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February 2013, Wellington, New Zealand | REPORT 127

THE 2013 REVIEW OF THE EVIDENCE ACT 2006





THE 2013 REVIEW OF THE EVIDENCE ACT 2006

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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11 March 2013

Hon Judith Collins
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

NZLC R127 – 2013 REVIEW OF THE EVIDENCE ACT 2006

I am pleased to submit to you Law Commission Report 127, The 2013 Review of the Evidence Act 2006, which we submit under s 16 of the Law Commission Act 1985.

With best wishes.

Yours sincerely



Sir Grant Hammond
President

Enc.

President

Hon Sir Grant Hammond KNZM

Commissioners

Judge Peter Boshier

Dr Geoff McLay

Hon Dr Wayne Mapp QSO

Foreword

The Law Commission has been engaged for close to a quarter of a century with reform of the law of evidence in New Zealand.

In August 1989 it was asked to review the entirety of this body of law in as clear, simple and accessible form as could be advanced in this country. There were a respectable number of doubters as to the prospects of the Commission's preference for an Evidence Code. Nevertheless the work was advanced and resulted in the enactment of the Evidence Act 2006. That statute contained some progressive advances – such as that relating to propensity evidence – which were considered to be contentious at that time. But as a safeguard, and because no statute of this kind can ever be complete and perfect on enactment, Parliament made provision for the operation of the Act to be reviewed by the Commission at successive five yearly intervals.

In February 2012 the Minister of Justice, the Hon Judith Collins, exercised her powers under s 202 of the Act to trigger the first of these five yearly reviews. The review has been accomplished within 1 year of the Commission being given this reference as required by the Act, and will be tabled in Parliament as a Report of the Commission.

As to the form of this review, the Evidence Act does not contemplate a first principles review. Section 202 provides for an operational review as to whether the Act is working as was contemplated by Parliament. At an early stage the Commission determined that rather than picking through matters which might be thought to need attention, or which have been drawn to our notice, it was best to undertake the task systematically. We have tried to describe how the law has got to its present state so that there is in existence one document setting out clearly the evolution, interpretation, and operational readiness of the law of evidence. In taking that course we hope that the report will thereby not only fulfil its task of reporting to the Minister, but be useful to the profession, the judiciary, and policy-makers for future reference as well.

As to the content of the review, we are gratified that there is widespread acceptance that the original evidence project was a thoroughly important and worthwhile initiative in New Zealand law. It has overwhelmingly met the objectives of its proposers and the needs of users. The Evidence Act is the first port of call in the practice of evidence law in New Zealand.

We have recommended some changes, which are in two categories.

First, rather like the tune up afforded to an automotive engine on a periodic check, there are some things that can be made to improve the performance of the Act. Those are relatively straightforward. We are particularly grateful to submitters for drawing them to our attention.

Second, as to major matters, happily there is only one. After a good deal of consultation and consideration we have recommended that s 35(1) and (2) of the Act (which deals with prior consistent statements) be repealed. The section has proved difficult and contentious in practice, even with the assistance of several appeals to the Supreme Court of New Zealand. We have taken the view that the problems which this section has sought to deal with can be adequately and more simply dealt with by the general admissibility precepts in the Act (ss 7 and 8).

The legal and policy advisors who worked with the President on this reference are Allison Bennett, Tania Chin, Susan Hall, Sophie Klinger and Mark Wright.



Grant Hammond
President



Acknowledgements

We are grateful to all the people and organisations that provided input during this review. This includes submitters, the judiciary and academic commentators that we approached for comment.

We particularly wish to acknowledge the contribution of members of our Evidence Act advisory group. The project has greatly benefited from the group's generosity in giving their time and expertise to assist with the review, although the views and recommendations in this report remain those of the Law Commission.

Members of the advisory group were:

- Andrew Beck, New Zealand Law Society
- Dr Mathew Downs, Crown Law Office
- Brendan Horsley, Public Defence Service
- Professor Richard Mahoney, University of Otago
- Associate Professor Elisabeth McDonald, Victoria University of Wellington
- Chelly Walton, Ministry of Justice.

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Chapter 1

Initial review under section 202: background, purpose and guiding principles

THE EVIDENCE ACT 2006

- 1.1 In August 1989 the Law Commission was asked by the then Minister of Justice, the Hon Geoffrey Palmer (as he then was), to review the laws of evidence. The purpose of that review was “[t]o make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes”.¹
- 1.2 At that time, the law of evidence was largely found in judicial decisions, which were supplemented by statutory provisions, many of which were not found in the Evidence Act 1908 itself. As was noted later by the Law Commission, this made the law of evidence “difficult to access, at times uncertain and lacking consistency.”²
- 1.3 Ten years after receiving the reference, in August 1999, the Law Commission delivered its final report on an Evidence Code to the Minister of Justice. The President of the Law Commission at that time, the Hon Justice Baragwanath, described the report as “the culmination of a decade of research and consultation with special interest groups and individuals.”³ During that decade, the Law Commission released numerous discussion papers, miscellaneous papers, and other research papers. It consulted widely with the

1 Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at xviii.

2 At 2.

3 At xv.

judiciary, practitioners, academics and the community. It was one of the most extensive law reform exercises conducted in New Zealand legal history.

- 1.4 The Evidence Code recommended by the Law Commission was intended to draw together the common law and statutory provisions relating to evidence in one comprehensive scheme. The Law Commission's intention was that there be a fundamental change in approach, with the Code being the first point of call for judges and practitioners.⁴ As the Chair of the Select Committee that considered the Evidence Bill said:⁵

One of the beauties of the Evidence Bill, when it becomes law, is that the busy lawyer in the District Court, particularly the duty solicitor—a position reasonably recently evolved—and the overworked legal aid lawyers will have in one lengthy, but hopefully clear, statute the rules of evidence that they can expect to be applied and can expect the judge to recognise in the pressure of those very busy courts.

- 1.5 In terms of the substance of its Evidence Code, the Law Commission took an approach that emphasised:⁶

... facilitating the admission of relevant and reliable evidence A significant consequence of this emphasis is that the Code contains very few rules that limit the use of particular kinds or items of evidence. The Code relies on the common sense of the triers of fact and the wisdom of the judiciary who will give them guidance on how to approach the evidence in a given case. The Code does not therefore prohibit the admission of relevant evidence except when such exclusion is warranted on policy grounds; nor does the Code limit the use of admissible evidence, except where not to do so would be contrary to the purpose of the Code.

- 1.6 The Evidence Bill introduced by the Government in 2005 largely reflected the recommendations of the Law Commission. The Bill was considered by a subcommittee of the Justice and Electoral Committee, which made a number of changes. However, the underlying legislative purpose remained the same: the simplification and drawing together of the laws of evidence in one place. Its enactment brought about what one Member of Parliament described as “a new dawn in the law of evidence”.⁷ A senior judge commenting extra-judicially has noted that the Act:⁸

... replaced the comfortably familiar Evidence Act 1908, and decades of accumulated common law. Students, lawyers and judges had to come to grips with a piece of legislation that required a new way of thinking. They would receive only limited assistance from what had gone before.

4 At 3.

5 (23 November 2006) 635 NZPD 6802.

6 Law Commission *Evidence: Volume 1*, above n 1, at 3.

7 (21 November 2006) 635 NZPD 6638.

8 Helen Winkelmann “Foreword” in Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) v at v.

INITIAL REVIEW UNDER SECTION 202

1.7 There were some concerns about the sea change proposed in the Evidence Bill. Even some of the Bill's supporters harboured concerns about aspects of the reforms. The Ministry of Justice noted in its departmental report to the Select Committee that the New Zealand Law Society, for example, saw the advantages of clarity, simplicity and accessibility of having all evidence laws in one place and supported the simplification of overly technical rules. However, it did not support fundamental changes to the current law in some areas.⁹

1.8 Perhaps in response to these concerns about how the new legislative scheme would “bed in”, a provision requiring periodic review of the Act was included. Section 202 reads:

202 Periodic review of operation of Act

- (1) The Minister must, as soon as practicable after 1 December 2011 or any later date set by the Minister by notice in the Gazette, and on at least 1 occasion during each 5-year period after that date, refer to the Law Commission for consideration the following matters:
 - (a) the operation of the provisions of this Act since the date of the commencement of this section or the last consideration of those provisions by the Law Commission, as the case requires:
 - (b) whether those provisions should be retained or repealed:
 - (c) if they should be retained, whether any amendments to this Act are necessary or desirable.
- (2) The Law Commission must report on those matters to the Minister within 1 year of the date on which the reference occurs.
- (3) The Minister –
 - (a) may not set a date later than 1 December 2011 for the commencement of the initial periodic review of this Act under subsection (1) unless the Minister is satisfied that, because of the limited number of cases concerning the provisions of this Act decided by the superior courts of New Zealand or for any other reason, it is appropriate to defer the date of the initial periodic review; and
 - (b) must not set a date later than 1 December 2014 under subsection (1).

1.9 The inclusion of this review mechanism by the Select Committee was explained at a later stage in the parliamentary process by Christopher Finlayson MP (as he was then):¹⁰

An important issue arose in the select committee. The issue was how, once the legislation has been passed, we will ensure that it is kept up to date. That is an important factor,

⁹ Ministry of Justice *Evidence Bill: General Comments and Miscellaneous Issues: Departmental Report for the Justice and Electoral Committee* (June 2006) at 1.

¹⁰ (23 November 2006) 635 NZPD 6638.

bearing in mind the legislative history of the Evidence Act, which was first enacted in 1908 then amended three or four times. The last real substantial amendment to the Evidence Act 1908 was the Evidence Amendment Act (No 2) of 1980. So periodic review of this kind of legislation raises important questions. Given the huge amount of work that has been done by the Law Commission over the years and, more recently, the excellent work by the ministry, it is important to ensure that the new legislation is kept up to date. On the other hand, we do not want to see regular amendments as soon as there has been a case on a particular aspect. In other words, the legislation will need to have time to settle down.

...

I commend this bill to the Committee as a good model for post-legislative review. I am not saying that it should be [in] all legislation, but, certainly, with this kind of legislation we do not want those finicky amendments that sometimes bedevil legislation. It will be good for the body that authored the reports that gave rise to the legislation to look at this legislation after it has been in operation for 5 years, and in a principled way go through the various provisions to see whether the sorts of innovations we have been talking about this afternoon actually work and, if they do not, what changes need to be made. So I simply say that it is a good and workable clause, and it will enable this very important area of the law to be kept up to date, not in a piecemeal or an episodic fashion but in a principled way.

- 1.10 In accordance with s 202, the Minister of Justice wrote to the Law Commission on 28 February 2012 to refer the matters outlined in s 202(1) for review. This report responds to that reference.

PREVIOUS LAW COMMISSION ADVICE ON THE EVIDENCE ACT 2006

- 1.11 The Law Commission has been monitoring the Act since it came into force. During the past five years, we have provided several pieces of advice to the Minister of Justice on the operation of various aspects of the Act.
- 1.12 In 2007, following public disquiet at the non-disclosure to the jury of previous convictions of two former police officers tried and acquitted of sexual offending, the Law Commission was asked to review the existing law relating to the disclosure to criminal courts of evidence of defendants' previous convictions, similar offending and bad character.¹¹

11 The terms of reference for that review were:

“The Commission is to review the existing law relating to the extent to which the court in a criminal trial is made aware of:

- (a) The prior convictions of the accused;
- (b) Any other allegations of similar offending by the accused;
- (c) Any other evidence of the accused's bad character;

In the course of its review, the Commission is to consider:

- (a) The effect of any change to the existing law brought about by the enactment of the Evidence Act 2006;
- (b) The law in other comparable jurisdictions including the United Kingdom, Australia and Canada. and make any proposals for changes that are necessary and desirable.”

- 1.13 That reference was given before the Evidence Act came into force and therefore the use of the term “existing law” in the terms of reference was to the pre-Act common law. However, the terms of reference also clearly asked the Law Commission to consider the effect that the Act would have in relation to the matters covered in the reference.
- 1.14 The Law Commission issued a final report in response to this reference in May 2008.¹² The Law Commission concluded that, in view of the short period of time that the Evidence Act had been in force during its review, it was not convinced that there was any problem with the way the Act dealt with the issues. However, the Law Commission thought that it was premature to conclude that no change was necessary. It therefore proposed that it would continue to monitor the situation closely and report back to the Government by 28 February 2010.¹³
- 1.15 Accordingly, further advice was provided to the Minister of Justice in 2010 on the operation of the propensity and veracity provisions of the Act. The Law Commission’s view at that time was that the Act was generally working well, although there were some instances of pre-Act approaches being adopted. The Law Commission recommended, again, that the matter be kept under review and that any amendments that might be necessary could be included in our first report under s 202.¹⁴ This advice and the Law Commission’s 2008 report are discussed in further detail below in the chapters of this report addressing the veracity and propensity provisions of the Act.
- 1.16 The Law Commission also provided a stand-alone piece of advice to the Minister of Justice on s 35 of the Act and previous consistent statements.¹⁵ In *R v Barlien*, the Court of Appeal had drawn attention to what it regarded as significant deficiencies in the present formulation of s 35 of the Evidence Act 2006, and referred the matter to the Law Commission and the Ministry of Justice for consideration.¹⁶ This advice is discussed further below in relation to our consideration of s 35 of the Act.
- 1.17 Copies of the unpublished advice on the veracity and propensity provisions and s 35 are contained in Appendices 2 and 3 to this report.

12 Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008).

13 At 10.

14 Letter from Geoffrey Palmer (President of the Law Commission) to Simon Power (Minister Responsible for the Law Commission) regarding the Evidence Act review and the operation of the veracity and propensity provisions (1 April 2010).

15 Letter from Warren Young (Deputy President) and Val Sim (Commissioner) to Simon Power (then Minister of Justice) regarding *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170 and s 35 of the Evidence Act 2006 (8 July 2009).

16 *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170 at [64]–[73].

OUR PROCESS AND CONSULTATION

- 1.18 Given that this review is not in the nature of a “first principles” review (our approach is discussed further below), and the relatively short period for review following receipt of the reference, we have not followed our usual process of releasing an issues paper after initial consultation, followed by further focused consultation and receipt of public submissions, culminating in a final report. Instead, given the technical and specialised nature of the Act, we have undertaken more targeted consultation.
- 1.19 As the Law Commission has been monitoring the operation of the Act and responses to it since its coming into force, we had identified some key areas that would require our attention in this review. In 2011 we began to consult on those with the authors of one of the leading texts on the Act.¹⁷
- 1.20 Upon receipt of the reference from the Minister, we contacted the Heads of Bench to seek feedback on any impressions or concerns that the judiciary might have with respect to the operation of the Act. The Law Commission has subsequently been in correspondence with the judiciary’s Evidence Act Committee (which was established prior to the commencement of this review to deal with Evidence Act issues and cases of significance).
- 1.21 The Law Commission released a press release in April 2012 inviting comment and feedback on the operation of the Act from the public. We invited public submissions through our website. We wrote to the New Zealand Law Society, the Auckland District Law Society, and the New Zealand Bar Association at this time specifically inviting their input. We also invited comment from and met with the Crown Law Office and the Ministry of Justice to discuss their respective views on how the Act has “bedded in” and is operating on a day to day basis.
- 1.22 In addition to this targeted consultation process, we considered that it would be appropriate to establish an advisory group comprised of key stakeholders and persons with particular expertise in the Act. This group involved representatives of the Ministry of Justice, the Crown Law Office, the Public Defence Service, the New Zealand Law Society and academia. The Criminal Bar Association was also invited to nominate a representative to participate on the advisory group but did not do so. As our review has progressed, we sent initial drafts of our thinking on particular areas of the Act to this group for their comment and suggestions.
- 1.23 We are very grateful to all who provided input, advice and assistance throughout our review. In particular, we acknowledge the contribution of the advisory group who gave generously of their time at a very busy period of the year to read and comment on papers. They also attended a day-long meeting to discuss issues.

¹⁷ Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010).

SUBMISSIONS AND FEEDBACK

- 1.24 We received a total of 19 submissions. These are listed in Appendix 1 to this report.
- 1.25 Overall, the feedback we received about the operation of the Act was positive. Three submissions specifically made the point that the Act is generally working well and is not in need of major legislative amendment. This accords with the view expressed by one judicial commentator speaking extra-judicially in 2008:¹⁸
- It may be unfashionable to compliment change, but I am of the view that the Evidence Act ("Act") is working pretty well. I have been encouraged by the fact that some have read it, and generally arguments are sourced in its terms rather than those dated cases of the early 2000s. Mostly, the words of the Act are clear, and promote sensible debate [O]verall I consider it is a positive development.
- 1.26 It is a view that was confirmed in early 2012 by Scott Optican providing comment in an article on the Law Commission's upcoming review under s 202:¹⁹
- I think on the whole the Act is working reasonably well and as intended as an aggregate matter. It was a very carefully thought-out piece of legislation produced after many years. You would expect it to operate coherently.
- 1.27 Generally, submissions were focused on particular issues that are perceived to have posed difficulties, or which have been the subject of attention from the appellate courts. Of these issues, we consider that only a small number can be described as causing significant problems in the day to day application of the Act.
- 1.28 There appears to be widespread agreement amongst commentators that the most problematic provision is previous consistent statements (s 35). That is certainly the issue that has generated the most case law at Court of Appeal and Supreme Court level.
- 1.29 The other main issues of significance identified by commentators and submitters related to the propensity provisions and the privilege for settlement negotiations or mediation. We consider that the remainder of the issues identified are relatively confined issues, the majority of which can be described as technical in nature and do not appear to warrant urgent legislative intervention.

18 Simon France "Hearsay" (paper presented to the New Zealand Law Society Criminal Law Symposium, Wellington, November 2008).

19 Catriona MacLennan "Law Commission will probably be selective in its review of the Evidence Act" *Law News* (New Zealand, 11 May 2012) at 1.

OUR APPROACH

- 1.30 We have taken the view that, given the emphasis of s 202 on the “operation” of the provisions of the Act and the reasons for the inclusion of s 202 in the Act, what is required by this review is a focus on how the Act is being applied and whether it is working as intended. We do not consider this to be a first principles review.
- 1.31 Nor do we consider that it is appropriate for the Law Commission to use the review as an opportunity to revisit policy decisions that were taken by the government when it introduced its Evidence Bill or those decisions made by Parliament throughout the legislative process. There were a number of places where the Law Commission’s Code was changed along the way. Where the legislative intent is clear and the Act is working as intended, we have not recommended change.
- 1.32 We have recommended legislative change when it is clear that the Act is not working as intended or there is a real problem with how it is operating, and it appears there is no room for the courts to correct the approach. In some instances we have recommended small technical amendments to clarify or tidy up a provision. In our 2010 advice to the government on the veracity and propensity provisions we said:²⁰
- As one would expect, the Courts are continuing to refine, and in some instances self-correct, their early interpretations of the provisions. We consider that opportunity ought to be allowed for this process to continue. Consequently, although the operation of this legislation has not been perfect, we think it remains possible that any wrinkles will be ironed out over time.
- 1.33 This is the approach we have continued to apply in our review under s 202.
- 1.34 The other point of note in relation to s 202 is that it is a mechanism providing for ongoing periodic review of the Act. We have been very conscious of the fact that the Act has only been in force for a little over five years. In some areas, there is little or no case law to date. For this reason, we have been cautious about intervening before the approach that will be taken is clear. This is not the final or only opportunity to recommend amendment. In saying this, it is clear in some areas (s 35 being the most obvious) that intervention is required.

MATTERS NOT CONSIDERED IN THIS REPORT

- 1.35 In the course of this review, we received various submissions asking us to consider matters we considered were outside of its scope. Although not

²⁰ Letter from Geoffrey Palmer (President of the Law Commission) to Simon Power (Minister Responsible for the Law Commission), above n 14, at 3.

canvassed in this report, these matters could merit further consideration in an appropriate context.

Employment Court and arbitration proceedings

- 1.36 We received submissions suggesting that the Act should be extended to apply to the Employment Court and arbitration proceedings, and the privilege provisions extended to all tribunals. The evidence that may be considered by tribunals and arbitrators is a matter that goes to the heart of how specialist courts and tribunals should operate, and the fundamental nature of arbitration itself (founded in the contractual agreement between parties). Consideration of whether the Act should be extended to tribunals and arbitration should take place in a setting that considers whether this is appropriate in light of the nature of the specialist courts, tribunals and arbitration, rather than as an ad hoc consideration as part of this review.²¹

Expert evidence

- 1.37 We were asked to consider whether the process for giving expert evidence should be changed. Issues with the current way expert evidence is adduced in court was raised in a recent newspaper article.²² Among other matters, the article raises questions about the impartiality of experts, the so-called “CSI effect” and the effectiveness of presenting expert evidence in an adversarial manner. These are interesting questions. Ultimately, however, they involve substantive policy issues of whether there should be a new approach to presenting expert evidence in court, rather than an assessment of whether the current expert opinion provisions are working as intended.

Right to silence

- 1.38 An editorial in the New Zealand Law Journal noted that two prominent cases have brought the issue of the “right to silence” into the spotlight.²³ The editorial went on to say, “[t]his would be a matter that it would be proper for the Law Commission to consider as part of its review of the Evidence Act 2006.”²⁴
- 1.39 The right to silence is often characterised as an overarching right that applies across a number of contexts. There are a number of provisions that relate to the “right to silence” under the Act, including s 32 (which provides that the fact-finder cannot be invited to infer guilt from a defendant’s silence before trial); s 33 (which provides that only the defendant, defendant’s counsel and

21 For our preliminary view on evidence in tribunals, see Law Commission *Tribunal Reform* (NZLC SP20, 2008).

22 Nikki McDonald “How effective are expert witnesses?” *The Dominion Post* (online ed, Wellington, 18 December 2012).

23 Bernard Robertson “The right to silence” [2012] NZLJ 221.

24 At 221.

the judge may comment on the fact that the defendant did not give evidence at trial); and s 60 (which relates to the privilege against self-incrimination).

- 1.40 We understand the proposals noted in the New Zealand Law Journal editorial to relate to judicial or counsel comment on the fact that a defendant has chosen not to give evidence in court, or their failure to answer police questions when being investigated. These are fundamental policy matters that we consider are outside the scope of this technical review.

Issues relating to vulnerable witnesses

- 1.41 We have considered the recommendations made by Elisabeth McDonald and Yvette Tinsley in *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* that relate to a range of evidence issues.²⁵ Most of these appear in this report in the discussion of the relevant provisions of the Act to which they relate. Of the remainder, there are some that on the face of it appear to have merit, but which are not strictly about the operation of the current Act as they do not involve amending the Act. Others require a number of substantive policy issues to be resolved and may have significant cost and resource implications. Many also require detailed consultation to occur with the judiciary, the profession, relevant government departments and other interest groups. We do not consider that these issues can be resolved in a narrow focused technical review such as that envisaged by s 202 and should be considered and advanced separately if appropriate. A brief description of these issues follows.

Recording of evidence for use at re-trial

- 1.42 McDonald and Tinsley recommended that where pre-trial or trial recording of the complainant’s evidence is undertaken, the prosecution should be able to apply for the recording (appropriately edited if necessary) to be used at any re-trial. In deciding whether to allow the use of the recorded evidence, the judge should take account of the needs of the new trial and ensure that the defendant will not be unfairly disadvantaged. Where evidence recorded pre-trial or at trial is used in a re-trial, there should be provision, where necessary, for any supplementary evidence to be given in an alternative way.²⁶

Defence counsel access to evidential video interviews

- 1.43 There was a recommendation that s 106(4)(a) of the Evidence Act be amended so that defence counsel would not automatically be entitled to a copy of the evidential interview, but could apply to the judge for a copy. Where a copy of the evidential interview is not applied for, or if the judge declines to order that a copy is provided, regulations should govern requirements

25 Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

26 At 308.

for reasonable viewing time on police premises (or premises agreed by the parties) in addition to the provision of a transcript of the interview. Where the judge orders that a copy of the interview should be provided to the defence, regulations should govern the protocol around possession and viewing of that copy.²⁷

- 1.44 Further information is needed about whether there are actual practical difficulties arising from the operation of the current provision.

Communication assistance

- 1.45 Section 80 provides for communication assistance for defendants in criminal proceedings and for witnesses in civil or criminal proceedings, subject to the judge's discretion (per s 81). "Communication assistance" is defined in s 4.
- 1.46 McDonald and Tinsley have recommended that the s 4 definition of "communication assistance" should be amended to specifically include assistance with understanding questions for witnesses who do not have a communication disability, but who may struggle to comprehend questions (for example, because of age).²⁸ In an Issues Paper, the Law Commission has previously made similar suggestions to allow for assistance in the process of answering questions for a wider group than just witnesses with a "communication disability". The Law Commission commented:²⁹

This would allow for an incremental and careful approach to the introduction of intermediaries, who could assist with the phrasing of questions in an appropriate way. Their primary initial role would be to assist with communication and questioning issues rather than actually question witnesses.

- 1.47 It should also be noted that in 2011 Cabinet agreed to changes to introduce intermediaries to improve the questioning of child complainants,³⁰ although this set of decisions is currently on hold.
- 1.48 This proposal involves expanding of the scope of s 80 and the associated definitions, rather than concern as to whether the current provisions are working as intended. Although the Law Commission remains of the view that amending s 80 of the Act could be a useful avenue to allow for the use of intermediaries, consideration of the merits of doing so would involve a number of substantive policy issues.

27 At 307.

28 At 313.

29 Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 39.

30 Cabinet Domestic Policy Committee "Child Witnesses in the Criminal Courts: Proposed Reforms" (29 June 2011) DOM Min (11) 10/1 at [10]–[11].

Fast-tracking of sexual offending cases

- 1.49 McDonald and Tinsley have recommended that sexual violence cases be fast-tracked where possible.³¹ We consider that while fast-tracking of certain cases may be desirable, it is not in itself an Evidence Act issue; rather it is a practical, procedural issue that is best addressed through non-legislative means.

Expert evidence or statements on sexual offending myths and misconceptions

- 1.50 McDonald and Tinsley have recommended that in sexual offending cases, the parties should be encouraged to agree upon expert evidence or a written statement to educate the jury regarding common myths and misconceptions. Where prepared, such statements could be admitted by consent as a joint statement under s 9 of the Evidence Act.
- 1.51 We note that this is not an issue requiring legislative change, since what is proposed is already possible within the existing provisions of the Act. In any event, we do not believe that it is appropriate to use legislation to encourage parties to agree on a particular course of action, and it is not clear that legislative amendment would achieve this aim.

Public interest immunity

- 1.52 New Zealand has two statutory provisions that directly relate to this area of law: s 70 of the Evidence Act 2006, which provides a judge with a discretion to direct that communications or information relating to “matters of State” not be disclosed in a proceeding; and s 27 of the Crown Proceedings Act 1950, which provides that the Crown is not required to discover a document if the Prime Minister certifies that disclosure would be likely to prejudice certain matters such as national security, or the Attorney-General certifies it would be likely to prejudice the prevention, investigation or detection of offences.
- 1.53 The Crown Law Office has asked us to consider the relationship between these two provisions as well as whether there should be a regime that governs the use of classified information in civil proceedings. The Law Commission is currently undertaking a review of the Crown Proceedings Act, with a view to modernising and simplifying it. Our view is that consideration of public interest immunity fits better under the Law Commission’s review of the Crown Proceedings Act. Accordingly, the relationship between s 70 of the Evidence Act and s 27 of the Crown Proceedings Act will be considered in that review, along with the other matters raised by the Crown Law Office that fall within the review’s scope.

³¹ McDonald and Tinsley, above n 25, at 305.

STRUCTURE OF THIS REPORT

- 1.54 This report generally covers issues in the same sequence as the Act. The Act has five Parts:
- Part 1: Preliminary provisions
 - Part 2: Admissibility rules, privilege, and confidentiality
 - Part 3: Trial process
 - Part 4: Evidence from overseas or to be used overseas
 - Part 5: Miscellaneous
- 1.55 This report considers issues raised with Parts 1–3 of the Act. Submitters did not raise any issues with Parts 4 and 5.
- 1.56 Consideration of matters under Part 1 of the Act is covered in chapter 2. Although Part 1 contains the general interpretation provision (s 4), consideration of whether defined terms should be amended is located in the chapter that contains discussion about the substantive provisions to which the terms relate. The terms considered in this report are “hearsay statement”, “proceeding”, “visual identification evidence”, and “witness”. Similarly, although s 12A (which preserves the common law in relation to statements of co-conspirators and co-defendants in certain circumstances) is located in Part 1, that provision is considered in chapter 3, alongside the general discussion on co-defendant’s statements. Matters under Part 3 of the Act are covered in chapter 11.
- 1.57 Part 2 of the Act contains the core admissibility provisions of the Act. It is therefore unsurprising that discussion of the provisions in this Part form the majority of this report. Discussion of Part 2 has been divided into a number of chapters that cover:
- hearsay, defendants’ statements and co-defendants’ statements (ss 16–34);
 - improperly obtained evidence (s 30);
 - previous consistent statements (s 35);
 - veracity and propensity evidence (ss 36–43);
 - complainants in sexual cases (s 44);
 - identification evidence (ss 45 and 126); and
 - privilege and confidentiality (ss 51–69).

- 1.58 Some of the discussion in these chapters necessarily refers to, and considers amendments to, sections located in other Parts of the Act. For instance, the chapter on hearsay, defendants' statements and co-defendants' statements considers definitions of relevant terms in Part 2. Likewise, the identification evidence chapter discusses s 126, which deals with judicial directions where a case depends wholly or substantially on the correctness of visual or voice identification evidence.

Chapter 2

Preliminary provisions (Part 1 of the Act)

INTRODUCTION

- 2.1 Part 1 contains the preliminary provisions of the Act. It contains provisions relating to interpretation, including the relevance and use to be made of the common law and the courts' inherent powers, the provisional admission of evidence and the use that may be made of evidence given to establish admissibility.
- 2.2 The only general issue raised with us under Part 1 was the status of the common law under ss 10 and 12 of the Act. This chapter contains discussion of this issue. As ss 10 and 12 are often used to assist in the interpretation of other provisions in the Act, this chapter will also contain brief descriptions of those provisions. However, as the focus of this chapter is on the courts' interpretation and use of ss 10 and 12, analysis of the other provisions is limited to what is necessary to describe the issue. Detailed consideration of the substantive provisions of the Act occurs later in this report.

STATUS OF THE COMMON LAW UNDER THE ACT

- 2.3 Sections 10 and 12 read:

10 Interpretation of Act

- (1) This Act—
- (a) must be interpreted in a way that promotes its purpose and principles; and
 - (b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but
 - (c) may be interpreted having regard to the common law, but only to the extent that the common law is consistent with—
 - (i) its provisions; and
 - (ii) the promotion of its purpose and its principles; and

- (iii) the application of the rule in section 12.
- (2) Subsection (1) does not affect the application of the Interpretation Act 1999 to this Act.

12 Evidential matters not provided for

If there is no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part, decisions about the admission of that evidence—

- (a) must be made having regard to the purpose and the principles set out in sections 6, 7, and 8; and
 - (b) to the extent that the common law is consistent with the promotion of that purpose and those principles and is relevant to the decisions to be taken, must be made having regard to the common law.
- 2.4 There is a question whether there is a need for greater certainty about the status of the common law under the Act. The question has arisen because of a handful of cases where the common law has been employed in a way that, arguably, is not anticipated by these provisions.

Development of the Evidence Code

- 2.5 The terms of reference for the Law Commission's review of the law of evidence asked it to examine evidence law to "make recommendations for its reform with a view to codification". In its Preliminary Papers *Principles for Reform and Codification*, the Law Commission stated its intention to recommend the "true" codification of evidence law.³² It noted that the term "codification" had been accorded a number of meanings. The Law Commission adopted the term to mean the development of a set of rules that were "comprehensive, systematic in structure [and] pre-emptive of the common law".³³ Pre-emptive of the common law meant a code that "displace[d] all other law in its subject area, save only that which the code excepts" and that it should "supersede existing law and make a fresh start."³⁴ So that reference to previous judicial decisions would not obstruct the objective of codification, the Law Commission suggested that "any ambiguity in the meaning of a provision of the code must be resolved by reference to the policies and principles of the code rather than to the pre-existing common law."³⁵
- 2.6 In its report, the Law Commission confirmed its recommendation for an Evidence Code that would "replace most of the existing common law and

32 Law Commission *Evidence: Principles for Reform – a Discussion Paper* (NZLC PP13, Wellington, 1991) at 31 and Law Commission *Evidence: Codification – a Discussion Paper* (NZLC PP14, Wellington, 1991) at 1.

33 Law Commission *Evidence: Codification*, above n 32, at vii.

34 At 3 and 12.

35 At 12.

statutory provisions on the admissibility and use of evidence in court proceedings.”³⁶

- 2.7 Sections 10 and 12 (in a different form to the enacted provisions) were proposed as aids to the interpretation of the Code.
- 2.8 In the course of its review, the Law Commission considered four relevant points about the interpretation of the Code discussed below.³⁷

A Interpretation according to its principles and purpose

- 2.9 In its preliminary papers the Law Commission considered whether there was a need for a provision to the effect that:³⁸

This Code should be liberally construed to secure its purpose and is not subject to the rule that statutes in derogation of the common law shall be strictly construed.

- 2.10 Such a provision had been proposed for the draft Canadian code.³⁹ The rule of strict construction of statutes in derogation of the common law meant that courts had to be careful not to extend Acts beyond the clear intent of the legislature and gave effect to a presumption against an intention to change existing law except by express terms. Inclusion of a provision such as the one above would signal, instead, that the statute was to be construed liberally according to its purpose.
- 2.11 Initially, the Law Commission considered that there was no need for such a provision. It felt that it was doubtful whether the rule of strict construction of statutes in derogation of the common law applied in New Zealand. It also considered that the Code would be clear that it was its policies and principles to which the court should turn for interpretation. Furthermore, the (then) Acts Interpretation Act 1924 provided adequately for a purposive approach to interpretation.⁴⁰
- 2.12 However, in its final report the Law Commission recommended the inclusion of the following provision:

10 Code to be liberally construed

This Code is to be liberally construed in such a way as to promote its purpose and principles and is not subject to any rule that statutes in derogation of the common law should be strictly construed.

36 Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, Wellington, 1999) at xviii and 3.

37 At 11–16.

38 Law Commission *Evidence: Codification*, above n 32, at 11.

39 Law Reform Commission of Canada *Evidence* (Report 1, 1975).

40 See now Interpretation Act 1999, s 5(1): “The meaning of an enactment must be ascertained from its text and in the light of its purpose.”

- 2.13 The Law Commission concluded that s 10 was in fact necessary as “consultations indicated that a lifetime of training has ingrained into both bench and bar an almost automatic reaction of referring to case law to resolve evidential issues. Accordingly ... s 10 [is] a necessary reminder that the Code should be construed by reference to its purpose and principles, rather than ... the common law.”⁴¹
- 2.14 The Law Commission also proposed the inclusion of s 11 (inherent and implied powers not affected) on the grounds that it was impossible to foresee all the ways the courts will need to use their powers to regulate procedure and prevent abuse of process. At the same time, its Evidence Code would become meaningless and ineffectual if the courts used their inherent powers in ways that contradicted the Code’s express provisions. Section 11 was drafted with the intent of preserving a court’s freedom of action so long as it was not exercised contrary to the Code’s express provisions.⁴²

B Continuing scope for reference to the common law to inform the application of the Code

- 2.15 In its preliminary paper *Codification*, the Law Commission noted that the focus on the principles and purpose of the Code was not intended to suggest that previous common law cases would never be of value. Since aspects of the Code would incorporate existing common law rules, the Code would, wherever appropriate, embody the wisdom and experience of the common law. There would, therefore, be a significant number of instances where the Code’s policies and principles would be the same as those underlying the common law. In those instances, it was anticipated that reference by the courts to earlier cases might be helpful in “elucidating the application of the principles contained in the Code”.⁴³
- 2.16 The Law Commission did not propose any provision to address this particular point. However, in its final report, it reiterated that “judges should look to the Code’s purpose for guidance on interpreting or applying the Code, rather than to the common law”.⁴⁴

41 Law Commission *Evidence: Volume 1*, above n 36, at 9.

42 Section 11 provides:

Inherent and implied powers not affected

(1) The inherent and implied powers of a court are not affected by this Act, except to the extent that this Act provides otherwise.

(2) Despite subsection (1), a court must have regard to the purpose and the principles set out in sections 6, 7, and 8 when exercising its inherent or implied powers as proposed by the Commission does not differ materially from the enacted version, set out above.

43 Law Commission *Evidence: Volume 1*, above n 36, at 9.

44 At 10.

2.17 As Peter Williams put it, the intention was that:⁴⁵

[T]he main function of the common law will ... 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.

C The problem of gaps

2.18 Inevitably, there would be gaps in the Code. The Law Commission foresaw two kinds of gap:

- Where developments, for example in technology, meant that some matters may not be provided for. In those circumstances the Law Commission thought that the gap should be filled by resort to the policies and principles as contained in the Code.
- Where a topic was, by its nature, outside the scope of the Code. In those circumstances the common law would govern.

2.19 In its preliminary papers, the Law Commission did not propose a “gap-filling” provision. Instead, it intended to deal with the problem by ensuring full codification. The Code was intended to be the authoritative source of evidence law. It also stated that the Code should be explicit about its intended field of application.

2.20 However, in its final report, the Law Commission proposed the inclusion of s 12 to deal with evidential matters not provided for. The provision, as it appeared in the Law Commission’s Evidence Code, did not make references to the common law. It stated:⁴⁶

Evidential matters not provided for

Matters of evidence that are not provided for by this Code are to be determined consistently with the purpose and principles of this Code.

2.21 Again, the Law Commission noted “[o]ne of the major features of a code is that it supersedes existing law and makes a fresh start. References to earlier judicial decisions can obstruct that objective.”⁴⁷ The Law Commission reiterated that the general Code principles and purposes should apply to any “gaps” that are within the scope of the Code. In “any unprovided-for case”, therefore, the courts should look to the purpose and principles of the Code to resolve the matter.⁴⁸ This statement and the heading to the provision tend to support a conclusion that the section was directed at the first type of gap

45 Peter Williams “Evidence in Criminal Law: Codification and Reform in the Evidence Act 2006” (2007) 13 Auckland UL Rev 228 at 229.

46 Law Commission *Evidence: Volume 2 – Evidence Code and Commentary* (NZLC R55, 1999) at 38.

47 Law Commission *Evidence: Volume 1*, above n 36, at 10.

48 At 11.

referred to above, rather than the second. The proposed provision made it clear, however, that the Code was to be the source of law for “matters of evidence”. While the Law Commission did not provide any examples of the second type of gap, it must be inferred that it meant matters of law *not* relating to evidence.

D The status of the commentary

- 2.22 In its preliminary papers, the Law Commission stated its intention to publish a detailed commentary, which, it was hoped, courts would draw upon as an aid to interpretation. In particular it noted that the commentary would make it clear that although comparisons with the previous law may be helpful, the ultimate determination of the provisions of the Evidence Code should be on the basis of the principles of the Code rather than the common law. In its final report, the Law Commission stated that the purpose of the commentary was to be “an authoritative guide to interpreting the Code”.⁴⁹
- 2.23 The approach to interpretation described above was restated in the commentary.⁵⁰

Differences between the Evidence Code and the Evidence Bill as introduced

- 2.24 Changes were made to ss 10 and 12 in the Bill as introduced. There is little record of the rationale for the alterations, or of whether it was anticipated that they altered the fundamentals of the Law Commission’s proposals. Elisabeth McDonald and the authors of *The Evidence Act 2006: Act & Analysis* note that all that is available on the point is contained in a briefing to the Minister stating that the “Bill adds reference to the status of the common law with respect to the Bill that did not appear in the Code. This was thought to be a helpful addition to aid interpretation”.⁵¹ The description of the provisions in the Departmental Report sheds little further light on the matter, although it appears to mirror the original intention of the Law Commission. With regard to cl 10 it states:⁵²

Clause 10 sets out three rules for interpreting and applying the Act. Clause 10 provides that the Act should be interpreted consistently with clauses 6, 7, and 8 and that Judges may still have regard to the common law but only to the extent that is consistent with

49 At 3–4.

50 Law Commission *Evidence: Volume 2*, above n 46, at 37–39.

51 Letter from the Ministry of Justice to Phil Goff (Minister of Justice) regarding the Evidence Bill (8 February 2005) quoted in Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 15 and Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) at [EV10.01].

52 Ministry of Justice *Evidence Bill: Part 1 – Preliminary Provisions Departmental Report for the Justice and Electoral Committee* (June 2006) at 12.

the Act. Clause 10 also provides that the Act is not subject to any rule that statutes in derogation of the common law must be interpreted narrowly.

2.25 **And in relation to cl 12:**⁵³

The purpose of this clause is to provide the Act with some flexibility in cases where courts are faced with new developments in technology (say) which were not contemplated at the time the Act was drafted. The courts could give effect to these changes but only to the extent whereby the use of that technology was consistent with the purposes and principles of the Act.

2.26 Commentators have stated that the effect of the open recognition of a continuing role for the common law in ss 10 and 12 is that, as enacted, the Act is no longer a code.⁵⁴ As with other changes made between the Law Commission's final recommendations and enactment, the amendments also leave the status of the Law Commission's commentary unclear.

Parliamentary history

2.27 There was no detailed parliamentary discussion of cls 10 and 12 during the passage of the Evidence Bill. There was also little discussion of whether the Bill was a code or what was meant by "codification". Comments made by the members of the sub-committee of the Select Committee that considered the Bill suggest that there was no settled view.

2.28 For example, in the first reading, Russell Fairbrother MP (chair of both committees) observed:⁵⁵

I urge the select committee to make constant reference in its report to the Law Commission report, so that when the courts come to consider some of the changes in the bill they can go back to Parliament to ascertain its intention, and can hope that Parliament's intention will reflect that of the Law Commission.

2.29 Mr Fairbrother also referred to "the [Law Commission's] draft code, which the bill very much reflects ...". In the second reading he stated: "it is not a codification of the law of evidence, but an attempt to bring into statute, in a clear, concise, and accessible way, the laws that must be followed."⁵⁶ Richard Worth MP (as he then was) responded:⁵⁷

I understood him to say that this bill is not a codification of the law of evidence. It is substantially on that path, so I believe that the opportunity for judge-made law and other influences to intervene will be starkly limited by the passage of this legislation.

53 At 13.

54 Mahoney and others, above n 51, at [EV10.01].

55 (10 May 2005) 625 NZPD 20428.

56 (15 November 2006) 635 NZPD 6561.

57 At 6562.

- 2.30 During the third reading, Mr Finlayson said: “Some said that there was no need for a comprehensive code of the law of evidence. I happen to think that those people were totally wrong.” He went on, “clauses 10 and 12 ... herald the major change in the law of evidence”.⁵⁸
- 2.31 There was greater discussion of these issues during the passage of the Evidence Amendment Bill which dealt with an issue in relation to co-conspirators.⁵⁹ Importantly, in its report to the House on the Amendment Bill, the Select Committee stated:⁶⁰
- [W]e emphasise that the Evidence Act should be regarded as codification of the law of evidence in New Zealand. This amendment should not be seen as resiling from the purpose of the Act.
- 2.32 However, speeches in the House on the Amendment Bill were inconsistent in describing the problem the Bill sought to remedy. On one view, s 12A was necessary to prevent the co-conspirators rule being “removed from the statute book”.⁶¹ This view appeared to be endorsed by Mr Fairbrother who, in contrast to his earlier comments, observed that the committee were “careful to endeavour to codify the common law in the Evidence Act”. Mr Fairbrother “agree[d] that this bill should quickly go through so that when the Evidence Act comes into operation ... it is complete”, and referred to the need to avoid “the effect of encouraging judges to go where they would naturally want to ... the common law rather than to the statute.”⁶²
- 2.33 Mr Worth likewise said “[t]he Evidence Act sets out to codify the law of evidence. ... It was a major undertaking to codify the law of evidence that was intended. ... It is intended that the Evidence Act be a code, and there are a number of indications of that intention in the statute ... for example ... sections 10 and 12.”⁶³ Mr Worth also referred to the “desirability of maintaining in a stand-alone form, without the need to resort to extrinsic aids, a code of evidence.”
- 2.34 The other view, which was put forward in the second reading, was that there was a “very respectable” argument based on ss 10 and 12 that s 12A was not needed since those provisions enabled the courts to say that the common law

58 (23 November 2006) 635 NZPD 6804.

59 See discussion at paragraph 3.108.

60 Evidence Amendment Bill (129-2) (select committee report) at 2.

61 (19 June 2007) 640 NZPD 9964. This view is shared by Pita Sharples (at 9968) and Christopher Finlayson (at 9969). This view was also articulated in Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at [EA12A.01], “As the Act originally stood, the prohibition in s 27(1) left no room for the operation of these common law exceptions.”

62 (19 June 2007) 640 NZPD 9966.

63 At 9971.

is still relevant.⁶⁴ Each of the sub-committee members indicated that s 12A was required because of uncertainty in the import of s 12.

Current case law on sections 10 and 12

2.35 Four cases have given rise to concern about the way courts are interpreting ss 10 and 12. *New Zealand Institute of Chartered Accountants v Clarke* involved a question about the scope of the s 57 “privilege for settlement negotiations or mediation”.⁶⁵ Keane J considered that the common law could be called upon to assist in determining what fell within the term “communication” in s 57(1).⁶⁶ Relevant to this question was whether s 57(3) states exhaustively the exceptions to the privilege or whether that subsection in fact relates to the scope of the privilege. The authors of *The Evidence Act 2006: Act & Analysis* hold the former view: “The common law recognised other exceptions to the privilege. However, the effect of codification is that there is little room to argue for the continued existence of these earlier exceptions.”⁶⁷ In *Clarke*, Keane J preferred the latter view, shared by the authors of *Cross on Evidence*.⁶⁸ Keane J made three observations:⁶⁹

... of course, the Act itself says that it is not a code and ss 10 and 11 [sic] allow the common law a definite place.

...

Section 10(1), which governs interpretation, sets the balance. The Act is the starting point and may well be the end point. It speaks for itself and is not to [be] read subject to the common law. If it speaks explicitly and completely there can be no resort to the common law. If it speaks less than definitively and completely there can and may need to be, but only insofar as the common law marches with the purposes, principles and letter of the Act.

...

Where an issue of admissibility cannot be resolved under the Act, or resolved completely, s 12 makes the common law a mandatory consideration, but in much the same way as s 10(1).

2.36 He concluded that the common law has “a continuing place in setting the boundaries” of s 57. The common law could therefore be referred to in order to determine which elements of a “communication” were privileged and which were not. Reliance on the scope of the privilege as it was recognised

64 (28 June 2007) 640 NZPD 10336.

65 *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) [*Clarke*].

66 This section is considered in detail at paragraph 10.34 of this report.

67 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (1st ed, Brookers, Wellington, 2007) at [EV57.09].

68 Donald Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA.57.9].

69 *Clarke*, above n 65, at [37], [38] and [40].

at common law enabled Keane J to rule admissible the “peripheral features” of a letter (notably the fact that the writer had used the designation “CA” after his name) when the letter itself was subject to the s 57 privilege. Asher J employed s 10 for essentially the same purpose in *Consolidated Alloys v Edging Systems (NZ) Ltd*.⁷⁰ In both cases, the judges considered that the interpretation supported by the common law was in keeping with the purpose of the privilege in s 57.

- 2.37 In contrast, in *Sheppard Industries Ltd v Specialized Bicycle Components Inc* the Court of Appeal referred to s 57(3) as containing “exceptions” to the privilege, but stated that “[p]lainly, however, there are other recognised exceptions to the “without prejudice” rule. One is contained in s 67(1) of the Act ... In respect of other exceptions, however, resort must be had to the common law.”⁷¹ That observation is accompanied by a footnote that states:

Evidence Act 2006, s 12. There is no suggestion that Parliament considered that the exceptions not mentioned in ss 57(3) and 67 should no longer be available. See also ... *Clarke* ... where Keane J reached the same conclusion.

- 2.38 The Court of Appeal, in fact, took a different route to Keane J in determining that s 57 is not a definitive statement of the privilege.
- 2.39 The concern that arises in relation to ss 10 and 12 is the broad treatment of what amounts to a “gap” under s 12. On a broad reading of these cases, any pre-existing rule of common law not contained in the Act could be interpreted as a case where the Act does not “speak explicitly and completely”. However, reference to the pre-Act material does not support this approach. Doubt also must be cast on it given that Parliament felt the need to enact s 12A to preserve the common law co-conspirators rule, rather than relying on s 12 to fill this gap.
- 2.40 One reading of these cases is that they seek to remedy a problem with s 57. This is best illustrated by Heath J’s comments in *Jung v Templeton*.⁷² He cites with approval the view in *The Evidence Act 2006: Act & Analysis* that it is important to inquire whether the material in question comes within the scope of the particular privilege in question. Where s 57 is concerned, the question is whether the privilege protects *everything* arising in the context of settlement negotiations / mediations, except in the situations in s 57(3), or whether there is still scope for the court to determine the breadth of terms such as “communication”.⁷³ In Heath J’s view, s 57 as enacted leads to the former result. However, he is not sure whether that conclusion represents Parliament’s will or is an unintended consequence.

70 *Consolidated Alloys v Edging Systems (NZ) Ltd* [2012] NZHC 2818.

71 *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 (CA) at [15].

72 *Jung v Templeton* HC Auckland CIV-2007-404-5383, 21 September 2009, at [61]–[64] per Heath J.

73 See also the discussion below at paragraph 5.1 regarding s 35 of the Act.

- 2.41 The third case is *New Zealand Air Line Pilots Association v Jetconnect Ltd (No 2)* where the Chief Employment Court Judge made the following obiter observation:⁷⁴

Although acknowledging that the Act is a code, it is arguable that “*privilege*” dealt with under the Evidence Act 2006 relates to exposure to criminal liability and the common law of privilege affecting claims to civil penalties may have been left untouched by Parliament.

- 2.42 It could be inferred from this that the Act’s silence on any privilege against self-exposure to a non-criminal penalty means that it is a gap, at which s 12 is directed. However, it seems unlikely that a court giving direct consideration to this question could reach this outcome, given that Law Commission and parliamentary materials make it clear that the intention was to abrogate that privilege.⁷⁵

- 2.43 The fourth and most problematic case is *R v Fan*.⁷⁶ There, the question was whether the common law discretion to exclude evidence on the ground of unfairness has survived the enactment of the Act. The Court of Appeal concluded that s 30(5)(c) related only to the act of “obtaining” evidence unfairly, rather than to any broader general rule of fairness.⁷⁷ Interpreted in that way, the “obtaining” by the police in *Fan* was fair.⁷⁸ However, it then said:⁷⁹

Nevertheless, it is necessary to look further to whether it was in fact the intention of the drafters of the Act to limit the consideration of unfairness only to the act of “obtaining”.

- 2.44 In doing so it noted three post-Evidence Act cases where evidence had been excluded on the general ground of unfairness, but stated that those cases had not considered explicitly whether the general discretion survived the Act.⁸⁰

74 *New Zealand Air Line Pilots Association v Jetconnect Ltd (No 2)* [2009] ERNZ 207 at [23].

75 Law Commission *Evidence: Volume 1*, above n 36, at 76.

76 *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29. See generally McDonald, above n 52, at 239–241. An order is in force prohibiting publication of the judgment and any part of the proceedings of the relevant case until final disposition of the trial.

77 “For the purposes of this section, evidence is improperly obtained if it is obtained—(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or (c) unfairly.”

78 *Fan v R*, above n 76, at [21].

79 At [23].

80 *R v Simanu* [2011] NZCA 326; *R v Petricevich* [2007] NZCA 325 at [18] and *R v Cameron* [2009] NZCA 87 at [41]. Note also *Poulton v Police* HC Christchurch CRI-2010-409-138, 7 October 2010 at [12] where Fogarty J suggests that the question of unfairness is not a separate enquiry since it is “embedded in s 30 criteria”.

2.45 It also noted that the leading New Zealand texts on the Act “assume that the enactment of s 30 will make it difficult to argue that it is unfair to admit the evidence as distinct from arguing that it had been unfairly obtained”.⁸¹

2.46 It then stated that there is nothing to indicate in any of the relevant Law Commission papers or reports an intention to exclude the common law discretion. The Law Commission’s report on *Police Questioning* is not cited in the footnote accompanying this observation.⁸² That report states:⁸³

The improperly obtained evidence rule will be a strong prima facie rule of exclusion, with specific attention being drawn to breaches of the Bill of Rights Act. The courts’ ability to admit the evidence in the “interests of justice” means that they will not be required to take a rigid or technical approach to the admissibility of the evidence. In addition, *the rationale behind the rule is clearly articulated: the rule provides for the exclusion of improperly obtained evidence. The lack of clarity in the guiding principles behind the current fairness discretion (ie, to exclude evidence on the ground of unfairness) has, therefore, been addressed by the proposed rule.*

2.47 Although it could have been stated more plainly, the italicised text indicates that any lack of clarity about the rationale for the rule was being cleared up by the proposed provision: that is that it would apply only to *improperly obtained evidence*. The Law Commission also stated that “the new rule replaces the fairness discretion”.⁸⁴

2.48 After describing ss 10, 11 and 12 of the Act, the Court in *Fan*, said:⁸⁵

It would be inconsistent with the common law and the purpose of the Evidence Act which is to promote fairness to parties, to construe s 30 as excluding the common law discretion. The continued existence of the common law discretion is consistent with the purpose of promoting fairness in s 6(c) to parties, and the Court must have regard to that purpose under s 11(2). The exclusion of evidence on unfairness grounds can be seen as dealt with only “in part” (in terms of s 12) by s 30, so that decisions on the admission of evidence can still involve a consideration of what is fair to the parties, that is, irrespective of the provisions of s 30. We conclude that the common law discretion survives the Evidence Act, although s 30 governs those cases to which the section applies.

2.49 There is an argument that the court misdirected itself. First, the court itself came to the conclusion that s 30 could not be interpreted as including general unfairness, instead of only unfairly *obtained* evidence. A contradictory interpretation of s 30 was therefore arguably barred by s 10(1)(c)(i). Second, the court interpreted s 30 as dealing with exclusion on unfairness grounds

81 *Fan v R*, above n 76, at [29]. The leading texts are Mathieson, above n 68, at [EVA30.10], Mahoney and others, above n 51, at [EV30.10(1)] and Robertson (ed), above n 61, at [EA30.10].

82 Law Commission *Police Questioning* (NZLC R31, 1994).

83 At 34 (emphasis added).

84 At 101.

85 *Fan v R*, above n 76, at [31].

“in part (in terms of s 12)”. This conclusion is debatable since s 30 deals with improperly obtained evidence, rather than any general concept of unfairness. And, in any event, this is not the type of gap at which s 12 is targeted.

- 2.50 Two other judicial statements arguably overstate the place of the common law under ss 10 and 12. One occurred in the District Court.⁸⁶ The other was a Court of Appeal case, where it was said:⁸⁷

Both are elements of the right to justice and to present a defence promised by ss 25(e) and 27 of the New Zealand Bill of Rights Act 1990, themselves reflecting the common law which continues to inform evidentiary decisions. [FN 18: Sections 10 and 12 of the Evidence Act.]

- 2.51 To be weighed against the above examples are the cases where courts have made it clear that the provisions of the Act are to be the paramount consideration; and that the common law can only be considered under ss 10 and 12 to the extent that it is consistent with the purpose and principles of the Act.⁸⁸
- 2.52 In *Mahomed v R* the majority of the Supreme Court determined that ss 40 and 43 provided definitively for the admissibility of propensity evidence and made the following statement:⁸⁹

We do not consider a great deal is now to be gained from an examination of pre-Evidence Act case law. The Act substantially codified that case law and it is preferable, and consistent with s 10(1), to focus firmly on the terms of the Act; albeit the application or interpretation of a particular provision in the Act may sometimes benefit from a consideration of the previous common law.

86 See *Police v Stevenson* DC Waitakere CRN-0809-003-987, 26 November 2008 at [58] per Judge Burns: “... Insofar as ss.10(1)(c) and 12(b) are concerned, when a Judge has regard to, the common law, the result will usually be a direct application of the common law. This means that the Act cannot be described as a complete code. It is clear from ss.10 to 12 gives priority to the Act’s purpose and principles, that does not provide a barrier to applications of the common law”.

87 *Singh v R* [2010] NZCA 144 at [52].

88 In addition to the cases described below, see *R v Buddle* [2011] DCR 347 at [42]: “Rather than set hard and fast rules excluding or including certain types of evidence, the new Act presupposes that a decision is to be made on the facts of each case, applying the principles in the Act. Given that the provisions of the Act are generally consistent with the common law in this particular area of propensity, the pre-Act cases continue to have some relevance (see s 10(1)(c) and s 12(b) of the Act). However, the provisions of the Act are the paramount consideration.” And *Moffat v R* [2009] NZCA 437, [2010] 1 NZLR 701 which related to the interpretation of s 42(1)(b): “A defendant in a criminal proceeding may offer propensity evidence about a co-defendant only if – (a) that evidence is relevant to a defence raised or proposed to be raised by the defendant; and (b) the Judge permits the defendant to do so.” Section 10 was used to justify a construction of paragraph (b) that accorded both with the fundamental purpose of the Act in s 7(3) and the pre-existing common law.

89 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [4].

2.53 The Supreme Court in *Wi v R* stated:⁹⁰

One of the expressed purposes of the Act is to help secure the just determination of proceedings by providing for facts to be established by the application of logical rules. Determining relevance is not, however, solely an exercise in pure logic. Experience and common sense play their part as well. The experience of the common law should not in this respect be completely ignored.

This view is supported by s 10 of the Act which provides guidance for the interpretation of the Act. First the Act must, as is conventional with all statutes, be interpreted in a way which promotes its purpose and principles. Secondly, the Act is not subject to any rule that statutes in derogation of the common law should be strictly construed. This point is a companion to the first and was presumably included to emphasise that the Act marked a new departure in the law of evidence and Judges should not interpret it restrictively on account of any hankering for the old common law or instinctive resistance to change. Thirdly, however, s 10 provides that the Act may be interpreted having regard to the common law, but only to the extent that the common law is consistent with its provisions, the promotion of its purpose and policies, and the application of the rule in s 12. That rule requires the common law to be taken into account, subject to stated conditions, if any evidential issue arises which the Act does not cover or covers only in part.

2.54 The question for the Court in *Wi* was whether a lack of previous convictions could be relevant propensity evidence under s 40(1)(a).⁹¹ It determined that it could, drawing on the previous common law approach, which was consistent with “the way the Act should be interpreted” (ie presumably in accordance with its purpose and principles). The Court held that the common law “fortifies the appropriate construction of the Act.”⁹²

2.55 In *R v Healy* the Court of Appeal disagreed with the trial judge’s emphasis on former authorities when interpreting s 43 of the Evidence Act 2006:⁹³

In our view, the words of the statute are the most helpful starting point in the propensity analysis and, to the extent that the decisions referred to above might be read as suggesting the starting point is a comparison with the common law or some judicial gloss on those words based on earlier authorities, we disagree.

...

... a focus on the relevant statutory provisions rather than the previous law is arguably consistent with the legislative history as we discuss below. ... But, in any event, taking the statutory provisions as the starting point is correct as a matter of statutory interpretation

90 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [25]–[26] (footnote omitted).

91 “...[P]ropensity evidence ... means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved”.

92 *Wi v R*, above n 90, at [32].

93 *R v Healy* [2007] NZCA 451, (2007) 23 CRNZ 923 at [46], [48] (original emphasis). See also [49] “Section 12 deals with the situation where there is a lacuna because matters are not provided for in the Evidence Act or in any other enactment.”

and is consistent with the direction in s 10 of the Act to interpret the Act in a way that promotes its purpose and principles and with the further directions in s 10 that the Act:

(b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but

(c) may be interpreted having regard to the common law, *but only to the extent that the common law is consistent with*— (i) the provisions; and (ii) the promotion of its purpose and its principles; and (iii) the application of the rule in section 12.

2.56 The Court went on to note that:⁹⁴

An analysis which takes as its starting-point the wording of the propensity provisions is also consistent with more general principles of statutory interpretation. While the Evidence Act is not expressed as a complete code as was the Law Commission’s initial proposal ... the following excerpt from Lord Herschell’s speech in *The Governor and Company of the Bank of England v Vagliano Bros* [1891] AC 107 at 144-145 (HL) is still helpful:

“I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.”

...

In terms of the propensity provisions, having started with the Act it may occasionally be necessary in a particular case to refer back to the common law. But it has to be remembered that the Act is the product of a long and considerable history of reforms and that one of the objectives in terms of the law relating to propensity evidence was to reduce the previous uncertainty as to the likely approach to the admissibility of this sort of evidence. ... However, the provisions relating to propensity evidence offer the opportunity of a clean slate in this area that should be grasped.

2.57 The Court referred to the intentional change in terminology with the use of “propensity” and the Law Commission’s expressed wish to state the test “more definitively” as reinforcing the break with the pre-existing law. The approach in *Healy* was endorsed by the majority of the Court of Appeal in *Vuletich v R*⁹⁵ and *R v L*⁹⁶ in relation to s 43 and in *R v X* in relation to s 69 (confidential information).⁹⁷

94 At [53]–[54].

95 *Vuletich v R* [2010] NZCA 102 at [24], [27] per Glazebrook J and [96], [97] per Randerson J. Baragwanath J sought to devise a sliding scale for the application s 43 which was rejected by the other judges as an “unwarranted gloss on the statutory language”.

96 *R v L* [2009] NZCA 286.

97 *R v X* [2009] NZCA 531, [2010] 2 NZLR 181 at [32].

- 2.58 In *R v Barlien* the Court of Appeal refused to use s 10 to correct an “illogical distinction” created by the definition of “statement” in s 4 and s 35 of the Act (relating to previous consistent statements).⁹⁸ The Court said:⁹⁹

We accept that, under s 10, the Act must be interpreted in a manner that promotes its purpose and principles, but this cannot override explicit exclusionary wording in the Act itself. It is also true that our interpretation leads to the exclusion of relevant evidence. The fundamental principle in s 7, that all relevant evidence is admissible, is, however, subject to an exception for evidence that is inadmissible under the Act.

Neither is it of assistance that the evidence would have been admissible at common law. Under s 10, the Act may be construed having regard to the common law but this is only to the extent that the common law is consistent with its provisions. Again this runs into the difficulty that the wording of s 35 is clear. No previous consistent statement is admissible except in two limited circumstances. That s 10 should not be given an expansive interpretation in the face of clear wording in the Act is backed up by the fact that it was considered necessary, in the face of the clear wording in s 27(1), to amend the Act by the introduction of s 12A in order to preserve the common law co-conspirators rule.

- 2.59 It is worth noting that, in its postscript to the judgment, the Court of Appeal suggested that problems with s 35 needed to be addressed by the Law Commission. It made no reference to any suggestion that it was inhibited by or unclear on the position under s 10.

- 2.60 Finally, in *Hart v R* the Supreme Court considered s 10 and 12 again against the background of s 35.¹⁰⁰ Elias CJ said:¹⁰¹

The Evidence Act 2006 is significant legislation which restates the principles upon which evidence is admitted in court proceedings and substantially reforms the pre-existing law. It is the first stop when questions of admissibility arise. And in many cases it will be the last stop. In interpretation of the Act and where the Act is silent on a question of admissibility, ss 10 and 12 permit recourse to the common law, provided the common law is consistent with the purpose and principles of the Act. In this case, turning on the admissibility of a previous consistent statement under s 35(2) of the Act, a topic of conceptually unsatisfactory case law at common law, care needs to be taken not to stray from the text and principles of the new Act.

...

... Care therefore needs to be taken to ensure that authorities under the former law, in which evidence of a previous consistent statement by a witness was excluded to meet the policies behind the exclusion of hearsay (and which have been largely overtaken in the reforms), do not distort the application of s 35.

98 *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170 at [54].

99 At [54], [55].

100 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.

101 At [1], [9].

- 2.61 A similar observation was made by the other members of the court.¹⁰²
- These inherent difficulties support our view that in interpreting s 35(2) the Courts should not follow the general common law approach as to timing when that is not mandated by the statutory language.
- 2.62 The paragraph contained the footnote “Indeed the Act is designed to make a break from the common law: see s 10”.
- 2.63 For the sake of completeness, commentators have highlighted two other potential difficulties with the interpretation of s 10. First, they note that the requirement to interpret the Act in a way that promotes its purposes and principles does not present an easy task for judges. How, for example, in specific provisions should a judge balance “fairness to parties and witnesses” (s 6(c)) with “enhancing access to the law of evidence” (s 6(f)). Second, what does “have regard to” mean? The authors of the text consider that “the result will usually be a direct application of the common law”.¹⁰³

General comment

- 2.64 We agree with Elisabeth McDonald’s observation that it is difficult to see how the addition of references to the common law in either s 10 or s 12 was necessary, particularly if the principles in ss 6, 7 and 8 are applied in the interpretation of the Act.¹⁰⁴ The addition of the references to the common law, particularly in the mandatory form contained in s 12, provides some invitation to judges either to adopt the approach that the Law Commission expressly sought to avoid – that is “an almost automatic reaction of referring to case law to resolve evidential issues” – or to place heightened reliance on the common law where it is thought it will do justice in a particular case or avoid a problem with a particular provision of the Act.
- 2.65 However, on balance, we do not consider amendment to ss 10 and 12 to be necessary at this stage. First, for the most part, the courts have adopted an appropriate interpretation of s 10, and this interpretation has the support of the Supreme Court. Second, in most cases where the perceived problems have arisen with ss 10 and 12, this has been because the court has struggled with the interpretation of a substantive provision. In those cases, we consider that the difficulty lies primarily with the individual provisions themselves, such as s 57.¹⁰⁵ Third, we do not consider that there has been enough judicial consideration of s 12 to assess the extent to which the provision might cause difficulties. Problems are most likely to arise in assessing what amounts to a “gap” under that provision. This is illustrated by the *Fan* case. Our

102 At [53].

103 Mahoney and others, above n 51, at [EV10.03].

104 McDonald, above n 51, at 16.

105 See substantive discussion about s 57 at paragraph 10.34.

impression is that, in that case, the Court used s 12 to seek to revive what it considers to be a useful pre-existing rule.

