Te Aka Matua o te Ture
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Second Review of the Evidence Act 2006

Te Arotake Tuarua i te Evidence Act 2006

The Law Commission | Te Aka Matua o te Ture 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 people of New Zealand.

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Foreword

The Evidence Act 2006 contains the rules that govern the admissibility of evidence in criminal and civil court proceedings and often in tribunal hearings as well. The law of evidence plays a critical function in the justice system. Opposing parties present evidence to a judge (where the judge is sitting alone) or jury (if the judge is sitting with a jury). The judge or jury must first decide what the facts are by assessing the evidence. Once the facts are found, the relevant law is applied.

The rules of evidence govern who may say what and how in court proceedings and also what documents and material items may be presented. The rules of evidence are therefore crucial to the fair, just and expeditious determination of all proceedings and are an integral part of the rule of law. They may be described as the oil in the machinery of the justice system.

When Parliament, acting on the advice of the Law Commission, enacted the Evidence Act 2006, it substantially, though not completely, codified the rules of evidence in one accessible statute. Because this was a relatively radical move, Parliament also decided the Commission should review the operation of the new statute every five years to make sure it was working well in practice.

This is the Commission's second review of the Act. We have two years in which to complete the review and this allows us to publish this Issues Paper and consult widely on how the rules in the Evidence Act are operating in practice.

Following its first review in 2013, the Commission concluded the Act was working in a generally satisfactory manner. Our preliminary view is that broadly speaking the Act is still working well. At the same time, however, we have identified a number of issues that warrant consideration and possible amendment.

This Issues Paper summarises the issues that arise and explores possible options for reform. We now seek submissions and comments from all interested parties. In approaching its original review of the law of evidence, the Commission was cognisant of the significance of te ao Māori. We remain committed to recognising any specific issues affecting Māori in this context and welcome submissions in that regard.

The feedback we receive will be taken into account by the Commission in making its recommendations to the Government in our final report, which must be delivered in February 2019.

Douglas White
President

Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be received by **15 June 2018**.

Emailed submissions should be sent to:

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The Law Commission asks for any submissions or comments on this Issues Paper on the second review of the Evidence Act 2006. Submitters are invited to focus on any of the questions. It is certainly not expected that each submitter will answer every question.

The submission can be set out in any format, but it is helpful to specify the number of the question that you are discussing.

OFFICIAL INFORMATION ACT 1982

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus, copies of submissions made to the Commission will normally be made available on request and may be published on the Commission's website. The Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

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INTRODUCTION

1 The Evidence Act 2006 is based on the Evidence Code, which the Law Commission published in 1999. The Act transformed the law of evidence in New Zealand by bringing together in one statute most of the previous relevant statutory provisions as well as the relevant common law rules of evidence. Section 202 of the Act requires the Commission to undertake five yearly reviews of the operation of the Act. This is the second review of the Act and it must be completed by February 2019.

2 Generally speaking, the transformation of the law of evidence into the one Act has been considered a success. When the Commission completed its first review in 2013, it reported that the Act was generally working well and there was widespread acceptance of the value of codification of the law in this area.

CHAPTER 1 – INTRODUCTION

3 This second review, like the previous one, is governed principally by section 202(1) of the Act, which places emphasis on the "operation" of the provisions. It is not a first principles review intended to revisit the Act's fundamental policy settings. However, under paragraph 4 of the terms of reference (attached as Appendix 1) the Commission is required, on this occasion, to extend its review to consider some policy matters. These stem from the Commission's 2015 report, *The Justice Response to Victims of Sexual Violence*, in which the Commission reported to the Government that some of the rules of evidence relating to sexual and family violence were potentially problematic and should be reviewed. Our terms of reference now require us to undertake that review.

4 Under section 202 we must consider whether the Act's provisions should be retained or repealed; and if they should be retained, whether amendments are "necessary or desirable". In considering whether a particular amendment meets the test of necessity or desirability, we intend to use the six "limbs" of the Act's purpose provision (in section 6) as a principled check list. The purpose of the Act is to help secure the just determination of proceedings by:

- the application of logical rules;
- recognising the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990;
- promoting fairness;
- protecting confidentiality and other important public interests;
- avoiding unjustifiable expense and delay; and
- enhancing access to the law of evidence.

5 Any possible reform that is not consistent with, or does not implement, this purpose will not meet the statutory test of "necessary or desirable". Minor amendments that merely tinker with a provision will also not meet the threshold.

Is there a need for a review every five years?

6 Our terms of reference require us to consider whether section 202 ought to be retained. Relevant considerations include the likelihood of further problems arising with the interpretation and application of the Act's provisions in practice and the impact of periodic reviews on the Commission's resources. We are also considering (if the requirement for regular reviews is retained) whether the reviews should:

- continue to be at five yearly intervals;
- be limited in scope to the operation of the Act's provisions; and
- be conducted by the Commission, rather than the Ministry of Justice (the administering department).

CHAPTER 2 – TE AO MĀORI AND THE EVIDENCE ACT

7 Te Tiriti o Waitangi (The Treaty of Waitangi) is of vital constitutional importance as "part of the fabric of New Zealand society"[1] and plays an important part in the Government process for developing policy and legislation. There has also been growing recognition of te ao Māori (the Māori dimension) and tikanga Māori (Māori customary law) and the need to address how tikanga may operate within and alongside the law.

8 When developing the Evidence Code, the Commission endeavoured to take te ao Māori into account. A number of provisions in the Code and the subsequent Act were crafted to address issues and problems that had arisen at common law over the admission of oral evidence on Māori custom (for example, the general test for the admissibility of hearsay evidence and the rules on opinion and expert evidence). Consideration was also given to whether the privilege and confidentiality provisions adequately addressed communications with kaumātua (elders), tohunga (experts) and rongoā (traditional Māori medicine) practitioners.

9 It is now over 10 years since the Act came into force and nearly 20 years since the development of the underpinning Code. However, there is surprisingly little case law relating to the Act and te ao Māori and this makes it difficult to draw any conclusions about how well the provisions of the Act are recognising Māori interests.

10 We are therefore seeking feedback and submissions on whether any particular issues have arisen for Māori in relation to the Act, and if so, whether any amendments are necessary or desirable to better recognise te ao Māori.

CHAPTER 3 – EVIDENCE OF SEXUAL EXPERIENCE

11 Section 44 of the Act is known as the "rape shield" provision. It applies in sexual cases to restrict the extent to which complainants may be questioned about their previous sexual experience. Rape shield provisions protect complainants from unnecessarily intrusive questions focused on their sexual history. Such evidence has little probative value and causes many complainants to feel they are on trial.

1 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

12 A number of important issues relating to the rape shield provision are being considered in this review.

Sexual disposition evidence

13 Section 44 precludes reference to a complainant's "sexual experience … with any person other than the defendant" unless the judge grants leave, and absolutely prohibits reference to the complainant's "reputation … in sexual matters". Section 44 makes no mention of evidence of a complainant's general *disposition* in sexual matters (unlike its predecessor section 23A of the Evidence Act 1908) – an example of this type of evidence is a recording of sexual fantasies in a personal diary. This has created some uncertainty about the admissibility of such evidence.

14 In *B (SC12/2013) v R*,[2] the Supreme Court considered section 44's application to evidence of a complainant's sexual disposition was ambiguous. The majority said the Act's distinction between evidence of "sexual experience" in section 40(3)(b) and "sexual experience … with any person" in section 44(1) potentially created a gap, as evidence relating to a complainant's sexual disposition could arguably fall within the former subsection but not the latter. The majority concluded that section 44 needs further legislative clarification.

15 We think it would be desirable to amend section 44 to clarify the admissibility of sexual disposition evidence. Our preliminary view is that all evidence relating to the complainant's propensity in sexual matters should be captured by section 44. The policy of the provision is to provide protection for complainants and to prevent erroneous assumptions being drawn from the complainant's sexual history.

16 If the Act is amended to clarify that sexual disposition evidence falls within the scope of section 44, then a decision must be made as to which admissibility rule should apply to this evidence. We are seeking feedback on whether sexual disposition evidence should always be inadmissible, or admissible with the permission of the judge subject to meeting the heightened relevance test in section 44(3).

Extension of section 44 to cover sexual experience with the defendant

17 Section 44 does not apply to evidence of the complainant's previous sexual experience with the defendant. New Zealand is one of the few jurisdictions where evidence of the complainant's sexual history with the defendant is admissible, even if it can be objected to.

18 The extension of the rape shield to include the complainant's sexual history with the defendant has been a contentious matter in the past, with different views being taken over the perceived relevance of such evidence. Those in favour of extending the rape shield argue that evidence of previous sexual experience between the complainant and defendant should not lead to an implication that the complainant is more likely to agree to sexual activity on another occasion. Those opposed to the extension argue that the existence of a prior sexual relationship between the complainant and the defendant will often be, or inevitably is, relevant to the issue of consent or reasonable belief in consent.

19 Given it is now 21 years since the Commission consulted the public on the ambit of the rape shield, and over 10 years since the current settings were enacted by Parliament, we think it is timely to seek views on whether the rape shield should now be extended to cover evidence of the complainant's

2 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261.

sexual experience with the defendant (particularly since the Commission has on this occasion been expressly asked to review the rules of evidence relating to sexual violence).

Admissibility of false or allegedly false complaints

20 In *Best v R*,[3] the Supreme Court provided guidance on the interaction between section 37 (veracity), section 40 (propensity) and section 44 (sexual experience) in cases where a complainant has previously made a false or allegedly false complaint of sexual offending. That guidance changed the law, and has attracted some criticism for being overly complicated and blurring the distinction between propensity and veracity evidence.

