Evidence (Giving Evidence of Family Violence) Amendment Bill

Member's Bill

As reported from the Justice Committee

Commentary

Recommendation

The Justice Committee has examined the Evidence (Giving Evidence of Family Violence) Amendment Bill and recommends that it be passed. We recommend all amendments unanimously.

Introduction

This is a Member's bill in the name of Dr Tracey McLellan. It seeks to extend the range of possible protections for parties and witnesses giving evidence of family violence in the Family Court. This would closely follow the protections available to similarly vulnerable complainants and witnesses in criminal proceedings. The bill would do so by amending the Evidence Act 2006. It would create an entitlement for a party or a witness to give evidence of family violence in Family Court proceedings in an alternative way.

At present, in Family Court hearings, evidence is generally given by affidavit (written statement) in advance of the hearing, while cross-examination occurs in person at the hearing. Alternative methods of giving evidence currently available in civil and criminal proceedings include:

- by a video record made before the hearing
- in the courtroom but unable to see one or more parties or witnesses about whom the evidence relates
- from an appropriate place outside the courtroom, either in New Zealand or elsewhere.

At present, a party in Family Court proceedings can apply to give evidence in an alternative way or a Judge can allow a party or witness to give evidence in these

ways, but the bill would automatically entitle a witness giving evidence of family violence to do so.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Title of the bill

We propose changing the title of the bill to Evidence (Giving Family Violence Evidence in Family Court Proceedings) Amendment Bill. This would more clearly describe what the bill seeks to do.

Definitions of "Family Court proceeding" and "family violence evidence"

We recommend inserting definitions of "Family Court proceeding" and "family violence evidence" into section 4(1) of the Evidence Act. They would help to describe what these terms mean in relation to sections 106BA to 106BC.

The definition of "family violence evidence" would make it clear that the term means all oral evidence given by a witness in a Family Court proceeding, including:

- evidence in chief
- evidence given in cross-examination
- evidence in re-examination given about matters arising out of evidence given in cross-examination.

We note that the bill as introduced would allow any party or witness in a Family Court proceeding to give evidence of family violence in 1 or more ways. We recognise that this might allow witnesses who are not themselves victims of family violence to give their evidence in an alternative way. We are concerned that this provision could allow a person accused of family violence to use the entitlement to give their version of the allegations as evidence. Therefore, we recommend specifying that "family violence evidence" means evidence of family violence that the witness experienced as a person against whom the family violence was inflicted.

Our proposed definition would also make clear that family violence evidence excludes a Police video record of an interview with a witness that is to be offered by the prosecution as the witness's evidence in chief in a criminal proceeding and that has been ordered to be accessible or disclosed for a Family Court proceeding. The definition would also specify that family violence evidence does not mean the wishes or views of a child or young person ascertained by the court or Judge.

As consequential amendments, we recommend inserting clauses 11 and 12, which would amend rule 54 and rule 299 of the Family Court Rules to align with the definition of "family violence evidence".

Removal of entitlement to give evidence by a video record made before the hearing

In the bill as introduced, new section 106BB(1)(a)(i) would allow a party or witness to give evidence by a video record made before the hearing. We note that this new provision would require substantial investment in video recording capability in all Family Court rooms and could affect court timeliness given current delays in the system. Therefore, we recommend removing proposed section 106BB(1)(a)(i) and retaining the entitlement to give evidence in the following ways:

- while in the courtroom but unable to see 1 or more persons to whom the evidence relates
- from an appropriate place outside the courtroom, either in New Zealand or elsewhere.

As a consequential change, we also recommend removing proposed section 106BB(3)(b) as introduced.

Judicial discretion to ensure fairness of proceedings

Proposed section 106BC applies where a party or witness gives notice that they intend to give some or all of their evidence in an alternative way. It provides that any other party may apply to a Judge for a direction that all or part of the evidence be given in the ordinary way, or in a different alternative way. When considering whether to give a direction, the Judge must consider certain matters, including whether the interests of justice require a departure from the presumption for a witness to give evidence in an alternative way.

We recognise that allowing such an application for a judicial direction is important for ensuring procedural fairness. However, we note that, under the bill as introduced, judicial discretion is limited: a Judge cannot give a direction unless another party makes an application.