- 2.66 In our view, close examination of the wording of s 12, alongside the Law Commission’s original recommendations, commentary and Select Committee materials illustrates clearly that s 12 was intended for the unforeseen case, rather than instances where a provision is silent on a previously existing rule of common law relating directly to evidence. However, one element of the wording of the provision (that it is to be employed where “the relevant provisions deal with that question *only in part*”) arguably invites courts to reintroduce aspects of admissibility rules on which the Act is silent. It must also be acknowledged that some parliamentary statements during the passage of the Evidence Amendment Act may have introduced some degree of confusion about the extent of the provision. As noted, however, the courts are most likely to use s 12 where a particular provision of the Act is not entirely clear on its face, and where the pre-Act materials are unhelpful.¹⁰⁶ Again, then, the problem will arguably lie with the provision at hand, rather than s 12 itself.
- 2.67 We remain of the view that a gap-filling provision for the unforeseen case is desirable. It may be that amendment to both ss 10 and 12, to return them to the form originally proposed by the Law Commission, for example, would serve a useful signalling purpose. However, courts have demonstrated a willingness to seek to revive common law rules in some circumstances, and it is clear that there are other routes for judges to employ pre-existing common law rules. As commentators have noted, the purpose and principles in ss 6–8 are sufficiently flexible to accommodate much of the common law.¹⁰⁷ The same might be said of s 11.¹⁰⁸ Changes to ss 10 and 12 would only result in the amendment of one of those routes. Instead, we prefer the retention of the current wording at this time. However, we propose to monitor these provisions and, if they continue to prove problematic, to consider them at the next five year review.

R1 We recommend that ss 10 and 12 be kept under review with any problems identified to be considered at the next five year review.

106 In contrast, for example, Elias CJ has noted that the text, legislative history and purpose of s 35 made the provision clear so that recourse to s 10 or s 12 is not warranted. See *Hart v R*, above n 100, at [9]. See also *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23 at [8].

107 Mahoney and others, above n 51, at [EV10.03].

108 See *R v King* [2009] NZCA 607, (2009) 24 CRNZ 527 and *R v Felise (No 3)* (2010) 24 CRNZ 533 (HC) for examples of cases where the court has found a means to allow evidence while acknowledging that such admission was precluded by s 21 of the Evidence Act.

Chapter 3

Hearsay, defendants' statements and co-defendants' statements

INTRODUCTION AND BACKGROUND

- 3.1 This chapter is divided into three inter-related sections. The first covers matters relating to the general hearsay provisions. The second covers a specific type of hearsay: defendants' statements. The third covers co-defendants' statements. Although this chapter briefly discusses s 30 in the context of the hearsay provisions that are the focus of this chapter, as its application extends beyond hearsay statements (such as physical evidence obtained from searches), it is considered separately in chapter four.¹⁰⁹

HEARSAY

Introduction and background

- 3.2 This part of our report considers general matters that have been raised in relation to the general hearsay provisions. The issues considered relate to the definition of "witness" and the business record exception.
- 3.3 The Act's hearsay provisions are located in subpart 1 of Part 2. Section 17 provides that hearsay evidence is inadmissible, unless allowed under the Act or any other legislation. The general test for admissibility is contained in s 18:

18 General admissibility of hearsay

- (1) A hearsay statement is admissible in any proceeding if—
- (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and

109 See also discussion at paragraph 2.43.

- (b) either–
 - (i) the maker of the statement is unavailable as a witness; or
 - (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

(2) This section is subject to sections 20 and 22.¹¹⁰

- 3.4 Prior to the Act, the former rule against hearsay generally prevented out of court statements being admitted to prove the truth of their contents. The rule reflected the common law view that factual evidence should be presented by the person with immediate knowledge of those facts under oath, in court, and subject to cross-examination. This enables parties to test the evidence through cross-examination, and tease out any shortcomings in the evidence. For instance, cross-examination may reveal that an eyewitness’s observation of a crime occurred at night, in a dimly lit street, while the eyewitness was not wearing their glasses. Or it may reveal that an eyewitness is related to another suspect and therefore had a motive to lie.
- 3.5 Strictly applied, however, the rule could exclude evidence that was highly relevant to the case. For instance, a label on a bag of coriander seed stating “Produce of Morocco” was excluded as hearsay even though the country of origin was a central element to the charge of making a false entry in a document produced to a customs officer.¹¹¹ Concern that the hearsay rule deprived courts of relevant evidence led to the development of both common law and statutory exceptions to the rule. These included dying declarations, statements against interest, regular entries in records made in the course of business and official statements.¹¹²

Development of the Evidence Code

- 3.6 In developing the Evidence Code, the Law Commission released two papers on hearsay. The first set out options for reform, ranging from the minor (clarifying the hearsay provisions in the Evidence Amendment Act (No 2) 1980) to significant (abolishing the hearsay rule altogether).¹¹³ The second paper set out the Law Commission’s preferred option to replace the hearsay rule and its myriad of exceptions with a rule of general application: “if the evidence has reasonable assurance of reliability it should be admitted notwithstanding its hearsay character”.¹¹⁴ This avoided technical arguments as to whether a particular piece of evidence fell within one of the exceptions

110 Section 20 covers the admissibility of certain hearsay statements in civil proceedings and s 22 contains the hearsay notice provision for criminal proceedings.

111 *Patel v Comptroller of Customs* [1966] AC 356 (PC).

112 Law Commission *Hearsay Evidence: An Options Paper* (NZLC PP10, 1989) at 4.

113 Law Commission *Hearsay Evidence*, above n 112.

114 Law Commission *Evidence Law: Hearsay: A Discussion Paper* (NZLC PP15, 1991) at 19.

to the rule, and instead focused the inquiry on whether the hearsay evidence was sufficiently reliable to be placed before the court.

- 3.7 The Law Commission subsequently refined this proposal in its reports *Evidence: Reform of the Law*¹¹⁵ and *Evidence: Evidence Code and Commentary*.¹¹⁶ These reports set out a hearsay rule with admissibility governed by reliability (Do the circumstances in which the statement was made provide reasonable assurance as to its reliability?) and necessity (Is the maker of the statement available to give evidence? Or would calling the witness cause undue expense or delay?).
- 3.8 As enacted, the Act's hearsay provisions essentially followed the Law Commission's recommendations with the following key differences that were recommended by the Justice and Electoral Committee considering the Bill:
- The Act reinstated the exception for business records that was previously contained in the Evidence Amendment Act (No 2) 1980.¹¹⁷
 - An additional section (now s 21) was inserted to prevent a criminal defendant from offering his or her own hearsay statement where he or she does not give evidence.

Definition of witness

- 3.9 Submitters have suggested that the definition of "witness" should be clarified as to whether past and / or future testifiers are included in the definition. The definition has implications for the application of various admissibility rules. For instance, an out of court statement by a "witness" is not a "hearsay statement" and is therefore not subject to the hearsay rules. "Hearsay statement" and "witness" are defined in s 4 of the Act:

4 Interpretation

- (1) In this Act, unless the context otherwise requires,—

hearsay statement means a statement that—

- (a) was made by a person other than a witness; and
- (b) is offered in evidence at the proceeding to prove the truth of its contents

witness means a person who gives evidence and is able to be cross-examined in a proceeding

- 3.10 Also relevant is s 34, which provides:

115 Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at 13-21.

116 Law Commission *Evidence: Volume 2 – Evidence Code and Commentary* (NZLC R55, 1999) at 44-55.

117 Evidence Act 2006, s 19.

34 Admissions in civil proceedings

- (1) Subpart 1 (hearsay evidence), subpart 2 (opinion evidence and expert evidence), and section 35 (the previous consistent statements rule) do not apply to evidence of an admission offered in a civil proceeding that is—
 - (a) given orally by a person who saw, heard, or otherwise perceived the admission being made; or
 - (b) contained in a document.
- (2) Evidence of an admission that is a hearsay statement may not be used in respect of the case of a third party unless—
 - (a) the circumstances relating to the making of the admission provide reasonable assurance that the admission is reliable; or
 - (b) the third party consents.
- (3) In this section, *third party* means a party to the proceeding concerned, other than the party who—
 - (a) made the admission; or
 - (b) offered the evidence.

3.11 The definitions of witness and hearsay statement were recommended by the Law Commission in its draft Evidence Code. The reason for linking the definition of hearsay statement with that of “witness” was due to the Law Commission’s view that:¹¹⁸

The main reason for not allowing one person to give evidence about another person’s statement is because of the lack of opportunity to test the reliability of the statement in cross-examination. But if the maker of the statement is able to be cross-examined (the second limb of the definition of *witness*), then this objection no longer applies.

3.12 In practice, the ability to cross-examine a witness will vary, as is apparent with hostile witnesses.¹¹⁹

3.13 A witness who is currently engaged in giving evidence clearly falls within the definition of “witness”. The situation with regard to past and future testifiers is outlined below.

Current case law

3.14 The Court of Appeal has held that past testifiers come within the s 4 definition of “witness”, stating that “X, as a past-testifier, is a witness for the purposes of the Act according to s 4”.¹²⁰ This is consistent with the Law Commission’s commentary on the draft Evidence Code¹²¹ and the explanatory

118 Law Commission *Evidence: Volume 2*, above n 116, at 11.

119 *Morgan v R* [2010] NZSC 23 at [11], [2010] 2 NZLR 508 at [11].

120 *M v R* [2010] NZCA 302 at [26].

121 Law Commission *Evidence: Volume 2*, above n 116, at 11.

note to the Evidence Bill.¹²² This can cause timing issues where a subsequent witness recounts what a past testifier said to them on a matter that the past testifier did not give evidence on. In *R v Foreman (No 7)* a witness was asked about his conversation with a past testifier who had left the courtroom.¹²³ Simon France J refused to let the question be put, holding that:¹²⁴

Although not hearsay, in general it cannot be that an out of court statement admissible for its truth, can be led about a topic when the maker of the statement has already testified and has not been asked about the topic ... What would happen if the question is allowed at this point is that what should be a prior statement is led as original evidence proving its truth in circumstances where the maker of the statement has been a witness but has not himself testified to the truth of the contents. In my view that remains impermissible.

- 3.15 His Honour recognised that this timing issue can be remedied through recalling the past testifier.¹²⁵ This ensures the court is provided with evidence by the person who made the statement, and that the statement maker can be cross-examined on it. Admissibility would remain subject to the previous consistent statement rule in s 35.¹²⁶
- 3.16 In relation to future testifiers, the Supreme Court in *R v B* proceeded on the basis that a future testifier is not a “witness” for the purposes of s 35.¹²⁷ However, the Court also held that “It does not matter that [the witness] is not presently a witness in the s 4 sense because she will be a witness *when the ruling comes to be applied*”, thus allowing the admissibility of the previous consistent statement to be considered pre-trial.¹²⁸

Should future testifiers be “witnesses”?

- 3.17 The authors of *The Evidence Act 2006: Act & Analysis* set out their view that the core admissibility provisions relating to hearsay (s 18), admissions in civil proceedings (s 34) and previous consistent statements (s 35) would be “almost unworkable” if future testifiers were included in the definition of “witness”.¹²⁹ The problems identified are that:¹³⁰

122 Evidence Bill 2005 (256-1) (explanatory note) at 5.

123 *R v Foreman (No 7)* HC Napier CRI-2006-041-1363, 22 April 2008.

124 At [4].

125 At [5].

126 Section 35 is discussed in detail in chapter 5.

127 *R v B* [2010] NZSC 160, [2011] 2 NZLR 82.

128 At [10] (emphasis added).

129 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) at 31.

130 At 31-32.

- Hearsay: out of Court statements by a future testifier would be admissible without the controls of reliability, unavailability and notice (in criminal proceedings) being met.
- Admissions in civil proceedings: s 34(2), which limits the use of hearsay statements of a third party in civil proceedings, would be largely meaningless as such admissions would seldom be “hearsay statements” as parties in civil proceedings almost always give evidence.
- Previous consistent statements: it would be difficult to determine whether a statement is consistent with evidence that a future testifier is yet to give.

3.18 We think that it would be odd for the admissibility of a conversation between two witnesses to be determined by who gives evidence first under the three sections discussed above. In relation to the specific sections:

- Hearsay: We remain of the view that “the lack of opportunity to test a witness’s evidence in cross-examination is the most compelling reason for limiting the admissibility of hearsay evidence”.¹³¹ Cross-examination fulfils the function of the “reasonable assurance of reliability” test by ensuring that the fact-finder has information to assess the reliability of the statement. There seems no reason, in principle, for distinguishing between past and future testifiers. We also note that the timing issue that can occur in relation to past testifiers is not a problem as parties can ensure that the witness gives evidence about, and is cross-examined on, the circumstances in which they made the relevant statement.
- Admissions in civil proceedings: Section 34(2) preserves the position of a party (witness A) from having their position damaged by another party’s admission (witness B) where witness A is neither the person who made the admission, nor the person who is giving evidence of the admission. As with hearsay, cross-examination fulfils the function of the reliability test set out in s 34(2)(a).
- Previous consistent statements: We acknowledge that including future testifiers in the definition of “witness” could cause difficulties with s 35 as it would be difficult to know in advance whether a statement will be “consistent” when the witness has not yet testified. In contrast to ss 18 and 34, whether future events will justify admission depends on the content of the evidence to be given, and not only on whether the future testifier will in fact give evidence. However, our recommendation to repeal s 35(1) and (2) would eliminate this issue.¹³² Alternatively, s 14 provides a means for this evidence to be provisionally admitted.

131 Law Commission *Evidence: Volume 1*, above n 115, at 14.

132 See paragraph 5.61.

- 3.19 We acknowledge that there is a risk that a future testifier who is scheduled to appear as a witness does not do so. Alternatively, a party may change their mind about calling a particular witness. In this event, s 14 would allow evidence to be provisionally admitted subject to the statement maker giving evidence as a witness. If this does not occur, any prejudice or unfairness could be remedied through a judicial direction to the jury. A party could also appeal, or in extraordinary circumstances where the extent of the prejudice or unfairness is such that remedial action is ineffective, the judge may declare a mistrial.
- 3.20 We have considered whether an amendment to clarify that the definition of witness includes future testifiers is necessary or desirable. We are conscious that the term “witness” is peppered throughout the Act with different nuances in meaning depending on the context in which it appears. For instance, the hostile witness provisions (definition of hostile in s 4, and s 94), opinion evidence provisions (s 24) and provisions relating to the questioning of witnesses under subpart 4 of Part 3 of the Act, generally only relate to a witness that is currently engaged in giving evidence. Other provisions clearly refer also to future testifiers.¹³³ We are therefore reluctant to recommend any legislative amendment in the absence of any evidence that the definition is causing problems in practice, as it could have wide-ranging and unintended effects. Accordingly, we recommend no amendment but will continue to monitor the interpretation of the term “witness” for reconsideration at the next five year review if any problems are identified.

R2 We recommend that the definition of “witness” be kept under review with any problems identified to be considered at the next five year review.

Business Records

- 3.21 We received submissions that the business record exception (which allows a hearsay statement in a business record to be admitted without having to separately satisfy the reliability test) should not include items such as police notebooks which contain eyewitness statements. The exception is contained in s 19 and provides:

19 Admissibility of hearsay statements contained in business records

- (1) A hearsay statement contained in a business record is admissible if—
- (a) the person who supplied the information used for the composition of the record is unavailable as a witness; or
 - (b) the Judge considers no useful purpose would be served by requiring that person to be a witness as that person cannot reasonably be expected (having

¹³³ See, for example, provisions relating to alternative modes of giving evidence (s 103), witness anonymity orders (ss 110-120), privacy of witnesses (s 87) and New Zealand subpoenas served on Australian witnesses (s 154).

regard to the time that has elapsed since he or she supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he or she supplied; or

(c) the Judge considers that undue expense or delay would be caused if that person were required to be a witness.

(2) This section is subject to sections 20 and 22.

3.22 Business, business record and duty are defined in s 16 as:

business—

- (a) means any business, profession, trade, manufacture, occupation, or calling of any kind; and
- (b) includes the activities of any department of State, local authority, public body, body corporate, organisation, or society

business record means a document—

- (a) that is made—
 - (i) to comply with a duty; or
 - (ii) in the course of a business, and as a record or part of a record of that business; and
- (b) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied

duty includes any duty imposed by law or arising under any contract, and any duty recognised in carrying on any business practice.

3.23 Section 19 and the associated definitions in s 16 were inserted by the Select Committee for the following reasons:¹³⁴

Business records as a class of documents are accepted as reliable. In addition, we consider that time and cost will be saved by retaining the existing exception to the hearsay rule contained in the Evidence Amendment Act (No 2) 1980.

3.24 This was confirmed during the debate in the Committee of the Whole House considering the Evidence Bill. Mr Finlayson said that “Following on from submissions, we have gone back, essentially, to the equivalent provision in the Evidence Amendment Act (No 2) 1980.”¹³⁵

3.25 However, s 19 is different from the equivalent provision in the Evidence Amendment Act (No 2) 1980. In particular, the previous business record exception did not include a document that “[r]ecords the oral statement of any person made when the criminal proceeding was, or should reasonably have

134 Evidence Bill 2005 (256-2) (select committee report) at 3.

135 (21 November 2006) 635 NZPD 6642. See also Kate Wilkinson MP’s (as she then was) speech at (21 November 2006) 635 NZPD 6644.

been, known by him to be contemplated".¹³⁶ This previously had the effect of excluding statements that might be self-interested or biased.¹³⁷

- 3.26 It has been suggested to us that s 19 be repealed as s 18 could adequately determine the admissibility of such statements. In the alternative, some submitters were of the view that the definition of business record should be reconsidered to exclude police notebooks and documents that contain eyewitness statements.

Police documents and notebooks containing eyewitness statements

- 3.27 The issue of police notebooks first arose in *R v Hovell* under the Evidence Amendment Act (No 2) 1980.¹³⁸ The statement in question was a narrative prepared by a police officer following a question and answer session with the victim of an indecent assault who subsequently died before the defendant was charged. The victim signed the statement after it was read to her. The Court of Appeal held that the statement taken by the police officer was a "business record" as it was a document made pursuant to the police officer's duty in investigating the victim's complaint.¹³⁹
- 3.28 *R v Kereopa* concerned the admissibility of a police statement of a deceased eyewitness under the Evidence Act 2006.¹⁴⁰ The Court determined the admissibility of the statement under both s 18 and s 19. Looking first to s 18, Cooper J held that there was not reasonable assurance that the statement was reliable for the purposes of s 18, and should therefore be excluded.¹⁴¹ In the alternative, Cooper J found that s 19 applied as the definition of "business record" in the Act is not materially different from the old definition in s 3 of the Evidence Amendment Act (No 2) 1980.¹⁴² However, he applied the overriding discretion in s 8 to exclude the statement on the basis that its probative value would be outweighed by the prejudicial effect of its admission.¹⁴³
- 3.29 The exclusion in *R v Kereopa* appears to have been the correct result in the circumstances. However, it seems unsatisfactory that the judge had to resort to the general overriding s 8 provision to exclude a statement he regarded as unreliable.

136 Evidence Amendment Act (No 2) 1980, s 3(2) of Evidence Act 2006, s 19.

137 Scott Optican and Peter Sankoff "Hearsay" (paper presented to New Zealand Law Society Evidence Act 2006 Revisited for Criminal Lawyers Seminar, February 2010) 45 at 59.

138 *R v Hovell* [1986] 1 NZLR 500 (CA).

139 At [504] per Richardson J and at [511] per Somers J.

140 *R v Kereopa* HC Tauranga CRI-2007-087-000411, 11 February 2008.

141 At [31].

142 At [32].

143 At [33].

- 3.30 Police records containing statements of eyewitnesses or victims are different from other business records that generally do not raise reliability concerns, such as microfilms recording numbers stamped into cards during manufacture,¹⁴⁴ financial records,¹⁴⁵ information on a police computer system containing a national register of vehicle owners,¹⁴⁶ loan and mortgage documents,¹⁴⁷ a copy of an Information,¹⁴⁸ and medical records.¹⁴⁹ Our view is that police records containing eyewitness or victim statements should be subject to the reliability test in s 18.
- 3.31 We believe that this is consistent with the Select Committee’s reinstatement of the business record exception. Its rationale for doing so was that business records are inherently reliable and an independent assessment of reliability would therefore consume unnecessary time and cost.¹⁵⁰ Ensuring the business record exception does not apply to documents that are *not* inherently reliable is consistent with this rationale.
- 3.32 There are a number of options for reform:
- Repeal the business record exception in s 19. This would treat business records in the same way as other hearsay evidence, requiring reliability to be assessed on a case by case basis. This is consistent with the Law Commission’s recommendation in its previous reports. However, we note the Select Committee specifically rejected this approach.¹⁵¹
 - Amend either s 19 or the definition of “business record” to exclude statements made when criminal proceedings are reasonably contemplated. This would effectively reinstate the limitation previously contained in the Evidence Amendment Act (No 2) 1980. However, the Court of Appeal in *R v Hovell* ruled that a police notebook containing a victim’s statement was admissible, notwithstanding this limitation. It is therefore doubtful whether reinstating this limitation would have the desired effect.
 - Amend the definition of “business record” to exclude police notebooks that contain statements or interviews of eyewitnesses or victims. Such documents would be considered under s 18 and subject to the reliability test.

144 *DPP v Myers* [1965] AC 1001 (HL).

145 *Blanchett v Keshvara* HC Auckland CIV-2010-404-1282, 13 September 2011 at [17]–[18].

146 *Hastie v Police* HC Christchurch CRI-2010-409-000222, 9 September 2011 at [45]–[49].

147 *Westpac v Bateman* HC Auckland CIV-2009-404-004616, 3 March 2010 at [19].

148 *Pakai v Police* HC Invercargill CRI-2008-425-37, 13 March 2009 at [40].

149 *Tucker v Police* HC Palmerston North CRI-2008-454-16, 12 March 2008; *Knight v Crown Health Financing Agency* HC Wellington CIV-2005-485-2678, 16 November 2007.

150 Evidence Bill 2005 (256-2) (select committee report) at 3.

151 At 3.

- 3.33 The latter is our preferred approach. It respects, and is consistent with, the Select Committee's rationale for reinstating the business record exception.

R3 We recommend amending the definition of "business record" to exclude police documents containing statements or interviews with eyewitnesses or victims.

Notice requirements

- 3.34 Parties are required to give notice of their intention to adduce hearsay evidence in criminal proceedings under s 22. This written notice must contain:

- (a) the party's intention to offer the hearsay statement in evidence; and
- (b) the name of the maker of the statement, if known (subject to the terms of any witness anonymity order); and
- (c) if the hearsay statement was made orally, the contents of the hearsay statement; and
- (d) if section 18(1)(a) is relied on, the circumstances relating to the statement that provide reasonable assurance that the statement is reliable; and
- (e) if section 19 is relied on, why the document is a business record; and
- (f) if section 18(1)(b)(i) or 19(1)(a) is relied on, why the person is unavailable as a witness; and
- (g) if section 18(1)(b)(ii) or 19(1)(c) is relied on, why undue expense or delay would be caused if the person were required to be a witness.

- 3.35 There are three grounds for admissibility under the business record exception: (a) the person is unavailable as a witness; (b) calling the person would serve no useful purpose as they cannot reasonably be expected to recollect the matter; or (c) calling the person would cause undue expense or delay. There appears no reason why information is required as to why a party believes the business record exception applies under paragraphs (a) and (c), but not paragraph (b). This appears to be a drafting oversight that should be rectified.

R4 We recommend amending s 22 so that a party intending to offer a hearsay statement under s 19(1)(b) must give notice as to why no useful purpose would be served by requiring that person to be a witness.

DEFENDANTS' STATEMENTS

- 3.36 This part of our report considers the following issues that have been raised in relation to defendants' statements:

- The treatment of defendants' statements that contain both inculpatory and exculpatory parts;

- the status of allegations that are “put” to a defendant; and
- reliability under s 28.

Introduction and background

3.37 A defendant’s out of court statement is a hearsay statement.¹⁵² Historically, confessions were treated by the law as a special category of evidence, governed by particular rules of admissibility.¹⁵³ This reflected concerns about the reliability of confessions and the need to protect people from coerced self-incrimination. These concerns are now dealt with under ss 27–30 of the Act, considered below.

3.38 The applicable rules that determine whether a defendant’s statement is admissible depend on who is seeking to adduce the statement: the defendant, the prosecution, or a co-defendant.

Defendant adducing evidence

3.39 Section 21 is the operative provision:

21 Defendant who does not give evidence in criminal proceeding may not offer own statement

- (1) If a defendant in a criminal proceeding does not give evidence, the defendant may not offer his or her own hearsay statement in evidence in the proceeding.
- (2) To avoid any doubt, this section does not limit the previous consistent statement rule.

3.40 This provision differs from the Law Commission’s original recommendation that a defendant could adduce a prior statement if it passed the reliability test in s 18(1).¹⁵⁴ However, s 21 was included in the Evidence Bill as introduced to ensure that a defendant could not tell his or her version of events through another witness, and thus get their story across without being subject to cross-examination.¹⁵⁵ If the defendant takes the stand, their out of court statement is no longer hearsay, and they may offer evidence of this statement if it is not inadmissible by virtue of another rule, such as s 35.¹⁵⁶

152 A defendant cannot be compelled to give evidence. If they choose not to do so, their out of court statement would constitute hearsay.

153 Law Commission *Criminal Evidence: Police Questioning: A Discussion Paper* (NZLC PP21, 1992) at 62.

154 Law Commission *Evidence: Volume 1*, above n 115, at 15-16 and 33.

155 Evidence Bill 2005 (256-1) (explanatory note) at 6.

156 Discussion and recommendations regarding s 35 are contained in chapter 5 of this report.

Prosecution adducing statement

3.41 Section 27 governs the admissibility of a defendant's statement when offered by the prosecution:

27 Defendants' statements offered by prosecution

- (1) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant, but not against a co-defendant in the proceeding.
- (2) However, evidence offered under subsection (1) is not admissible against that defendant if it is excluded under section 28, 29, or 30.
- (3) Subpart 1 (hearsay evidence), subpart 2 (opinion evidence and expert evidence), and section 35 (previous consistent statements rule) do not apply to evidence offered under subsection (1).

3.42 The prosecution may offer a defendant's out of court statement if it is not excluded under ss 28–30 because it is unreliable, obtained improperly or by oppression. Sections 28 and 29 are rules of automatic exclusion that apply only to defendants' statements: if certain conditions are satisfied, the judge *must* exclude the evidence. Section 30 provides a discretionary rule of exclusion based on a balancing of relevant factors and applies to all evidence, not merely defendants' statements. These sections represent a reform of the previous law of confessions, including the voluntariness rule (and the exception in s 20 of the Evidence Act 1908), and the common law discretion to exclude evidence on the grounds of unfairness or breach of the New Zealand Bill of Rights Act 1990.¹⁵⁷

3.43 The common law and s 20 had a two-fold purpose: ensuring the reliability of incriminating admissions and controlling the methods used to obtain such admissions.¹⁵⁸ This two-fold purpose was reflected in the Law Commission's recommendations in the Evidence Code.¹⁵⁹ What became s 28 was primarily concerned with reliability.¹⁶⁰ What became ss 29–30 were concerned with the conduct of enforcement officers in obtaining defendants' statements, and whether it was obtained through oppression (s 29) or unfairly (s 30).¹⁶¹

157 Law Commission *Evidence: Volume 1*, above n 115, at 28-29; Law Commission *Evidence: Volume 2*, above n 116, at 79.

158 Law Commission *Evidence: Volume 1*, above n 115, at 28.

159 At 30.

160 Law Commission *Evidence: Volume 2*, above n 116, at 79.

161 Although the Law Commission recognised that the oppression rule was likely to promote reliability as statements obtained by oppression or violence have the potential to be unreliable (see Law Commission *Evidence: Volume 2*, above n 116, at 83).

Co-defendant adducing evidence

- 3.44 If a co-defendant offers a defendant's statement in evidence, admissibility will be determined by the general admissibility rules in the Act (for example, the hearsay and previous consistent statement rule), rather than ss 27–30. The issue of what use, if any, a co-defendant may make of another defendant's statement (in a joint trial) that has already been admitted under s 27(1) is considered in the section relating to co-defendants' statements, along with the preservation of the common law in s 12A.

Mixed inculpatory and exculpatory statements

- 3.45 Submitters have raised two concerns in relation to defendants' statements which contain both inculpatory and exculpatory parts. The first relates to the relationship between s 27, which provides that a defendant's out of court statement that is offered by the prosecution is admissible "against" the defendant, and s 21, which prevents a defendant from offering his or her out of court statement where he or she does not take the stand. There is concern that these provisions, taken together, may require or permit the prosecution to excise the exculpatory parts of a defendant's mixed statement.
- 3.46 The Court of Appeal in *R v Green* has clarified that a statement offered under s 21 need not solely be inculpatory. The Court made the obiter statement that "against" in the context of s 27 means "the evidence will be proffered by the prosecution and that it will be taken into account by the jury in considering the Crown case against the defendant". This allows the exculpatory parts of a defendant's statement to be offered alongside the inculpatory parts, allowing the statement to be adduced in its entirety.¹⁶² This has since been applied in *Kendall v R* and is a sensible approach to the section.¹⁶³ We understand that general practice is for the prosecution to put in the whole of a defendant's statement, rather than simply the inculpatory parts.
- 3.47 The second concern is that *R v King*¹⁶⁴ and *R v Felise*¹⁶⁵ may have confused the prohibition in s 21. In *R v King* and *R v Felise (No 3)* the prosecution opted not to adduce evidence of a defendant's statement. In *R v King*, the Court of Appeal stated that:¹⁶⁶

Sections 21 and 27 suggest that the admissibility of a defendant's statement depends on who tenders the statement, so that it is admissible if offered by the prosecution and inadmissible if offered by the defence. If so, this implies that the admissibility of such a statement turns on the exercise of the prosecutor's discretion.

162 *R v Green* [2009] NZCA 400 at [12].

163 *Kendall v R* [2012] NZCA 5 at [16].

164 *R v King* [2009] NZCA 607, (2009) CRNZ 527.

165 *R v Felise* HC Auckland CRI-2008-092-8864, 8 February 2010; *R v Felise (No 3)* (2010) 24 CRNZ 533.

166 At [16].

- 3.48 The Court suggested that this discretion is not unfettered, and that the court could use its power under s 368(2) of the Crimes Act 1961 (which allows the court to require the prosecution to call a witness it believes ought to be called) to require a prosecutor to lead particular evidence from a witness.¹⁶⁷ Alternatively, the Court suggested that such a power may be implicit in s 25 of the New Zealand Bill of Rights Act 1990.¹⁶⁸
- 3.49 The High Court reached a similar conclusion in a multi-defendant trial in *R v Felise (No 3)*. Lang J held that issues of fairness and balance arise where the prosecution chooses to lead parts of a discussion before the jury, but not other parts that may be helpful to the defence.¹⁶⁹ Accordingly, he allowed counsel for the defendants to cross-examine the witness on the full discussions (notwithstanding the prohibition in s 21(1)) to allow the jury to place the statements elicited by the prosecution in the context of the discussions generally.¹⁷⁰

In reaching that conclusion I did not underestimate the force of the prohibition contained in s 21(1) of the Evidence Act 2006. Like all legislation, however, it must be applied consistently with the rights guaranteed by the New Zealand Bill of Rights Act 1990. These include the right of an accused person to be treated fairly. I took the view that it would be unfair for counsel or the accused not to be able to explore what was said at the meetings.

- 3.50 Submitters have questioned whether the approach in *R v King* and *R v Felise (No 3)* is consistent with the Act being the primary source for the law of evidence, and undermines the clear intention in s 21.
- 3.51 The fair trial rights enshrined in the New Zealand Bill of Rights Act 1990 are referred to in s 6 of the Act, which relevantly provides:

6 Purpose

The purpose of this Act is to help secure the just determination of proceedings by—

...

- (b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and
- (c) promoting fairness to parties and witnesses;

...

167 At [19].

168 At [19]. Section 25 of the New Zealand Bill of Rights Act 1990 is entitled “minimum standards of criminal procedure” and contains, among other things, the right to a fair trial (s 25(a)), and the right to be present at the trial and to present a defence (s 25(e)).

169 At [23].

170 At [24]–[25].

- 3.52 While the Act should be the first port of call in determining admissibility issues, it is not the only relevant port of call. As stated in *R v King*, provisions such as s 368(2) in the Crimes Act 1961 continue to apply. Likewise, trial judges retain their powers to control the criminal trial process.¹⁷¹ These powers are explicitly preserved in s 11 of the Act. Finally, the principle that legislation, where possible, should be interpreted consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 is well established.¹⁷²
- 3.53 We recognise that the approaches suggested in *R v King* and applied in *R v Felise (No 3)* will only be appropriate in rare circumstances where the resulting unfairness to the defendant impacts on his or her right to a fair trial. We also note the obligations on prosecutors contained in both the Prosecution Guidelines¹⁷³ and the Rules of Conduct and Client Care for lawyers.¹⁷⁴ While submitters have expressed concern about the approach in *R v King* and *R v Felise (No 3)*, the heart of these concerns is not about the drafting of s 21, but the use of s 368 of the Crimes Act and the court's inherent powers. Accordingly, we recommend no amendment to s 21.

Allegations put to a defendant

- 3.54 Victims, victims' families and police may confront a defendant about alleged offending. An issue that has been raised with us is the approach the courts have taken to the admissibility of these allegations and the defendant's response to them.

Pre-Act common law

- 3.55 Under the pre-Act common law, admissibility was determined by whether the defendant had accepted the statement by their words or actions.¹⁷⁵ The basis for admissibility was that the defendant, by accepting the statement, adopted it as his or her own.¹⁷⁶

171 *R v King*, above n 164, at [19].

172 New Zealand Bill of Rights Act 1990, s 6.

173 Crown Law *Prosecution Guidelines* (January 2010). See duties on prosecutors in relation to an defendant's right to a fair trial, in particular, at [17.2.4]: "The prosecutor may be obliged to call a witness although that person adds little to the prosecution case but whose testimony may favour the defendant's case."

174 See, in particular, chapter 13.2.

175 Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at [EA12A.03]

176 *R v Christie* [1914] AC 545 (HL) at 554; *R v Duffy* [1979] 2 NZLR 433 (CA) at 435; *Lal v Police* HC Auckland CRI-2005-404-062 at [11].

- 3.56 The general principles arising from the pre-Act case law are:
- A statement made in the presence of a defendant is admissible against him or her to the extent that they have accepted the statement.¹⁷⁷
 - A defendant may accept a statement through words, conduct, action or demeanour.¹⁷⁸ The court must consider all the circumstances in which the defendant is alleged to have accepted the statement in determining whether acceptance occurred.¹⁷⁹
 - Silence will only constitute acceptance in exceptional circumstances.¹⁸⁰ Factors supporting acceptance are where the statement is made spontaneously¹⁸¹ and by someone on “equal terms” with the defendant.¹⁸²
- 3.57 In addition to this, the Court of Appeal enunciated the following principle in *R v Halligan* in relation to police questioning:¹⁸³
- ... police officers cannot be allowed to introduce evidence for the Crown by making accusations to a suspect, and, when they receive no damaging admission in reply, retailing to the jury what they said as if it were relevant evidence.

Section 27 and current case law

- 3.58 Section 27 reformed the law relating to defendants' statements and provided a general rule for all statements, not merely admissions or confessions. As set out above, such statements are admissible unless excluded under ss 28–30.¹⁸⁴ The hearsay, opinion and expert evidence provisions and previous consistent statements rule do not apply to statements offered under s 27(1).¹⁸⁵ Section 27 therefore allows in statements that would otherwise be inadmissible.
- 3.59 A threshold issue for s 27 is whether the statement is “made by a defendant”. The definition of “statement” is contained in s 4:

statement means—

- (a) a spoken or written assertion by a person of any matter; or

177 *R v Christie*, above n 176, at 554; *R v Duffy*, above n 176, at 435.

178 *R v Christie*, above n 176, at 554; *Parkes v R* [1976] 3 All ER 380 (PC) at 383; *Juken Nisho Ltd v Northland Regional Council* [2000] 2 NZLR 556 (CA) at [17].

179 *R v Duffy*, above n 176, at 438; *R v Beresford* HC Invercargill T13/90, 17 April 1991 at 2.

180 *R v Duffy*, above n 176, at 438; *R v Lapham* CA29/03 and CA30/03, 12 June 2003 at [23].

181 *Parkes v R*, above n 178, at 383; *R v Duffy*, above n 176, at 438.

182 *Parkes v R*, above n 178, at 383; *R v Duffy*, above n 176, at 438; *R v Kora* CA489/99, 11 May 2000 at [15].

183 *R v Halligan* [1973] 2 NZLR 158 at 162.

184 Evidence Act 2006, s 27(2).

185 See s 27(3).

- (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter

3.60 Obviously any statement that a defendant says or writes in response to an allegation or confrontation will be captured by s 27(1). A defendant's non-verbal response to an allegation will also be captured by s 27(1), so long as the defendant intended to assert something by it. However, while the defendant's response is covered by s 27(1), it is not clear that the allegations to which they are responding are also covered.

3.61 The applicability of s 27(1) to an allegation put to a defendant was considered by the Court of Appeal in *R v Barlien*.¹⁸⁶ That case involved the complainant's mother confronting the defendant about alleged sexual offending against her daughters. She asked the defendant what he had done to her girls and put to him that he had touched them and also kissed one of the girls. He responded "[d]o you think I would still be here if I'd done anything wrong".¹⁸⁷ The Court of Appeal held that:¹⁸⁸

Mr Barlien's statements in reaction to the allegations put to him by Mrs S were clearly admissible (see s 27(1) of the Act...). His reaction is so tied up with the allegations (being effectively an answer to those allegations) that what Mrs S put to Mr Barlien must be seen as *part of Mr Barlien's statements* and therefore admissible, in the same way that the allegations put to an accused in a police interview (as required by the Chief Justice's Practice Note – Police Questioning ... [2007] 3 NZLR 297 at [4]) would be admissible.

3.62 Although this approach has been criticised,¹⁸⁹ it has subsequently been applied by the Court of Appeal in *R v H*.¹⁹⁰ *R v Saunokonoko* extended this approach to situations where the defendant is silent in response to allegations.¹⁹¹

3.63 The approach in *R v Saunokonoko* has been questioned in another Court of Appeal judgment *Hitchinson v R*:¹⁹²

If the complainant made [an assertion] and the defendant did not respond, evidence of the defendant's silence and the accusation to which it relates are admissible, not under s 27 (because the defendant has made no "statement"¹⁰) but under s 7.

3.64 In the footnote to this statement, the Court said:

We do not accept that a defendant's silence constitutes "a statement" for the purposes of s 27, given the definition of "statement" in s 4: contrast *R v Saunokonoko* [2008] NZCA

186 *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170.

187 At [10].

188 At [60] (emphasis added).

189 Richard Mahoney "Evidence" [2009] NZ L Rev 127 at 129.

190 *R v H* [2009] NZCA 16. See also *R v Edmonds* [2012] NZCA 472.

191 *R v Saunokonoko* [2008] NZCA 393, [2008] BCL 972.

192 *Hitchinson v R* [2010] NZCA 388 at [44].

393 at [21]. In support of our view, see Richard Mahoney "Evidence" [2009] NZ L Rev 127 at 130.

- 3.65 A similar approach was taken in *L v R* where the police put substantial portions of the complainant's allegations to the defendant during an interview.¹⁹³ The Court of Appeal held that s 27 did not apply as the defendant was not given an opportunity to respond.¹⁹⁴ The Court also found that, even if the defendant was given an opportunity to respond, the material was too extensive to be regarded as part of the defendant's statement.¹⁹⁵ As s 27 did not apply, the evidence was therefore inadmissible under s 35.¹⁹⁶

Law Commission's view

- 3.66 We agree with Richard Mahoney's concerns that an allegation that has been refuted by a defendant can be considered to be part of their statement.¹⁹⁷ The concept that a defendant's denial of an allegation somehow transforms that allegation into their own statement is counter-intuitive. It is also inconsistent with the definition of "statement" in s 4 which involves a written or spoken statement, or non-verbal conduct *intended* by a person (in this case, the defendant) *as an assertion of any matter*.
- 3.67 However, the defendant's response is clearly admissible under s 27(1). The defendant's response would be unintelligible without the context in which the response was made. An alternative approach would therefore be to admit the allegation on the basis that it is necessary for the defendant's statement to be intelligible. This avoids a strained interpretation to the phrase "statement by a defendant".
- 3.68 There is support for this approach in the cases set out above. For instance, Winkelmann J in *L v R* described s 27(3) as "legislative recognition that a statement by a defendant might contain otherwise inadmissible material, the receipt of which is *necessary to understand the effect* of the answers".¹⁹⁸ Likewise, in *G v R* the Court of Appeal held that "[t]he letter, as much as his response to it, was admissible to give full sense to his statement".¹⁹⁹

193 *L v R* [2010] NZCA 131.

194 At [35].

195 At [35].

196 At [35].

197 Mahoney, above n 189, at 129.

198 At [35] (emphasis added). This echoes other statements by the Court of Appeal that an allegation is admissible so that the defendant's response can be properly understood and put in context. See, for example *Hitchinson v R*, above n 192, at [44].

199 *G v R* [2010] NZCA 283 at [20]. See also *R v H*, above n 190, at [16] where the Court remarks "The narrative would be unintelligible if part or parts were excised".

- 3.69 In relation to allegations where the defendant remains silent, we agree with the view expressed in *Hitchinson v R* and *L v R* that a defendant's silence when confronted with an allegation, without more, does not engage s 27. We note that there may be some limited situations where a defendant's silence may be admissible under s 27(1). For instance, a defendant, when confronted by a complainant, may nod or shake their head in response to the allegations. Whether this is admissible as a "statement made by a defendant" under s 27(1) will ultimately turn on whether the defendant intended to assert something as per the definition of "statement" under s 4. If this conduct is admissible, as provided above, the allegations will also be admissible to place the statement in context.
- 3.70 The concerns raised about the admissibility of allegations do not seem to relate to the drafting of s 27 or the definition of "statement" in s 4, but with how they have been interpreted. Ultimately, we agree with the final position reached by the courts whereby allegations put to a defendant are admissible where it is necessary to provide the context for the defendant's (admissible) statement in response. As such, we see no compelling case for change and recommend no specific amendment to s 27 to deal with this issue.
- 3.71 The extent to which the allegations are admissible is likely to depend on the facts. As the Court of Appeal noted in *R v Edmonds* "[t]he appellant's statement should not be a vehicle for extensive repetition of inadmissible co-offenders' statements."²⁰⁰ Editing of the allegation will be necessary in some cases to ensure that the allegation is only admissible to the extent necessary to make the defendant's response intelligible.
- 3.72 The continued relevance of the principle in *R v Halligan* remains a little unclear.²⁰¹ The High Court applied this principle in *R v Jamieson*, stating that where a defendant has provided no meaningful response in response to an allegation, the allegation itself is inadmissible.²⁰² In *R v Bain*, the Court of Appeal noted the *Halligan* principle, but did not expressly consider its continued relevance in light of the interpretation taken to s 27(1). Our view is that the principle has now been overtaken by ss 27(1) and 32(1) of the Act.

Reliability under section 28

- 3.73 As discussed above, s 28 provides that a defendant's statement is not admissible if the defendant, co-defendant, or judge raises the issue of the statement's reliability. If the issue is raised, the test for admission is whether the "circumstances in which the statement was made" affected its reliability. Submitters have suggested that s 28 should be clear about whether the actual

200 *R v Edmonds*, above n 190, at [67].

201 See above discussion at paragraph 3.57.

202 *R v Jamieson* HC Timaru CRI-2008-076-000328, 10 September 2008 at [37]. See also *R v Churchward* HC Tauranga CRI-2008-270-361, 14 October 2009 at [11].

reliability, or truth, of a statement is relevant, or whether it is merely the circumstances of its making. Section 28 currently provides:

28 Exclusion of unreliable statements

- (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer a statement of a defendant if—
 - (a) the defendant or, if applicable, a co-defendant against whom the statement is offered raises, on the basis of an evidential foundation, the issue of the reliability of the statement and informs the Judge and the prosecution of the grounds for raising the issue; or
 - (b) the Judge raises the issue of the reliability of the statement and informs the prosecution of the grounds for raising the issue.
- (2) The Judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.
- (3) However, subsection (2) does not have effect to exclude a statement made by a defendant if the statement is offered only as evidence of the physical, mental, or psychological condition of the defendant at the time the statement was made or as evidence of whether the statement was made.
- (4) Without limiting the matters that a Judge may take into account for the purpose of applying subsection (2), the Judge must, in each case, take into account any of the following matters that are relevant to the case:
 - (a) any pertinent physical, mental, or psychological condition of the defendant when the statement was made (whether apparent or not):
 - (b) any pertinent characteristics of the defendant including any mental, intellectual, or physical disability to which the defendant is subject (whether apparent or not):
 - (c) the nature of any questions put to the defendant and the manner and circumstances in which they were put:
 - (d) the nature of any threat, promise, or representation made to the defendant or any other person.

3.74 The Law Commission has previously set out its view that the truth of a defendant's statement was irrelevant under each of ss 28–30.²⁰³

The rules are concerned with admissibility. So far as reliability is concerned, therefore, the focus should be on whether the circumstances surrounding the making of the statement “were likely to have adversely affected its reliability”. To require truth to be established at this preliminary stage would usurp the function of the jury. The position is essentially the same as under s 20 of the Evidence Act 1908, which requires the prosecution to prove that the means by which a confession was obtained “were not in fact likely to cause an untrue admission of guilt to be made”. The actual truth of the admission is not part of this enquiry (*R v Fatu* [1989] 3 NZLR 419, 429-430).

203 Law Commission *Evidence: Volume 1*, above n 115, at 32.

3.75 Section 31 of the Law Commission’s Evidence Code (an independent section that applied to the reliability, oppression and unfairly obtained evidence provisions) therefore expressly provided that the truth of a defendant’s statement was to be disregarded when determining whether to exclude the defendant’s statement under the reliability, oppression or unfairly obtained evidence rules.²⁰⁴ Consistent with this approach, the reliability test focuses on the “circumstances in which the statement was made” rather than the truthfulness of the statement itself.²⁰⁵ This was similar to the “means by which the confession was obtained” focus under the previous provision that dealt with reliability, s 20 of the Evidence Act 1908.

3.76 However, the Evidence Bill 2005 (256-1) as introduced deliberately departed from the Law Commission’s Code. The relevant clause provided that, where the reliability of a statement has been raised as an issue:

The Judge must exclude the statement unless satisfied on the balance of probabilities–

- (a) that the circumstances in which the statement was made were not likely to have adversely affected its reliability; or
- (b) that the statement is true.

3.77 The import of s 31 of the Evidence Code was relocated to the oppression rule in cl 25 (now s 29).²⁰⁶ These changes meant that, in the Bill as introduced, a statement’s truth was expressly irrelevant in applying the oppression rule (cl 25, now s 29), expressly relevant in applying the reliability rule (cl 24, now s 28) and relevant under the balancing process in the improperly obtained evidence rule under the “nature and quality of the improperly obtained evidence” factor (cl 26, now s 30).

3.78 The Select Committee subsequently reverted back to the Law Commission’s recommendation on the irrelevance of truth when applying the reliability rule.²⁰⁷

We recommend that clause 24(2) be amended to provide that the truth of a statement is not a relevant consideration when determining whether to admit a statement where the issue of its reliability has been raised. We consider that the truth of a statement should not be used to justify its admissibility, and that the truth of a statement should be determined when the guilt or innocence of the defendant, not the admissibility of evidence, is considered.

204 Law Commission *Evidence: Volume 2*, above n 116, at 88.

205 Evidence Act 2006, s 28(2).

206 The oppression rule encapsulated by s 29 provides that, if a defendant, co-defendant or judge raises the issue of a statement being obtained by oppression, the judge must exclude it unless satisfied beyond reasonable doubt that the statement was not influenced by oppression.

207 Evidence Bill 2005 (256-2) (select committee report) at 4.

- 3.79 The Select Committee's report is therefore clear that truth should be irrelevant under the reliability rule, and its recommendation was to remove paragraph (b) above ("that the statement is true").²⁰⁸ However, the Select Committee's recommended drafting did not insert a provision equivalent to (what is now) s 28(3) stating categorically that the truth of a statement is irrelevant in assessing admissibility.
- 3.80 There is some inconsistency in the courts' approach as to whether truth is relevant under s 28. The Court of Appeal in a pre-trial ruling in *R v Cameron* accepted that s 28 focuses on the circumstances in which the statement is made, rather than the truthfulness of the statement itself.²⁰⁹ This was reaffirmed by the Court of Appeal in *R v Edmonds* in an obiter statement regarding the similar phrase "the circumstances in which the identification was made have produced a reliable identification" in s 45(2).²¹⁰

The emphasis in s 45(2) (and indeed in s 45(1) also) is on whether the evidence is such that it would be legitimate for the jury to rely on it. This is a threshold question and it was not intended that the judge usurp the function of the jury by determining whether the identification was in fact accurate.

As submitted by the Crown, the test specified in s 45(2) is not dissimilar to the test for determining the admissibility of challenged statements of a defendant under s 28(2). This Court, in *R v Cameron* [2007] NZCA 564 at [60], stated that it is not the truth of the statement being assessed, but the impact of the surrounding circumstances on its reliability.

- 3.81 This approach has also been applied by the High Court.²¹¹
- 3.82 A second line of cases appear to suggest that a statement's truth is relevant under s 28. In the same *R v Cameron* case discussed above, counsel for Mr Cameron raised similar issues on appeal from the subsequent conviction.²¹² A different composition of the Court of Appeal stated that "[r]eliability is concerned with whether what was said was sound".²¹³ The Court also referred to corroborating evidence to assess reliability under s 28.²¹⁴

208 At 28.

209 *R v Cameron* [2007] NZCA 564, [2008] BCL 564 at [61].

210 *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [105]–[106].

211 See *R v K* [2012] NZHC 1045; *R v Patten* [2008] BCL 476; *R v Jamieson*, above n 202, at [29].

212 *R v Cameron* [2009] NZCA 87, [2009] BCL 368.

213 At [35].

214 At [36]. See also *R v McCallum* HC Auckland CRI-2006-004-17181, 29 August 2007 at [64] where the Court states "[r]eliability is not defined in the Act, but I interpret the word as relating to the accuracy and soundness of the statement, rather than to the fairness of the circumstances that led to it being made" and Chisholm J's application of this statement in *Tahaafe v Commissioner of Inland Revenue* HC Auckland CRI-2009-404-102, 10 July 2009 at [41].

- 3.83 The Supreme Court tangentially referred to this issue in obiter in *Bain v R*.²¹⁵ The Court ultimately determined admissibility with reference to ss 7 and 8, but also referred to the exclusionary rule in s 28. In doing so, the Court emphasised the “circumstances” in which the disputed admission is made.²¹⁶
- 3.84 A mix of the two approaches is applied in *Davies v Ministry of Health*.²¹⁷
- For my part I consider that the two, accuracy and fairness, are inextricably linked. I consider that s 28 brings into focus not only the accuracy and soundness of the statement itself, but also the circumstances in which it was made.
- 3.85 We remain of the view that truth should be irrelevant to the admissibility of defendants’ statements under s 28.²¹⁸ A final determination as to whether a statement is true should not be made at the threshold admissibility stage, but during the determination as to guilt. To do so would usurp the function of the jury²¹⁹ and risks diverting the court’s attention from questions of improper police conduct to large volumes of corroborating evidence.²²⁰
- 3.86 This can be demonstrated through consideration of an example where the statement at issue is “I killed Mr Smith”. If truth was relevant in determining admissibility, the judge would need to consider the central jury question. It would also risk a mini-trial in which the Crown and defence adduce extrinsic evidence demonstrating each party’s view as to why this statement is or is not true.
- 3.87 We believe that s 28 should be clarified to make it clear that the truth of the statement is irrelevant, consistent with s 29(3). This would be consistent with the Select Committee’s recommendation “to provide that the truth of a statement is not a relevant consideration when determining whether to admit a statement where the issue of its reliability has been raised”.²²¹ It also recognises the overlap between s 28 and s 29, given that one of the factors that must be considered under s 28(4)(d) is “the nature of any threat, promise or representation made to the defendant or any other person”.

R5 We recommend inserting a subsection into s 28 that provides that the truth of the statement is irrelevant to the application of that section.

215 *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1.

216 At [63].

217 *Davies v Ministry of Health* HC Christchurch CRI-2011-409-00026, 8 August 2011 at [25].

218 Law Commission *Evidence: Volume 1*, above n 115, at 15-16 and 32.

219 See also *R v Edmonds*, above n 210, at [105].

220 Law Commission *Criminal Evidence: Police Questioning*, above n 153, at 106.

221 Evidence Bill 2005 (256-2) (select committee report) at 4.

CO-DEFENDANTS' STATEMENTS

Introduction and background

- 3.88 This part of our report covers co-defendants' statements. Two main issues are considered: the use, by a co-defendant, of a statement offered by the prosecution in respect of another defendant under s 27; and codification of the common law currently preserved by s 12A.
- 3.89 Co-defendants in a joint trial may run "cut-throat" defences where the defence of each is that the other committed the offence. In such circumstances, a co-defendant is likely to wish to point to evidence that implicates the other in order to bolster their own case. In a joint trial, this can include a statement made by a co-defendant that has been offered by the prosecution under s 27(1).
- 3.90 The Law Commission had originally proposed that a statement admitted under s 27(1) should also be admissible against a co-defendant, changing the general common law principle that one defendant's statement cannot be used to implicate another defendant in the same proceeding.²²² However, the Select Committee was concerned that this would "unfairly deny the co-defendant the opportunity to test the reliability of the statement by cross-examining its maker and add to the length and complexity of many joint trials".²²³ The Select Committee amended what became s 27 so that such statements were not admissible against co-defendants.
- 3.91 In doing so, the Select Committee mistakenly believed it was maintaining the common law position.²²⁴ However, concerns were raised by commentators that the amendment did not capture two common law exceptions relating to joint criminal enterprises and acceptance by a co-defendant, and the Evidence Amendment Act 2007 was subsequently enacted to insert the new s 12A (discussed further at paragraph 3.108) to preserve these exceptions.

Co-defendant's use of a statement offered by the prosecution under section 27

- 3.92 Section 27 has resulted in contradictory judgments in the High Court as to whether a co-defendant can rely on a statement offered under that section. We have received submissions from the judiciary, one firm holding a Crown Solicitor's warrant and an individual suggesting that the position be clarified. The three cases directly relevant to this issue are *R v Vagaia (No 2)*, *Kupa-Caudwell v R* and *Leslie-Whitu v R*.²²⁵

222 Law Commission *Evidence: Volume 1*, above n 115, at 33.

223 Evidence Bill 2005 (256-2) (select committee report) at 4.

224 At 4.

225 *R v Vagaia (No 2)* HC Auckland CRI-2006-092-16228, 20 March 2008; *Kupa-Caudwell v R* [2010] NZCA 357; *Leslie-Whitu v R* HC Rotorua CRI-2009-263-0163, 5 October 2011.

- 3.93 In *R v Vagaia (No 2)* counsel for a defendant (D2) wished to refer to an out of court statement by a co-defendant (D1) in their closing address to the jury. D1's statement was unhelpful to D1 but helpful to D2. Asher J held that D2 was entitled to use D1's statement for his benefit in closing.²²⁶

This is because in such circumstances the evidence is not being used "against" a co-defendant. It is being used, instead, "for" a co-defendant and indeed "by" a co-defendant. Section 27(1) does not contain any prohibition on portions of an accused's statement elicited by the prosecution being used for, rather than against, a co-accused.

- 3.94 His Honour also found that once a relevant statement has passed through the admission "portal", D1 had accepted its admissibility and did not need another opportunity to challenge it.²²⁷

- 3.95 In *Kupa-Caudwell v R* the Court of Appeal questioned Asher J's reasoning:²²⁸

We add, however, that we are not sure that Asher J was right to suggest that there was no objection to D2 using D1's admission in closing where the admission had been introduced by the prosecution.

- 3.96 The Court expressed its concern about Asher J's observation regarding the need for D1 to challenge a statement in this manner:²²⁹

[A]lthough D1 may not have objected to the prosecution introducing the statement, D1 may do so if aware that the statement is also to be used in a cut-throat way. If the statement is simply referred to by D2's counsel in closing, D1 by then will have lost the opportunity to challenge admissibility which D1 may have done if aware of the use to which it would be put.

- 3.97 To address this disadvantage to D1, the Court suggested that the Act's hearsay notice provisions could be applied to the admission of evidence as part of D2's case.²³⁰ The Court stated that this was consistent with the traditional view that evidence led by the prosecution in D1's case is not necessarily evidence in D2's case.²³¹ It is also consistent with the trial judge's direction to the jury that they should operate on the basis that they are considering three separate trials, albeit held together.²³²

- 3.98 The Court acknowledged the Supreme Court's statement in *Hart v R* that generally evidence will be admissible for all purposes (absent limited use

226 *R v Vagaia (No 2)*, above n 225, at [9].

227 At [15].

228 *Kupa-Caudwell v R*, above n 225, at [62].

229 At [66].

230 At [67].

231 At [67].

232 At [67].

provisions),²³³ but noted that it did not concern evidence in a co-defendant's trial.²³⁴

3.99 In *Leslie-Whitu v R* the High Court applied the Court of Appeal's suggestion, with Woolford J concisely summarising his conclusions as follows:²³⁵

- (a) Multi-defendant trials are trials within a trial. The admissibility of evidence must be determined in respect of each co-defendant individually.
- (b) Assuming it is being offered for its truth, the out-of-court statement of a defendant who does not give evidence in court is hearsay evidence. It is prima facie inadmissible under s 17.
- (c) Section 27(1) provides an exception to the hearsay rule – the prosecution may offer the statement of a defendant as part of the prosecution evidence in respect of that defendant. It is therefore admissible in the defendant's trial.
- (d) The s 27(1) exception does not extend to use of the statement in the case of a co-defendant. The statement cannot be offered by the prosecution in the co-defendant's case, so it does not form part of the evidence in the co-defendant's trial.
- (e) The co-defendant may, however, seek to offer the statement as part of their own defence. The hearsay statement of a defendant will be admissible in a co-defendant's trial if it can reasonably be considered to be reliable under s 18(1).

3.100 The differing approaches by the High Court in *R v Vagaia (No 2)* and *Leslie-Whitu v R* seem to reflect different views on the status of evidence in joint trials. The view in *R v Vagaia* seems to be that, as the evidence is already admitted in the joint trial, the co-defendant should be free to use it (absent any relevant limited use provision).²³⁶ The view in *Leslie-Whitu v R*, on the other hand, is that the prosecution's proffering of D1's statement only makes the statement admissible in D1's case; it does *not* make D1's statement automatically admissible in D2's case. Admissibility in D2's case must therefore be independently determined.²³⁷ If D1 does not give evidence, the statement will be hearsay and only admissible in D2's case if it passes the reasonable assurance of reliability test in s 18 (the necessity criterion will be satisfied as D1 is not compellable to give evidence). An out of court confession by a defendant is likely to be reliable as a statement against his or her interest.²³⁸ We referred to discussion about the interpretation of "against" at paragraph 3.46.

233 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [54].

234 At [64].

235 *Leslie-Whitu v R*, above n 225, at [49].

236 *R v Vagaia (No 2)*, above n 225, at [9].

237 *Leslie-Whitu v R*, above n 225, at [28] and [49].

238 At [41].

3.101 We believe that the approach in *Leslie-Whitu v R* more accurately reflects the status of evidence in a joint trial. In *R v McKewen (No 2)* McCarthy P stated that:²³⁹

In a trial of two persons charged jointly the jury are required to consider the case against each independently of the case against other, for they are two separate trials, though taken together.

3.102 In *Ngamu v R* Chambers J also noted the fundamental nature of a joint trial as “where each accused is entitled to be judged individually, solely on evidence admissible against him or her”.²⁴⁰ This is reflected in standard jury directions. In *R v M* the Court of Appeal held that a trial judge must direct the jury on two matters in relation to an out of court statement of a defendant:²⁴¹

- An out of court statement of one defendant is not evidence in relation to a co-defendant (the situation now codified in s 27(1)).
- Whether the Crown has proved its case beyond reasonable doubt against a particular defendant must be determined only by reference to the evidence admissible in respect of that defendant.

3.103 This was applied by Winkelmann J in *R v Naea* who also noted that it has become best practice to repeat this direction before any evidence is given about the statements of co-defendant in a joint trial.²⁴²

3.104 We agree with the reasoning in *Leslie-Whitu v R* and *Kupa-Caudwell v R* that the hearsay provisions provide an appropriate means of determining admissibility for the following reasons:

- It is an accurate characterisation of the evidence (an out of court statement by a person who is not a witness).
- The requirement of notice in s 22 will provide D1 with a complete picture on how his or her out of court statement will be used, allowing an informed decision as to whether to challenge the prosecution offering this statement in evidence (for example under ss 28–30 of the Act).
- If D1’s statement is admissible by virtue of s 18(1) in D2’s case, it will be admissible in its entirety, subject to any other exclusionary rule. This means that the prosecution will be able to rely on aspects that are unfavourable to D2’s case, ensuring D2 cannot selectively rely on those parts that are favourable to him or her. It also ensures that the jury is provided with the context in which the statements were made, assisting in its assessment of the weight to give such statements.

239 *R v McKewen (No 2)* [1974] 1 NZLR 626 (CA) at 627.

240 *Ngamu v R* [2010] NZCA 256, [2010] 3 NZLR 547 at [29].

241 *R v M* CA148/99, CA218/99, 6 September 1999 at [11].

242 *R v Naea (No 12)* HC Auckland CRI-2006-092-4989, 9 July 2007.

- 3.105 There are a number of options to address this issue. One option suggested to us is to amend s 27(1) to read: “Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant, but is not admissible in relation to any co-defendant in the proceeding.”²⁴³ The phrase “in relation to” is broad. There is a risk that this could be interpreted as not only preventing the prosecution from seeking to admit the statement in D2’s case, but also preventing D2 from doing so.
- 3.106 A second option is to amend s 27 to make it clear that subs (1) does not affect the admissibility of statements by a defendant offered by a co-defendant.
- 3.107 The third option is to do nothing. This is our preferred option. The conflicting judgments in the High Court appear to reflect different views as to the status of evidence in a joint trial, and not problems with the drafting or interpretation of s 27. As set out in our introductory chapter, our approach to this review has been to recommend change only where there is a problem with how a provision is operating and it appears there is no room for the courts to correct the approach. We note that the Court of Appeal has also set out its preliminary view on the correct approach to resolve the issue, with which we agree. We therefore do not recommend any change to s 27 in response to this issue.

Common law preserved by section 12A

- 3.108 Section 12A provides:

12A Rules of common law relating to statements of co-conspirators, persons involved in joint criminal enterprises, and certain co-defendants preserved

Nothing in this Act affects the rules of the common law relating to—

- (a) the admissibility of statements of co-conspirators or persons involved in joint criminal enterprises; or
 - (b) the admissibility of a defendant’s statement against a co-defendant in circumstances where the defendant’s statement is accepted by the co-defendant.
- 3.109 Section 27 is expressly made subject to s 12A.
- 3.110 Our understanding is that s 12A was always intended to be a temporary measure, with codification to be considered during the first review of the Act. We agree that codification is desirable and set out our recommendations below.

Joint criminal enterprises

- 3.111 The basis for the exception in s 12A(a) is that of implied agency. A member of a joint criminal enterprise is deemed by law to have implied authority for other members of that enterprise to act or speak to further the common

²⁴³ Letter from Mathew Downs and Andrea King (Crown Law) to Law Commission regarding the review of the Evidence Act 2006 (26 June 2012).

purpose.²⁴⁴ The Court of Appeal helpfully set out the three threshold issues that a judge must determine in *R v Messenger*:²⁴⁵

- there was a conspiracy or joint enterprise of the type alleged;
- the defendant was a member of that conspiracy or joint enterprise; and
- the statements were made and / or the acts were done in furtherance of the conspiracy or joint enterprise.

3.112 We propose that these threshold issues be codified in the Act. This requires consideration of two secondary issues. First, the standard that must be reached before the threshold issue is adequately satisfied; second, whether the Act should prescribe the type of evidence a judge may (or must) consider when determining these issues. Both these secondary issues have generally been settled in the case law, which is set out below.

Existence of a conspiracy or joint enterprise

3.113 The standard for this first threshold issue is “reasonable evidence”.²⁴⁶ Reasonable evidence is “evidence which of itself would not sustain a verdict of guilt but which is of such a nature that the Judge considers it safe to admit the evidence of a co-conspirator”.²⁴⁷ The existence of a conspiracy or joint enterprise must be shown to this standard without the use of hearsay evidence.²⁴⁸ However, an out of court statement that is not being used to prove the truth of its contents is not hearsay. For instance, a statement may provide evidence of a person’s state of mind that allows a judge to infer the existence of an illegal common enterprise.²⁴⁹

Statements made by other persons about what they are intending to do, against the background of their statements about what they have done, however, can be led as evidence of the state of mind of those other persons at the time of speaking. Such statements are led not to prove the truth of the participation of a person who is not a party to the conversation, but as facts from which the existence of the agreement or combination to engage in an illegal common enterprise may be inferred. The existence of a conspiracy can thus be shown by the statements of all alleged participants, including what they have said about the accused.

3.114 The Crown need not prove every detail of the conspiracy or joint enterprise, but simply that it is of the kind alleged in general terms.²⁵⁰

244 *R v Tripodi* (1961) 104 CLR 1 at 7.

245 *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [11].

246 *R v Messenger*, above n 245 at [12].

247 *R v Messenger*, above n 245 at [12].

248 *R v Messenger*, above n 245 at [13].

249 *R v Messenger*, above n 245 at [13]. See also *R v Morris (Lee)* [2001] 3 NZLR 759 (CA) at [17].

250 *R v Messenger*, above n 245, at [14].

The defendant's membership in the conspiracy or joint enterprise

- 3.115 The standard for the second threshold issue is also “reasonable evidence”. The defendant's membership must be shown to this standard independently of statements that are made in the defendant's absence. That is, the defendant's membership of a common enterprise cannot be shown just by what the conspirators said when the defendant was not there.²⁵¹

Furtherance of conspiracy or joint enterprise

- 3.116 The cases do not specify a standard or articulate the type of evidence that may be considered to establish furtherance of conspiracy or joint enterprise. This threshold issue is different from the other two in that this element can be determined by reference to the statement itself whereas the defendant's participation in a common enterprise requires external evidence. However, case law does note that the common purpose must be continuing at the time of the act or statement in order for it to be said or done for the purpose of advancing the common design.²⁵² Statements recording what has been successfully or unsuccessfully completed do not further the common purpose, and therefore do not fall within this exception.²⁵³ Furthermore, statements made and acts done after the defendant has ceased to be a member of the conspiracy or joint enterprise do not fall within the exception.²⁵⁴
- 3.117 We propose a new provision in subpart 1 of Part 2 (hearsay evidence) providing for the admissibility of hearsay statements of co-conspirators. This would provide that a hearsay statement is admissible against a defendant if:
- there is reasonable evidence that there was a conspiracy or joint enterprise;
 - there is reasonable evidence that the defendant was a member of that conspiracy or joint enterprise; and
 - the hearsay statement was made in furtherance of the conspiracy or joint enterprise.
- 3.118 This provision should be subject to the notice provision in s 22 so the person seeking to adduce the evidence (likely to be the prosecution) is required to give notice as to the reasons why they think the three threshold issues above are satisfied. We also recommend amending s 27(1) to clarify that the restriction on admissibility in relation to co-defendants is subject to the new provision.