21 Prior to *Best*, the admissibility of evidence of a previous complaint of sexual offending was assessed under section 37 in cases where it was manifestly clear the complainant had made a false complaint. Where the truth or falsity of the past complaint was disputed, the admissibility of the evidence fell to be determined under section 44. The Supreme Court in *Best* set out a new approach: (1) there must be some evidential foundation for asserting that a prior complaint was false; (2) the complainant (in the absence of the jury) should be asked to confirm whether the previous complaint was false; (3) the judge should then consider whether the evidence is "substantially helpful" under section 37; and (4) if the test is met, the judge should consider under section 44 whether it would be "contrary to the interests of justice" to exclude the evidence. Even if that final test is met, section 44 may still limit the way the evidence is led.

22 The *Best* approach is arguably more complex to apply than the previous bright-line test. However, from a policy point of view we suggest the approach in *Best* is more logical than the previous approach. It is logical to treat the admissibility of evidence of a false complaint in the same way as an allegedly false complaint – that is, as evidence primarily directed at the complainant's veracity. Although *Best* is arguably complex to apply, our preliminary view is that it is the right approach. We are considering whether the position might be simplified or clarified in the Act.

Extension of section 44 to civil proceedings

23 Section 44 applies only in criminal proceedings. In civil proceedings there is no general mechanism governing evidence of sexual experience or reputation, although the Employment Relations Act 2000 and the Human Rights Act 1993 do contain specific provisions controlling such evidence in sexual harassment proceedings. Arguably, there may be situations in other civil proceedings where a rape shield provision would be appropriate (for example, in professional disciplinary proceedings involving allegations of sexual misconduct).

24 We are seeking feedback on whether section 44 or an equivalent provision should apply in all civil proceedings or whether sections 7 and 8 are sufficient to control evidence of sexual experience and reputation in civil proceedings.

Notice requirement in section 44A

25 Section 44A was recently inserted into the Act by the Evidence Amendment Act 2016, following a recommendation by the Commission (during the 2013 review) to require notice to be given of an application for leave to offer evidence of a complainant's sexual experience. The new section does not entirely reflect the Commission's recommendation because it does not require the notice to specify the grounds relied on for admission of the evidence. We think this omission may have been an oversight, which should be corrected.

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3 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.

CHAPTER 4 – CONVICTION EVIDENCE

26 Section 49 contains what is known as the "conclusive proof" rule, which applies only in criminal proceedings. The fact a person has been convicted of an offence is admissible as conclusive proof they committed the offence. The rule is a convenient way of proving the commission of an offence that has already been established to the criminal standard of proof. There are, however, some difficulties with the operation of section 49.

The relationship between sections 8 and 49

27 The relationship between sections 8 and 49 is not clear. In particular, it is unclear whether the conclusive effect of a conviction can give rise to unfair prejudice under section 8, given this is the precise effect mandated by section 49(1). Two judges in the Supreme Court suggested in *Morton v R*[4] that an effect mandated by section 49(1) should not be regarded as unfairly prejudicial under section 8 if there are no "exceptional circumstances" under section 49(2).

28 We are considering whether the relationship between sections 8 and 49 should be clarified in the Act, or whether any ambiguity is a matter best resolved by the courts over time.

Exceptional circumstances

29 Before the Supreme Court's decision in *Morton*, the courts took a narrow view of the scope of the "exceptional circumstances" test in section 49, essentially restricting it to when new evidence put the safety of the conviction in doubt. The courts frequently held that, while a defendant's fair trial rights are paramount and evidence of the conviction may impair a defendant's defence, the right to mount an effective defence does not necessarily require that the defendant be entitled to attack a relevant conviction.

30 In *Morton* the Supreme Court divided over what constitutes "exceptional circumstances". William Young and O'Regan JJ interpreted the test broadly, holding it was satisfied where the conviction evidence would have the practical effect of depriving the defendant of a defence. The Chief Justice considered the test was satisfied where the evidence related to an issue that had not been determined in a previous trial. Glazebrook and Arnold JJ considered the "exceptional circumstances" test was "a high one" (in their view, not met in that case), justified by a number of policy considerations. Subsequently, the Supreme Court in *V v R* held that the policy of section 49(1) was not engaged where the evidence of the conviction is directed at an element of an offence but the particular issue has not been determined in the previous trial.[5]

31 These cases indicate some difficulty in applying the "exceptional circumstances" test, however we are unsure of the scale of this problem. We would like to hear how section 49 is generally operating in practice, and whether submitters consider the scope of "exceptional circumstances" should be clarified.

The evidential effect of the conviction once the exceptional circumstances test is satisfied

32 Section 49(2) does not clearly state what the evidential effect of a conviction is once the exceptional circumstances test is satisfied. The courts have expressed different views on this. Our preliminary view is that the drafting of section 49(2) could be improved to state clearly the intended evidential effect of a conviction if exceptional circumstances are established.

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4 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1.

5 *V v R* [2017] NZSC 142.

Retention of the conclusive proof rule?

33 Given the difficulties that have arisen under the conclusive proof rule, and depending on the scale of these problems, we are considering an alternative option of replacing the current rule in section 49 with a presumptive proof rule.

34 This would be a significant change in policy, but is the approach the Commission recommended in its Evidence Code. A new rule could specify the standard to be met before the presumption is displaced (for example, whether the defendant needs to raise an evidential burden, or if the defendant has an onus on the balance of probabilities).

CHAPTER 5 – RIGHT TO SILENCE

Distinction between challenges to credibility and invitations to infer guilt

35 Sections 32 and 33 proscribe only the drawing of inferences that a defendant is guilty from their pre-trial silence or silence at trial. They do not preclude adverse inferences about a defendant's credibility from being drawn. The courts have acknowledged this can be a "fine line" to walk in practice. The difficulty arises because a challenge to credibility based on pre-trial silence or silence at trial effectively invites the fact-finder to assign some evidential significance to a defendant's silence – this can come perilously close to an invitation to infer guilt.

36 We consider the fine-grained distinction between permissible and impermissible uses of a defendant's silence before and during trial is worth revisiting during this review. It has been over 20 years since the Commission consulted the public on the scope of the right to silence.

37 We are considering whether the Act should be amended to remove the need to determine whether the line between a permissible and impermissible comment on a defendant's silence has been crossed in any given case. One option is to amend the Act to prohibit any adverse inferences being drawn from a defendant's pre-trial silence or silence at trial. Alternatively, the Act could be amended to permit the drawing of appropriate adverse inferences from a defendant's pre-trial silence or silence at trial and remove the current prohibition on inviting inferences of guilt (in other words, permitting inferences of guilt).

Additional issues

38 A number of other issues relating to sections 32 and 33 also need to be addressed if the provisions continue to permit adverse inferences to be drawn from silence in certain circumstances:

- Section 32 does not expressly prevent a judge in a judge-alone trial from relying on a defendant's pre-trial silence as the basis for an inference of guilt. We are seeking feedback on whether the Act should clarify the position.
- The caution Police currently give to suspects does not reflect the reality of how pre-trial silence is used, as it does not mention the possibility of an adverse inference being drawn from silence. We are seeking feedback on whether the ability to draw such an inference should be made conditional upon the defendant having been cautioned about that possibility.
- Section 32 does not specify the exact circumstances in which adverse inferences can be drawn from pre-trial silence to challenge a defendant's credibility. We are seeking feedback on whether the Act should provide guidance in this regard.

- Section 33, which allows a judge to comment on the fact the defendant did not give evidence at trial, is silent on the exact circumstances in which comment is appropriate. We are seeking feedback on whether the Act should provide guidance in this regard.

CHAPTER 6 – UNRELIABLE STATEMENTS

39 Section 28 of the Act sets out the reliability rule. The section is concerned with whether a defendant's statement is sufficiently reliable to be admitted in a criminal proceeding.

40 The current wording of section 28 does not say whether the truth or falsity of the statement can be considered when assessing its reliability. This issue received attention from the Supreme Court in *R v Wichman*.[6] Four of the judges concluded that truth was relevant to this assessment. They did not think it was appropriate for an obviously true confession to be excluded solely on the basis of a theoretical likelihood that the circumstances in which it was made may have affected its reliability. The Chief Justice disagreed – she thought the reliability assessment should only consider the circumstances in which the statement was made. This would avoid collateral inquiries and avoid intruding on the jury's task.

41 *Wichman* has prompted us to include in our review the issue whether truth ought to be relevant to the determination of admissibility under section 28. We have tentatively reached the view that it would be undesirable to require courts to ignore any actual indicia of the truth or falsity of a statement when assessing the risk of unreliability.

42 The question whether truth is relevant to the determination of admissibility under section 28 impacts on the permissible scope of questioning of a defendant during a pre-trial hearing or voir dire that is held to determine admissibility. We are seeking feedback on whether cross-examination of the defendant on whether their statement is true should be permitted, if truth is relevant to the section 28 enquiry. The majority in *Wichman* did not address this question, although both the majority and Glazebrook J emphasised the judge was not to conduct a "mini-trial" when assessing reliability under section 28. Glazebrook J did not think cross-examination on the truth of the statement should be permitted.

CHAPTER 7 – IMPROPERLY OBTAINED EVIDENCE

43 The admissibility of improperly obtained evidence is governed by section 30. The section applies to all evidence offered by the prosecution at trial. When a judge finds that evidence has been improperly obtained the judge must consider whether its exclusion is proportionate to the impropriety. This must be done by 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". A non-exhaustive list of factors is included in section 30(3) and these may be taken into account by the judge in the balancing process.

Section 30(3) factors

44 There is currently a degree of uncertainty as to how the section 30 test is to be applied, particularly in relation to the weight, interpretation and application of the relevant factors listed in section 30(3).

6 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

We are considering whether the Act should be amended to provide more guidance in this area, for example by clarifying: whether the centrality of evidence to the prosecution case is a relevant factor favouring admission; how the "seriousness" of an offence is to be determined and whether this factor favours exclusion or admission; whether the availability of alternative techniques favours admission or exclusion; and whether the absence of alternative techniques has any bearing on the section 30(2) balancing exercise.

