LEGISLATION NOTE

Evidence in Criminal Law: Codification and Reform in the Evidence Act 2006

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I INTRODUCTION

The Evidence Act 2006 ("the Act") has been designed to amalgamate the multitude of disparate evidential rules found in various parts of New Zealand law into one comprehensive set of rules and principles. The Act is intended to operate as the first and primary port of call for all evidentiary issues. In designing the Act, the New Zealand Law Commission ("the Law Commission")[1] aspired to the goal of "reforming the law so as to increase the admissibility of relevant and reliable evidence."[2] The Act has a clear inclusionary emphasis, albeit balanced by the weighty considerations of fairness and efficiency. As is typical for such comprehensive codification and reform, the Act will no doubt take some years to 'bed in' and there will be inevitable 'bumps on the road', some of which may perhaps be identifiable even at this early stage.

The following will examine some of the areas of the Act of interest to criminal practitioners. While a comprehensive analysis of all the Act's provisions cannot be achieved in the available space, this note will touch upon a range of topics with the aim of setting out changes and developments of interest, and drawing the reader's attention to some issues that may arise.

II PRELIMINARY PROVISIONS

Part 1 of the Act sets out provisions of general application. When dealing with a specific provision elsewhere in the Act that provides for the admissibility of certain evidence, one should always have recourse, first and last, to these preliminary provisions.

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1 Authors of the original "Evidence Code" (the culmination of over a decade of research).

2 New Zealand Law Commission *Evidence* Report 55 (August 1999) (NZLC R 55), vol 1, [48].

Section 7 is perhaps the most pivotal provision in the entire Act. It sets out the fundamental rule that *all* relevant evidence (evidence that has a tendency to prove or disprove anything of consequence in a proceeding) is admissible, *unless* a provision in the Act or in any other Act states that the evidence is inadmissible or should be excluded. Section 7 is the "relevance" gateway through which all evidence must pass at the outset, and once through the gate, all other questions of admissibility are to be determined solely by statutory rules. Put simply, all evidence that is relevant will be admissible unless otherwise provided for in an enactment. Common law rules governing the admissibility of evidence no longer have any precedential force.

Other preliminary provisions also strictly limit the role of the common law. Section 10 allows the Act to be interpreted with regard to the common law (subsection (1)(c)), as long as it is consistent with the Act's provisions and its purpose and principles. Section 12 similarly allows common law rules that are consistent with the Act's purpose and principles to be used where the Act has not provided a rule for the admissibility of certain evidence. However, the main function of the common law will, from the commencement of the Act, be illustrative rather than precedential in nature. Cases may be used to illustrate, for example, a set of circumstances that may show a hearsay statement to be reliable, but will not bind the court in its application of the Act.

The point to emphasize here is that the Evidence Act is now the starting point for *all* evidential inquiries. The common law may be of use as an aid to interpretation, or by way of illustration, or perhaps to plug any legislative gaps; however, those are the limits of its application.

Section 8 provides that evidence must be excluded if its probative value is outweighed by its unfairly prejudicial effect or by the risk that the use of the evidence "will needlessly prolong the proceeding". Section 8 deals with the *exclusion* of evidence, meaning that evidence found to be admissible under the Act may still be excluded under section 8, as admissibility and exclusion are two distinct concepts. This highlights the importance of returning to the preliminary part of the Act before assuming that evidence complying with a specific rule or rules in Part 2 or 3 will be able to be used in a proceeding.

III HEARSAY

A hearsay statement is currently defined as an out of court statement offered to prove the truth of its contents. This rule is subject to a plethora of exceptions that have been compiled, added to and adapted over more than a century of common law jurisprudence. The Act rebuilds the law on hearsay from its foundations. Hearsay is defined in section 4 as a statement made

by a person who is not a witness, offered to prove the truth of its contents. "Statement" is defined very broadly, as a spoken or written assertion or non-verbal conduct intended as an assertion. A witness is someone who gives evidence in a proceeding and is able to be cross-examined.