251 *R v Messenger*, above n 245 at [18]; and *R v Morris (Lee)*, above n 249, at [18].

252 *Goffe v R* [2011] NZCA 186, [2011] 2 NZLR 771 at [50].

253 *Goffe v R*, above n 252 at [50].

254 *R v Messenger*, above n 245, at [20].

3.119 We do not propose that the new provision specify the types of evidence that a judge may or must consider in determining the above matters. Provisions elsewhere in the Act do not specify this, and it would be anomalous for this provision to do so.

- R6 We recommend deleting s 12A and inserting a new provision in subpart 1 of Part 2 that provides a hearsay statement is admissible against a defendant if:
- there is reasonable evidence that there was a conspiracy or joint enterprise;
 - there is reasonable evidence that the defendant was a member of that conspiracy or joint enterprise; and
 - the hearsay statement was made in furtherance of the conspiracy or joint enterprise.
- R7 We recommend that this provision should be subject to the notice provision in s 22, and s 27(1) should be amended to clarify that the restriction on admissibility in relation to co-defendants is subject to the new provision.

Statements made by defendants in the presence of co-defendants

- 3.120 Section 12A also preserves the common law relating to “the admissibility of a defendant’s statement against a co-defendant in circumstances where the defendant’s statement is accepted by the co-defendant”. At common law, the admissibility of such a statement hinged on whether the co-defendant “accepted” the statement of the defendant. As outlined in the discussion above at paragraph 3.56 regarding the admissibility of allegations put to a defendant under s 27(1), the basis for admissibility was that the co-defendant, by words or conduct, adopted the statement as his or her own.
- 3.121 Absent s 12A, the Crown has (at least) two avenues to seek admission of the defendant’s statement in the case of the co-defendant. First, under the hearsay provisions (as discussed above under co-defendant’s use of statements), or second, where the co-defendant’s response to the statement is admissible under s 27(1) (as discussed above).
- 3.122 With the liberalisation of the hearsay rule and the advent of s 27(1), there does not appear to be a continued need for this exception. A defendant is non-compellable and thereby unavailable as a witness under s 16(1). The statement will therefore be admissible in the co-defendant’s case provided it is both relevant (s 7) and sufficiently reliable (s 18). Alternatively, s 27(1) provides a route to admissibility if a co-defendant makes an assertion amounting to a “statement” in response. Given there are principled provisions dealing with the admissibility of such statements, we are unconvinced that there is a continued need for this common law rule and do not recommend its retention in the Act.

Chapter 4

Improperly obtained evidence

INTRODUCTION AND BACKGROUND

- 4.1 At common law, courts had a discretion to exclude evidence on the grounds of unfairness.²⁵⁵ Following the enactment of the New Zealand Bill of Rights Act 1990, courts developed a prima facie exclusion rule for evidence obtained in breach of that Act.²⁵⁶
- 4.2 In its report on *Police Questioning* the Law Commission proposed that evidence that was improperly obtained would be inadmissible, unless the court considered that exclusion would be contrary to the interests of justice.²⁵⁷ The Law Commission refined this recommendation in subsequent publications on its Evidence Code.²⁵⁸
- 4.3 After the Law Commission's Evidence Code had been published, but prior to the enactment of the Evidence Act 2006, the Court of Appeal replaced the prima facie exclusion rule with a new "balancing test" in *R v Shaheed*.²⁵⁹ The test required courts to balance a number of non-exhaustive factors to determine whether exclusion of the evidence is a proportionate response to the breach of the right.²⁶⁰
- 4.4 The improperly obtained evidence rule in the Evidence Bill essentially codified the test outlined in *R v Shaheed*, but extended it beyond evidence

255 Law Commission *Criminal Evidence: Police Questioning : A Discussion Paper* (NZLC PP21, 1992) at 79.

256 *R v Butcher* [1992] 2 NZLR 257 (CA).

257 Law Commission *Police Questioning* (NZLC R31, 1994) at 101.

258 Law Commission *Evidence: Volume 2 – Evidence Code and Commentary* (NZLC R55, 1999) at 84.

259 *R v Shaheed* [2002] 2 NZLR 377 (CA).

260 At [145].

obtained in breach of the New Zealand Bill of Rights Act 1990. Section 30 now provides:

30 Improperly obtained evidence

- (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—
 - (a) the defendant or, if applicable, a co-defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
 - (b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.
- (2) The Judge must—
 - (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
 - (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.
- (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
 - (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it;
 - (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith;
 - (c) the nature and quality of the improperly obtained evidence;
 - (d) the seriousness of the offence with which the defendant is charged;
 - (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used;
 - (f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant;
 - (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others;
 - (h) whether there was any urgency in obtaining the improperly obtained evidence.
- (4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.
- (5) For the purposes of this section, evidence is *improperly obtained* if it is obtained—
 - (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or

- (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
 - (c) unfairly.
- (6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.
- 4.5 The Select Committee's recommended changes to the Bill included insertion of subs (6) and removing the words "in particular whether it is central to the case of the prosecution" from subs (3)(c).²⁶¹

THE SECTION 30 BALANCING EXERCISE

- 4.6 The application of the test in s 30 and its precursor, the *R v Shaheed* test, have been subjected to criticism by commentators.²⁶² The criticism is grounded in the lack of guidance as to how these tests should be applied, including the weight, interpretation and application of the relevant factors.²⁶³ There is concern that "s 30 may simply 'permit the personal predilections of judges to masquerade as principle and ... sanction little more than a judicial 'gut check' [in] respect [of] the decision to exclude'".²⁶⁴ Similar reservations are that s 30 turns criminal trials into "lotteries"²⁶⁵ dependent on the personal inclination of a particular judge.²⁶⁶ Opinion is divided as to whether uncertainty in the application of s 30 is unavoidable²⁶⁷ or could be ameliorated by adherence to mutually agreed principle.²⁶⁸ Further criticisms relate to either the courts'

261 Evidence Bill 2005 (256-2) (select committee report) at 4.

262 Scott Optican "*Hamed, Williams and the Exclusionary Rule: Critiquing the Supreme Court's approach to s 30 of the Evidence Act 2006*" [2012] NZ L Rev 605; Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 245; Scott Optican "*R v Williams and the Exclusionary Rule: Continuing Issues in the Application and Interpretation of Section 30 of the Evidence Act 2006*" [2011] NZ L Rev 507; Scott Optican "Criminal Procedure" in Julie Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 153; Scott Optican and Peter Sankoff "Reliability/ Oppression/ Improperly Obtained Evidence" (paper presented to New Zealand Law Society Evidence Act Revisited for Criminal Lawyers, February 2010) 145 at 149. See also discussion on the test in *R v Shaheed* on which s 30 is based: Scott Optican and Peter Sankoff "The New Exclusionary Rule: A Preliminary Assessment of *R v Shaheed*" [2003] NZ Law Rev 1; Scott Optican "The New Exclusionary Rule: Interpretation and Application of *R v Shaheed*" [2004] NZ Law Rev 451.

263 Optican "*R v Williams and the Exclusionary Rule*", above n 262, at 510; McDonald, above n 262, at 245; Richard Mahoney "Evidence" [2010] NZ L Rev 433 at 445.

264 Optican "Criminal Procedure", above n 262, at 178 (footnote omitted).

265 Bernard Robertson "Exclusion of Evidence" [2011] NZLJ 293 at 293.

266 Bernard Robertson "Evidence Review" [2012] NZLJ 113 at 113.

267 Robertson "Evidence Review", above n 266 at 113.

268 Chris Gallavin and Justin Wall "*Hamed: section 30*" [2012] NZLJ 116 at 117.

- approach to the balancing exercise itself or their interpretation and application of the specific factors listed in s 30(3).²⁶⁹
- 4.7 Commentators have also indicated concern that some factors are given primacy over others. In particular, *R v Hawea*²⁷⁰ is cited as an instance where the nature and quality of the evidence (subs 3(c)) and the seriousness of the offence (subs 3(d)) were prioritised over other s 30 factors.²⁷¹
- 4.8 As a first step, a judge must determine, on the balance of probabilities, whether the disputed evidence was “improperly obtained” as defined in subs (5). If the judge finds that evidence was improperly obtained, he or she must determine whether exclusion of the evidence would be proportionate to the impropriety, having regard to the factors listed in subs (3). This balancing process must be one that “gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice”.²⁷²
- 4.9 Courts have repeatedly stated that strict rules cannot be laid down to guide the judge.²⁷³ Rather, admissibility will always require a proceeding-specific assessment²⁷⁴ as the inquiry under s 30 will very much depend on the facts.²⁷⁵
- 4.10 The evaluative nature of the s 30 balancing process means that different judges may come to different conclusions on the same evidence. As Gault J stated in *Hamed* “[a]ll of the factors specified in s 30(3) call for value judgments that may well depend on inclinations of particular judges, as will the comparative weighting to be accorded those factors”.²⁷⁶ This is aptly demonstrated by the number of judgments and appeals on the application of s 30 to date. It is likewise evident from *Hamed*, the only Supreme Court case to have considered s 30 in detail, where admissibility fell to be determined by differently constituted majorities on the different types of evidence.
- 4.11 The s 30 balancing process is necessarily fact specific. Factors such as “the nature of the impropriety”, the “nature and quality of the improperly obtained evidence” and “whether there was any urgency” will always need to be determined by reference to the facts in a given case. A degree of uncertainty is also implicit in a multi-faceted balancing approach. In relation

269 Optican “*R v Williams and the Exclusionary Rule*”, above n 262; Gallavin and Wall “*Hamed: section 30*”, above n 268.

270 *R v Hawea* [2009] NZCA 127.

271 Mahoney “Evidence”, above n 263, at 445.

272 Evidence Act 2006, s 30(2)(b).

273 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [59] per Elias CJ; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [251]; and *R v McGaughey* [2007] NZCA 411 at [22].

274 *JF v R* [2011] NZCA 645 at [28].

275 *Tye v R* [2012] NZCA 382 at [25].

276 *Hamed v R*, above n 273, at [282]. See also *R v Winitana* HC Rotorua CRI-2009-263-163, 26 July 2011 at [88].

to each factor, a judge must determine whether it is relevant, whether it favours admission or exclusion, and what weight to ascribe to it. Only then can these factors be balanced against each other to determine whether exclusion is a proportionate response to the impropriety.

4.12 Two observations can be made against this background:

- The fact specific nature of the s 30 inquiry does not preclude courts from making general statements to guide admissibility. Indeed, the Court of Appeal did just that in *R v Williams* when it set out to “assist trial judges in determining the weight and relevance to be given to each statutory factor in the circumstances of a particular case”.²⁷⁷ The Court also made the following generalisations that courts have subsequently found useful to apply:²⁷⁸

Thus, where a breach is minor, the balancing exercise would often lead to evidence being admissible where the crime is serious and the evidence is reliable, highly probative and crucial to the prosecution case. The exclusion of evidence in such cases would properly be seen as unbalanced and disproportionate to the circumstances of the breach.

By contrast, if the illegality or unreasonableness is serious, the nature of the privacy interest strong, and the seriousness of the breach has not been diminished by any mitigating factors such as attenuation of causation or a weak personal connection to the property searched or seized, then any balancing exercise would normally lead to the exclusion of the evidence, even where the crime was serious. This result would be almost inevitable where the breach was deliberate, reckless or grossly careless on the part of the police – see *Shaheed* at [148]–[149].

- A systematic approach to the s 30 balancing process encourages clear and transparent decision making. This, in turn, is likely to lead to increased certainty and consistency in the application of s 30 over time.

4.13 Certain general principles have already emerged in the application of s 30. This is confirmed by commentators who have stated that “judgments under the proportionality-balancing test have fallen into patterns that are reasonably predictable and subject to rational discernment”.²⁷⁹

4.14 Our view is that, generally, judges are conscientious in their approach to s 30 and seek to articulate the factors that favour admission and those that favour exclusion. Courts have also been very clear that s 30 requires a balancing of

277 *R v Williams*, above n 273, at [150].

278 At [144] and [145]. See *R v Yeh* [2007] NZCA 580 at [52]; *R v Murphy* HC Hamilton CRI-2009-039-796, 30 June 2010 at [139]; *Duncan v R* [2010] NZCA 318 at [38].

279 Scott Optican “‘Lessons from Down Under’: The Exclusion of Improperly Obtained Evidence in New Zealand as a Model for a Changing United States Exclusionary Rule” [2011] JCCL 226 at 248. See also Optican and Sankoff “Reliability/ Oppression/ Improperly Obtained Evidence”, above n 262, at 152.

- all relevant factors, and are conscious that disproportionate weight cannot be given to any one factor.²⁸⁰ This is borne out by cases that have excluded real and probative evidence even where very serious offending is involved.²⁸¹
- 4.15 We emphasise the importance of courts setting out clear reasoning for decisions under s 30 and endorse the direction by Elias CJ in *Hamed* for “conscientious disclosure of the full reasons for decision”.²⁸² A systematic process whereby courts clearly articulate the factors considered and the weight attached to each will aid in the development of jurisprudence in this area and lead to more consistent decision making.
- 4.16 There are undoubtedly some areas where interpretation of the factors in subs (3) has not yet fully settled. By way of example (and by no means seeking to set out a comprehensive list):
- What offences are “serious” under paragraph (d)?²⁸³
 - Are there circumstances where a “serious” offence should be considered a factor that favours exclusion rather than inclusion?²⁸⁴
 - Should the centrality of the disputed evidence to the prosecution’s case be considered in light of the Select Committee’s amendment to paragraph (c)?²⁸⁵
 - Does the fact that there were / were not alternative techniques available favour admission or exclusion?²⁸⁶
- 4.17 Our view is that the multi-faceted nature of the decision making process under s 30 necessarily involves difficult questions of judgment that are not amenable to scientific precision. However, our view is that, over time, further general principles will emerge to assist courts with the balancing exercise in s 30. We have therefore been cautious about recommending legislative change that could impede the courts’ progress to achieving clarity in this area. Matters such as those identified above should be clarified over time.

280 *R v Climie* [2007] NZCA 490 at [21].

281 *R v Yeh*, above n 278; *Duncan v R*, above n 278; *Haggie v R* [2011] NZCA 221.

282 *Hamed v R*, above n 273, at [59]. See also Optican “*R v Williams* and the Exclusionary Rule”, above n 262, at 543; McDonald, above n 262, at 245.

283 *Hamed v R*, above n 273, at [69] per Elias CJ, [197] per Blanchard J, [241] and [243] per Tipping J, [277] per McGrath J; *R v Williams*, above n 273, at [135]; *R v Yeh*, above n 278, at [55]; *Haggie v R*, above n 281, at [19].

284 *Hamed v R*, above n 273, at [65] per Elias CJ; *R v Williams*, above n 273, at [136]; *R v Allen* HC Rotorua CRI-2007-087-1729, 10 February 2009 at [86]; *R v Winitana*, above n 276, at [97].

285 *Hamed v R*, above n 273, at [237] per Tipping J. Compare *Hamed v R*, above n 273, at [276] per McGrath J, at [201] per Blanchard J; *R v Williams*, above n 273, at [144].

286 *Hamed v R*, above n 273, at [73] per Elias CJ, [196] per Blanchard J, [246] per Tipping J, [274] per McGrath J; *Balfour v R* [2010] NZCA 465 at [17]; *R v Moreton* [2009] NZCA 121 at [39].

- 4.18 One possible drafting issue, however, was highlighted by the Supreme Court in *Hamed*. Subsection (2)(b) requires the proportionality inquiry to be conducted via “a balancing process that gives appropriate weight to the impropriety *but* also takes proper account of the need for an effective and credible system of justice” (emphasis added). The use of the word “but” seems to suggest that an effective and credible system of justice is a counterpoint to the impropriety that points towards admissibility. As Elias CJ succinctly puts it:²⁸⁷

“[T]he need for an effective and credible system of justice” is not a consideration that points only to admissibility (as suggested by the erroneous view that s 30(2)(b) requires a balance to be struck *between* the impropriety *and* “the need for an effective and credible system of justice”).

- 4.19 As their Honours note, an effective and credible system of justice also gives substantive effect to human rights and the rule of law²⁸⁸ and does not condone police impropriety in obtaining evidence.²⁸⁹ We agree. Replacing the word “but” with “and” would better reflect the relevance of an “effective and credible system of justice”.
- 4.20 We have considered whether amendment is necessary given that courts generally do not seem to have had any problems with interpreting the subsection as intended. Indeed, a number of cases have explicitly stated that *exclusion* of evidence is consistent with “an effective and credible system of justice”.²⁹⁰ However, the amendment is desirable to avoid the perception that an effective and credible justice system in New Zealand is one that is aimed only at the prosecution and conviction of offenders. The Supreme Court’s pronouncement on the issue in *Hamed* should ensure that the amendment is interpreted appropriately.

R8 We recommend amending s 30(2)(b) to read “if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.”

287 *Hamed v R*, above n 273, at [60] (original emphasis). See also [187] per Blanchard J, [228] per Tipping J, [258] per McGrath J.

288 At [62] per Elias CJ, [230] per Tipping J.

289 At [187] per Blanchard J, [258] per McGrath J.

290 *R v Herlund* HC Auckland CRI-2006-004-21413, 28 May 2008 at [106]; *R v Allen*, above n 284, at [90]; *Duncan v R*, above n 278, at [46]; *R v D* [2011] NZCA 69 at [79]; *R v Murphy*, above n 278, at [71]; *R v Winitana*, above n 276, at [106].

Chapter 5

Previous consistent statements

INTRODUCTION AND BACKGROUND

- 5.1 As discussed in chapter 3, the former rule against hearsay prevented out of court statements being admitted to prove the truth of their contents. This meant that generally, a witness's previous statement could not be offered in evidence if it was consistent with the witness's testimony.²⁹¹ While there were certain exceptions to this that would render a previous consistent statement admissible, such as "recent complaint" evidence and statements forming part of the *res gestae*, the statement could still only be used to bolster the witness's credibility, rather than to prove the truth of its contents.²⁹²
- 5.2 Prior consistent statements are now covered by s 35 of the Act, which provides:

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) applies 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 a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness.
- (3) A previous statement of a witness that is consistent with the witness's evidence is admissible if—
 - (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
 - (b) the statement provides the court with information that the witness is unable to recall.

291 Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at 40.

292 At 40.

Development of previous consistent statements in the Evidence Code

5.3 During the development of its Evidence Code the Law Commission ultimately proposed to retain the general rule, but suggested significant changes for the exceptions. For instance, “recent complaints” would now be treated like any other previous consistent statement of a witness. Further, once admitted, a previous consistent statement could be used both “to support the truthfulness and accuracy of the witness *and* to prove the truth of the contents of the statement.”²⁹³

5.4 The corresponding provision, in *Evidence: Code and Commentary*, provided that.²⁹⁴

37 Previous consistent statements rule

A previous statement of a witness which is consistent with the witness’s evidence is not admissible except

- (a) to the extent necessary to meet a challenge to that witness’s truthfulness or accuracy; or
- (b) if the statement will provide the court with information which that witness is unable to recall.

5.5 The Law Commission said of its proposed provision that:²⁹⁵

... “Consistent” does not simply mean the lack of inconsistency: there must be something in the witness’s testimony with which the previous statement is consistent. The intention of s 37 is to prevent the parties from inundating the courts with voluminous amounts of repetitive material in order to shore up a witness’s consistency. So if the witness’s testimony is silent on a matter that is the subject of a previous statement, or if the witness’s testimony is different from the content of a previous statement, s 37 will not exclude evidence of the previous statement.

5.6 The wording of this section was slightly different when the Code became the Evidence Bill, but the effect was largely the same:²⁹⁶

31 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) applies 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 truthfulness or accuracy.

293 At 41 (original emphasis).

294 Law Commission *Evidence: Volume 2 – Evidence Code and Commentary* (NZLC R55, 1999) at 98 and 100.

295 At 99.

296 Evidence Bill 2005 (256-1).

- (3) A previous statement of a witness that is consistent with the witness's evidence is admissible if—
 - (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
 - (b) the statement provides the court with information that the witness is unable to recall or able to recall only imperfectly.
- (4) A statement that is otherwise admissible under subsection (3) may not be admitted in evidence unless leave is sought and obtained from the Judge prior to the admission of the statement.

Amendments made by the Justice and Electoral Committee

- 5.7 When the Evidence Bill was reported back from the Justice and Electoral Committee, various changes had been recommended. Of most relevance, an amendment to sub-cl (2) to include, after the word “accuracy”, the phrase “based on a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness” had been made.²⁹⁷
- 5.8 The Select Committee explained that it recommended this change because it considered that the sub-cl (2) “exception in the bill as introduced is unworkable and too broad”.²⁹⁸ In its view, the suggested amendment “would ensure a workable rule, and limit the circumstances in which previous consistent statements could be used to those available under current law.”²⁹⁹
- 5.9 These recommended amendments were accepted by Parliament and the Evidence Bill was ultimately passed without further change to this section.

***R v Barlien* and Law Commission's subsequent advice**

- 5.10 The majority of the Evidence Act 2006 came into force on 1 August 2007. One of the first jury trials to take place after its commencement was that of Eivin Barlien, who was alleged to have sexually offended against three young girls. Mr Barlien was convicted and subsequently appealed against his conviction. The primary ground of appeal was that the trial judge should not have admitted the evidence of two of the complainants' previous consistent statements.³⁰⁰
- 5.11 In dismissing the appeal, the Court of Appeal identified a number of concerns that it had with the final version of s 35 and referred the matter to the Law Commission and the Ministry of Justice for consideration.³⁰¹ As a result of

297 Evidence Bill 2005 (256-2).

298 Evidence Bill 2005 (256-2) (select committee report) at 5.

299 At 5.

300 *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170 at [2].

301 At [73].

this, the Law Commission duly reported to the Minister of Justice on 8 July 2009.³⁰²

5.12 In its advice to the Minister, the Law Commission commented that the Select Committee that settled on the wording of s 35 incorrectly thought that it was codifying the existing law.³⁰³ The Law Commission then stated that:

7. In particular, the wording it adopted excluded two types of previous consistent statements that had been generally admissible prior to the Evidence Act 2006:
 - a. a complaint of a sexual offence relatively soon after its occurrence (a “recent complaint”);
 - b. a statement that was sufficiently close to the offence to be regarded as part of the surrounding circumstances (known as the “res gestae”).

Problems with section 35

8. The exclusion of statements in these two categories has provoked criticism. More generally, the restrictive nature of the requirements that must be met before a statement is admissible under section 35(2) has produced a number of practical problems and anomalies.
9. In summary, these problems and anomalies are:
 - a. The requirement that there be a challenge to truthfulness and accuracy based on a previous inconsistent statement or a claim of recent invention has led to the exclusion of some highly relevant and reliable previous consistent statements (such as the content of 111 calls). This is contrary to the Act’s fundamental principles.
 - b. The Act has different rules for determining the admissibility of consistent and inconsistent statements, but there are often real difficulties in determining whether a statement is consistent or inconsistent (or an inseparable mix of the two).
 - c. Neither party may know in advance of a witness’ evidence whether a previous statement will be consistent or inconsistent with that evidence. This has significant implications for victims and witnesses, who may need to remain on standby in case they are required to give evidence of a previous statement.
 - d. If there is a perceived inconsistency between the evidence of a witness (including the complainant) and a previous statement, defence counsel is faced with a dilemma in knowing whether to cross-examine on that inconsistency (since it will open the door to the admission of other previous consistent statements).
 - e. If they do not do so, this does not stop them from challenging the credibility of the witness in some other way without opening the door to the admission of such statements. This seems an arbitrary and untenable distinction.

302 Letter from Warren Young and Val Sim (Law Commission) to Simon Power (Minister of Justice) regarding *R v Barlien* [2008] NZCA 180 and section 35 of the Evidence Act 2006 (8 July 2009).

303 At [6].

- f. Trial judges have sometimes been excluding evidence of not only the substance of a complaint of an offence, but also the fact that it was made. This has meant that juries have not been told, for example, why the police were called. (However, the Court of Appeal two weeks ago in *R v Rongonui* [2009] NZCA 279 clarified that the fact that a complaint was made is admissible).
- 5.13 While the Law Commission considered these problems to be “real and significant”, it did not have any evidence that they were producing wrongful trial outcomes. Rather, they were causing “significant practical problems in the conduct and administration of trials” and, as such, the Law Commission considered that they needed to be addressed “as a matter of high priority”.³⁰⁴
- 5.14 The Law Commission’s proposal was that all previous statements (both consistent and inconsistent) would be admissible on the following conditions:³⁰⁵
- it must be the statement of a witness (who is then available to be cross-examined on it);
 - it must be relevant and not be unduly prejudicial or needlessly prolong proceedings (the general principles set out in ss 7 and 8 of the Act);
 - it must in addition be substantially helpful in proving or disproving anything that is of consequence to the proceedings;
 - it will be inadmissible if the judge is satisfied that the evidence of the statement is likely not to be an accurate account of what was said.
- 5.15 Additional changes the Law Commission suggested were:
- notice must be given by the prosecution or defence if they intend to lead evidence of the previous statement of a witness (or leave of the judge will be required);³⁰⁶
 - s 35 should make it clear that “in assessing the admissibility of a complaint in sexual cases, delay in the making of the complaint, or the making of other previous inconsistent statements, should not in itself render the complaint inadmissible because in such cases there may be good reasons for the delay or inconsistency”;³⁰⁷ and
 - it should be confirmed that statements admitted under s 35 are admissible to prove the truth of the contents of the statement.³⁰⁸

304 At [10].

305 At [16].

306 At [17].

307 At [20].

308 At [21].

Subsequent events

- 5.16 The Law Commission’s recommendations were not subsequently acted upon. However, a little over a year later the Supreme Court delivered two judgments (on the same day) that fundamentally changed the approach trial courts were to take to the admissibility of previous consistent statements.
- 5.17 The first of the companion judgments was *Hart v R*.³⁰⁹ Elias CJ summed up what happened in the trial as follows:³¹⁰

The complainant in a case of sexual offending was cross-examined in order to provide a basis for the defence case that she had invented the story in order to qualify for a lump sum ACC payment. Having ascertained that the defence intended to close on invention with this suggested motive, the trial Judge permitted the prosecutor in re-examination to lead from the complainant evidence of when she first became aware of her potential eligibility for an ACC lump-sum payment and her disclosure of the sexual offending to a family friend before that time. The Crown was also permitted to call the family friend, who gave evidence that the complainant had told him about the offending in an apparently spontaneous response to unrelated family stress and confirmed the timing of the disclosure as being some months before the time at which the complainant had said she knew of her eligibility for compensation.

- 5.18 Her Honour then went on to describe the issue as:³¹¹
- ... whether the statement made to the family friend should have been excluded in application of s 35(1) of the Act or whether it was admissible within the exception in s 35(2) as an answer to an attack on the complainant’s veracity based on recent invention of the account of the incident given in her evidence to the court.
- 5.19 The Supreme Court unanimously dismissed the appeal, holding that the statement was properly admitted pursuant to s 35(2).³¹²
- 5.20 The second case was *Rongonui v R*.³¹³ This case dealt with an appeal by Mr Rongonui against his conviction on two counts of sexual violation. At trial, the complainant had been permitted to give evidence that, soon after the alleged offending, she had told her friends “what had happened”. On appeal, it was argued that this was a previous consistent statement and should have been excluded by s 35(1) of the Act.
- 5.21 The majority of the Supreme Court (Blanchard, Tipping, McGrath and Wilson JJ) considered that the statement was caught by s 35(1),³¹⁴ although they would have applied the proviso to s 385(1) of the Crimes Act 1961 (ie

309 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.

310 At [2].

311 At [3].

312 The Supreme Court’s reasoning will, where relevant, be discussed later in this document.

313 *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23.

314 At [47] per Tipping J.

- that no miscarriage of justice arose from its admission) on this ground of appeal.³¹⁵ On the other hand, Elias CJ was of the opinion that the evidence that the complainant told her friends “what had happened” was part of the events at issue and, as such, did not fall into s 35(1).³¹⁶ The appeal was unanimously allowed on a different ground of appeal and a retrial ordered.
- 5.22 There have since been three Supreme Court cases that have considered s 35 in detail.³¹⁷ *R v B (SC88/2010)* involved a pre-trial appeal against a decision in the District Court that a previous consistent statement of a complainant of sexual offending could be led at trial.³¹⁸ The basis for the first instance ruling was that, in the defendant’s video interview with the police that would be played at trial, there was a challenge to the complainant’s veracity based on recent invention, and so s 35(2) was engaged.
- 5.23 The Court of Appeal had allowed the appellant’s appeal on the basis that the complainant was not a witness yet so s 35(2) could not have been triggered.³¹⁹ The Crown appealed to the Supreme Court, who allowed the appeal on the basis that the ruling in the District Court pursuant to s 344A of the Crimes Act 1961 was provisional, and that by the time it came to be applied at trial the complainant would be a witness.³²⁰
- 5.24 *Singh v R* involved the (more unusual) situation of defence counsel wishing to introduce a previous consistent statement of a hostile Crown witness (the complainant) through re-examination of the defendant.³²¹ This had been refused at trial, with one of the bases being that it was prohibited by s 35, a finding which was upheld by the Court of Appeal.³²² The Supreme Court found that the documents were not “necessary” to respond to the challenge to the witness’s veracity and, citing *Hart v R*, that they were certainly not “an answer” to that attack.³²³ The appeal was dismissed.
- 5.25 *B (SC114/2010) v R*, on the other hand, followed a similar course to the other cases in requiring a determination as to whether the complainant’s veracity had been challenged, based on a claim of recent invention, thus allowing a previous consistent statement to be admitted to the extent that it was

315 At [50] per Tipping J.

316 At [16].

317 *R v B (SC 88/2010)* [2010] NZSC 160, [2011] 2 NZLR 82; *Singh v R* [2010] NZSC 161, [2011] 2 NZLR 322; *B (SC 114/2010) v R* [2011] NZSC 64.

318 *R v B (SC 88/2010)*, above n 317.

319 *B (CA 313/2010) v R* [2010] NZCA 326, (2010) 25 CRNZ 6.

320 *R v B (SC 88/2010)*, above n 317, at [10].

321 *Singh v R*, above n 317.

322 *Singh v R* [2010] NZCA 144.

323 *Singh v R*, above n 317, at [54]–[55].

necessary to respond.³²⁴ Citing *Rongonui v R*, *Hart v R* and *R v B (SC88/2010)*, the Supreme Court found that the statement had been properly admitted, and dismissed the appeal.³²⁵

USE OF A PREVIOUS CONSISTENT STATEMENT ONCE ADMITTED

- 5.26 Section 35 is silent as to whether, if admissible, a previous consistent statement can be used for all purposes, or only to bolster the witness's credibility.
- 5.27 At the first opportunity, the Court of Appeal concluded that "if [previous consistent] statements are admissible under s 35, they are admissible to prove the truth of their contents."³²⁶ Such an approach was subsequently criticised.³²⁷
- 5.28 However, the Supreme Court in *Hart v R* has concluded that the "admissible for all purposes" interpretation is correct.³²⁸ This position is consistent with what the Law Commission said in *Evidence: Reform of the Law*,³²⁹ and in the subsequent advice to the Minister of Justice,³³⁰ and we remain of the view that it is right. As such, while the provision could be amended to expressly provide this, as we earlier suggested,³³¹ it is not strictly necessary.

WHEN IS A STATEMENT "CONSISTENT"?

- 5.29 The word "consistent" is not defined in the Act. As noted above, in *Evidence: Code and Commentary* the Law Commission stated that "[c]onsistent' does not simply mean the lack of inconsistency: there must be something in the witness's testimony with which the previous statement is consistent."³³² However, the authors of *Cross on Evidence* take a different view, stating that "consistent" should be interpreted to mean "not inconsistent".³³³

324 *B (SC 114/2010) v R*, above n 317.

325 *Rongonui v R*, above n 313; *Hart v R*, above n 309; *R v B (SC 88/2010)*, above n 317.

326 *R v Barlien*, above n 300, at [20].

327 Bernard Robertson "Prior consistent statements" [2009] NZLJ 347.

328 *Hart v R*, above n 309, at [54]–[57] per Tipping J.

329 Law Commission *Evidence: Volume 1*, above n 291.

330 Letter from Warren Young and Val Sim to Simon Power, above n 302.

331 At [21].

332 Law Commission *Evidence: Volume 2*, above n 294, at 99.

333 Donald Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA35.4].

5.30 In *Hart v R*, Elias CJ noted the competing views and, while expressly noting that the matter did not need to be decided, tended to favour the Law Commission's narrow approach, stating:³³⁴

... If the rationale for the rule of exclusion is unnecessary repetition, then the better view may well be that remedying an omission in evidence through admitting a previous statement does not engage the rule of exclusion in s 35(1).

5.31 The Court of Appeal in *Hitchinson v R* subsequently noted:³³⁵

Section 35 was not intended to exclude relevant and probative evidence which is not repetitive, and which can be categorised as a previous consistent statement only in the sense that it is consistent with the general tenor of the witness's evidence.

5.32 As "consistent" has largely been interpreted how the Law Commission intended it should be, and we are not convinced that this position is wrong, our inclination is that this sub-issue in isolation does not require legislative amendment.

CONTINUING PROBLEMS WITH SECTION 35

5.33 This section considers three interrelated issues which we consider require amendment to the Act:

- What is a "statement" that engages s 35?
- What is the status of "res gestae" under s 35?
- What amounts to a challenge to a witness's veracity or accuracy?

What is a "statement"?

5.34 The Act (relevantly) defines a "statement" as "a spoken or written assertion by a person of any matter".³³⁶ In some situations, the interpretation of this is clear. For example, in *R v Barlien* the Court of Appeal held that the evidence from the two complainants as to what they said to a close family friend after the offending allegedly occurred was a previous consistent "statement" and so engaged s 35(1).³³⁷ However, the Court of Appeal left open the more difficult situation where only the fact of complaint is led from a complainant,³³⁸ which had been held to be admissible in the pre-Act case of *R v Turner*.³³⁹

334 *Hart v R*, above n 309, at [10].

335 *Hitchinson v R* [2010] NZCA 388 at [26].

336 Section 4(1).

337 *R v Barlien*, above n 300, at [56].

338 At [53].

339 *R v Turner* [2007] NZCA 427 (leave to appeal refused: *Turner v R* [2008] NZSC 11).

- 5.35 We are aware that a practice then began whereby in sexual offence trials in which the complainant had made a “complaint” to someone (typically a friend or family member), prosecutors would lead from the complainant that after the alleged offending occurred he or she told someone “what had happened” (ie the fact of the complaint). The belief was that this was not a previous consistent “statement”, and so it would not be caught by the prohibition in s 35(1).
- 5.36 However, when the question came before the Supreme Court in *Rongonui v R*, the majority concluded that such an approach still engaged s 35(1), stating:³⁴⁰
- ... The evidence in question, on any realistic view of its meaning, goes beyond the mere fact of the complainant having spoken to her friends. In context the evidence was of a spoken assertion by the complainant to her friends that she had been sexually violated by Mr Rongonui.
- 5.37 The majority did, though, go on to make a distinction between the complainant telling someone “what had happened” and the complainant simply speaking to someone, which:³⁴¹
- ... can be regarded as amounting only to evidence of conduct, rather than evidence of an assertion of some matter, and is admissible if the fact of her doing so is relevant to a matter in issue ...
- 5.38 This distinction is not necessarily easy to apply, however. For instance, in *O'Donnell v R* the complainant gave evidence at trial that the morning after the sexual offending was alleged to have occurred she returned home, spoke to her father and then, as a result of this, he took her back to the house and confronted the appellant.³⁴²
- 5.39 The Court of Appeal was able to distinguish this from *Rongonui v R* on the basis that the complainant did not say in court what she had told her father (either in detail or simply “what had happened”).³⁴³ Despite acknowledging that there was an “irresistible inference” that during the conversation the complainant had told her father she had been sexually offended against, the Court held that there was no previous consistent statement issue. The Court did agree, though, that the distinction they drew between this case and *Rongonui v R* may seem “somewhat forced or artificial.”³⁴⁴
- 5.40 To summarise, there are broadly three classes of evidence relevant to this issue:

340 *Rongonui v R*, above n 313, at [33] per Tipping J.

341 At [33] per Tipping J.

342 *O'Donnell v R* [2010] NZCA 352.

343 At [38].

344 At [39].

- Detail of complaint – prima facie inadmissible.³⁴⁵
 - Fact of complaint – prima facie inadmissible.³⁴⁶
 - Fact of speaking – prima facie admissible.³⁴⁷
- 5.41 And as *R v O'Donnell* shows, the dividing line between the latter two situations is not always clear.³⁴⁸
- 5.42 It has been suggested to us that these interpretations frequently mean that there is a “hole” in the evidence, as the jury is often not told what happened immediately after the offending allegedly occurred (that is, when the complainant told someone about the incident). We agree that this is misleading, particularly as the jury will often hear what the defendant said soon after the alleged incident (if they are confronted with the allegations by the police or, as can be seen below, another person). All (or nearly all) cases rely on a complaint to come before court, so it is odd that the jury is left to infer how this actually happened.
- 5.43 In any event, even if the three categories are being correctly dealt with, such fine distinctions are unsatisfactory.

Res gestae

- 5.44 Mahoney and others explain res gestae as “[l]iterally translated as ‘things done’, the res gestae exception was justified at common law on the basis that all the circumstances surrounding a relevant event should be admissible to give a true picture of what occurred.”³⁴⁹ There is no mention of such an exception in s 35 (or, indeed, anywhere in the Act) and at an early stage the Court of Appeal commented that it “appears likely that it was just overlooked”.³⁵⁰ The implication from the Court was that res gestae evidence was no longer admissible.
- 5.45 However, the Supreme Court disagreed with this in *Rongonui v R*, the majority stating that “[t]here is nothing in the legislative history of the Act to suggest that Parliament meant to bring res gestae statements within the scope of s 35(1).”³⁵¹ Although the majority’s discussion stemmed from a consideration of only one aspect of the res gestae exception, namely words

345 *R v Barlien*, above n 300.

346 *Rongonui v R*, above n 313.

347 *Rongonui v R*, above n 313.

348 *R v O'Donnell*, above n 342.

349 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) at 151.

350 *R v Barlien*, above n 300, at [37].

351 *Rongonui v R*, above n 313, at [46].

spoken as part of the events in issue,³⁵² they went on to discuss all three “principal categories”.³⁵³ Mahoney and others consider that it is “therefore likely that all three classes of *res gestae* statements will be held to fall outside the scope of s 35(1).”³⁵⁴

- 5.46 The practical upshot of this is that a complainant will, for example, be able to give evidence that at the time they were assaulted they were calling out “I am being attacked”, but will not be able to give evidence that immediately after they were assaulted they told someone “I was just attacked”. As discussed above in relation to “detail of complaint”, “fact of speaking” and “fact of complaint”, such fine distinctions are unhelpful.

What is a “challenge” to a witness’s veracity or accuracy?

- 5.47 As has been noted above, the Justice and Electoral Committee appear to have been operating under the belief that the changes it made to the subs (2) exception meant that it restated the common law.³⁵⁵ However, it has been noted that the Supreme Court has interpreted this exception “much more broadly than existed at common law”³⁵⁶ This has happened in (at least) the following two ways:³⁵⁷

- There will nearly always be a challenge in sexual cases. For instance, in *Rongonui v R* the majority stated:³⁵⁸

... Most defences in sexual cases involve the proposition either that the alleged offending did not occur at all or that the conduct involved was consensual. The very nature of such defences must, at least implicitly, involve a challenge to the complainant’s veracity, on the basis of invention; that is a contrivance later in time than the events in issue.

- The complaint need not be made before the event that is said to give rise to the fabrication. While the majority in *Hart v R* noted that, before the Act “[t]he great preponderance of authority suggested that in order to be admissible to rebut an allegation of invention the witness’s statement

352 At [45] per Tipping J.

353 At [47] per Tipping J. Briefly, these are: (a) spontaneous utterances accompanying an event; (b) contemporaneous statements explanatory of an act; and (c) statements concerning a present physical or mental condition.

354 Mahoney and others, above n 349, at 152.

355 Evidence Bill 2005 (256-2) (select committee report) at 5.

356 Mahoney and others, above n 349, at 157.

357 At 157-158.

358 *Rongonui v R*, above n 313, at [43].

must have preceded the circumstances giving rise to and hence the alleged invention”,³⁵⁹ they went on to hold that:³⁶⁰

... in interpreting s 35(2) the courts should not follow the general common law approach as to timing when that is not mandated by the statutory language. They should anchor themselves firmly in the statutory concept of the previous consistent statement being necessary to “respond” to the claim of invention. Whether the requirements of necessity and response are satisfied do not depend rigidly on timing issues. A consistent statement made later than the occasion of the claimed invention may, depending on its contents and the circumstances of its making, have sufficient cogency in rebutting the claim of invention to enable it to be viewed as a response to the claim within the meaning and purpose of s 35(2). We would therefore hold that to be admissible the previous consistent statement does not have to precede the occasion or motive of the claimed invention.

- 5.48 When these two factors are coupled with the removal of any requirement that the complaint be “recent” (ie made at the first reasonable opportunity), it can be seen that complaint evidence in sexual cases will now almost always be admissible (subject to ss 7 and 8). This has been recognised by the Court of Appeal.³⁶¹

Summary of problem

- 5.49 There are two main concerns with the operation of s 35. The first relates to the interpretations of the Supreme Court. When the “fact of complaint” was brought within the ambit of s 35(1),³⁶² this created an artificial “hole” in the evidence that is presented to the court. In part to get around this, it seems the courts have relaxed the s 35(1) prohibition by engaging in fine distinctions as to what a “statement” is and excluding *res gestae* from its ambit. And when subs (1) is engaged, the courts have interpreted subs (2) broadly, in particular as to when there is a challenge to veracity or accuracy based on a claim of recent invention. Ironically, this has led to much more being admitted, at least in sexual cases, than simply the fact of complaint.
- 5.50 This has led to the second problem, namely that the section appears to be ill-equipped to procedurally deal with the above approach. This is noted by the majority in *Rongonui v R*, with Tipping J stating:³⁶³

... Thus in most [sexual cases] it is likely that the evidence which the complainant would have been able to give in evidence-in-chief, as recent complaint evidence at common

359 *Hart v R*, above n 309, at [47].

360 At [53] (footnote omitted).

361 *H (CA671/2011) v R* [2012] NZCA 102 at [13].

362 *Rongonui v R*, above n 313, at [33] per Tipping J.

363 *Rongonui v R*, above n 313, at [43].

law, will now be admissible, in re-examination, as a previous consistent statement under s 35(2).

- 5.51 While the Court went on to comment that in some situations the required challenge may have become apparent in a sufficiently clear way before trial, or in counsel's opening, so that the complaint evidence can be given in evidence-in-chief, they concluded that the "practical implications of bringing "recent complaint" evidence within the law relating to previous consistent statement evidence do not appear to have been given much attention in the formulation of the change."³⁶⁴
- 5.52 One way of getting around the awkward way that previous consistent statement evidence is now to be given has been for the prosecution to seek a ruling under s 344A of the Crimes Act 1961³⁶⁵ that the previous consistent statement is admissible at trial on the basis that the witness's veracity or accuracy will be challenged on the basis of recent invention.³⁶⁶ However, this will not be possible in every case, for example where the defendant has declined to make a statement and the defence has not been signalled, and it has recently been held that a bare "not guilty" plea will not be enough.³⁶⁷

OPTIONS

- 5.53 We set out two options for meeting the problems raised with s 35 below, along with the advantages and disadvantages of each. We conclude by setting out the Law Commission's preferred approach.
- 5.54 In addition to these options, we considered the option of not amending s 35 on the basis that, while the present situation is not perfect, it is at least now settled and understood.³⁶⁸ However, given our view that the section is not operating as intended and the problems it is currently causing in practice, we do not see this as a viable option. We also reconsidered the recommendation that the Law Commission provided to the Minister of Justice in 2009 (discussed above at paragraph 5.14), but subsequent jurisprudence on s 35 has superseded this advice.

Option One: Substantially redraft s 35

- 5.55 This option involves a redraft of s 35 so that previous consistent statements would generally be inadmissible, except in the following circumstances:

³⁶⁴ At [44].

³⁶⁵ The equivalent provisions in the Criminal Procedure Act 2011 are s 79 (for judge-alone trials) and s 101 (for jury trials), neither of which are in force yet.

³⁶⁶ See, for example, *R v B (SC 88/2010)*, above n 317.

³⁶⁷ *H (CA671/2011) v R*, above n 361, at [10].

³⁶⁸ By the time this review is published, it will be over two and a half years since the Supreme Court delivered the decisions of *Hart v R*, above n 309, and *Rongonui v R*, above n 313.

- (a) the statement forms an integral part of the event or events in issue;
 - (b) the statement constitutes the fact of a complaint made by a complainant against a defendant in a sexual case;
 - (c) the statement is necessary to respond to a challenge to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of invention on the part of the witness; or
 - (d) in exceptional circumstances, the judge considers it necessary in the interests of justice.
- 5.56 Paragraph (c) omits the term "recent" from "recent invention" consistent with case law that this term is redundant.³⁶⁹
- 5.57 To deal with the timing issues raised above, under this option we would recommend a notice provision, modelled on the hearsay notice provision, requiring a party seeking to offer a previous consistent statement in a criminal proceeding under paragraphs (a), (c) or (d) above to provide written notice to every other party. This will ensure that any objections to the evidence (for instance, on the grounds that the other party does not intend to challenge the witness's veracity or accuracy or that the statement does not form an integral part of the events in issue) are dealt with pre-trial. If the statement is ruled admissible, it can then be offered during the witness's evidence-in-chief, avoiding the statement being unduly emphasised by coming out in re-examination, and ensuring other parties have the opportunity to cross-examine the witness on the statement.
- 5.58 It is not proposed that the exception in paragraph (b) be subject to the notice requirement. This will mean that the fact of a complaint will be automatically admissible (subject to the general tests in ss 7 and 8).
- 5.59 The main advantage of this option is that it has been specifically crafted to deal with the concerns that have arisen in the case law and raised by submitters. The option resolves the practical timing issues outlined above, enabling admissibility issues to be determined pre-trial so that admissible statements may be offered in evidence-in-chief. It clarifies the admissibility of statements forming part of the "res gestae" and "fact of complaint" and provides a framework for trial judges to determine admissibility.
- 5.60 The disadvantages of this option that we have identified are:
- It involves a pre-trial notification process that may require a party to "show their hand" pre-trial. However, we note that similar concerns were raised in relation to the hearsay notification process, and we have received no indication that these are not currently working well.

369 *Hart v R*, above n 309; letter from Mathew Downs (Crown Counsel, Crown Law Office) to Grant Hammond (President of the Law Commission) regarding Review of the Evidence Act 2006: s 35: previous consistent statements (11 December 2012).

- The exception in paragraph (d) is broad. While the “interests of justice” is a broad term, it is readily understood and is used in many other provisions of the Act. Further, we think that the exception can be drafted in a manner that makes it clear that it only covers exceptional circumstances. Finally, we think that it is desirable to have a general provision to cover any unforeseen situations.
- As the option involves a substantive amendment to the Act, there is likely to be a “settling-in” period.

Option Two: Repeal s 35(1) and (2)

- 5.61 The second option we have considered is to repeal s 35(1) and (2) so that admissibility of previous consistent statements falls to be determined by ss 7 and 8. This is our preferred approach. This would mean that previous consistent statements and previous inconsistent statements are treated the same.³⁷⁰ The test would be whether the statement is relevant and, if so, it would be admissible unless its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect or needlessly prolong the proceeding. This solution has been suggested by some of the academics who we have approached for comment.³⁷¹
- 5.62 This option has similar benefits to option one. Where admissible, the statement will be able to be given by the witness in his or her evidence-in-chief. The “fact of complaint” could also be led from the recipient of it (the friend in the above example) so long as, again, it met ss 7 and 8.³⁷² For example, the recipient could say that “the complainant told me that the defendant did X to her”. Whether or not the “complaint witness” will be required to give this evidence can be argued (or agreed) in advance of the trial, which will mean that the occasions on which such witnesses will have to simply be on standby should be reduced.
- 5.63 We note that concern has previously been expressed that the absence of an exclusionary rule for previous consistent statements could lead to witnesses fabricating statements and lengthening the trial process.³⁷³ However, we consider such issues are able to be adequately dealt with by ss 7 and 8. An invented statement is clearly not relevant, and the judge will have the power to exclude (true) statements where their probative value is outweighed by the risk that the evidence will needlessly prolong the proceedings.

370 As to previous inconsistent statements, see *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508.

371 It has also been specifically discussed as an option in Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 104-105.

372 It will not be a “hearsay statement”, as the complainant is still a “witness” for the purposes of s 4 of the Act: *R v M (CA663/08)* [2010] NZCA 302 at [26].

373 Law Commission *Evidence: Volume 1*, above n 291, at 40.

- 5.64 This option was put to the Evidence Act advisory group who raised the following additional concerns:
- Repeal would cause considerable uncertainty in this area. Without more, it could leave a gap in this area of evidence law, with courts uncertain as to how they should determine admissibility (eg by reference to the pre-Act common law).
 - The threshold tests in ss 7 and 8 are relatively low, which may result in the courts being inundated with voluminous material. In particular, the test for excluding evidence on the basis it will “needlessly prolong the proceeding” in s 8(1)(b) may be a difficult one to meet.
- 5.65 We acknowledge these concerns and the risk that this option may not provide sufficient guidance to trial judges in the most difficult cases. However, we are of the view that, properly applied, this option provides a principled approach to deal with previous consistent statements. It has the key benefit of simplicity. It will focus admissibility decisions on the fundamental tests under the Act so that judges and counsel will be required to determine whether a particular previous statement is relevant, and, if relevant, whether its probative value outweighs its prejudicial effect or will needlessly prolong proceedings.
- 5.66 This approach also has the benefit of conceptual clarity. The concepts of relevance, probity and prejudicial effect and needlessly prolong are generally well understood by the profession and the judiciary. Application of the fundamental tests focuses attention on the critical matters under the Act, rather than an analysis of whether a particular statement falls within a particular category. It avoids engaging in fine distinctions as to whether a statement is “consistent” or “inconsistent” or whether it constitutes a “statement”.
- 5.67 There will undoubtedly be a “settling-in” period as courts tackle this new approach. However, we note that any amendment would have this effect, and we consider that this uncertainty can be mitigated by strong extrinsic material (such as material that accompanies the progress of a bill through the parliamentary process) that sets out the legislative intention behind the repeal of subs (1) and (2). Appellate guidance on the admissibility of previous consistent statements will also occur in the usual way.
- 5.68 Consequential amendments should also be made deleting the “previous consistent statements rule” definition in s 4, and references to the section or rule in s 25(4), s 27(3) and s 34(1).

R9 We recommend repealing s 35(1) and (2) so that the admissibility of previous consistent statements is determined by the fundamental tests contained in ss 7 and 8, and deleting the “previous consistent statements rule” definition in s 4, and deleting references to s 35 and the previous consistent statements rule in s 25(4), s 27(3) and s 34(1).

Subsection (3)

5.69 The above options cover subs (1) and (2). We have received comments from submitters that subs (3) never sat neatly alongside subs (1) and (2). Rather than admitting evidence that is consistent with a witness's testimony, subs (3) provides for the admission of a previous statement that a witness is unable to recall. The import of this provision fits more appropriately in s 90 which deals with the use of documents in questioning a witness or refreshing memory. Under both options discussed above, we recommend moving subs (3) to s 90.

R10 We recommend moving the substance of s 35(3) to s 90.

Chapter 6

Veracity and propensity evidence

INTRODUCTION

- 6.1 As the fact-finding process of a courtroom trial is largely based on the giving of oral testimony by witnesses, evidence of character and evidence of credibility can be of critical importance. In cases where there is little or no “real evidence”, the fact-finder may have to decide a case based on which witnesses and which version of events they believe. While evidence of credibility and character can be helpful in assisting a fact-finder to reach this decision, such evidence can also have little or no relevance, or be unfairly prejudicial. As with all evidence law, the law relating to credibility and character evidence seeks to strike an appropriate balance between providing the fact-finder with relevant information that is of assistance to it, while excluding such evidence if it is unfairly prejudicial or of only marginal relevance. It is vital that the rules that provide the framework within which the fact finder will assess credibility are “rational, consistent and fair”.³⁷⁴
- 6.2 The common law rules law relating to evidence of character and evidence of credibility encompassed what has come to be known in the Act as evidence of “veracity” and “propensity evidence”.
- 6.3 Veracity is defined in the Act to mean “the disposition of a person to refrain from lying, whether generally or in the proceeding”.³⁷⁵ The Act defines propensity evidence to mean “evidence that tends to show a person’s propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved”. Evidence of an act or omission that is one of the elements of the offence for which the person is being tried or the

374 Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at 21.

375 Evidence Act 2006, s 37(5).

cause of action in the proceeding are specifically excluded from the definition of propensity evidence.³⁷⁶

- 6.4 Put simply, veracity evidence is generally concerned with whether a person is honestly recounting their version of events and is not being deliberately untruthful. Propensity evidence is concerned with whether a particular person has a tendency to act in a particular way or have a particular state of mind. Evidence of past behaviour may be relevant in determining whether the person behaved in the same way in the instant case.
- 6.5 Veracity evidence and propensity evidence are distinct concepts, although at times there may be some overlap. Where this occurs, the Act is clear that the veracity rules take precedence if the evidence is being used solely or mainly for veracity purposes.³⁷⁷
- 6.6 These categories of evidence have given rise to difficulty in practice both prior to and subsequent to the implementation of the Evidence Act. The relevant parts of this vexed history are set out in this chapter, together with the issues that have been raised for consideration in the context of this review. Those issues include the scope of the veracity evidence sections of the Act and some fine tuning matters related to those provisions. In relation to propensity evidence, the key issues are the balancing test to be carried out and directions to be given to a jury about propensity evidence.

DEVELOPMENT OF THE VERACITY AND PROPENSITY PROVISIONS IN THE EVIDENCE CODE AND THE ACT

- 6.7 In its 1997 preliminary paper *Evidence Law: Character and Credibility*, the Law Commission set out in some detail the law relating to evidence of character and evidence of credibility. They covered:³⁷⁸
- prior convictions;
 - reputation;
 - previous statements;
 - physical or mental disorder;
 - demeanour;
 - bias; and
 - corroboration.

376 Evidence Act 2006, s 40(1).

377 Evidence Act 2006, s 40(4).

378 Law Commission *Character and Credibility*, above n 374, at 21.

- 6.8 There was a considerable body of complex rules applying in respect of each of these categories of evidence,³⁷⁹ often drawing a distinction between the position of defendants in criminal proceedings and that of other witnesses, in order to afford adequate protection to defendants' fair trial rights by recognising that much of this kind of evidence could be unfairly prejudicial.

Evidence of veracity

- 6.9 Prior to the Act the law had not specifically isolated the concept of "veracity".³⁸⁰ Generally, parties in a proceeding were relatively free to show that a witness was in error. However, there were more restraints on challenging a witness's truthfulness, primarily due to concerns that such challenges were likely to waste the court's time, lead to confusion, and in criminal proceedings, be unfairly prejudicial.³⁸¹ In particular, there were specific procedural rules which had considerable impact on the assessment of credibility of witnesses. These were:

- the rule prohibiting a party from bolstering the credibility of a witness;
- the rule prohibiting a party from impeaching its own witness; and
- the collateral issues rule.

- 6.10 The Law Commission described the first of these rules in the following terms:³⁸²

At common law a party cannot bolster the truthfulness of a witness – except in a tacit fashion, such as by way of introductory questions – unless that witness's truthfulness has first been attacked. This is so even if a party anticipates an attack on that witness by another party. However, a party may rebut an attack of a witness's truthfulness by calling another witness to affirm the first witness's truthfulness. ... Under the current law a witness whose truthfulness has been attacked in cross-examination may also be rehabilitated in re-examination, but it is uncertain what kind of evidence can be offered to do so. For instance, it is debatable whether a party can offer evidence of general good character to rehabilitate the witness.

- 6.11 The rule against prohibiting a party from impeaching its own witness meant that:³⁸³

... a party cannot impeach the credit of its own witness, although it can call other evidence to *contradict* its own witness. In New Zealand this is reflected in s 9 of the Evidence Act

379 The Commission described the rules applying to character and credibility as "very technical". See Law Commission *Character and Credibility*, above n 374, at 11.

380 In its 1997 preliminary paper and its report on the Code, the Commission used the term "truthfulness". The Select Committee later recommended the term "veracity" be used instead.

381 Law Commission *Character and Credibility*, above n 374, at 22.

382 Law Commission *Character and Credibility*, above n 374, at 44.

383 At 45 (original emphasis).

1908. ... This section applies to both hostile and unfavourable witnesses, in both criminal and civil proceedings. Its prohibition of “general evidence of bad character” presumably includes evidence of such matters as the witness’s convictions and reputation for veracity.

If the witness proves hostile, he or she may be cross-examined by the party calling the witness, but not ... about bad character, although cross-examination about possible bias is probably permissible. Cross-examination may also extend to prior inconsistent statements of the hostile witness. In New Zealand this right is explicitly recognised in s 10 of the Evidence Act 1908. ...

6.12 Finally, the third of these rules, the collateral issues rule:³⁸⁴

... [applied] when cross-examination is directed to a matter which is not a fact in issue. It treats a witness’s answers as final and does not permit evidence which is intended to contradict them. Commonly the cross-examination is directed to credibility, whether relating to error or to truthfulness.

Collateral issues do, however, vary in their degree of relevance. As a consequence, a number of exceptions to the collateral issues rule, have become established. They relate to questions designed to show:

- that the witness has previous convictions for indictable offences;
- that the witness has previously made a statement inconsistent with his or her present testimony;
- that the witness is biased in favour of or against one of the parties; and
- that the witness suffers from a physical or mental disorder which affects the witness’s credibility.

In all of the above instances, contradictory evidence may be offered.

6.13 The test for determining what was a “collateral issue” was laid down in *Attorney-General v Hitchcock*:³⁸⁵

... the test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence – if it have such a connection with the issue, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him.

6.14 This test was, however, described by the Court of Appeal as “easy to state” but “notoriously difficult to apply”.³⁸⁶ The Law Commission noted in 1997 that courts were “increasingly doubting, and even eroding” the collateral issues rule.³⁸⁷

384 At 47-48.

385 *Attorney-General v Hitchcock* (1847) 1 Exch 91, 154 ER 38 at 99.

386 *R v Boskovik* CA33/06, 12 December 2006 at [20] and citing the earlier decision of Young J in *R v H (No. 1)* HC Timaru T97/1747, 14 September 1998.

387 Law Commission *Character and Credibility*, above n 374, at 49.

- 6.15 In short, the previous law can be summarised in the following terms: prosecution evidence of bad character going to a defendant's veracity was excluded unless the defendant put his or her own character in issue or cast imputations upon a prosecution witness. If either of these things occurred, the courts exercised a discretion to exclude or narrow the bad character evidence if potential prejudice outweighed the probative value for veracity. A defendant had a free hand to disclose his or her own convictions and had wider rights against co-defendants (although still subject to a judicial discretion). In theory, evidence of bad character went only to veracity and not to the defendant's propensity to commit the offence he or she was charged with. Juries were directed on this latter point.
- 6.16 The Law Commission later identified two key difficulties in practice with this system. First, a defendant suffered the consequences of casting imputations on a prosecution witness, even when the line of questioning was essential to the defence being mounted. Second, a defendant could avoid disclosure of evidence going to veracity by not giving evidence and thus not bringing his or her veracity into issue.³⁸⁸
- 6.17 In approaching codification of the law in 1999, the Law Commission cited the authors of *Cross on Evidence*, who had said that the law on the admissibility of character evidence was beset by "confusion of terminology, by the disparity of contexts to which the terminology is applied, by the vicissitudes of history, and by the impact of piecemeal statutory change."³⁸⁹
- 6.18 The general rule proposed by the Law Commission in its codification proposals was that evidence challenging or supporting a person's truthfulness would be admissible only if it were "substantially helpful" in assessing that person's truthfulness.³⁹⁰ The Law Commission saw this as a test of "significant or heightened relevance so as to prohibit truthfulness evidence that is of limited value".³⁹¹ The commentary to the proposed Code contained a (non-exhaustive) list of factors considered to be appropriate considerations in determining substantial helpfulness.³⁹²
- 6.19 The Evidence Code abolished the collateral issues rule that had proven troublesome for the common law.³⁹³ It did, however, preserve the "retaliatory

388 Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at 147.

389 Tapper (ed) *Cross on Evidence* (7th ed, Butterworths, London, 1990) at 312 cited in Law Commission *Evidence: Volume 1: Reform of the Law* (NZLC R55, Wellington, 1999) at 44.

390 Law Commission *Evidence: Volume 1*, above n 389, at 45.

391 At 45-46.

392 At 46.

393 The Court of Appeal in *R v Smith* [2007] NZCA 400, at [20] stated that the combination of the "substantially helpful" test and the s 8(1)(b) requirement for evidence that would needlessly prolong the proceeding to be excluded, means that, in practice, there will be little, if any, difference between the Act and the common law.

features” of the common law rules governing the admissibility of prosecution evidence about a defendant’s bad character (in what became s 38(2) of the Act).³⁹⁴

6.20 The Justice and Electoral Committee made a number of changes to the “truthfulness” provisions proposed by the Law Commission. These were:³⁹⁵

- “Truthfulness” was replaced with the term “veracity” on the basis that the latter is more appropriate because it places the emphasis upon the intention to tell the truth, whereas “truthfulness” is more readily confused with factual correctness or accuracy;
- Reference to a person’s reputation for being untruthful was deleted as it was considered irrelevant to an assessment of the veracity of evidence;
- Some wording was removed to eliminate any possible impression that the Bill was intended to change the practice of allowing parties to challenge the testimony of their own witnesses by calling other evidence or by cross-examining witnesses called by another party;
- Wording was amended to reinstate the law limiting the opportunity for the prosecution to call evidence as to the defendant’s bad character as the Law Commission’s original formulation was seen as skewed too far in favour of the prosecution;
- A clause giving judges more guidance when determining whether to allow the prosecution to offer evidence about a defendant’s veracity was added (this clause incorporated five factors set out in the Law Commission’s commentary to its proposed Evidence Code); and
- Amendments were made to allow a defendant in a criminal proceeding to offer veracity evidence about a co-defendant only with the permission of the judge to ensure a proper balance between the respective interests of co-defendants.

6.21 As enacted, s 37 of the Act provides:

37 Veracity rules

- (1) A party may not offer evidence in a civil or criminal proceeding about a person’s veracity unless the evidence is substantially helpful in assessing that person’s veracity.
- (2) In a criminal proceeding, evidence about a defendant’s veracity must also comply with section 38 or, as the case requires, section 39.
- (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may

394 Law Commission *Evidence: Volume 2: Evidence Code and Commentary* (NZLC R55, Wellington, 1999) at 111.

395 Evidence Bill 2005 (256-2) (select committee report) at 5-6.

consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:

- (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
 - (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
 - (c) any previous inconsistent statements made by the person:
 - (d) bias on the part of the person:
 - (e) a motive of the part of the person to be untruthful.
- (4) A party who calls a witness—
- (a) may not offer evidence to challenge that witness’s veracity unless the Judge determines the witness to be hostile; but
 - (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
- (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding.

Propensity evidence

6.22 Prior to the Act, the general rule was that evidence of propensity to offend was not admissible on the basis that such evidence is unduly prejudicial and therefore contrary to a fair trial. However, despite this basic principle of non-admissibility, exceptions developed. These recognised the inherent potential for prejudice but allowed propensity evidence to be admitted. The most significant of these exceptions was the so-called “similar fact” exception.

6.23 Similar fact evidence involved other conduct which had significant probative value in relation to an issue in the present case. That other conduct may or may not yet have been the subject of a criminal charge or conviction, and it may have even been the subject of an acquittal.³⁹⁶ Broadly speaking, it meant evidence as to disreputable aspects of a defendant’s character, other than evidence of the commission of the offence being tried.³⁹⁷

6.24 The Law Commission in 1997 said that it would be “a significant challenge to codify a rule which has defeated precise expression.”³⁹⁸ The Law Commission said that:³⁹⁹

396 In some other common law jurisdictions, the similar fact evidence rule has been applied only to evidence of the defendant’s previous *criminal* acts; see Kenneth Arenson “The propensity evidence conundrum: a search for doctrinal consistency” (2006) 12 *University of Notre Dame Law Review* 31 at 33 for discussion of the position in Australia.

397 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) at 187.

398 Law Commission *Character and Credibility*, above n 374, at 83.

399 At 82.

In spite of the New Zealand Court of Appeal's view that the law is settled, the admission or exclusion of similar fact evidence is often the subject of litigation, and is frequently taken to appeal. This reflects the significance attached to such evidence by both prosecution and defence. As the common law now stands, the admission of similar fact evidence is based on the judge's assessment of the balance between the probative value and the prejudicial effect of the evidence. But each case presents unique factors, and the imprecise nature of the "test" applied in considering admission means that it can be difficult for counsel to assess in advance whether the evidence will be admitted.

Indeed, there is some doubt about the meaningfulness of the common law test.

6.25 While the basic test, namely a balancing of probative value against unfair prejudicial effect, seemed clear enough at first glance, confusion and debate about terminology was a common theme in the case law, something that the Law Commission also acknowledged in its report setting out its recommended propensity provisions in its Evidence Code.⁴⁰⁰ It suggested that propensity evidence be defined in the Evidence Code as "evidence of a person's tendency to act in a particular way, as shown by his or her reputation, disposition, acts and omissions".⁴⁰¹

6.26 In recommending the incorporation of "propensity evidence" in its proposed Evidence Code, the Law Commission said:⁴⁰²

Courts have always been – and in the Commission's view rightly – cautious about admitting propensity evidence about the defendant. The concern is that the jury might make unwarranted and dangerous assumptions along the lines of "once a thief, always a thief." The Law Commission has, for the most part, codified the common law on propensity evidence (both "bad character" and "similar fact" evidence). The proposed rules also clarify certain aspects of the common law. ...

