proceedings other than under section 106 or in Family Court proceedings

33 Section 119 amended (Offences)

Before section 119(1), insert:

- (1AA) A person who is in possession of a video record of any of the types specified in section 106(4A), other than as permitted by an Act or any regulations, commits an offence and is liable on conviction,—
- (a) in the case of an individual, to a fine not exceeding \$2,000;
 - (b) in the case of a body corporate, to a fine not exceeding \$10,000.
- (1AB) A person who is in possession of a video record of any of the types specified in section 106(4A) with the intention of copying, supplying, or showing the video record, other than as permitted by an Act or any regulations, commits an offence and is liable on conviction,—
- (a) in the case of an individual, to a term of imprisonment not exceeding 6 months;
 - (b) in the case of a body corporate, to a fine not exceeding \$10,000.
- (1AC) A person who copies, supplies, or shows a video record of any of the types specified in section 106(4A), other than as permitted by an Act or any regulations, commits an offence and is liable on conviction,—
- (a) in the case of an individual, to a term of imprisonment not exceeding 6 months;
 - (b) in the case of a body corporate, to a fine not exceeding \$10,000.

34 New sections 119A and 119B inserted

After section 119, insert:

119A Requirements for disclosure of video records in proceedings other than under section 106 or in Family Court proceedings

- (1) Unless subsection (2) applies, the Police must not disclose a copy or a transcript of any video record to which this section applies to parties in any proceedings other than—
- (a) criminal proceedings (disclosure of which is provided for in section 106); or
 - (b) Family Court proceedings (disclosure of which is provided for in regulations made under section 201).
- (2) A Judge or judicial officer may order disclosure of a video record to the parties, if he or she is satisfied that—
- (a) the disclosure will not prejudice any criminal proceedings for which the video record may be offered as evidence; and
 - (b) it is in the interests of justice to do so after considering the matters in section 119B.
- (3) If a Judge or judicial officer makes an order for disclosure, he or she must, subject to subsection (4), give directions for the way in which disclosure is to be made, which may include the Police providing the parties with—

- (a) a copy, a transcript, or a summary of the video record;
 - (b) an opportunity to view the video record;
 - (c) access to 1 or more extracts or parts of the video record by any of the means in paragraphs (a) and (b).
- (4) A Judge or judicial officer may make a particular direction for the way in which disclosure is to be made, if he or she is satisfied that the direction is in the interests of justice after considering the matters in section 119B.
- (5) A video record that is disclosed in proceedings under this section must be dealt with in compliance with any regulations made under section 201.
- (6) To avoid doubt, this section applies to the exercise of existing powers to order the production and disclosure of evidence, and does not create a new power to do so.
- (7) For the purposes of this section,—
- proceedings** means proceedings in any court or tribunal, other than the proceedings listed in subsection (1)(a) and (b)
- video record** means a video record of an interview with a witness it is intended may be offered by the prosecution as evidence in a criminal proceeding.

119B Matters Judge or judicial officer must consider before ordering disclosure of video record or giving direction for disclosure

The matters that a Judge or judicial officer must consider for the purposes of section 119A(2)(b) and (4) are—

- (a) the extent to which the video record is relevant to the proceedings before them; and
- (b) the likely extent of harm to the witness whose evidence is contained in the video record from disclosure of that record; and
- (c) the nature of the criminal proceedings for which the video record may be or has been offered as evidence; and
- (d) the availability of other means of obtaining the evidence; and
- (e) the public interest in protecting the privacy of witnesses; and
- (f) any other matter that the Judge or judicial officer considers relevant.

35 Section 126 amended (Judicial warnings about identification evidence)

After section 126(2), insert:

- (3) If evidence of identity is given against the defendant in any criminal proceeding and the defendant disputes that evidence, the court must bear in mind the need for caution before convicting the defendant in reliance on the correctness of any such identification and, in particular, must bear in mind the possibility that the witness may be mistaken.

36 Section 201 amended (Regulations)

- (1) After section 201(g), insert:
 - (ga) prescribing the ways in which video records may be dealt with, including the custody or return of video records, or prohibiting or restricting their copying:
- (2) After section 201(h), insert:
 - (ha) prescribing requirements for viewing video records of evidence by defendants, their lawyers, and expert witnesses, including where and when viewing can take place:
- (3) After section 201(i), insert:
 - (ia) regulating the destruction of video records:
 - (ib) prescribing offences for non-compliance with regulations relating to the use of video records of evidence and any transcripts of such evidence, with a maximum penalty of,—
 - (i) in the case of an individual, a fine not exceeding \$2,000:
 - (ii) in the case of a body corporate, a fine not exceeding \$10,000:

37 Section 202 amended (Periodic review of operation of Act)

In section 202(2), replace “1 year” with “2 years”.

Part 2**Revocation and amendments to other enactments****38 Consequential amendments and revocation**

- (1) Amend the Criminal Procedure Act 2011 as specified in the Schedule.
- (2) The Evidence (Recognition of Overseas Practitioners) Order 2008 (SR 2008/202) is revoked.

Schedule Amendment to Act

s 38

Criminal Procedure Act 2011 (2011 No 81)

After section 217(2)(j), insert:

- (ja) making or refusing to make a pre-trial witness anonymity order under section 110 of the Evidence Act 2006:

Reprints notes

1 *General*

This is a reprint of the Evidence Amendment Act 2016 that incorporates all the amendments to that Act as at the date of the last amendment to it.

2 *Legal status*

Reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by any amendments to that enactment. Section 18 of the Legislation Act 2012 provides that this reprint, published in electronic form, has the status of an official version under section 17 of that Act. A printed version of the reprint produced directly from this official electronic version also has official status.

3 *Editorial and format changes*

Editorial and format changes to reprints are made using the powers under sections 24 to 26 of the Legislation Act 2012. See also <http://www.pco.parliament.govt.nz/editorial-conventions/>.

4 *Amendments incorporated in this reprint*

Evidence Amendment Act 2016 Commencement Order 2016 (LI 2016/293)