We consider that allowing judicial discretion is essential to ensure the proceedings are fair. It would also be an important safeguard against misuse of the provision, for example to delay proceedings. Therefore, we recommend amending proposed section 106BC(2) to allow the Judge, on their own initiative, to make a direction that the witness give their evidence in the ordinary way or a different alternative way.

Provisions not intended to displace the use of affidavit evidence

We note that in Family Court proceedings, primary evidence is generally given by affidavit, not orally in court. This is a way of giving evidence that is already protective of victims and witnesses. We consider that the bill as introduced does not make it clear that the provisions are not intended to displace the use of affidavit evidence. Therefore, we recommend inserting clause 10 to amend Rule 48 of the Family Court

Rules 2002. This would make it clear that the general rule is that evidence in support of a party's case must be given by affidavit. The exception to this is a judicial direction that relevant evidence be given orally.

Amending the Evidence Act directly

Clause 5 of the bill as introduced would make a consequential amendment to section 12 of the Sexual Violence Legislation Act 2021. That section replaced section 102 of the Evidence Act on 21 December 2022. With the replacement section 102 now in force in the Evidence Act, the consequential amendment needs to be made directly to section 102 in the Evidence Act (and not via section 12 of the Sexual Violence Legislation Act 2021, which is now spent). This would be done in new clause 5 of the bill.

Appendix

Committee process

The Evidence (Giving Evidence of Family Violence) Amendment Bill was referred to the committee on 6 November 2024. We called for submissions on the bill with a closing date of 19 December 2024. We received and considered submissions from 30 interested groups and individuals. We heard oral evidence from 7 submitters.

We invited the member in charge of the bill to provide oral evidence to us regarding the bill. They did so on 20 February 2025. Advice on the bill was provided by the Ministry of Justice. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Hon Andrew Bayly (member from 9 April 2025 and Chairperson from 10 April 2025)

Hon James Meager (member and Chairperson until 9 April 2025)

Hon Ginny Andersen

Jamie Arbuckle

Carl Bates (from 29 January 2025)

Cameron Brewer (until 29 January 2025)

Tākuta Ferris

Paulo Garcia (until 29 January 2025)

Dr Tracey McLellan (until 14 May 2025)

Rima Nakhle

Tamatha Paul (until 29 January 2025)

Tom Rutherford (from 29 January 2025)

Todd Stephenson

Vanushi Walters (from 14 May 2025)

Hon Dr Duncan Webb

Dr Lawrence Xu-Nan (from 29 January 2025)

Related resources

The documents we received as advice and evidence are available on the Parliament website.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Dr Tracey McLellan

Evidence (Giving Evidence of Family Violence) Amendment Bill

Member's Bill

Contents

		Page
1	Title	2
2	Commencement	2
~~3~~	~~Principal Act~~	~~2~~
~~4~~	~~New sections 106BA to 106BC and cross-heading inserted~~	~~2~~
	~~*Giving of family violence evidence in Family Court proceedings*~~	
	~~106BA Sections 106BB and 106BC apply to family violence evidence in Family Court proceedings~~	~~3~~
	~~106BB Giving of family violence evidence in Family Court proceedings~~	~~3~~
	~~106BC Application by any other party for family violence evidence to be given in ordinary way or different alternative way~~	~~4~~
~~5~~	~~Consequential amendment to Sexual Violence Legislation Act 2021~~	~~4~~
~~6~~	~~Schedule 1AA amended~~	~~4~~
	Part 1 Amendments to Evidence Act 2006	
3	Principal Act	5
4	Section 4 amended (Interpretation)	5
5	Section 102 amended (General provisions are subject to provisions for specific situations)	5
6	New sections 106BA to 106BC and cross-heading inserted	5

		Giving of family violence evidence by witnesses in Family Court proceedings	
	106BA	Sections 106BB and 106BC apply to witnesses giving family violence evidence in Family Court proceedings	6
	106BB	Giving family violence evidence in Family Court proceedings	6
	106BC	Direction that family violence evidence be given in ordinary way or different alternative way	7
7	Schedule 1AA amended		7
	Part 2 **Amendments to Family Court Rules 2002**		
8	Principal rules		7
9	New rule 7A inserted (Transitional, savings, and related provisions)		7
	7A	Transitional, savings, and related provisions	8
10	Rule 48 amended (Evidence at hearing generally to be by affidavit)		8
11	Rule 54 amended (Ascertaining wishes or views of child or young person)		8
12	Rule 299 amended (Evidence at hearing of certain proceedings generally to be given orally)		8
13	New Schedule 1AA inserted		9
	Schedule 1 **New Part ~~2~~3 inserted into Schedule 1AA of Evidence Act 2006**		10
	Schedule 2 **New Schedule 1AA inserted into Family Court Rules 2002**		11

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Evidence (Giving ~~Evidence of~~ Family Violence Evidence in Family Court Proceedings) Amendment Act **2024**.