6.27 The Justice and Electoral Committee recommended just a few changes to the propensity provisions proposed by the Law Commission, but none that significantly altered the Law Commission's suggested codification of the common law on propensity evidence.⁴⁰³ The propensity provisions were subsequently enacted as follows:

40 Propensity rule

- (1) In this section and sections 41 to 43, propensity evidence—
 - (a) means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but
 - (b) does not include evidence of an act or omission that is—

400 Law Commission *Evidence: Volume 1*, above n 389, at 44.

401 At 48.

402 At 48.

403 Evidence Bill 2005 (256-2) (select committee report) at 6.

- (i) 1 of the elements of the offence for which the person is being tried; or
 - (ii) the cause of action in the proceeding in question.
- (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
- (3) However, propensity evidence about—
 - (a) a defendant in a criminal proceeding may be offered only in accordance with section 41, 42 or 43, whichever section is applicable; and
 - (b) a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44.
- (4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.

41 Propensity evidence about defendants

- (1) A defendant in a criminal proceeding may offer propensity evidence about himself or herself.
- (2) If a defendant offers propensity evidence about himself or herself, the prosecution or another party may, with the permission of the Judge, offer propensity evidence about that defendant.
- (3) Section 43 does not apply to propensity evidence offered by the prosecution under subsection (2).

42 Propensity evidence about co-defendants

- (1) A defendant in a criminal proceeding may offer propensity evidence about a co-defendant only if—
 - (a) that evidence is relevant to a defence raised by the co-defendant; and
 - (b) the Judge permits the defendant to do so.
- (2) A defendant in a criminal proceeding who proposes to offer propensity evidence about a co-defendant must give notice in writing to that co-defendant and every other co-defendant of the proposal to offer that evidence unless the requirement to give notice is waived—
 - (a) by all the co-defendants; or
 - (b) by the Judge in the interests of justice.
- (3) A notice must—
 - (a) include the contents of the proposed evidence; and
 - (b) be given in sufficient time to provide all the co-defendants with a fair opportunity to respond to that evidence.

43 Propensity evidence offered by prosecution about defendants

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute

- in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.
- (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
 - (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
 - (a) the frequency with which the acts, omissions, events, or circumstances which are the subject of the evidence have occurred:
 - (b) the connection in time between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
 - (c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
 - (d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:
 - (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:
 - (f) the extent to which the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.
 - (4) When assessing the prejudicial effect of the evidence on the defendant, the Judge must consider, among any other matters,—
 - (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
 - (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

LAW COMMISSION'S 2008 REPORT INTO PRIOR CONVICTIONS AND ALLEGATIONS

- 6.28 After the Act received Royal assent, but prior to the Act coming into force, the Law Commission received a reference asking it to consider the extent to which a jury in a criminal trial is made aware of prior convictions of a defendant and allegations of similar offending. The Law Commission

published an issues paper⁴⁰⁴ in 2007 and a final report in 2008⁴⁰⁵ in response. The issue of how to deal with evidence of bad character was also included in the review, but was not its primary focus. The report noted some issues with the provisions (considered in more detail below) but ultimately recommended no amendment to the veracity and propensity provisions in the Act. However, the report proposed that the Law Commission continue to monitor the courts' interpretation of the veracity and propensity provisions with a view to providing advice to the Government in 2010 as to whether they are operating adequately and as intended.

Evidence of veracity

6.29 After examining the issues and analysing the submissions it received, the Law Commission concluded that veracity “is not the major issue of public concern”,⁴⁰⁶ but did note that:

- It is questionable whether a court should have regard to previous convictions for offences which indicate a propensity merely for “dishonesty” as opposed to a “lack of veracity” (offences indicating a propensity for dishonesty are included in the list of factors to be considered when determining whether evidence is substantially helpful in terms of veracity). While the courts may read down “dishonesty” where there is no significant veracity issues (as courts in England have done), specific amendment of the Act may be required at some point.
- Where a defendant is charged with offences of dishonesty and has previous convictions for similar kinds of dishonesty, directions that the jury should only consider the previous convictions in relation to the defendant's veracity and not to propensity are likely to be ineffective. While a judge might exclude the similar previous convictions under s 8 as unfairly prejudicial, specific provision for this in the Act may be required.
- There is uncertainty as to whether the prosecution may lead its own evidence of a defendant's previous convictions when a defendant has attacked the credibility of prosecution witnesses but has refrained from giving evidence themselves. It is unclear whether the previous position, based on the “cardinal principle” of relevance, survives where the prosecution is unable to do so. There is a difficulty with this proposition if the prosecution has put the defendant's statement to the police in evidence.

404 Law Commission *The Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character* (NZLC IP4, 2007).

405 The reference followed public disquiet regarding the non-disclosure to the jury of previous convictions of two former police officers who were tried and acquitted of sexual offending in a high-profile case.

406 Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character*, above n 388, at 147. The aspects of the 2008 report dealing with propensity evidence are discussed later in this report.

Propensity evidence

- 6.30 At the time the Law Commission published its issues paper, there was some uncertainty as to how the exclusionary approach in s 43 of the new Act would be interpreted and applied. One possible approach, based on the earlier stated objectives of the Law Commission, would be for the courts to treat s 43 as simply restating the common law approach to similar fact. An alternative was to focus on the statutory language, reading it on its face as a fresh start.⁴⁰⁷ As it turned out, by the time the Law Commission reported in 2008, the Court of Appeal had answered this question in favour of the latter “fresh start” approach.⁴⁰⁸ The Law Commission considered this to be acceptable.⁴⁰⁹
- 6.31 In its issues paper, the Law Commission put forward eight options in relation to propensity evidence:⁴¹⁰
- 1 No change from the present position;
 - 2 “Wait and see”: respond as appropriate after judicial interpretations and working experience has clarified the effects of the new legislation;
 - 3 “Wait and see”: (as in (2) above), but with immediate amendments enabling appropriate determination of circumstances of previous convictions, and confirming that multiple complainants’ similar fact evidence is propensity evidence and is not veracity evidence;
 - 4 Amend section 43 by a declaratory provision that it is not to be interpreted by reference to previous rules as to similar fact evidence, but is to be read as if a code;
 - 5 Amend section 43 (with or without removal of similar fact restrictions) by stating propensity evidence will not be admissible if the risk of unfairly prejudicial effect of the defendant or proceeding “substantially” outweighs probative value;
 - 6 Replace section 43 by provision that propensity evidence will not be admissible if the evidence will prevent a fair trial;
 - 7 Adopt solution 4 above, but in addition create a special class of or classes of offence in which propensity evidence is admissible regardless of risk of unfair prejudice;
 - 8 Repeal section 43 and qualify section 8: allow in all relevant propensity evidence in all trials regardless of risk of unfair prejudice and risk of unfair trials.
- 6.32 By the time of the Law Commission’s 2008 report, option 4 had become redundant in light of the Court of Appeal decision referred to above interpreting section 43 as a “fresh start”.

407 Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending and Bad Character*, above n 388, at 153.

408 *R v H* [2007] NZCA 451.

409 Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending and Bad Character*, above n 388, at 153.

410 At 154-155.

6.33 In that report, the Law Commission was not prepared to countenance any options that involved “acceptance of a heightened risk of unfair trials”.⁴¹¹ The Law Commission took the view, however, that while there are a number of circumstances in which the probative value of previous convictions is very limited, the law prior to the Evidence Act was “too restrictive” and “notoriously difficult to apply in practice”.⁴¹²

6.34 It noted that with the Court of Appeal adopting a fresh start, a more liberal approach, and even expansion in some classes of case, was probable. The Law Commission was not persuaded that there was any inherent difficulty with the statutory test involving a weighing of probative value and prejudicial effect. While there is imprecision in these concepts, any test that did not involve a difficult exercise of judgment would likely result in rigidity and hence injustice.

6.35 Finally, the Law Commission concluded that:⁴¹³

It would nevertheless be premature to reach the conclusion that the current rules do not need to be changed. The Act is very new, and it cannot be said with certainty that a more liberal position will necessarily be adopted or maintained. If there were to be an unexpected retreat back to more restrictive traditional outlooks, some additional legislative guidance might become warranted. Moreover, there are some unresolved difficulties and uncertainties in the current law that the courts may or may not be able to resolve unaided. These include the potential difficulties that arise in the segregation between propensity and veracity. ...

The Commission therefore proposes that it should continue to monitor and further assess the operation and impact of the provisions of the Evidence Act 2006 relating to previous convictions, propensity and veracity, and to report back to government by 28 February 2010 whether any amendment to the legislation is required in the light of experience in the intervening period.

LAW COMMISSION’S 2010 ADVICE TO THE MINISTER OF JUSTICE

6.36 Consistent with the proposal in its 2008 report, the Law Commission provided further advice to the Minister of Justice on 1 April 2010 about the operation of the veracity and propensity provisions in the Act. Its overall

411 At 155.

412 At 156. In terms of circumstances where prior convictions have low probative value, the Commission gave the example of a defendant facing burglary charges where the prosecution case is purely circumstantial (perhaps involving evidence that the defendant was near the scene of a burglary late at night and gave no satisfactory account of his or her movements). In such a case, the evidential value of the mere fact that the defendant has a prolific record for burglary is “extremely limited” and runs the risk of being misunderstood and given undue weight.

413 At 157.

conclusion was that the picture was “very largely a positive one”, although it did note some instances of pre-Evidence Act practice creeping through.⁴¹⁴

- 6.37 The majority of issues addressed in that advice related to the propensity evidence provisions of the Act and noted that there had, at that point, “not been many cases” decided under ss 37 to 39.⁴¹⁵ The Law Commission noted some issues with the veracity and propensity provisions (discussed further below), but were of the view that they were not pressing enough to require urgent action in the absence of other problems.

Evidence of veracity

- 6.38 The one veracity issue discussed in detail related to two Court of Appeal decisions that held that in determining the scope of the veracity rule, judges need to look at the principal purpose for which the evidence is being adduced; that is, whether to establish a disposition to lie or refrain from lying, or for some other collateral purpose.⁴¹⁶
- 6.39 In *R v Davidson* a complainant’s earlier videotaped statement denying any sexual offending occurred was held to be admissible on the basis it was not veracity evidence as the predominant purpose for the defence seeking to introduce it was to establish the truth of its contents. The Court of Appeal took a similar approach in *R v Tepu* and held that an initial false statement to the police by the defendant to the effect that he had never met the complainant was admissible as the primary purpose for the prosecution seeking to introduce the statement was not to attack the defendant’s veracity.
- 6.40 The Law Commission outlined differing academic views as to the correctness of this line of reasoning. Whereas Scott Optican and Peter Sankoff took the view that the result reached by the Court of Appeal in *Tepu* was the correct one (although they took issue with some of the analysis), Richard Mahoney disagreed, taking a narrower statutory interpretation approach. On his analysis, s 37 applies to any evidence *about* a person’s veracity, and therefore the Court in *Tepu* was wrong to frame its decision around the absence of any *attack* on veracity.⁴¹⁷
- 6.41 The Law Commission took the view that the outcome achieved by the Court of Appeal was the right one and reflected parliamentary intentions about the scope of the veracity provisions. It did note, however, that if Richard Mahoney’s view as to the correct interpretation of the Act was to prevail, the

414 Letter from Geoffrey Palmer (President of the Law Commission) to Simon Power (Minister of Justice/Minister Responsible for the Law Commission) regarding the Evidence Act Review: Operation of the Veracity and Propensity Provisions (1 April 2010).

415 Law Commission, above n 414.

416 See *R v Tepu* [2008] NZCA 460, [2009] 3 NZLR 216 and *R v Davidson* [2008] NZCA 410.

417 See Scott Optican and Peter Sankoff “Cross-examination” (paper presented to New Zealand Law Society Evidence Act Revisited for Criminal Lawyers, February 2010) 85 and Richard Mahoney “Evidence” [2009] NZ Law Rev 127.

disputed evidence in *Tepu* would have been excluded, a result that the Law Commission took issue with as, in its view, evidence of lies about the current offending ought to be admissible. The Law Commission considered that this matter should continue to be monitored.

Propensity evidence

- 6.42 The Law Commission noted that propensity evidence cases decided under the Act could be divided into two categories: those where the courts effectively “side-stepped” the provisions of the propensity provisions, notwithstanding their prima facie applicability, and those where sections 40–43 were applied.⁴¹⁸
- 6.43 In terms of those cases that “side-stepped” the Act, the Law Commission considered a line of Court of Appeal decisions which applied a number of “theoretical distinctions” with respect to the definition of “propensity evidence” in s 40. In particular, the Court held in a number of cases that where the evidence is merely “part of the narrative” or “directly relevant” the propensity provisions did not apply and its admissibility was to be determined via ss 7 and 8.⁴¹⁹
- 6.44 The Law Commission, along with academic commentators, considered that this approach was erroneous, and that while no miscarriage of justice appeared to have resulted to date, there was a risk for future cases. However, it took the view that since the error was one of interpretation rather than an inherent problem with the drafting of the propensity provisions themselves, the law should be allowed to develop further before any decision to intervene was made.⁴²⁰
- 6.45 The Law Commission also discussed the Supreme Court decision in *Wi v R*.⁴²¹ The Court in that case held that a defendant’s lack of previous convictions could be admitted as such evidence has a tendency, if only slight, to prove that the defendant, on account of the lack of previous convictions, is less likely to have committed the offence with which he or she is charged.
- 6.46 The Court in *Wi* also held that, beyond evidence of a lack of convictions, the defence may be able to introduce a broader range of good character evidence, although not all will meet the necessary threshold of relevance.⁴²²
- 6.47 The Law Commission went on to discuss the aspects of *Wi* that were of concern to the Crown Law Office, namely that:

418 Law Commission, above n 414.

419 See for example, *R v Tainui* [2008] NZCA 119; *R v R* [2008] NZCA 342; *R v Broadhurst* [2008] NZCA 454; *R v Gooch* [2009] NZCA 163; and *R v Mahomed* [2009] NZCA 477.

420 Law Commission, above n 414.

421 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.

422 This effectively affirmed the approach of the Court of Appeal in *R v Alletson* [2009] NZCA 205.

- if such good character evidence is adduced, it may open the door to rebuttal evidence from the prosecution (although, evidence of lack of previous convictions without more will not do so); and
 - the trial judge may give a direction about the proper use of such evidence, but this is not mandatory.
- 6.48 Crown Law was concerned about these aspects of the Supreme Court’s decision creating uncertainty about when a direction should be given, and that precluding the Crown from responding, albeit to the very narrow class of good character evidence, is not consistent with the party-neutral thrust of the Act.
- 6.49 The Law Commission concluded that it was comfortable with the Court’s approach and considered it reflected what was intended. It recommended that Crown Law’s concerns be “taken under advisement” and developments continue to be monitored.⁴²³
- 6.50 The Law Commission also discussed the Court of Appeal decision in *R v Moffatt* where the Court held that if the requirements of s 42 (propensity evidence offered against co-defendants) were met, a defendant should not be prevented from adducing any evidence that would support his or her case.⁴²⁴ It held that the High Court should not have invoked s 8 of the Act to exclude the evidence on the basis of collateral damage to a co-defendant. Instead, the Court considered that where prejudice to another defendant would be undue, the appropriate remedy would be severance, as opposed to exclusion of the evidence from the first defendant’s defence.
- 6.51 Academic commentators have criticised the Court effectively holding that s 8 will not operate to prevent undue prejudice to co-defendants on the basis that such an approach is “looser” than would be justified by a proper reading of the Act.⁴²⁵
- 6.52 The Law Commission noted that there was no potential for miscarriage of justice arising from the Court’s decision given that severance would be ordered in the event of undue prejudice to a co-defendant, although that might give rise to other problems in terms of resourcing or for witnesses. It took the view that this, along with the Court of Appeal’s approach to the scope of propensity evidence under s 40, was the most significant issue arising in relation to the propensity provisions. However, the Law Commission again was of the view that the problem does not lie with the drafting of the Act but

423 Law Commission, above n 414.

424 *R v Moffat* [2009] NZCA 437, [2010] 1 NZLR 701.

425 Scott Optican and Peter Sankoff “Relevance and prejudice” (paper presented to New Zealand Law Society Evidence Act Revisited for Criminal Lawyers, February 2010) 3 at 27-28.

rather with the way it has been applied. It recommended no action be taken, with ongoing monitoring of the situation.⁴²⁶

- 6.53 The Law Commission noted that in terms of the cases where the courts were applying s 43, the approach being taken “is very much a case by case fact-specific balancing exercise” and that the provisions are “working”.⁴²⁷
- 6.54 Finally, it also noted that its approach to directions from its 2008 report (namely that a more detailed approach than had been applied prior to the Act was required) had been adopted by the Court of Appeal in *R v Stewart* [2008] NZCA 429.⁴²⁸

EVIDENCE OF VERACITY: ISSUES

- 6.55 The following discussion covers issues that have been raised by submitters in relation to the veracity provisions, and also revisits issues that were identified in the Law Commission’s 2008 report and 2010 advice to the Minister.

Definition of veracity

- 6.56 The definition of veracity is critical as it determines whether the veracity provisions apply to a particular piece of evidence. Section 37(5) defines veracity as “the disposition of a person to refrain from lying, whether generally or in the proceeding”. One of the leading texts on the Evidence Act has suggested that the negative way in which this definition is cast becomes potentially confusing when it comes to making the enquiries required under s 37(3) to determine substantial helpfulness. This is particularly the case with s 37(2)(b). If the definition of veracity in s 37(5) is substituted for the term “veracity” in that paragraph, it asks the judge to determine whether the proposed evidence about veracity tends to show that the person whose veracity is in question has been convicted of one or more offences that “indicate a propensity for ... lack of ... a disposition to refrain from lying”.
- 6.57 This potential confusion seems to stem from reading s 37(2)(b) as referring to offences indicating a propensity for dishonesty or a *propensity* for a lack of veracity as opposed to a propensity for dishonesty or a lack of veracity. Read the latter way, the paragraph does not present the same kind of potential for confusion.
- 6.58 However, there does remain a substantial issue regarding the definition of veracity in s 37(5) and therefore the scope of the veracity provisions as a whole. This is the issue that emerged following the Court of Appeal decision in *Tepu*, which was discussed in the Law Commission’s 2010 advice to the Minister of Justice set out above.

426 Law Commission, above n 414.

427 Law Commission, above n 414.

428 Law Commission, above n 414.

- 6.59 Elisabeth McDonald has recently summarised the problem raised by the Court of Appeal’s decision in *Tepu* in the following way:⁴²⁹

The facts of *R v T[epu]* illustrate the difficulties the prosecution may have when seeking to offer veracity evidence about a defendant in the absence of a trigger under s 38. There will either need to be acceptance of an argument that the evidence falls outside the definition of veracity (on the basis of purpose or use), or adoption of the approach taken by the Court of Appeal [in *Tepu*]. There is no equivalent to s 43 with regard to veracity evidence, but general agreement that the Court reached the correct position in *R v T[epu]* (in spite of s 38(2)) may indicate the need to consider a provision that does not depend on the common law “tit for tat” approach.

- 6.60 McDonald’s view on the appropriate scope of the veracity provisions (and by implication the way that the definition in s 37(5) ought to be cast) is that:⁴³⁰

Evidence of someone’s veracity may be helpfully thought of as a piece of evidence extraneous to the subject matter of the proceedings. The definition of veracity in s 37(5) of the Act may not make this entirely clear, stating that “veracity means the disposition of a person to refrain from lying, whether generally or in the proceeding”. However, the wording in s 38(2)(a) that states “by reference to matters other than the facts in issue” indicates more clearly that the type of evidence s 37 is intended to cover is narrowly constrained; the sort of material that at common law would have been within the scope of the collateral issues rule.

- 6.61 McDonald cites material from the Law Commission’s files indicating that it intended that a distinction be drawn between truthfulness in general, and truthfulness of the evidence on a particular matter in the proceeding.⁴³¹

- 6.62 This distinction has also been cast as a distinction between “probative credibility” and “moral credibility”:⁴³²

Investigation of the credibility of a person’s account of relevant facts, or the weight of their evidence, through cross-examination or otherwise, does not always raise concerns of time-wasting or distraction. What might be referred to as “direct proof of mendacity” (or “probative” credibility), that is, calling other people to contradict a witness’s account, should be contrasted with “indirect” proof; that is, suggesting that the witness is the kind of person that should not be believed (“moral credibility”).

- 6.63 Given recent decisions, it seems that the Court of Appeal and the Supreme Court are adopting a broadly similar approach to interpreting the veracity provisions. In *Weatherston v R* the Court of Appeal said:⁴³³

429 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 186.

430 At 168-169.

431 At 170.

432 At 163.

433 *Weatherston v R* [2011] NZCA 276 at [60].

The policy of ss 37 and 38 was not intended to limit the ability of prosecutors to ask defendants or other witnesses directly whether their evidence was truthful. The concern of ss 37 and 38 is with diverting trials into collateral issues. That concern did not arise in the present case.

6.64 The Supreme Court subsequently confirmed this approach:⁴³⁴

The Court of Appeal correctly interpreted and applied the Act. Sections 37 and 38 are not intended to relate to that kind of questioning of veracity and are, instead, like the old collateral issues rule, intended to stop the introduction of material outside the scope of facts directly or indirectly in issue.

6.65 It has been suggested that one way of dealing with this would be to apply a similar approach to the scope of veracity evidence as is applied to propensity evidence by s 40(4) by considering the main purpose of admitting the evidence. In commenting on the Court of Appeal's decision in *Tepu*, Scott Optican and Peter Sankoff commented:⁴³⁵

... the lies were not tendered for the purpose of attacking the witness's veracity. Sections 37 and 38 played no part in the analysis, not because the lie was irrelevant to the defendant's veracity, but because any such effect was merely subsidiary to the main purpose of admitting the evidence.

Approaching the matter in this way would effectively mirror the manner in which the Evidence Act treats propensity evidence that has another potential use. Section 40(4) provides that the propensity rules are inapplicable where the evidence – despite having some relevance regarding propensity – is “solely or mainly relevant to veracity”. In the same way, it is suggested that where the evidence is solely or mainly relevant to something other than the witness's veracity, the rules governing veracity should be inapplicable.

6.66 It is not necessarily helpful to draw a parallel with s 40(4), however, in determining the scope of the veracity rules. The purpose of s 40(4) is to prevent evidence that is primarily veracity evidence but is cast as being about a person's propensity for veracity (or lack of veracity) being admitted in circumvention of the veracity rules, particularly the need for veracity evidence to be substantially helpful.⁴³⁶

6.67 The problem with the scope of the veracity rules is not one of the evidence needing to be considered for admissibility under another set of rules that limit the use of such evidence. Rather, it is simply that the evidence is not of the type that requires application of special rules governing admissibility and its admissibility should be governed by the general rules in the Act.

6.68 Accordingly, the solution proposed by McDonald, to make clear on the face of s 37(5) what constitutes veracity evidence, is a better approach to the problem. We think s 37(5) should be amended to make clear the distinction

434 *Weatherston v R* [2011] NZSC 105 at [5].

435 Optican and Sankoff, above n 417, at 88-89.

436 Mahoney and others, above n 397, at 193-194.

that was intended by the Law Commission, namely, that there be “no rule that prevents a party from offering evidence contradicting or challenging a witness’s answers given in response to cross-examination directed *solely* to truthfulness ...”⁴³⁷ This could be done by simply deleting the words “whether generally or in the proceeding” from s 37(5).

- 6.69 Commenting on the *Tepu* decision and the debate surrounding the Court’s approach in that case, the Law Commission noted in its 2010 advice that the evidence in dispute (evidence of a lie about the alleged offending at issue in the proceeding) would have been admissible under the common law and should continue to be admissible under the Act. We think an amendment to s 37(5) to put this beyond doubt is desirable.

R11 We recommend amending s 37(5) by deleting the words “whether generally or in the proceeding”, which would have the effect of making clear the distinction that was intended to be drawn by the Law Commission in relation to veracity evidence, namely, that there be “no rule that prevents a party from offering evidence contradicting or challenging a witness’s answers given in response to cross-examination directed solely to truthfulness”

Matters relevant to an assessment of whether evidence is “substantially helpful”

- 6.70 Section 37(3) sets out matters that a judge may consider in assessing whether evidence is “substantially helpful”. It has been suggested that s 37(3) is too narrowly drawn. By way of example, “ordinary lies” are not substantially indicative of a lack of veracity (only lies that are told when under a legal obligation to tell the truth come under s 37(3)(a)). Furthermore, s 37(3)(b) is uncertain in terms of what sort of offences indicate a propensity for dishonesty or a lack of veracity.⁴³⁸
- 6.71 In terms of the point about s 37(3)(b), the Law Commission, in its 2008 report, questioned whether the reference to “dishonesty” in this paragraph was appropriate:⁴³⁹

First, it is questionable whether a Court should have regard to previous convictions for offences which indicate a propensity merely for “dishonesty” as opposed to “lack of veracity” (matters which are so distinguished in section 37(3)(b)). It is *veracity* that is in issue. If it is an offence of dishonesty, without bearing on veracity, why should it be accorded equal treatment? Indeed, given the empirical evidence, such as it is, some might say it should not be treated differently from other non-veracity convictions such as violence. It is to be expected courts will endeavour to read down “dishonesty” where there is no significant veracity element included, as has occurred in England, but the Courts

⁴³⁷ Law Commission *Evidence: Volume 1*, above n 389, at 46 (emphasis added).

⁴³⁸ Richard Mahoney (written comments to the Law Commission, undated).

⁴³⁹ Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending and Bad Character*, above n 388, at 149 (original emphasis).

should not be forced into attempting to ignore a stipulation which Parliament has imposed in this way. Specific amendment may be warranted.

- 6.72 The point has also been made that there are three concepts in s 37(3), namely veracity, dishonesty and untruthfulness (introduced by s 37(3)(e)), which might lead to points being litigated on the basis of “esoteric distinctions among these three concepts”.⁴⁴⁰ As discussed earlier, the Select Committee made a deliberate decision to replace the term “truthfulness” (proposed by the Law Commission) with “veracity”. The Committee took the view that “veracity” was “more appropriate as it places the emphasis upon the intention to tell the truth, whereas “truthfulness” is more readily confused with factual correctness”.⁴⁴¹
- 6.73 It is of note that (as discussed above) the list of matters in s 37(3) did not actually form part of the Law Commission’s proposed Evidence Code, but rather were matters included in a list in the commentary by way of illustration of a point. When the Select Committee decided that legislative guidance was appropriate, the list from the Law Commission’s commentary was simply picked up by the drafters and incorporated into the Bill.⁴⁴²
- 6.74 A further point about s 37(3) that should be borne in mind is that the list of factors set out in this subsection is expressly stated to be “neither necessary nor exclusive considerations”.⁴⁴³ The fact that the subsection is cast in this way suggests that the legislative intention was to include these matters as being particularly “appropriate” considerations when assessing what is “substantially helpful”, but not precluding consideration of other relevant factors.⁴⁴⁴
- 6.75 In the Law Commission’s view this might include “ordinary lies” told when the person is not under any legal obligation to tell the truth. At this point we consider that no amendment to s 37(3)(a) to include such “ordinary lies” is necessary. “Ordinary lies” are clearly not as damning in terms of veracity as lies told when under a legal obligation to tell the truth (and therefore are far less likely to be “substantially helpful”), but there is nothing to prevent a judge from taking account of them where the circumstances are such that the evidence reaches the “substantially helpful” threshold. However, it is less likely that evidence of ordinary lies will reach that level of helpfulness than evidence of lies told under a legal obligation.

440 Mahoney and others, above n 397, at 175.

441 Evidence Bill 2005 (256-2) (select committee report) at 5.

442 McDonald, above n 429, at 179.

443 Donald Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA37.6].

444 The Law Commission described the list in its commentary on the Code as things “a judge may appropriately consider”. See Law Commission *Evidence: Volume 2*, above n 394, at 105.

- 6.76 The Law Commission does, however, remain of the view that the inclusion of previous convictions for offences that indicate a propensity merely for “dishonesty” as opposed to “lack of veracity” in s 37(3)(b) is problematic.
- 6.77 It is worth noting that the wording of s 37(3)(b) differs from the description of the convictions that might be appropriately considered by a judge in the Law Commission’s commentary. There the Law Commission referred to where:⁴⁴⁵
- ... the person has been convicted of one or more offences, and the nature and number of the offences (convictions for some offences, such as perjury or fraud, may be more relevant to truthfulness than others, but the relevance of a previous conviction will also depend on the circumstances of the particular case).
- 6.78 This was translated into a reference to “offences that indicate a propensity for dishonesty or lack of veracity”. We consider that this drafting should be amended to better reflect the relevance of previous convictions to veracity.
- 6.79 Put simply, the inquiry under this subpart of the Act is as to “veracity”. Accordingly, any evidence of previous offending that is to be considered in this inquiry should be directed to veracity and not to “dishonesty”. As has been noted elsewhere, theft is an offence that is usually committed with no lie having been told.⁴⁴⁶
- 6.80 The Law Commission noted previously that it was open to the courts to read down “dishonesty” where there is no significant veracity element indicated by the evidence. Indeed, this does seem to have occurred in practice with the Court of Appeal having expressed doubt about whether petty theft and shoplifting can cast light on an offender’s propensity to tell the truth when giving evidence.⁴⁴⁷ However, it is, as the Law Commission said in 2008, inappropriate for the courts to be forced into ignoring a stipulation which Parliament has imposed.
- 6.81 For this reason, an amendment to s 37(3)(b) to remove the words “dishonesty or” is appropriate and we recommend accordingly. A simple reference to “offences that indicate a propensity for lack of veracity” does not impose any rules as to the categories of offence that might be considered (as a reference to dishonesty offences appears to do), but rather leaves it to the courts to determine whether the circumstances of the prior offending will be substantially helpful in assessing veracity in the present proceeding.
- 6.82 We have considered whether s 37(3)(e) should be similarly amended as it refers to a motive on the part of the person to be “untruthful”, which is a different concept from that of “veracity” (as is “dishonesty”). However, the removal of the reference to “dishonesty” in s 37(3)(b) is recommended

445 Law Commission *Evidence: Volume 2*, above n 394, at 105.

446 Mahoney and others, above n 397, at 172.

447 *Key v R* [2010] NZCA 115 at [57].

as the word “dishonesty” in that paragraph refers to particular types or a category of offences rather than being a reference to the concept of dishonesty generally. As the reference to “untruthful” in s 37(3)(e) does not seem to have caused any difficulties or confusion in practice, no recommendation is made in relation to that paragraph at this time.

R12 We recommend amending s 37(3)(b) to remove the words “dishonesty or” to leave the courts free to consider on the facts of individual cases whether the circumstances of prior offending really are substantially helpful in assessing veracity.

Veracity that is an ingredient of a civil claim or element of an offence

6.83 Section 36 provides:

36 Application of subpart to evidence of veracity and propensity

- (1) This subpart does not apply to evidence about a person’s veracity if that veracity is an ingredient of the claim in a civil proceeding or one of the elements of the offence for which a person is being tried in a criminal proceeding.
- (2) This subpart does not apply so far as a proceeding relates to bail or sentencing.
- (3) Subsection (2) is subject to section 44.

6.84 The authors of one of the leading texts on the Evidence Act have said that it is not possible to identify a situation in which subs (1) will apply in a criminal proceeding:⁴⁴⁸

It is difficult to construct an example where s 36(1) would apply in criminal proceedings. The first edition of this book suggested a perjury prosecution, but this view must now be questioned. The difficulty arises from s 37(5)’s definition of veracity as a person’s disposition to refrain from lying “whether generally or in the proceeding”. The focus of a perjury charge is the defendant’s truthfulness or otherwise on the *particular* occasion in question. In terms of s 36(1), the defendant’s *disposition* to refrain from lying *generally* (or in the proceeding) is not “one of the elements of the ... (offence or perjury).” No example readily springs to mind of any other offence which contains such an element.

6.85 The authors do go on to note that the fact that a perjury prosecution does not, in their view, come within s 36(1) does not “present any great problems for the prosecution”. In attempting to prove the crucial fact of the defendant’s dishonesty when giving the allegedly perjured testimony, the prosecution would not have to meet the s 37(1) “substantial helpfulness” test, nor be concerned with any of the other veracity rules because of the very fact that it does not fall within the definition of “veracity evidence” in s 37(5).⁴⁴⁹

448 Mahoney and others, above n 397, at 164 (original emphasis).

449 See footnote 999 at 164.

- 6.86 The Law Commission clearly envisaged that what became s 36(1) would apply in perjury prosecutions. In its report on its proposed Evidence Code, the Law Commission specifically gave the example of perjury as a criminal proceeding to which s 36(1) (which was s 38(1) of the proposed Evidence Code) would apply.⁴⁵⁰
- 6.87 We are not aware of any cases where s 36(1) has caused a problem and nor was it raised in any submissions the Law Commission received during this review. Even if the commentators are correct and s 36(1) does not apply to a perjury prosecution, this would not present a problem for the reason set out above. Accordingly, legislative amendment would not seem to be required at the present time.

Tit for tat rule

- 6.88 Section 38 provides:

38 Evidence of a defendant's veracity

- (1) A defendant in a criminal proceeding may offer veracity evidence about his or her veracity.
 - (2) The prosecution in a criminal proceeding may offer evidence about a defendant's veracity only if—
 - (a) the defendant has offered evidence about his or her veracity or has challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; and
 - (b) the Judge permits the prosecution to do so.
 - (3) In determining whether to give permission under subsection (2)(b), the Judge may take into account any of the following matters:
 - (a) the extent to which the defendant's veracity or the veracity of a prosecution witness has been put in issue in the defendant's evidence:
 - (b) the time that has elapsed since any conviction about which the prosecution seeks to give evidence:
 - (c) whether any evidence given by the defendant about veracity was elicited by the prosecution.
- 6.89 The prosecution may only offer evidence about a defendant's veracity in limited circumstances. A defendant will "open the door" to evidence about his or her veracity being offered by the prosecution when:
- he or she offers evidence about his or her own veracity; or
 - he or she challenges the veracity of a prosecution witness by reference to matters other than the facts in issue.

⁴⁵⁰ Law Commission *Evidence: Volume 2*, above n 394, at 103.

6.90 When either of these things occurs, then the prosecution may offer evidence about the defendant's veracity if the judge grants permission for it to do so. In this way, s 38(2) can be described as a "tit for tat" rule. This rule gives rise to a number of issues:

- Should the tit for tat rule be retained?
- When does a defendant offer evidence about their veracity so as to engage subs (2)(a)?
- What limits does the rule place on the cross-examination of a defendant?

Retention of the "tit for tat" rule

6.91 It is of note that the Law Commission has, elsewhere in this report, rejected a "tit for tat" proposal in relation to propensity evidence on the basis there is no logical connection between the defendant's past sex offence convictions and the fact that a defendant has been granted leave to question a complainant about her own sexual history.⁴⁵¹

6.92 In proposing the rule that came to be s 38(2), the Law Commission said:⁴⁵²

The Commission considers that different rules should apply when dealing with evidence that is solely or mainly relevant to the truthfulness of a defendant in a criminal proceeding (whether or not the defendant is a witness). Admissibility rules governing evidence of truthfulness (or propensity) should not admit unfairly prejudicial evidence that may undermine the protection the law traditionally gives defendants under the criminal justice system.

6.93 Despite the emphasis on protection of defendants' rights in the commentary, the provision that the Law Commission proposed was more liberal in terms of what the prosecution could do than the rule that was eventually enacted in s 38. Section 40(2) of the Evidence Code read:

The prosecution in a criminal proceeding may offer evidence about a defendant's truthfulness, but cannot offer evidence that the defendant has committed, been charged with, or been convicted of an offence which is relevant to truthfulness (other than the offence for which the defendant is being tried) unless

- (a) the defendant has offered evidence about the defendant's truthfulness or challenging the truthfulness of a prosecution witness; and
- (b) the judge gives permission.

6.94 As noted above, the Select Committee made substantial amendments to this provision. These were made as a result of submissions by the New Zealand

451 See Elisabeth McDonald and Yvette Tinsley "Evidence Issues" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 355 and the discussion at paragraph 6.134 of this report.

452 Law Commission *Evidence: Volume 1*, above n 389, at 47.

Law Society that the major change in the law that the Law Commission proposed was unjustified.⁴⁵³ The Committee described its changes to what became s 38(2) as reinstating “the existing law that limits the opportunity for the prosecution to call evidence as to the defendant’s bad character”,⁴⁵⁴ although commentators have said that the Select Committee’s intervention has led to s 38(2) preventing a broader range of evidence from being led than the common law had previously.⁴⁵⁵

- 6.95 The basic rationale for the common law retaliatory rule was that while it was generally considered unfair for a defendant to be exposed to cross-examination as to his or her criminal record, there should be a cost to a defendant who made allegations against a prosecution witness or who put his or her own veracity in issue.⁴⁵⁶
- 6.96 While the common law’s “tit for tat” approach might have operated effectively to discourage unnecessary or gratuitous attacks on witnesses, there is no obvious logical connection between the defendant’s veracity and a challenge to the veracity of another witness. Furthermore, there is also a serious question about whether the law of evidence is the appropriate place to be putting in place incentives in relation to the conduct of the criminal trial process.
- 6.97 In light of these factors, there are three obvious options in relation to s 38(2):
- no change from the present;
 - amend to broaden the range of veracity evidence that the prosecution may lead about the defendant without the defendant having first “opened the door” in one of the ways set out in s 38(2)(a); or
 - remove s 38(2) altogether and rely on ss 7 and 8 in combination with s 37 to strike an appropriate balance between what is fair to the defendant and the interests of justice in having all relevant information, including that pertaining to the veracity of the defendant, available to the fact finder.
- 6.98 The strongest argument for no change is that, as far as the Law Commission is aware, there have not been difficulties with s 38 that are resulting in miscarriages of justice or manifest unfairness. However, as the Law Commission made clear in its 2010 advice to the Minister of Justice, despite the arguments about the reasoning applied by the Court of Appeal in the leading case of *Tepu*, it was comfortable with the result reached by the Court.

453 Mathieson, above n 443, at [EVA38.1].

454 Evidence Bill 2005 (256-2) (select committee report) at 6.

455 See Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at [EA38.02]; and Mahoney and others, above n 397, at 178-179.

456 Mathieson, above n 443, at [EVA38.8].

- 6.99 In terms of possible amendments to s 38(2)(a), there are two obvious options. One would be to amend in the way originally suggested by the Law Commission in the Evidence Code. That is, the prohibition in s 38(2) would only apply to evidence of offending / alleged offending by the defendant that related to the truthfulness of the defendant. Other veracity evidence about the defendant would be able to be offered by the prosecution provided that it met the substantially helpful threshold and was relevant.⁴⁵⁷ This approach was specifically rejected by the Select Committee.
- 6.100 A further option that has been suggested is an amendment to s 38(2)(a) to permit the prosecution to offer evidence of defendant's veracity by "reference to the facts in issue". It has been noted that the defendant is permitted to do this without risking retaliation by the prosecution, yet the same is seemingly not possible for the prosecution, who must wait for the trigger in s 38(2)(a).⁴⁵⁸ This would in effect be achieved if the amendment to s 37(5) that the Law Commission recommends above is made.
- 6.101 If s 38(2) were repealed altogether, the alternative would be to simply rely on ss 7 and 8 in combination with s 37. This would obviously be a radical change in the sense that the law has long provided special protection against challenges to the veracity of a defendant in a criminal proceeding in comparison with the protections afforded to witnesses and other persons. This protection has been seen as operating as an incentive to defendants to consider any attack on the veracity of a prosecution witness very carefully.
- 6.102 At this stage, the Law Commission is not minded to recommend amending the "tit for tat" aspect of s 38(2), or its repeal. We acknowledge that this aspect is not entirely logical in connecting an attack on a prosecution witness with the veracity of the defendant. And it is a lack of logical connection that has convinced us that a suggested "tit for tat" approach not be put in place in the propensity evidence provisions. However, the Select Committee that considered the Evidence Bill took a deliberate decision in relation to what became s 38(2). In recommending the reinstatement of the former rule limiting the prosecution's ability to call evidence as to the defendant's bad character, the Committee said that the approach taken by the Law Commission in the Evidence Code "would move the balance in favour of the prosecution".⁴⁵⁹ It clearly regarded such a change as inappropriate.
- 6.103 In the context of a review focused on the practical operation of the Act, we consider that it would be inappropriate to recommend a radical policy change in the absence of any identified problems with this section. Furthermore,

457 In order for evidence about the defendant's veracity to be relevant, the defendant's veracity would need to be in issue, either because the defendant had given evidence him or herself or because there was evidence of a pre-trial exonerating statement made by the defendant. See Mahoney and others, above n 436, at 183. See below in relation to the latter situation where the defendant does not give evidence but a pre-trial statement is admitted.

458 McDonald, above n 429, at 186.

459 Evidence Bill 2005 (256-2) (select committee report) at 6.

we have recommended an amendment to s 37(5) that will have the effect of clarifying that the veracity rules are engaged in the manner originally envisaged by the Law Commission. This will in effect limit the scope of the rule in s 38(2)(a). This may be an issue that can be considered again in the future when the Law Commission's proposed amendment to s 37(5) has had time to "bed in".

When does a defendant offer evidence about their veracity so as to engage s 38(2)(a)?

6.104 Under the common law the position was very clear: the prosecution could not challenge the defendant's veracity if the defendant did not give evidence.⁴⁶⁰ Section 38(2)(a) allows the prosecution to offer evidence if the defendant has offered evidence about his or her veracity. This can lead to possible complications where the defendant does not take the stand to offer evidence about his or her veracity, but evidence of their pre-trial statement to police is led. In some cases, arguably this engages para (a) and thus "opens the door" to allow the prosecution to lead evidence of the defendant's veracity.

6.105 This issue was discussed in the Law Commission's 2008 report:⁴⁶¹

The point is logical. The veracity of the defendant has come into issue. Evidence on the point becomes relevant accordingly. However, it might be thought a bizarre situation if the prosecution can engineer a right to lead evidence as to a defendant's previous convictions going to veracity through the prosecution offering evidence itself, quite possibly against the defendant's wishes, and especially when the defendant's evidence in issue is un-sworn and open to discounting accordingly.

6.106 The Law Commission then went on to express doubt that this could have been Parliament's intention, given that it had reinstated the full common law protections limiting the prosecution's ability to offer evidence of a defendant's bad character in what became s 38(2). The Law Commission considered that a proper reading of the Act required a strict approach – when the defendant does not give evidence from the witness box, the veracity of the defendant is not put in issue by the defendant and is not relevant.⁴⁶²

6.107 The Law Commission concluded that:⁴⁶³

The preferable view, based on the cardinal principle of relevance, may be that the previous position survives, and the prosecution may not do so. However there remains a further question whether that is so when the defendant's statement to police (if any) has been put in evidence by the prosecution. There are policy issues involved, and some dissatisfaction. It is desirable the obscurity be clarified.

460 See *R v Butterwasser* [1948] 1 KB 4, [1947] 2 All ER 415; *R v Kino and Mete* [1997] 3 NZLR 24.

461 Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*, above n 388, at 36.

462 At 36-37.

463 At 150.

6.108 We understand that, at least at District Court level, an out of court statement made by the defendant is being treated as putting his or her veracity at issue on occasion.⁴⁶⁴ While there is some doubt about the precise parliamentary intention, we consider that this is an aspect of the Act that would benefit from clarification. Accordingly, we recommend an amendment to s 38 to clarify that a defendant only “opens the door” to the prosecution giving evidence of their veracity when he or she gives evidence in court.

R13 We recommend amending s 38 to clarify that the defendant only “opens the door” to evidence about his or her veracity being introduced by the prosecution when he or she gives evidence in court.

Cross-examination of the defendant

6.109 Another issue that has been raised with us is whether the drafting of s 38 imposes a complete prohibition on any attack on a defendant’s veracity unless he or she has first opened the door to such evidence through s 38(2).⁴⁶⁵

... the prosecution is absolutely prohibited from suggesting that the defendant is lying when the defendant gives evidence of his or her innocence. In view of s 4’s definition of “offer evidence”, this prohibition on the prosecution offering evidence of the defendant’s veracity will cover the process of *cross-examination of the defendant* as well.

The surprising result of the argument ... is that in a case where the defendant gets into the witness box and gives evidence of his or her innocence, but not about his or her veracity, the prosecution is prevented from cross-examining the defendant by such traditional means ...

6.110 This potential issue does seem to have been dispelled by the approach taken to the veracity provisions by the Court of Appeal and the Supreme Court in the *Weatherston* appeals, as discussed above.

6.111 Furthermore, the Law Commission’s proposed amendment to s 37(5) would seem to put the matter beyond doubt. Accordingly, no amendment to s 38 is required in this regard.

PROPENSITY EVIDENCE: ISSUES

6.112 Since the Law Commission’s 2010 advice to the Minister, the Supreme Court decision in *Mahomed v R*⁴⁶⁶ has provided important guidance on two issues relating to propensity evidence:

464 Elisabeth McDonald “Evidence Act 2006 Review: Some Comments” (written comments to the Law Commission, 9 January 2012) at 1 and McDonald, above n 429, at 183 with discussion of *R v Jamieson* HC Timaru CRI-2008-076-328, 12 February 2009 at footnote 143.

465 Mahoney and others, above n 397, at 179 (original emphasis).

466 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

- whether evidence falls within the definition of “propensity evidence” in s 40(1) of the Act (in other words, the decision squarely tackles the issue raised by the Law Commission in its 2010 advice about “side-stepping” of the propensity provisions); and
 - if evidence is propensity evidence, whether a jury direction is required, and if so, in what terms.
- 6.113 In terms of the first of these issues, both the majority and minority took a broad approach to s 40(1) and were clear that its language requires a broad approach to determining what is propensity evidence. In the words of the minority, a “broad and literal approach” should be taken.⁴⁶⁷ Accordingly, the Court unanimously held that evidence that had been categorised by the Court of Appeal as part of the narrative, did fall squarely with s 40(1).
- 6.114 The key significance of categorising the evidence as propensity rather than part of the narrative or background, is that it must then be subjected to the analysis required by s 43 rather than falling to be considered under the general test for exclusion in s 8. Despite recognising the difference in the persuasive burden between the two,⁴⁶⁸ both the majority and minority were of the view that it mattered little whether s 8 or s 43 was applied. The majority described s 8 as dealing with a similar issue as s 43(3) “in general and materially similar terms”,⁴⁶⁹ while the minority said “there is little or no practical difference between the s 8 and s 43 balancing tests.”⁴⁷⁰
- 6.115 In terms of the second key issue dealt with in *Mahomed*, both the majority and minority recognised that directions to the jury may address potential prejudice to the defendant arising from propensity evidence.⁴⁷¹ The Court of Appeal in the earlier decision of *R v Stewart* had adopted a fairly detailed approach to the type of direction to be given to a jury in a case involving propensity evidence.⁴⁷²
- 6.116 While the majority in *Mahomed* had nothing further to say on the issue of jury directions, the minority expressed some dissatisfaction with the *Stewart* approach. In particular, they did not consider that a direction is necessary in every case where propensity evidence is led, rather, it is only required

467 At [84].

468 Section 8(1) requires exclusion where the probative value of the evidence is outweighed by the risk of prejudicial effect, while s 43(1) permits admission of propensity evidence only where the probative value outweighs the risk of prejudicial effect. As the minority note at [66], “if probative value and the risk of unfair prejudice were equal, exclusion would only be *required* by s 43” (original emphasis).

469 At [5].

470 At [67].

471 At [7] and [91] respectively.

472 The Court adopted a 7 stage process in *Stewart (Peter) v R* [2008] NZCA 429, [2010] 1 NZLR 197 at [30].

where the propensity evidence is “led primarily in reliance on coincidence or probability reasoning”.⁴⁷³ As one commentator has noted, this distinction tends to mirror that previously made by reference to the governing admissibility rule (and which the Supreme Court overruled in this very case).⁴⁷⁴ Accordingly, when discussing why a propensity direction was not needed in relation to particular evidence, the minority made arguments similar to those employed by the Court of Appeal in earlier cases where it held that evidence was not propensity evidence caught by ss 40–43 of the Act.⁴⁷⁵ The minority were of the view that there is “no scope for a one-size-fits-all standard propensity direction” and that any direction must be tailored to the circumstances of the case.⁴⁷⁶

- 6.117 While the majority declined to address the issue when jury directions are required, preferring to leave it for a future case where consideration of the issue was necessary, in a footnote, it did agree with the reservations expressed by William Young J for the minority about “the utility and content of the directions suggested in *Stewart*”.⁴⁷⁷
- 6.118 In summary, while the Court was unanimous in its view that the prescriptive approach in *Stewart* is unhelpful, there was no agreement as to when a propensity direction ought to be given and what form it should take. However, it is worth noting that more recently in *Fenemor v R*,⁴⁷⁸ Tipping J for the whole Court stated that “in the substantial majority of cases it will be necessary for the judge to tell the jury how the propensity evidence should and should not be used”.⁴⁷⁹
- 6.119 The following discussion considers issues raised by submitters in relation to the propensity provisions and also outstanding issues that were highlighted by the Law Commission in its 2008 report and 2010 advice to the Minister.

Weighing of probative value against prejudicial effect

- 6.120 As noted above, both the majority and the minority in the Supreme Court in *Mahomed* held that there is little difference between the tests in ss 8(1)(a) and 43(1), which, (if correct) begs the question of whether there is any point in retaining both.
- 6.121 On the face of it, there is a subtle but real difference between the two tests. Section 8(1) requires exclusion where the probative value of the evidence is

473 At [92].

474 Elisabeth McDonald “*Mahomed*: future application” [2011] NZLJ 385 at 388.

475 At 388.

476 *Mahomed v R*, above n 466, at [94].

477 At n 1.

478 *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298.

479 At [14].

outweighed by the risk of prejudicial effect, while s 43(1) permits admission of propensity evidence only where the probative value outweighs the risk of prejudicial effect. As the minority in *Mahomed* note, “if probative value and the risk of unfair prejudice were equal, exclusion would only be *required* by s 43”.⁴⁸⁰ While recognising this apparent difference, neither judgment in *Mahomed* considered it significant in practice.

- 6.122 One of the leading texts on the Act had previously expressed the view that because s 43 is concerned with prejudicial effect on the defendant (as opposed to the proceeding), it may lead to exclusion of some evidence that would not be excluded under s 8, given the wider spectrum of interests accommodated by the latter section.⁴⁸¹
- 6.123 One of the authors of that text has more recently repeated the view that there is significance in the different ways that the ss 8 and 43 admissibility tests are cast. Richard Mahoney has noted that while s 8(1)(a) requires the court to take account of the prosecution’s interests, that consideration has no part to play under the s 43 analysis.⁴⁸² He has also described the s 43 test as a “more detailed calculation of admissibility”.⁴⁸³
- 6.124 With respect to s 8 referring to prejudice to the proceedings (and thereby requiring consideration of the prosecution’s interests) and s 43 referring only to prejudice to the defendant, the minority in *Mahomed* explained that this is because the only relevant prejudicial effect that can logically need to be considered in relation to propensity evidence about the defendant is that on the defendant.⁴⁸⁴
- 6.125 As Richard Mahoney and Elisabeth McDonald have both noted, there is a more stringent approach taken to what is considered probative under s 43 than more generally under the Act.⁴⁸⁵ In particular, Elisabeth McDonald notes that the majority’s view that there is a need to identify “with some specificity the ‘particular’ state of mind the propensity evidence tends to show and relate that to the states of mind required for each offence”.⁴⁸⁶ This insistence on precise articulation of the particular way in which an item of propensity evidence is sufficiently probative to outweigh the unfairly prejudicial effect inherent in this class of evidence is seen by Richard Mahoney as a recognition of the particular risks of prejudice arising from propensity evidence (something, which in his view, does not appear to be an ongoing concern for

480 At [66].

481 Mahoney and others, above n 397, at 204.

482 Richard Mahoney “Review: Evidence” [2010] NZ Law Review 433 at 437.

483 At 548.

484 At [66].

485 Mahoney, above n 482, at 550; McDonald, above n 474, at 387.

486 *Mahomed v R*, above n 466, at [8].

- a significant sector of the judiciary).⁴⁸⁷ It also recognises that the probative value of propensity evidence cannot be assessed in the abstract.⁴⁸⁸
- 6.126 The view of the minority in *Mahomed* that there is “little or no practical difference” between the ss 8 and 43 tests, is probably true in terms of the result that would be achieved through applying the respective admissibility tests in most cases. As the Court in *R v L* said, “in most cases involving evidence of propensity the analysis under s 43 will subsume the s 8(2) considerations.”⁴⁸⁹
- 6.127 The difference between the probative value of the evidence being outweighed by the risk of prejudicial effect, as opposed to the probative value outweighing the risk of prejudicial effect, is indeed a very subtle one unlikely to bring about different results in the vast majority of cases. However, there remains the possibility of a case arising where the probative value and the risk of unfair prejudice are judged equal. In such a case s 43 would require exclusion while s 8 would render the same evidence admissible. While unlikely to arise often, it is still an actual difference that might lead to distinct outcomes.
- 6.128 As noted by the minority in *Mahomed*, the specific test laid down by s 43 can be said to be a “reminder of the need for caution” that has historically been required in relation to propensity evidence, and which arguably remains.⁴⁹⁰ The factors in subs (2) and (3) provide specific guidance as to how this caution should be exercised. Further, this reminder of the particular need for caution in relation to propensity evidence is arguably a useful reminder to the court of the need to consider whether a specific direction to the jury is required.
- 6.129 In this context, it should be noted that the Crown Law Office in its submission was critical of the majority in *Mahomed* for requiring this degree of specificity. In particular, Crown Law’s concern is that the approach of the majority has led to courts in other cases searching for a “signature” or “striking similarity”, concepts which were especially problematic for the common law in the past. Crown Law is of the view that while there is little difference between the tests in ss 8 and 43, the application of the various factors in s 43 to a broad range of evidence, some of which was previously governed by other principles (such as the narrative principle), is potentially awkward. It considers that the propensity provisions should be amended so that it is clear that all categories of this evidence, including narrative evidence, evidence of motive, relationship evidence or orthodox propensity evidence, are admissible according to one criterion only, that being when the probative value of the evidence outweighs its prejudicial effect.

487 Mahoney, above n 482, at 552.

488 Mahoney and others, above n 397, at 204.

489 *R v L* [2009] NZCA 286 at [13].

490 At [66].

- 6.130 There is, however, nothing in the text of *Mahomed* which appears to suggest the adoption of concepts such as “signature” or “striking similarity”. Rather, the focus of the majority is on ensuring that the relevance of propensity evidence is stated with sufficient particularity to guard against improper use of such evidence. That is rightly so.
- 6.131 Ultimately, the judgements to be made about probative value and unfair prejudice in this area are difficult ones. As the Court of Appeal said in *R v Taunoa*:⁴⁹¹
- It says much about the difficulty of *applying* the law in this area that a very experienced trial judge could so firmly be of the view that the probative value of [the] evidence decisively outweighed its prejudicial effect while we are of an equally clear view that [the] evidence is inadmissible on the ground that its probative value is outweighed by the inevitable prejudice which would inure to Mr Taunoa if the evidence of his 1991 offending were presented to the jury.
- 6.132 It is not clear that further legislative amendment to the propensity provisions in the Act would make the exercise of such value judgements any easier and indeed may lead to further confusion about where the balance lies.
- 6.133 In summary, while the distinction *in practice* between the s 8 and s 43 tests may be subtle and have little impact in most cases, there remains at least the theoretical possibility of a case or cases where it would lead to a different outcome in terms of admissibility. Having a separate and more detailed test for admissibility of propensity evidence also arguably serves as a valuable reminder about the particular risks of this type of evidence. Section 43 also provides guidance as to the specific factors to be considered in assessing probative value and prejudice and reminds the judge of the need to assess these in the context of the case at hand. While these are not necessarily relevant in all cases, it is useful for them to be spelled out. Nor does this preclude consideration of other factors that might be relevant to the balancing exercise in a particular case. Accordingly, we consider the s 43 test should be retained.

An additional tit for tat rule?

- 6.134 Elisabeth McDonald and Yvette Tinsley, in a recent publication that explores possible improvements to the criminal justice process as it impacts on sexual violence cases, have recommended that:⁴⁹²
- ... the Evidence Act 2006 be amended to allow the prosecution, with the permission of the judge, to offer propensity [evidence] about the defendant in a sexual case if the defendant has offered propensity evidence about the complainant pursuant to s 44.
- 6.135 They note the particular difficulties associated with the admission of propensity evidence in acquaintance rape cases. In particular, the need for

491 *R v Taunoa* CA494/04, 13 April 2005 at [12] (original emphasis).

492 McDonald and Tinsley, above n 451, at 355.

the precise issue formulation (discussed in more detail below) has tended to mean that in practice consent and reasonable belief in consent is not regarded as precise enough for the purposes of s 43(2) and evidence of previous non-consensual sexual activity will be seen as evidence of a mere propensity to offend generally and not sufficiently relevant to the issue of whether there was non-consensual activity in relation to a different complainant.⁴⁹³

- 6.136 The authors go on to argue that allowing propensity evidence about a defendant who has offered evidence about a complainant's sexual experience is "a justified response to victim concerns about the fairness of the trial process".⁴⁹⁴ However, the logic of linking the admissibility of a defendant's past sex offence convictions to the fact that a defendant has been granted leave to question a complainant about her own sexual history has been questioned.⁴⁹⁵ If indeed there is a problem with the frequency with which leave to question about sexual history is being granted then that ought to be addressed directly. To permit admission of propensity evidence that is potentially unfairly prejudicial due to a lack of relevance in the circumstances of a particular case (put crudely, a "tit for tat" approach) does not solve the problem in relation to s 44.⁴⁹⁶
- 6.137 In its 2008 report, the Law Commission said it was not prepared to countenance any approach that would give rise to a risk of unfair trials – that should continue to be a governing principle. Accordingly, we do not support this recommendation.

Propensity directions

- 6.138 As noted above, the minority in *Mahomed* took the view that there are problems with the seven stage judicial direction that the Court of Appeal adopted in *R v Stewart*. While the majority tended to agree that there were issues with it, they preferred to leave the issue for a case where it was necessary to address it. The Crown Law Office has recommended that there be "legislative clarification of the circumstances in which jury direction is required in relation to orthodox propensity evidence, and of the nature of any such direction".⁴⁹⁷

493 At 350-351. See also, Elisabeth McDonald and Stephanie Bishop "What's in an Issue? The Admissibility of Propensity Evidence in Acquaintance Rape Cases" (2011) 17 *Canta LR* 168.

494 McDonald and Tinsley, above n 451, at 355.

495 Scott Optican "Comment: Elisabeth McDonald and Yvette Tinsley, "Evidence Issues"" (2011) 17 *Canta LR* 160 at 164.

496 It is worth noting that McDonald and Tinsley acknowledge that evidence that is potentially unfairly prejudicial might be admitted – their recommendation is prefaced on the assumption that trials of sexual offending will be decided by a judge alone and therefore the fact finder will be better equipped to make the judgement about the appropriate weight to be given to such evidence. See McDonald and Tinsley, above n 451, at 355.

497 Letter from Mathew Downs and Andrea King (Crown Law) to Law Commission regarding the review of the Evidence Act 2006 (26 June 2012).

- 6.139 The utility and effectiveness of directions generally is discussed earlier in this report, with the orthodox position being that juries pay close attention to judicial directions and apply them carefully. The question is whether the circumstances in which they should be applied and the type of direction that is required can or should be prescribed in legislation.
- 6.140 The minority in *Mahomed* said in relation to the *Stewart* formulation of judicial direction that:⁴⁹⁸
- ... there is no scope for a one-size-fits-all standard propensity direction. And although the Court of Appeal in *Stewart* rightly recognised the need for flexibility and the need to tailor directions to the facts of the particular case, its attempt to provide something of a universal template was overly ambitious. As well, there are some components in the seven-step process which we think are likely to be unhelpful from the point of view of a jury.
- 6.141 There is also research suggesting directions that are tailored to the particular needs and complexities of the individual case are preferable to standard directions.⁴⁹⁹ Earlier Law Commission research found that the use of standard directions may be unhelpful as juries may not understand that a direction is standard and think that it has a particular relevance in the context of the case at hand.⁵⁰⁰
- 6.142 Furthermore, legislation does not typically prescribe the content of judicial directions. That is usually a matter of judicial discretion to be exercised in the circumstances of the particular case, having regard to the nature of the issues raised, the evidence that has been adduced and the dynamics of the trial process. As the minority in *Mahomed* emphasised, the giving of directions is a matter of “common sense”.⁵⁰¹

Previous convictions

- 6.143 A firm holding a Crown Solicitor’s warrant has submitted to us that there is some uncertainty as to how admissible propensity evidence of previous convictions should be adduced. In addition to the propensity provisions, there are two other relevant sections in the Act. Section 49 provides that, absent exceptional circumstances, a previous conviction is conclusive proof that the person committed that offence. Where the fact of a conviction is admissible, s 139 allows evidence of that to be given by way of a certificate of conviction. These sections are considered further at paragraph 9.1.
- 6.144 Propensity evidence is evidence that “tends to show a person’s propensity to act in a particular way or to have a particular state of mind”.⁵⁰² As the

498 At [94].

499 McDonald and Tinsley, above n 451, at 371.

500 Law Commission *Juries in Criminal Trials – Part Two* (NZLC PP37, 1999) at 56.

501 At [105].

502 Evidence Act 2006, s 40(1)(a).

majority of the Supreme Court held in *Mahomed* “[i]t is necessary, therefore, that the propensity have some specificity about it”.⁵⁰³ Offering a conviction certificate as evidence under s 139 will generally be an inadequate method of adducing propensity evidence, as the probative value of the previous conviction will lie in the similarity of the circumstances of the offending with the instant case, not the bare fact of conviction.

- 6.145 Courts have taken different approaches as to how propensity evidence of previous convictions may be admitted. In some cases, the court has directed counsel to seek to agree upon a statement of facts to be admitted under s 9, with recourse to the trial judge if agreement is not reached.⁵⁰⁴ Alternatively, the statement of facts from the previous conviction⁵⁰⁵ or the sentencing notes are admitted.⁵⁰⁶ In some circumstances, the prosecution has called the previous victim or complainant to give evidence of the previous offence. The Court of Appeal has stated:⁵⁰⁷

It will be for the trial Judge to determine the way in which the propensity evidence is to be adduced, taking into account all relevant circumstances ... Our view on the admissibility of the evidence in relation to the 2002 incident would likely be different if P were not available to give evidence and it was suggested that her evidence be given in some other way, for example by producing her deposition statement and evidence of the appellant’s conviction for threatening to kill. That could well tip the balance and render the evidence unfairly prejudicial to the appellant.

- 6.146 The Court went on to explain why the failure to call the previous complainant to give evidence could be unfairly prejudicial to the defendant.⁵⁰⁸

The probative value of the evidence of the 2002 incident relies on the features we have identified, or most of them, being established. Some of those features are capable of being disputed or explored with P to highlight differences from the 2000 offending ... Accordingly, the defence should be able to explore with P the apparently probative features of the 2002 incident, to establish they exist and to bring out aspects that may be different from the 2000 incident. The defence will be unable to do this if P is not available for cross-examination. Without her giving evidence, there is a risk that unfair prejudice to the appellant will result because the defence will not be in a position to expose any differences and P’s evidence may be given greater weight by the jury than, properly tested, it deserves.

503 At [3].

504 *R v Sharma* HC Rotorua CRI-2008-063-003826, 30 November 2009; *R v Franklin* HC Christchurch CRI-2009-061-537, 30 October 2009; *R v C* [2010] NZCA 614.

505 *Solicitor-General v Rudd* [2009] NZCA 401; *R v Wallace* HC Auckland CRI-2010-092-2879, 11 October 2010; *CSH v R* [2012] NZCA 531; *R v Kumeroa* [2010] NZCA 496; *Waterworth v R* [2012] NZCA 58.

506 Letter from Mathew Downs and Andrea King (Crown Law) to Law Commission regarding the review of the Evidence Act 2006 (26 June 2012).

507 *Batchelor v R* [2012] NZCA 106 at [28].

508 At [29].

6.147 We consider that the current approach, whereby the trial judge retains the flexibility to determine how propensity evidence of previous convictions should be adduced (as assisted by counsel) is appropriate. As highlighted by *Batchelor v R*, the means by which the evidence is adduced may be relevant to its admissibility.⁵⁰⁹ It is therefore not desirable for the Act to unduly prescribe the manner in which propensity evidence of previous convictions should be adduced; what is appropriate in one case may not be appropriate in another. It would be helpful for the party seeking admission of a defendant's previous conviction under s 43 to specify the manner in which it proposes to adduce the evidence. This will ensure the court is provided with the full picture when it determines the prejudicial effect of the statement. In many cases, parties may be able to agree on a statement under s 9.

509 See also *R v P* HC Auckland CRI-2009-004-22364, 23 July 2010 at [23] where the Court found relevant that the proposed evidence was to be adduced in a way that means it will not be lengthy or overwhelming.

Chapter 7

Evidence of sexual experience of complainants in sexual cases

INTRODUCTION AND BACKGROUND

- 7.1 This chapter considers the following matters relating to the evidence of the sexual experience of complainants in sexual cases:
- the sexual experience of a complainant with the defendant in a sexual case;
 - the desirability of introducing an “interests of justice” test into s 44;
 - a pre-trial notification procedure; and
 - the need for written decisions under s 44.
- 7.2 Section 44 deals with the admissibility of statements relating to the sexual experience of a complainant. It provides:

44 Evidence of sexual experience of complainants in sexual cases

- (1) In a sexual case no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the judge.
- (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
- (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

- (4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1).
- (5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.
- (6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.
- 7.3 Traditionally, the law of evidence treated the past sexual activity of a complainant in a sexual case as relevant to his or her credibility as a witness, even where it had no relevance to the alleged offending.⁵¹⁰ It was particularly common in cases where consent was an issue, for the defence to offer evidence about the complainant's sexual behaviour on other occasions, to argue that she was more likely to have consented to sexual activity with the defendant. In effect, this was a form of propensity evidence – about the complainant, rather than the defendant.⁵¹¹
- 7.4 While complainants received some limited protection during cross-examination from ss 13 and 14 of the Evidence Act 1908 and the operation of the collateral issues rule, the common law permitted the defence considerable latitude in the questioning of the complainant.⁵¹²
- 7.5 Concern at the practice of subjecting the complainant to a “second rape” during the trial led New Zealand, along with a number of comparable jurisdictions, to enact legislation intended to control the extent to which the complainant could be questioned about her prior sexual experience. So-called “rape shield” legislation was first enacted in New Zealand in 1977 in s 23A of the Evidence Act 1908. As enacted, this provision provided protection for complainants only in cases involving charges of rape. In 1985 the provision was re-enacted with a broader application to “cases of a sexual nature”.
- 7.6 When it was considering the law in 1997 the Law Commission described s 23A in the following terms:⁵¹³

The provision does not exclude the evidence absolutely. Rather there is a limited ability for the judge to admit the evidence, if it is directly relevant and if “to exclude it would be contrary to the interests of justice”. But its proviso makes clear that “inferences [raised]

510 Elisabeth McDonald “Her Sexuality as Indicative of His Innocence: The Operation of New Zealand’s “Rape Shield” Provision” (1994) 18 Crim LJ 321 at 321.