45 These issues also raise a broader question as to whether section 30 should provide more prescriptive guidance as to its application, or whether a degree of indeterminacy in the statute is necessary in order to accommodate the necessarily fact-specific and evaluative nature of the section 30 balancing process.

Use of previously excluded evidence in a subsequent proceeding

46 The exact status of evidence that has previously been ruled inadmissible in an earlier proceeding on the basis it was improperly obtained has been subject to some uncertainty.

47 In *Marwood v Commissioner of Police*[7] a majority of the Supreme Court concluded that an earlier exclusion of evidence can be characterised as a "vindication of rights" that weighs in favour (but is not determinative) of admission in a subsequent proceeding. We are seeking feedback on whether submitters agree with this approach.

48 The Court in *Marwood* also held it was open to a judge to exclude evidence in a subsequent civil proceeding (albeit taken by way of law enforcement and with a public officer as plaintiff) that had been obtained in breach of the New Zealand Bill of Rights Act 1990. We are considering whether the Evidence Act should be amended to reflect this position; and if so, whether the Act should recognise a power to exclude improperly obtained evidence in *all* civil proceedings, or only proceedings of a criminal nature.

Addressing concerns associated with evidence gathered during undercover operations

49 Police questioning is governed by the Chief Justice's Practice Note on Police Questioning. Section 30(6) of the Evidence Act requires a judge to take into account guidelines set out in the Practice Note when determining whether evidence has been obtained "unfairly" (and therefore improperly obtained). The Practice Note assists to protect individuals' rights by requiring Police to provide advice relating to the right to silence and the right to consult and instruct a lawyer without delay to a person in custody or in respect of whom there is sufficient evidence to lay a charge. It also prohibits questioning in a manner that amounts to cross-examination.

50 In *Wichman* there was disagreement among the judges of the Supreme Court as to whether the Practice Note applies to undercover police officers. The majority held that it did not – if it did, this would have the potential to affect materially the way Police undertake undercover operations. Both Glazebrook J and Elias CJ, in separate dissenting judgments, considered the Practice Note did apply to undercover police officers.

51 It is difficult to see how the procedures contemplated by the Practice Note could be carried out during an undercover operation without exposing the subterfuge (and potentially endangering the safety of the undercover officers involved). Last year the Law Commission and Ministry of Justice—in a joint review of the Search and Surveillance Act 2012—endorsed the legitimacy of undercover operations, but recommended a new regime to improve the regulation of such operations. The

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7 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260.

recommendations will, if implemented, impose greater prospective constraints on the circumstances and manner in which such operations are conducted.

52 In light of that recent review, we are hesitant to recommend any amendments that could materially hinder the way that such operations are conducted. However, we are interested in submitters' views on whether there is room for any procedural constraints to be placed on the questioning of suspects in the undercover context without unduly compromising this investigative technique. We are also interested in whether the Evidence Act sufficiently addresses the concerns about reliability and unfair prejudice that arise in relation to undercover operations designed to secure incriminating statements and/or involve recruiting the target into a fictitious criminal organisation (in particular, Mr Big operations). If sections 28 and 8 do not provide sufficient safeguards, additional mechanisms may be needed.

CHAPTER 8 – IDENTIFICATION EVIDENCE

53 Section 45 controls the admissibility of visual identification evidence in criminal proceedings. Under section 45, visual identification evidence obtained by way of a formal procedure followed by officers of an enforcement agency is admissible in a criminal proceeding, unless the defendant proves on the balance of probabilities that it is unreliable.

The definition of "visual identification evidence"

54 A witness may make a visual identification tentatively. For example, a witness may identify a person from a photomontage as the person they saw at the time of the relevant events, but qualify that identification by nominating another person from the photomontage as also looking similar, or may pick only one person but express uncertainty about whether it is in fact the right person.

55 Our review of the cases indicates that the status of these types of tentative identifications is uncertain. Whether tentative identifications amount to "an assertion … to the effect that a defendant was present at or near" the scene of the offending, in terms of the section 4 definition of "visual identification evidence", is not clear. It may therefore be appropriate to amend the definition to clarify the position. We are interested in submitters' views on whether tentative identifications should be characterised as "visual identification evidence" (and therefore subject to the criteria for admissibility in section 45); "resemblance evidence" (and therefore not captured by section 45); or some other type of circumstantial evidence.

56 We are also interested in submitters' views on whether there is a need to clarify the admissibility rules that apply to evidence falling outside the scope of the section 4 definition. Should the admissibility of the evidence be assessed under the alternative route of sections 7 and 8?

Relationship between identification evidence and hearsay provisions

57 Visual identification evidence is not necessarily given directly by an eyewitness. The definition in section 4 can include an account of the identification by someone other than the identifier (for example, evidence of the outcome of a formal procedure might be given by the attending police officer). Where evidence is of this sort, and the identifier is not a "witness" (for example, because they become unwell and are unable to give evidence), the identification also arguably constitutes a "hearsay statement". A potential conflict then arises between the Act's identification evidence and hearsay rules. While section 45(1) makes the evidence admissible if a formal procedure was followed, sections 17 and 18 make the evidence admissible only if the prosecution can show there is a reasonable assurance of reliability.

58 We are seeking feedback on whether the Act should be amended to clarify the relationship between the identification evidence and hearsay provisions.

CHAPTER 9 – GIVING EVIDENCE IN SEXUAL AND FAMILY VIOLENCE CASES

59 In any proceeding, the judge may direct that a witness is to give evidence either: "in the ordinary way", which is orally in the courtroom before a judge, a jury (if there is one), the defendant, counsel and potentially members of the general public; or in an alternative way. Alternative ways of giving evidence include a witness giving evidence by way of a pre-recorded video.

60 Evidence-in-chief can be given by way of a pre-recorded video of the witness' original police interview (the evidential video interview or EVI), and in sexual violence cases it is relatively common for complainants to give their evidence-in-chief in this way. The Act also permits a judge to direct that a witness' cross-examination and re-examination be pre-recorded (at a separate pre-trial hearing), though this option is rarely used.

Pre-recording evidence

61 It has been suggested that pre-recording evidence has a number of benefits for witnesses and for the administration of justice. It minimises the risk of victims being re-traumatised by their involvement in the criminal justice process, and also alleviates the negative impact that lengthy delays can have on the quality of evidence.

62 In Australia and the United Kingdom there has been a trend towards enabling certain complainants and other witnesses to give pre-recorded evidence at trial (including cross-examination). In its 2015 report, *The Justice Response to Victims of Sexual Violence*, the New Zealand Law Commission recommended the Act be amended so that:

- adult complainants in sexual violence cases are automatically entitled to give their evidence-in-chief in an alternative way (including by way of a pre-recorded EVI); and
- complainant witnesses in sexual violence cases may pre-record their cross-examination evidence in a pre-trial hearing, unless a judge makes an order to the contrary.

These recommendations are being considered by the Government.

63 This second review of the Evidence Act provides an opportunity to consider whether the Act could better facilitate the use of pre-recorded evidence in family violence cases, including pre-recorded cross-examination. Our preliminary view is that it may be appropriate for the same starting point to apply in family violence cases as we have recommended for complainants in sexual violence cases. Complainants in sexual and family violence cases face a number of similar challenges. For example, the perpetrators are often known to the complainant, there is often a power imbalance with the alleged offender having a degree of dominance, the offending usually occurs in private without other witnesses, and the nature of the offending means that recalling and re-telling events in court can be traumatising and difficult. We are therefore seeking feedback on whether family violence complainants should be automatically entitled to give their evidence (including cross-examination) by way of a pre-recorded video, unless a judge makes an order to the contrary.

64 We are also seeking feedback on whether it may be desirable to provide an entitlement to offer pre-recorded evidence to witnesses who will give propensity evidence about an allegation of sexual or family violence they have previously made; and/or family members of a sexual or family violence complainant who are witnesses in the trial. These witnesses may experience the same

anxiety about testifying as complainants. We also raise the question whether vulnerable witnesses more generally should be entitled to offer pre-recorded evidence.

Access to evidential video interviews

65 The Act was amended on 8 January 2017 to restrict access by defence counsel to certain types of video interviews. New subsections 106(4A)–(4C) now prohibit a copy of a video interview automatically going to defence counsel if it relates to a child witness or a witness (including an adult complainant) in a sexual or violent case. Instead of being entitled to a copy of the video record, defence counsel need to apply to the judge for a copy. The Evidence Regulations 2007 were also amended, and now provide that, unless the judge directs otherwise, the video record may only be viewed at the premises of Police or a Crown lawyer, or other premises with the judge's agreement.

66 We have received feedback that indicates there may be problems with these new restrictions. We are seeking submissions about any practical problems faced by defence counsel, as well as the impact of these provisions on Police, Crown prosecutors, complainants or anyone else, and possible solutions.

Judicial control over witness questioning

67 Section 85 gives the trial judge a wide discretion to control the nature and manner of witness questioning. Although section 85 already allows a judge to intervene where the manner of questioning or the structure or content of questioning is unfair, there is concern that in practice complainants and other vulnerable witnesses are being subjected to inappropriate and overbearing questioning.

68 We are considering whether any amendments should be made to the Act so it is clearer that judges have a duty to intervene in questioning to protect vulnerable witnesses if the manner of questioning, or the structure or content of questioning, becomes unacceptable.

CHAPTER 10 – CONDUCT OF EXPERTS

69 Section 26 of the Act applies only to experts giving evidence in *civil proceedings*. It requires them to comply with "the applicable rules of court" – that is, the Code of Conduct for expert witnesses, which is found in the High Court Rules 2016.

Should experts in criminal proceedings be subject to a code of conduct?

70 The courts have consistently held that similar obligations apply to expert witnesses in criminal proceedings. Given it is widely accepted that expert witnesses in criminal proceedings have ethical obligations when giving evidence in court, it may well be desirable to reflect this position in the Act. Section 26 could, for example, be amended to require expert witnesses in criminal proceedings to adhere to:

- the existing Code of Conduct in the High Court Rules (either in whole or in part); or
- a new, separate code of conduct designed for expert witnesses in criminal proceedings.