2 Commencement

This Act comes into force ~~on the day that is~~ 6 months after ~~the date it receives the~~ Royal assent.

~~3 Principal Act~~

~~This Act amends the Evidence Act 2006.~~

~~4 New sections 106BA to 106BC and cross-heading inserted~~

~~After section 106B, insert:~~

Giving of family violence evidence in Family Court proceedings

106BA Sections 106BB and 106BC apply to family violence evidence in Family Court proceedings

Sections 106BB and 106BC apply to a party or witness in a proceeding in the Family Court who is to give or is giving evidence of family violence.

106BB Giving of family violence evidence in Family Court proceedings

(1) A party or witness in a proceeding in the Family Court who is to give or is giving evidence of family violence is entitled to give evidence in 1 or more alternative ways so that—

(a) the party or witness gives evidence in 1 or more of the following ways:

(i) by a video record made before the hearing:

(ii) while in the courtroom but unable to see 1 or more other parties or witnesses about whom the evidence relates:

(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 and any lawyers can see and hear the party or witness giving evidence, in accordance with any regulations made under section 201:

(c) the parties can see and hear the party or witness, unless the Judge directs otherwise.

(2) A party or witness who gives evidence of any kind in one way is entitled to give the other parts of their evidence in 1 or more other ways.

(3) A party wishing to give, or call a witness who will give, evidence of family violence must provide every other party and the court with a written notice stating—

(a) the 1 or more ways in which the party or witness will give their evidence (which may be or include the ordinary way); and

(b) if the party's or witness's cross-examination evidence (as defined in **subsection (6)**) is to be given by a video record made before the hearing, any 1 or more other alternative ways in which their evidence is to be given during the recording.

(4) Unless a Judge permits otherwise, the notice required under **subsection (3)** must be given as early as practicable and in any event no later than 28 days before the hearing.

(5) If a party has given notice under **subsection (3)** and it is no longer possible or desirable for the party or 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.

~~(6) In this section, **cross-examination evidence**, for a party or witness, includes the following evidence (if any) that they give with their evidence given in cross-examination:~~

~~(a) evidence in chief given by them further to their evidence given by whatever means:~~

~~(b) evidence in re-examination given by them about matters arising out of their evidence given in cross-examination.~~

~~106BC Application by any other party for family violence evidence to be given in ordinary way or different alternative way~~

~~(1) Despite **section 106BB**, if a notice given under **section 106BB(3)** states that a party or witness is to give all or any part of their evidence in an alternative way, any other party may apply to a Judge for a direction that the party or witness give evidence or that part of their evidence in the ordinary way under section 83, or in a different alternative way under **section 106BB**.~~

~~(2) An application for a direction under **subsection (1)** must be made as early as practicable before the hearing, 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 party or 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, in addition to any other matter that the Judge considers relevant, have regard to—~~

~~(a) whether the interests of justice require a departure from the usual procedure under **section 106BB(1)** in the particular case; and~~

~~(b) the matters in section 103(3) and (4).~~

~~5 Consequential amendment to Sexual Violence Legislation Act 2021~~

~~(1) This section amends the Sexual Violence Legislation Act 2021.~~

~~(2) In section 12, new section 102, after paragraph (a), insert:~~

~~(aa) **sections 106BA to 106BC** (which relate to evidence of family violence in Family Court proceedings):~~

~~6 Schedule 1AA amended~~

~~In **Schedule 1AA**,—~~

~~(a) insert the Part set out in the Schedule of this Act as the last Part; and~~

~~(b) make all necessary consequential amendments.~~

Part 1
Amendments to Evidence Act 2006

3 Principal Act

This Part amends the Evidence Act 2006.