It is immediately evident that in proceedings where a number of witnesses give evidence about a particular occurrence, witness A may give evidence about what witness B said, provided no other provision excludes witness B's statement, because B is a witness and can be cross-examined on what she said, therefore her previous statement is not hearsay. The Law Commission considered that the main rationale for the rule against hearsay is that hearsay evidence cannot be tested by cross-examination,[3] and the new hearsay definition seems to reflect this. A further implication of the new definition of hearsay is that previous statements made by a witness, provided that they are not inadmissible by virtue of any other provision, are admissible *as evidence of the truth of their contents*. Thus, previous inconsistent statements are included in this category and can now be adopted by a jury as evidence, rather than being relevant to the witness's credibility only.

Part 2, subpart 1 of the Act governs the admissibility or otherwise of hearsay evidence. The presumption is that hearsay evidence will be inadmissible: section 17. In terms of exceptions to this rule, the Act reflects recent trends in jurisdictions such as Canada and in the New Zealand Court of Appeal,[4] which suggest that a hearsay statement that is relevant, reliable, and necessary due to witness unavailability would generally be admissible. Section 7 of the Act requires that evidence must be relevant to be admissible. Section 18 provides that a hearsay statement will be admissible if the circumstances in which it was made show it to be reliable, and if it was made by a witness who is unavailable or if undue expense or delay would be caused in procuring the witness's presence at the hearing.

In terms of reliability, it is the surrounding circumstances (including those listed in section 16) in which the statement was made that must provide a "reasonable assurance" that the statement is reliable. While the six common law categories of *res gestae* have not been retained, the fact that "circumstances" is cast in wide and inclusive terms suggests that those exceptions and their case law may continue to provide guidance in this area. The phrase "reasonable assurance" appears to be a test or standard in and of itself, rather than connoting another standard of proof such as balance of probabilities. Reliability in terms of section 18 is a gateway test only, concerned with the circumstances in which a statement was made. This in no way impinges upon the role of the trier of fact in assessing the reliability and substantive accuracy of the statement in determining what weight to give the evidence.

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3 NZLC R 55, vol 1 at [50].

4 See for example *R v Manase* [2001] 2 NZLR 197.

Unavailability is defined in section 16(2), and expands the categories found in the Evidence Act 1908 to include non-compellable witnesses (such as a defendant) and witnesses who are either extremely old *or* extremely young. It should be noted that a witness who is overseas may be able to give their evidence via video link (see sections 103 and 105, discussed below), and so should not be regarded as automatically unavailable.

Business records form their own exception to hearsay in section 19, and do not have to be shown to be reliable, as such evidence is assumed to be inherently reliable. A statement contained in a business record will be admissible if the statement-maker is unavailable, if undue expense or delay would be required to procure him or her, or if the record contains information that the statement-maker cannot reasonably be expected to remember.

Section 22 requires that notice be given of any hearsay to be adduced in a proceeding, in sufficient time to allow the other parties a fair opportunity to respond. Notice must include justifications for the admission of the hearsay evidence (sections 22(2)(d)-(g)). The requirements of the section are onerous, given the fact that there will be no indication whether or not the other party actually objects to the evidence prior to the notice being given.

IV EXPERT OPINIONS

An "expert" is defined in section 4 as a person who has "specialised knowledge or skill based on training, study or experience." This is a broad definition and may potentially expand the category of witness allowed to give an expert opinion on a fact or matter at issue in a proceeding.

Section 25 simplifies the law on expert opinions: the opinion must be of "substantial help" to the fact-finder.[5] Gone are the "ultimate issue" and "common knowledge" rules (by virtue of section 25(2)), though it does not necessarily follow that expert opinions in relation to either of these will pass the substantial help threshold test. It is suggested that any opinion purporting to be that of an expert should be carefully scrutinized as to whether: (a) the person really is an expert; (b) the opinion is made within the expert's field of expertise; and (c) whether the opinion will be of real assistance to the trier of fact.

5 The common law approach may not be far removed from this position: *Diagnostic Medlab Ltd v Auckland District Health Board* (High Court Auckland, 5 December 2006, Asher J).