71 If the Act is amended so that expert witnesses in criminal proceedings are required to adhere to a code of conduct, we are considering whether the code should impose an obligation to confer with other expert witnesses.

Clarifying the consequences if expert witnesses fail to comply with the Code

72 Currently, section 26(2) provides that if an expert witness does not comply with the rules of the court (that is, the Code of Conduct) the expert evidence may only be given with the judge's permission. No guidance is given, however, as to when the discretion should be exercised. We think it may be desirable for the Act to be amended to provide such guidance (especially if the Act is amended to require experts in criminal proceedings to adhere to a code of conduct). Our provisional view is that the same guidance should apply in civil and criminal cases.

CHAPTER 11 – COUNTERINTUITIVE EVIDENCE IN SEXUAL AND FAMILY VIOLENCE CASES

73 Counterintuitive evidence is evidence offered to correct "erroneous beliefs or assumptions that a judge or jury may intuitively hold and which, if uncorrected, may lead to illegitimate reasoning".[8] Counterintuitive evidence is most often presented to juries to counter misconceptions concerning the behaviour of children who have allegedly been sexually assaulted, or the behaviour of adult complainants in sexual or family violence cases.

74 The Evidence Act provides three methods of presenting counterintuitive evidence to a jury:

- it may be admitted under section 25 as expert opinion evidence;
- it may be admitted by way of an agreed statement under section 9;
- the judge may give a judicial direction aimed at addressing misconceptions about the behaviour of complainants. The Act currently provides for this type of direction to be given in one situation: section 127 permits a judge to tell the jury there can be "good reasons" for a complainant in a sexual case to delay making a complaint.

75 In its 2015 report, *The Justice Response to Victims of Sexual Violence*, the Commission recommended that in court proceedings involving charges of sexual violence, the parties should be encouraged to agree upon expert evidence or a written statement for the jury dealing with myths and misconceptions around sexual violence and that, whenever possible, a written statement should be admitted by consent as an agreed statement under section 9 to obviate the need for evidence by experts in court. In the 2015 report, the Commission also briefly considered the use of judicial directions to the jury to address myths and misconceptions around sexual violence, but did not make any recommendations for new judicial directions to be included in the Act.

76 Our current review revisits the provisions relating to counterintuitive evidence. We are considering two issues:

- whether parties in family violence cases should also be encouraged to agree on expert evidence dealing with myths and misconceptions around family violence, which could be admitted under section 9; and
- whether further provision should be made for judicial directions to be given in relation to counterintuitive evidence in cases involving sexual or family violence.

77 If further directions are needed, then these might be better included in non-legislative material (such as guidelines for the judiciary), rather than in the Act itself. One advantage of non-legislative reform is that the directions can be amended as knowledge about the effect of sexual and family violence

8 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [2].

myths on juror decision-making evolves. On the other hand, the Act is publicly accessible, which could make it easier for parties to request that a specific direction on counterintuitive evidence be given.

CHAPTER 12 – JUDICIAL DIRECTIONS ON THE IMPACT OF SIGNIFICANT DELAY

78 Section 122 governs judicial directions about evidence that may be unreliable in criminal proceedings tried with a jury. Section 122(2)(e) requires a judge to consider giving a reliability warning about the evidence of a defendant's conduct alleged to have occurred more than 10 years ago. Section 122(2)(e) is not confined to trials involving historical sexual abuse, but it commonly arises in that context.

79 The Supreme Court's decision in *CT v R*[9] has raised an issue over the policy and purpose of section 122(2)(e). Prior to *CT*, section 122(2)(e) had been interpreted as targeting reliability concerns arising from the effect of time on memory. However, in *CT* the majority viewed the scope of section 122(2)(e) more broadly. The majority concluded that a defendant's inability to check and challenge the allegations could be material to a judge's assessment of whether evidence may be unreliable for the purposes of section 122(2)(e).

80 The majority's approach is potentially problematic, as it appears to have introduced a near mandatory requirement to direct a jury about the reliability of evidence in cases involving delay (in particular, historic sexual offending cases). The conclusion that evidence can be considered unreliable solely because of delay-related prejudice (even where there is nothing about the particular circumstances indicating the evidence is unreliable) could be seen as suggesting that it is dangerous to convict without corroboration. In light of these concerns, it may be desirable to amend section 122(2)(e) and expressly confine its scope to the effect of delay on the reliability of the evidence itself. A related consideration is whether the Act or non-legislative guidelines should also specifically provide for judicial directions on the forensic disadvantage to a defendant in cases of delay.

CHAPTER 13 – VERACITY EVIDENCE

Are there redundant provisions?

81 In the 2013 review of the Act, the Commission recommended clarifying the scope of the veracity rules by amending the definition of "veracity" (by removing the words "whether generally or in the proceedings"). The amendment was intended to clarify that there is no rule that prevents a party from offering evidence contradicting or challenging a witness' answers given in response to cross-examination directed *solely* to truthfulness. The recommendation was adopted and the definition was amended.

82 It now seems that some of the other veracity provisions (sections 36(1), 37(3)(c) and 38(2)(a)) may have been rendered redundant as a result of the amendment. Our review is considering whether those provisions should be repealed or amended.

9 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465.

The section 38(2)(a) trigger

83 During the 2013 review, the Commission recommended an amendment to section 38 to clarify that the defendant only "opens the door" to evidence about their veracity being introduced by the prosecution when they give evidence in court that puts veracity in issue. This recommendation was accepted and section 38(2)(a) was amended. We are aware of some criticism of the policy underlying this recent amendment, and accordingly are interested in receiving feedback from submitters on how the amendment is working in practice.

The term "veracity" and its definition

84 Use of the term "veracity" may be confusing to the public. A simpler word such as "honesty" or "truthfulness" could possibly be used in the Act. However, we are reluctant to recommend replacing "veracity" with a different term without clear evidence that the existing term is creating difficulties in practice. If submitters consider the term has been causing problems and have suggestions for reform, we would like to hear about them.

85 We have been told that the definition of veracity is difficult to understand, in part because it is defined in the negative as "the disposition of a person to *refrain* from lying". In practice, the courts appear to treat the definition of "veracity" as encompassing both a "disposition to lie" as well as a "disposition to refrain from lying". We therefore think there may be merit in clarifying the definition.

CHAPTER 14 – CO-DEFENDANTS' STATEMENTS

86 Section 27(1) provides that evidence offered by the prosecution of a defendant's statement is not admissible against a co-defendant, unless it is admitted under section 22A. Section 22A is new – it was inserted by the Evidence Amendment Act 2016 in response to a Law Commission recommendation that was made during the 2013 review. Section 22A provides that a hearsay statement is admissible against a defendant if it was made in furtherance of a conspiracy or joint enterprise.

87 Section 22A applies only to "hearsay statements". Because section 22A provides the only potential avenue for the prosecution to offer evidence of a defendant's statement against a co-defendant, the prosecution appears to be prohibited from using a defendant's statement against a co-defendant (that would otherwise meet the requirements of section 22A) if it is not hearsay.

88 Our preliminary view is that there is no principled basis for the admissibility of a defendant's statement made in furtherance of a conspiracy or joint enterprise to depend on whether it is hearsay. We suggest that, rather than treating section 22A as a general exception to the hearsay rule, it would be more logical to amend the provision to provide an independent means of admitting a defendant's out-of-court statement against a co-defendant. If that was done, a defendant's out-of-court statement made in furtherance of a conspiracy or joint enterprise would be able to be used in the prosecution's case against a co-defendant, irrespective of whether it is hearsay. We are seeking feedback on this suggestion.

CHAPTER 15 – PRIVILEGE

89 The review is considering issues that have arisen in relation to section 54 (legal advice privilege), section 56 (litigation privilege), and section 57 (settlement negotiation privilege).

Extension of legal advice privilege

90 Section 54 protects legal advice privilege, which covers communications between a person and their legal adviser (this includes lawyers, registered patent attorneys, and overseas practitioners). Section 54 only protects communications by third parties where they are acting as an agent for the client. The Commission noted in its 2013 review of the Act that this position does not "reflect the realities of modern day practice", where third parties are often used "as more than mere agents, where advice is sought on detailed commercial or financial arrangements".

91 In this second review of the Act we are considering whether the scope of section 54 should be extended to protect third party communications and documents provided to a client or legal adviser, where the dominant purpose of the communication or document is to enable legal advice to be provided to the client.

Termination of privilege

92 In the 2013 review the Commission also considered the question whether (and if so, when) litigation privilege and settlement negotiation privilege should terminate. The Commission made no recommendations on this issue, but suggested the issue be kept under review. We are therefore considering the issue during this review.

93 Since 2013 a number of cases have considered when litigation privilege should terminate, without reaching a definitive conclusion. The cases indicate a degree of uncertainty as to whether litigation privilege terminates with the end of the litigation it is connected to. In light of that uncertainty, there may be merit in amending the Act to clarify the position.

94 We are not aware of any recent litigation in relation to the termination of settlement negotiation privilege. We are interested to hear whether the question of termination of settlement negotiation privilege is causing any problems in practice; and if so, whether the Act should be amended. There are comments by the High Court suggesting the current position is that the privilege does not terminate when settlement is reached.

CHAPTER 16 – REGULATIONS

95 Our terms of reference ask us to consider whether the Evidence Regulations 2007 are comprehensible and fit for purpose. We are not conducting the actual review of the regulations, but are making an assessment about whether they require review in the future. The regulations deal primarily with procedural matters associated with video recorded evidence and evidence given by children in criminal proceedings. The regulations are divided into five parts.

96 We are not aware of any difficulties arising from the application of Parts 3 or 5 of the regulations. We are also not aware of any issues in respect of Part 2 of the regulations, which deal with the content of warnings by a judge to a jury in relation to the evidence of a child under the age of six.