511 Law Commission *Evidence Law: Character and Credibility – A Discussion Paper* (NZLC PP27, 1997) at 101.

512 Sections 13 and 14 provided general protection for all witnesses against improper, offensive and unnecessary types of questions. For further discussion of the collateral issues rule, see paragraph 6.12.

513 Law Commission *Character and Credibility*, above n 511, at 104–105.

as to the general disposition or propensity of the complainant in sexual matters” will not make such evidence directly relevant. The section would therefore exclude evidence of promiscuity and prostitution, although it does not control evidence of the sexual experience of the complainant with the defendant.

- 7.7 The Law Commission noted that the courts had interpreted the section as aimed at protecting a complainant from “unnecessarily intrusive questioning” about their previous sexual history, but had also sought to strike a balance between this objective and unduly hampering the defence.⁵¹⁴ It concluded that, while the New Zealand provision had avoided some of the problems that had been experienced with the so-called “rape shield” laws in other jurisdictions, it certainly was not “without its flaws”.⁵¹⁵
- 7.8 In its 1997 Preliminary Paper, the Law Commission suggested that there be a prohibition on evidence or questions about a complainant’s reputation in sexual matters for the purpose of challenging or bolstering her credibility, as such evidence has limited relevance to the issue of consent. It also questioned whether evidence of the complainant’s sexual experience with the defendant should be restricted.⁵¹⁶
- 7.9 This latter issue gave rise to a “clear split of opinion among the commentators”.⁵¹⁷ In the end the Law Commission recommended that the recast s 23A require that evidence of the complainant’s sexual history with the particular defendant must be of direct relevance in order to be admitted, but did not require permission from the judge to be sought. It considered that this acknowledged the relevance of a prior relationship with the defendant in some cases, but also reinforced the desirability of making a conscious inquiry into that relevance.⁵¹⁸
- 7.10 The other amendment the Law Commission suggested in relation to s 23A was to prohibit questions or evidence about the complainant’s reputation in sexual matters for the purpose of challenging her truthfulness or to establish her consent. The permission of the judge was to be required in relation to such evidence being led for any other purpose.⁵¹⁹
- 7.11 The Evidence Bill as introduced did not include this suggested change.⁵²⁰ The Select Committee that considered the Evidence Bill, however, recommended that cl 40 of the Bill (which became s 44 of the Act) be amended to:⁵²¹

514 At 105.

515 At 109–110.

516 At 110–112.

517 Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at 51.

518 At 51.

519 Law Commission *Evidence: Volume 2 – Evidence Code and Commentary* (NZLC R55, 1999) at 125.

520 Evidence Bill 2005 (256-1), cl 40.

521 Evidence Bill 2005 (256-2) (select committee report) at 7.

... provide that no evidence can be given and no question be put relating to the sexual reputation of the complainant in sexual matters. We consider that any reference to a person's sexual reputation is irrelevant and should not be admitted.

- 7.12 Section 44 as it was enacted (set out above at paragraph 7.1) has been described as a re-enactment of s 23A of the Evidence Act 1908 “with a few changes”.⁵²²

SEXUAL EXPERIENCE OF THE COMPLAINANT WITH THE DEFENDANT

- 7.13 In a recent publication covering issues arising from the investigation and prosecution of sexual offences, Elisabeth McDonald and Yvette Tinsley have said:⁵²³

One current challenge is subjecting evidence of the sexual experience of the complainant *with the particular defendant* to appropriate scrutiny – in a way that reduces the prejudice to the complainant but does not prevent fairness to an accused.

- 7.14 A Ministry of Justice Discussion Document in 2008 noted that New Zealand is one of the few jurisdictions where evidence of sexual history between the complainant and the defendant is allowed, even if it can be objected to. In most jurisdictions, the approach is to generally prohibit such evidence but allow it to be admitted where the judge is satisfied of its relevance. The Discussion Document noted that there is debate as to the relevance of evidence of prior sexual history between the complainant and the defendant, with some arguing that such evidence should not lead to an implication that a person automatically agrees to the sexual activity on another occasion and others arguing that the existence of a prior sexual relationship between the complainant and the defendant will often be relevant.⁵²⁴
- 7.15 The Ministry's Discussion Document proposed amending the Evidence Act to make all evidence about the sexual experience of the complainant with any person, including the defendant, inadmissible except with the consent of the judge.⁵²⁵
- 7.16 A “halfway house” option would be to adopt the provision recommended by the Law Commission in s 46(2) of the Evidence Code. As noted above, that provision would have required any question about the sexual experience of the complainant with the defendant to be of “direct relevance to facts in issue

522 See Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at [EA44.01].

523 See Elisabeth McDonald and Yvette Tinsley “Evidence Issues” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 336.

524 Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand: Public Discussion Document* (Wellington, 2008) at 24.

525 At 25.

- in the proceeding”. The fact that the evidence would not be subject to a leave requirement (unlike other sexual history evidence) would depend on defence counsel considering the evidence in light of the rule and the willingness of the prosecution to object.⁵²⁶
- 7.17 With respect to the proposal put forward in the Ministry’s 2008 Discussion Document, we do not support the extension of the “rape shield” to relationships between the defendant and the complainant. Cases involving such a prior relationship will almost always turn on the question of consent or belief in consent. Almost inevitably, the existence of a prior sexual relationship will be relevant to this question.
- 7.18 For this reason, an application for leave to cross-examine the complainant on the prior relationship could reasonably be expected to be made in the vast majority of cases involving a prior relationship between the complainant and the defendant, thereby inevitably increasing the number of pre-trial applications and appeals. This would add to delays, which in our view, compounds rather than alleviates problems for complainants.
- 7.19 Further, we think that as a matter of principle, leave requirements should be confined to matters that are the exception rather than the norm. If we are right in thinking that evidence as to the fact of the prior relationship will be relevant and admissible in the vast majority of cases, it follows that a leave requirement is undesirable.
- 7.20 We are not inclined to recommend amendment along the lines of the “half-way house” originally suggested by the Law Commission. Arguably, this would do little more than reinforce the existing ability of the prosecution to object to irrelevant evidence (in the unusual circumstance of the prior relationship of the complainant with the defendant not being relevant to the issues at trial).
- 7.21 It has been argued that there is a difference between the relevance test in s 7 of the Act and the “heightened relevance” requirement in s 44(3) that will lead to evidence that is admissible under s 7 being held inadmissible under s 44(3).⁵²⁷ While s 44(3) is on its wording a stricter test, we do not consider that there will be a difference in outcome as regards admissibility in the vast majority of cases. As made clear above, we consider that in most cases involving a prior sexual relationship, evidence of that relationship will be *directly* relevant to issues before the court and therefore would be admissible under s 44(3).
- 7.22 Finally, the Law Commission’s “half-way house” proposal was specifically rejected by the drafters of the Bill and the Select Committee. As we have

526 McDonald and Tinsley, above n 523, at 336.

527 At 338.

said elsewhere in this report, this review is not the proper vehicle for a reassessment of policy on a first principles basis.⁵²⁸

“INTERESTS OF JUSTICE”

7.23 McDonald and Tinsley have also proposed that s 44 of the Evidence Act be amended to provide:⁵²⁹

That when determining the admissibility of evidence of the sexual experience of the complainant with any person (including the defendant), the judge must consider whether it is in the interests of justice to admit the evidence, by taking into account:

- The distress, humiliation and embarrassment the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions the complainant is likely to be asked;
- The risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility;
- The need to respect the complainant’s personal privacy;
- The right of the defendant to fully answer and defend the charge; and
- Any other relevant matter.

7.24 They argue that s 44(3), as it is currently worded, only requires the judge to take account of the effect of exclusion of the evidence, rather than the effect of inclusion. For this reason, they say that the test does not encourage judges to consider the impact of admissibility on the complainant when assessing where the “interests of justice” lie in a particular case.⁵³⁰ Their recommendation is based on a proposal of the Australian Law Reform Commission.⁵³¹

7.25 We are not convinced of the desirability of this proposal. The test for inclusion of sexual history evidence is that it is so clearly relevant to the issues that to exclude it would be contrary to the interests of justice. The way in which s 44(3) is currently cast clearly puts the emphasis on exclusion of such evidence and contemplates its admission only where it is of such direct relevance that the interests of justice require admission. At the heart of the test is the direct relevance to the issues at trial.

528 See paragraph 1.30.

529 McDonald and Tinsley, above n 523, at 336.

530 At 335.

531 Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, 2010) at 1252-1253.

- 7.26 The suggested rewrite does not fundamentally change the test, but rather, sets out a list of matters that a judge might consider in determining where the interests of justice lie. Given that it is not a proposed change to the test, we find it difficult to see how the additional matters that the judge would be required to take into account are relevant to the application of that test. For example, how is the degree of distress, humiliation or embarrassment suffered by the complainant, or his or her age, relevant to the degree of relevance?
- 7.27 We acknowledge that by its very nature this kind of evidence is inevitably going to be a source of distress, humiliation and embarrassment for a complainant. Indeed, this is the very reason that s 44 is underpinned by a presumption against admission of evidence of the complainant's sexual experience with other persons. However, as well as respecting the interests of complainants, the Act must also protect the interests and rights of defendants. Accordingly, where fair trial rights require it, such evidence will be available to the court. That is the balance struck by s 44, and more broadly, by the Act as a whole.
- 7.28 For these reasons, we are not convinced that the proposed amendment to spell out matters that should be considered in determining the interests of justice under s 44(3) is desirable.

PRE-TRIAL NOTIFICATION PROCEDURE

- 7.29 McDonald and Tinsley also recommend an amendment to the Act to require notice of intent to offer evidence of the sexual experience of the complainant to be given pre-trial and for decisions about admissibility to be made pre-trial. They use s 22 of the Act (notice of hearsay in criminal proceedings) as an example of how this would operate.⁵³² Again, this proposal is based on a similar recommendation made by the Australian Law Reform Commission.⁵³³
- 7.30 Procedural controls were imposed on the admission of prior sexual history evidence in some Australian jurisdictions, following an evaluation of earlier reforms which showed that they had limited effect on the admission of prior sexual history evidence.⁵³⁴ The Australian Law Reform Commission recommended that these procedural requirements, including a requirement for a pre-trial written application, should be included in federal, state and territory legislation as:⁵³⁵

Formalising the procedure by which leave to admit evidence of the complainant's sexual experience is sought and granted will encourage judicial officers and legal practitioners to

532 McDonald and Tinsley, above n 523, at 338.

533 Australian Law Reform Commission *Family Violence*, above n 531, at 1256.

534 Victorian Law Reform Commission *Sexual Offences: Final Report (2004)* at 200.

535 Australian Law Reform Commission *Family Violence*, above n 531, at 1256.

turn their minds to the admissibility issues before they arise in the course of proceedings and to help ensure compliance.

- 7.31 In Victoria where a requirement for written notice has been in place since 2009, an application must set out the initial questions sought to be asked, the scope of the questioning, and how the evidence sought to be elicited has “substantial relevance” to the facts in issue or why it is a proper matter for cross-examination as to credit.⁵³⁶
- 7.32 In terms of the parallel that McDonald and Tinsley draw with s 22 and the notice requirements in relation to hearsay, the rationale there for the notice provision was to encourage admissibility decisions concerning hearsay evidence to be made pre-trial where possible given the change from a category-based approach to one relying on the exercise of judicial discretion.⁵³⁷ Interestingly, the Law Commission in recommending the notice requirement that became s 22, described it as “an important safeguard” in relation to its proposed liberalisation of the hearsay rules.⁵³⁸
- 7.33 It would not be inconsistent for similar notice requirements to be imposed in relation to the exercise of judicial discretion under s 44 to admit sexual experience evidence. Furthermore, there are arguably efficiency gains to be made if potentially important admissibility decisions can be made pre-trial. As the Law Commission noted in relation to the equivalent of s 22 in its Evidence Code, there is sufficient flexibility to ensure it does not lead to injustice.⁵³⁹
- 7.34 For these reasons we support the incorporation of a notice requirement in relation to applications for leave to adduce evidence as to the sexual experience of a complainant. We recommend that it be modelled on the notice requirements in s 22 of the Act.

R14 We recommend amending s 44 to require that notice of an application for leave to lead evidence as to the sexual experience of a complainant in a sexual case be given, modelled on the notice requirement in relation to hearsay evidence in s 22 of the Act.

WRITTEN REASONS FOR SECTION 44 DECISIONS

- 7.35 We have considered a recommendation that reasons are given in writing for any decision given at any time concerning the admissibility of evidence

536 Criminal Procedure Act 2009 (Vic), s 345.

537 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) at [EV22.02].

538 Law Commission *Evidence: Volume 1*, above n 517, at 19.

539 At 19.

pursuant to s 44 of the Evidence Act, which addresses evidence of sexual experience of the complainant.⁵⁴⁰

- 7.36 We are not aware of any current problems with judges omitting to give written reasons under the current system. It would also be rather anomalous to require reasons to be given in writing for decisions under s 44 but not to have an equivalent requirement for admissibility decisions made under other provisions of the Act. The intention of this proposal may be to improve communication and clarity for complainants in sexual cases, and to promote greater understanding about the reasons for decisions relating to evidence of their sexual experience. However, if communication with complainants is the concern, it is a matter that may be better addressed through practice rather than legislative reform.

540 McDonald and Tinsley, above n 523, at 338.

Chapter 8

Identification evidence

INTRODUCTION AND BACKGROUND

- 8.1 During the 20th century, it became widely acknowledged that there were a number of issues with identification evidence. In a Miscellaneous Paper on eyewitness identification the Law Commission issued in 1999, it was noted that a study of post-1900 wrongful convictions in the United States had shown eyewitness misidentification to be a factor in 52 per cent of the cases.⁵⁴¹ In terms of particular issues, research showed that many jurors appear to believe eyewitnesses too readily, have problems distinguishing between accurate and inaccurate eyewitnesses, and that assumptions people make about reliability (such as an ability to recall peripheral details) are not necessarily correct.⁵⁴²
- 8.2 To deal with some problems that had been identified, ss 344B to 344D were inserted into the Crimes Act 1961 by the Crimes Amendment Act 1982. The most important, for our purposes, was s 344D, which set out the warning a judge was to give to a jury where the principal evidence in a case related to identification.⁵⁴³ The Law Commission's proposed Evidence Code envisaged substantially re-enacting s 344D of the Crimes Act 1961, and going further by formalising the process for determining when identification evidence would be admissible in court.⁵⁴⁴

541 Law Commission *Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999) at 11.

542 Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at 56-57.

543 At the same time, s 67A, which is the equivalent of s 344D for judge-alone trials, was inserted into the Summary Proceedings Act 1957 by the Summary Proceedings Amendment Act 1982. With the introduction of the Criminal Procedure Act 2011, s 67A will be repealed and will be replaced by new section 46A of the Evidence Act 2006.

544 Sections 344B and 344C of the Crimes Act were not altered, but we note that the latter is now set to be repealed once the remainder of the Criminal Procedure Act 2011 comes into force.

FORMAL PROCEDURE IN SECTION 45

- 8.3 The admissibility of visual identification evidence is provided for in s 45, in conjunction with the definition of “visual identification evidence”:

4 Interpretation

- (1) In this Act, unless the context otherwise requires,-

...

visual identification evidence means evidence that is—

- (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
- (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a)

...

45 Admissibility of visual identification evidence

- (1) If a formal procedure is followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.
- (2) If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.
- (3) For the purposes of this section, a formal procedure is a procedure for obtaining visual identification evidence—
 - (a) that is observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency; and
 - (b) in which the person to be identified is compared to no fewer than 7 other persons who are similar in appearance to the person to be identified; and
 - (c) in which no indication is given to the person making the identification as to who among the persons in the procedure is the person to be identified; and
 - (d) in which the person making the identification is informed that the person to be identified may or may not be among the persons in the procedure; and
 - (e) that is the subject of a written record of the procedure actually followed that is sworn to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and

- (f) that is the subject of a pictorial record of what the witness looked at that is prepared and certified to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
 - (g) that complies with any further requirements provided for in regulations made under section 201.
- (4) The circumstances referred to in the following paragraphs are good reasons for not following a formal procedure:
- (a) a refusal of the person to be identified to take part in the procedure (that is, by refusing to take part in a parade or other procedure, or to permit a photograph or video record to be taken, where the enforcement agency does not already have a photo or a video record that shows a true likeness of that person):
 - (b) the singular appearance of the person to be identified (being of a nature that cannot be disguised so that the person is similar in appearance to those with whom the person is to be compared):
 - (c) a substantial change in the appearance of the person to be identified after the alleged offence occurred and before it was practical to hold a formal procedure:
 - (d) no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant:
 - (e) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence was reported and in the course of that officer's initial investigation:
 - (f) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency after a chance meeting between the person who made the identification and the person alleged to have committed the offence.

Location of formal process in legislation

- 8.4 It has been suggested to us that the formal procedure outlined in subs (3) may be better placed in regulation rather than primary legislation. There are facets of the formal procedure that make it appropriate for inclusion in regulations.⁵⁴⁵ First, a formal identification process can be regarded as a technical area that does not require parliamentary consideration. Second, it is an area which tends to be dictated by current research; putting the process in regulation provides more flexibility for the process to be amended if and when the research suggests change is desirable.
- 8.5 There is precedent for this approach in the Act. For instance, the Justice and Electoral Committee recommended that the discretionary criteria for giving

⁵⁴⁵ See generally, Legislation Advisory Committee *Legislation Advisory Committee Guidelines* (May 2001) at [10.1.4].

directions relating to children's evidence be removed from (what is now) s 125 to instead be addressed in regulations.⁵⁴⁶ Its reason for doing so was that the flexibility of regulations would more readily accommodate developments in understanding and technique relating to children's evidence. Accordingly, this is now covered by reg 49 of the Evidence Regulations 2007.

8.6 We have some sympathy for the suggestion that the formal procedure be moved to regulation. The procedure currently outlined in s 45 is based on research on identification evidence that was current at the time the Law Commission developed its Evidence Code.⁵⁴⁷ There is a risk that it may become outdated if the prevailing view changes.

8.7 However, the matter of how amendments should be made to provisions in the Evidence Act was a matter that was squarely before the Justice and Electoral Committee when it was considering the Bill. It stated:⁵⁴⁸

Some submitters suggested that the bill was too prescriptive and that many of the provisions could [be] dealt with by regulation. We spent a considerable time discussing this matter and heard from the Legislation Advisory Committee and representatives of the judiciary. We believe it is appropriate that the content of the bill be contained in statute, as a comprehensive evidence code is too important to be relegated to regulations.

8.8 The Justice and Electoral Committee amended (what is now) s 45 and the regulation making power (what is now s 201) so that the formal procedure must also comply with any further requirements provided for in regulation. The inference from this amendment, along with the Select Committee's discussion about the content of the Bill being retained in statute, is that the Select Committee agreed that the formal identification procedure is a matter that should be dealt with in primary legislation. This view is reinforced by the fact that the Select Committee recommended the substance of another provision be moved to regulations (discretionary criteria for giving directions relating to children's evidence) but chose not to do so in relation to the formal procedure contained in s 45.

8.9 As a practical matter, establishing a formal identification regime requires a significant amount of training for police. Having the procedure prescribed in legislation ensures that it will not change too often or too quickly.

8.10 For these reasons, we do not recommend that the formal procedure outlined in s 45 be moved to regulation.

"Person to be identified"

8.11 Originally, the Law Commission intended for the formal procedure set out in its Evidence Code to apply to the identification of people other than alleged

546 Evidence Bill 2005 (256-2) (select committee report) at 13.

547 Law Commission *Evidence: Volume 1*, above n 542, at 53.

548 Evidence Bill 2005 (256-2) (select committee report) at 14.

offenders as “in some cases such identifications are as critical as identifying the offender”.⁵⁴⁹ However, the definition of “visual identification evidence” in cl 4(1) of the Bill as introduced referred only to the defendant, and not “any other person”. This change was not reflected in what became s 45 of the Act, which continued to refer to “the person to be identified”.

- 8.12 We consider that, in light of the change that was made to the s 4(1) definition of “visual identification evidence”, it is unnecessary for the paragraphs of s 45(3) and (4) referred to above to use the phrase “person to be identified”, and that there is scope for confusion by using this broad term. We are of the view that it would be clearer for this phrase to be replaced with “suspect” in each of these paragraphs.
- 8.13 This will still mean that there is a difference in terminology between the s 4(1) definition of “visual identification evidence”, which uses the word “defendant”, and s 45(3)(b), (c) and (d) and s 45(4)(b) and (c), which will use the word “suspect”. However, we note that s 45(3) and (4) deal with the *obtaining* of visual identification evidence, which will occur only when there is a suspect, whereas by the time the resulting visual identification evidence (as defined in s 4(1)) is *used* in court, the suspect will have become a defendant. As such, there is a legitimate reason for using different terminology.

R15 We recommend that the term “person to be identified” in s 45(3)(b), (c) and (d) and s 45(4)(b) and (c) be replaced with “suspect”.

Requirement that identification take place soon after reporting of offence

- 8.14 One of the “good reasons” not to follow a formal procedure is when the identification is made “soon after the offence was reported”.⁵⁵⁰ The Law Commission has previously given as an example a police officer who drives around the vicinity with the victim immediately after the crime is reported, to see if the victim can spot the alleged offender.⁵⁵¹ However, as is readily apparent, “soon after the offence occurred” is not necessarily the same thing as “immediately after a crime is reported”.
- 8.15 In *R v Edmonds*, the Court of Appeal held that an identification one day after the offence was reported, but four days after it was alleged to have been committed, came within the provision.⁵⁵² While this was probably correct as a matter of statutory interpretation, it could lead to bizarre outcomes where many years pass between when an offence is alleged to have happened and

549 In this regard, the identification of Heidi Paakkonen in *R v Tamihere* [1991] 1 NZLR 195 (CA) was cited.

550 Evidence Act 2006, s 45(4)(e).

551 Law Commission *Evidence: Volume 1*, above n 542, at 60.

552 *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [48]–[52].

when it is reported, but identification occurs very soon after the latter. On the face of it, this would fit within the provision.

- 8.16 We consider that the provision should be amended to read “soon after the offence occurred”. This better reflects the rationale behind the exception: that an identification made shortly after an incident (for example, when the offender is still milling about the area and his or her appearance is fresh in the complainant’s mind) is likely to be sufficiently reliable such that a formal procedure is not required.

R16 We recommend amending s 45(4)(e) to replace “soon after the offence was reported” with “soon after the offence occurred”.

List of good reasons

- 8.17 The Law Commission originally recommended that the list of “good reasons” for not following a formal procedure should be closed. Our rationale for this was that “the list reflects sound policy considerations and that, because the existence of a “good reason” assures admission, the list should be exhaustive.”⁵⁵³ Further, even if none of these factors exists, the identification evidence will still be admissible if the prosecution can prove beyond reasonable doubt that the circumstances in which the identification was made were likely to have produced a reliable identification (s 47(2) of the Evidence Code). However, in the Bill as introduced, the list of “good reasons” was no longer expressly exhaustive. It has been confirmed by the Supreme Court that this means that the list of “good reasons” in s 45(4) is not closed.⁵⁵⁴
- 8.18 The primary “good reason” that has been added to the list is where the identification is of an alleged offender who “was sufficiently known to the witness before the time of the alleged offending that a formal procedure would be of no utility”.⁵⁵⁵ It has been argued that such an extension was unnecessary as this situation would already fit into s 45(4)(d), on the basis that “[w]here an identification procedure would not serve a useful purpose, it is surely the case that it could not at the time be “reasonably anticipated” that identification would be an issue.”⁵⁵⁶
- 8.19 Beyond this, the courts have noted that they should be cautious before extending the list of good reasons, especially when s 45(2) allows an alternative method of rendering identification evidence admissible in

553 Law Commission *Evidence: Volume 1*, above n 542, at 60. We note that it is not strictly correct that a good reason “assures admission”, as it is still open for the defendant to prove on the balance of probabilities that the evidence is unreliable.

554 *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [25].

555 At [27].

556 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) at 239.

circumstances where its reliability is assured.⁵⁵⁷ The Court of Appeal in *Tararo v R* noted that any additions to the list should be for generic situations rather than for a situation described by the facts of a particular case.⁵⁵⁸

- 8.20 While we remain of the view that the list of good reasons should have been exhaustive, Parliament specifically left it open for the courts to add further “good reasons” where appropriate. We do not consider, therefore, that it would be appropriate to recommend that the list now be made exhaustive.
- 8.21 In relation to whether we should add identification of a person known to the witness to the list, we agree with the argument by Richard Mahoney and others that “recognition evidence” that reached the standard required by the courts would also meet the “good reason” that it could not be “reasonably anticipated” that identification was an issue.⁵⁵⁹ As such, we do not see any benefit in formally including this in the list.
- 8.22 We are also aware that other “good reasons” have been suggested in cases that have come before the courts, such as identification evidence obtained by corrections officers (ie not an enforcement agency) in circumstances where the identifier may not survive,⁵⁶⁰ and cases “which involve the identification of defendants from a small pool of suspects in circumstances of surrounding investigative control”.⁵⁶¹ However, we do not consider that these are sufficiently established to be included (and, indeed, the latter was rejected by the Court of Appeal, at least in the circumstances of the case).

OBSERVATION EVIDENCE AND DIRECTIONS UNDER SECTION 126

- 8.23 Section 126 sets out when a judge must direct a jury on visual or voice identification. Unlike s 45, it is not triggered by “visual identification evidence” as defined in s 4:

126 Judicial warnings about identification evidence

- (1) In a criminal proceeding tried with a jury in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the Judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.
- (2) The warning need not be in any particular words but must—
 - (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and

557 *Tararo v R* [2010] NZCA 287, [2012] 1 NZLR 145 at [82].

558 At [82]. See, also, *Lord v R* [2011] NZCA 117 at [28].

559 Evidence Act 2006, s 45(4)(d).

560 *R v Phillips* HC Wellington CRI-2009-020-4936, 27 August 2010 at [40].

561 *Lord v R*, above n 558, at [25].

- (b) alert the jury to the possibility that a mistaken witness may be convincing; and
- (c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.

8.24 Three categories of general visual identification evidence emerge from the case law:

- Resemblance evidence – where a witness gives evidence that a person shares certain features or attributes in common with the defendant (ie “the person I saw doing X looked like the defendant”).
- Recognition evidence – where a witness gives evidence that the offender is someone with whose appearance they are already acquainted (ie “the person I saw doing X was the defendant”).
- Observation evidence – where a witness gives evidence about what a person does at the scene (ie “the person I saw was doing X”).

8.25 The first two categories (resemblance evidence and recognition evidence) have caused little concern. Resemblance evidence does not come within the s 4 definition of “visual identification evidence”,⁵⁶² so s 45 is not engaged, and no s 126 warning is required (although it may be appropriate for the judge to give the jury some directions).⁵⁶³ On the other hand, recognition evidence does meet the s 4 definition,⁵⁶⁴ so s 45 is engaged, and a s 126 warning is required.⁵⁶⁵

8.26 However, observation evidence has caused problems as to whether it comes within the s 4 definition, and so engages s 45, and / or whether a s 126 warning is required. In particular, there was arguably a divergence in the view of the Court of Appeal in the case of *R v Uasi*,⁵⁶⁶ on the one hand, and the cases of *R v Edmonds*⁵⁶⁷ and *R v Turaki*,⁵⁶⁸ on the other.

8.27 In *R v Uasi*, the issue at trial was whether the defendant was, as alleged by the Crown, the person who had beaten the complainant around the head with a metal pole. Mr Uasi accepted that he had been at the party at which the complainant was injured, but his defence was that, when a fracas broke out, he had only been involved in kicking another man (ie not the complainant). One witness, Ms Cotterell, gave evidence that she had seen Mr Uasi kicking

562 *R v Turaki* [2009] NZCA 310 at [58].

563 At [94].

564 *R v Uasi* [2009] NZCA 236, [2010] 1 NZLR 733 at [21]; *R v Turaki*, above n 562, at [62]; *R v Edmonds*, above n 552, at [38]; and *Harney v Police*, above n 554, at [16].

565 *R v Uasi*, above n 564, at [21] and [25]; and *R v Turaki*, above n 562, at [62].

566 *R v Uasi*, above n 564.

567 *R v Edmonds*, above n 552.

568 *R v Turaki*, above n 562.

and striking the person on the ground with the pole. The Court of Appeal had “no difficulty” in concluding that her evidence did contain visual identification of Mr Uasi,⁵⁶⁹ and that a s 126 identification warning was required.⁵⁷⁰

- 8.28 Then there were the decisions in *R v Edmonds*⁵⁷¹ and *R v Turaki*,⁵⁷² which were both delivered by the same composition of the Court of Appeal on 20 June 2009. The former dealt primarily with s 45. In that case, the Court was considering whether s 45(4)(d) applied, which depended on whether the officer involved in the case could reasonably anticipate that identification would be in issue. The Court stated:⁵⁷³

There is a difference between observation and identification evidence. Identification evidence involves identifying an individual as being present at the scene of the offence – see the definition of visual identification evidence in s 4. By contrast, observation evidence concerns the actions of a person, including an offender’s alleged participation in the offence. It is different from identification evidence, and there may be instances where it stands alone because the presence of the offender at the scene is not in dispute.

- 8.29 This reasoning seems to have influenced the Court’s decision in *R v Turaki*, which dealt primarily with s 126 warnings.⁵⁷⁴ That case was similar to *R v Uasi*, in that Mr Turaki accepted that he was at the party at which the complainant was assaulted, but his position was that he took no part in the attack.

- 8.30 The Court stated:⁵⁷⁵

Given that it is clear that Mr Turaki was in the group of three males outside Ms Graham’s apartment, the only real issue is whether the jury ought to have entertained a reasonable doubt about Mrs Ulukita’s evidence that the person (by implication the male with the Afro she had earlier described) who kicked Mr Fonoti while he was on the ground was the chubby one with the umbrella, as described at [14]. *This was not identification evidence. It was a question of observation.* The chubby man with the Afro and the umbrella (ie Mr Turaki) had already been “identified” as one of the three males outside the apartment, by way of Mrs Ulukita’s, Ms Graham’s and Ms Taie’s descriptions being matched against Mrs Packer’s evidence of speaking to Mr Turaki just before. Further, Mr Turaki accepts that he was outside the party at the time of the assault.

569 *R v Uasi*, above n 564, at [21].

570 At [25].

571 *R v Edmonds*, above n 552.

572 *R v Turaki*, above n 562.

573 *R v Edmonds*, above n 552, at [42].

574 *R v Turaki*, above n 562.

575 At [36] (emphasis added).

8.31 Given it was not identification evidence, the Court held that s 126 did not apply,⁵⁷⁶ and so the trial Judge did not err in law in not giving a full identification warning.

8.32 This brings us to *R v Peato*, another s 126 case.⁵⁷⁷ Again, Mr Peato accepted his presence at the scene of the attack on the complainant, and that he had punched the complainant, but he denied kicking him or using a bottle on him. Therefore, the evidence of the witnesses as to what Mr Peato did at the scene was what the Court in *R v Turaki* would call “observation evidence”. However, the Court here did not consider that this meant that the evidence could not also be visual identification evidence. The Court stated:⁵⁷⁸

The definition of visual identification evidence in s 4 and the linkage between ss 45 and 126 are not straightforward. To draw a bright line distinction between visual identification evidence in the strict sense and observation evidence, and to require a s 126 warning for the former but not the latter, is not necessarily consistent with the evident statutory purpose of avoiding miscarriages of justice through mistaken identifications. In particular, we do not see any necessary logical distinction in all cases between evidence identifying the accused as being present at or near the scene of an offence and evidence identifying which of several possible attackers was responsible for inflicting the fatal blow or, in this case, wielding the bottle which injured the victim.

8.33 An alternative (and, in their view, possibly less attractive) argument the Court posited to support their view was that:⁵⁷⁹

... It is possible to interpret ss 45 and 126 as distinct in purpose and scope. Section 45 is concerned with the admissibility of visual identification as defined in s 4. This is linked with the need for a “formal procedure” as a means of obtaining visual identification evidence.
...

There is nothing in s 45 directly linking the admissibility issues to the judicial warnings required by s 126, a provision contained in a quite separate Subpart 6 under Part 3 of the Act dealing with trial process. While there can be no question that s 45 is dealing with visual identification evidence as defined by s 4, the identical expression is not used in s 126. Section 126 is not confined to identifications of the defendant. Unlike s 4, it extends also to the identification of any other person.

We consider that s 126 may be interpreted as referring to all evidence relating to the identification of a person, regardless of whether that evidence is “visual identification evidence” within s 4. In particular, s 126 may include observation evidence, being evidence identifying the defendant as the person who committed the offence by doing a particular act. To restrict the need for a warning strictly to “visual identification evidence” as interpreted in *Turaki* would undermine the purpose of s 126 which is to ensure that juries

576 At [58].

577 *R v Peato* [2009] NZCA 333, [2010] 1 NZLR 788.

578 At [22].

579 At [41]–[43].

are aware of the well recognised reliability problems with eye-witness evidence as to identification.

- 8.34 Matters seem to have been resolved somewhat in relation to s 126 in *E (CA113/2009) v R (No 2)*, the Court of Appeal stating that they do not consider *R v Turaki* and *Peato v R* to be “in fact as inconsistent as they might appear at first blush”.⁵⁸⁰ They went on to note that:⁵⁸¹

... the Court did not mean to suggest in *Turaki* that identification could never be at issue when an accused accepts that he or she was present at or near the scene of the offending. *The question to be asked is, as the Crown submitted, whether identification was in issue, or whether it was merely the accused’s actions.*

- 8.35 The Court of Appeal also accepted the Crown submission that the wording of s 126 is “awkward”,⁵⁸² as it:⁵⁸³

... mandates a judicial direction in accordance with the provision’s terms whenever “the case against the defendant depends wholly or substantially on the correctness of one or more visual identifications of the defendant or any other person”. In a sense, most criminal prosecutions ultimately rest upon such a proposition. However, it seems unlikely that Parliament intended judges to give this direction in every case and so the phrase “depends wholly or substantially” is presumably directed at those cases in which identification is either in issue or is such as to give rise for the need for the direction in light of the dangers commonly attributed to this category of evidence.

- 8.36 The final case it is necessary to refer to is *Witehira v R*.⁵⁸⁴ After referring to *R v Turaki*, *Peato v R* and *E (CA113/2009) v R (No 2)*, the Court of Appeal stated that they took the approach that “even where the defendant admits his or her presence at the scene of the crime, a s 126 warning may be required.”⁵⁸⁵ In their view, “where ... there is an issue about participation in the offending, presence at the precise spot where the offence occurred becomes intertwined with involvement in the act constituting the offence.”⁵⁸⁶

- 8.37 The position at present in respect of “observation evidence” is, therefore, as follows:

- A s 126 warning will be required for observation evidence if identification is still in issue.

580 *E (CA113/2009) v R (No 2)* [2010] NZCA 280 at [63].

581 At [65] (emphasis added).

582 At [63].

583 At [60].

584 *Witehira v R* [2011] NZCA 658.

585 At [45].

586 At [47].

- Observation evidence does not come within the s 4 definition.⁵⁸⁷

- 8.38 We are satisfied with the final position that has been reached with respect to “observation evidence” and s 126 warnings. In respect of “observation evidence” and s 4 (and so s 45), we note that some doubt was cast on the above interpretation by *R v Peato*.⁵⁸⁸ However, we are not aware of any problems in practice with it, and we suspect that the same question is being asked as regards s 126 – is identification in issue, or was it merely the defendant’s actions?
- 8.39 Accordingly, we consider that no legislative change is required in either regard.
- 8.40 However, we note that s 4 of the Evidence Amendment Act 2011 inserts a new s 46A into the Act which reminds a judge of the need for caution where a defendant disputes identity evidence against him or her. This is due to the repeal of the equivalent provision in the Summary Proceedings Act 1957 as part of the criminal procedure reforms effected by the Criminal Procedure Act 2011. It is a companion section to s 126. It is more appropriately located either in, or alongside, s 126.⁵⁸⁹

R17 We recommend that the substance of the new s 46A that the Evidence Amendment Act 2011 inserts into the Act be re-located in, or alongside, s 126.

587 *R v Edmonds*, above n 552, at [42].

588 *R v Peato*, above n 577, at [22]. Given this case was primarily dealing with s 126, the Court’s comments on s 4 (and s 45) were strictly obiter, suggesting that, if necessary, the position in *R v Edmonds*, above n 552, would have to be followed by the lower courts. This seems to be reflected in *Harney v R* [2010] NZCA 264 at [26], a point which the Supreme Court did not comment on in *Harney v Police*, above n 554.

589 See discussion in Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 316 and footnote 228.

Chapter 9

Conviction evidence

INTRODUCTION AND BACKGROUND

- 9.1 At common law, the rule in *Hollington v Hewthorn* excluded evidence of conviction in later civil proceedings.⁵⁹⁰ New Zealand subsequently abolished the rule so that, in defamation proceedings, a previous conviction is “sufficient evidence” that an offence has been committed; and in other civil proceedings, a previous conviction was “admissible as evidence” that an offence has been committed.⁵⁹¹
- 9.2 The Law Commission proposed in its Evidence Code to strengthen the position in relation to defamation actions so that a conviction is “conclusive proof of guilt” that an offence was committed. The Law Commission also proposed that convictions should be admissible in criminal proceedings as:⁵⁹²
- it would save time and expense as it would prevent a party from re-litigating a matter that has already been resolved;
 - it makes relevant and highly probative evidence available to the court; and
 - it is consistent with the policy of the criminal justice system that a criminal conviction is sufficient basis to impose grave penalties.
- 9.3 The Law Commission also proposed that civil judgments or findings of fact should be inadmissible to prove the existence of the fact.⁵⁹³

590 *Hollington v Hewthorn* [1943] KB 587.

591 Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at 62.

592 At 65–66.

593 At 68.

CONVICTION EVIDENCE IN CRIMINAL CASES

9.4 Section 49 provides:

49 Conviction as evidence in criminal proceedings

- (1) Evidence of the fact that a person has been convicted of an offence is, if not excluded by any other provision of this Act, admissible in a criminal proceeding and proof that the person has been convicted of that offence is conclusive proof that the person committed the offence.
- (2) Despite subsection (1), if the conviction of a person is proved under that subsection, the Judge may, in exceptional circumstances,—
 - (a) permit a party to the proceeding to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted; and
 - (b) if satisfied that it is appropriate to do so, direct that the issue whether the person committed the offence be determined without reference to that subsection.
- (3) A party to a criminal proceeding who wishes to offer evidence of the fact that a person has been convicted of an offence must first inform the Judge of the purpose for which the evidence is to be offered.

9.5 The fact that a person has been convicted of an offence is admissible as conclusive proof that they committed it. This is subject to the fact of conviction not being excluded by any other provision in the Act. To enable the judge to determine whether other provisions in the Act exclude the use of such evidence (such as the propensity or veracity provisions), the party seeking to offer the evidence must inform the judge of the purpose for which they seek to use it. In “exceptional circumstances” the judge may allow a party to offer evidence tending to prove that the person convicted did not commit the offence.

9.6 The Law Commission has received a submission concerned that s 49 can potentially deprive a co-defendant of running a defence that would otherwise be available to them, and relieve the Crown of the burden of proving essential elements of a charge. One situation is a case involving multiple defendants in which one defendant pleads guilty prior to trial. If the prosecution case is that the remaining co-defendants committed the offences in conjunction with that defendant, evidence of the conviction can be relevant to essential elements of the charges in relation to the remaining co-defendants.

9.7 This risk is illustrated by the case of *R v Bouavong* in which a co-defendant pleaded guilty to 36 counts of supplying methamphetamine, conspiring to supply methamphetamine, and engaging in money-laundering.⁵⁹⁴ The Crown sought to offer evidence of the conviction that followed this guilty plea in

⁵⁹⁴ *R v Bouavong (No 7)* [2012] NZHC 524.

the trial of the remaining co-defendants. The High Court was concerned that admitting this evidence would prove “key ingredients of the Crown case regarding each alleged transaction; namely, that the substance in question was methamphetamine and that supplies of that controlled drug occurred on the particular dates alleged”.⁵⁹⁵ The Court excluded the conviction evidence under s 8, holding that:⁵⁹⁶

Offering evidence of previous convictions in the circumstances and manner which the Crown propose would essentially deprive the defendants of their opportunity to test the evidence offered against them on essential elements of the charges. In that sense, it would deprive them of their ability to offer an effective defence of their choosing. That the convictions in this case have come as the result of guilty pleas serves to accentuate the unfair prejudice which would occur – the supposed evidence of guilt would remain untested by any Court.

- 9.8 Similar reservations led to Potter J excluding conviction evidence under s 8 in *R v Tanginoa*.⁵⁹⁷ That case also involved a co-defendant pleading guilty to a charge of conspiracy to import methamphetamine. Potter J was concerned that:⁵⁹⁸

... the evidence that establishes the essential elements of the charges against them has not been tested at trial and has not been admitted by the three accused. They are entitled to offer an effective defence which challenges both that a conspiracy has been established, and, if so, that the accused in question was a party to it.

- 9.9 Another situation that has given rise to concern is where a co-defendant is tried as a party to an offence *after* the principal defendant is convicted (either in an earlier trial or following a guilty plea). As secondary liability is contingent on a principal offence being committed, a co-defendant cannot be convicted as a party to the offence if the principal offence itself is not proved.⁵⁹⁹ However, a co-defendant can potentially be deprived of the opportunity to advance a legitimate defence (that there was no principal offence to which their liability as a party could attach) if evidence of the principal defendant’s conviction is offered as conclusive proof that the principal offence occurred.
- 9.10 This issue was highlighted in *McNaughton v R* in which the Crown sought to offer evidence of a principal defendant’s conviction for murder in the trial for the remaining co-defendants who were charged as parties (the trial of the principal defendant and co-defendant was severed for evidentiary

595 At [63].

596 At [75].

597 *R v Tanginoa* [2012] NZHC 3121.

598 At [47].

599 Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at [CA66.04].

reasons).⁶⁰⁰ The co-defendant sought to offer evidence under the “exceptional circumstances” proviso in s 49(2) that the principal defendant acted in self-defence (a defence that the principal defendant unsuccessfully advanced at his own trial), and that they therefore could not be liable as parties.

9.11 The trial judge held that evidence to counter the principal defendant’s conviction was inadmissible, and the co-defendant appealed to the Court of Appeal. The Court heard the appeal in conjunction with that of the principal defendant, who had also appealed his conviction. The Court allowed the principal’s appeal on the murder charge and ordered he be retried, together with the co-defendant, in a new trial.⁶⁰¹ Its comments in relation to the co-defendant’s appeal were therefore brief. The Court agreed with the trial judge that the certificate of conviction was admissible and that there were no extraordinary circumstances for the purposes of s 49(2) to allow the co-defendant to offer counter-evidence. In doing so, O’Regan P for the Court specifically cited his concern about the possibility of a second jury reaching a different conclusion, based on different evidence, as to the guilt of the principal defendant.⁶⁰²

9.12 These cases demonstrate the particular difficulties in the use of conviction evidence under s 49 in trials of co-defendants. Although we acknowledge that s 49 can, in certain circumstances, affect a co-defendant’s ability to run certain defences, there are a number of safeguards in place to protect the co-defendant’s right to a fair trial. First, admissibility under s 49(1) is made expressly subject to the other admissibility provisions in the Act. As *R v Bouavong* demonstrates, this includes the fundamental admissibility provisions (ss 7 and 8) enabling a co-defendant to challenge admissibility on the grounds that its probative value is outweighed by its unfair prejudicial effect. As the High Court stated in *R v Nguyen*:⁶⁰³

Section 49 is a gateway to introducing evidence of conviction. It is not, as I have said, a substitute for the s 8(1) balancing exercise. This approach is reinforced by the words “if not excluded by any other provision of this Act” used in s 49(1).

9.13 The right of a defendant to offer an effective defence forms part of that balancing process.⁶⁰⁴ This right has been explicitly referred to by the courts when excluding conviction evidence that the Crown has sought to adduce under s 49.⁶⁰⁵ Second, a co-defendant may seek to offer evidence to counter the conviction evidence if they can prove there are “exceptional circumstances” under s 49(2). Sections 8 and 49 therefore provide avenues

600 *McNaughton v R* [2011] NZCA 588.

601 At [65].

602 At [62].

603 *R v Nguyen (No 2)* HC Auckland CRI-2008-092-17198, 17 September 2010 at [19].

604 Evidence Act 2006, s 8(2).

605 *R v Bouavong*, above n 594 at [75]; *R v Tanginoa*, above n 597, at [47].

for a co-defendant to challenge the use of conviction evidence if it would impact on his or her right to a fair trial. In the absence of clear case law demonstrating that these avenues are deficient (indeed, our assessment of the case law is that courts are acutely conscious of a defendant's right to offer an effective defence when making decisions about the admissibility of conviction evidence), we recommend no legislative change at this time. However, we recommend that the effect of these provisions on co-defendants continue to be monitored for the next five year review.

R18 We recommend that the effect of s 49 on co-defendants be kept under review with any problems identified to be considered at the next five year review.

CIVIL JUDGMENTS AS EVIDENCE IN CRIMINAL PROCEEDINGS

9.14 Section 50 provides:

50 Civil judgment as evidence in civil or criminal proceedings

- (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.
- (2) This section does not affect the operation of—
 - (a) a judgment in rem; or
 - (b) the law relating to res judicata or issue estoppel; or
 - (c) the law relating to an action on, or the enforcement of, a judgment.

9.15 The effect of this section is that a finding of fact in an earlier civil proceeding is inadmissible in a later proceeding to prove the existence of a fact in issue. The definition of proceeding in s 4 is:

proceeding means—

- (a) a proceeding conducted by a court; and
- (b) any interlocutory or other application to a court connected with that proceeding

9.16 The definition of court includes the Supreme Court, the Court of Appeal, the High Court and any District Court. It has been suggested to us that the definition of “court” and “proceeding” could mean that a finding of fact in a tribunal would not engage s 50. Admissibility would therefore be determined by reference to other provisions in the Act. In *Hao v Minister of Internal Affairs*, the High Court held that a decision of the Administrative Appeals Tribunal of Australia was a “public document” under s 138 and admissible

as to the truth of its contents.⁶⁰⁶ The judgment does not refer to s 50, a fact which *Adams on Criminal Law* describes thus:⁶⁰⁷

Hugh Williams J did not refer to s 50, but he was probably correct not to do so. Section 50 refers only to a finding of fact in a civil *proceeding*. Under s 4, a “proceeding” includes only a proceeding conducted by a *court*, as opposed to a tribunal. The curious effect of this is that it may be arguable that a finding of fact by a tribunal (not governed by s 50) can be given more effect in a subsequent proceeding than a finding by a *court*. This is likely an example where the common law would be applied under s 12 (rendering a tribunal’s finding of fact inadmissible in a subsequent proceeding).

- 9.17 We agree that it would be an odd result that a finding of fact by a tribunal could be afforded more weight than one made by a court. If there were to be any differentiation, arguably it should be the reverse as a court’s finding is decided on the basis of evidence admitted under the Act. If a fact that was determined by a tribunal is relevant to a criminal or civil proceeding, that fact should be independently proved.

R19 We recommend extending the application of s 50 so that a judgment or finding of fact made by a tribunal is not admissible to prove the existence of a fact that was in issue in the tribunal.

606 *Hao v Minister of Internal Affairs* HC Auckland CIV-2009-404-5610, 7 September 2009.

607 Bruce Robertson (ed), above n 599, at [EA50.01].

Chapter 10

Privilege and confidentiality

INTRODUCTION AND BACKGROUND

- 10.1 A privilege recognises that the public interest in protecting certain types of confidences can be more important than ensuring a court has all relevant evidence at its disposal in order to decide the matters before it. The law relating to privilege reflects the delicate balancing act between these competing interests. The nature of the privilege and the relationship or interests it protects affects the manner in which the balance is struck.
- 10.2 This balancing requires consideration as to the form of privilege that is appropriate. A privilege can be absolute (so there is a clear right not to testify about the protected information) or qualified (where there is a general understanding that the protected information is protected but a court has a discretion to require it be disclosed in a particular case). Alternatively, instead of privilege attaching to particular information or relationships, a court can be provided with a discretionary power to allow information not to be disclosed in the circumstances of a particular case.
- 10.3 The privilege and confidentiality provisions are contained in subpart 7 of Part 2 of the Act. This chapter considers issues raised regarding legal advice privilege, the privilege for settlement negotiations and mediation, and medical privilege and confidential information. The chapter concludes with consideration of other general privilege matters: interpretation, waiver and joint and successive interests.

Development of the Evidence Code

- 10.4 The Law Commission issued a preliminary paper on privilege in 1994 that contained a detailed discussion on the law of privilege and its preliminary views on how the competing interests should be balanced.⁶⁰⁸ One of the

608 Law Commission *Evidence Law: Privilege – A Discussion Paper* (NZLC PP23, 1994).

most controversial recommendations was that legal advice privilege, litigation privilege and settlement privilege be “qualified”. This would mean the privilege could be overridden if “the court considers that, in the interests of justice, the need for the communication to be disclosed in the proceeding outweighs the need for the privilege.”⁶⁰⁹ The Law Commission also proposed that the legal advice privilege be extended beyond lawyers to anyone conducting a case or giving legal advice.⁶¹⁰

- 10.5 However, in 1999 when the Evidence Code was issued, submitters had persuaded the Law Commission to change its view.⁶¹¹ In the intervening five years, it became convinced that the legal advice privilege, litigation privilege and mediation privilege should be absolute privileges. It was also convinced that legal advice privilege should remain restricted to lawyers.

LEGAL ADVICE PRIVILEGE

Introduction and background

- 10.6 The former “legal professional privilege” is now encapsulated in three sections:
- section 54: privilege for communications with legal advisers (also known as legal advice privilege);
 - section 55: privilege and solicitors’ trusts accounts; and
 - section 56: privilege for preparatory materials for proceedings (also known as litigation privilege).
- 10.7 Legal advice privilege is covered by s 54 of the Act:

54 Privilege for communications with legal advisers

- (1) A person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—
- (a) intended to be confidential; and
 - (b) made in the course of and for the purpose of—
 - (i) the person obtaining professional legal services from the legal adviser; or
 - (ii) the legal adviser giving such services to the person.
- (2) In this section, professional legal services means, in the case of a registered patent attorney or an overseas practitioner whose functions wholly or partly correspond to

609 At 51.

610 At 23-24.

611 Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at 70.

those of a registered patent attorney, obtaining or giving information or advice concerning intellectual property.

- (3) In subsection (2), intellectual property means 1 or more of the following matters:
- (a) literary, artistic, and scientific works, and copyright:
 - (b) performances of performing artists, phonograms, and broadcasts:
 - (c) inventions in all fields of human endeavour:
 - (d) scientific discoveries:
 - (e) geographical indications:
 - (f) patents, plant varieties, registered designs, registered and unregistered trademarks, service marks, commercial names and designations, and industrial designs:
 - (g) protection against unfair competition:
 - (h) circuit layouts and semi-conductor chip products:
 - (i) confidential information:
 - (j) all other rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.

- 10.8 Legal advice privilege attaches to communications between a person and their legal adviser. This can be contrasted with s 56 where privilege attaches to communications with, and information prepared by, “any person” provided that it was made for the dominant purpose of preparing for a proceeding. This difference in approach reflects the different origins and purposes of the privileges. Litigation privilege is said to arise out of the adversarial nature of litigation:⁶¹²

It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations.

- 10.9 On the other hand, legal advice privilege is directed at encouraging the full disclosure of relevant facts by the client to his or her legal adviser so that the lawyer can give accurate legal advice to enable the client to order his or her affairs in accordance with the law.⁶¹³ On the basis of this rationale, communications made by third parties will only attract the protection of the privilege if they are made by the third party acting as the client’s agent, or as has been said, “... as ‘the man on the spot’, as the client’s ‘alter ego’, and on

612 *Three Rivers DC v Bank of England (Disclosure) (No 4)* [2005] 1 AC 610 (HL) at [52].

613 Joan Loughrey “Legal Advice Privilege and the Corporate Client” (2005) 9 Int’l J Evidence & Proof 183 at 185.

its behalf.”⁶¹⁴ For this reason, at common law in New Zealand, legal advice privilege only applied to communications with third parties if the third party was the agent of the client or the legal adviser.⁶¹⁵ Section 54(1) is to the same effect.⁶¹⁶ This is in direct contrast to litigation privilege, which protects communications between the lawyer or client and third parties where the “dominant purpose” is “preparing for a proceeding or an apprehended proceeding”.⁶¹⁷

Third party involvement in the receiving or giving of legal advice

- 10.10 It has been suggested to us that the limitation of legal advice privilege to third parties acting as the client’s agent does not reflect the realities of modern day practice, particularly in complex cases. We were told that third parties are now commonly utilised, as more than mere agents, where advice is sought on detailed commercial or financial arrangements. We were asked to consider whether s 54 should be amended to apply to documents (and potentially all communications) between the client or legal adviser and third parties, where the dominant purpose of that document / communication was to enable legal advice to be provided to the client.⁶¹⁸
- 10.11 It was the recognition of such commercial realities that led the Full Court of the Federal Court of Australia to recognise privilege in relation to accountants’ documents in *Pratt Holdings Pty Ltd v Commissioner of Taxation*.⁶¹⁹ In that case, the Court unanimously held that, even if no litigation is on foot or anticipated, where a person requests a third party to prepare a document for the dominant purpose of that person providing it to their lawyer to obtain legal advice, that document is privileged.⁶²⁰ One of the key arguments underpinning the Court’s decision in *Pratt Holdings* was that to require an agency relationship between the client and the third

614 *Brandlines Ltd v Central Forklift Group Ltd* HC Wellington CIV-2008-485-2803, 11 February 2011 at [34] [*Brandlines*].

615 *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209 (HC) at 213-214, applying *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 (SC) and *Wheeler v Le Marchant* (1881) 17 Ch D 675 (CA). See also *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA); *Mudgway v New Zealand Insurance Co Ltd* [1988] 2 NZLR 283 (HC) and *C-C Bottlers Ltd v Lion Nathan* [1993] 2 NZLR 445 (HC).

616 *Brandlines*, above n 614. Indeed, we noted in *Evidence: Volume 2 – Evidence Code and Commentary* (NZLC R55, Wellington, 1999) at 147 that s 55(1) “spells out what is essentially the present law on privilege for legal advice.”

617 Evidence Act 2006, s 56.

618 Letter from Andrew Butler (Partner, Russell McVeagh) to Law Commission regarding the review of the Evidence Act 2006 (1 June 2012) and letter from Jonathan Temm (President, New Zealand Law Society) to Law Commission regarding the review of the Evidence Act 2006 (8 June 2012).

619 *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122 [*Pratt Holdings*].

620 While noting that a privileged communication may be oral, documentary or a combination of each, the Court noted that the issue of privilege most frequently arises in documents and in this case it was only necessary to refer to this form of communication: at [14] per Finn J.

party (in that case, accountants) would undercut the policy objectives of the privilege itself as it would not facilitate access to effective legal advice or communication with legal advisers.⁶²¹

- 10.12 Despite the decision having been criticised on a number of grounds,⁶²² the extension has subsequently been adopted in the Evidence Amendment Act 2008 (Cth), based on a recommendation by the Australian Law Reform Commission.⁶²³ The Commission made its recommendation citing the following passage from *Pratt Holdings*:⁶²⁴

... recognising that the situations in which people need legal advice are increasingly complex and that the client may need the assistance of third party experts if he is to be able to instruct the legal adviser appropriately.

- 10.13 Section 118 of the Evidence Act 1995 (Cth) now relevantly provides that privilege attaches to:

...

(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;

for the dominant purpose of the lawyer, or one or more lawyers providing legal advice to the client.

[emphasis added]

- 10.14 This is, perhaps, even wider than *Pratt Holdings*, as it says nothing of the distinction between who instructed the third party to provide the confidential document (ie the lawyer or the client). Such a distinction was important in *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority*,⁶²⁵ a decision that Finn J approved of in *Pratt Holdings*.⁶²⁶
- 10.15 In *Mitsubishi Electric Australia Pty Ltd*, Batt JA had rejected a claim for privilege in respect of reports commissioned by Mitsubishi's solicitors (as opposed to being commissioned by the client) for precisely that reason. The suggestion from *Pratt Holdings*, therefore, is that it was intended to apply only where *the client* had requested the document from the third party.

621 At [44].

622 RJ Desiatnik "Legal Professional Privilege and the Pratt Holdings Saga" (2006) 80 ALJ 462 at 468–470.

623 Recommendation 14-4 in Australian Law Reform Commission *Uniform Evidence Law* (ALRC R102, 2006) at 485.

624 *Pratt Holdings*, above n 619, at [87] per Stone J quoted in Australian Law Reform Commission *Uniform Evidence Law*, above n 623, at [14.109].

625 In *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] VSCA 59, (2002) 4 VR 332.

626 *Pratt Holdings*, above n 619, at [34] per Finn J.

10.16 *Pratt Holdings* has also been applied by the Full Court of the Federal Court of Australia to documentary communications prepared *by the client* for the third party, provided that the communication was made with the dominant purpose of the client seeking or obtaining legal advice.⁶²⁷

10.17 However, a recent decision of the UK Supreme Court should also be noted. In *R (on the application of Prudential plc) v Special Commissioner of Income Tax* the Supreme Court was required to consider whether legal advice privilege attached to legal advice where it was given by accountants in relation to a tax avoidance scheme.⁶²⁸ The more general question before the Court was:⁶²⁹

... whether [legal advice privilege] extends, or should be extended, so as to apply to legal advice given by someone other than a member of the legal profession, and, if so, how far [legal advice privilege] thereby extends, or should be extended.

10.18 While recognising the strength of some of the arguments for extending legal advice privilege to cover advice such as that given by the accountants in the appeal before the Court, the majority held that such an extension of privilege was a significant policy decision that should be taken by Parliament and not by the courts.⁶³⁰

10.19 Against this background, it is necessary to consider the reasons for and against extending s 54. In our view, there are several key arguments in favour of an extension.

10.20 First, it is artificial to distinguish between situations where an agent provides expert advice to a client / lawyer and those where a third party does the same.⁶³¹ Rather, as Finn J stated in *Pratt Holdings*, the “important consideration ... is not the nature of the third party’s legal relationship with the party that engaged it but, rather, the nature of the function it performed for that party.”⁶³² This argument was also regarded by Lord Neuberger in *Prudential plc* to be a strong one:⁶³³

[Legal advice privilege] is based on the need to ensure that a person can seek and obtain legal advice with candour and full disclosure, secure in the knowledge that the communications involved can never be used against that person. And [legal advice privilege] is conferred for the benefit of the client, and may only be waived by the client; it does not serve to protect the legal profession. In light of this, it is hard to see why, as a matter of pure logic, that privilege should be restricted to communications with legal

627 *State of New South Wales v Betfair Pty Ltd* [2009] FCAFC 160 at [40].

628 *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1 [Prudential plc].

629 *Prudential plc*, above n 628, at [1].

630 *Prudential plc*, above n 628, at [52], [61], [81], [92], and [101].

631 *Pratt Holdings*, above n 619, at [106] per Stone J.

632 At [42] per Finn J.

633 *Prudential plc*, above n 628, at [39].

advisers who happen to be qualified lawyers, as opposed to communications with other professional people with a qualification or experience which enables them to give expert legal advice in a particular field.

- 10.21 Second, as noted above, there is an argument that the realities of contemporary business are such that it is unrealistic to expect a client to always be in a position to set out his or her affairs adequately for the purposes of seeking legal advice without the assistance of specialist advisers. This is probably the strongest argument in favour of extension.
- 10.22 Finally, there is also the fact that extension of the privilege would ensure harmonisation with Australia. This is, arguably, an area of evidence law where there would be real benefits in a common approach, given the extension is likely to be most relevant in larger-scale business settings, many of which will have a trans-Tasman element.
- 10.23 However, against these factors, it could be argued that this is tilting the balance too far away from the fundamental idea, contained in s 7 of the Act, that all relevant evidence should be before the court. As one author states, the Full Federal Court in *Pratt Holdings*:⁶³⁴
- ... acted contrary to repeated admonitions to judges by the High Court that because the doctrine is “potentially destructive of respect for their decisions [since] ... they are obliged to arrive at them, deprived of access to potentially relevant and important communications”, it “should be closely confined”.
- 10.24 In a similar vein, our own Court of Appeal, in the course of discussing the scope of litigation and legal advice privilege, has said that “[t]he privilege should be as narrow as its principle necessitates”.⁶³⁵
- 10.25 On the other hand, the judges in *Pratt Holdings* were of the view that the dominant purpose test would not be an “uncontrollable extension of the privilege” and that the “difficulties in proving the relevant purpose should not be underestimated.”⁶³⁶
- 10.26 Following on from this, there could be a concern that parties may be tempted to “try their luck” and withhold any and all information that they have given to, or received from, third parties. This could lead to an increasing number of interlocutory hearings, which will inevitably lead to delay in the courts. This is tempered by lawyers’ professional obligations,⁶³⁷ although this may not be a complete answer.

634 Desiatnik, above n 622, at 470, citing (respectively) *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49 at 88 per Kirby J and *Grant v Downs* (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ.

635 *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [165].

636 *Pratt Holdings*, above n 619, at [107] per Stone J. See also [46]–[48] per Finn J.

637 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.9.2.

- 10.27 As the majority of the Supreme Court in *Prudential plc* recognised, any extension of legal advice privilege is a complex policy decision involving consequences that are not easy to identify or assess.⁶³⁸ This point was also made by a member of our advisory group, who raised the question of how such an extension of legal advice privilege would interact with the privilege for tax advisers in the Tax Administration Act 1994. For this reason, we consider that the issue is one that goes beyond the scope of a narrowly focused “fine tuning” review such as the review we are mandated to carry out under s 202 of the Evidence Act.
- 10.28 Furthermore, while there may be compelling arguments in favour of an extension of privilege at a principled level, we are not aware of any evidence demonstrating widespread problems in practice with the current application of legal advice privilege. A member of our advisory group questioned whether there really had been such a widespread change in business practices as suggested and thought that it was probably possible for parties to arrange their affairs to ensure privilege would be available where necessary.
- 10.29 Accordingly, we are not recommending an extension of legal advice privilege in this manner. It may be that matters such as the desirability of trans-Tasman harmonisation suggest that some further consideration of this issue is required. However, it should be done in circumstances that allow widespread consultation and consideration of the likely consequences of any extension.

Initial communications prior to “obtaining” of information

- 10.30 The final wording of s 54(1) of the Act provides that legal advice privilege attaches when a person *obtains* professional legal services from a legal adviser. This was changed by the Select Committee from the previous wording of “requests” professional legal services.
- 10.31 It has been suggested to us that any initial communications with a legal adviser who is unable or refuses to act (for example, due to a conflict of interest) will not amount to “obtaining” professional legal services, and as such no privilege will attach. This would be a departure from the common law.⁶³⁹
- 10.32 Ironically, we understand that the wording was changed by the Justice and Electoral Committee specifically to catch such initial communications, because they considered that the word “requests” may not adequately do so, rather than any desire to change the position at common law. Indeed, one would have expected that they would have included commentary if that had been their intention. Instead, it seems that any change brought about by this drafting choice was an inadvertent one.

638 *Prudential plc*, above n 628, at [62].

639 See Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at [ED20.09(3)(a)].

- 10.33 Against this background, we consider that the s 54(1) should be amended to cover both situations, namely where a person requests and / or obtains professional legal services.

R20 We recommend that the word “obtains” in s 54(1) be replaced with “requests and / or obtains”.

PRIVILEGE FOR SETTLEMENT NEGOTIATIONS AND MEDIATION

Introduction and background

- 10.34 Settlement negotiations and mediation are an alternative to the court process for parties to resolve the disputes between them. Settlement involves parties conferring and bargaining with a view to reaching agreement.⁶⁴⁰ Mediation is a similar process that involves an intermediary who assists the process.⁶⁴¹ These processes rely on full and frank discussion by the parties of their respective cases. Accordingly, the common law recognised the ability of parties to enter into “without prejudice” negotiations. Anything said or done in such negotiations would be without prejudice to the speaker’s right to pursue or defend litigation as if the statement had not been made.
- 10.35 The privilege for settlement negotiations – formerly known as the “without prejudice” rule – is contained in s 57 of the Act:

57 Privilege for settlement negotiations or mediation

- (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
 - (a) was intended to be confidential; and
 - (b) was made in connection with an attempt to settle or mediate the dispute between the persons.
- (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.
- (3) This section does not apply to—
 - (a) the terms of an agreement settling the dispute; or

640 Stephen Hooper, Peter Spiller and Ian Macduff “Negotiation” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Victoria, 1999) 23 at 23.

641 Paul Hutcheson and Stephen Hooper “Mediation” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Victoria, 1999) 57 at 57.

- (b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or
 - (c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer that—
 - (i) is expressly stated to be without prejudice except as to costs; and
 - (ii) relates to an issue in the proceeding.
- 10.36 In its preliminary paper on privilege, the Law Commission stated that it considered the without prejudice rule to be a “useful and well-justified legal doctrine”, but that the process of its codification was not without problems.⁶⁴² Two problems related to the extent of the privilege.
- 10.37 The first issue was that the privilege had only been used in civil proceedings to date, but that its application to “plea bargaining” in criminal proceedings was less clear.⁶⁴³ At the time of the review, although plea bargaining was common in the United States, it was not formally recognised in New Zealand criminal procedure. The Law Commission believed that it would be inappropriate to include provisions relating to it in a New Zealand evidence code until practice changed.⁶⁴⁴
- 10.38 The second problem was how the various public interest limits on the privilege should be accommodated in a code provision.⁶⁴⁵ The common law recognised that there were circumstances when the privilege could be overridden. In the Law Commission’s preliminary paper it noted that the state of the law was unclear as to what these circumstances were. On the one hand, in *Rush and Tompkins v GLC*, Lord Griffiths said “resort may be had to the ‘without prejudice’ material for a variety of reasons *when the justice of the case requires it*”.⁶⁴⁶
- 10.39 On the other hand, attempts had been made to spell out those circumstances in more specific detail. The Law Commission noted that the most comprehensive example could be found in the legislation proposed by the Australian Law Reform Commission, which was (in substance) introduced into the Federal Parliament in 1991.⁶⁴⁷ Section 131 of the Evidence Act 1995 (Cth) now sets out the following “exceptions” to the settlement negotiation privilege:
- (a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document

642 Law Commission *Privilege*, above n 608, at 67.

643 At 67.

644 At 67. We also noted that the “broader topic may fall for consideration under the Commission’s reference on criminal procedure.”