V THE CO-CONSPIRATORS RULE

In its current form, section 27 removes the co-conspirators exception to the rule that out of court evidence of a defendant is not admissible against a co-defendant. Section 27 simply provides that any statement of the defendant offered by the prosecution is admissible against the defendant *but not against a co-defendant.* While there is currently no re-enactment of the co-conspirator's exception in the Act, this is likely to be the subject of Parliamentary amendment before the commencement of the Act,[6] and so does not need to be addressed further.

VI DEFENDANTS' STATEMENTS

Co-conspirators aside, section 27(1) seems to be worded broadly enough to encompass statements elicited from a defendant during cross-examination.[7] Any statement elicited from a defendant in those circumstances would not be admissible against any co-defendant. Having such evidence admissible against one defendant but not the other would be difficult to explain to a jury in many circumstances, and such a formulation may lead to the unnecessary severance of trials. It is not clear whether that was the intention behind this section, and on its face it is problematic. It may be possible to read down the word "statement" in section 27 to mean "out of court statement", as this would be consistent with the scheme of the Act and the context of section 27, which sits in Part 2, subpart 3 alongside sections 28-30, which govern the admissibility of out-of-court statements made to the police or other persons in authority. However, section 4 expressly defines "statement" much more broadly, thus the more desirable solution is parliamentary amendment.

Given these immediately evident issues of interpretation, the primary effect of section 27 may be overlooked. It is important to emphasize that it is *any* statement of a defendant, not just an admission against interest, that will be admissible against that defendant under the Act. Section 27 represents an express exception to the hearsay, opinion and previous consistent statement rules in respect of defendants' statements.

6 See Evidence Amendment Act 2007. For a more detailed discussion of the changes made by this amendment see the case note on the recent Supreme Court decision of *R v Qui* by Sean Kinsler in this volume.

7 Section 4 provides that "offer evidence" includes the eliciting of evidence by way of cross-examination.

VII UNRELIABLE EVIDENCE AND EVIDENCE GAINED BY OPPRESSION

Sections 28 and 29 relate to statements made by the defendant that may have been made in circumstances that suggest they may be unreliable (section 28), or, notwithstanding any question of reliability, were influenced by oppression (section 29). Both sections are triggered by the defendant or judge raising the issue of reliability or oppression based on an "evidential foundation". Once this occurs the onus is on the prosecution to satisfy the court that exclusion is not necessary in the circumstances. The standard to which the prosecution must discharge this onus is the balance of probabilities under section 28, and beyond reasonable doubt under section 29. This is justified by the fact that conduct that produces an involuntary confession will not be as "outrageous" as conduct amounting to oppression.[8]

VIII CODIFICATION OF *SHAHEED*

Section 30 essentially writes into statutory law the balancing test introduced by the Court of Appeal in *R v Shaheed*[9] to deal with the exclusion of evidence in response to the unlawful obtaining of evidence by State agencies such as the Police.

However, section 30 introduces a number of modifications to current practice, many of which were foreshadowed in the recent decision of the Court of Appeal in *R v Williams*.[10] Where the Judge finds that evidence has been "improperly obtained", the *Shaheed*-type balance is immediately triggered, and factors such as the importance of any right breached, the nature of the impropriety, the quality of the evidence obtained, whether there was urgency, etc are weighed to determine whether exclusion is appropriate. There is no question of whether, for example, a breach of an enactment is nevertheless reasonable in terms of the New Zealand Bill of Rights Act 1990. This is in effect a departure from the idea that "illegality is not the touchstone of unreasonableness" enunciated in *R v Grayson and Taylor*.[11]

The concept of unfairness is included in the definition of "improperly obtained evidence" (section 30(5)). Thus section 30 provides that the balancing test will also apply to cases where evidence has been obtained unfairly, albeit strictly legally.

8 NZLC R 55 v 1, [101].
9 [2002] 2 NZLR 377 (CA).
10 [2007] NZCA 52.
11 [1997] 1 NZLR 399.

Section 30(6) provides for the Chief Justice to issue a practice note containing guidelines for the fair obtaining of evidence by the police. This practice note will replace the Judges' Rules, which currently perform this function. The Act does not provide that the practice note will have the force of law, rather that the judge must take it into account when considering the issue of unfairness.