97 We have, however, identified several issues concerning Parts 1 and 4. Part 1 contains the procedural requirements for video recording witness interviews for later use as evidence in criminal proceedings and certain military proceedings. Part 4 contains specific procedural requirements for video recording an interview with an adult complainant on a mobile device, for later use as evidence in criminal proceedings concerning domestic violence.

98 Our main concern is whether the regulations currently accommodate, and will continue to accommodate, developments in recording technology. This issue alone is probably significant

enough to require a review of the regulations. A review may also be necessary if a policy decision is made to amend the Act to automatically entitle certain complainants to record their evidence at a pre-trial hearing and offer this as evidence at trial. To give effect to this policy shift, the regulations would need to be amended to provide appropriate safeguards around the use, storage and security of the recordings.

List of questions

CHAPTER 1 – INTRODUCTION

Q1 Should section 202 be retained, and if so, what form should future reviews take?

Q2 Are there any issues associated with the Evidence Act 2006 that are not addressed in this Issues Paper? If so, please let us know.

CHAPTER 2 – TE AO MĀORI AND THE EVIDENCE ACT

Q3 Are any of the Act's provisions creating particular difficulties for Māori? If so, how should the Act be amended to better recognise Māori interests?

CHAPTER 3 – EVIDENCE OF SEXUAL EXPERIENCE

Sexual disposition evidence

Q4 What admissibility rule should apply to sexual disposition evidence: should it always be inadmissible, or admissible subject to meeting the heightened relevance test in section 44(3)? How should the Act be amended to achieve this?

Complainant's sexual experience with the defendant

Q5 Should the admissibility of evidence about the complainant's previous sexual experience with the defendant be subject to greater controls in the Act? If so, what controls or restrictions should there be?

False or allegedly false prior complaints

Q6 Should the admissibility of a false complaint of previous sexual offending be treated differently from an allegedly false complaint?

Q7 Should false and/or allegedly false complaints be treated as evidence of veracity, sexual experience, or as both? If both, could the approach in *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 be simplified or clarified by amending the Act?

Extension of section 44 to civil proceedings

Q8 Should section 44, or an equivalent rape shield provision, apply in civil proceedings?

Notice requirement in section 44A

Q9 Should section 44A be amended to require a written application to include the grounds relied on for admission under section 44(3)?

CHAPTER 4 – CONVICTION EVIDENCE

Q10 Should the relationship between sections 8 and 49 be clarified in the Act? If so, how?

Q11 Should section 49 be amended to clarify when the "exceptional circumstances" test will be met? If so, in what circumstances should the test be met?

Q12 Should section 49 be amended to clarify the evidential effect of convictions when the "exceptional circumstances" test is satisfied? If so, how?

Q13 Should section 49 be amended to adopt a presumptive proof rule?

CHAPTER 5 – RIGHT TO SILENCE

Q14 Which of the following options should be preferred, and why:

a. amending sections 32 and 33 to prevent any adverse inference to be drawn from a defendant's pre-trial silence and/or silence at trial;

b. amending sections 32 and 33 to permit any appropriate adverse inferences to be drawn (and removing the prohibition on inviting inferences of guilt) from a defendant's pre-trial silence and/or silence at trial; or

c. retaining the status quo?

Q15 Should section 32 be amended to:

a. clarify whether a judge sitting alone is permitted to draw an adverse inference of guilt from a defendant's pre-trial silence?

b. make the drawing of adverse inferences about a defendant's credibility from their pre-trial silence conditional upon the defendant having been cautioned about that possibility?

c. clarify the circumstances in which an adverse inference about a defendant's credibility can be drawn from their pre-trial silence?

Q16 Does the relationship between section 32 and the Act's veracity provisions create any difficulties in practice?

Q17 Should section 33 be amended to provide guidance on the circumstances in which it is appropriate to comment on the exercise of a defendant's silence at trial?

CHAPTER 6 – UNRELIABLE STATEMENTS

Q18 Should the truth of a defendant's statement be considered when determining its admissibility under section 28? Does section 28 need to be amended to clarify the position?

Q19 If truth is relevant to the determination of admissibility under section 28, should cross-examination of the defendant in relation to the truth or falsity of their statement be permitted at a pre-trial hearing or voir dire?

CHAPTER 7 – IMPROPERLY OBTAINED EVIDENCE

Section 30(3) factors

Q20 Should the centrality of the improperly obtained evidence to the prosecution's case be considered under section 30? If so, should it be considered as part of the assessment in section 30(3)(c) or as an independent factor in section 30(3)? Does section 30 need to be amended to clarify the position?

Q21 Is the "seriousness of the offence" assessment in section 30(3)(d) sufficiently comprehensible in light of the guidance provided in *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433? Would the assessment be easier to undertake if the guidance in *Underwood* was reflected in the Act? If so, should the Act:

a. define what is meant by "seriousness"?

b. explain when section 30(3)(d) favours exclusion or admission?

Q22 Should the availability of alternative techniques favour admission or exclusion (or both)? Does section 30 need to be amended to clarify the position?

Q23 Should the absence of alternative techniques have any bearing on the section 30(2) balancing exercise? If so, should this favour admission or exclusion (or both)? Does section 30 need to be amended to clarify the position?

Q24 Is a more prescriptive approach required in section 30? If so, how could this be achieved?

Use of previously excluded evidence in a different context

Q25 When courts determine the admissibility of evidence that has been previously excluded on the basis it was improperly obtained, should the earlier exclusion be treated as a relevant factor (favouring admission) in the section 30(2) balancing exercise? If so, should the earlier exclusion be viewed as an "alternative remedy" within the meaning of section 30(3)(f)?

Q26 Should the Act be amended to contain an express provision dealing with the admissibility of improperly obtained evidence in:

a. civil proceedings taken by way of law enforcement with a public officer as plaintiff?

b. civil proceedings more generally?

If so, should admissibility be determined by way of a balancing test, as in section 30(2)? Should any of the factors listed in section 30(3) apply by analogy?

Addressing concerns associated with evidence gathered during undercover operations

Q27 Should the Practice Note on Police Questioning (or aspects of it) apply to undercover police officers when they are engaged in the questioning of suspects? If so, how could the rules apply to them without unduly compromising the effectiveness of the undercover operation or the safety of the officers?

Q28 Do sections 28 and 8 adequately address concerns about reliability and unfair prejudice that can arise in relation to undercover operations designed to secure incriminating statements and/or involve recruiting the target into a fictitious criminal organisation? If not, should the Act be amended to address these concerns? How could this be achieved?

CHAPTER 8 – IDENTIFICATION EVIDENCE

Q29 Should the definition of "visual identification evidence" in section 4 be amended to clarify whether identifications that are expressed with uncertainty are included? If so, how?

Q30 Should evidence falling outside the scope of the definition of "visual identification evidence" remain admissible, subject to sections 7 and 8? Does the Act need to be amended to clarify the position?

Q31 Should the Act be amended to clarify the relationship between the identification evidence and hearsay provisions? If so, how?

CHAPTER 9 – GIVING EVIDENCE IN SEXUAL AND FAMILY VIOLENCE CASES

Pre-recording evidence

Q32 Should a family violence complainant automatically be entitled to:

a. give their evidence-in-chief by way of a pre-recorded video, regardless of whether the video is recorded within two weeks of the alleged incident?

b. offer pre-recorded cross-examination evidence?

If so, how could the Act mitigate the possibility that additional disclosure may occur after the pre-recording hearing takes place?

Q33 Should prosecutors be required to consult with complainants in family violence cases about their preferred mode of giving evidence?

Q34 Should the Act entitle the following witnesses in sexual and/or family violence cases to pre-record their evidence (including cross-examination) unless a judge makes an order to the contrary:

a. propensity witnesses?

b. family members of the complainant?

Q35 Should reforms in the area of pre-recording aim to provide an entitlement for all vulnerable witnesses to have their entire evidence pre-recorded in advance of a criminal trial? If so, which vulnerable witnesses should an entitlement extend to?

Recording evidence for use at re-trial

Q36 Should the Act be amended to allow:

a. the evidence of sexual and/or family violence complainants to be recorded by video at trial for use at any re-trial?

b. the prosecution to tender any evidence recorded pre-trial in any re-trial?

Access to evidential video interviews

Q37 Have sections 106(4A) to (4C) and regulation 20B, which restrict access by defence counsel to video interviews in sexual or violent cases, created any difficulties in practice? If so, how could access to video records be improved while still mitigating the risk that they may be inappropriately used?

Judicial control over witness questioning

Q38 Should there be greater judicial control over the questioning of witnesses? For example:

a. should the Act be amended to include a provision that the judge may disallow a question if it is asked in a manner that the judge considers unduly intimidating or overbearing?

b. should the Act be amended to allow a judge to exclude particular types of questioning (for example, tag questions)?

c. should there be a statutory duty on judges to intervene when the manner of questioning, or the structure or content of questioning is unacceptable? If so, in what kind of proceedings or in relation to whom should the duty apply?

d. do submitters support the approach of addressing the scope and nature of questioning of vulnerable witnesses at a pre-trial "ground rules" hearing? If so, in what kind of proceedings or in relation to whom would such a hearing be appropriate?

CHAPTER 10 – CONDUCT OF EXPERTS

Q39 Should expert witnesses in criminal proceedings be required to adhere to a code of conduct? If so:

a. should a separate code be developed or should the current Code of Conduct in the High Court Rules 2016 apply to them (either in whole or in part)?

b. should they be subject to an obligation to confer with another expert witness if directed to do so?

Q40 Should section 26 be amended to include guidance on how the discretion in section 26(2) should be exercised? If so, what guidance should be provided?

CHAPTER 11 – COUNTERINTUITIVE EVIDENCE IN SEXUAL AND FAMILY VIOLENCE CASES

Q41 How common is it for parties in sexual or family violence trials to present an agreed statement under section 9 on counterintuitive evidence to the jury?

