

TERMS OF REFERENCE

SECOND STATUTORY REVIEW OF THE EVIDENCE ACT 2006

Section 202 of the Evidence Act 2006 (the Act) requires the Minister of Justice to refer a review of the operation of the Act to the Law Commission by 28 February 2017. The Law Commission must report to the Minister of Justice within two years of the referral. This will be the second statutory review of the Act. The first review of the Act was a technical review that was required to be completed within one year of the referral. This second review will be more comprehensive than the first review, but will not be a first principles review.

The review will include (but not be limited to) the following matters:

1. As required by s 202 of the Act, the Law Commission will consider:
 - a) The operation of the provisions of the Act, taking into account the matters already considered in the first statutory review of the Act;
 - b) Whether those provisions should be retained or repealed; and
 - c) Whether any amendments are necessary or desirable.
2. The review will focus on the operation of the following provisions where, in several cases, Courts have indicated the provision requires particular attention, including:
 - a) Section 26 (conduct of experts): in light of *Lisiate v R* [2013] NZCA 129, (2013) 26 CRNZ 292.
 - b) Section 28 (unreliable statements): in light of *R v Wichman* [2015] NZSC 198.
 - c) Section 30 (improperly obtained evidence): in light of *R v Wichman* [2015] NZSC 198 and *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204 (criminal proceedings) and *Commissioner of Police v Marwood* [2015] NZCA 608 and *Marwood v Commissioner of Police* [2016] NZSC 139 (civil proceedings).
 - d) Section 31 (prosecution may not rely on certain evidence offered by other parties): in light of *Boskell v R* [2014] NZCA 538.
 - e) Section 32 (fact-finder not to be invited to infer guilt from silence before trial): operational issues such as the relationship between s 32 and veracity provisions, and whether s 32 applies to judge alone trials.
 - f) Sections 37 and 38 (veracity): in light of *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612.
 - g) Section 40 (propensity): in light of *Mahomed v R* [2011] NZSC 52 and *Taniwha v R* [2016] NZSC 121.

- h) Sections 44 and 40(3)(b) (sexual experience): in light of *B (SC12/2013) v R* [2013] NZSC 151.
 - i) Section 49 (conviction as evidence in criminal proceedings): in light of *Morton v R* [2016] NZSC 51.
 - j) Section 122 (judicial directions about evidence that may be unreliable): in light of *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 and *L v R* [2015] NZSC 53, [2015] 1 NZLR 658.
3. It will revisit matters identified in the first statutory review that the Law Commission recommended be kept under review at the second statutory review:
 - a) Section 4 (definition of “witness”).
 - b) Sections 10 and 12 (the status of the common law).
 - c) Section 49 (conviction evidence in trials of co-defendants).
 - d) Sections 56 and 57 (termination of privileges).
 - e) Sections 31 and 90 (the relationship between these provisions: co-defendants seeking to offer a defendant’s statement in evidence may seek to “use” it when questioning a witness and s 90(1) may prevent them from doing so).
 4. The review will consider the rules of evidence as they relate to sexual violence and family violence, including, in particular:
 - a) Section 35 (previous consistent statements).
 - b) Section 37 (veracity).
 - c) Section 40 (propensity).
 - d) Section 44 (sexual experience).
 - e) Section 122(2)(e) (judicial directions about evidence which may be unreliable: the alleged conduct of the defendant occurred more than 10 years previously).
 - f) Section 125(2)(b) (judicial directions about children’s evidence: suggestions as to tendencies of children to invent or distort).
 - g) Section 127 (delayed complaints or failure to complain in sexual cases).
 5. The review will consider whether the Evidence Regulations 2007 are comprehensible and fit for purpose, or whether they require review in the future.
 6. The review will consider s 202 (Law Commission periodic review of Act).

The Law Commission will consult with experts, interested parties, and the general public. The Commission will report to the Minister with its recommendations within two years of receiving the reference (February 2019).