IX PREVIOUS CONSISTENT STATEMENTS AND THE RECENT COMPLAINT RULE

The previous consistent statements rule, set out in section 35, effectively removes the "recent complaint" rule from the law of evidence. Where under current law evidence of a complaint made at the "first reasonable opportunity" in a sexual case is admissible to bolster the complainant's credibility by showing consistency in his or her evidence,[12] section 35 provides that any previous statement that is consistent with what a witness says in evidence is *not* admissible, subject to two exceptions. The first is found in section 35(2), which allows a previous consistent statement to be offered in response to a challenge to the witness's veracity or accuracy, based on a previous inconsistent statement or a claim of recent invention. The original Evidence Bill lacked the latter qualifications, and had the Act remained in that form (allowing a consistent statement to be used to rebut a challenge to veracity or accuracy), recent complaint evidence may still have been frequently admissible. However, the qualifications added at the Select Committee stage have the effect of severely limiting the admissibility of recent complaint evidence.

The second exception, section 35(3), is problematic. It was designed to ensure that statements used to refresh the memory of a witness, for instance a police officer's notebook entry, would be admissible (refreshing memory is now governed by section 90 of the Act).[13] Subsection (3) provides that a previous consistent statement that is shown in the circumstances to be reliable may be admissible to provide the court with information the witness cannot recall. The requirement for reliability renders section 90(5) entirely unnecessary, as that provision requires that only statements made when the witness's memory was fresh be used to refresh memory, in other words, when the circumstances demonstrate that the statement is reliable.

Secondly, this exception potentially has a far wider application than originally intended. It extends further than simply allowing evidence to be admitted to refresh a witness's memory. If a witness is unable to recall part of their brief, then it appears that their previous consistent statement may

12 See for example *R v Nazif* [1987] 2 NZLR 122 (CA).

13 G Burston & S Verrall "Questioning of Witnesses" in NZ Law Society Intensive *Evidence Act 2006* (June 2006, CLE, Wellington), 118.

be admitted in evidence for its truth to fill gaps in the witness's evidence. However, one may question how a statement *not* made by a forgetful witness on the witness stand can possibly be consistent with anything they said on a previous occasion. The provision appears to be illogical, but if it does not apply in this way, it cannot have any effect.

If not section 35(3), what other section of the Act governs the evidence of a forgetful witness? The previous statement of a witness is no longer hearsay. If a forgetful witness's previous statement is not governed by the previous consistent statements rule, then it seems that sections 7 and 8 are the only impediments to its admission, notwithstanding the fact that any cross-examination of such a witness is unlikely to be fruitful.[14]

X VERACITY AND PROPENSITY

Evidence relevant to a witness's credibility is governed by what are termed the "veracity rules" in the Act. The first point to note is that the "collateral evidence rule", which prohibited any challenge to a witness's answers given in cross-examination on collateral issues, has not been enacted. Instead, the admissibility of this kind of evidence is determined by whether it is *substantially helpful* in determining a person's veracity, namely their "disposition to refrain from lying" (section 37). Once the "substantial helpfulness" hurdle is overcome (with reference to the matters outlined in section 37(3)), it seems that there is no additional rule to limit exploration into collateral issues, even if the witness rejects the evidence (of course this will be subject to sections 7 and 8). The term used in place of veracity in the original Evidence Bill was "truthfulness"; however, it was thought that this might often be misinterpreted to mean factual accuracy.[15] Veracity refers to how a person is disposed to act rather than to their accuracy.

The importance of returning to sections 7 and 8 is elevated in areas where the Act imposes potentially subjective tests such as "substantial helpfulness", in order to ensure a degree of consistency in the application of the Act to veracity evidence.[16]

Similar fact evidence or character evidence has finally been called what it actually is — evidence of propensity — in sections 40 to 43 of the Act. "Propensity" is no longer a dirty word in the law of evidence, and the drafters of the Act clearly accepted that evidence showing that the accused has previously done substantially similar acts to those alleged shows that

14 Under Canadian law this has been recognised in *R v Diu* (2000) 144 CCC (3d) 481, 508 (Ont CA), where the Court considered that the ability to cross-examine a forgetful witness was of no assistance in determining the reliability of a previous statement.