Q42 Should parties in family violence cases be encouraged to agree upon expert evidence dealing with myths and misconceptions around family violence and admit the evidence by way of an agreed statement under section 9?

Q43 Is there a need for new judicial directions addressing specific areas of counterintuitive evidence in New Zealand? If so:

a. what particular myths and misconceptions should be the subject of judicial directions?

b. should these judicial directions be contained in the Evidence Act 2006 or in non-legislative guidelines?

CHAPTER 12 – JUDICIAL DIRECTIONS ON THE IMPACT OF SIGNIFICANT DELAY

Q44 Should section 122(2)(e) be amended to expressly confine its scope to the effect of delay on the reliability of the evidence?

Q45 Is there a need for judicial directions about disadvantage arising from delay? If so, should these directions be contained in the Evidence Act 2006 or in non-legislative guidelines?

CHAPTER 13 – VERACITY EVIDENCE

Q46 Does the inclusion of sections 36(1), 37(3)(c) and/or 38(2) in the Act cause any confusion or difficulties in practice? If so, should any or all of these provisions be removed or amended?

Q47 Are there any concerns about the amendment made by the Evidence Amendment Act 2016 to section 38(2)(a)? In particular, does the amendment reflect a logical and fair approach to determining whether the defendant has put their veracity in issue?

Q48 Is the Act's use of the term "veracity" or its definition causing any confusion or difficulties in practice? If so, how could the Act be amended to eliminate this confusion or difficulty?

CHAPTER 14 – CO-DEFENDANTS' STATEMENTS

Q49 Should a defendant's out-of-court statement made in furtherance of a conspiracy or joint enterprise be able to be used in the prosecution's case against a co-defendant, irrespective of whether it is hearsay?

CHAPTER 15 – PRIVILEGE

Extension of legal advice privilege to third party communications

Q50 Is the current scope of legal advice privilege creating any problems in practice?

Q51 Should section 54 be amended so that legal advice privilege attaches to third party communications and documents provided to a client or legal adviser, where the dominant purpose of the communication or document is to enable legal advice to be provided to the client?

Termination of privilege

Q52 Should the Act be amended to clarify whether (and if so, when) litigation privilege terminates? If so, which of the following options should be preferred, and why:

a. amending the Act to provide that litigation privilege does not terminate; or

b. amending the Act to provide that litigation privilege ends when the litigation it is associated with ends (with an exception for ongoing, related litigation). If this option is preferred, how should the exception be framed?

Q53 Is the question of whether (and if so, when) settlement negotiation privilege terminates causing any problems in practice? If so, should the Act be amended to clarify the position?

CHAPTER 16 – REGULATIONS

Q54 Are there any issues associated with the application of the Evidence Regulations 2007 that are not addressed in this paper? If so, please let us know.

Q55 Are there any difficulties in the application of the regulations in light of recent developments in recording technology?

Q56 If the Act was amended to entitle certain witnesses to pre-record their evidence (including cross-examination), what restrictions would need to be placed around the storage and use of the video records of that evidence?

Q57 Do the regulations governing transcripts of video records in criminal proceedings sufficiently preserve the privacy of those people they relate to? If not, how could the regulations be improved?

Q58 Is the recent restriction on defence access to certain video records in regulation 20B unduly burdensome? If so, how could the regulations be amended to ameliorate the practical difficulties?

Q59 Are there any problems, or anticipated problems, in the application of the regulations to military proceedings?

CHAPTER 1

Introduction

IN THIS CHAPTER:

We explain the background to this second review of the Evidence Act 2006, including:

- our approach to the identification of practical problems that have arisen over the last 10 years;
- the nature and scope of the review;
- the implications of the Act's purpose provision;
- whether section 202 (the review provision) should be retained;
- the matters we are not going to address in this paper; and
- the structure of this paper.

BACKGROUND

1.1 The Evidence Act 2006 is based on the Law Commission's 1999 report reviewing the law of evidence.[1] The Act transformed the law of evidence in New Zealand in several significant respects.

1.2 First, it brought together in one statute most of the previous relevant statutory provisions as well as the relevant common law rules of evidence. While Parliament did not implement the Commission's recommendation that the law in this area should be completely codified,[2] for practical purposes the law of evidence is now to be found substantially in the new Act.[3]

1.3 Second, the opportunity was taken to put the rules of evidence into language that was accessible, clear and simple, especially when compared with the formulation of the existing statutory and common law rules, which were frequently difficult to find and sometimes uncertain and inconsistent.

1.4 Third, Parliament accepted the Commission's recommendation that there should be overarching

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1 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999); and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999).

2 Compare Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C1] and Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [35]–[38] with Evidence Act 2006, ss 10 and 12. See also ch 2 of Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013); Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV10.01]; and Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA10.2].

3 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [26] and *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [4].

provisions in the Act explaining its purpose and principles.[4] The Act is to be interpreted in a way that promotes its purpose and principles.[5]

1.5 Finally, Parliament took the unprecedented step of including section 202, requiring regular five yearly reviews of the new Act's "operation" by the Commission. It is important to emphasise that Parliament does not expect the Commission to revisit the principles underlying the legislation, though of course the Minister Responsible for the Law Commission may ask the Commission to extend its review (as has been done in this case).

1.6 Generally speaking, the transformation of the law of evidence in New Zealand has been considered a success. In the 2013 review the Commission reported that a clear message had been received that the new Act was generally working well and there was widespread acceptance of the value of codification of the law in this area.[6] Our preliminary impression is that this remains the position.

THE 2013 REVIEW

1.7 The Commission's first review occurred between February 2012 and February 2013.[7] The Commission took the view that it was not appropriate to use the review as an opportunity to revisit policy decisions already made by the Government.[8] Nor did the Commission follow its usual consultation and issues paper process, as the review was not in the nature of a "first principles" review and had to be completed within one year.[9] Instead, the Commission undertook targeted consultation and focused on certain key issues that had been identified. The Commission also established an advisory group of stakeholders and persons with particular expertise in the Act.[10]

1.8 In its report, the Commission recommended legislative change when it was clear that the Act was not working as intended or there was a real problem with how it was operating, and it appeared there was no room for the courts to correct the approach.[11] The main recommendations related to issues of hearsay, previous consistent statements, veracity, identification evidence, privilege and confidentiality. The Government accepted most of the Commission's recommendations, leading to the enactment of the Evidence Amendment Act 2016, which came into force on 8 January 2017.[12]

THE SECOND REVIEW

1.9 The Commission's second review commenced on 20 February 2017. With over a decade of court decisions, especially from the Supreme Court and Court of Appeal, there are now a range of

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4 Such provisions reflect good practice: Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, 1990) at [224]; Law Commission *Legislation Manual: Structure and Style* (NZLC R35, 1996) at [30]; and Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2014) at [12.1]. See also *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [42]–[43]; and Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at ch 8.

5 Evidence Act, ss 10(1)(a) and 12 and Interpretation Act 1999, s 5; Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 220; and Legislation Bill 2017 (275-1), cl 10.

6 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.25].

7 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013).

8 At [1.31].

9 At [1.18].

10 At [1.18]–[1.23].

11 At [1.32].

12 Evidence Amendment Act 2016 Commencement Order 2016 (LI 2016/293).

issues that may warrant further consideration. As the Commission's terms of reference recognise,[13] these include evidence of sexual experience, the admissibility of improperly obtained evidence, the conduct of expert witnesses, veracity evidence, and judicial directions. They also include the adequacy of the Evidence Regulations 2007 and the future of section 202 (further five yearly reviews) itself.

1.10 Under paragraph 4 of the terms of reference, the Commission is required to extend its review to consider some policy matters in respect of the rules of evidence relating to sexual and family violence. In its 2015 report, *The Justice Response to Victims of Sexual Violence*, the Commission reported to the Government that some of the rules of evidence were potentially problematic and should be reviewed.[14] The Commission said it would be well-placed to undertake that review, and suggested that such a review could be referred to the Commission to coincide with its next operational review of the Evidence Act (as has now occurred).

1.11 With the amendment of section 202 in 2016 to give the Commission two years to complete its second review (February 2017 – February 2019),[15] the Commission is able to follow its usual practice of publishing this Issues Paper and engaging in wide consultation.

1.12 An advisory group of people with particular expertise in the Act was established, comprising Brendan Horsley, Elisabeth McDonald, Simon Mount QC, Scott Optican, Tania Singh, Kingi Snelgar, and Chelly Walton. The Chief Justice has established a judicial advisory committee comprising Justices French and Simon France and Judge Stephen Harrop. The Commission has met with both advisory groups in preparing this Issues Paper and will meet with them again before completing our final report.

1.13 In preparing this Issues Paper, we have tried to identify the practical problems with the interpretation and application of the Act by reading all the relevant decisions of the Supreme Court and the Court of Appeal and consulting within the legal profession and the academic community.

1.14 We have also met with Judges Anne Kiernan and Duncan Harvey who have been involved with the Sexual Violence Court Pilot in Auckland and Whangārei to improve case and trial management of offences of sexual violence within the existing law. Guidelines published for the Pilot provide for certain matters to be considered during a case review hearing under the Criminal Procedure Act 2011.[16] Among other matters, the judge must "enquire into and make appropriate directions as to" alternative ways of giving evidence, admissibility of evidence, the length and content of evidential video interviews, the need for interpreters, communication assistance and support persons, and the likelihood of expert evidence being offered.[17] We met Judges Kiernan and Harvey to discuss how the Pilot was working in practice within the constraints of the existing provisions of the Evidence Act and to receive their views about possible areas for reform.

1.15 We have also examined data we obtained concerning pre-trial evidence admissibility appeals to the Court of Appeal.[18] With the approval of the President of the Court of Appeal, and assistance from the judges' clerks of the Court, we collected data on appeals decided in 2015 and 2016.[19] We

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13 See Appendix 1.

14 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.75]–[6.88].