645 At 68.

646 *Rush and Tompkins v GLC* [1989] AC 1280 at 1300 (emphasis added).

647 Australian Law Reform Commission *Evidence* (ALRC R38, 1987).

in evidence in another Australian or overseas proceeding, all the other persons so consent; or

- (b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or
- (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or
- (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
- (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
- (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
- (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
- (h) the communication or document is relevant to determining liability for costs; or
- (i) making the communication, or preparing the document, affects a right of a person; or
- (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
- (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

10.40 More recently, the United Kingdom Supreme Court has listed the exceptions as follows:⁶⁴⁸

- Where there is a dispute as to whether the without prejudice communications have resulted in a concluded compromise agreement.
- Where there is an argument that the agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.
- Where even if there is no concluded compromise, a clear statement is made by one party on which the other party is intended to act and does in fact act – here the evidence may be admissible as giving rise to an estoppel.

648 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2010] 4 All ER 1011 at [32].

- Where exclusion of the evidence would act as a cloak for perjury, blackmail or other “unambiguous impropriety”.
- Where there is a need to explain delay or apparent acquiescence (for instance, on an application to strike out proceedings for want of prosecution).
- Where there is an issue as to whether a party had acted reasonably to mitigate his or her loss in his or her conduct and conclusion of negotiations.
- In the case of offers expressly made “without prejudice except as to costs”.
- For the purposes of rectification of an agreement made by way of settlement.

10.41 In the Law Commission’s preliminary paper, it preferred the view that the law on the scope of the privilege was too fluid to permit the enactment of a firm rule with a series of defined exceptions. Instead, it recommended a “qualified privilege” and suggested a formulation of the provision that would deal with the matter “more broadly, leaving it to the court to determine whether, in the circumstance of the particular case, the need for the evidence in court proceedings outweighs the policy reasons for excluding it.”⁶⁴⁹ The Law Commission suggested the following draft provision:

Privilege for settlement negotiations

- (1) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of:
 - (a) any communication between that person and any other person who is a party to the dispute if the communication was
 - (i) intended to be confidential; and
 - (ii) made in connection with an attempt to settle the dispute between the persons; and
 - (b) a confidential document that contains the terms of an agreed settlement of the dispute.
- (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document which that person has prepared, or caused to be prepared, in connection with an attempt to negotiate a settlement of the dispute.
- (3) Notwithstanding subsection (1) and (2), a court may order the disclosure in a proceeding of a communication or document for which a person has a privilege under those subsections *if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege.*

649 Law Commission *Privilege*, above n 608, at 68.

[emphasis added]

10.42 However, as outlined above, the Law Commission was subsequently persuaded by submissions to recommend an “absolute privilege” for settlement negotiations in its Evidence Code. The explanation for this change was a wish for the provision to be “in keeping with [the Law Commission’s] approach to legal professional privilege”.⁶⁵⁰ The Law Commission favoured an absolute privilege in that area because “giving the courts the power to override the privilege would be likely to result in interlocutory applications as a matter almost of routine in litigation of any size, with resulting delay and added expense.”⁶⁵¹

10.43 The settlement privilege provision was intended to state the existing law⁶⁵² and contained two situations where the privilege did not apply:

- where an agreement settling the dispute has been concluded; or
- in a proceeding where the conclusion of such an agreement is in issue.

10.44 The commentary to the Evidence Code stated that these exceptions were articulated to remove doubt:⁶⁵³

If the parties reach agreement, there is then a contract on which either party may sue. In that litigation, it must of course be possible to refer not only to the agreement made, but also – if, for example, one party alleges that the agreement was induced by mistake or misrepresentation – to the communications relied on to support that allegation.

10.45 The commentary makes no mention of whether the Law Commission intended that the courts should be able to employ the other pre-existing “exceptions” to the privilege, although arguably the discussion set out at paragraph 10.41 above and the Law Commission’s aim of codification implies that the draft section was intended as an exhaustive statement of the privilege.

10.46 In its final report, the Law Commission also made the following comment on the issue of mediation privilege:⁶⁵⁴

The Law Commission considers that the provision as it stands provides adequate protection for communications between parties involved in mediation. The presence of a third party as mediator is not a bar to invoking the privilege. Such communication would also be protected under the general discretion to protect confidential communications in s 67.

650 Law Commission *Evidence: Volume 1*, above n 611, at 73. The Commission still did not intend it to apply to criminal proceedings, for the same reasons as set out earlier.

651 At 70.

652 Law Commission *Evidence: Volume 2*, above n 616, at 153.

653 At 153.

654 Law Commission *Evidence: Volume 1*, above n 611, at 73.

10.47 The Justice and Electoral Committee recommended the following changes to the settlement and mediation privilege provision:

- References to mediation / mediator were inserted into the heading and each subsection, to expressly provide that the privilege would apply in mediation and to mediators.
- The wording of subsection (3)(a) was altered so that the section would only not apply to the terms of an agreement settling the dispute, as opposed to it not applying in the situation where an agreement settling the dispute had been concluded.
- A third paragraph was added to subsection (3), namely where a written offer is expressly stated to be “without prejudice as to costs” and relates to an issue in the proceeding.

10.48 There was no discussion of the reason for these changes in the Committee report or departmental report. The Bill was passed without further amendment to this section.

Scope of privilege and exceptions

10.49 Section 57(3) sets out the circumstances when the privilege does not apply. There are two potential views of the subsection. One view is that s 57(3) does not preclude the pre-existing common law exceptions. This view was taken by Keane J in *New Zealand Institute of Chartered Accountants v Clarke*.⁶⁵⁵ He considered that s 57(3) relates to the *scope* of the privilege. For Keane J, it sets out only the “obvious formal boundaries” of the privilege but does not prevent the court from referring back to the other circumstances when the common law allowed the admission of evidence of settlement negotiations.⁶⁵⁶ Asher J adopted the same approach in *Consolidated Alloys v Edging Systems (NZ) Ltd*.⁶⁵⁷

10.50 In slight contrast, the Court of Appeal in *Sheppard Industries Ltd v Specialized Bicycle Components Inc* viewed s 57(3) as containing “exceptions” to the privilege, but it also considered that “[p]lainly, however, there are other recognised exceptions to the “without prejudice” rule.”⁶⁵⁸ It too concluded that s 57 is not a definitive statement of the privilege. This view is shared by the authors of *Cross on Evidence*.⁶⁵⁹

655 *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC).

656 At [48].

657 *Consolidated Alloys v Edging Systems (NZ) Ltd* [2012] NZHC 2818.

658 *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [15] [*Sheppard Industries Ltd*].

659 Donald Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA57.9].

Generally speaking, the common law exceptions may be best seen as examples outside the true scope of the privilege, rather than as exceptions to it. Seen in this light, they exemplify instances outside the statutory without prejudice privilege in the same way.

- 10.51 On the other hand is the view held by Richard Mahoney and others that: “The common law recognised other exceptions to the privilege. However, the effect of codification is that there is little room to argue for the continued existence of these earlier exceptions”.⁶⁶⁰
- 10.52 Heath J’s comments in *Jung v Templeton* support this view.⁶⁶¹ He cites with approval the Mahoney view that with each of the privilege provisions it is important to inquire whether the material in question comes within the scope of the particular privilege. The question in relation to s 57 is whether the privilege protects *everything* arising in the context of settlement negotiations / mediations, bar in the situations in s 57(3), or whether there is still scope for the court to determine the breadth of the privilege.⁶⁶² In Heath J’s view, s 57 as enacted leads to the former result. However, he is not sure whether that conclusion represents Parliament’s will or is an unintended consequence.⁶⁶³
- 10.53 We consider that the original Law Commission material clearly supports the view of Richard Mahoney and Heath J. The Law Commission’s recommendation was for an absolute privilege and no express issue was taken with that through the parliamentary process.
- 10.54 However, given the current difficulties with s 57, we suggest that the Law Commission’s original recommendation should be reconsidered. We prefer the view put forward in the Law Commission’s preliminary paper. In our view, there will continue to be legitimate circumstances outside those in s 57(3) where the interest in admitting evidence from settlement negotiations will outweigh the interest in upholding the privilege. The limited “exceptions” set out in s 57(3) have, we suggest, inappropriately broadened the reach of the privilege. This situation has proven unsatisfactory to the courts and so they have sought ways to get around the limits of s 57. It is relevant that one of the methods they have employed arguably puts an incorrect interpretation on ss 10 and 12 which inappropriately expands their effect (discussed above at paragraph 2.35).
- 10.55 Also, we do not consider that an “absolute privilege” is needed so that it is “in keeping with [the Law Commission’s] approach to legal professional privilege”.⁶⁶⁴ In contrast to the without prejudice privilege, the pre-Act

660 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (1st ed, Brookers, Wellington, 2007) at [EV57.09].

661 *Jung v Templeton* HC Auckland CIV-2007-404-5383, 30 September 2009.

662 At [61].

663 At [64].

664 Law Commission *Evidence: Volume 1*, above n 611, at 73. We still did not intend it to apply to criminal proceedings, for the same reasons as set out earlier.

common law position was that legal professional privilege was absolute. Although there were some narrow exceptions, the received view was that information protected by the privilege could not be divulged, no matter how important the information may be to an issue before the court. The recognised exceptions were narrower than those for the without prejudice rule and thus lent themselves more readily to statutory statement. They are set out in ss 65–67 of the Act. Also, the policy behind legal professional privilege, which differs from that for settlement negotiations, better justifies its broader reach.

- 10.56 We suggest that s 57(3) be amended to better reflect the appropriate policy balance between the admissibility and exclusion of evidence of settlement negotiations. We are faced with the same options as the Law Commission considered in its preliminary paper: that is, either attempt to spell out each of the exceptions or make provision along the lines that:⁶⁶⁵

[A] court may order disclosure in a proceeding of a communication for which a person has a privilege under [this section] if the court considers that, in the interests of justice, the need for the communication to be disclosed in the proceeding outweighs the need for the privilege.

- 10.57 There is a risk in adopting the latter option. Enabling the court to assess admissibility where the “interests of justice” favour it might invite litigation in areas outside the pre-existing recognised exceptions to the privilege. Nevertheless, we favour that option. We consider there is a greater risk in seeking to spell out the exceptions. There is a difficulty in adequately capturing them in statutory form. In addition, a provision that unwittingly introduces limits on or differences with the pre-existing law may continue to invite courts to seek to employ other sections of the Act to circumvent the provision. In our view it is better that the Act acknowledge the courts’ role in setting the boundaries of the privilege. But it will be important that the courts describe clearly and adhere to those boundaries. Our recommendation is set out following paragraph 10.94.

Termination of the privilege

- 10.58 It is unclear on the face of the provision whether the privilege contained in s 57 (and the litigation privilege contained in s 56) terminates and, if so, when it does.
- 10.59 It was well-recognised at common law that, in terms of solicitor-client privilege (what is now legal advice privilege under s 54 of the Act), the adage “once privileged, always privileged” applied.⁶⁶⁶ However, the position with respect to litigation privilege (what is now s 56) and without prejudice privilege (what is now s 57) was always less clear.⁶⁶⁷

665 Law Commission *Privilege*, above n 608, at 54.

666 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) at [EV67.06].

667 Richard Mahoney “Evidence” [2006] NZ Law Rev 717 at 725.

- 10.60 Shortly before the Act was passed, the Supreme Court of Canada determined, in *Blank v Minister of Justice*, that litigation privilege comes to an end once the litigation that created the privilege terminates.⁶⁶⁸ In terms of s 56, the decision in *Blank* was noted by the New Zealand Court of Appeal in *A v Attorney-General*, which described it as raising an “interesting question”, but found that it did not need to consider the issue.⁶⁶⁹ Subsequently, leave to appeal to the Court of Appeal was granted in *Reid v New Zealand Fire Service Commission* on the question: “Does litigation privilege come to an end when the proceeding that gave rise to it and any related proceedings are complete?”⁶⁷⁰ However, there is no record of the substantive appeal being heard.
- 10.61 Regarding s 57, the issue was addressed, in obiter, by the High Court in *Jung v Templeton*.⁶⁷¹ Heath J concluded that, had he been obliged to apply the section, he would have concluded that the privilege did not terminate despite settlement having been reached.⁶⁷² This was because, despite the Law Commission’s apparent intention that the privilege would end once a settlement had been reached,⁶⁷³ the wording of subs (3)(a) was changed by the Justice and Electoral Committee prior to the Second Reading of the Evidence Bill.⁶⁷⁴
- 10.62 The question of when the privileges in both ss 56 and 57 terminate has not yet been resolved in New Zealand. We have considered what the appropriate position might be under each of the provisions. Our initial view is that the policy balance differs between them. The two privileges serve different purposes. Litigation privilege is about protecting the adversarial process. Once that need has been exhausted, ie once the litigation has concluded, it may well be that there is no need for the privilege to endure. However, the boundaries of this are very difficult to draw. The solution in *Blank* was that:⁶⁷⁵

The privilege may retain its purpose and its effect where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may be reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or related cause of action or juridical source. Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well.

668 *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319.

669 *A v Attorney-General* [2009] NZCA 490 at [27].

670 *Reid v New Zealand Fire Service Commission* [2010] NZCA 133, (2010) 19 PRNZ 923.

671 *Jung v Templeton*, above n 661.

672 At [64]. His Honour was unsure as to whether this was Parliament’s will or an unintended consequence.

673 Law Commission *Evidence: Volume 2*, above n 616, at 153 (set out at paragraph 10.45 above).

674 *Jung v Templeton*, above n 661, at [60].

675 *Blank*, above n 668 (headnote).

- 10.63 In practice, then, assessing when the privilege should end would be difficult.
- 10.64 The settlement negotiation privilege, on the other hand, is intended to encourage settlement and avoid unnecessary trial. Things may be said and positions taken in a free and frank settlement exchange that a party may never want to be made public. Parties may not make certain offers or concessions if they thought there was a later chance of publicity. The argument for an enduring privilege may therefore be greater in this area. On the other hand, this concern may be adequately met by the use of confidentiality agreements.
- 10.65 To date, we are not aware that this issue has caused problems in practice. Additionally, it seems to us that it would be difficult to neatly encapsulate the idea of “termination” in legislation as this is likely to be driven by the facts in any given case. We think it appropriate to leave the matter of when a privilege under s 56 or s 57 terminates to be determined by the courts. We propose to monitor the interpretation of these provisions and, if they prove problematic, reconsider this issue in the next five year review.

R21 We recommend that the termination of the privileges contained in ss 56 and 57 be kept under review with any problems identified to be considered at the next five year review.

Mediation

- 10.66 The Court of Appeal’s decision in *Sheppard Industries Ltd v Specialized Bicycle Components Inc* has caused concern about the application of the provision to mediation.⁶⁷⁶ The concern is that s 57, and the interpretation placed on it in that case, does not appropriately recognise the special nature of mediation. The need for confidentiality in mediation, it is suggested, differs from that in normal settlement negotiations, and mediation may therefore require separate treatment.
- 10.67 In *Sheppard Industries Ltd*, proceedings had been filed and the parties went to mediation in an attempt to settle them. The mediation agreement, at least on one reading, required written agreement for settlement to occur. There were also standard confidentiality provisions requiring neither side to divulge what happened at the mediation unless compelled by law.
- 10.68 No written settlement agreement transpired and Specialized wished to proceed with the litigation. However, Sheppard contended that the dispute had been settled orally at the mediation and wished to lead evidence from the mediation in support of this. This was refused at first instance.⁶⁷⁷

⁶⁷⁶ *Sheppard Industries Ltd*, above n 658.

⁶⁷⁷ *Specialized Bicycle Components Inc v Sheppard Industries Ltd* [2011] 2 NZLR 242 (HC).

- 10.69 On appeal, the Court of Appeal held that the exception in s 57(3)(b) applied even if the parties had agreed: (i) not to seek to introduce any communication from the mediation as evidence in any proceeding; and (ii) that settlement could only be reached by written agreement. The Court added that a prior mediation agreement requiring any settlement agreement to be in writing did not prevent the Court enquiring into whether an alleged (but disputed) oral settlement agreement had been reached, as the “no settlement unless in writing” requirement may have been orally varied or waived in the course of the mediation.
- 10.70 The Court couched the confidentiality provisions as having the effect of illegitimately “contract[ing] out of s 57(3)(b)”.⁶⁷⁸ Even if that were possible, the Court thought, that agreement would not necessarily be effective given the parties’ ability to vary or waive its terms.
- 10.71 Leave was granted to Specialized Bicycle Components to appeal to the Supreme Court on the ground of “whether the respondents are precluded by the terms of the mediation agreement and / or the confidentiality agreement from adducing the disputed evidence”,⁶⁷⁹ but the parties settled the dispute shortly before the substantive hearing.
- 10.72 Both the Arbitrators’ and Mediators’ Institute of New Zealand (“AMINZ”) and LEADR have concerns that the decision does not adequately distinguish between *privilege* and *confidentiality*. AMINZ describes the problem as follows:⁶⁸⁰

Privilege is a creature of the law of evidence, and governs when certain types of communications may be admissible before a court. Confidentiality is a creature of the law of contract, and governs what rights may be enforced between parties to an agreement.

- 10.73 The former, they suggest, governs what material a *court may receive*; the latter governs what a *party may adduce*. However, AMINZ considers that a number of comments in the Court of Appeal judgment suggest that privilege rules abrogate contractual rights:⁶⁸¹

... there is nothing in them [s 57(3)(a) and (b)] which indicates that parties may agree that the exceptions they contain should not apply to them. Moreover, if the parties did attempt to contract out of s 57(3)(b) in their mediation agreement, it is difficult to see how they could exclude the possibility of waiver, variation or a collateral contract arising.

We therefore consider that Sheppard is entitled to argue that the parties did reach an oral settlement agreement at the conclusion of the mediation, which Sheppard has in part

678 *Sheppard Industries Ltd*, above n 658, at [52].

679 *Specialized Bicycle Components Inc v Sheppard Industries Ltd* [2011] NZSC 123.

680 Letter from Deborah Hart (Executive Director of AMINZ) to Law Commission regarding the review of the Evidence Act 2006 (1 June 2012).

681 *Sheppard Industries Ltd*, above n 658, at [44]–[45].

performed, and is entitled to lead evidence of what occurred at the mediation to support that contention.

10.74 AMINZ also notes that it was on this question that the Supreme Court gave leave:⁶⁸²

The approved ground is whether the respondents are precluded by the terms of the mediation agreement and / or the confidentiality agreement from *adducing* the disputed evidence.

10.75 Both AMINZ and LEADR suggest that the Court of Appeal's interpretation of s 57(3) dramatically undermines the private nature of mediation. They suggest that the result will be the erosion of the effectiveness of New Zealand mediations since parties will know that, whatever protections they agree to, anything they say may later be called as evidence in court to prove an alleged unwritten settlement agreement. AMINZ notes a number of matters:⁶⁸³

- The common law without prejudice rule was developed in the context of direct negotiations. As a result, some of the common law exceptions that have been developed for settlement negotiations may not be appropriate in a mediation context.
- The usually structured nature of mediation demands a policy balance that weighs privacy considerations more heavily than for less structured direct negotiations.⁶⁸⁴
- The international trend is, increasingly, for their separate treatment. The Commonwealth of Australia and some states have enacted separate mediation privilege provisions with more limited exceptions.⁶⁸⁵ Such provisions also exist in Hong Kong, some American states and two Canadian provinces.⁶⁸⁶ Commentators in the United Kingdom have argued that mediation and negotiation privilege should be dealt with separately because of the different policy concerns.⁶⁸⁷ Also, the European Union has issued a Directive calling for states to respect the confidentiality of the mediation process, and establishing a qualified mediator's privilege with limited exceptions.⁶⁸⁸

10.76 AMINZ suggest two options for addressing the asserted difference between standard settlement negotiations and mediation. They suggest either:

682 *Specialized Bicycle Components Inc v Sheppard Industries Ltd*, above n 679, at [B] (emphasis added).

683 Letter from Deborah Hart (Executive Director of the AMINZ) to Law Commission, above n 680.

684 At 4.

685 At 7.

686 At 8-9.

687 At 8.

688 At 8.

- a separate provision dealing with mediation privilege; or
- the addition of a subsection to s 57 to clarify that confidentiality agreements made in respect of mediation are enforceable.⁶⁸⁹

Are there grounds for treating mediation separately?

- 10.77 There are two ways of addressing this issue. One is that it is a question of the enforceability of confidentiality clauses. The second, which we prefer, is to treat it as a question of the appropriate scope of the privilege. We do not think there is any doubt that legislation can set a bar for when confidentiality clauses can be overridden. And we suggest that it is better that the fundamental policy balance be set in that manner.
- 10.78 The difficulty, however, is in defining in legislation the circumstances when they should be overridden. The question is whether and how mediation differs from standard settlement negotiations, and whether the scope of the privilege, or range of “exceptions”, should differ.
- 10.79 As AMINZ observe, the two are treated differently under some Australian statutes. For instance, while s 131 of the Evidence Act 1995 (Cth) sets out the numerous “exceptions” to the settlement negotiation privilege, it has been accepted that the provision is subject to s 53B of the Federal Court of Australia Act 1976.⁶⁹⁰ Section 53B provides:

Admissions made to mediators

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:

- (a) in any court (whether exercising federal jurisdiction or not); or
 - (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.
- 10.80 While there are other international moves toward recognising a mediation privilege, the approaches to it differ. For example, in contrast to the Australian approach, the United States Uniform Mediation Act recognises that evidence from mediation may need to be admitted in certain circumstances including where:
- There is an intention to inflict bodily injury, commit a crime or to conceal an ongoing crime or ongoing criminal activity.

689 They propose the following wording: “Nothing in this section prevents the Court from enforcing, as a matter of contract law, the terms of any mediation or confidentiality agreement entered into between parties to a mediation.”

690 *Pinot Nominees Pty Ltd v Commissioner of Taxation* [2009] FCA 1508.

- It is needed to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; a mediation party or their representative.
 - To prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party.
- 10.81 The main United Kingdom commentator takes a nuanced approach to the privilege. He acknowledges the value of the recognised exceptions to “without prejudice” negotiations in the mediation context. His focus is on separate treatment for “mediator secrets” – communications by parties to the mediator about their views, hopes and fears about the mediation which might assist the mediator to source a solution but which the party does not want the other party to know – rather than the whole mediation process per se.⁶⁹¹
- 10.82 We suggest that the concern with *Sheppard Industries Ltd* is not so much the result in that case; there is an argument that the general “without prejudice” rule was not being subverted since what was being admitted was evidence that the (oral) agreement was concluded, rather than evidence as to the substantive merits of the case. But the case signals the court’s willingness to override a confidentiality clause, leading to uncertainty as to when in future circumstances it will do so again. That uncertainty is driven by the questions surrounding the scope and import of s 57(3), described above.
- 10.83 The same problem arises. It would be difficult to adequately provide in legislation for all the circumstances where a privilege relating to mediation should be overridden. In keeping with our approach above, we suggest that this is an area that should be left to the courts to develop, taking into account the importance of mediation in settling disputes.
- 10.84 As an aside, we note that s 69 of the Act (discussed further below) provides further protection for mediation. It gives the court an overriding discretion as to confidential information. There is no doubt that communications during and in preparation for mediation would fall within the scope of that section which protects “confidential communications” and “any confidential information”. Section 69 was not relied upon in *Sheppard Industries Ltd*.

Criminal proceedings

- 10.85 As stated above, the Law Commission’s intention was that s 57 would not apply to what is known as “plea bargaining” in criminal proceedings, on the basis that this was not, then, a recognised practice in New Zealand. By the time the Act came into force, however, this was no longer the case. The process of “plea discussions” is now effectively formalised by the Prosecution Guidelines⁶⁹² and is given further recognition by the Criminal Procedure Act

691 Justice Briggs “Mediation Privilege: Part Two” (2009) 159 NLJ 55.

692 Crown Law *Prosecution Guidelines* (January 2010).

2011.⁶⁹³ There is therefore a question of whether the provision should be changed to apply expressly to plea discussions.⁶⁹⁴ The arguments in favour of the extension of s 57 have been well made by Justin Harder.⁶⁹⁵ He notes on the one hand the significant value for the administration of justice offered by plea discussions as set out in the Prosecution Guidelines:

- relieving victims of complainants from the burden of the trial process;
- releasing court and judicial time, prosecution costs, and legal aid resources; and
- providing a structured environment in which the defendant may accept any appropriate responsibility for offending that may be reflected in any sentence.

10.86 On the other hand, he notes the risks posed by a lack of express protection around such discussions. First, as Richard Mahoney and others note, the current situation may not be appreciated by many operating in criminal practice.⁶⁹⁶ They comment that “it is common for defence lawyers who are seeking to resolve criminal charges before trial to communicate with the police or Crown counsel on a ‘without prejudice’ basis” and that this is done “on the assumption that no evidence could be given of their contents.”⁶⁹⁷

10.87 Second, as noted, there is now more formal recognition of plea discussions, particularly since the introduction of status hearings and the enactment of the Criminal Procedure Act 2011. For example, the Act provides for the courts to give a sentence indication,⁶⁹⁸ the request for which is not admissible in evidence in any proceeding.⁶⁹⁹ Another example is the case management provisions, which require the defendant to record certain matters in a memorandum, such as whether they intend to change their plea.⁷⁰⁰ It is arguable that such a signal, if it is not followed through with, would be admissible against the defendant as an admission against interest.⁷⁰¹

10.88 Justin Harder cites three cases from the United Kingdom as illustrating the risks posed by a lack of recognition of privilege for such discussions. In *R*

693 Criminal Procedure Act 2011, ss 60–65.

694 We say “expressly” because there is an argument, referred to below at paragraph 10.91, that s 57 could be interpreted as already applying to criminal proceedings.

695 Justin Harder “Plea discussions and statements of disputed issues” [2012] NZLJ 269.

696 Mahoney and others, above n 666, at 269.

697 At 269.

698 Criminal Procedure Act 2011, s 61.

699 Criminal Procedure Act 2011, s 65.

700 Criminal Procedure Act 2011, Part 3 Subpart 3. (Not in force.)

701 Evidence Act 2006, s 27. However, we note that such evidence may be ruled inadmissible pursuant to the general exclusion in s 8 or the specific exclusions in ss 28 to 30.

v Hayes, the Court of Appeal admitted evidence of a letter the defendant's solicitor wrote to the Crown suggesting the defendant might plead guilty to a lesser offence.⁷⁰² The Court noted that the letter was relevant to the defendant's credibility in the same way that a defendant might be cross-examined about an alibi notice or a defence statement of issues made at a case management hearing.⁷⁰³

- 10.89 In *R v Adams* the Court ruled that a hearsay statement which was the sole evidence against the defendant was reliable and therefore admissible because it was consistent with an oral statement made by counsel at callover intimating that supply but not possession of ecstasy would be disputed at trial.⁷⁰⁴ In addition, in *R v Newell* the defendant's lawyers had written "no possession" on a memorandum at a case management hearing in relation to charges of possession and supply of cocaine.⁷⁰⁵ The Crown sought to make use of the memorandum to challenge the defendant's credibility on the basis that the defendant's plea to possession was inconsistent with counsel's memorandum. The Court of Appeal refused, noting that the application of *Hayes* and *Adams* in this way had led to an understandable reluctance on the part of the defence bar to engage frankly in case management hearings and that this would have an impact on the administration of justice.
- 10.90 At best, these cases illustrate the need for counsel to be circumspect in their plea discussions, but at worst the lack of express protection could inhibit effective plea discussions and significantly diminish the benefits for the administration of justice.
- 10.91 There is an argument that s 57 already protects negotiations in some criminal proceedings. This argument goes as follows:⁷⁰⁶
- Under s 57, the privilege exists as long as the dispute is "of a kind for which relief *may* be given in a civil proceeding". Many disputes which routinely end up in a criminal court could, in theory, support a civil proceeding (eg, for battery, conversion, or deceit). Section 57(1) does not require that any civil proceeding is ever actually launched. All that is needed is that the dispute could, in theory, follow that path. In this way, negotiations in many criminal proceedings may still be protected under s 57(1).
- 10.92 Whether or not this is correct, we consider that, in the interests of clarity, express provision should be made for disclosures made in plea discussions to be privileged. This could be achieved by the amendment of s 57 or by a separate plea discussion provision.

702 *R v Hayes* [2004] EWCA Crim 2844.

703 At [23].

704 *R v Adams* [2007] EWCA Crim 3025, [2008] 1 Cr App R 35.

705 *R v Newell* [2012] EWCA Crim 650, [2012] 2 Cr App R 10.

706 Mahoney and others, above n 666, at 269. We note that the authors also suggest other arguments, involving ss 30 and 69, could be run.

- 10.93 The same arguments arise as those canvassed in relation to mediation above. The policy basis for privilege for plea discussions differs from that for settlement negotiations in civil disputes and for mediation. There may be circumstances where communications made in such discussions should be admitted that differ from the other two forms of negotiation. And, again, we suggest that there is a risk in seeking to set out, exhaustively, in legislation what those exceptional circumstances might be.
- 10.94 We therefore favour a provision which leaves the matter for development by the courts. The disadvantage of this approach might be thought that, given the broad approach taken by the United Kingdom courts and the scant existing New Zealand case law on the matter, the courts will have a blank sheet on which to frame exceptions which make the privilege ineffective. However, ultimately, the dicta of the English Court of Appeal in *Newell* showed that Court's sensitivity to the countervailing interest of the administration of justice.

R22 We recommend amending s 57 to apply expressly to criminal proceedings, and adding a paragraph to s 57(3) that allows a court to order disclosure if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of settlement negotiations, mediation or plea discussions as the case may be.

MEDICAL PRIVILEGE AND CONFIDENTIAL INFORMATION

Introduction and background

- 10.95 Medical privilege and confidential information are covered by ss 59 and 69 of the Act, which provide:

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

- (1) This section—
- (a) applies to a person who consults or is examined by a medical practitioner or a clinical psychologist for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct; but
 - (b) does not apply in the case of a person who has been required by an order of a Judge, or by other lawful authority to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or for any other purpose.
- (2) A person has a privilege in a criminal proceeding in respect of any communication made by the person to a medical practitioner or clinical psychologist that the person believes is necessary to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.

- (3) A person has a privilege in a criminal proceeding in respect of information obtained by a medical practitioner or clinical psychologist as a result of consulting with or examining the person to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.
- (4) A person has a privilege in a criminal proceeding in respect of information consisting of a prescription, or notes of a prescription, for treatment prescribed by a medical practitioner or clinical psychologist as a result of consulting with or examining the person to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.
- (5) A reference in this section to a communication to or information obtained by a medical practitioner or a clinical psychologist is to be taken to include a reference to a communication to or information obtained by a person acting in a professional capacity on behalf of a medical practitioner or clinical psychologist in the course of the examination or treatment of, or care for, the person by that medical practitioner or clinical psychologist.
- (6) In this section,—

clinical psychologist means a health practitioner—

- (a) who is, or is deemed to be, registered with the Psychologists Board continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of psychology; and
- (b) who is by his or her scope of practice permitted to diagnose and treat persons suffering from mental and emotional problems

Drug dependency means the state of periodic or chronic intoxication produced by the repeated consumption, smoking, or other use of a controlled drug (as defined in section 2(1) of the Misuse of Drugs Act 1975) detrimental to the user, and involving a compulsive desire to continue consuming, smoking, or otherwise using the drug or a tendency to increase the dose of the drug.

69 Overriding discretion as to confidential information

- (1) A direction under this section is a direction that any 1 or more of the following not be disclosed in a proceeding:
 - (a) a confidential communication:
 - (b) any confidential information:
 - (c) any information that would or might reveal a confidential source of information.
- (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
 - (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or

- (b) preventing harm to—
 - (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
 - (ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
 - (c) maintaining activities that contribute to or rely on the free flow of information.
- (3) When considering whether to give a direction under this section, a Judge must have regard to—
- (a) the likely extent of harm that may result from the disclosure of the communication or information; and
 - (b) the nature of the communication or information and its likely importance in the proceeding; and
 - (c) the nature of the proceeding; and
 - (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
 - (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
 - (f) the sensitivity of the evidence, having regard to—
 - (i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
 - (ii) the extent to which the information has already been disclosed to other persons; and
 - (g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.
- (4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.
- (5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

10.96 Traditionally, the common law did not recognise privilege from disclosure in court proceedings between a medical practitioner or clinical psychologist and a patient.⁷⁰⁷ The only protection was a court's discretion to excuse disclosure where it would breach ethical values and if injustice would not be caused by doing so in the particular case.⁷⁰⁸

10.97 Medical privilege in New Zealand has therefore derived from statute. It arises from the existence of a particular type of confidential relationship, namely

707 *C v Complaints Assessment Committee* [2006] NZSC 48, [2006] 3 NZLR 577 at [13].

708 At [13].

a doctor-patient relationship.⁷⁰⁹ The underlying policy justifications for it are two-fold: society's interest in encouraging its citizens to seek medical attention and communicate candidly with doctors, and considerations of privacy.⁷¹⁰ However, as with all privileges, the concern has always been to balance these imperatives against the need to protect the administration of justice and bring all relevant evidence before the courts.⁷¹¹

- 10.98 The first medical privilege provision appeared in the Evidence Further Amendment Act 1885 (No 14), which specified that communications from patients necessary for their treatment were privileged and inadmissible in both criminal and civil proceedings unless the patient expressly consented to disclosure.⁷¹² An 1895 amendment confined this privilege to civil proceedings and restricted it so that it simply prohibited a surgeon or physician from divulging, without the patient's consent, communications made by the patient for the purpose of treatment. The patient's consent no longer needed to be "express".⁷¹³ Meanwhile, the privilege was inherently narrowed by the provision's framing as a privilege against disclosure *by doctors*, meaning that (in theory, anyway) the communications themselves were not privileged and that parties other than the doctor could divulge the information.⁷¹⁴
- 10.99 Medical privilege was considered by the Torts and General Law Reform Committee in 1974. It recommended against extending the privilege beyond "communications" but did propose some form of limited privilege in criminal proceedings for communications made to a medical practitioner by a defendant.⁷¹⁵ This was enacted in a limited form in 1980.⁷¹⁶
- 10.100 The rationale underlying the privilege in the context of criminal proceedings was discussed in the Law Commission's preliminary paper on privilege:⁷¹⁷

This is a case where the administration of justice should give way to the need for confidentiality since the broader aim of securing due compliance with the law is more likely to be achieved through medical treatment than through prosecution. This is particularly true of drug addiction, where legal sanctions have little effect and the most important thing is to rehabilitate the addict.

709 Law Commission *Privilege*, above n 608, at 74.

710 Law Commission *Evidence: Volume 1*, above n 611, at 74.

711 At 3.

712 Evidence Further Amendment Act 1885 (No 14), s 7; *C v Complaints Assessment Committee*, above n 707, at [107].

713 Evidence Further Amendment Act 1895 (No 10), s 9; *C v Complaints Assessment Committee*, above n 707, at [14].

714 Evidence Further Amendment Act 1895 (No 10), s 9; *C v Complaints Assessment Committee*, above n 707, at [107].

715 *C v Complaints Assessment Committee*, above n 707, at [15].

716 Evidence Amendment Act (No 2) 1980, s 33.

717 Law Commission *Privilege*, above n 608, at 99.

- 10.101 In that preliminary paper, the Law Commission examined the various relationship-based privileges that had historically been recognised by the courts or the legislature and suggested that at least some of these might in the future be better dealt with under the discretion it proposed apply in respect of confidential relationships rather than continuing to be given an absolute privilege by virtue of the relationship.⁷¹⁸
- 10.102 The Law Commission concluded that, while there was justification for some form of medical privilege on privacy grounds in civil proceedings, the interests of the patient were not necessarily being met by the statutory privilege in s 32 of the Evidence Amendment Act (No 2) 1980. It suggested that the matter was better dealt with under its proposed discretionary provision that would apply to confidential information generally.⁷¹⁹
- 10.103 With respect to the privilege in criminal proceedings, the Law Commission noted that the privilege then available by virtue of s 33 of the Evidence Amendment Act (No 2) 1980:⁷²⁰
- ... gives absolute protection, but only in one very specific type of case. This is where, without treatment, there is likely to be further criminal offending. In that case there is a very direct link between the health problem, potential court proceedings and a defined social harm of some magnitude.
- 10.104 The Law Commission proposed that the limited but absolute privilege in s 33 should be brought forward in the proposed Evidence Code and that its ambit be widened to include all information acquired in confidence as a result of the examination or treatment.⁷²¹ It also suggested a broadening of the protection so that the information would be protected from disclosure in any criminal trial, and not just the trial of the person being treated.⁷²²
- 10.105 With respect to the range of health professionals to whom the privilege was to apply, the Law Commission said:⁷²³
- It may be thought that the group of health professionals covered by s 33 is too narrow. Not all persons to whom addicts and others may be referred for examination, treatment and action will be registered medical practitioners or registered clinical psychologists. The Commission has considered a wider and more functional definition, under which it would be sufficient that the person seeking assistance genuinely believed that the person consulted was appropriately qualified to offer professional assistance in dealing with their condition. But we have rejected that approach as entailing needless uncertainty. The privilege proposed gives absolute protection, and the legislation should clearly indicate

718 At 75.

719 At 98.

720 At 99.

721 At 100.

722 At 100.

723 At 100.

its intended scope. The simplest way of doing so is to continue to confine its protection to registered medical practitioners and clinical psychologists. Cases which are clearly analogous should receive appropriate protection under the general discretion.

- 10.106 The only change to its earlier proposals that the Law Commission made in its final report was to extend the privilege to cover communications relating to the prescribed treatment, which might also indicate the nature of the condition being treated.⁷²⁴ The Select Committee recommended no changes to cl 55 of the Evidence Bill, which was substantially similar to s 60 of the Law Commission's Evidence Code.

What does privilege attach to?

- 10.107 The Law Commission received a submission arguing that there is ambiguity concerning the scope of the protection in s 59, which arises from a problem in the drafting of this provision. In particular, this submission considers that the “unusual way of stating the application of the privilege, by reference to a ‘person’” is a major cause of the problem. The reason that this is potentially problematic is because of:⁷²⁵

... the position of a person to whom *both* ss 59(1)(a) and (b) might apply. These subsections state that the privilege does and does not apply, respectively, to a person in certain circumstances. In summary, under subs (1)(a), the privilege *applies* to a person who seeks assistance for a condition that manifests itself in criminal offending (to encourage them to seek treatment, and so prevent the offending), but under subs (1)(b) the privilege does *not apply* to a person who has been directed to undergo assessment by a court.

What is the position, then, of *information* contained in medical records, or in the minds of clinicians, that relates to the kind of consultation covered by (a), when a person to whom the information relates is later directed to undergo assessment by a court, contemplated by (b)? The person may later be ordered to undergo psychiatric assessment, for instance, for the purposes of a criminal trial, having earlier been in treatment for an offending related condition. In that case, can the court-ordered, assessing psychiatrist trawl back through that person's prior records of treatment that would otherwise be covered by s 59(1)(a), and put that material before the court, via their report or their testimony on that report, or not?

- 10.108 The submitters go on to note that there is considerable variation in psychiatrists' understanding of the operation of the privilege provision, which was apparent at a meeting of the forensic section of the Royal Australian and New Zealand College of Psychiatrists in Wellington in late 2011. Some take the view that a literal reading of s 59(1) means that medical privilege does not apply to a person who has been directed to undergo assessment by a court and therefore that person's prior medical records can be freely examined,

724 Law Commission *Evidence: Volume 1*, above n 611, at 75.

725 Letter from John Dawson and Alisaundre van Ammers to Law Commission regarding the Review of the Evidence Act 2006 (undated) at 1-2 (original emphasis). See also: John Dawson “Medical Privilege and Court-Ordered Psychiatric Reports” (2012) 25 NZULR 239 at 266-267.

regardless of the type of treatment that they relate to. This approach would have all such material about the person available to be called upon when reporting to the court and could be offered as evidence in court.

- 10.109 The submitters do not consider that any substantial change of this nature was intended when the Evidence Act was passed. We agree that the intention at the time was clearly to maintain the substance of the privilege in criminal proceedings and to broaden its scope, rather than narrowing it in the dramatic way that the above interpretation would do.
- 10.110 The submitters suggest that s 59 should be redrafted to remove the ambiguity as to the scope of the privilege where a person is ordered to undergo assessment by a court. We agree that if the exemption of communications, observations and information made in the course of such an assessment is to be retained (see discussion below), then a redrafting of s 59 is desirable. Such a redraft would make clear that this exemption from the privilege applies only in respect of communications, observations and information arising in relation to the court-ordered assessment and does not in any way affect the privilege that attaches to other medical records of that person.

R23 We recommend amending s 59 to make it clear that the exemption from the privilege in s 59(1)(b) applies to communications, observations and information collected or generated during a court-ordered assessment and does not affect the privilege that attaches to other medical records of the privilege-holder.

Court-ordered reports

- 10.111 At present, when a judge orders that a defendant undergo (for example) a fitness to plead assessment, then anything that is said to the medical practitioner or clinical psychologist who conducts the assessment is not privileged and is admissible against the defendant. This arguably creates a strong incentive for a defendant to refuse to participate or to be untruthful in these psychiatric assessments because of a concern that whatever he or she says may be used in court against them. It might also lead to psychiatrists not asking pertinent questions because the information may be used against the defendant if the matter goes to trial. Either result is arguably undesirable.
- 10.112 For this reason, there may be a case for any information given in the course of these assessments being subject to the privilege and unable to be used in any proceedings (other than, obviously, the fitness to plead assessment itself). However, whether that is so turns on the issue of whether there is real prejudice to the assessment process due to the possibility of information imparted by a defendant in that process being disclosed in subsequent proceedings.

10.113 A similar issue about the need to protect communications made in the course of assessments arose in the case of *R v X (CA553/2009)*.⁷²⁶ Ronald Young J delivered a dissenting judgment in favour of protecting the confidentiality of communications between arrested persons and forensic nurses who work with the police and courts to conduct assessments of defendants for the purpose of risk. He reasoned that:⁷²⁷

If the confidentiality of these discussions is not protected then counsel acting for such persons are highly likely to advise their client not to talk to a forensic nurse about the facts which have given rise to the charges they face. This advice, if acted upon by a defendant, means the task of the forensic nurses will inevitably be compromised. This will be especially so if there is any suggestion that the police are using this process to obtain confessional evidence by the back door.

10.114 In determining where the balance of interests under the discretion to order confidential information not be disclosed under s 69(3) lay, the majority of the Court of Appeal was not convinced that therapy or counselling will be “imperilled” if patients know that the therapist or counsellor may have to reveal information such as plans to commit violence. The majority referred to the judgment of Hammond J in *R v Lory (Ruling 8)*,⁷²⁸ where he suggested that a “certain scepticism is required with respect to the trust patients place in confidentiality regarding their most extreme statements.”⁷²⁹

10.115 Subsequently, Scott Optican and Peter Sankoff have discussed the difficulties of adjudicating these sorts of evidential disputes and the lack of an “objectively ascertainable method of predicting when an application to uphold confidentiality should succeed under s 69”, while expressing the view that there is much to be said for Ronald Young J’s conclusion on the issue.⁷³⁰ Their view is that in cases like *R v X*:⁷³¹

... admission is likely to be favoured in most instances, especially where the information in question is not available from another source, and is critical to a significant and disputed issue in a criminal trial. The court will effectively be tasked with deciding whether its own need in obtaining a correct result is more important than that of preserving confidence in a relationship that is often external to the criminal justice system. In light of the balancing test, it is hardly surprising that most cases of this type end with a judicial decision under s 69 that confidence – while important – is less critical than the court’s need for the evidence in the proceeding at hand.

726 *R v X (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181.

727 At [97].

728 *R v Lory (Ruling 8)* [1997] 1 NZLR 44.

729 At [82].

730 Scott Optican and Peter Sankoff “Hearsay” (paper presented to New Zealand Law Society Evidence Act 2006 Revisited for Criminal Lawyers Seminar, February 2010) 45 at 59.

731 At 143.

- 10.116 We received little in the way of submissions on this issue in the course of our review. The New Zealand Law Society suggested that s 59(1)(b) should preserve privilege for discussion on the facts / merits between a defendant and a court-appointed psychiatrist / psychologist, or that protocols should be established to ensure defendants are properly advised that what they say could end up in an admissible report.⁷³² However, no submissions directly addressed the question of whether there is a real possibility of prejudice to court-ordered assessment procedures due to a lack of privilege attaching to such processes.
- 10.117 Nor has there been an opportunity to conduct consultation with those in the health sector involved in court-ordered assessment procedures to assess whether there is a real possibility of prejudice to assessment procedures because of the exclusion in s 59(1)(b). We consider that such consultation is required.
- 10.118 The issue was subsequently raised with the Ministry of Justice in the context of a number of issues arising in relation to the Criminal Procedure (Mentally Impaired Persons) Act 2003. We have been advised that work on these issues has been deferred for the time being due to competing priorities.
- 10.119 We recommend that the issue of whether court-ordered assessments should continue to be excluded from medical privilege under s 59(1)(b) be examined further in the context of this wider review of related issues when it is advanced. This will provide a good opportunity for the necessary consultation with the health sector to occur.

R24 We recommend that the issue of whether court-ordered assessments should continue to be excluded from the protection of medical privilege by s 59(1)(b) should be examined further in the context of a proposed wider review of issues relating to the Criminal Procedure (Mentally Impaired Persons) Act 2003 and appropriate consultation with the health sector should occur at that time.

Extension of medical privilege to psychotherapists

- 10.120 The Law Commission received a submission from some members of the New Zealand Association of Psychotherapists suggesting that s 59 be amended so that the privilege extends to a person who consults or is examined by a psychotherapist. The key arguments in support of this suggested amendment are:
- the work undertaken by psychotherapists is similar to psychologists with respect to the professional and ethical standards that apply, including confidentiality; and

⁷³² Letter from Jonathan Temm (President of the New Zealand Law Society) to Law Commission, above n 618.

- both psychotherapists and psychologists are regulated under the same statutory framework, namely the Health Practitioners Competence Assurance Act 2003.⁷³³
- 10.121 As noted above, the Law Commission did specifically consider the range of health professionals to which medical privilege in the Evidence Code would attach. Because the privilege is an absolute one, the Law Commission favoured certainty. Its view was that any relationships with other health professionals that similarly involved confidentiality would receive adequate protection under the general discretion in s 69.
- 10.122 As the Law Commission noted in its Preliminary Paper on privilege, the courts and the legislature have long been alive to the fact that medical privilege involves a balance between the interests of confidentiality and privacy in medical procedures / treatment, and the protection of the administration of justice. As a result, both Parliament and the courts have “hedged the privilege with major limitations ... It is readily overridden if the evidence is important to the decision of the case.”⁷³⁴
- 10.123 In a decision involving the predecessors to s 59, the Court of Appeal held that a narrow approach to interpretation of medical privilege was required, and pointed to the existence of s 35 (the predecessor to s 69) as supporting this approach.⁷³⁵ As noted above, the Law Commission saw s 69 as providing a fall-back protection for confidential information which fell outside the narrowly cast medical privilege provision. Indeed, this was the justification for not re-enacting medical privilege in civil proceedings.⁷³⁶
- 10.124 Furthermore, s 69(5) makes it clear that a direction preventing the disclosure of confidential information can be made under s 69(1) notwithstanding the circumstances falling short of establishing a privilege under one of the other provisions in this subpart of the Act.
- 10.125 The Law Commission has not been made aware of any situations where the discretion available under s 69 in relation to confidential information has failed to adequately protect information disclosed in the course of consultation with a health professional that did not attract medical privilege. In the absence of a practical difficulty we are not convinced that any change to s 59 to expand the categories of health professionals covered by the privilege is warranted at this time.
- 10.126 For the sake of completeness, we note that one submission from a psychotherapist suggested that no health professional should have an

733 Letter from some members of the New Zealand Association of Psychotherapists to Law Commission regarding review of the Evidence Act 2006 (undated).

734 Law Commission *Evidence Law: Privilege – A Discussion Paper*, above n 608, at 96.

735 *R v Gulliver* CA51/05, 9 June 2005 at [43].

736 Law Commission, *Evidence Law: Privilege – A Discussion Paper*, above n 608, at 98.

automatic privilege, but rather, there should be a mechanism by which privilege could be sought on a case by case basis.⁷³⁷ We have not pursued this suggestion as we are satisfied at this point that the relatively narrow privilege that exists in s 59 is appropriate and should be retained.

GENERAL PRIVILEGE PROVISIONS

10.127 The Law Commission has received a number of submissions relating to the general privilege provisions, such as s 51 (interpretation), s 65 (waiver of privilege) and s 66 (joint and successive interests in privileged material).

Overseas practitioner regime

10.128 The common law has always protected communications with overseas practitioners for the purpose of obtaining legal advice.⁷³⁸ However, there was no mention of how this should be treated in the Law Commission's preliminary paper on privilege, or in the final report on evidence and accompanying Evidence Code. Similarly the Evidence Bill, as introduced and read for the first time, was silent on this.⁷³⁹

10.129 It was only when the Bill was reported back by the Justice and Electoral Committee that the references to "overseas practitioners" were inserted,⁷⁴⁰ the Committee stating:⁷⁴¹

We recommend that the definition of legal adviser also include overseas practitioners. This would mean that clients of overseas practitioners could claim privilege for legal advice. As to which overseas practitioners we should recognise, we recommend that those who are entitled to practise as a barrister and solicitor in Australia, and those who are registered patent attorneys or trade marks attorneys in Australia, should be included. We recommend that there be a process by which lawyers and patent attorneys in other countries can be recognised by Order in Council.

10.130 The Bill was then passed with no further change to (what is now) s 51. The definition of "overseas practitioner" in s 51 of the Act provides:

overseas practitioner means—

- (a) a person who is entitled to practise as a barrister, or a solicitor, or both in the High Court of Australia or in a Supreme Court of a State or a territory of Australia; or

737 Letter from Seán Manning to Law Commission regarding Review of the Evidence Act 2006 (undated).

738 *Todd Pohokura Ltd v Shell Exploration NZ Ltd* (2008) 18 PRNZ 1026 (HC) at [73].

739 Evidence Bill 2005 (256-1).

740 Evidence Bill 2005 (256-2), cl 47.

741 Evidence Bill 2005 (256-2) (select committee report) at 7.

- (b) a person who is entitled to practise in Australia as a registered patent attorney or as a registered trade marks attorney; or
 - (c) a person who is, under the laws of a country specified by an Order in Council made under this section, entitled to undertake work that, in New Zealand, is normally undertaken by a lawyer or a patent attorney.
- 10.131 In accordance with s 51(6), the Evidence (Recognition of Overseas Practitioners) Order 2008 was made on 7 July 2008 and came into force on 7 August 2008, just over one year after the Act came into force (on 1 August 2007). The Order specified 87 countries for the purpose of para (c) of the definition of “overseas practitioner” in s 51(1) of the Act. No further Orders in Council have been made in this respect.
- 10.132 The present ability to claim privilege over communications with an “overseas practitioner” therefore currently relies on the country in which the lawyer or patent attorney is qualified having been specified in an Order in Council.⁷⁴² This is narrower than the common law, which did not contain such a restriction.
- 10.133 A problem was initially encountered because, as noted above, the first Order in Council (and, indeed, the only one to date) was not made until just over a year after the Act came into force.⁷⁴³ In a case that came to the High Court in the intervening period it was, accordingly, argued (at least in effect, if not explicitly) that the second defendant could not claim privilege over any communications with overseas lawyers.⁷⁴⁴
- 10.134 Dobson J disagreed and upheld the claim to privilege. First his Honour, in discussing the period between the commencement of the Act and the making of the Order in Council (which had been promulgated after the hearing, but before the time the judgment was delivered), stated:⁷⁴⁵
- ... It would clearly be an absolute contradiction to the clear legislative intention for the lapse in time until an Order in Council is promulgated under s 51(6) to trigger the removal, by a side wind, of the firmly entrenched notion of legal professional privilege. That privilege is respected in similar terms throughout the common law world. I am satisfied that Parliament cannot have intended that the delay in promulgating the Order in Council would create a lacuna in which the settled state of recognition of legal professional privilege, as it applies across jurisdictions in the common law world, should be disrupted.
- 10.135 The Judge then went on to hold that privilege is a substantive legal concept to which the presumption against retrospective construction applies,⁷⁴⁶ and that s 5(3) of the Act, which states that the Act applies to all proceedings

742 Section 51(1)(c) and definition of “overseas practitioner”.

743 Evidence (Recognition of Overseas Practitioners) Order 2008.

744 *Todd Pohokura Ltd v Shell Exploration NZ Ltd*, above n 738, at [66].

745 At [73].

746 At [87].

commenced before, on, or after the commencement of this section, does not oust this.⁷⁴⁷

- 10.136 Dobson J's approach, and the making of the Evidence (Recognition of Overseas Practitioners) Order 2008, has dealt with the transitional issue, but that is not the end of the matter. For instance, it remains to be seen what would happen if a party claimed privilege over a communication with a lawyer (or patent attorney) of a country that is not specified in the Order in Council. It has been suggested to us that the common law privilege cannot apply to such a communication, or else there would be no need for any Order in Council at all.⁷⁴⁸ We agree that this should be the case.
- 10.137 The Ministry of Justice advised us that after the enactment of the Evidence Act, a two stage process for designation under s 51 was agreed to. The second stage of the process required countries to respond to a questionnaire from New Zealand. However, many countries did not respond and the second stage of designations was not achieved as intended originally.
- 10.138 The Ministry suggested that an alternative approach would be to provide for the courts to recognise the privilege of clients of overseas lawyers and patent attorneys who are recognised in their country as being properly qualified to provide legal advice.
- 10.139 We also received a submission from Russell McVeagh questioning the appropriateness of the Order in Council procedure. It expressed concern that the 2008 Order (which is the only Order in Council made under the Act to date),⁷⁴⁹ is not an exhaustive list and excludes communications with overseas practitioners that quite properly would have been regarded as attracting privilege under the common law. It gives the example of the Cayman Islands as not being included in the Order.⁷⁵⁰
- 10.140 The Russell McVeagh submission suggests that if the Order in Council procedure had not been included in the Act, it is likely that the common law approach would have continued to apply by virtue of ss 10 and 12 of the Act. It submits that a preferable approach would be to amend para (c) of the definition of "overseas practitioner" to read:

[A] person who is, under the laws of any country, except a country specified by an Order in Council made under this section, entitled to undertake work that, in New Zealand, is normally undertaken by a lawyer or patent attorney.

747 At [88].

748 Indeed, by remaining silent on the issue of overseas practitioners, it may be that the Law Commission originally intended that the common law would simply apply, pursuant to ss 10 and 12 of the Act.

749 Evidence (Recognition of Overseas Practitioners) Order 2008.

750 Letter from Andrew Butler (Partner, Russell McVeagh) to Law Commission, above n 618.

- 10.141 Alternatively, Russell McVeagh suggested that if the current approach is retained, there should be a review within the next year to consider whether any other countries need to be added by an Order in Council made under s 51(6), and there should be a requirement for five yearly reviews of the countries that are recognised under s 51.
- 10.142 We prefer the approach suggested by the Ministry of Justice. This approach worked prior to the enactment of s 51. Further, it avoids the need for Orders in Council to be made updating the list in the event of international events affecting the constitution of nations or the desirability of recognising legal practitioners from particular jurisdictions.
- 10.143 It is possible that Russell McVeagh is correct in its view that, in the absence of s 51(6), the prior common law would apply (by virtue of ss 10 and 12). However, given that one of the key aims of the Evidence Act from its inception was to enhance the accessibility of evidence law, we recommend that para (c) of the definition of “overseas practitioner” should be repealed and replaced with the following:
- Any person who is, under the laws of their country, recognised as being properly qualified to undertake work that is normally undertaken by a lawyer or patent attorney.
- 10.144 This would enable courts faced with claims to privilege in respect of advice provided by overseas practitioners to decide on a case by case basis whether that claim should be accepted. Section 51(6) should be repealed and the Evidence (Recognition of Overseas Practitioners) Order 2008 should also be revoked.
- 10.145 It was suggested to us by a member of our advisory group that the unfortunate situation created by the *Todd Pohukura* case should be avoided with any proposed amendment. The Act should provide that, in any proceeding, the court is to apply the law of privilege as stated in the Act, regardless of when the communication took place.
- 10.146 It was suggested that if this step is not taken, there will be an ongoing time continuum issue when any question of privilege arises before the courts. If the Act is amended to alter privilege, the courts following *Todd Pohukura* will only apply the amended version to communications that took place after the amendment. There is the potential for a complex situation to develop. As the Act almost invariably provides better protection than the common law, there is no removal of any vested right.
- 10.147 We suggest that, as a transitional issue, this is best left to Parliamentary Counsel to consider in the context of drafting any amendment to s 51.

R25 We recommend that the definition of “overseas practitioner” in s 57(1) be replaced with “Any person who is, under the laws of their country, recognised as being properly qualified to undertake work that is normally undertaken by a lawyer or patent attorney.”

R26 We recommend that s 51(6) be repealed and the Evidence (Recognition of Overseas Practitioners) Order 2008 be revoked.

Definition of “information”

10.148 Section 51 contains the following subsections that are relevant to the term “information” used in ss 60 to 63 (which concern the privilege against self-incrimination):

- (2) A reference in this subpart to a communication or to any information includes a reference to a communication or to information contained in a document.
- (3) Despite subsection (2), in sections 60 to 63, information means a statement of fact or opinion given, or to be given,—
 - (a) orally; or
 - (b) in a document that is prepared or created—
 - (i) after and in response to a requirement to which any of those sections applies; but
 - (ii) not for the principal purpose of avoiding criminal prosecution under New Zealand law.

10.149 The privilege against self-incrimination has traditionally been a privilege against compelled testimony. In line with this, we proposed (in a separate preliminary paper the Law Commission issued about this privilege) that documents already in existence before the demand for information is made should not be protected.⁷⁵¹ Such documents would be treated on the same basis as real evidence, which is not normally within the scope of the privilege.

10.150 As the bulk of submissions agreed with this approach, in *Evidence: Reform of the Law* the Law Commission determined that:⁷⁵²

... Accordingly, the definition of “information” in s 4 is limited to statements made orally or in a document created after and in response to a request for the information (but not for the principal purpose of avoiding criminal prosecution under New Zealand law).

10.151 The corresponding provision in *Evidence: Code and Commentary* provided that:⁷⁵³

information in sections 61 to 64 means a statement of fact or opinion which is given, or is to be given,

- (a) orally; or

⁷⁵¹ Law Commission *The Privilege Against Self-Incrimination* (NZLC PP25, 1996), ch 8.

⁷⁵² Law Commission *Evidence: Volume 1*, above n 611, at 77.

⁷⁵³ Law Commission *Evidence: Volume 2*, above n 616, at 14.

- (b) in a document that is prepared or created after and in response to a requirement from the person requiring the information, but not for the principal purpose of avoiding criminal prosecution under New Zealand law.

10.152 In the Evidence Bill, the definition was moved into subpart 8 of Part 2 and amended slightly, but not in any substantive way.⁷⁵⁴ No changes were made to it before the Bill became the Act.

10.153 We are not aware of any suggestion that the line drawn by the Law Commission in *Evidence: Reform of the Law* between documents created before a request for information, and those created after (and in response to) it, was wrong. However, one submitter has argued that the provision as drafted is misguided and does not actually reflect this distinction.

10.154 The issues are explained by Richard Mahoney and others.⁷⁵⁵ After noting that the privilege “does not provide an excuse for refusing to produce a *pre-existing document*”, they state:⁷⁵⁶

Despite this intention of the legislation, s 51(3)(b) still contains some uncertainties. Section 51(3)(b)(i) gives the impression that the privilege against self-incrimination can somehow be claimed for a statement that *has been given* in a document prepared or created *after* a requirement for information. This impression is misleading because, as stated above, the privilege does not apply once a disclosure has actually been made.

10.155 They conclude:⁷⁵⁷

It is best to read s 51(3)(b)(i) as focussing on a portion only of the opening phrase of s 51(3) and applying solely to a statement *to be given* in a document following a requirement to provide information. Although a government official is demanding that the statement *be given* in a document, the privilege can still be claimed as a reason to refuse to comply with the demand. However, if the privilege holder capitulates and gives the statement, there is nothing left for the privilege to protect.

10.156 We agree, and consider that this could be resolved by the removal of the words “given, or” in the phrase “given, or to be given” in s 51(3)(b)(i).

10.157 The authors also take issue with s 51(3)(b)(ii). In addition to noting the same problem, namely that it seems to envisage the privilege being utilised after the document has been created, they state that a literal reading of this provision would remove from the scope of the privilege “any document prepared or created because of the privilege holder’s hope that it would make the spectre of a prosecution go away.”⁷⁵⁸ And as they point out, it “seems a safe assumption that many self-incriminating documents prepared or created

754 Evidence Bill 2005 (256-1), cl 47.

755 Mahoney and others, above n 666, at 253.

756 At [EV51.07] (original emphasis).

757 At [EV51.07] (original emphasis).

758 At [EV51.08].

after a requirement of the sort set out in ss 60–63 *are* motivated by the hope that this show of cooperation may lead to the end of a threatened prosecution.”⁷⁵⁹ In their view, this part of the provision is aimed at excluding from the operation of the privilege a fraudulent statement, but it requires a “substantial gloss” to read it as such.⁷⁶⁰

- 10.158 We consider that Mahoney and others are probably correct. However, we do not consider that the courts would read s 51(3)(b)(ii) as literally as they suggest. Further, we are not sure how the provision would be reworded to make the distinction that they seek. Given no one else has raised the issue, and we are not aware of it ever coming before the courts, we are inclined at this stage to recommend no legislative change in this respect.

R27 We recommend deleting the words “given, or” in the phrase “given, or to be given” in s 51(3).

Waiver

- 10.159 Section 65 of the Act provides:

65 Waiver

- (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
- (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
- (3) A person who has a privilege waives the privilege if the person—
 - (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
 - (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.
- (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.
- (5) A privilege conferred by s 57 (which relates to settlement negotiations or mediation) may be waived only by all the persons who have that privilege.

⁷⁵⁹ At [EV51.08] (original emphasis).

⁷⁶⁰ At [EV51.08].

10.160 It has been said that waiver of privilege has never been an easy matter and that this remains the case after the enactment of the Evidence Act 2006.⁷⁶¹ The Law Commission examined the issue of waiver of privilege in its 1994 preliminary paper on privilege and proposed retention of the approach to waiver taken by the New Zealand courts at that time, which it saw as essentially encompassing two situations:⁷⁶²

Privilege will be lost if it is unfair for the client to take the benefits of disclosure while also seeking to retain the benefits of privilege. And it will be lost if what the client has done is inconsistent with a claim to keep the document confidential.

10.161 It gave the example of a client suing the lawyer who provided the advice for negligence or malpractice, thereby putting the advice into issue in the proceeding.

10.162 The Law Commission also proposed codification of the rule in *R v Uljee*⁷⁶³ whereby if a party obtains material subject to legal professional privilege without the consent of the privilege holder, the privilege is not waived and the material is inadmissible.⁷⁶⁴

10.163 In its report on the Evidence Code in 1999, the Law Commission proposed removal of the waiver ground where it is unfair for the client to take the benefits of disclosing the document while also seeking to retain the privilege, as it considered that such situations would be covered by the other proposed basis for waiver, namely where the client disclosed the privileged material inconsistently with a claim of confidentiality.⁷⁶⁵

10.164 The Select Committee made only one change to cl 61 of the Evidence Bill, which dealt with waiver of privilege. This was to add a reference to “mediation” in the subclause dealing with settlement negotiation to reflect the changes made to the scope of that privilege elsewhere in Bill.⁷⁶⁶ That change is not relevant to any of the issues raised in this report.

Scope of “putting in issue” in s 65(3)(a)

10.165 Richard Mahoney has argued that the High Court interpreted s 65(3)(a) “out of existence” in two significant cases. He notes that:⁷⁶⁷

Two ways in which it might have been thought that a litigant puts privileged material “in issue” can immediately be eliminated from the scope of s 65(3)(a). The first is by *disclosing*

761 Richard Mahoney “Evidence” [2010] NZ L Rev 433 at 449.

762 Law Commission *Privilege*, above n 608, at 56.

763 *R v Uljee* [1982] 1 NZLR 561 (CA).

764 At 69–70.

765 Law Commission *Evidence: Volume 1*, above n 611, at 85.

766 Evidence Bill 2005 (256-2), cl 61(5).

767 Mahoney, above n 761, at 449.

a significant part of the privileged material “in circumstances that are inconsistent with a claim of confidentiality”. We know this cannot be the target of s 65(3)(a) because such a disclosure is precisely what amounts to a waiver under s 65(2). The same conclusion follows from s 65(3)(b), which declares that a waiver of privilege occurs when a privilege holder *institutes a civil proceeding* against a person who is in possession of privileged material and the effect of instituting the proceeding is to put the privileged matter in issue in the proceeding.

- 10.166 Once these possibilities have been eliminated as the intended target of s 65(3)(a), Richard Mahoney argues that the next most obvious target might be some version of the common law “putting in issue” exception to legal professional privilege. This exception came up in *Shannon v Shannon*.⁷⁶⁸ It applies when a privilege holder raises an issue in litigation that is “incapable of fair resolution” without reference to the privileged material.⁷⁶⁹ The Court of Appeal followed its earlier decision in *Ophthalmological Society of New Zealand v Commerce Commission*⁷⁷⁰ and refused to adopt the putting in issue exception, preferring to preserve the sanctity of legal professional privilege.⁷⁷¹
- 10.167 The Court of Appeal in *Shannon* considered whether the Law Commission’s proposed s 69 in the Evidence Code was recommending the adoption of a putting in issue exception in New Zealand. It examined the commentary to the Evidence Code and concluded that it appeared not to be. It noted that the Law Commission had referred to putting the privileged communication in issue, which is not the same thing as putting a matter in issue which cannot fairly be assessed without reference to the privileged material.⁷⁷² The Court concluded that:⁷⁷³
- Whatever the extent of the “putting in issue” exception recommended by the Law Commission, its introduction is best left to Parliament. The policy issues can be fully canvassed in that forum.
- 10.168 Despite the fact that *Ophthalmological Society of New Zealand* and *Shannon* were both decided prior to the enactment of the 2006 Act, the High Court has subsequently applied these decisions in interpreting the possible scope of s 65(3)(a).⁷⁷⁴

768 *Shannon v Shannon* [2005] 3 NZLR 757 (CA).

769 At [34].

770 *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145.

771 *Shannon*, above n 768, at [38]–[39].