15 Justice & Electoral Committee Report on the Evidence Bill (2006), October 2006, 5.

16 H Cull QC and J Eaton *Veracity and Propensity* in NZ Law Society Intensive *Evidence Act 2006* (June 2006, CLE, Wellington), 74.

the accused has a *propensity* to commit such acts, and is therefore more likely to have committed the acts in issue.

The admissibility of propensity evidence offered by the prosecution about a defendant is governed by section 43. The probative value of the evidence must outweigh its unfairly prejudicial effect in order for it to be admissible. Section 43 provides guidelines to assist in this balancing exercise. The important point to note is that although section 43 includes a "probative — unfair prejudice" balancing test, evidence admitted under this test may still be excluded under section 8. This is because section 43 deals with the *admissibility* of propensity evidence, whereas section 8 allows the court to consider the *exclusion* of otherwise admissible evidence.

Section 40(3)(b) provides that evidence of the sexual experience of a complainant may only be offered pursuant to section 44. Section 44 enacts what is known as the "rape shield rule" (currently contained in section 23A of the Evidence Act 1908), and places very strict limits on the use of evidence of a complainant's sexual experience. Evidence of general sexual reputation is simply inadmissible (section 44(2)). Evidence of the complainant's sexual experience with a person other than the accused will only be admissible where the Judge considers that the evidence is of such relevance that it would be contrary to the interests of justice to exclude it. The effect of section 44 is limited to providing that certain evidence is not inadmissible. It does not provide a pathway for evidence to be admitted that would not otherwise be admitted under the Act (section 44(6)).

XI IDENTIFICATION EVIDENCE

The Act's regime relating to identification evidence (both visual and voice identification) is based on the results of research conducted by the Law Commission into memory and recall.[17] The essential findings of that research suggest that identification evidence is very fragile and prone to inaccuracy. The best way to ensure accuracy is to implement some kind of formal identification procedure as early as possible after a witness reports an offence or relevant act. The research showed that the use of a photomontage is just as effective as a live parade (which are seldom, if ever, used in practice in New Zealand), and accordingly there is no preference for one over the other in section 45, which sets out the requirements for visual identification evidence. Section 45 essentially requires the party adducing the evidence to have completed a "formal procedure" (defined in section 45(3)) with the witness, or have a "good reason" (defined in section 45(4)) for not doing so. The onus is then on the opposing party to show to the balance of probabilities that the evidence is unreliable in order for

17 NZ Law Commission *Evidence: Total Recall? The Reliability of Witness Testimony* Miscellaneous Paper 13, (August 1999, Wellington).

it to be ruled inadmissible. If a formal procedure is not followed and no "good reason" offered, the onus shifts to the party seeking to adduce the evidence to show beyond reasonable doubt that the circumstances in which the identification was made produced a reliable identification.

Section 46 concerns voice identification evidence. The presumption is that such evidence is inadmissible unless it can be shown to be reliable to the balance of probabilities.

Section 45 only applies to the identification of defendants; thus, the identification of any other person whose identification is relevant and probative in a proceeding is governed by sections 7 and 8 only. In contrast the definition of voice identification evidence in section 4 includes the identification of the defendant or any other person connected with the offence in some way.

Careful regard should be had to the definitions of visual and voice identification evidence in section 4, as these definitions have the potential to encompass more evidence than would previously have been thought to fall within these categories.

XII PRIVILEGE AND CONFIDENTIALITY

The privileges codified in the Act provide the holder of the privilege with the power to prevent disclosure in a *proceeding*. The Act's provisions do not affect privilege law outside of court proceedings: section 53.

Section 54 confers an absolute privilege on communications with a legal advisor made in the course of and for the purpose of obtaining "professional legal services" from the legal advisor. Section 56 codifies litigation privilege, and section 57 codifies the "without prejudice" rule in civil settlement/mediation negotiations.