15 Evidence Amendment Act 2016, s 37.

16 The District Court of New Zealand *Sexual Violence Court Pilot: Guidelines for Best Practice* (2016).

17 At [12.4]–[12.10].

18 Criminal Procedure Act 2011, s 217(2)(b).

19 There were 1,299 decisions issued by the Court of Appeal in 2015 and 2016. 592 of these were recorded as criminal appeals (this figure excludes standalone applications for leave, other interlocutory decisions, and all civil matters). Pre-trial criminal

requested information on the outcomes of cases following these appeals and with the help of judges and clerks of the High Court and District Court we obtained information on 90 cases.[20]

1.16 Although the sample related to two years only and more research is necessary to better assess the impact of these pre-trial appeals on the court process, we note some tentative figures.[21] Ninety per cent of the appeals were brought by the defendant, but only 32 per cent of these were successful. In light of this it is interesting that 67 per cent of the cases proceeded to trial following the determination of the pre-trial appeal.[22] This information raises questions about the time taken for these appeals and the implications of their outcomes for the trial courts. Do they contribute to trial costs and delays?

1.17 We have also had the benefit of attending two conferences: the first a seminar organised by the Legal Research Foundation in Auckland in September 2016 ("Evidence Act 2006 – 10 years on") and the second a conference organised by Elisabeth McDonald (from the University of Canterbury) in Wellington in September 2017 ("Reforming the Law of Evidence"). We also gratefully acknowledge the assistance of Elisabeth McDonald in preparing a paper on counterintuitive evidence in sexual and family violence cases, which formed the basis for Chapter 11 of this Issues Paper.[23]

THE NATURE AND SCOPE OF OUR REVIEW

1.18 Our review is governed principally by section 202(1) of the Act, which involves two steps.

1.19 First, it requires consideration of "the operation of the provisions" of the Act. That raises the following questions:

- How are the provisions working in practice?
- Have any real problems or difficulties with the interpretation and application of the provisions been identified by the courts (trial and appellate), the legal profession and/or the academic community, Police, and complainant support services?
- Have the appellate decisions that identified problems or difficulties also resolved them?

1.20 Second, if any problems or difficulties have arisen, should the provisions be repealed, amended or retained unchanged? When considering whether to repeal or amend any provision we need to consider whether any amendments or repeals are "necessary or desirable". Not every proposed amendment will meet this statutory threshold because to be necessary or desirable the amendment or repeal will need to correct a real problem that has been identified and is not able to be left to the courts to correct. A minor amendment that merely tinkers with a provision will not meet the threshold.

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appeals made up 116 of these decisions. 106 of these pre-trial appeals related to the admissibility of evidence. Of these, some 28 appeals concerned improperly obtained evidence (s 30) and 39 concerned propensity evidence (s 43).

20 We requested information relating to the 106 pre-trial admissibility appeals and obtained information on 90 cases. This number is lower because some files could not be located (for instance, some were at a different registry or still active). All subsequent figures are drawn from the information gathered from these 90 cases.

21 Ultimately the complexity of a criminal trial means it is important to be careful before suggesting that a particular outcome can be tied to a particular event. There are inevitably always a number of factors influencing decisions such as whether to plead guilty and when to do so.

22 This figure includes three per cent of cases where the defendant pleaded guilty on the first day of trial and cases where there were multiple defendants and at least one proceeded to trial.

23 The views expressed in that chapter and any errors are our own.

1.21 Our preliminary view is that the six limbs of section 6, the purpose provision, provide a principled basis for considering any proposed amendment. An amendment that is not consistent with, or does not implement, the Act's purpose will not meet the statutory threshold. Before exploring how the different limbs might be applied as guidance for assessing potential reforms, it is helpful to explore briefly how the purpose provision operates and its significance within the scheme of the Act.

THE PURPOSE PROVISION

1.22 Section 6 provides that the purpose of the Act "is to help secure the just determination of proceedings" by:

(a) providing for facts to be established by the application of logical rules; and

(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; and

(d) protecting rights of confidentiality and other important public interests; and

(e) avoiding unjustifiable expense and delay; and

(f) enhancing access to the law of evidence.

1.23 Interpreting the Act in accordance with the purpose provision is mandatory.[24]

Logical rules

1.24 The primary purpose of the law of evidence is to establish facts as a prerequisite to the decision-maker applying the law and determining the outcome. The first limb provides that facts are to be proved "by the application of logical rules".[25] The reference to logic provides "a criterion for assessment of specific provisions in the Act and of judicial interpretation of those provisions."[26]

1.25 The "fundamental principle" contained in section 7 is that to be admissible, the particular item of evidence must be relevant. This requires parties, counsel and the judge to focus on the real issues in the particular case. This is made clear by the definition of "relevance" in section 7(3):

> Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

Recognising the New Zealand Bill of Rights Act 1990

1.26 The second limb emphasises the importance of rights affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA), both substantive and procedural, in the context of determining evidence admissibility issues. Relevant substantive rights include freedom of thought, conscience, religion, expression, peaceful assembly, association and movement, and freedom from discrimination and unreasonable search and seizure. Relevant procedural rights include the rights of persons arrested or detained and charged, minimum standards of criminal procedure and the right to natural justice.

1.27 Many cases over the last decade have illustrated the susceptibility of Evidence Act provisions to NZBORA interpretative influence.[27] Perhaps the most obvious example is section 30, which provides

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24 Section 10(1)(a).

25 Section 6(a).

26 Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA 6.2].

27 For instance, *Stewart v R* [2008] NZCA 429, [2010] 1 NZLR 197; *R v L* [2009] NZCA 286 at [16]; *Rei v R* [2012] NZCA 398, (2012) 25 CRNZ 790 at [15]; *R v P* [2013] NZCA 424 at [50]; and *Boskell v R* [2014] NZCA 538, (2014) 27 CRNZ 212 at [26].

that "improperly obtained" evidence, as defined, must be excluded if its exclusion is determined by the judge to be proportionate to the impropriety.[28] In this context, allegations of breaches of NZBORA occur frequently, especially allegations of unreasonable search or seizure in breach of section 21 of NZBORA.

Promoting fairness

1.28 This third limb recognises the importance of fairness to parties and witnesses. In doing so, it directly reinforces the objective of securing "the just determination of proceedings". In the context of criminal proceedings, it also overlaps with the second limb because section 25 of NZBORA contains minimum standards of criminal procedure designed to ensure fair trials for defendants.

1.29 Examples of provisions in the Evidence Act that promote fairness to parties and witnesses are those that enable courts to offer assistance to vulnerable witnesses such as sections 79 (support persons), 80 (communication assistance), and 85 (controlling unacceptable questions).

1.30 The Court of Appeal has recognised that a fair trial requires fairness towards all parties and witnesses, and this requires the complainant to be able to communicate in a way that best presents his or her evidence to the jury.[29] Other decisions have also taken this limb of section 6 into account.[30]

1.31 The third limb of section 6 is of particular significance in relation to term of reference 4 of this review (the rules of evidence as they relate to sexual and family violence).

Confidentiality and other important public interests

1.32 This fourth limb recognises the importance of public interests that may qualify or limit the requirement for otherwise relevant evidence to be admitted. Examples include:

- the right to assert that a communication is protected by privilege;[31]
- rights of privacy for witnesses and complainants in sexual cases;[32]
- the non-compellability of certain categories of people: judges, jurors and counsel, defendants in criminal proceedings, the Sovereign, the Governor-General and bank officers;[33] and
- the need for an effective and credible system of justice,[34] which:[35]

> … requires not only that offenders be brought to justice but also that impropriety on the part of the police should not readily be condoned by allowing evidence thereby obtained to be admitted as proof of the offending.

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28 Section 30(4).

29 *R v Hetherington* [2015] NZCA 248 at [22]. On this basis the trial judge's appointment under s 80 of a communication assistant for a complainant with Down syndrome in a sexual assault case was upheld.

30 *R v Vagaia (No 2)* HC Auckland CRI-2006-092-16228, 20 March 2008; *R v Selby (No 6)* HC Auckland CRI-2007-092-20293, 7 December 2009; and *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29.

31 Sections 53–59.

32 Sections 87–88.

33 Sections 72–75. The Commission explained the issue of non-compellability of a judge in respect of a judge's conduct as a judge in its recent report, *Reforming the Law of Contempt of Court: A Modern Statute/Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017) at [6.77].

34 Section 30(2)(b).

35 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [187] per Blanchard J. See also at [258] per McGrath J.

Avoiding unjustifiable expense and delay

1.33 This fifth limb recognises the importance of interpreting and applying the rules of evidence in a manner that avoids unjustifiable expense and delay. The limb reflects the concern to ensure court proceedings are heard and determined as expeditiously as possible: justice delayed is justice denied. Similar admonitions appear in NZBORA,[36] the rules of court,[37] the Lawyers and Conveyancers Act 2006,[38] and the new Senior Courts Act 2016 and District Court Act 2016.[39]

1.34 Relevant in this context are the cost and time pressures of the court system: the volume of cases in busy trial courts and the need to avoid unnecessarily lengthy trials, appeals and retrials, with the inevitable stresses they cause for parties and witnesses.[40]

1.35 As the Commission noted in its recent report, *Reforming the Law of Contempt of Court*,[41] the Ministry of Justice has advised that the typical cost incurred during the 2014/15 financial year for a District Court jury trial was $8,170 per day or $26,144 per trial. These figures include court costs, juror costs, judicial costs and legal aid costs, but exclude investigation or prosecution costs incurred by other agencies such as Police, the Crown Law Office, Crown Solicitors or the Department of Corrections. The figures also do not include any private costs incurred by a defendant. The Commission noted that the average cost of a High Court trial is likely to be higher because such trials are generally longer and the judicial costs will be higher.

1.36 In the Evidence Act there are provisions designed to assist the expeditious determination of court proceedings, including:

- section 7(3) (evidence that is not relevant to the issues for determination is inadmissible); and
- section 8(1)(b) (evidence must be excluded if its probative value is outweighed by the risk the evidence will needlessly prolong the proceeding).