772 At [47].

773 At [49].

774 See for example, *Shuttle Petroleum Distribution Ltd v Chevron New Zealand* HC Wellington CIV-2007-485-831, 5 September 2008; *Body Corporate No 191561 v Argent House Ltd* HC Auckland CIV-2007-404-4634, 19 December 2008; *Houghton v Saunders* HC Christchurch CIV-2008-409-000348, 24 July 2009; *S v W* HC Auckland CIV-2011-404-3775, 13 July 2012; and *Guttenbeil v Tower Insurance* [2012] NZHC 2106.

10.169 The leading case on s 65(3)(a) post-Evidence Act is *Astrazeneca Ltd v Commerce Commission* (2008) 12 TCLR 116 (HC). The Court in that case noted that the Court in *Shannon* had described two versions of the putting in issue exception, namely:⁷⁷⁵

- The wide version whereby privilege is lost once the privileged communication forms a legitimate and reasonable issue in the litigation. The focus is on the nature of the case, the issues raised by it, and whether the privileged communication is directly relevant to an issue in the proceeding.
- The narrower version, which is based in the conduct of the party claiming privilege. If that party asserts reliance on the privileged communication, such that examination of the relevant advice becomes necessary to assess the claimed reliance, then waiver of privilege would result.

10.170 The Court went onto to say:⁷⁷⁶

... the judgments in *Ophthalmological Society* and *Shannon* indicate where the boundaries of s 65(3)(a) lie. While the former espouses a test based on the Court's objective judgment as to the consistency of the claimant's conduct with maintaining the privilege, the discussion in *Shannon* elucidates the principles which underpin that test. The mere relevance of a privileged communication to an issue in the case provides no basis for waiver. Even a party's asserted reliance upon a privileged communication is generally insufficient. *Waiver occurs where a party both asserts reliance upon the communication and also seeks to inject the substance of the communication in evidence.*

10.171 Focusing on the last sentence of this passage, it might be thought that the kind of situation that would be covered by s 65(3)(a) is where, for example, a party to a proceeding asserts the fact of reliance on legal advice as a defence to a matter in issue in the proceeding. However, in *Shuttle Petroleum Distribution Ltd v Chevron New Zealand* in the context of discussing s 65(2), Dobson J referred to:⁷⁷⁷

The classic situation is where a party resisting an application for security for costs, or defending an allegation of illegality, refers to and relies on legal advice, either about the strength of the plaintiff's case in the first instance, or as justifying the lawfulness of the conduct, in the second case.

10.172 In order to achieve this result it seems that Dobson J must have seen a reference to the existence of legal advice supporting or justifying the person's position as a "disclosure" in terms of s 65(2). If s 65(3)(a) does not cover this kind of case, it is difficult to see what it would cover.

⁷⁷⁵ *Astrazeneca Ltd v Commerce Commission* (2008) 12 TCLR 116 (HC) at [31]–[39].

⁷⁷⁶ At [39] (emphasis added).

⁷⁷⁷ *Shuttle Petroleum Distribution Ltd v Chevron New Zealand*, above n 774, at [62].

- 10.173 As for what the Law Commission actually intended when it included s 65(3), Richard Mahoney is right that the discussions are indeed sparse.⁷⁷⁸ In its preliminary paper on privilege, the Law Commission noted:⁷⁷⁹

Under the present law, all of this information is protected, unless the client unwisely makes reference to the advice received from the lawyer, or otherwise puts the existence or terms of that advice in issue. But what is a reference to that advice? In Australia, a finding of waiver has been made upon the basis of very slight, or merely implicit, reference to the communication between lawyer and client. ... Such decisions have introduced considerable uncertainty about the scope of the client's protection. They are perhaps inspired by a concern that the law of privilege would otherwise protect too much, in circumstances where it is important to the court to have the information.

The Commission considers that the problem should be tackled more directly. There are cases where the privilege ought, in the interests of fairness, to be overridden. These situations should be approached on their merits, not indirectly by invoking the doctrine of waiver.

- 10.174 This passage might be seen as a clear signal that the Law Commission did not favour a wholesale adoption of the Australian “putting in issue” approach to waiver. However, it has to be viewed in the context of the Law Commission's view of legal professional privilege at that time, which was that it should be a qualified privilege. Such an approach would mean that a narrower approach to waiver could be adopted. As discussed earlier in this report, the Law Commission subsequently retreated from this view and recommended an absolute privilege.
- 10.175 The Law Commission went on to note that communications between lawyer and client relating to general legal advice will only infrequently become relevant to court proceedings. Even then, it will be a small minority of cases where the importance of the communication is sufficient to override privilege.⁷⁸⁰
- 10.176 The commentary to the Evidence Code as it relates to the predecessor to s 65(3) is particularly bare. The commentary simply notes as an example, people who sue their lawyer for malpractice cannot rely on legal professional privilege to prevent disclosure of communications between them that are relevant to defending the claim.⁷⁸¹ There is no signal anywhere in the final report to suggest that the Law Commission was recommending a departure from the approach of the New Zealand courts at that time. For this reason, the Court of Appeal's view of what the Law Commission intended is probably an accurate view.

778 Mahoney and others, above n 666, at 301.

779 Law Commission *Privilege*, above n 608, at 48–49.

780 At 49.

781 Law Commission *Evidence: Volume 2*, above n 616, at 181.

- 10.177 Accordingly, a curious situation has arisen. The Law Commission's proposed provision on waiver has been enacted and the courts have interpreted the provision as not intended to alter the state of the law in New Zealand. However, that provision can have no meaning separate from the other bases for waiver covered in s 65 unless a change to the common law position was intended.
- 10.178 For our part, while we consider that Richard Mahoney is probably correct and s 65(3)(a) has been effectively interpreted out of existence, we received no submissions on this and certainly no one appears to be saying that the balance currently struck between the maintenance of privilege and the interests promoted by legal professional privilege, and the interests of justice, is the wrong one. For this reason, we do not recommend any change to this provision.

An "authorised person"

- 10.179 Commentators on the Act have said that it gives mixed messages about whether an "authorised representative" of a privilege holder can effectively waive privilege.
- 10.180 Prior to the Act, the basic rule was that only the privilege holder could waive privilege.⁷⁸² Section 51 (the interpretation provision for the privilege subpart of the Act) extends the grant of privilege to communications involving the privilege holder's "authorised representative", acting on behalf of that person.⁷⁸³ Section 65(2) (dealing with implied waiver of privilege) also refers to anyone who acts "with the authority" of the privilege holder. However, there is no other reference to "authorised person" elsewhere in s 65. Section 65(1) (setting out the general rule regarding waiver) refers only to a privilege holder being able to waive the privilege.
- 10.181 The problem has been stated as follows:⁷⁸⁴

It is difficult to know what conclusion should be drawn from the sudden specific reference to an authorised representative in s 65(2). On one hand, it appears to confirm the ... suggestion that s 51(4) was *not* meant to apply to s 65 (or else, why would this particular part of s 65(2) be necessary?). On the other hand, it seems questionable that the mere *absence* in s 65(1) and 65(3) of a specific reference to an authorised representative means that conduct by a person, acting *with the privilege holder's express authority*, can never (in the circumstances covered by ss 65(1) or 65(3)) amount to a waiver.

- 10.182 While these inconsistencies in drafting are unfortunate, we are not aware of any difficulties in practice regarding waiver and authorised representatives. We consider that it is likely that s 65(3) would be interpreted as including the

782 Mahoney and others, above n 666, at [EV65.03]. *Shannon*, above n 768, at [60] citing *B v Auckland District Law Society* [2003] UKPC 38, [2002] 1 NZLR 326 (PC) at [45].

783 Evidence Act 2006, s 51(4).

784 Mahoney and others, above n 666, at [EV65.03] (original emphasis).

conduct of authorised representatives acting on behalf of the privilege holder. After all, the majority of legal proceedings are instituted by lawyers acting as the authorised representative of the plaintiff / applicant.

- 10.183 In the absence of specific problems, we prefer at this time to make no recommendation for amendment to the privilege provisions relating to authorised representatives.

Joint and successive interests

- 10.184 Section 66 of the Act provides:

66 Joint and successive interests in privileged material

- (1) A person who jointly with some other person or persons has a privilege conferred by any of sections 54 to 60 and 64 in respect of a communication, information, opinion, or document—
 - (a) is entitled to assert the privilege against third parties; and
 - (b) is not restricted by any of sections 54 to 60 and 64 from access or seeking access to the privileged matter; and
 - (c) may, on the application of a person who has a legitimate interest in maintaining the privilege (including another holder of the privilege), be ordered by a Judge not to disclose the privileged matter in a proceeding.
 - (2) If a person has a privilege conferred by any of sections 54 to 57 in respect of a communication, information, opinion, or document, the personal representative of the person or other successor in title to property of the person—
 - (a) is entitled to assert the privilege against third parties; and
 - (b) is not restricted by any of sections 54 to 60 and 64 from access or seeking access to the privileged matter.
 - (3) However, subsection (2) applies only to the extent that a Judge is satisfied that the personal representative or other successor in title to property has a justifiable interest in maintaining the privilege in respect of the communication, information, opinion, or document.
 - (4) A personal representative of a deceased person who has a privilege conferred by any of sections 54 to 57 in respect of a communication, information, opinion, or document and any other successor in title to property of a person who has such a privilege, may, on the application of a person who has a legitimate interest in maintaining the privilege (including another holder of the privilege), be ordered by a Judge not to disclose the privileged matter in a proceeding.
- 10.185 A drafting issue has been raised in relation to s 66. That is a question as to whether the word “deceased” was omitted from s 66(2)–(3) deliberately. Section 66(2)–(3) uses “personal representative” without restricting it to deceased persons to cover other personal representatives (for example, someone appointed under the Protection of Personal and Property Rights Act 1988), whereas the definition in s 66(4) is a narrower one, referring to a “personal representative of a dead person”.

10.186 It has been said that there:⁷⁸⁵

... could be a foundation for an argument ss 66(2) and (3) were dealing with a wider class of personal representatives. Yet, if this is so, the result is an undesirable uncertainty. With no guidance from the Act, a vast field opens up for people who may legitimately be described as the “personal representatives” of other people.

10.187 The difference in language might be because in the circumstances the latter subsection deals with, there could be a conflict between the interests of a deceased privilege holder and the interests of beneficiaries.

10.188 Alternatively, commentators have suggested that it is likely that this issue arises due to a simple drafting error. They note that the Law Commission’s proposed Evidence Code used the phrase “personal representative of a deceased person” consistently throughout their version of s 66.⁷⁸⁶ The clause by clause analysis of the Bill as introduced also refers to “personal representatives of deceased privilege holders” which seems to indicate that the Government did not intend to depart from the Law Commission’s approach.⁷⁸⁷ There is also nothing in the report of the Select Committee or in the parliamentary debates to suggest any legislative intent to change the original policy.

10.189 We tend to agree that this appears to be a simple drafting issue caused by the omission of the term “of a deceased person” from s 66(2). While this does not appear to have caused problems to date, we note that it does introduce potential uncertainty as to the scope of s 66(2) and accordingly, recommend an amendment to clarify the Law Commission’s intent that s 66(2) apply to personal representatives of deceased persons.

R28 We recommend that “deceased” should be added after “personal representative of the” in s 66(2)

785 Mahoney and others, above n 666, at 307.

786 At 307. See also Law Commission *Evidence: Volume 2*, above n 616, at 182.

787 Evidence Bill 2005 (256-1) (explanatory note) at 16.

Chapter 11

Trial process (Part 3 of the Act)

INTRODUCTION

- 11.1 This chapter considers issues raised about Part 3 of the Act pertaining to the trial process. The issues are generally considered sequentially with the exception of issues about “vulnerable witnesses” which involve consideration of various provisions in the Act and associated regulations. These have been bundled together as they are conceptually linked, and to avoid unnecessary repetition of the underlying concerns and principles.

ELIGIBILITY AND OATHS AND AFFIRMATIONS

Eligibility

- 11.2 Section 71 of the Act sets out the general rule that any person is eligible to give evidence, and that any person eligible to give evidence is also compellable to give evidence. Subsequent provisions set out limited exceptions to this rule for judges, jurors and counsel in cases they are involved in,⁷⁸⁸ defendants and co-defendants,⁷⁸⁹ Sovereigns, Heads of State and judges acting in their judicial capacity,⁷⁹⁰ and bank officers.⁷⁹¹
- 11.3 This rule of general eligibility and compellability replaced the former concept of “competence” which involved an assessment of a witness’s level of intelligence and ability to understand the meaning and implications of

788 Evidence Act 2006, s 72.

789 Evidence Act 2006, s 73.

790 Evidence Act 2006, s 74.

791 Evidence Act 2006, s 75.

promising to tell the truth.⁷⁹² The Law Commission's recommendation to abolish the competence requirement was consistent with the general policy of its proposed Evidence Code to increase the amount of relevant evidence available to the fact-finder.⁷⁹³ The Law Commission proposed that any testimony that would be unhelpful because of incoherence or insuperable communication difficulties would be ruled inadmissible under s 8, and rejected the suggestion of retaining a residual discretion for a judge to rule on a witness's competency.⁷⁹⁴

- 11.4 A number of submitters have questioned whether infants and persons with severe mental impairment should be eligible to be a witness.
- 11.5 We remain of the view that a rule of universal eligibility is desirable. If a person has evidence that is relevant and probative, that evidence should be available to the fact-finder through that person giving evidence as a witness. Any issues as to the quality of the evidence can be determined by s 8. This ensures that decisions on admissibility are properly focused on the quality of the evidence, rather than the quality of the witness. Other provisions in the Act (such as alternative ways of giving evidence⁷⁹⁵ and communication assistance⁷⁹⁶) are available to enhance the quality of the witness's evidence.

Oaths and affirmations

- 11.6 We have been asked by the Ministry of Justice to consider the relationship between the requirement that a witness take an oath or make an affirmation before giving evidence (s 77(1) of the Act) and the requirement that a witness on a video record interview make a "promise to tell the truth" in an evidential video record (reg 8(c) of the Evidence Regulations 2007). These provisions relevantly provide:

77 Witnesses to give evidence on oath or affirmation

- (1) A witness in a proceeding who is of or over the age of 12 years *must take an oath or make an affirmation* before giving evidence.
- (2) A witness in a proceeding who is under the age of 12 years—
 - (a) must be informed by the Judge of the importance of telling the truth and not telling lies; and
 - (b) must, after being given that information, make a promise to tell the truth, before giving evidence.

792 Donald Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVAPart3Subpart1.1] and Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at 89.

793 Law Commission *Evidence: Volume 1*, above n 792, at 89.

794 At 89–90.

795 Evidence Act 2006, s 105.

796 Evidence Act 2006, s 80.

- (3) Evidence given by a witness to whom subsection (2) applies must be treated in the same manner as if that evidence had been given on oath.
- (4) Despite subsections (1) and (2), a witness—
 - (a) to whom either of those subsections applies may give evidence without taking an oath, or making an affirmation, or making a promise to tell the truth, with the permission of the Judge; and
 - (b) if the Judge gives permission under paragraph (a), must be informed by the Judge of the importance of telling the truth and not telling lies, before the witness gives evidence; and
 - (c) after being given the information referred to in paragraph (b), may give evidence which must be treated in the same manner as if that evidence had been given on oath.

8 What must be on video record

A video record of an interview must show the following:

...

- (c) subject to any contrary direction by a Judge, in the case of a witness who is of or over the age of 12 years, that person *making a promise to tell the truth* (in any form, provided the overall effect is a promise to tell the truth); and
- (d) in the case of a witness who is under the age of 12 years,—
 - (i) the interviewer informing the witness of the importance of telling the truth and not telling lies; and
 - (ii) subject to any contrary direction by a Judge, the witness making a promise to tell the truth (in any form, provided the overall effect is a promise to tell the truth); and

...

[emphasis added]

11.7 The issue was first mentioned by Judge Burns, who noted in obiter that:⁷⁹⁷

Regulation 8(c) as it now appears is inconsistent with s.77 of the Evidence Act 2006, in so far as it envisages the possibility of a witness over the age of 12 being able to give evidence at a trial having only made a promise to tell the truth

11.8 However, an evidential video record forms part of the witness's evidence-in-chief. It will only be adduced in evidence once the witness is on the stand and has taken the oath or affirmation as per s 77 of the Act. Regulation 8(c) therefore does not envisage a witness over the age of 12 being able to give evidence after only having made a promise to tell the truth in contravention of s 77(1) (unless the judge gives permission under subs (4)). This approach

⁷⁹⁷ *Police v Stevenson* DC Waitakere CRN-0809-003-987 to 991, 26 November 2008 at [89].

has been confirmed by the Court of Appeal.⁷⁹⁸ We have considered whether it is desirable to amend the Regulations to require an oath or affirmation to be administered at the outset. However, there would be very real practical difficulties in requiring a person who was able to administer an oath or affirmation to be present every time the police interviewed a victim or witness via video record. We therefore recommend no amendment.

QUESTIONING OF WITNESSES

Ordinary way of giving evidence

- 11.9 The principle of orality, which provides that witnesses should generally give evidence orally in court, has long been a tradition in New Zealand.⁷⁹⁹ The Law Commission's Evidence Code reflected this principle by providing that the ordinary way of giving evidence should continue to be that of witnesses testifying in court.⁸⁰⁰ In doing so, the Law Commission noted that this was not intended to "preclude or discourage the convenient practice, particularly in civil proceedings, of accepting evidence in written form with the parties' consent".⁸⁰¹
- 11.10 The Evidence Bill reproduced the equivalent provision in the Evidence Code, but also expressly provided for the use of written statements and affidavit evidence where the parties consent, and, in civil proceedings, if permitted or required by rules of court.⁸⁰² The Select Committee subsequently added a proviso that the affidavit or written statement must also be the personal statement of the maker, and not contain otherwise inadmissible statements.⁸⁰³
- 11.11 As enacted, s 83 of the Act provides:

83 Ordinary way of giving evidence

- (1) The ordinary way for a witness to give evidence is,—
- (a) in a criminal or civil proceeding, orally in a courtroom in the presence of—
- (i) the Judge or, if there is a jury, the Judge and jury; and
 - (ii) the parties to the proceeding and their counsel; and
 - (iii) any member of the public who wishes to be present, unless excluded by order of the Judge; or

798 *R v Jellyman* [2009] NZCA 532 at [39] (leave to appeal to the Supreme Court dismissed in [2010] NZSC 21) and *Blagojevich v R* [2011] NZCA 217 at [21].

799 Mathieson (ed) *Cross on Evidence*, above n 792, at [EVA83.5].

800 Law Commission *Evidence: Volume 2 – Evidence Code and Commentary* (NZLC R55, 1999) at 204.

801 At 205.

802 Evidence Bill 2005 (256-1), cl 79.

803 Evidence Bill 2005 (256-2), cl 79(2).

- (b) in a criminal proceeding, in an affidavit filed in the court or by reading a written statement in a courtroom, if both the prosecution and the defendant consent to the giving of evidence in this form; or
 - (c) in a civil proceeding, in an affidavit filed in the court or by reading a written statement in a courtroom, if—
 - (i) rules of court permit or require the giving of evidence in this form; or
 - (ii) both parties consent to the giving of evidence in this form.
- (2) An affidavit or a written statement referred to in subsection (1)(b) or (c) may be given in evidence only if it—
- (a) is the personal statement of the deponent or maker; and
 - (b) does not contain a statement that is otherwise inadmissible under this Act.

11.12 The Ministry of Justice has queried whether the ability to give evidence via affidavit or written statement where the rules of court so permit or require should be extended to criminal trials. A related issue is a possible inconsistency between s 83(1)(b) and r 12BA of the Court of Appeal (Criminal) Rules 2001.

11.13 Rules of court may be made under s 51C of the Judicature Act 1908 by the Governor-General in Council, with the concurrence of the Chief Justice and two or more members of the Rules Committee.⁸⁰⁴ The Evidence Bill as introduced provided that rules of court could permit or require evidence to be given by way of written statement or affidavit in civil, but not criminal, proceedings.⁸⁰⁵ It is likely that this decision was made, at least in part, because of fair trial concerns that take on particular importance in criminal trials. For instance, the ability of rules of court to require evidence to be given by way of affidavit could impact on a defendant's fair trial rights in the New Zealand Bill of Rights Act 1990, such as the right to examine witnesses for the prosecution under s 25(f).

11.14 We have considered whether it is desirable to amend s 83(1)(b) so it is consistent with s 83(1)(c). However, we have concluded that the principle of orality in criminal proceedings is an important one; it allows a defendant to fully test a witness's evidence by cross-examining them on it and provides the fact-finder with the opportunity to assess first-hand the credibility and veracity of the witness giving evidence.⁸⁰⁶ While in no way doubting that the Chief Justice and Rules Committee can be safely entrusted with safeguarding defendants' fair trial rights in making rules of court relating to when evidence

804 The Rules Committee was established under s 51B of the Judicature Act 1908 and comprises the Chief Justice, Chief High Court Judge, 2 other Judges of the High Court, Chief District Court Judge, Attorney-General, Solicitor-General, Chief Executive of the Ministry of Justice, 2 barristers and solicitors as nominated by the New Zealand Law Society and approved by the Chief Justice.

805 Evidence Bill 2005 (256-1), cl 79.

806 Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Brookers, Wellington, 2010) at 348.

may be given by way of affidavit, we are unconvinced that it would be appropriate for such a fundamental change to be effected through secondary legislation. This is consistent with the Select Committee's view discussed above at paragraph 8.7 that the matters contained in the Bill should be dealt with in statute rather than secondary legislation.

- 11.15 Turning to the relationship between s 83 and the Court of Appeal (Criminal) Rules 2001, r 12BA provides that a party served with an affidavit in an appeal based on r 12A (complaint against trial counsel) or r 12B (fresh evidence) is deemed to have consented to the deponent giving his or her evidence by way of affidavit, unless they have filed an oral evidence notice requiring the deponent to give his or her evidence orally. In other words, silence is treated as consent for evidence to be given by way of affidavit for appeals under rr 12A and 12B.
- 11.16 We are not persuaded that r 12BA of the Court of Appeal (Criminal) Rules 2001 and s 83 of the Act are necessarily inconsistent. Section 83(1)(b) provides that evidence may be given by way of affidavit where the prosecution and defence consent. Rule 12BA sets out how consent can be determined for certain appeals. This elucidation of consent is an appropriate matter for the Rules and consistent with s 83 itself. However, if clarification of the interrelationship is considered desirable, we believe that the appropriate means to achieve this would be through amending the Rules, rather than the Act itself.

Intimidating or overbearing questioning

11.17 Section 85 provides:

85 Unacceptable questions

- (1) In any proceeding, the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.
- (2) Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to—
 - (a) the age or maturity of the witness; and
 - (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and
 - (c) the linguistic or cultural background or religious beliefs of the witness; and
 - (d) the nature of the proceeding; and
 - (e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

- 11.18 The Law Commission’s draft Evidence Code included the term “intimidating” in the list of grounds on which a judge may disallow a question.⁸⁰⁷ However, this word was removed by the Select Committee for the following reasons:⁸⁰⁸

We consider that this should not be grounds for the Judge to disallow a question. There are other definitions of unacceptable questioning which protect the interests of the witness, and we consider that grounds to disallow a question because it is intimidating could lead to the loss of relevant information. Many legitimate lines of cross examination will be intimidating to some witnesses and we consider that the other protections in clause 81 are sufficient to guide the Judge when deciding whether a question is unacceptable.

- 11.19 McDonald and Tinsley have recommended that the Evidence Act should be amended to include a provision that the judge may disallow a question if asked in a way that is unduly intimidating or overbearing, by taking into account the matters in s 85(2).⁸⁰⁹ They noted calls for greater judicial management of inappropriate cross-examination, and considered such a change may assist such judicial control.⁸¹⁰ They observed that this amendment ought to be a separate section, since the inquiry into the extent to which a question may “intimidate” is focused on the person asking the question:⁸¹¹

However, the inquiry as to the extent to which a question may “intimidate” the witness is arguably focused on a different inquiry to the other aspects of s 85, as it is likely to be about the manner or behaviour of the person asking the question, rather than the substance or content of the question itself. A proper question may be asked in an intimidating way; such a question should still be able to be asked but in a different manner.

- 11.20 The approach we have taken in this review has been to avoid revisiting policy decisions made by Parliament throughout the legislative process, which points away from the inclusion of a reference to “intimidating” questioning, since the Select Committee has previously thought fit to remove this wording. Arguably McDonald and Tinsley’s proposal differs slightly from the original format of the provision, in that it is recommending a separate section focused on the manner in which the question is asked rather than its content. That said, the Law Commission’s intent with s 85 was to allow both to be addressed: “It gives the judge a wide discretion to control the nature of the questions *and the manner in which they are put.*”⁸¹²

807 Law Commission, *Evidence: Volume 2*, above n 800, at 208.

808 Evidence Bill 2005 (256-2) (select committee report) at 10.

809 Elisabeth McDonald and Yvette Tinsley “Evidence Issues” in Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 317.

810 At 317.

811 At 317.

812 Law Commission, *Evidence: Volume 2*, above n 800, at 209 (emphasis added).

- 11.21 The Court of Appeal considered the application of s 85 in *M v R* regarding the prosecution questioning of a defence expert.⁸¹³ The Court considered that the questioning did not fall foul of s 85:⁸¹⁴

The questions did not repeat themselves or dwell on any salacious points in an emotive manner. The questions were short, to the point and were aimed at attempting to establish a lack of objectivity ... the questions had a legitimate purpose and cannot be said to have been calculated simply to humiliate, belittle or break the witness.

- 11.22 This assessment seems to indicate some consideration of the way in which the questions were asked as well as their substance.
- 11.23 While we would not have any major objection to the inclusion of a reference to “overly intimidating” or “overbearing”, we are not convinced that it would add much to the section. A question may be intimidating but appropriate. In contrast, a question that is overly intimidating is by definition “improper” or “unfair” and therefore already covered by s 85. Accordingly, we do not recommend change in this area.

Use of documents in questioning witnesses or refreshing memory

- 11.24 A number of submitters have raised concerns about s 90, which provides:

90 Use of documents in questioning witness or refreshing memory

- (1) A party must not, for the purpose of questioning a witness in a proceeding, use a document that has been excluded under section 29 or 30.
- (2) A witness must not consult a document that has been excluded under section 29 or 30 while giving evidence.
- (3) If when questioning a witness a party proposes to use a document or to show a document to the witness, that document must be shown to every other party to the proceeding.
- (4) If a witness proposes to consult a document while giving evidence,—
 - (a) that document must be shown to every other party to the proceeding; and
 - (b) that document may not be consulted by that witness—
 - (i) without the prior leave of the Judge or the consent of the other parties; or
 - (ii) if the purpose of consulting that document is to refresh his or her memory while giving evidence, except in accordance with subsection (5).
- (5) For the purposes of refreshing his or her memory while giving evidence, a witness may, with the prior leave of the Judge, consult a document made or adopted at a time when his or her memory was fresh.
- (6) Subsection (5) is subject to subsection (2).

813 *M v R* [2011] NZCA 84 at [32]–[34].

814 At [34].

Use of documents in questioning witnesses

- 11.25 The Law Commission's final report on its Evidence Code noted authorities that allowed inadmissible documents to be used when examining a witness, generally to refresh a witness's memory.⁸¹⁵ The rationale for allowing such evidence seemed to be that "the actual evidence is the witness's oral testimony, and the fact-finder never sees the inadmissible document."⁸¹⁶ The Law Commission found this practice "difficult to support" and noted that most commentators agreed with its proposal that inadmissible statements should never be used for the purpose of examining a witness.⁸¹⁷ The Evidence Bill as introduced reflected the equivalent provision in the Evidence Code which prevented a party from using any "inadmissible written statement" when questioning a witness.⁸¹⁸
- 11.26 The Select Committee recommended two changes to this provision: expanding "written statements" to "documents"; and limiting the prohibition to documents that had been excluded under the oppression and unfairly obtained evidence provisions, rather than all inadmissible evidence.⁸¹⁹ The Select Committee report did not provide detailed explanations for this amendment, merely saying that:⁸²⁰
- [W]e recommend that the clause be limited to documents that have not been excluded under clauses 25 and 26 rather than preventing the use of any "inadmissible document" for the purpose of questioning a witness or refreshing a witness' memory.
- 11.27 The Select Committee's rationale for making this amendment is not immediately evident. Arguably, the reason for which a document has been excluded under the Act would also act as a good reason for that document not to be used during questioning. However, it may have been the Select Committee's view that the dangers in using an excluded document during questioning are not as significant as the dangers involved in admitting that same document as evidence.
- 11.28 We note that the limitation on use is not extended to documents excluded under s 28, despite it being a companion section to ss 29 and 30. It may be that the s 90(1) limitation on use was not extended to s 28 because of the nature of the concern that section seeks to address. Section 28 is primarily concerned with reliability; ss 29 and 30 are more particularly concerned with the conduct of enforcement officers. Preventing the use of documents excluded under s 29 (oppression) or s 30 (unfairly obtained evidence) is important to ensure that the prosecution does not benefit from evidence

815 Law Commission *Evidence: Volume 1*, above n 792, at 105.

816 At 105.

817 At 105.

818 Evidence Bill 2005 (256-1), cl 86(1); Law Commission *Evidence: Volume 2*, above n 800, at 214.

819 Evidence Bill 2005 (256-2), cl 86.

820 Evidence Bill 2005 (256-2) (select committee report) at 10.

obtained by the police in an improper or unacceptable way. By way of contrast, it is arguably not as important to prevent the use of documents excluded under s 28 as a witness who is giving evidence under s 90 is able to have his or her credibility assessed by the fact-finder.

- 11.29 It has been argued that evidence arising out of questioning that uses a document that has been excluded under s 28 could be excluded under the general ground in s 8.⁸²¹ While this is possible, exclusion under s 8 would not be inevitable.⁸²² It seems anomalous for s 28 to be treated differently from ss 29 and 30, particularly as s 31 applies to evidence excluded under all three sections.⁸²³ Section 31 prevents the prosecution from relying on evidence offered by another party (generally a co-defendant) that the prosecution is prevented from offering because of ss 28–30.
- 11.30 Our view is that documents that have been excluded under s 28 should not be available for use in questioning under s 90. This will mean that the prohibition in s 90 will extend to all defendants' statements that have been excluded under ss 28–30 and ensure consistency with s 31.

R29 We recommend amending s 90 so that documents that have been excluded under s 28 are not available for use in questioning under s 90.

Relationship between section 31 and section 90

- 11.31 Sections 28–30 only prevent the *prosecution* from offering defendant's statements in the outlined circumstances; they do not prevent a *co-defendant* from doing so. A co-defendant may offer a defendant's statement that the prosecution cannot offer because of ss 28–30, provided that it is not inadmissible for any other reason (for example hearsay or previous consistent statements). Section 31 ensures that if this occurs, the prosecution cannot ride on the co-defendant's coat-tails to use the evidence against the defendant:

31 Prosecution may not rely on certain evidence offered by other parties

Evidence that is liable to be excluded if offered by the prosecution in a criminal proceeding because of section 28 or 29 or 30 may not be relied on by the prosecution if that evidence is offered by any other party

- 11.32 Commentators and submitters have pointed out that a co-defendant seeking to offer a defendant's statement in evidence may seek to "use" it when questioning a witness and that s 90(1) may prevent them from doing so. This relates to the status of evidence in joint trials, which is discussed above at paragraph 3.100. Although a joint trial involves defendants being tried

821 Grant Burston and Saeeda Verrall "Questioning of Witnesses" (paper presented to New Zealand Law Society Evidence Act 2006 Intensive Conference, June 2007) 115 at 121.

822 Mahoney and others, above n 806, at 370.

823 See generally Burston and Verrall "Questioning of Witnesses", above n 821, at 121.

together, the fact-finder is nevertheless required to consider the evidence against each defendant independently. Evidence that is admissible in relation to one defendant in a joint trial is not necessarily admissible against a co-defendant. A corollary of this is that evidence that has been excluded in relation to one defendant is not necessarily excluded in relation to all defendants so as to engage the prohibition in s 90.

- 11.33 As we are not aware of the relationship between s 31 and s 90 causing problems in practice, we suggest no amendment but recommend that the relationship of these provisions continue to be monitored.

R30 We recommend that the interrelationship between ss 31 and 90 be kept under review with any problems identified to be considered at the next five year review.

Editing of inadmissible statements

- 11.34 Section 91 provides:

91 Editing of inadmissible statements

- (1) If a statement is determined by the Judge to be inadmissible in part in a proceeding, a party who wishes to use an admissible part of the statement may, subject to the direction of the Judge, edit the statement by excluding any part of it that is inadmissible.
- (2) A party may not edit a statement under subsection (1) unless, in the opinion of the Judge, the inadmissible parts of the statement can be excluded without obscuring or confusing the meaning of the admissible part of the statement.

- 11.35 The New Zealand Law Society submitted that s 91(2) should allow editing of statements by agreement of counsel without the judge being involved.

- 11.36 Section 9 of the Act is a general provision that allows the admission of evidence where parties agree:

9 Admission by agreement

- (1) In any proceeding, the Judge may,—
 - (a) with the written or oral agreement of all parties, admit evidence that is not otherwise admissible; and
 - (b) admit evidence offered in any form or way agreed by all parties.
- (2) In a criminal proceeding, a defendant may admit any fact alleged against that defendant so as to dispense with proof of that fact.
- (3) In a criminal proceeding, the prosecution may admit any fact so as to dispense with proof of that fact.

- 11.37 This section adequately covers the situation where counsel agree as to how a statement should be edited.

Hostile witnesses

11.38 Section 94 provides:

94 Cross-examination by party of own witness

In any proceeding, the party who calls a witness may, if the Judge determines that the witness is hostile and gives permission, cross-examine the witness to the extent authorised by the Judge.

11.39 Hostile is defined in s 4:

hostile, in relation to a witness, means that the witness—

- (a) exhibits, or appears to exhibit, a lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge; or
- (b) gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness; or
- (c) refuses to answer questions or deliberately withholds evidence

Circumstances in which a previous inconsistent statement can be excluded

11.40 A previous inconsistent statement by a witness is not hearsay (because the person making the statement is a witness) and is therefore not subject to the hearsay rules. Nor is such a statement subject to the previous consistent statement rule in s 35. There is therefore no specific restriction on the admissibility of a prior inconsistent statement of a witness.⁸²⁴

11.41 The Supreme Court set out the approach to previous statements of hostile witnesses in *Morgan v R*.⁸²⁵ The majority held that a previous statement of a witness who has been declared hostile may be put to that witness without offending the rule against hearsay.⁸²⁶ The majority noted that exclusion of a statement is still subject to the overriding discretion under s 8.⁸²⁷

Now that a hostile witness's previous statement is evidence of the truth of the matters stated therein, even if it is not adopted by the witness, the Judge must be satisfied that leading evidence based on the statement, or its production, will not have an unfairly prejudicial effect on the proceeding.

11.42 The Court of Appeal has also noted that the admissibility of a hostile witness's previous inconsistent statements "turns on the application for three new

824 *Singh v R* [2010] NZCA 144 at [7].

825 *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508.

826 At [36].

827 At [40].

sections of which the most important are ss 7 and 8”.⁸²⁸ The third section is s 94.⁸²⁹

- 11.43 It has been suggested to us that s 94 could set out the circumstances in which the prior inconsistent statements of a hostile witness should be excluded, rather than relying on the general provision in s 8.⁸³⁰ The basis of this concern seems to be that such statements are not subject to normal cross-examination as it is the party calling the witness who puts the previous inconsistent statement to them. As set out in *Morgan v R*:⁸³¹

Issues of fairness may arise when a witness is expected to be hostile and is called for the purpose of getting the unsworn statement before the jury. Unfairness may be present or exacerbated if the hostility of the witness results in the accused being unable sensibly to cross-examine on the statement.

- 11.44 The Supreme Court expressly stated that “Trial judges should be particularly vigilant in the case of a hostile witness to ensure that the evidence of the witness does not require exclusion under s 8”.⁸³² Trial judges are therefore required to be alert to the risk of prejudice under s 8 in relation to hostile witnesses. We are not convinced that previous inconsistent statements of hostile witnesses are of a nature that requires a specific test for admission. The general balancing exercise in s 8 seems to us to be adequate to deal with this issue.

Scope to cross-examine non-hostile witnesses

- 11.45 A firm holding a Crown Solicitor warrant has queried whether the Act provides sufficient scope to cross-examine one’s own witnesses who fail to come up to brief. The examples provided were witnesses who downplay their account or fail to come up to brief because they are honestly mistaken.
- 11.46 The law has long distinguished between questions that are permitted in cross-examination as opposed to examination-in-chief and re-examination, as well as between hostile and merely unfavourable witnesses.⁸³³ These distinctions have been carried over into the Act. Thus, s 89 contains a general prohibition on counsel putting leading questions to a witness in examination-in-chief and re-examination (with some limited exceptions), while no such general prohibition applies to cross-examination.

828 *Singh v R*, above n 824, at [8].

829 At [10].

830 Letter from Scott Optican (University of Auckland) to Warren Young (Law Commissioner) regarding 2011/2012 Review of the Evidence Act 2006 – Areas for Consideration (Document Drafted by Law Commission) (14 December 2011).

831 *Morgan v R*, above n 825, at [40].

832 At [40].

833 See generally Mathieson (ed) *Cross on Evidence*, above n 792, at [EVAPart3Subpart4.1] and Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at [ED11.04].

11.47 The prohibition reflects the differing purposes of examination-in-chief and cross-examination. Examination-in-chief seeks to elicit the witness's evidence; the general view is that this is best achieved through the witness giving their evidence in their own words (rather than merely agreeing with examining counsel's propositions) in court. Cross-examination, on the other hand, involves challenging a witness's evidence. Leading questions provide a tool to do so.

11.48 Section 89 provides:

89 Leading questions in examination in chief and re-examination

- (1) In any proceeding, a leading question must not be put to a witness in examination in chief or re-examination unless—
 - (a) the question relates to introductory or undisputed matters; or
 - (b) the question is put with the consent of all other parties; or
 - (c) the Judge, in exercise of the Judge's discretion, allows the question.
- (2) Subsection (1) does not prevent a Judge, if permitted by rules of court, from allowing a written statement or report of a witness to be tendered or treated as the evidence in chief of that person.

11.49 Both pre-Act common law⁸³⁴ and the Act⁸³⁵ provide that a witness, deemed "hostile" by a judge, may be cross-examined by the party who called him or her. This allows the party to put leading questions, which may relate to a previous inconsistent statement, to the witness. This does not extend to witnesses who are not declared hostile.

11.50 This means that the following options are available to a party if a witness they have called gives unfavourable evidence, or evidence that is not as favourable as the party expected:

- Seek to have the witness declared hostile under s 94. As set out above, a previous inconsistent statement is then admissible to prove the truth of its contents unless it is excluded under s 8.
- Request the judge to exercise their discretion to allow a leading question to be put to the witness under s 89(1)(c). We note that this is unlikely to be allowed in relation to matters that are a central issue in the case.⁸³⁶
- Seek the judge's leave for the witness to refresh their memory under s 90.⁸³⁷

834 Mathieson (ed) *Cross on Evidence*, above n 792, at [EVA94.7]

835 Evidence Act 2006, s 94.

836 *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23 at [58].

837 *R v Foreman (No 8)* HC Napier CIV-2006-041-1363, 28 April 2008.

- 11.51 Our view is that the provisions set out above provide an appropriate and principled basis for a party to question a witness they have called who fails to come up to brief. In addition to the above, a party may adduce evidence that contradicts the witness's evidence, provided that the evidence does not offend against any other provision of the Act.⁸³⁸

Restrictions on cross-examination in person

- 11.52 Section 95 provides:

95 Restrictions on cross-examination by parties in person

- (1) A defendant in a criminal proceeding that is a sexual case or a proceeding concerning domestic violence or harassment is not entitled to personally cross-examine—
 - (a) a complainant;
 - (b) a child (other than a complainant) who is a witness, unless the Judge gives permission.
- (2) In a civil or criminal proceeding, a Judge may, on the application of a witness, or a party calling a witness, or on the Judge's own initiative, order that a party to the proceeding must not personally cross-examine the witness.
- (3) An order under subsection (2) may be made on 1 or more of the following grounds:
 - (a) the age or maturity of the witness;
 - (b) the physical, intellectual, psychological, or psychiatric impairment of the witness;
 - (c) the linguistic or cultural background or religious beliefs of the witness;
 - (d) the nature of the proceeding;
 - (e) the relationship of the witness to the unrepresented party;
 - (f) any other grounds likely to promote the purpose of the Act.
- (4) When considering whether or not to make an order under subsection (2), the Judge must have regard to—
 - (a) the need to ensure the fairness of the proceeding and, in a criminal proceeding, that the defendant has a fair trial; and
 - (b) the need to minimise the stress on the complainant or witness; and
 - (c) any other factor that is relevant to the just determination of the proceeding.
- (5) A defendant or party to a proceeding who, under this section, is precluded from personally cross-examining a witness may have his or her questions put to the witness by—
 - (a) a lawyer engaged by the defendant; or

838 Evidence Act 2006, s 37(4)(b).

- (b) if the defendant is unrepresented and fails or refuses to engage a lawyer for the purpose within a reasonable time specified by the Judge, a person appointed by the Judge for the purpose.
- (6) In respect of each such question, the Judge may—
 - (a) allow the question to be put to the witness; or
 - (b) require the question to be put to the witness in a form rephrased by the Judge; or
 - (c) refuse to allow the question to be put to the witness.
- (7) Subsection (1) overrides section 354 of the Crimes Act 196

Application of section 95(1) to civil proceedings

11.53 It is open to interpret s 95(1) in two ways:

- the restriction applies to criminal cases alleging sexual assault, domestic violence or harassment;
- the restriction applies to criminal cases alleging sexual assault, and any proceedings (both civil and criminal) that involve domestic violence or harassment.

11.54 The difference in these two approaches has particular relevance in the family context where, for example, an application for a protection order is a civil proceeding. Ronald Young J analysed s 95(1) in *FU v RU* and held that the first interpretation was correct.⁸³⁹ The equivalent subsection in the Law Commission’s draft Evidence Code was clear that it only applied to criminal proceedings.⁸⁴⁰ However, the drafting in the Bill as introduced differed from that proposed in the Evidence Code.⁸⁴¹ The Ministry of Justice’s departmental report on the Evidence Bill indicates that this was a conscious decision to extend the prohibition to civil cases involving domestic violence and harassment. The Ministry’s report provides that “[a]s well as criminal cases sub-clause (1) covers any proceeding concerning domestic violence”.⁸⁴²

11.55 This indicates that the ambiguity in drafting has led to s 95(1) being interpreted contrary to intention. For instance, subs (1) uses the terms “complainant” and “defendant” which are associated with criminal, rather than civil, proceedings.⁸⁴³ By way of example and contrast, the relevant actors in an application for a protection order are referred to as the applicant and respondent. Further, subs (2) is drafted in a manner that makes it clear it

839 *FU v RU* [2008] 1 NZLR 816 at [36].

840 Law Commission *Evidence: Volume 2*, above n 800, at 220.

841 Evidence Bill 2005 (256-1), cl 91(1).

842 Ministry of Justice *Departmental Report for the Justice and Electoral Committee: Evidence Bill: Part 3 – Trial Process* (May 2006) at 17.

843 *FU v RU*, above n 839, at [16].

applies to both civil and criminal proceedings, using the terms “party” and “witness”. There is therefore a question as to why subs (1) is not similarly unambiguously drafted.⁸⁴⁴

- 11.56 An amendment is therefore necessary to give effect to the intention behind the provision.

R31 We recommend amending s 95(1) so that it unambiguously applies to both civil and criminal proceedings involving domestic violence or harassment.

Complainants who wish to be cross-examined by the defendant in person

- 11.57 A submitter has commented to us that s 95(1) appears to be an absolute bar which may prevent a complainant from being cross-examined in person should they wish to be. The fact that the judge may permit personal cross-examination of a child witness, but not a complainant, does suggest that subs (1) may operate as a complete bar. However, it seems to us that s 9 provides a formal means for parties to agree to cross-examination in person should the complainant request this occur. A member of the advisory group pointed out that amending s 95 to allow personal cross-examination of a complainant gives rise to concern that a complainant may face undue pressure to allow personal cross-examination. We agree that this is a risk. Accordingly, in the absence of evidence that this provision is causing problems in practice, we recommend no amendment.

Failure of defendant to engage a lawyer within a reasonable time

- 11.58 Under s 95(5), a party who is precluded from personally cross-examining a witness may have his or her questions put to the witness by their lawyer. Alternatively, if the defendant is unrepresented and fails or refuses to engage a lawyer for this purpose within a reasonable time, the judge may appoint a person on their behalf. A submitter has raised the possibility that defendants may refuse to appoint a lawyer in order to delay a trial.
- 11.59 The previous section in the Evidence Act 1908 did not explicitly provide that the defendant could choose their own lawyer. A defendant was able to give their questions to a “person, approved by the Judge” who could then put them to the complainant.⁸⁴⁵ The equivalent provision in the Law Commission’s proposed Evidence Code provided that:⁸⁴⁶

... an unrepresented defendant or party to a proceeding who under this section is precluded from personally cross-examining a witness may have his or her questions put to the witness by the judge or a person appointed by the judge for this purpose.

844 At [19].

845 Evidence Act 1908, s 23F.

846 Law Commission *Evidence: Volume 2*, above n 800, at 222.

- 11.60 The ability for a defendant to choose a lawyer to put these questions was added by the government in the Evidence Bill as introduced.⁸⁴⁷ The Select Committee subsequently removed the ability for a judge to put questions to the complainant if the defendant refused or failed to engage a lawyer for this purpose, but did not provide any reasons for this amendment.⁸⁴⁸
- 11.61 We acknowledge that allowing a defendant to engage a lawyer for the purpose of cross-examining a complainant provides that defendant with an opportunity to delay the trial by not doing so. This is a necessary consequence of the policy decision to allow defendants to engage their own lawyer. The proviso that the defendant must engage a lawyer “within a reasonable time specified by the Judge” limits the extent to which this can occur. We believe that the “reasonable time specified by the Judge” provides the judge with the necessary flexibility to deal with different circumstances. It seems to us that the only way in which the submitter’s concern could effectively be addressed is to remove the ability of a defendant to engage their own lawyer, and for the defendant’s questions to be put by a person appointed by the judge and / or the judge themselves. We note that the government was presented with this option but chose to enact the current provision contained in subs (5)(b). Revisiting this decision would be inappropriate in the context of this review without evidence demonstrating it is causing significant problems.

VULNERABLE WITNESSES

- 11.62 This section addresses some specific issues raised regarding the evidence of vulnerable witnesses in court, particularly complainants in sexual cases and child witnesses. Many of the recommendations considered are sourced from Elisabeth McDonald and Yvette Tinsley’s text, *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand*.⁸⁴⁹

Alternative ways of giving evidence

Directions on whether evidence is to be given in an alternative way

- 11.63 Section 103(1) provides that, in any proceeding, the judge may make directions that a witness may give evidence “in the ordinary way” or “in an alternative way”. Directions may be made on the application of a party or on the judge’s own initiative. The ordinary way of giving evidence set out in s 83 has been discussed above in the section under “questioning of witnesses”. Alternative ways of giving evidence are set out in s 105, such as giving evidence from behind a screen. Sections 103 and 105 provide:

847 Evidence Bill 2005 (256-1), cl 91(5).

848 Evidence Bill 2005 (256-2), cl 91(5).

849 McDonald and Tinsley, above n 809, Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

103 Directions about alternative ways of giving evidence

- (1) In any proceeding, the Judge may, either on the application of a party or on the Judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.
- (2) An application for directions under subsection (1) must be made to the Judge as early as practicable before the proceeding is to be heard, or at any later time permitted by the court.
- (3) A direction under subsection (1) that a witness is to give evidence in an alternative way, may be made on the grounds of—
 - (a) the age or maturity of the witness:
 - (b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
 - (c) the trauma suffered by the witness:
 - (d) the witness's fear of intimidation:
 - (e) the linguistic or cultural background or religious beliefs of the witness:
 - (f) the nature of the proceeding:
 - (g) the nature of the evidence that the witness is expected to give:
 - (h) the relationship of the witness to any party to the proceeding:
 - (i) the absence or likely absence of the witness from New Zealand:
 - (j) any other ground likely to promote the purpose of the Act.
- (4) In giving directions under subsection (1), the Judge must have regard to—
 - (a) the need to ensure—
 - (i) the fairness of the proceeding; and
 - (ii) in a criminal proceeding, that there is a fair trial; and
 - (b) the views of the witness and—
 - (i) the need to minimise the stress on the witness; and
 - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
 - (c) any other factor that is relevant to the just determination of the proceeding.

105 Alternative ways of giving evidence

- (1) A Judge may direct, under section 103, that the evidence of a witness is to be given in an alternative way so that—
 - (a) the witness gives evidence—
 - (i) while in the courtroom but unable to see the defendant or some other specified person; or
 - (ii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or
 - (iii) by a video record made before the hearing of the proceeding:

- (b) any appropriate practical and technical means may be used to enable the Judge, the jury (if any), and any lawyers to see and hear the witness giving evidence, in accordance with any regulations made under section 201:
 - (c) in a criminal proceeding, the defendant is able to see and hear the witness, except where the Judge directs otherwise:
 - (d) in a proceeding in which a witness anonymity order has been made, effect is given to the terms of that order.
- (2) If a video record of the witness's evidence is to be shown at the hearing of the proceeding, the Judge must give directions under section 103 as to the manner in which cross-examination and re-examination of the witness is to be conducted.
 - (3) The Judge may admit evidence that is given substantially in accordance with the terms of a direction under section 103, despite a failure to observe strictly all of those terms.

11.64 At present it is not mandatory for the prosecution to apply for directions about the way in which an adult complainant in a sexual case should give their evidence. It is, however, mandatory to apply for directions for child complainants in criminal proceedings.⁸⁵⁰ This applies only to child complainants, not all child witnesses.

11.65 The guidelines in *Victims of Crime Guidance for Prosecutors* also do not require prosecutors to apply for directions, stating merely that doing so “may be appropriate ... from time to time” and that prosecutors “will have to consider whether a particular mode of evidence is appropriate and would improve the quality of the evidence given.”⁸⁵¹ The guidelines further state that prosecutors “should confirm the views of the victim; inform the victim of the directions made (if any); or explain why it is not considered appropriate to apply for a direction.”⁸⁵²

11.66 McDonald and Tinsley have recommended that the Act be amended to require the prosecution to seek directions as to how a complainant in a sexual case should give their evidence.⁸⁵³ Although the Prosecution Guidelines state that the prosecutor should seek the views of the victim when considering whether to seek directions on alternative modes of evidence,⁸⁵⁴ research by the Ministry of Women's Affairs and anecdotal feedback from complainants and sexual violence agencies suggest that complainants are not always aware that they may be able to give evidence in an alternative way.⁸⁵⁵

850 See Evidence Act 2006, s 107(1).

851 Crown Law Office *Victims of Crime – Guidance for Prosecutors* (5 March 2012) at [22].

852 At [23].

853 McDonald and Tinsley, above n 809, at 355.

854 Crown Law Office, above n 851, at [23].

855 Venezia Kingi and others *Responding to Sexual Violence: Pathways to Recovery* (Ministry of Women's Affairs, Wellington) at 20 and 95.

- 11.67 McDonald and Tinsley considered that a requirement to seek directions regarding mode of evidence for all complainants in sexual cases would ensure that complainants are aware of the availability of alternative modes; there would be a clear responsibility on the part of the prosecutor; and the court would need to address the question of how to achieve the best evidence from the complainant.⁸⁵⁶
- 11.68 Similarly, the Ministry of Justice in an Issues Paper considered whether mandatory applications about alternative ways of giving evidence should be extended to child witnesses who are not the complainant.⁸⁵⁷ The Issues Paper noted that this change would likely result in an increase in child witnesses giving evidence in an alternative way. It noted the possible drawback that it could result in applications made where it is unnecessary to do so (for example where the witnesses is unconcerned about giving evidence in the ordinary way).⁸⁵⁸
- 11.69 At present we do not consider it is necessary to require mandatory applications in respect of evidence of all complainants in sexual cases. We appreciate that complainants in cases involving sexual offending may experience distress in giving evidence in the courtroom in front of the defendant. We acknowledge that such complainants will often benefit from giving evidence via an alternative way and this will often produce the best evidence as well as reduce the distress to the witness. However, we are not aware that there is currently a significant problem with cases where directions were not sought, and it would have been appropriate to do so.
- 11.70 We also consider that there may be difficulties in introducing into the Act a requirement to seek directions particularly for sexual offending complainants. Child complainants as a class broadly require the protection of mandatory applications for directions, but not all sexual offending complainants will want or need alternative modes of giving evidence. Moreover, while the distinction between child complainants and all other witnesses is clear and easy to draw,⁸⁵⁹ the situation is not so straightforward for sexual offending complainants. Similar considerations may apply to complainants in other cases, such as those involving serious violence.
- 11.71 The decision of whether to apply for directions on alternative ways should be based on the needs of the individual witness, rather than by virtue of them belonging to a particular category. This rationale formed the basis for s 103 making *all* witnesses eligible to give evidence in alternative ways; the

856 McDonald and Tinsley, above n 809, at 288.

857 Ministry of Justice *Alternative Pre-trial and Trial processes for Child Witnesses* (2010) at [58].

858 At [59].

859 Law Commission *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at 35.

previous section had only applied to child sexual offending complainants and those with a mental handicap.⁸⁶⁰

- 11.72 We agree that it is important for the prosecutor to consider carefully whether an alternative way of giving evidence would be appropriate for sexual offending complainants, and should seek complainants' informed views on this. We note concerns about a lack of clarity and inconsistency of practice about whose responsibility it is to provide information to complainants in this area and obtain their views; we understand that in some cases complainants may be inadequately consulted or not consulted at all.⁸⁶¹ However, this is an issue to do with communication and practice, rather than the drafting of the Act.
- 11.73 It may be desirable to clarify Crown Law's *Victims of Crime Guidance for Prosecutors* to more strongly state that prosecutors "should" consider whether an application is appropriate, and to note that an application will generally be appropriate for complainants in sexual cases, and perhaps for complainants in cases involving serious violence.

R32 We recommend that the Crown Law Office consider whether it would be appropriate to amend its *Victims of Crime Guidance for Prosecutors* to provide a clearer indication to prosecutors that they should consider making an alternative mode of evidence application for complainants in sexual cases or cases involving serious violence.

Evidence of child complainants

- 11.74 Section 107(1) provides that in criminal proceedings involving child complainants, the prosecution must apply to the court for directions about the way in which the complainant is to give evidence-in-chief and be cross-examined.
- 11.75 A submitter recommended that child complainants should give evidence via audio-visual link in all cases. They proposed that s 107(1) be repealed and replaced with a provision requiring that in a criminal proceeding in which there is a child or young person complainant aged 17 and under, all evidence will be given by the complainant from a CCTV room within the court building via CCTV; this would be mandatory and the courtroom would be closed while the complainant gives their evidence.⁸⁶²
- 11.76 We do not consider that it is appropriate to specify that child complainants give evidence in any particular way. There is already provision for mandatory

860 At 32–35.

861 Elisabeth McDonald "Complainant desire for information, consultation and support: How to respond and who should provide?" in McDonald and Tinsley, above n 809, at 175-178.

862 Letter from the Wellington Institute of Technology Social Policy to Law Commission regarding child and young person complainants giving evidence in criminal proceedings (2 May 2012).

applications by the prosecution for directions about the way in which child complainants are to give evidence. As noted by the Court of Appeal, child complainants already normally give evidence by way of video record if there is one, unless there are exceptional circumstances.⁸⁶³ It is not practical or appropriate to dictate a particular mode of evidence and it may not be necessary to use an alternative mode of evidence in every case.

Pre-trial recording of evidence

- 11.77 McDonald and Tinsley recommended that where fast-tracking of cases was not possible, consideration should be given to pre-recording of the complainant's evidence including cross-examination and re-examination, should that be appropriate.⁸⁶⁴ It was also suggested that we consider the current position regarding pre-trial cross-examination,⁸⁶⁵ which the Court of Appeal addressed in *M v R*.⁸⁶⁶
- 11.78 In that case the Court concluded that it was possible for orders for pre-trial cross-examination to be made under sections 103 and 105 as they currently stand, but that such orders would only be available in a "compelling case",⁸⁶⁷ and that as a general rule, cross-examination should not take place pre-trial. The Court cited problems with pre-trial cross-examination such as the general principle that the defendant not be required to show their hand before trial, issues with disclosure, recall of witnesses, the absence of the jury, increased use of courtroom resources, requiring repeat preparation for trial, and contributing to delay for the trial of the defendant.⁸⁶⁸
- 11.79 In 2011, just prior to the Court of Appeal decision in *M v R*, Cabinet approved the introduction of a legislative presumption that child witnesses (excluding defendants) under the age of 12 give their evidence via their evidential interview video record (where one exists) and CCTV, regardless of whether a child gives evidence at a pre-trial pre-recording hearing or at trial. It also approved introduction of a legislative presumption in favour of pre-recording children's entire evidence in criminal proceedings, applying to child witnesses (excluding defendants) under the age of 12. In these cases, an application for how a child witness is to give evidence should not be required.⁸⁶⁹ This set of Cabinet decisions is currently on hold.

863 *R v M* [2009] NZCA 455 at [39].

864 McDonald and Tinsley, above n 809, at 305.

865 Letter from Justice Ellen France (Judges' Evidence Committee) to Grant Hammond (President, Law Commission) regarding the Evidence Act review (14 June 2012).

866 *R v M* [2011] NZCA 303, [2012] 2 NZLR 485.

867 At [41].

868 At [34]–[41].

869 Cabinet Domestic Policy Committee "Child Witnesses in the Criminal Courts: Proposed Reforms" (29 June 2011) DOM Min (11) 10/1 at [2]–[4].

- 11.80 The Law Commission has previously suggested that pre-recording of evidence (including cross-examination) should be considered.⁸⁷⁰ We remain of the view that pre-recording of evidence has some merit, where fast-tracking is not possible, and this area requires further attention. However as indicated clearly by the decision in *M v R*, the area raises a number of significant policy and practical issues that would need to be fully explored. This statutory review is not the appropriate place for that enquiry.

WITNESS ANONYMITY

- 11.81 There are two sets of provisions in the Act that allow witnesses to give evidence anonymously. A general regime allowing parties to apply to the court for a witness anonymity order is contained in ss 110–120 of the Act. Undercover police officers are subject to a separate regime in ss 108 and 109 of the Act whereby protection of identity is automatic on satisfaction of specified legislative criteria.

Introduction and background

- 11.82 The genesis of New Zealand’s witness anonymity provisions can be traced back to Parliament’s responses to the Court of Appeal decisions *R v Hughes* and *R v Hines* in which the Court held that prosecution witnesses must disclose their true identity to the defence, in order to allow the defence to make inquiries about their credibility.⁸⁷¹ The Government enacted ss 13A–13J of the Evidence Act 1908 to allow witnesses to give evidence anonymously.
- 11.83 In the Law Commission’s subsequent report, it recommended that ss 13A–13J of the Evidence Act 1908 be reproduced in its proposed Evidence Code.⁸⁷² These provisions were substantially imported as ss 108–120 of the Evidence Act 2006, with some cosmetic changes relating to the reordering and separation of some provisions.
- 11.84 The Evidence Amendment Act 2011, which comes into force on 18 October 2013 (unless brought into force earlier by Order in Council), makes some amendments to ss 108–120 of the Act. These amendments are generally consequential to the criminal procedure amendments contained in the Criminal Procedure (Reform and Modernisation) Bill, from which the Evidence Amendment Act 2011 was divided. The details of these amendments are discussed further below.

870 Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 38–39.

871 *R v Hughes* [1986] 2 NZLR 129 (CA); *R v Hines* [1997] 3 NZLR 529 (CA).

872 Law Commission *Evidence: Volume 1*, above n 792, at xix.

Scope of police anonymity provisions

- 11.85 Sections 108–109 of the Act provide for undercover police officers to give evidence without disclosing their true identity. They provide that:
- The Police Commissioner may file a certificate as to the credibility of an undercover police officer who is to be called as a prosecution witness.
 - Once this certificate is filed, the undercover officer's true name, address, and any particulars likely to enable someone to discover this name or address, are protected.
 - This protection prohibits any person in court from asking any witness a question about the true name or address of the undercover officer. It also prohibits anyone from stating the true name or address of the undercover officer in court, or making any other statement likely to enable someone to discover this name and address.
 - This prohibition is only lifted by leave of the Court. Leave will only be granted if there is some evidence that calls into question the undercover officer's credibility.
 - This protection is only available for the following offences:
 - a) Offences with a maximum penalty of 7 years or more;
 - b) All offences under the Misuse of Drugs Act 1975 other than offences against ss 7 and 13;
 - c) An offence against section 98A of the Crimes Act 1961 (participation in an organised criminal group);
 - d) Conspiracy to commit or attempting to commit an offence described in paragraphs (Offences with a maximum penalty of 7 years or more; and (All offences under the Misuse of Drugs Act 1975 other than offences against ss 7 and 13; above.
- 11.86 The police identity protection provisions also apply to restraint and forfeiture proceedings under the Criminal Proceeds (Recovery) Act 2009 and ss 142A-142Q of the Sentencing Act 2002.⁸⁷³
- 11.87 The Evidence Amendment Act 2011 amends these provisions. The majority of the amendments are merely consequential on the new categorisation of offences under the Criminal Procedure Act 2011 (categories 1–4 replace the summary and indictable distinction). However, one amendment will change the threshold for Misuse of Drugs Act 1975 offences.⁸⁷⁴ This means there are a small number of offences in the Misuse of Drugs Act 1975 that meet the

873 Evidence Act 2006, s 108(6).

874 Evidence Amendment Act 2011, s 5.

- current threshold for the police identity protection provisions which will not meet the new threshold.
- 11.88 The New Zealand Police, in its submission, asked us to consider extending the protection conferred by ss 108–109 to a broader range of offences. Two arguments have been put forward for this extension. First, there is concern that the general 7 year threshold excludes offences commonly detected by undercover police officers, such as most Arms Act 1983 offences, certain forms of assault, and other offences committed by organised criminal groups such as those under the Sale of Liquor Act 1989 and the Fisheries Act 1996.
- 11.89 Second, the current threshold can mean the Crown makes charging decisions based on what will attract the protection conferred by ss 108–109 rather than an assessment of what is most appropriate on the facts. The Law Commission was directed to the case of *R v Roil* where the complainant was an undercover officer.⁸⁷⁵ Originally, the Crown had laid a charge of injuring with intent to injure; subsequently the Crown laid the more serious charge of wounding with intent to injure for the express purpose of allowing the officer to avail himself of the anonymity protection in s 13A of the Evidence Act 1908 (now contained in ss 108–109 of the Act).
- 11.90 The regime by which undercover officers may give evidence anonymously is significantly different to the regime that applies to other witnesses. A key difference is that the anonymity provisions apply to undercover officers automatically on the Police Commissioner issuing a certificate and do not require a court order. Other significant differences include:
- a court cannot appoint independent counsel to assist it to safeguard the rights of the defendant;
 - the absence of an explicit statement that a certificate should only be issued in “exceptional circumstances”; and
 - no requirement to demonstrate that revealing the protected person’s identity would put the safety of that person at risk.
- 11.91 A judge may grant leave for questioning or evidence to be given relating to the identity of the undercover officer on application by any party. This leave may only be granted if the judge is satisfied that: (i) there is some evidence that could call into question the credibility of the officer; (ii) it is in the interests of justice that the defendant be able to properly test the credibility of the officer; and (iii) it would be impracticable for the defendant to test this credibility without knowing the true name or address of the witness.
- 11.92 As a matter of practice, it is highly unlikely that the defence will be in a position to make an application for leave. Although the defence will have a copy of the certificate filed by the Police Commissioner detailing whether the officer has previously been convicted of an offence or found guilty of a

875 *R v Roil* HC Wellington T100/91, 17 February 1992.

breach of a police code of conduct, it is difficult to see how the defence will be able to gather much, if any, information as to the officer's credibility without knowing his or her identity. Further, as provided above, the court is not able to appoint independent counsel to make such inquiries on its behalf.

- 11.93 Undercover officers perform an important function in the investigation and detection of serious offending. The nature of their work is such that, when giving evidence, they can be required to betray relationships formed during undercover operations. This can expose these officers to a level of retribution that may not accrue to, for instance, an innocent bystander giving evidence. Revealing their identity can also have a detrimental effect on their continuing as undercover officers and may deter other officers from undertaking undercover work. These considerations justify undercover officers being subject to the special procedure set out in ss 108–109, rather than the general anonymity provisions in ss 110–119. The requirement for a certificate from the Police Commissioner outlining credibility issues provides a safeguard against the abuse of these provisions.
- 11.94 However, the very fact that there is a special procedure for undercover officers that is subject to fewer safeguards requires careful circumspection as to the offences for which that procedure is available. Without evidence demonstrating that cases are regularly falling over or that the Crown is not proceeding with cases because of undercover officers declining to give evidence, there appears to be little justification for extending the protection afforded by ss 108–109.
- 11.95 The concern that the current threshold may mean the prosecution is laying more serious charges specifically to engage the protection of ss 108–109 is an unconvincing reason to lower the threshold. The existence of a threshold enables tactical decisions to be made no matter where the threshold is set. In any event, the appropriateness of charges laid is a general matter that should continue to be dealt with by the Prosecution Guidelines⁸⁷⁶ and the court process itself,⁸⁷⁷ rather than through individual provisions relating to evidence.

Witness anonymity provisions

- 11.96 There are two forms of witness anonymity orders: pre-trial (s 110) and trial (s 112). These sections provide:

110 Pre-trial witness anonymity order

- (1) This section and section 111 apply if a person is charged with an offence and is to be proceeded against by indictment.

⁸⁷⁶ Crown Law Prosecution Guidelines (January 2010).

⁸⁷⁷ See, for example, s 345(5) and (6) of the Crimes Act 1961 which allows the court to quash a count that is not founded on the evidence.