The privilege for communications with ministers of religion, to date provided for in section 31 of the Evidence Amendment Act (No 2) 1980, is re-enacted in section 58. The privilege has been extended beyond communications made for the purpose of making a "confession" to a "minister", to communications made for the purpose of obtaining religious or spiritual advice, benefit or comfort from a person who has the requisite status in a church or other "religious or spiritual community" to give such advice, benefit, or comfort. "Religious or spiritual community" has been left undefined, however, it is clear that the application of this privilege is now potentially very broad.

The Act limits doctor-patient privilege to criminal proceedings. The general discretion to uphold the confidentiality of communications in section 69 is considered sufficient to cover situations where the protection of doctor-patient information is necessary in the civil context.[18]

18 NZLC R 55, v 1, [269].

The Act does not include a privilege for spouses in relation to communications between one another (such a privilege has been recognised to date in section 29 of the Evidence Amendment Act (No 2) 1980). Depending on the circumstances, such a communication may be protected by the general discretion in section 69 (below).

Section 64 enacts a new privilege for informers in respect of information that would disclose or be likely to disclose their identity. An "informer" is a person who has supplied information to an enforcement agency relating to the commission of an offence, where the person would, in the circumstances, reasonably expect that their identity would not be disclosed. Informers have been protected to date by public interest immunity, which will continue to operate alongside the protections of the Act. The privilege against self-incrimination is provided for in sections 60-63. Section 60(4) resolves a long-standing conflict in the common law by providing that the privilege does not apply to body corporates.[19]

Privilege in the Act is limited by section 67. Section 67(1) requires that a privilege *cannot* apply to a communication made for a dishonest or criminal purpose. Section 67(2) provides a judge with the discretion to disallow a privilege in respect of information necessary to enable a defendant to present an effective defence. The disclosure of information under section 67(2) cannot be used against the holder of a privilege, so although section 67(2) essentially means that the privileges provided for in the Act are not absolute, the detrimental effect of the limitation on the principles underlying the concept of privilege will be minimal.

Section 64 of the Act does not confer a privilege per se, but provides that a journalist cannot be compelled to reveal the identity of an informant to whom the journalist has promised confidentiality. Subsection 2 attaches a proviso: a High Court judge may order that such information is compellable if the public interest in doing so outweighs any adverse effects on the informant and on the ability of the news media to access facts.

Both the common law[20] and statute[21] provide judges with the discretion to excuse any witness from disclosing information imparted in confidence, provided that the public interest in upholding the integrity of the confidential relationship outweighs the public interest in the disclosure of the information. Section 69 of the Act, while essentially codifying this discretion, in doing so broadens its potential reach. The rule can apply to *any* witness, not just a person who is actually in the relationship of confidence with the confider. Any witness can be ordered not to disclose the information. Subsections (2) and (3) set out a detailed guide to the exercise of the judge's discretion.

19 See *NZ Apple and Pear Marketing Board v Master and Sons Ltd* [1985] 1 NZLR 191 (CA).

20 *G v R* [1981] 2 NZLR 91; *R v McNicol* [1995] 1 NZLR 576.

21 The Evidence Amendment Act (No 2) 1980, s 35.

XIII ELIGIBILITY AND COMPELLABILITY

The competency of a witness, in other words their ability to give a rational account of past events and understand the nature and consequences of an oath or promise, is no longer required by a specific provision. Section 71 provides that all witnesses are "eligible" to give evidence, including children. The rationale for this lies in the impetus to have as much relevant evidence before the court as possible, and leave the determination of the value of evidence largely in the hands of the fact-finder.

The move to relax the rules governing child testimony is reflected in section 77. Children (and other witnesses) may now be released from the obligation to give evidence under oath or to promise to tell the truth, with the permission of the Judge: section 77(4)(a). Such a witness must be informed of the importance of "not telling lies". These changes were justified by research that suggested that a child's truthfulness or accuracy was not enhanced by making them promise to tell the truth, nor by questioning them about the nature of a promise.[22]

All eligible witnesses are now *compellable* to give evidence (section 71(1)(b)) with a few specific exceptions set out in sections 72-75). Spouses are not included amongst those exceptions, and, being unable to avail themselves of a marital communications privilege, are now compellable to give evidence in any proceeding. The law no longer provides special protection to married people in this regard, which is perhaps a consequence of New Zealand's current social climate and lowering marriage rates. The Act was originally drafted to allow a judge the discretion not to require a person in a "close relationship" with the defendant to give evidence. However, due to an apprehension of definitional difficulties in such a provision, spousal non-compellability was simply removed and no form of replacement was made.

