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Review of the Evidence Act 2006

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Law Commission's *Review of the Evidence Act 2006*. This submission has been prepared with assistance from the Law Society's Civil Litigation and Tribunals, Criminal Law and Employment Law Committees.

Section 4 – Interpretation and definition of proceeding and court

By virtue of the definitions of "proceeding" and "court" the rules of evidence in the Evidence Act 2006 (Act), including privilege, do not apply to tribunals, such as the Human Rights Review Tribunal. This can produce awkward situations where recourse has to be had to the common law, and the possibility of different results. It would be preferable to have a comprehensive system.

The Act should also apply expressly to proceedings in the Employment Court, which should be added to the definition of "court" in section 4(1). Currently the Act is only used by analogy in the Employment Court: see the decision in *Maritime Union v TLNZ Ltd* [2007] ERNZ 593 at [14]. Any application of the Act to the Employment Court should not impinge upon the Court's power, under section 189(2) of the Employment Relations Act 2000 (ERA), to "accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not" and the jurisprudence which has developed around this provision.

The rules as to admissibility under the Evidence Act cannot of course apply to the Employment Relations Authority which, under section 157 (1) of the ERA, "has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities", and, under section 160(2), has the power to "accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not". However, rules such as those governing privilege should operate in all tribunals, including the Employment Relations Authority.

Section 10 – Effect of common law rules

The effect of the common law of evidence is unclear, following decisions such as *NZ Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 and *Sheppard Industries Ltd v Specialized Bicycle Components Inc.* [2011] 3 NZLR 620 (CA). There are suggestions in the cases that the common law can modify the provisions of the Act, which seems inconsistent with sections 10 and 12. Clarification of the position would be helpful.

Confusion has also been caused by decisions such as *Todd Pohukura Ltd v Shell Exploration NZ Ltd* (2008) 18 PRNZ 1026, which raised issues of retrospectivity, and developed a differential approach to privilege. Consideration should be given to having a unitary approach.

Section 35 – Previous consistent statements rule

Section 35(2) should allow recent complaint evidence in chief, even if it is not clear that the complainant's evidence will be challenged for inconsistency or recent invention.

Removing this evidence via section 35 has actually prolonged trials by leading to almost constant argument about when the section 35(2) and/or (3) lines have been crossed. Having such evidence come out in re-examination is unfair as it allows too little scope for a defendant to adequately respond. This also creates a disproportionate impact with the jury, because the evidence is isolated and highlighted in a way that would not have been the case if it merely formed part of the narrative during examination in chief.

Section 37 – Veracity rules

Section 37(3)(b) should be clearer as to convictions that show lack of veracity, consistent with the Court of Appeal's decision in *R v Wood* [2006] 3 NZLR 743.

Section 54 – Privilege for communications with legal advisers

Section 54 should extend privilege to third party documents prepared for the dominant purpose of obtaining legal advice. The privilege should also cover communications related to the third party documents and having the same dominant purpose of obtaining legal advice.

The current section 54 extends to communications between a client, or their lawyer, and third parties only if the third party was acting as an agent of the client or lawyer. Section 54 therefore does not extend privilege to third party documents or communications that are created outside the scope of apprehended legal proceedings (litigation privilege), but which are nevertheless tied to the giving or receiving of legal advice. Such a situation can arise in complex commercial matters where, for example, an accountant or consultant may prepare documents for the dominant purpose of the lawyer providing legal advice to the client. Section 54 should therefore be amended to consider the *nature* of the function performed by the third party, rather than whether the third party's relationship with the client or lawyer is one of agency.

The Australian Evidence Act 1995 was amended on 1 January 2008 through the Evidence Amendment Act 2008 (Cth), to reflect the decision of the Full Federal Court of Australia in *Pratt Holdings v Commissioner of Taxation* [2004] FCAFC 122. The amendment extended legal advice privilege to confidential documents which may have been prepared by a person other than the client or lawyer for the dominant purpose of the lawyer providing legal advice to the client. This amendment was supported by the Australian Law Reform Commission and numerous other legal groups.

The Australian approach reflects the realities of modern day legal practice on both sides of the Tasman (particularly in complex cases). It is desirable that rules on privilege are broadly aligned between Australia and New Zealand, given the proliferation of Trans-Tasman businesses and in light of recent efforts to create a coherent framework for Trans-Tasman legal cooperation.

Section 59 – Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists

Section 59(1)(b) should preserve privilege for discussion on the facts/merits between a defendant and a court-appointed psychiatrist/psychologist, or protocols should be devised to ensure the defendant is properly advised that what he or she says could end up in an admissible report.

Section 91 – Editing of inadmissible statements

Section 91(2) should allow editing of statements by agreement of counsel without the judge needing to be involved.

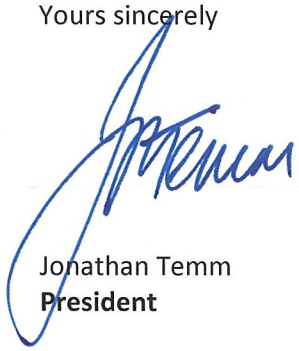
Section 106 – Video record evidence

Section 106(4) and the giving of a witness' video record to the defence do not accord with practice. Police often refuse to provide copies of child complainant recordings. This tends to bring section 106(4)(a) into conflict with (b). This is an area where the Act or Regulations could do with at least minor clarification – for instance, to allow the court to order that copies of video records of children or vulnerable complainants not be given to the defendant, but permitting counsel to have a copy (which must not be given to the defendant).

Conclusion

The Law Society hopes this submission is of assistance to the Law Commission. If you wish to discuss the submission please contact the Civil Litigation and Tribunals Committee convenor, Andrew Beck, through the Committee secretary, Rhyn Visser (phone (04) 463 2962 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely



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