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Submission to the Justice and Electoral Select Committee on the Evidence Bill

The National Council of Women of New Zealand (NCWNZ) is an umbrella organisation representing 40 nationally organised societies. It has 33 branches throughout the country attended by representatives of those societies and some 150 other societies. The Council's function is to serve women, the family and the community at local, national and international levels through research, study, discussion and action.

Ten specialist Standing Committees, working through various forms of correspondence, study issues relating to their particular subjects and, with input where possible from the general membership, prepare submissions on legislation and discussion documents. The Parliamentary Watch Committee monitors changes to legislation and makes oral submissions before the Select Committees of Parliament.

This submission has been prepared by the Justice and Law Reform Standing Committee, following consultation with the wider membership.

NCWNZ has policy from as early as 1925 in relation to the giving of evidence, particularly by children, and has on record many previous submissions made on justice and law reforms. NCWNZ will continue to monitor and make submissions on legislation where women, men and children are involved.

The Law Commission has spent many years reviewing the terms of reference given by the Minister of Justice to draw together the common law and the statutory provisions relating to evidence into one comprehensive scheme. This Bill will replace most of the existing evidence law on the admissibility and use of evidence in court proceedings.

General Comments

The general expression of membership is in favour of the principles, and defining the word "evidence" as meaning the facts, the testimony and the documents which may *legally* be placed before the Court in order to prove or disprove the allegations at issue between the parties.

Part 1

Purpose, principles, and matters of general application

Clause 6: Purpose

The members who replied with comments on these principles were fully in favour of the principles:

- providing for facts to be established by the application of logical rules; and
- promoting fairness to parties and witnesses; and
- protecting rights of confidentiality and other important public interests; and
- avoiding unjustifiable expense and delay.



Clause 7: Fundamental principle that relevant evidence admissible

NCWNZ supports the principle of relevance, particularly that unless otherwise provided, only relevant evidence will be admitted. Inadmissible evidence unless, there is a policy reason, will be excluded.

Clause 8: General exclusion

Members frequently reported of cases being delayed unnecessarily and support a process that is accessible and avoids undue delays. NCWNZ therefore supports Clause 8, enabling the Judge to exclude evidence if its probative value is outweighed by the risk that the evidence will

- have an unfair prejudicial effect on the outcome or the proceedings; or
- needlessly prolong the proceedings.

Part 2

Admissibility, rules, privilege and confidentiality.

Subpart 2: Statements of opinions and expert evidence

Clause 22: Admissibility of expert opinion evidence

This clause makes opinions expressed by experts as part of expert evidence admissible if the Judge or jury is likely to obtain substantial help. It also clarifies that certain common law rules against the admission of expert evidence cease to apply. These are the rules that bar an expert from giving evidence on the ultimate issue to be decided by Judge or jury, and giving evidence on matters of common knowledge.

Some members responded that a wide ranging overhaul of the evidence laws would have the effect of imposing strict limits on the opinions psychologists can offer in child sex cases. It raised questions of the decision to restrict expert evidence in regard to safety of the Peter Ellis abuse convictions, and was welcomed by his lawyer Judith Kerr, QC.

Part 2

Admissibility, rules, privilege and confidentiality

Subpart 3: Defendants' statements, improperly obtained evidence etc

Clause 26: Improperly obtained evidence

It has been observed over the years that even if the prosecution in a criminal case has quite clear and definite evidence of guilt, the evidence may nevertheless be rendered inadmissible if it can be shown that the police made errors of process in collecting evidence, such as not following the rules governing their work or behaviour. This is a concern for it can allow a person who actually committed a serious crime to go free. This is not natural justice and brings the justice system into disrepute.

It is pleasing to see therefore that this Bill gives Judges a good level of discretion to determine the admissibility of such evidence by applying a balancing process in which they consider the appropriate weight to be given the particular impropriety against the weight to be given to the need to maintain an effective and credible justice system. Thus minor errors in the investigation process should not result in the automatic failure of the prosecution's case. The consequences of such errors are a police disciplinary matter only.



Part 2
Admissibility, rules, privilege and confidentiality
Sub part 5: Truthfulness and Propensity

Clause 33: Truthfulness rules

The membership supports this clause that precludes evidence about a person's truthfulness being given in criminal and civil proceedings unless the Judge decides that the evidence is substantially helpful.

Clause 35: Evidence of co-defendants' truthfulness

Likewise NCWNZ supports this clause that prevents a party from challenging the truthfulness of the party's own witness unless the witness is declared hostile by the Judge.

In a previous submission NCWNZ defined honesty as "To be truthful, one must be able to understand the difference between right and wrong; to tell the whole truth, consistently telling the truth, and having a genuine desire to arrive at the truth and valuing truth itself".

Clause 36: Propensity rule

NCWNZ supports this clause, with the exceptions stated in *Clauses 37 to 40*, as it sets out the general rule that propensity evidence (that is, evidence that a person has a tendency to act in a particular way or to have a particular state of mind) may be given in civil and criminal cases.

Part 3
Trial Process
Subpart 2: Oaths and affirmations

Clause 73: Witnesses to give evidence on oath or affirmation

This Clause requires a witness of, or over, the age of 12 years to take an oath or make an affirmation before giving evidence, and a witness who is under 12 years to make a promise to tell the truth before giving evidence.

NCWNZ has policy, passed in 1931, "That no child be required to give evidence on oath". We are concerned that this clause is different from the recommendation outlined by the Law Commission in its report, *Evidence*, which required a Judge to tell a child under the age of 12 years about the importance of telling the truth and not telling lies, rather than requiring a child of this age to make a promise to tell the truth.

Clause 74: Interpreters to act on oath or affirmation

Members of NCWNZ support the requirement that a person acting as an interpreter should take an oath or make an affirmation before acting as an interpreter, or providing communication assistance.

Additional matters

Members of NCWNZ on previous occasions have made submissions on law reforms and we wish to quote on how members expressed an opinion of a useful indicator of character. Members felt that a person's character can often be a useful indicator of how a person will act in a given situation. The tendency to make the most of a situation becomes a challenge, be it honest or dishonest. Dishonest behaviour can often be excused by arguments. On the other hand, none of us could guarantee how we might act if we were frightened or in a tight corner. A person's



character can alter when under pressure and religious conviction, or lack of it, can be a powerful force in any situation. Character shapes behaviour.

Conclusion

Taking into account all those answering, the general consensus has been approval. With attention to the relevance of the Bill of Human Rights and other Codes, Acts and Regulations, National Council of Women of New Zealand will be ever watchful of any future legislation.

Christine Low
National President

Joan Howse
Convener, Justice and Law Reform Committee