The effect of spouses now being compellable, particularly in domestic violence cases where the spouse is often the key or only witness in a prosecution, is that prosecutions in such cases may now be possible where before there was no available evidence. Furthermore, the burden of deciding whether or not to give evidence is removed from the spouse, and he or she may (in certain cases) avail himself or herself of the alternative ways of giving evidence, which are now much more available.

XIV ALTERNATIVE WAYS OF GIVING EVIDENCE

Part 3, subpart 5 of the Act — "Alternative ways of giving evidence" — replaces the law on "modes of evidence." The effect of sections 102-107

22 NZLC R 55, v1 [352].

is that *all* witnesses in *any* proceeding may now apply to give evidence in an alternative way. This expands both the reach of the Evidence Act 1908 (ss 23C-23E) and the common law.[23] From a practitioner's perspective, the question of whether a witness may struggle to give evidence should be considered in every case. Section 103 provides possible grounds for allowing a witness to give evidence in an alternative way, including the witness's age or maturity, any impairment, trauma or feelings of intimidation, cultural or religious factors, the circumstances of the case, the content of what they will be asked to relate, and, for the first time, practical considerations such as being overseas, or physical inability.

Section 103(3) should be considered when the statement of a witness who is overseas is sought to be admitted as an exception to the hearsay rule (see sections 16 and 18). The witness in question may be able to give their evidence from overseas via video-link, eliminating the need to use a hearsay statement.

Whether alternative methods (for example using a screen, video link, CCTV or video record) are permitted will depend on the exercise of judicial discretion having regard to the need for a fair trial, the views of the witness and the need to minimize the witness's stress and promote their recovery from the alleged offence (section 103(4)). While defendants who choose to give evidence, being "witnesses", are not excluded from these provisions, it is unlikely that a judge will allow a defendant to give evidence in an alternative way except in exceptional circumstances, such as where personal safety is a real concern.[24]

XV JUDICIAL WARNINGS AND DIRECTIONS

Part 3, subpart 6 of the Act — "Corroboration, judicial directions, and judicial warnings" — largely enacts current law and practice in relation to the preferred form and content of judicial directions. Not every kind of direction is dealt with in the Act (for example, the "Papadopolous" direction is not mentioned), and it seems clear that this subpart was not intended to be exhaustive. The subpart does include guidance for directions relating to corroboration, unreliable evidence, alternative ways of giving evidence, lies, children's evidence, identification evidence and delayed complaints. Of these, section 122, dealing with unreliable evidence, is perhaps the most noteworthy. Section 122(2)(e) requires a judge to consider whether to warn a jury of the need for caution in accepting evidence of a defendant's conduct alleged to have occurred more than ten years previously. The target here appears to be historical sexual abuse cases. This is of some concern to prosecutors, given the inherent difficulties that already exist

23 See, for example *R v Accused (CA 32/91)* [1992] 1 NZLR 257; *R v Moke and Lawrence* [1996] 1 NZLR 263.
24 NZLC R 55, v 1 [455].

in prosecuting such cases, and the fact that a lengthy hiatus between an event and its recollection may not necessarily suggest that the quality of the recollection is poor.

XVI CONCLUSION

In the last six months I have had the privilege of witnessing a large number of highly skilled and vastly experienced practitioners give their exegesis of the Act. They have each emphasized different parts of the Act as key, and each have raised unique doubts and uncertainties. What is clear is that it will be some time before the Act becomes part of the common vernacular of the criminal bar. In the intervening period of uncertainty, regard should primarily be had to the principal goal of the Act: to increase the admissibility of relevant and reliable evidence.