4 Section 4 amended (Interpretation) 5

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

Family Court proceeding, in **sections 106BA to 106BC**, includes a proceeding in the District Court under—

(a) section 15 of the Family Court Act 1980; or

(b) section 151 of the Oranga Tamariki Act 1989 10

family violence evidence, in **sections 106BA to 106BC**, in relation to a witness, means evidence—

(a) given or to be given by the witness orally in a Family Court proceeding (whether evidence in chief, evidence given in cross-examination, or evidence in re-examination given about matters arising out of evidence 15 given in cross-examination); and

(b) of family violence that the witness experienced as a person against whom the family violence was inflicted; and

(c) that is not a Police video record—

(i) of an interview with the witness; and 20

(ii) made under regulations made under section 201 to be offered by the prosecution as the witness's evidence in chief in a criminal proceeding under section 106; and

(iii) that a Family Court Judge under those regulations orders access to, or disclosure of, for a Family Court proceeding; and 25

(d) that is not the wishes or views of a child or young person ascertained by the court or Judge (at, or apart from, any hearing of any application or proceeding) under any Act or rules of court

5 Section 102 amended (General provisions are subject to provisions for specific situations) 30

After section 102(a), insert:

(aa) **sections 106BA to 106BC** (which relate to witnesses giving family violence evidence in Family Court proceedings):

6 New sections 106BA to 106BC and cross-heading inserted

After section 106B, insert: 35

Giving of family violence evidence by witnesses in Family Court proceedings

106BA Sections 106BB and 106BC apply to witnesses giving family violence evidence in Family Court proceedings

Sections 106BB and 106BC apply to a witness who is to give or is giving family violence evidence in a Family Court proceeding. 5

106BB Giving family violence evidence in Family Court proceedings

(1) A witness in a Family Court proceeding who is to give or is giving family violence evidence is entitled to give evidence in 1 or more alternative ways so that—

(a) the witness gives evidence in either or both of the following ways: 10

(i) while in the courtroom but unable to see 1 or more other persons to whom the evidence relates (for example, another witness, a party or another party to the proceeding, or both):

(ii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere: 15

(b) by use of any appropriate practical and technical means the Judge and any lawyers can see and hear the witness giving evidence, in accordance with any regulations made under section 201:

(c) the parties can see and hear the witness, unless the Judge directs otherwise. 20

(2) A witness who gives evidence of any kind in one way is entitled to give the other parts of their evidence in 1 or more other ways.

(3) Any party intending to call a witness in a Family Court proceeding who will give family violence evidence must provide every other party and the court with a written notice stating the 1 or more ways in which the witness will give their evidence (which may be or include the ordinary way). 25

(4) Unless a Judge permits otherwise, the notice required under **subsection (3)** must be given—

(a) as early as practicable; and

(b) in any event, no later than 28 days before the hearing. 30

(5) If a party has given notice under **subsection (3)** and it is no longer possible or desirable for the witness to give evidence by the means stated in the notice, the party—

(a) may file an amended notice; but

(b) must do so as early as practicable. 35

106BC Direction that family violence evidence be given in ordinary way or different alternative way

(1) Despite **section 106BB**, if a notice given under **section 106BB(3)** states that a witness is to give all or any part of their evidence in an alternative way, the Judge may give a direction that the witness give evidence or that part of their evidence—

(a) in the ordinary way under section 83; or

(b) in a different alternative way under **section 106BB**.

(2) A direction under **subsection (1)** may be made—

(a) on an application made by any other party; or

(b) on the Judge's own initiative.

(3) An application for a direction under **subsection (1)** must be made—

(a) as early as practicable before the hearing; or

(b) at a later time permitted by a Judge.

(4) 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.

(5) When considering whether to give a direction under this section, the Judge must, in addition to any other matter that the Judge considers relevant, have regard to—

(a) whether the interests of justice require a departure from the usual procedure under **section 106BB(1)** in the particular case; and

(b) the matters in section 103(3) and (4).

7 Schedule 1AA amended

In Schedule 1AA,—

(a) insert the Part set out in **Schedule 1** of this Act as the last Part; and

(b) make all necessary consequential amendments.

Part 2
Amendments to Family Court Rules 2002

8 Principal rules

This Part amends the Family Court Rules 2002 (the **principal rules**).