- (2) At any time after the person is charged, the prosecution or the defendant may apply to a Judge for an order—
 - (a) excusing the applicant from disclosing to the other party prior to the standard committal or the committal hearing (if required) the name, address, and occupation of any witness, and (except with leave of the Judge) any other particulars likely to lead to the witness's identification; and
 - (b) excusing the witness from stating for the purposes of or at the standard committal or committal hearing (if required) his or her name, address, and occupation, and (except with leave of the Judge) any other particulars likely to lead to the witness's identification.
- (3) The Judge must hear and determine the application in chambers, and—
 - (a) the Judge must give each party an opportunity to be heard on the application; and
 - (b) neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.
- (4) The Judge may make the order if he or she believes on reasonable grounds that—
 - (a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed before the trial; and
 - (b) withholding the witness's identity until the trial would not be contrary to the interests of justice.
- (5) Without limiting subsection (4), in considering the application, the Judge must have regard to—
 - (a) the general right of a defendant to know the identity of witnesses; and
 - (b) the principle that witness anonymity orders are justified only in exceptional circumstances; and
 - (c) the gravity of the offence; and
 - (d) the importance of the witness's evidence to the case of the party who wishes to call the witness; and
 - (e) whether it is practical for the witness to be protected prior to the trial by any other means; and
 - (f) whether there is other evidence that corroborates the witness's evidence.
- (6) A pre-trial witness anonymity order may be made by—
 - (a) a District Court Judge who holds a warrant under the District Courts Act 1947 to conduct trials on indictment;
 - (b) if the preliminary hearing is held in a Youth Court, a Judge referred to in section 274(2)(a) of the Children, Young Persons, and Their Families Act 1989;
 - (c) a High Court Judge.

112 Witness anonymity order for purpose of High Court trial

- (1) This section and section 113 apply if a person is charged with an indictable offence and is committed to—
 - (a) the High Court for trial; or
 - (b) a District Court for trial and is the subject of an application under section 28J of the District Courts Act 1947 to transfer the proceeding to the High Court.
- (2) At any time after the person is committed for trial, the prosecution or the accused may apply to a High Court Judge for a witness anonymity order under this section.
- (3) The Judge must hear and determine the application in chambers, and—
 - (a) the Judge must give each party an opportunity to be heard on the application; and
 - (b) neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.
- (4) The Judge may make a witness anonymity order if satisfied that—
 - (a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and
 - (b) either—
 - (i) there is no reason to believe that the witness has a motive or tendency to be dishonest, having regard (where applicable) to the witness's previous convictions or the witness's relationship with the accused or any associates of the accused; or
 - (ii) the witness's credibility can be tested properly without disclosure of the witness's identity; and
 - (c) the making of the order would not deprive the accused of a fair trial.
- (5) Without limiting subsection (4), in considering the application, the Judge must have regard to—
 - (a) the general right of a defendant to know the identity of witnesses; and
 - (b) the principle that witness anonymity orders are justified only in exceptional circumstances; and
 - (c) the gravity of the offence; and
 - (d) the importance of the witness's evidence to the case of the party who wishes to call the witness; and
 - (e) whether it is practical for the witness to be protected by any means other than an anonymity order; and
 - (f) whether there is other evidence that corroborates the witness's evidence.

11.97 As with ss 109 and 110, the Evidence Amendment Act 2011 will amend these provisions. The majority of the amendments are merely consequential to the criminal procedure amendments contained in the Criminal Procedure

(Reform and Modernisation) Bill, from which the Evidence Amendment Act 2011 was divided.⁸⁷⁸

- 11.98 Section 4 of the Evidence (Witness Anonymity) Amendment Act 1997 required the Ministry of Justice to review the operation of the new ss 13B–13J as soon as practicable after 3 years after its commencement. This report was completed in March 2002 and tabled in Parliament on 4 June 2002. The review stated that “The Ministry of Justice considers that the witness anonymity provisions appear to be working effectively and no legislative amendment to any of sections 13B to 13J of the Evidence Act 1908 is required”.⁸⁷⁹
- 11.99 Our review of the case law likewise indicates that the witness anonymity provisions continue to work effectively. Their use appears to be confined to a small number of cases in which safety is a legitimate concern, and courts are carefully analysing the statutory requirements to ensure the defendant is not deprived of a fair trial. The practice by which the Solicitor-General must approve every application likewise places a check on overzealous use.⁸⁸⁰ Although the Ministry of Justice has pointed out some technical and procedural areas to be looked at (discussed below), no substantive concerns about these provisions were raised by the Ministry or any other submitter.

Right of appeal

- 11.100 The provisions for making pre-trial and trial witness anonymity orders are similar, but have some differences. One difference is that there is a right to appeal a decision to make or not make a trial witness anonymity order under s 112, but not a pre-trial order under s 110.⁸⁸¹ Although a party may seek judicial review of the decision under s 110, it seems desirable to provide for a full appeal right, given the significant implications of a pre-trial order. For instance, a witness may refuse to testify where witness anonymity is not granted, resulting in the Crown not proceeding with the prosecution.
- 11.101 A member of the advisory group raised the issue of appeal rights in the context of the inter-relationship between the Evidence Act and the Criminal Procedure Act 2011. Unfortunately, we have not had the opportunity to consider this matter in detail since it was raised with us. However, it is a matter that may merit further consideration elsewhere.

878 The amendments relating to the new categorisation of offences in the Criminal Procedure Act 2011 will change the threshold for which witness anonymity orders are available. Currently, the threshold is an offence laid indictably (pre-trial) or an indictable offence (at trial). The new threshold when the Evidence Amendment Act 2011 comes into force will be a category 3 or 4 offence, effectively an offence punishable by 2 years’ imprisonment or more.

879 Ministry of Justice *Report to the Minister of Justice under section 4 of the Evidence (Witness Anonymity) Amendment Act 1997* (March 2002) at 1.

880 At 15.

881 Crimes Act 1961, s 379A.

R33 We recommend amending s 379A of the Crimes Act 1961 to provide an appeal right from a decision regarding a pre-trial witness anonymity order under s 110.

Ancillary orders

11.102 In *R v Kelly* Randerson J raised the issue of whether the ancillary orders available under s 13G of the Evidence Act 1908 (now s 106 of the Evidence Act 2006) could be used where the defendant already knew the name of the witness.⁸⁸² Section 116 relevantly provides:

116 Judge may make orders and give directions to preserve anonymity of witness

- (1) A Judge who makes an order under section 110 or 112 may, for the purposes of any committal hearing or the trial (as the case may be), also make any orders and give any directions that the Judge *considers necessary to preserve the anonymity of the witness*, including (without limitation) 1 or more of the following directions:
 - (a) that the court be cleared of members of the public;
 - (b) that the witness be screened from the defendant;
 - (c) that the witness give evidence by closed-circuit television or by video link.
- (2) In considering whether to give directions concerning the mode in which the witness is to give his or her evidence at any committal hearing or the trial, the Judge must have regard to the need to protect the witness while at the same time ensuring a fair hearing for the defendant.
- (3) This section does not limit—
 - (a) section 206 of the Summary Proceedings Act 1957 (which confers power to deal with contempt of court); or
 - (b) section 197 of the Criminal Procedure Act 2011 (which confers power to clear the court); or
 - (c) any power of the court to direct that evidence be given, or to permit evidence to be given, by a particular mode.

[emphasis added]

11.103 The courts have recognised that an order may be made in less extensive terms than that provided for in the legislation. For instance, a court may make an order protecting the address and occupation of the witness where the defendant already knows the witness's name.⁸⁸³ In this situation, it is not clear whether the ancillary powers in s 116 are available as the defendant's anonymity has already been lost. However, there may be situations where such powers are desirable to otherwise protect the safety of the witness, even

⁸⁸² *R v Kelly* HC Rotorua T991636, 21 December 1999 at [45].

⁸⁸³ At [30].

if their identity is already known to the defendant. As Randerson J states in *R v Kelly*:⁸⁸⁴

It may be implicit that the orders contemplated by s 13G(1) may be made both to preserve anonymity and to ensure the witness is protected from harm but the legislature could consider amending s 13G to put the matter beyond doubt.

- 11.104 Randerson J declined to make a definitive ruling in this case by relying on the inherent jurisdiction of the court to allow evidence to be given in an alternative way. The Ministry of Justice, in its review, noted Randerson J's comments.⁸⁸⁵ However, on the basis that he had no difficulty using his inherent jurisdiction to make the desired orders, it recommended no change.
- 11.105 In addition to the ancillary orders in s 116, the Act provides for alternative ways of giving evidence in s 105. These include through screening or video recordings. A direction as to an alternative mode of giving evidence may be made on the judge's own initiative or on the application of a party. This can be made on the grounds of, among other things, the trauma suffered by the witness (s 103(3)(c)) and the witness's fear of intimidation (s 103(3)(d)). In making this determination, the judge must have regard to fair trial considerations and the need to minimise the witness's stress.⁸⁸⁶
- 11.106 Section 116 of the Act explicitly provides that the section does not limit the power of any court to direct that evidence "be given, or to permit evidence to be given, by a particular mode" (subs (3)(c)). The ability to make alternative orders in order to preserve witness's safety is therefore adequately provided for in the Act.

JUDICIAL DIRECTIONS

- 11.107 Section 122 is the general provision relating to judicial directions about evidence which may be unreliable:

122 Judicial directions about evidence which may be unreliable

- (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
 - (a) whether to accept the evidence:
 - (b) the weight to be given to the evidence.
- (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
 - (a) hearsay evidence:

884 At [45].

885 Ministry of Justice, above n 879, at 8.

886 Evidence Act 2006, s 103(4).

- (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
 - (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
 - (d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a Police station, or another place of detention:
 - (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.
- (3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—
- (a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or
 - (b) if the Judge is of the opinion that there is any other good reason not to comply with the request.
- (4) It is not necessary for a Judge to use a particular form of words in giving the warning.
- (5) If there is no jury, the Judge must bear in mind the need for caution before convicting a defendant in reliance on evidence of a kind that may be unreliable.
- (6) This section does not affect any other power of the Judge to warn or inform the jury.

11.108 We have received a suggestion that we consider whether s 122 should be amended to provide trial judges with more guidance as to when a warning should be given and what such a warning should contain, similar to the approach in s 126 (judicial warnings about identification evidence). Detailed discussion of s 126 is contained earlier in this report in the chapter relating to identification evidence.

11.109 Section 122 confers significant discretion on the trial judge. Although the judge is required to *consider* whether to give a warning in relation to certain types of evidence, the judge is not *required* to give such a warning. Subsection (4) makes it clear that no particular form of words is required for the warning. The section differs from s 126 of the Act which makes a warning mandatory in certain circumstances, and also sets out matters which must be included in the warning.

11.110 Guidance as to how the discretion contained in s 122 should be exercised was set out by the Court of Appeal in *Taylor v R*:⁸⁸⁷

It follows that the Judge's task is to isolate potentially unreliable evidence and to direct the jury expressly on it, if the Judge considers it was possible that the jury might give it too much weight without a direction. Such a direction would need to be accompanied by a short explanation of why the evidence might be considered unreliable. While the form (or intensity) of the warning will be a matter of discretion for the Judge, who will have the

887 *Taylor v R* [2010] NZCA 69 at [63] and [64].

best appreciation of the trial dynamics, it remains part of the appellate function to consider whether a warning ought, in any particular circumstances, to have been given.

Most Judges will tread cautiously in determining whether to give a reliability warning. A specific warning about the reliability of particular evidence has the potential to influence the jury's deliberations, one way or the other. The Court must always bear in mind the constitutional function of determining guilt rests with the jury, whose collective task it is to evaluate all relevant evidence. If a warning was given, it should be expressed as neutrally as circumstances permit.

11.111 Other judgments amplify the points set out above:

- The form and intensity of the warning is a matter for the trial judge, who is “in the best position to gauge the intensity of the warning ... Given the importance of trial dynamics to the form of the caution”.⁸⁸⁸ Courts have emphasised that subs (4) does not require any “particular form of words”.⁸⁸⁹
- Generally, a warning should explain why the evidence may be unreliable. As the Court of Appeal stated in *R v Ngarino* “In our view, a warning under s 122 is unlikely to be effective if it does not explain to the jury the reasons why the evidence may be unreliable.”⁸⁹⁰ However, this may not be necessary if the jury is already sufficiently aware of the risks.⁸⁹¹
- The warning should be given in a neutral manner⁸⁹² and does not need to set out the judge's own unfavourable view as to reliability.⁸⁹³
- Judges should tread carefully in deciding whether to give a warning to ensure they do not unduly influence the jury in determining reliability⁸⁹⁴ or overemphasise an issue.⁸⁹⁵

11.112 Numerous judgments also set out the view that a warning is not necessary where the issue of reliability (and its close relation, the credibility of the witness who gives the evidence) is already squarely before the jury.⁸⁹⁶ In such cases, there is a risk that a judicial warning under s 122 will exaggerate the importance of the evidence.

888 *Rewa v R* [2012] NZCA 181 at [28].

889 *R v Collins* [2009] NZCA 519 at [47].

890 *R v Ngarino* [2009] NZCA 200 at [46].

891 *HP v R* [2010] NZCA 617.

892 *Lockley v R* [2011] NZCA 439 at [20].

893 *H v R* [2011] NZCA 88 at [50].

894 *Witika v R* [2011] NZCA 137 at [14] and [18].

895 *HP v R*, above n 891, at [48].

896 *Taylor v R*, above n 887, at [73] (affirmed by *Taylor v R* [2010] NZSC 87 at [2]); *HP v R*, above n 891, at [4]; *Witika v R*, above n 894; *Pahau v R* [2011] NZCA 147 at [44]; *Tamati v R* [2011] NZSC 153 at [23]; *P v R* [2012] NZCA 325 at [47].

- 11.113 The purpose of jury directions is to provide guidance to a jury as to how it should approach the evidence in its deliberations. They provide juries, who are not specialists in evidence law, with information about the limitations and risks that attach to certain forms of evidence. The paradigm example is the use of identification evidence. As outlined earlier in this report, research has shown that many jurors appear to believe eyewitnesses too readily, and have problems distinguishing between accurate and inaccurate eyewitnesses, and that assumptions people make about reliability (such as an ability to recall peripheral details) are not necessarily correct.⁸⁹⁷ The warning required under s 126 sets out matters that a judge should include in his or her direction to deal with these concerns.
- 11.114 By way of contrast, a warning under s 122 can encompass a wide range of evidence, including, among other things, hearsay evidence, statements made by defendants while in custody, and witnesses who may have a motive to lie.⁸⁹⁸ As the reliability concerns underlying these types of evidence differ, it would be difficult to prescribe the content that should be contained in a warning. We considered whether there should be a general requirement for a warning under s 122 to contain reasons as to why the evidence to which the warning relates may be unreliable. However, as described above, we are satisfied that the Court of Appeal has already pronounced on the desirability of doing so. Further, there may be some situations where the provision of reasons is not appropriate or necessary, for instance, if the jury is already well-informed about the risks of such evidence and a further specific direction would serve no purpose, and risks overemphasising the evidence.⁸⁹⁹
- 11.115 Given the question of whether a s 122 warning should be given is so intimately connected to the dynamics of the trial process, we do not consider that further legislative guidance would be helpful. The trial specific nature of a s 122 warning, along with the wide range of situations s 122 covers, also weigh against further prescription as to what a direction under the section should contain.

EVIDENCE OF FOREIGN LAW

- 11.116 The Law Commission has received one submission in relation to s 144:

144 Evidence of foreign law

- (1) A party may offer as evidence of a statute or other written law, proclamation, treaty, or act of State, of a foreign country—
- (a) evidence given by an expert; or

⁸⁹⁷ See earlier at paragraph 8.1.

⁸⁹⁸ Evidence Act 2006, s 122(2).

⁸⁹⁹ *HP v R*, above n 891, at [48].

- (b) a copy of the statute or other written law, proclamation, treaty, or act of State that is certified as a true copy by a person who might reasonably be supposed to have the custody of the statute or other written law, proclamation, treaty, or act of State; or
 - (c) any document containing the statute or other written law, proclamation, treaty, or act of State that purports to have been issued by the government or official printer of the country or by authority of the government or administration of the country; or
 - (d) any document containing the statute or other written law, proclamation, treaty, or act of State that appears to the Judge to be a reliable source of information.
- (2) In addition, or as an alternative, to the evidence of an expert, a party may offer as evidence of the unwritten or common law of a foreign country, or as evidence of the interpretation of a statute or other written law or a proclamation of a foreign country, a document—
- (a) containing reports of judgments of the courts of the country; and
 - (b) that appears to the Judge to be a reliable source of information about the law of that country.
- (3) A party may offer as evidence of a statute or other written law of a foreign country, or of the unwritten or common law of a foreign country, any publication—
- (a) that describes or explains the law of that country; and
 - (b) that appears to the Judge to be a reliable source of information about the law of that country.
- (4) A Judge is not bound to accept or act on a statement in any document as evidence of the law of a foreign country.
- (5) A reference in this section to a statute of a foreign country includes a reference to a regulation, rule, bylaw, or other instrument of subordinate legislation of the country.
- (6) Subpart 1 of Part 2 (which relates to hearsay evidence) does not apply to evidence offered under this section.

11.117 Documents that are *prima facie* reliable because they have been certified, or purport to have been issued by a government or official printer, are automatically admissible. The admissibility of other documents and publications depends on whether a judge determines them “to be a reliable source of information”.

11.118 The following issues have been raised with s 144:

- The admissibility of printed material from electronic databases produced by commercial legal publishers in subs (1), (2) and (3) hinges on a judge’s assessment of reliability rather than being deemed to be *prima facie* reliable.

- Subsection (2) is too narrow and may exclude individual cases printed from electronic databases and publications that are not published in hard copy.

Admissibility of printed material from electronic databases

- 11.119 The Law Commission received a submission that printed material from electronic databases produced by commercial legal publishers should be deemed to be reliable under subs (1), (2) and (3). Currently the reliability of such material is determined by judges on an individual basis.
- 11.120 We acknowledge that material produced by commercial legal publishers will often be reliable. However, such reliability is by no means guaranteed in respect of all such publications, in all countries. Although the combination of market forces and the adversarial nature of a trial is likely to act as a reliability filter, we are uneasy about the suggestion for such material to be admissible *per se*. Moreover, it is not immediately apparent that the current test is difficult to satisfy where the material is from a well-known commercial legal publisher. We would expect that a judge would be more readily satisfied that printed material from an electronic database is “a reliable source of information” when it is from a well-known source or publisher as opposed to a rudimentary electronic database from an unknown publisher. We are satisfied that the current section provides a principled approach to the admissibility of material from commercial legal publishers.

Databases of case law

- 11.121 We have received a submission concerned that s 144(2) is limited to documents from a published volume that consists wholly or partially of law reports and:
- excludes a single case printed from an electronic database;
 - may exclude material from electronic databases that are never published in hard copy volumes.
- 11.122 The term “document” is defined in s 4 as follows:
- document** means—
- (a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds or from which symbols, images, or sounds can be derived, and includes—
 - (i) a label, marking, or other writing which identifies or describes a thing of which it forms part, or to which it is attached:
 - (ii) a book, map, plan, graph, or drawing:
 - (iii) a photograph, film, or negative; and
 - (b) information electronically recorded or stored, and information derived from that information

- 11.123 The definition is purposefully wide and clearly includes material derived from electronic sources; it reflects the intention of the Law Commission to ensure that “all information (paper-based or otherwise) which might need to be put in evidence in court can in fact be produced.”⁹⁰⁰
- 11.124 Paragraph (a) refers to documents “containing reports of judgments of the courts of the country”. The submitter is concerned that the definition of document in conjunction with para (a) may require an entire electronic database to be submitted into evidence, rather than a single printout from it. We do not read the section in this manner and note that the term “reports” also include the singular.⁹⁰¹ In our view the construction of para (a) and the definition of “document” is sufficiently wide to cover a printout of a single case from a database.

900 Law Commission *Evidence: Volume 2*, above n 800, at 7.

901 Interpretation Act 1999, s 33.

Recommendations

CHAPTER 2 PRELIMINARY PROVISIONS (PART 1 OF THE ACT)

- R1 We recommend that ss 10 and 12 be kept under review with any problems identified to be considered at the next five year review.

CHAPTER 3 HEARSAY, DEFENDANTS' STATEMENTS AND CO-DEFENDANTS' STATEMENTS

- R2 We recommend that the definition of "witness" be kept under review with any problems identified to be considered at the next five year review.
- R3 We recommend amending the definition of "business record" to exclude police documents containing statements or interviews with eyewitnesses or victims.
- R4 We recommend amending s 22 so that a party intending to offer a hearsay statement under s 19(1)(b) must give notice as to why no useful purpose would be served by requiring that person to be a witness.
- R5 We recommend inserting a subsection into s 28 that provides that the truth of the statement is irrelevant to the application of that section.
- R6 We recommend deleting s 12A and inserting a new provision in subpart 1 of Part 2 that provides a hearsay statement is admissible against a defendant if:
- there is reasonable evidence that there was a conspiracy or joint enterprise;
 - there is reasonable evidence that the defendant was a member of that conspiracy or joint enterprise; and
 - the hearsay statement was made in furtherance of the conspiracy or joint enterprise.
- R7 We recommend that this provision should be subject to the notice provision in s 22, and s 27(1) should be amended to clarify that the restriction on admissibility in relation to co-defendants is subject to the new provision.

CHAPTER 4 IMPROPERLY OBTAINED EVIDENCE

- R8 We recommend amending s 30(2)(b) to read “if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.”

CHAPTER 5 PREVIOUS CONSISTENT STATEMENTS

- R9 We recommend repealing s 35(1) and (2) so that the admissibility of previous consistent statements is determined by the fundamental tests contained in ss 7 and 8, and deleting the “previous consistent statements rule” definition in s 4, and deleting references to s 35 and the previous consistent statements rule in s 25(4), s 27(3) and s 34(1).
- R10 We recommend moving the substance of s 35(3) to s 90.

CHAPTER 6 VERACITY AND PROPENSITY EVIDENCE

- R11 We recommend amending s 37(5) by deleting the words “whether generally or in the proceeding”, which would have the effect of making clear the distinction that was intended to be drawn by the Law Commission in relation to veracity evidence, namely, that there be “no rule that prevents a party from offering evidence contradicting or challenging a witness’s answers given in response to cross-examination directed solely to truthfulness”
- R12 We recommend amending s 37(3)(b) to remove the words “dishonesty or” to leave the courts free to consider on the facts of individual cases whether the circumstances of prior offending really are substantially helpful in assessing veracity.
- R13 We recommend amending s 38 to clarify that the defendant only “opens the door” to evidence about his or her veracity being introduced by the prosecution when he or she gives evidence in court.

CHAPTER 7 EVIDENCE OF SEXUAL EXPERIENCE OF COMPLAINANTS IN SEXUAL CASES

- R14 We recommend amending s 44 to require that notice of an application for leave to lead evidence as to the sexual experience of a complainant in a sexual case be given, modelled on the notice requirement in relation to hearsay evidence in s 22 of the Act.

CHAPTER 8 IDENTIFICATION EVIDENCE

- R15 We recommend that the term “person to be identified” in s 45(3)(b), (c) and (d) and s 45(4)(b) and (c) be replaced with “suspect”.
- R16 We recommend amending s 45(4)(e) to replace “soon after the offence was reported” with “soon after the offence occurred”.
- R17 We recommend that the substance of the new s 46A that the Evidence Amendment Act 2011 inserts into the Act be re-located in, or alongside, s 126.

CHAPTER 9 CONVICTION EVIDENCE

- R18 We recommend that the effect of s 49 on co-defendants be kept under review with any problems identified to be considered at the next five year review.
- R19 We recommend extending the application of s 50 so that a judgment or finding of fact made by a tribunal is not admissible to prove the existence of a fact that was in issue in the tribunal.

CHAPTER 10 PRIVILEGE AND CONFIDENTIALITY

- R20 We recommend that the word “obtains” in s 54(1) be replaced with “requests and / or obtains”.
- R21 We recommend that the termination of the privileges contained in ss 56 and 57 be kept under review with any problems identified to be considered at the next five year review.
- R22 We recommend amending s 57 to apply expressly to criminal proceedings, and adding a paragraph to s 57(3) that allows a court to order disclosure if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of settlement negotiations, mediation or plea discussions as the case may be.
- R23 We recommend amending s 59 to make it clear that the exemption from the privilege in s 59(1)(b) applies to communications, observations and information collected or generated during a court-ordered assessment and does not affect the privilege that attaches to other medical records of the privilege-holder.

- R24 We recommend that the issue of whether court-ordered assessments should continue to be excluded from the protection of medical privilege by s 59(1)(b) should be examined further in the context of a proposed wider review of issues relating to the Criminal Procedure (Mentally Impaired Persons) Act 2003 and appropriate consultation with the health sector should occur at that time.
- R25 We recommend that the definition of “overseas practitioner” in s 57(1) be replaced with “Any person who is, under the laws of their country, recognised as being properly qualified to undertake work that is normally undertaken by a lawyer or patent attorney.”
- R26 We recommend that s 51(6) be repealed and the Evidence (Recognition of Overseas Practitioners) Order 2008 be revoked.
- R27 We recommend deleting the words “given, or” in the phrase “given, or to be given” in s 51(3).
- R28 We recommend that “deceased” should be added after “personal representative of the” in s 66(2).

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- R29 We recommend amending s 90 so that documents that have been excluded under s 28 are not available for use in questioning under s 90.
- R30 We recommend that the interrelationship between ss 31 and 90 be kept under review with any problems identified to be considered at the next five year review.
- R31 We recommend amending s 95(1) so that it unambiguously applies to both civil and criminal proceedings involving domestic violence or harassment.
- R32 We recommend that the Crown Law Office consider whether it would be appropriate to amend its Victims of Crime Guidance for Prosecutors to provide a clearer indication to prosecutors that they should consider making an alternative mode of evidence application for complainants in sexual cases or cases involving serious violence.
- R33 We recommend amending s 379A of the Crimes Act 1961 to provide an appeal right from a decision regarding a pre-trial witness anonymity order under s 110.

Appendix 1

List of submitters

The following list includes people the Law Commission approached for comment, as well as people and organisations who made submissions to the Law Commission:

- Arbitrators' and Mediators' Institute of New Zealand Inc
- Auckland District Law Society
- Crown Law Office
- Professor John Dawson and Alisaundre van Ammers
- Judiciary's Evidence Act Committee
- LEADR Association of Dispute Resolvers
- Alan Limbury
- Professor Richard Mahoney
- Seán Manning
- Associate Professor Elisabeth McDonald
- James McGeorge
- Ministry of Justice
- New Zealand Association of Psychotherapists
- New Zealand Law Society
- New Zealand Police
- Associate Professor Scott Optican
- Dean Russ
- Russell McVeagh
- Students of the Wellington Institute of Technology

Appendix 2

Briefing on the operation of the veracity and propensity provisions

29 March 2010

Minister of Justice / Minister Responsible for the Law Commission
Hon Simon Power

EVIDENCE ACT REVIEW: OPERATION OF THE VERACITY AND PROPENSITY PROVISIONS

Background

1. Both veracity and propensity are species of character evidence. Under the new Evidence Act 2006, they are the only route for the admission of character evidence.
2. Veracity means the disposition of a person to refrain from lying, either generally, or in the proceeding. It is about a person's truthfulness.
3. Propensity means evidence of acts, omissions, events or circumstances in which a person has been involved, that tend to show that person's propensity to act in a particular way or have a particular state of mind. Previous convictions, or multiple criminal charges that are similar in nature to the instant charge, are a couple of examples of possible types of propensity evidence.
4. In 2008, in the report *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, May 2008), the Law Commission undertook to provide advice by 28 February 2010 on the operation of the veracity and propensity provisions of the Evidence Act (sections 37 to 43 of the Act).

5. Our report arose out of concerns about the way the pre-2006 law had been applied, in the Rickards / Shipton / Schollum proceedings. By the time we reported, the new Act's provisions had commenced, and the Court of Appeal in *R v Healy* [2007] NZCA 451 had explicitly said that the previous law no longer applied under the new Act; a fresh approach was, therefore, required. The Court had also taken a more liberal view on the facts to the admissibility of evidence in that case than the previous law would have contemplated.
6. In that report, we were not persuaded that there was any difficulty with the Act's approach to these provisions. However, we were reporting less than a year after the Act had commenced. We therefore thought it would be premature to conclude no change was required; it was too early to state conclusively the approach the courts might take. We preferred to continue to monitor the working in practice of the veracity and propensity provisions.
7. We subsequently sought slight extension of the report-back date to the end of March, to which the Minister agreed.

Summary of advice

8. Each of the veracity and propensity provisions is individually reviewed below.
9. The picture is, we think, very largely a positive one. Although this advice highlights a number of problems or possible problems, it should not be inferred that the provisions on the whole are not working. In the vast majority of cases, the law seems to have operated smoothly, as intended, and produced the right results.
10. The Courts have embraced the notion that the Act should be a fresh start, and that, therefore, the language of the provisions is the proper starting point for interpreting them.
11. There have been some instances of former, pre-Act, practice creeping through, most notably under section 40, which defines propensity evidence. In a line of half a dozen appellate cases, the Court of Appeal has discussed evidence in terms that clearly categorise it as propensity evidence, whilst at the same time declining to apply the statutory safeguards that are the purpose of the propensity provisions. The Court has, instead, elected to rely upon the looser tests in sections 7 and 8 of the Act as the route to admissibility. This is not at all desirable. Indeed, it is an approach that carries some risk. However, it is not producing injustice.
12. Only one appellate case has been decided under section 42, which relates to propensity evidence admitted by one defendant against a co-defendant. The case, *R v Moffat* [2009] NZCA 437, is therefore the leading case. In it, the Court of Appeal takes a somewhat more liberal approach to the admission of evidence than we think strictly justified, concluding that once the terms of section 42 have been met, evidence will not be excluded under section 8 on the grounds of prejudice to a co-defendant.
13. The Court's approach in *Moffat* will necessitate severance in some cases, which has the potential for other collateral disadvantages. However, we do not

consider that the approach gives rise to any risk of miscarriage of justice, and we are not convinced that the problem lies in the drafting, as opposed to interpretation. The decision in question is quite recent and, once again, we are inclined to take a back seat approach for now, and observe how matters proceed.

14. Without exception, any problems that are occurring seem to be ones of interpretation and method, rather than the legislative drafting. This makes it tricky, from a law reform point of view, to assess whether intervention is needed; in other words, whether an attempt should be made to improve upon drafting that seems to be very largely sound.
15. As one would expect, the Courts are continuing to refine, and in some instances self-correct, their early interpretations of the provisions. We consider that opportunity ought to be allowed for this process to continue. Consequently, although the operation of this legislation has not been perfect, we think it remains possible that any wrinkles will be ironed out over time.
16. Our recommendation, again, would be to keep the matter under review, and deal with any issues arising in 2012, when the remainder of the Act will be reviewed in accordance with section 202.

Veracity (sections 37 to 39)

17. Section 39, which relates to challenges to a co-defendant's veracity, is not reproduced here. There are no issues arising from it that require discussion.
18. Sections 37 and 38 provide:

37 Veracity rules

- (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.
- (2) In a criminal proceeding, evidence about a defendant's veracity must also comply with section 38 or, as the case requires, section 39.
- (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
 - (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
 - (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
 - (c) any previous inconsistent statements made by the person:
 - (d) bias on the part of the person:
 - (e) a motive on the part of the person to be untruthful.

- (4) A party who calls a witness—
 - (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
 - (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
- (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding.

38 Evidence of defendant's veracity

- (1) A defendant in a criminal proceeding may offer evidence about his or her veracity.
- (2) The prosecution in a criminal proceeding may offer evidence about a defendant's veracity only if—
 - (a) the defendant has offered evidence about his or her veracity or has challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; and
 - (b) the Judge permits the prosecution to do so.
- (3) In determining whether to give permission under subsection (2)(b), the Judge may take into account any of the following matters:
 - (a) the extent to which the defendant's veracity or the veracity of a prosecution witness has been put in issue in the defendant's evidence:
 - (b) the time that has elapsed since any conviction about which the prosecution seeks to give evidence:
 - (c) whether any evidence given by the defendant about veracity was elicited by the prosecution.

Issues arising from case law

19. Case law on these provisions establishes several key points. Some of them are non-contentious and do not require further discussion; one is expanded on further below.

- Evidence adduced by a defendant about his or her absence of prior convictions is not relevant to veracity: *R v Kant* [2008] NZCA 194; *Wi v R* [2009] NZSC 121.
- The veracity provisions affect the permissible scope of cross examination, as well as the admissibility of evidence contesting denials by the witness (the former “collateral issues” rule). In *R v Alletson* [2009] NZCA 205 the Court held that questions which were not both relevant *and* substantially helpful should not even have been asked. This is an expansion of the collateral issues rule.
- In *R v Smith* [2007] NZCA 400, the Court considered the meaning of “substantially helpful” in section 37, and held that often in practice

there will be little, if any, difference, between the new Act and the common law.

- In determining the scope of the veracity rule, Courts need to look at the principal purpose for which evidence is adduced: whether to establish a disposition to lie or refrain from lying, or for some other collateral purpose. *R v Tepu* [2009] 3 NZLR 216 and *R v Davidson* [2008] NZCA 410, the two leading cases on this issue, are discussed further below.

Discussion – Tepu and Davidson

20. In *Davidson*, the Court of Appeal held that a complainant's earlier videotaped statement, in which she had denied any sexual offending occurred, was admissible, and not governed by the veracity provisions (as the Crown had argued). The defence was not wishing to demonstrate the complainant's disposition to lie or refrain from lying. Its case was that the videotape was the true account, even though the collateral effect of it, if believed, would establish that she must have lied on subsequent occasions. It was the primary purpose for which the statement was being introduced that was the determinant of whether the veracity provisions should be invoked. Where the predominant purpose is to establish the truth of what is asserted, the veracity rules have no application.
21. We, and others, think that this correctly confines the scope of the provisions.
22. By contrast, in *Tepu*, the Court considered the admissibility of a defendant's previous false statement. When questioned initially by the police, he had denied ever having met the complainant, an alleged victim of sexual offending. Subsequently, security system video footage proved this to be false, whereupon the defendant changed his defence to consent, or reasonable belief in consent. The prosecution sought to adduce the initial false statement; the defence argued that this should be governed by the veracity provisions, which would have resulted in the exclusion of the evidence.
23. Again, the Court of Appeal held that the primary use of the statement was not to attack the defendant's veracity – paralleling its approach in *Davidson*. The Crown was not attacking character or disposition simply by virtue of alleging lying on a particular occasion. An allegation that a defendant lied in a statement to the police does not, of itself, involve an allegation that he has a disposition to lie. The statement was admissible, without engaging sections 37 and 38.
24. Views differ as to correctness of this line of reasoning. Optican and Sankoff take the view that such evidence would have always been admissible at common law (albeit for limited purposes) – it was relied upon as circumstantial evidence of guilt, by way of inference drawn from the falsehood, rather than

evidence about veracity.⁹⁰² Therefore, they consider its admission was the right result. Mahoney disagrees, taking a narrower statutory interpretation approach.⁹⁰³ On his analysis, the result was wrong, the veracity provisions should have been applied, and would have worked to exclude the evidence in this case. First, section 37 addresses any evidence “about a person’s veracity”; the *Tepu* Court was, therefore, misdirected in framing its judgment around the absence of any attack on veracity. And secondly, in any event, it was in fact an attack: “*The whole point of the prosecution evidence of Mr Tepu’s lie is to demonstrate to the jury Tepu’s lack of veracity, and to ask them to disbelieve his testimony. This is a classic ‘challenge’.*”

25. However, even if Mahoney’s view is accepted, he argues that the legislation’s scheme is clear, just misinterpreted by the Court. In other words, he does not suggest that any legislative amendment is required.
26. There is, however, another implication, if Mahoney’s view is accepted. His approach would have resulted in the application of sections 37 and 38, and thus the exclusion of the evidence in the circumstances of this case (because the section 38 pre-requisites had not been satisfied). We have some difficulty with that proposition: we think that lies about the current offending ought to be admissible, regardless of section 38.
27. Overall, while there is room for some doubt and argument about the Court’s method of arriving at its result in *Tepu*, we believe it was the right result. On the whole, we consider that it will be better to continue to monitor the operation of these provisions, rather than intervening immediately.
28. As well as considering these points of law, we have reviewed all other decisions under sections 37 to 39 that we were able to obtain. There have not been many cases, but we think that the courts are applying the sections as intended, and the right results are, in general, being reached. This tends to bolster our view that immediate legislative intervention is not required. As far as case law to date is concerned, it seems the provisions are working.

Veracity – other issues

29. In our previous report, we identified four technical questions that we thought might warrant eventual attention. These are discussed at paras 9.12 - 9.16 of the report. Briefly, they were:
 - Section 37(3)(b) refers to “offences that indicate a propensity for dishonesty or lack of veracity“. We doubted whether dishonesty offending equates to veracity, and whether dishonesty offending should always be elevated above all other offending for the purpose of establishing veracity.

902 Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS seminar, February 2010).

903 Richard Mahoney “Evidence” [2009] NZ Law Rev 127.

- Where a defendant is charged with dishonesty, we queried whether a mechanism might be needed to stop previous dishonesty convictions, admitted for veracity purposes, from being improperly used as propensity evidence.
 - There may be doubt about whether evidence given by multiple complainants, usually in sexual offending cases, is veracity or propensity evidence. If it is only veracity then, similar to the point above, there may be a problem in stopping juries from improperly using it as propensity.
 - Previously, the prosecution was not allowed to lead evidence of a defendant's previous convictions, when the defendant (via his or her counsel, or another witness) had attacked the credibility of a prosecution witness without giving evidence himself or herself. Under the new legislation, the position is unclear.
30. We remain of the view that these issues will warrant eventual attention. However, we do not consider them sufficiently pressing to be addressed separately now, as opposed to 2012, in the light of the absence of other problems identified with sections 37 to 39.
31. It may yet be that the courts will in due course resolve them, when they do arise. Indeed, they must have arisen in daily court business by now, but they have not been identified to us as causing real obstacles or injustices.

Section 44, and false sexual offending allegations

32. Section 44 is not one of the veracity / propensity provisions. However, an issue has arisen regarding its interaction with section 37, in circumstances where a complainant has allegedly previously made false allegations of sexual offending.
33. Section 44 provides:

44 Evidence of sexual experience of complainants in sexual cases

- (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
- (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
- (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.
- (4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1).

- (5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.
- (6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.
34. Section 44 replaces the former section 23A of the Evidence Act 1908, and fulfils the same function.
35. In *R v C* [2007] NZCA 439, the Court of Appeal held that evidence of reputation for making false sexual offending allegations is not admissible under the Act. This is because, according to the Court, evidence of reputation in sexual matters is excluded by section 44(2); and under section 37, the select committee deleted a reference to evidence of reputation for untruthfulness, saying that it considered a person's reputation was irrelevant and should not be considered when determining veracity.
36. However, the Court held that where there is manifestly clear evidence that a complainant has previously made a false complaint, leave to offer the evidence is likely to be granted under section 44 if it would otherwise be admissible under section 37. In these circumstances, the sexual context will be seen as tangential to the issue of the veracity of the complainant and the focus will therefore be on section 37. But in other cases, where the truth or falsity of the past complaints is disputed, the matter will fall to be determined under section 44 in essentially the same way as it was under the old section 23A, as evidence of sexual experience.
37. There are two issues with this approach.
38. The first is that it is both confusing, and not semantically logical. Logically, the fact that a complainant has previously made a false complaint, or an allegedly false complaint, cannot relate to either the sexual experience of the complainant or her sexual reputation, and thus must be beyond the scope of section 44. A false complaint can, by definition, relate only to her honesty or (in the language of the Act) veracity.⁹⁰⁴
39. However, the approach taken in *C* replicates the earlier law. Courts' adherence to this pre-Act position signals that they are evidently happy that the approach works in practice. Although we are not entirely comfortable with it as a matter of logic, it is not explicitly at odds with the new terms of the Act.

904 "The Evidence Act and sexual offences" [2008] NZLJ 386. In *Evidence Volume 2: Evidence Code and Commentary* (NZLC R55) we similarly said, about the draft code as it then read: "Section 46(3) does not preclude evidence of a complainant's reputation to lie about sexual matters; for example, a reputation for making false allegations of sexual assault. *Such evidence is about reputation for truthfulness (or lack of it), not about reputation in sexual matters*, and is admissible provided that it complies with the truthfulness rules."

40. Secondly, we think that the distinction between reputation for untruthfulness (inadmissible) and disposition to lie (veracity, dealt with under section 37) is less clear than the Court in *C* suggests. We think that there must surely be a degree of overlap between the two: disposition is a form of reputation, and reputation must have arisen at some point from at least one instance of a lie or alleged lie.
41. However, in *R v K* [2009] NZCA 176 the Court resiled somewhat from its former position, holding that evidence of reputation for untruthfulness may in fact be admissible under section 37 after all, for reasons that included:
- The veracity rules as enacted are identical to the original proposals of the Law Commission, which contained no explicit reference to reputation evidence. The Law Commission recognised that this left some room for reputation evidence to be admitted in the rare event that it would be substantially helpful: *Evidence Law: Character and Credibility* (NZLC PP27).
 - The select committee chose not to prohibit (at least explicitly) evidence of a person's reputation for veracity. This may be contrasted with the changes it made to section 44, prohibiting evidence about the sexual reputation of a complainant in a sexual case.
42. We agree that this revised position is appropriate.

Propensity evidence – introduction

43. Broadly speaking, propensity cases decided under the Evidence Act to date can be divided into two groups. First, there are cases in which the courts have side-stepped the propensity provisions, notwithstanding their prima facie applicability. Second, there are cases in which sections 40 to 43 have been applied. Both sets of cases are discussed in more detail below.
44. In both instances, we can find nothing at all to indicate that any aspect of the provisions is acting as a barrier to the proper admission of relevant evidence. In the first category of case, even if sections 40 to 43 had been applied, we think that the evidence would have been admitted. And in the second category, when the provisions were applied, they seem to be working smoothly and properly. There is nothing to indicate evidence is being either inappropriately withheld from juries, or inappropriately admitted.

Definition and scope of propensity evidence (section 40)

45. Section 40, which defines propensity evidence, provides:

40 Propensity rule

- (1) In this section and sections 41 to 43, **propensity evidence**—
- (a) means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions,

- events, or circumstances with which a person is alleged to have been involved; but
- (b) does not include evidence of an act or omission that is—
 - (i) 1 of the elements of the offence for which the person is being tried; or
 - (ii) the cause of action in the proceeding in question.
- (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
- (3) However, propensity evidence about—
- (a) a defendant in a criminal proceeding may be offered only in accordance with section 41 or 42 or 43, whichever section is applicable; and
 - (b) a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44.
- (4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.
46. If evidence is not considered to be propensity evidence, none of the strictures in sections 41, 42 and 43 apply. Admissibility will be governed by the generally applicable provisions in sections 7 and 8.

Discussion – section 40 appeal case law

47. In *R v Healy* [2007] NZCA 451, the Court held that the wording of the statute should be the starting point in propensity analysis. And in *R v R* [2008] NZCA 342, the Court held that section 40 of the Evidence Act is “broadly worded and therefore ... it is possible to bring a large class of evidence within the section”.⁹⁰⁵
48. However, in subsequent cases, the Court’s approach has been less straightforward. There are a number of cases in which, in order to find evidence admissible, the Court of Appeal has declined to apply section 40 and related sections, and has instead turned to the rather different route via sections 7 and 8 to reach the result that is appropriate. The Court has described what is clearly propensity evidence as merely “part of the narrative”, or “directly relevant”.⁹⁰⁶
49. The resulting theoretical distinctions are somewhat tenuous. They are also difficult to understand, since it is clear from the Courts’ own language in each case where this has occurred to date that the evidence would have been, and in our view should have been, properly admitted even if sections 40 and 43 had been applied. In other words, the sections are not an obstacle to admissibility.
50. It may be that this is a hangover from the previous similar fact law, where, because of the complexity and anomalies of that law, the courts would work

905 See further “Recognising propensity evidence” [2009] NZLJ 284.

906 Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS seminar, February 2010); “Recognising propensity evidence” [2009] NZLJ 284.

around it in a similar fashion to that demonstrated above, referring to the broader or direct relevance of the evidence. However, that should no longer be necessary. There is no dispute that, as the Court itself held in *Healy*, the Act should be taken to be a fresh start.

51. All of this can be illustrated by the half dozen cases briefly reviewed below.
52. In *R v Tainui* [2008] NZCA 119, the defendant had made comments the night before an alleged sexual assault, that “one in five women get sexually abused” and “three in four females are sexually molested by the time they reach a certain age”. The Court held that this did not amount to propensity evidence, because the Crown did not lead evidence of Mr Tainui’s statements to show his propensity to have a particular state of mind. And yet, it also held that the Judge had correctly directed the jury that Mr Tainui’s words were relevant to establish whether or not he “had sexual activity in mind from earlier in the evening”. It held that “what was said was not propensity evidence but was instead directly material to whether or not Mr Tainui later sexually violated the complainant,” thus admissible under section 7. The Supreme Court refused leave to appeal.
53. In *R v R* [2008] NZCA 342, evidence was admitted to demonstrate the defendant’s ongoing pattern of offending against his family, which commentators have agreed would (on the facts of the case) obviously meet the section 40 definition. However, the Court held that it was not necessary or appropriate to undertake a propensity evidence analysis. In one sense, said the Court, the evidence would show a propensity of the appellant, because it would show the appellant’s tendency to behave in a particular way. However, they ultimately determined that while the evidence was relevant, and therefore admissible, “the fact that the evidence may also, in a broad sense, suggest a propensity” was a subsidiary feature of its relevance.
54. In *R v Broadhurst* [2008] NZCA 454, the defendant had sought on numerous previous occasions to explain away unusual bruising and other injuries to a small child, as clumsiness or falling incidents on the part of the toddler. This was regarded as improbable by experts, and the injuries were consistent with a severe sustained pattern of abuse. The pattern of injury and explanation was also consistent with the circumstances of the present charge. The Court held that, while it was possible to regard the evidence as propensity evidence and to analyse its admissibility in accordance with section 43 of the Evidence Act, a “more direct route” to the admissibility of the evidence was via sections 7 and 8. It further observed that, “whether the evidence is labelled as propensity evidence or simply regarded as relevant evidence, the same test for admissibility is reached in either case” (our emphasis). The emphasised part is incorrect: the test for admissibility is plainly not the same under both approaches, although the result (admission of the evidence) almost certainly would have been.
55. In *R v Gooch* [2009] NZCA 163, two witnesses, married women in the appellant’s circle, testified about the nature of his conversations with and behaviour towards them, which seemed to have sexual connotations and had made them feel uncomfortable. The Crown argued that it was evidence of

sexual frustration and various manifestations of it, relevant to motive; however, it neither expressly nor implicitly established the appellant's attitude to non-consensual sex. The Court applied *R v R*, holding at para 8: "On the primary question of relevance, we consider that the evidence is generally relevant, for the reasons advanced by counsel for the Crown. We consider that the potential relevance of the evidence is as contended for by the Crown, not as propensity evidence." But.⁹⁰⁷

The Court's denial that this was evidence of propensity can be contrasted with the ways in which the evidence was described in the later parts of the judgement. For instance "the events two weeks earlier mark the beginning of a pattern of behaviour which continued ... " (para [12]); "the evidence was ... relevant as indicating a preoccupation with sexual thinking" (para [28]); and in conclusion:

it was relevant for the jury to have before it evidence of a pattern of behaviour by the appellant during the period leading up to the incident of inappropriate and lascivious behaviour towards women when affected by liquor and in the context of evidence that he was sexually frustrated and resentful. (para [37])

When considered against the definition of propensity evidence in s 40 it is difficult to see how evidence of a "pattern of behaviour" and of a "preoccupation with sexual thinking" is not "evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind".

56. In *R v Mohamed* [2009] NZCA 477, on charges of assault and homicide, there was prior evidence of neglect, including leaving child in an overheated van two weeks before her death. The Court held that this was not propensity evidence, but instead "evidence that is part of the sequence of events leading up to Tahani's death". However, the Court also said: "The van incident can be seen as tending to show a propensity on Mr Mohamed's part to act towards Tahani in a way that was careless of her wellbeing and indifferent to her needs and suffering ... [and] a propensity on [Mrs Mohamed's] part to go along with ill-treatment of Tahani". But: "It is not necessary to carry a s 43(3) exercise through to a conclusion. While the evidence can be seen as probative as showing propensity, its probity is best weighed as part of the relevant facts."
57. The approach does pose some risk for future cases. According to academics Optican and Sankoff:⁹⁰⁸

it is far from clear why the court often seems so determined to conclude that prosecution evidence should not engage the propensity calculus of s 43. Indeed, the whole point of s 43 is that, since juries are likely to give great weight to propensity reasoning in the determination of guilt, the admissibility of evidence tending to trigger such thinking processes should be controlled by a stringent, multi-factored balancing test. Accordingly, a limited reading of the meaning of "propensity evidence" under s 40(1)(a) risks violence to

907 "Recognising propensity evidence" [2009] NZLJ 284.

908 Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS seminar, February 2010).

Parliament's clear intent of having judges strictly regulate the Crown use of such material in a criminal trial.

58. However, to date, no miscarriage of justice has resulted from this line of authority. As with the veracity provisions, given that the courts seem to be reaching the right results to date (in terms of their decisions to either admit or exclude particular evidence), albeit sometimes by somewhat circuitous routes, we think that the law should be allowed to continue to develop a little before any decision to intervene is made.

Propensity evidence from a defendant about himself or herself (section 41)

59. Section 41 provides:

41 Propensity evidence about defendants

- (1) A defendant in a criminal proceeding may offer propensity evidence about himself or herself.
 - (2) If a defendant offers propensity evidence about himself or herself, the prosecution or another party may, with the permission of the Judge, offer propensity evidence about that defendant.
 - (3) Section 43 does not apply to propensity evidence offered by the prosecution under subsection (2).
60. In *Wi v R* [2009] NZSC 121, overruling *R v Kant* [2008] NZCA 194, the Supreme Court held that evidence that a defendant has no previous convictions meets the definition of propensity evidence. Other good character evidence may also be admissible under the propensity provisions.

Discussion – Kant and Wi

61. In *Kant*, the Court of Appeal had held that an accused's lack of previous convictions was inadmissible as propensity evidence. The Court considered that it was generally neutral as to guilt or innocence of the particular offence charged, or indeed as to propensity, since it might equally be attributable to not having been apprehended. This was overruled in *Wi*. According to the Supreme Court, such evidence has a tendency, if only a slight tendency, to prove that the defendant, on account of the lack of previous convictions, is less likely to have committed the offence or offences with which he is charged.
62. *Wi* also held that, beyond proof of lack of previous convictions, the defence may be able to introduce a broader range of good character evidence, but not all will meet the necessary threshold of relevance. This affirms the approach of the Court of Appeal in *R v Alletson* [2009] NZCA 205. From evidence of good character – evidence from a clergyman as to his participation at church, and decent honest character – the jury would have been asked to infer that the appellant was not the sort of person who would have committed sexual offences against young girls. The Court of Appeal held that such evidence could not, by any logical chain of reasoning, tend to prove anything of consequence at

- the trial for sexual offending. However, that was not to say evidence of good character would never be relevant as propensity evidence.
63. *Wi* also stands for two further propositions:
- If such evidence is adduced, it may open the door to rebuttal evidence from the prosecution. However, evidence of lack of previous convictions without more will not do so.
 - The trial judge may give a direction about the proper use of such evidence, but this is not mandatory.
64. Crown Law has expressed some concern with these latter aspects of the decision: that it creates uncertainty about when a direction should be given, and that precluding the Crown from responding, albeit only to very narrow class of good character evidence, is not consistent with the party-neutral thrust of the Act.
65. We are comfortable with the approach in the interim. In general, it reflects what was intended. We think that, for the time being, it will be best to take Crown Law's concerns under advisement, and continue to monitor developments.
66. In *Alletson*, the Court also discussed the Australian approach,⁹⁰⁹ and suggested it might raise an issue as to whether good character evidence should be generally admissible, not constrained by the scope of the veracity and propensity provisions. We initially reached a similar conclusion, but that provision did not find its way into either the final draft Code or the 2006 Act. We concluded that veracity and propensity are the only aspects of character that are relevant in civil or criminal proceedings.⁹¹⁰
- This issue has, therefore, already been addressed.

Propensity evidence offered against co-defendants (section 42)

67. Section 42 provides:

42 Propensity evidence about co-defendants

- (1) A defendant in a criminal proceeding may offer propensity evidence about a co-defendant only if—
- (a) that evidence is relevant to a defence raised or proposed to be raised by the defendant; and
 - (b) the Judge permits the defendant to do so.

909 In Australia, specific provision is made for evidence of good character, in section 110 of the Evidence Act (Cth), which provides: "The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character".

910 *Evidence Volume 1: Reform of the Law* (NZLC R55), at para 155.

- (2) A defendant in a criminal proceeding who proposes to offer propensity evidence about a co-defendant must give notice in writing to that co-defendant and every other co-defendant of the proposal to offer that evidence unless the requirement to give notice is waived—
 - (a) by all the co-defendants; or
 - (b) by the Judge in the interests of justice.
 - (3) A notice must—
 - (a) include the contents of the proposed evidence; and
 - (b) be given in sufficient time to provide all the co-defendants with a fair opportunity to respond to that evidence.
68. *R v Moffat* [2009] NZCA 437 is the only Court of Appeal decision to date dealing with section 42. As a result of *Moffat*, the current law is arguably looser than would be justified by a proper reading of the Act, because of the Court having read down the effect of section 8.

Discussion – Moffat

69. Section 42(1)(b) has as one prerequisite the requirement for propensity evidence offered by a defendant about a co-defendant to be “relevant to a defence raised or proposed to be raised by the defendant”.
70. In *Moffat* (formerly *R v Jamieson* 4/12/08, HC Timaru CRI 2008-076-328), the defence case was that the group of six defendants co-accused of beating and kicking and stomping someone to death had comprised two groups, those who inflicted the fatal injuries, and a “less active” group, of which the defendant was part. The High Court had held that evidence of previous convictions for violence, including punching and kicking people in the head, of two of the six defendants, was either not relevant (because it told the jury nothing about whether the defendant seeking to call the evidence had been involved in the attack), or would be unduly prejudicial to those two defendants, applying section 8 of the Evidence Act.
71. On appeal against conviction for manslaughter, arguing both that the evidence was relevant in terms of section 42, and that section 8 should not be applied, a majority of the Court of Appeal overruled the High Court. They disagreed on the issue of what, on the facts, constituted relevance to the defence. McKenzie J, dissenting, held that this evidence conferred primarily a tactical advantage; he considered that relevance to the defence is not the same thing as making it more likely that the defendant will win, and needs to be construed as a stricter test.
72. However, all the judges considered that, if the requirements of section 42 are satisfied, a defendant should not be prevented from adducing any evidence that would support his or her case, referring to the section 25 Bill of Rights Act right to present a defence. Accordingly, a judge should not (as the High Court had) invoke section 8 of the Evidence Act on the grounds of collateral damage to another defendant. In extreme cases, where prejudice would be undue, the appropriate remedy would instead be severance. However, there was no

- miscarriage of justice, because in the Court's view admission of the evidence would not have made a difference to the end result of the trial.
73. Optican and Sankoff disagree.⁹¹¹
In their view, the High Court was right, and the Court of Appeal wrong on the second aspect of their decision, regarding section 8.
 74. The academics agree that it is important for judges considering section 42 to focus on whether the evidence supports merely the trial tactics of a defendant in a multi-defendant proceeding, or is actually probative on a material aspect of the defendant's defence. Propensity evidence that is simply a character-blackening exercise, or that is used simply to distract the jury or obfuscate the defendant's own role in the case, should not satisfy the test of admissibility under section 42(1)(a). However, the division of opinion in the Court on this issue seems to have been on the facts, not the law.
 75. However, they go on to argue that section 42 does not need to explicitly refer to section 8(1)(a), because that overarching provision of the Evidence Act applies regardless, and requires a judge to exclude any type of evidence if the court concludes it would have an unfairly prejudicial effect on the proceeding. "The proceeding" is a broad enough concept to cover the interests of other co-defendants. This should not be enfeebled by judges, they argue. A judge is obliged to consider the interests of all defendants, and that is what the respective sections provide for.
 76. The effect of *Moffat*, in their view, is therefore that the current law is looser than would be justified by a proper reading of the Act. Defendants who can satisfy the section 42 threshold will not be constrained by section 8 considerations of the interests of co-defendants; instead, where this is an issue, severance would need to be ordered, which may have other adverse implications (eg, for resources, or witnesses).
 77. In terms of any potential for a miscarriage of justice to arise from the present position, it seems fairly clear that there is no prospect of undue prejudice to any defendant (because in that event, severance would be ordered), and it may work to the benefit of some defendants, by allowing them to rely upon evidence that would otherwise be excluded if section 8 was more strictly applied.
 78. We think that, along with the line of cases discussed under section 40, that challenge the scope of propensity evidence, this is the most significant issue with the present operation of the Act. However, just as in all of the other instances we have identified, we are not wholly convinced that the problem lies in the drafting of the statutory provisions, as opposed to their interpretation, which it remains open to the courts to address, as they have already done in some cases. *Moffat* is quite a recent decision, and once again, we recommend that no action should be taken at this time. Instead, we will continue to monitor progress.

911 Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS seminar, February 2010).

Propensity evidence offered by prosecution about defendants (section 43)

79. Section 43 provides:

43 Propensity evidence offered by prosecution about defendants

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.
 - (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
 - (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
 - (a) the frequency with which the acts, omissions, events, or circumstances which are the subject of the evidence have occurred:
 - (b) the connection in time between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
 - (c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
 - (d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:
 - (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:
 - (f) the extent to which the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.
 - (4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,—
 - (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
 - (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.
80. The line of cases discussed above, under section 40, are all also section 43 cases – or would have been, had the Court invoked the propensity provisions.
81. As with veracity, we have reviewed all the cases we were able to obtain in which the propensity provisions have in fact been applied. The approach the courts are taking to section 43 is very much a case by case fact-specific balancing exercise. That is the approach the Act requires and, in our

judgement, as with veracity, the right evidence is being admitted or excluded, as the case may be. This indicates to us that, when applied, the provisions are working.

Summing up on propensity evidence under section 43

82. In *R v Stewart* [2008] NZCA 429, the Court held that section 43 requires greater specificity in the directions given to juries than the pre-Evidence Act approach. The more detailed approach to the directions that should be given, that we proposed in our report *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, May 2008), was adopted.

Consultation

83. We have been consulting with front line practitioners on these issues by way of various forums, and expect to continue to do so. For example, we issued an open invitation in the Law Society's LawTalk magazine; we are in touch with two special committees (the judicial Higher Courts Evidence Committee, and the NZLS Evidence Committee); we have corresponded directly with key stakeholders; and taken account of academic comment.
84. All feedback received so far has been fully taken into account in formulating this advice.
85. If you agree with our recommendation for further deferral of this work, the issues identified in this briefing along with any unresolved issues will remain under consideration, pending a further report in 2012.

Geoffrey Palmer
President

Appendix 3

Briefing on *R v Barlien* [2008] NZCA 180 and section 35 of the Evidence Act 2006

8 July 2009

MINISTER OF JUSTICE

***R V BARLIEN* [2008] NZCA 180 AND SECTION 35 OF THE EVIDENCE ACT 2006**

Background

1. In *R v Barlien* [2008] NZCA 180, the Court of Appeal drew attention to what it regarded as significant deficiencies in the present formulation of section 35 of the Evidence Act 2006, and referred the matter to the Law Commission and the Ministry of Justice for consideration.
2. Since then, the Law Commission in consultation with the Ministry has been considering how the section should be amended. We have had extensive discussions with the judiciary, prosecutors and members of the defence bar. We have also had a number of meetings and other communications with Rt Hon Justice Ted Thomas, who has taken a particular interest in the matter and is keen to see an amendment passed into law urgently.
3. Justice Thomas is meeting with you and the Attorney-General on Monday, 13th July to discuss the matter.
4. This briefing sets out the problems with the existing section 35 and proposes how it should be amended. If you find the proposal acceptable, it is recommended that there be further consultation with the judiciary before the proposal is taken to Cabinet.

The current section

5. Section 35 of the Evidence Act 2006 provides:

35 Previous consistent statement 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) applies 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 a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness.
 - (3) A previous statement of a witness that is consistent with the witness's evidence is admissible if –
 - (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
 - (b) the statement provides the court with information that the witness is unable to recall.
6. The Select Committee which settled on the wording of section 35 thought that it was codifying the existing law. This was incorrect.
7. In particular, the wording it adopted excluded two types of previous consistent statements that had been generally admissible prior to the Evidence Act 2006:
- a. a complaint of a sexual offence relatively soon after its occurrence (a “recent complaint”);
 - b. a statement that was sufficiently close to the offence to be regarded as part of the surrounding circumstances (known as the “*res gestae*”).

Problems with section 35

8. The exclusion of statements in these two categories has provoked criticism. More generally, the restrictive nature of the requirements that must be met before a statement is admissible under section 35(2) has produced a number of practical problems and anomalies.
9. In summary, these problems and anomalies are:
- a. The requirement that there be a challenge to truthfulness and accuracy based on a previous inconsistent statement or a claim of recent invention has led to the exclusion of some highly relevant and reliable previous consistent statements (such as the content of 111 calls). This is contrary to the Act's fundamental principles.
 - b. The Act has different rules for determining the admissibility of consistent and inconsistent statements, but there are often real difficulties in determining whether a statement is consistent or inconsistent (or an inseparable mix of the two).
 - c. Neither party may know in advance of a witness' evidence whether a previous statement will be consistent or inconsistent with that evidence.

- This has significant implications for victims and witnesses, who may need to remain on standby in case they are required to give evidence of a previous statement.
- d. If there is a perceived inconsistency between the evidence of a witness (including the complainant) and a previous statement, defence counsel is faced with a dilemma in knowing whether to cross-examine on that inconsistency (since it will open the door to the admission of other previous consistent statements).
 - e. If they do not do so, this does not stop them from challenging the credibility of the witness in some other way without opening the door to the admission of such statements. This seems an arbitrary and untenable distinction.
 - f. Trial judges have sometimes been excluding evidence of not only the substance of a complaint of an offence, but also the fact that it was made. This has meant that juries have not been told, for example, why the police were called. (However, the Court of Appeal two weeks ago in *R v Rongonui* [2009] NZCA 279 clarified that the fact that a complaint was made is admissible).
10. While these problems have been real and significant, and have been drawn to our attention by judges, prosecutors and defence counsel alike, we have no evidence that they are producing wrong trial outcomes. Nevertheless, they are causing significant practical problems in the conduct and administration of trials, and in our view need to be addressed as a matter of high priority.

Justice Thomas' Solution

11. In a letter to Dr Young dated 5 April 2009, Justice Thomas said:

"Indeed, I remain convinced that the best format for s 35 is a general exclusion subject to the established exceptions, including a specific provision relating to sexual cases. Outside the impact of s 35 on evidence which is part of the res gestae and sexual cases there has been no complaint about that format."

12. We understand from this that he wants evidence of the res gestae to be admissible as previously, and specific provision for the admissibility of previous consistent statements only in alleged sexual offending cases (not constrained by the "recency" aspect, which has been discredited).
13. We do not support this approach for two reasons. First, it would retain the concept of "res gestae" as a ground for admissibility. This previously caused considerable uncertainty and inconsistency. It has been described as "an unmeaning term" (*Cross on Evidence*), and "certainly a slippery term, which may mean different things in different contexts" (*R v H (CA429/06)* [2007] NZCA 218).
14. Secondly, it would continue to confine the general admissibility of complaint evidence to sexual cases. Justice Thomas argues that this is justified because the credibility of the complainant is almost always in issue in defended sex offence

trials and that complaint evidence is relevant to that assessment. We agree. However, the credibility of the complainant is frequently in issue in other trials as well (including many assaults) and complaint evidence is potentially equally relevant there. We therefore see no merit in confining the provision (however it is framed) to sex offences alone.

The objectives of our proposal

15. In developing reform proposals, our objectives have been:
 - a. to ensure that relevant evidence is available to the fact finder whenever it will be of significant value in enabling a determination of guilty or not guilty;
 - b. to prevent repetitive evidence that needlessly prolongs proceedings (in line with the general principle in section 8);
 - c. to provide some principles that would enable the courts to develop rules about the greater use of previous statements of witness as primary evidence; and
 - d. to eliminate the uneasy and problematic distinction between consistent and inconsistent statements.

Our proposal

16. In order to achieve these objectives, we propose that all previous statements (both consistent and inconsistent) will be admissible on the following conditions:
 - a. it must be the statement of a witness (who is then available to be cross-examined on it);
 - b. it must be relevant and not be unduly prejudicial or needlessly prolong proceedings (the general principles set out in sections 7 and 8 of the Act);
 - c. it must in addition be substantially helpful in proving or disproving anything that is of consequence to the proceedings;
 - d. it will be inadmissible if the judge is satisfied that the evidence of the statement is likely not to be an accurate account of what was said.
17. We also propose that, if prosecution or defence intend to lead evidence of the previous statement of a witness, they will be required to give notice of that intention. In the absence of such notice, the evidence will only be admissible with the leave of the judge.
18. Some have expressed concern that this expansion of s35 will result in a large number of applications to admit previous statements, an increase in the number of pre-trial hearings and the prolongation of trials. We think that there needs to be further consultation on this point. However, while we acknowledge that there will be a settling down period as the Courts develop more detailed guidance as to the circumstances in which previous statements are substantially helpful, we think that the risk of an increase in hearings and length of trial in the longer term is small. Unless previous statements are being

used as the primary evidence, they will only be substantially helpful when the witness' credibility is in question, and even then only in some circumstances. Otherwise there will be little reason for the party to call such evidence, and indeed it might be counterproductive to do so.

Section 127

19. Section 127 provides that if, in a sexual case tried before a jury, a question is asked or a comment made that tends to suggest that the person against whom the offence was allegedly committed either delayed making or failed to make a complaint, the judge may tell the jury there can be good reasons for such victims to delay or fail to complain.
20. Section 35 should similarly make clear that in assessing the admissibility of a complaint in sexual cases, delay in the making of the complaint, or the making of other previous inconsistent statements, should not in itself render the complaint inadmissible because in such cases there may be good reasons for the delay or inconsistency.

Purpose of adducing previous statements

21. The Act is silent on whether any previous consistent statement that is admitted under section 35 is admissible to prove truth of the contents of the statement, or relevant only to the witness' credibility. This has now been resolved by the Court of Appeal. In *R v Barlien* [2008] NZCA 180 and *R v Stewart* [2008] NZCA 429, the Court held that statements admitted under section 35 are admissible to prove their truth. This approach is consistent with the Law Commission's original recommendations. We are inclined to the view that it should be confirmed by legislation.

Judicial Views

22. We have talked to a number of judges at all levels. Some have expressed support for our approach and disagreed with the proposals of Rt Hon Ted Thomas; others have expressed reservations. We therefore think that formal consultation with the judiciary on the proposal would be desirable.

Recommendations

23. We recommend that you agree that we and the Ministry of Justice formally consult with the judiciary on the proposals set out in this paper.

Warren Young
Deputy President

Val Sim
Law Commissioner

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