Cur Adv Vult

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Changes to the Evidence Act 2006

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THE EVIDENCE AMENDMENT ACT 2016 CAME into force on 8 January 2017. It largely enacts recommendations made by the Law Commission in its 2013 Review of the Evidence Act 2006.

At the third reading, Attorney-General Chris Finlayson stated "this bill is going to reduce unnecessary trauma and better protect victims who become involved in the court processes through no fault of their own."

Three core changes were said to achieve this:

- There is now a rebuttable presumption that child witnesses are entitled to give evidence from behind a screen and with a support person present (ss107 and 79);
- There are new safeguards to prevent video records from getting into the hands of defendants (ss106 and 119); and
- Defendants charged with sexual offences who wish to lead evidence of a complainant's sexual activity with a person other than the defendant (s44) are now required to make a written pre-trial application to do so (s44A), thereby enabling complainants to be better prepared for questioning.

Despite the Attorney-General's intention, these amendments are unlikely to significantly improve the court process for child witnesses and for complainants of sexual offending. In practice it was already rare for the court to decline an application for a child to give evidence in an alternative way. Likewise, the rules around the handling of video records largely mirror current practice between police and defence counsel.

Having s44 issues resolved pre-trial is unlikely to significantly lessen the ordeal of giving evidence for complainants of sexual offending, however, it is a significant procedural change of which defence counsel need take note. The application required by s44A must be made as early as practicable and generally no later than when the case management or trial callover memorandum is filed.

Most of the other changes introduced by the Amendment Act were considered "minor and technical" so did not provide an opportunity for political comment in parliament. I do not propose to traverse them here, save for the changes to s35, the Previous Consistent Statements Rule.

Until this year, s35(1) and (2) stated:

35 Previous consistent statements rule

(1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) or subsection (3) apples to the statement.

(2) A previous statement of a witness that is consistent with the witness's evidence is admissible to the extent that the statement is necessary to respond to a challenge to the witness's veracity or accuracy, based on the witness or on a claim of recent invention on the part of the witness.

Section 35 proved problematic from the outset, particularly with regards to complaint evidence in sexual cases.

Case law has drawn somewhat artificial distinctions between a complainant giving evidence that, after the alleged offence, he or she "spoke to someone" and he or she "told someone what had happened". The former was admissible as it did not contain an "assertion of any matter" and therefore was not a "statement" (s4), whereas the latter was inadmissible unless it satisfied s35(2). This ignored the obvious inference that "speaking to someone" involved telling them what happened.

Once s35(2) had been engaged, there was uncertainty about what amounted to "a challenge to the witness's veracity or accuracy ... based on a claim of recent invention". The Supreme Court held that, in sexual cases, the defences that the alleged act did not happen or was consensual almost always amounted to a challenge based on a claim of invention. The Supreme Court also held that the statement need not precede the alleged "invention", thus the word "recent" was made redundant.

There was also uncertainty about when a "challenge" is made, affecting whether complaint evidence could be led in examination in chief (if there was a pre-trial indication of the defence) or only following cross-examination.

The Law Commission proposed two options: redrafting s35 or to repealing it so that previous consistent statements would be governed by ss7 and 8. It favoured the latter, but the Legislature redrafted s35(2):

(2) A previous statement of a witness that is consistent with the witness's evidence is admissible if the statment —

a. responds to a challenge that will be or has been made to the Continued on page 3...

OTAGO NEW ZEALAND LAW SOCIETY
NZLS EST 1869

From the President...

We've began the year with a strategic planning day and we were fortunate to have New Zealand Law Society Executive Director Christine Grice and General Manager Finance Robin Turner join us for the meeting.

It was most productive and we are working on the goals we want to achieve this year. We had dinner afterwards and were joined by Associate High Court Judge Rob Osborne.

We have two bar dinners planned for the year and would encourage people to make the most of these opportunities for us to show how collegial we can be. I would also encourage employers to fund, or at least subsidise, the attendance of employed solicitors at these events as the benefits are very real.

From the Faculty

Academic promotions

Congratulations to Faculty of Law staff whose academic promotions took effect on 1 February 2017. **Margaret Briggs** and Shelley Griffiths have been promoted to Professor, **Barry Allan** has been promoted to Associate Professor and **Marcelo Rodriguez Ferrere** has been promoted to Senior Lecturer.

Public lecture

You are invited to hear the international criminal and humanitarian law practitioner, Susan Lamb, talk on: **What are the prospects for, and barriers to, accountability for serious international crimes committed during the Syrian conflict?**

Wednesday, 15 March, 5.30pm

Moot Court, Lvl 10, Richardson Building, University of Otago

More details are available on our website: *http://www.otago.ac.nz/law/news/events/*

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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.

Paragraph (a) largely repeats the former version of subs (2). It deletes the redundant word "recent". The words "a challenge will be or has been made" clarify that a previous consistent statement can be led in examination in chief. However, this does not remove the problem of the prosecution incorrectly anticipating a defence. The Law Commission's recommendation of a notice provision requiring s35 issues to be determined pre-trial was not followed. The deletion of the word "necessary" in s35(2) may lead to previous consistent statements being more readily admissible.

Paragraph (b) is intended to allow in res gestae. Paragraph (c) removes any need for the artificial distinction referred to above. However, the "mere fact that a complaint has been made" may require interpretation.

Although the amendments are an attempt at clarification, s35 will likely continue to generate appeals.