9 New rule 7A inserted (Transitional, savings, and related provisions)

After rule 7, insert:

7A Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

10 Rule 48 amended (Evidence at hearing generally to be by affidavit)

Replace rule 48(1) and (2) with:

General rule: evidence in support of party's case must be given by affidavit

(1) Evidence given in support of a party's case at any hearing of an application must be given by affidavit (*see* section 83(1)(c)(i) of the Evidence Act 2006).

Exception: judicial direction that relevant evidence be given orally

(2) **Subclause (1)** does not apply if a Judge, on their own initiative or on an interlocutory application for the purpose, directs that some or all of the evidence may be given orally.

Exception: proceedings under Oranga Tamariki Act 1989

(3) In proceedings under the Oranga Tamariki Act 1989, the application of this rule is, as provided in rules 18(3) and 239(2), modified by rule 299 (evidence at hearing of certain proceedings generally to be given orally).

Witness's entitlement to give family violence evidence in alternative way

(4) **Sections 106BB and 106BC** of the Evidence Act 2006 apply to a witness who is to give or is giving family violence evidence in a Family Court proceeding (as those terms are defined in section 4(1) of that Act).

11 Rule 54 amended (Ascertaining wishes or views of child or young person)

In rule 54, after "the wishes", insert "or views".

12 Rule 299 amended (Evidence at hearing of certain proceedings generally to be given orally)

Replace rule 299(1) to (3) with:

General rule: for certain applications, evidence must be given orally

(1) Evidence must be given orally at the hearing of proceedings (other than interlocutory proceedings) on an application—

(a) for a care or protection order under section 68 of the Act; or

(b) under section 125 of the Act.

Exception: court order that evidence be given by affidavit or in another form

(2) However, the court may, at any stage of the proceedings, order that certain evidence be given by affidavit or in another form that it directs.

Relationship of rule with other rules and orders

(3) This rule, as provided in rules 18(3) and 239(2), modifies the application of rule 48 (evidence at hearing generally to be by affidavit), but nothing in this rule affects—

(a) an order made under rule 170 (pre-hearing rulings on evidence):

(b) rule 171 (evidence by deposition: District Court Rules 2014 apply):

(c) rule 172 (taking evidence outside New Zealand: District Court Rules 2014 apply).

Witness's entitlement to give family violence evidence in alternative way 5

(4) **Sections 106BB and 106BC** of the Evidence Act 2006 apply to a witness who is to give or is giving family violence evidence in a Family Court proceeding (as those terms are defined in section 4(1) of that Act).

13 New Schedule 1AA inserted

Insert the **Schedule 1AA** set out in **Schedule 2** of this Act as the first schedule to appear after the last rule of the principal rules. 10

Schedule 1
New Part ~~2~~3 inserted into Schedule 1AA of Evidence Act 2006

s 67

Part ~~2~~3
Provisions relating to Evidence (Giving ~~Evidence of~~ Family Violence Evidence in Family Court Proceedings) Amendment Act 2024

~~2~~4 Proceedings affected by ~~the~~ Evidence (Giving ~~Evidence of~~ Family Violence Evidence in Family Court Proceedings) Amendment Act 2024

(1) Amendments made by a provision of the Evidence (Giving ~~Evidence of~~ Family Violence Evidence in Family Court Proceedings) Amendment Act 2024 (except for this clause) apply only to proceedings commenced on or after the commencement of that provision.

(2) Proceedings commenced before that commencement, and not finally determined (including any rehearing or appeal) before that commencement, continue as if those amendments had not been enacted.

Schedule 2
New Schedule 1AA inserted into Family Court Rules 2002

s 13

Schedule 1AA
Transitional, savings, and related provisions

r 7A

Part 1
Provisions relating to Evidence (Giving Family Violence Evidence in Family Court Proceedings) Amendment Act 2024

1 Proceedings affected by Evidence (Giving Family Violence Evidence in Family Court Proceedings) Amendment Act 2024

(1) Amendments made by a provision of the Evidence (Giving Family Violence Evidence in Family Court Proceedings) Amendment Act 2024 (except for this clause) apply only to proceedings commenced on or after the commencement of that provision.

(2) Proceedings commenced before that commencement, and not finally determined (including any rehearing or appeal) before that commencement, continue as if those amendments had not been enacted.

Legislative history

5 March 2024	Introduction (Bill 30–1)
6 November 2024	First reading and referral to Justice Committee

Wellington, New Zealand:
Published under the authority of the House of Representatives—2025