Enhancing access to the law of evidence

1.37 This sixth limb recognises the importance of improving access to the law of evidence. It was added by the Select Committee during the passage of the Evidence Bill to emphasise the importance of providing a central place where the law of evidence might be found.[42]

1.38 Enhanced access to the law also reflects the complementary responsibilities of the Law Commission and the Office of Parliamentary Counsel to make the law of New Zealand as understandable and accessible as practicable.[43] Understandability and accessibility require the law to be as clear and simple as practicable taking into account the relevant context. Here the relevant context includes:

- the general scope of the law of evidence which applies to all proceedings, whether criminal or civil, and whether or not lawyers are involved representing the parties; and

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36 New Zealand Bill of Rights Act 1990, s 25(b).

37 High Court Rules 2016, r 1.2 and District Court Rules 2014, r 1.3: "The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application."

38 Under s 4(a) every lawyer has a fundamental obligation to "facilitate the administration of justice in New Zealand".

39 Section 170 of the Senior Courts Act 2016 requires the Heads of Bench to publish information about the timeliness of reserved judgments. There is a similar obligation on the Chief District Court Judge under s 218 of the District Court Act 2016.

40 This limb has also been taken into account in a number of decisions: *R v Christie* HC Christchurch CRI-2008-009-3597, 30 March 2009; *SJH v Auckland District Court* HC Auckland CIV-2009-404-3021, 9 September 2009; and *Keshvara v Blanchett* [2012] NZCA 553, (2012) 21 PRNZ 475.

41 Law Commission *Reforming the Law of Contempt of Court: A Modern Statute/Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017) at [2.7].

42 (15 November 2006) 635 NZPD 6563.

43 Law Commission Act 1985, s 5(1)(d); and Legislation Act 2012, s 3(e).

- the need for judges to be able to explain the relevant requirements of the rules of evidence in language that is easily understandable by members of juries, recognising that complex and difficult explanations should not be necessary.

ASSESSING ANY POTENTIAL AMENDMENT TO THE ACT

1.39 When considering whether any potential amendment to the Act meets the test of "necessary or desirable" we propose using the limbs of the purpose provision in section 6. We have therefore, throughout the paper (where it has been relevant to do so), noted how potential amendments might better implement the Act's purpose.

1.40 For example:

- In Chapter 5 (right to silence) we consider whether the distinctions currently drawn between permissible and impermissible uses of the defendant's silence before and during trial are logical (section 6(a)) and whether there is a case for simplifying the law so it is more accessible (section 6(f)).
- In Chapter 7 (improperly obtained evidence) we explore different options for addressing the current uncertainty concerning the weight, interpretation and application of the relevant factors listed in section 30(3) (which the court may apply when deciding whether improperly obtained evidence should be admitted). Sections 6(a) and (f) are again relevant here, but also relevant are recognising the importance of the rights affirmed by NZBORA (section 6(b)) and ensuring fairness to all parties (section 6(c)).
- In Chapter 8 (identification evidence) we consider whether amendments are needed to clarify how tentative identification evidence should be dealt with under the Act. This requires consideration of not only the purpose of section 45, which is to avoid miscarriages of justice through mistaken identity, but also the broader purpose in section 6(c) of promoting fairness to the defendant and witnesses.
- Promoting fairness to witnesses and complainants is also a major consideration in Chapter 9 (giving evidence in sexual and family violence cases), Chapter 11 (counterintuitive evidence) and Chapter 12 (judicial directions on the impact of significant delay). At the same time, however, some of the potential reforms considered in these chapters, such as pre-recording evidence, tighter control over the questioning of some witnesses, and greater use of agreed statements of evidence (rather than having both parties call expert witnesses) have the potential to avoid unjustifiable expense and delay (section 6(e)).

REVIEW OF SECTION 202

1.41 We note our terms of reference include consideration of the future of section 202 (the review provision) itself.[44]

1.42 The statutory requirement for regular reviews of the Act was included because Parliament considered the legislation should be checked to see how it was working in practice and whether

44 Term of reference 6.

any changes were needed. As the Commission explained in its 2013 review, there were concerns about how the new legislative scheme would "bed in".[45]

1.43 The 2013 review was able to address a number of issues that had arisen and the Act was amended as a consequence. This second review has the advantage of seeing how the Act has worked over 10 years. As will be seen, we have identified a number of further issues to be addressed, some of which may also lead to legislative amendments.

1.44 Whether the statutory requirement for further regular reviews should be retained involves consideration of factors such as the likelihood of further problems arising with the interpretation and application of the Act's provisions in practice; and the need or desirability of requiring the Commission to address these problems. If the requirement for ongoing reviews is retained, then we also need to consider the following issues:

- Whether the reviews should continue to be five yearly or less frequently (for instance, every 10 years). Relevant considerations in this context include: the timing of the enactment of any amendments following the completion of this second review;[46] the opportunity for such amendments to work in practice and for appellate court decisions interpreting and applying them to emerge; and the desirability or otherwise of requiring the Commission to carry out a third review in 2022 rather than at a later date.
- Whether the scope of reviews should continue to be limited to the operation of the Act (bearing in mind the ability to include specific terms of reference, such as term of reference 4, to permit an examination of wider policy issues) or whether there should be an opportunity for a more substantive review.
- Whether the Law Commission should continue to be responsible for the reviews, bearing in mind the costs involved, the impact on the Commission's work programme and the availability of alternative methods for considering and recommending amendments.

QUESTION

Q1 Should section 202 be retained, and if so, what form should future reviews take?

MATTERS WE ARE NOT GOING TO ADDRESS

1.45 This Issues Paper sets out the main issues we have identified with the Act. Some of those issues were anticipated in our terms of reference, which listed a number of specific provisions that we were to consider during this review;[47] and some of the issues relate to provisions that were not listed.[48]

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45 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.8].

46 We note amendments contained in the Evidence Amendment Act 2016 (stemming from the recommendations made by the Commission during the 2013 review of the Evidence Act) came into force on 8 January 2017; and this second review commenced in February 2017.

47 For example, we discuss issues relating to s 26 (the conduct of expert witnesses) in Chapter 10; issues relating to s 28 (unreliable statements) in Chapter 6; and issues relating to s 30 (improperly obtained evidence) in Chapter 7. These provisions were included in term of reference 2(a)–(c).

48 For example, we discuss issues relating to identification evidence in Chapter 8; and issues relating to s 22A (hearsay statements against defendants) in Chapter 14.

1.46 There are a few provisions listed in our terms of reference that we have not addressed because, having reviewed those provisions, we consider no significant issues arise. Subject to any submissions we may receive identifying issues with those provisions, we do not propose to address them during our review. In this section we briefly explain why.

Past and future testifiers

1.47 During the Commission's 2013 review of the Act, it considered whether the definition of "witness" in section 4 should be amended to clarify whether past and/or future testifiers are included.[49] After considering the case law in this area, the Commission ultimately did not recommend any legislative change. The Commission was conscious of the fact the term "witness" is used throughout the Act with different nuances in meaning depending on the context in which it appears.[50] The Commission recommended the definition be kept under review with any problems to be considered during this review.[51] We have reviewed the case law since the 2013 review and are not aware of any significant problems in practice that have arisen with section 4's silence on whether past and/or future testifiers are included in the definition of "witness".[52]

Status of the common law

1.48 During the 2013 review of the Act, the Commission expressed some concern that the courts had interpreted sections 10 and 12 as permitting recourse to the common law whenever the Act is silent on a question of admissibility or refers to it only in part.[53] The Commission noted this approach had not been anticipated in its original recommendations, commentary to the Code, or by the Select Committee, which envisaged that sections 10 and 12 would allow the pre-Act common law to be applied only in unforeseen cases.[54] The Commission did not recommend legislative change, but instead considered any problems should be identified during this review.[55]

1.49 We have reviewed the case law and consider section 10 is being interpreted appropriately and consistently by the courts.[56] While section 12 has sometimes been interpreted in a way that was not anticipated,[57] we have the same reservations about amending the section that we held in 2013:

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49 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.9]–[3.20]. A "past testifier" is a person who has already given evidence, and a "future testifier" is a person who has not yet given evidence.

50 At [3.20].

51 At 41, R2. The issue was included in term of reference 3(a) of this review.

52 In relation to past testifiers, the Court of Appeal in *M v R* [2010] NZCA 302 at [26] observed that they could fall within the definition of "witness" under s 4, and this approach was followed by the Court of Appeal in *Charlton v R* [2016] NZCA 212 at [43]. We note that approach is consistent with the Law Commission's commentary on its Evidence Code: see Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C18]. As for future testifiers, most cases appear to have treated them as falling within the definition of "witness" (see *C v R* [2015] NZHC 3150 at [80]; *Body Corporate 323716 v Mason Developments Ltd* [2016] NZHC 728 at [31]; and *Police v Winiata* [2016] NZDC 7509, [2017] DCR 282 at [64]; although compare *Janif v Police* [2014] NZHC 2753 at [21]). As we explained in our 2013 review, we do not see any particular difficulty with this approach: while there is a risk a future testifier who is scheduled to appear as a witness will not do so (or a party will change their mind about calling them), we note that s 14 would allow evidence to be provisionally admitted subject to the statement maker giving evidence as a witness. If this did not occur, any prejudice or unfairness could be remedied through a judicial direction to the jury: see Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.19].

53 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [2.39].

54 At [2.66].

55 At 35, R1. The issue was included in term of reference 3(b) of this review.

56 See *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835 at [29]–[30]; *Deliu v New Zealand District Court* [2016] NZHC 2806, [2017] NZAR 120 at [19], [25], and [26]; *Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* [2013] NZHC 2261, (2013) 21 PRNZ 520 at [20]; and *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [429], n 471.

57 See *Minister of Education v Reidy McKenzie Ltd* [2016] NZCA 326, (2016) 23 PRNZ 439 at [23]; *R v McNaughton (No 4)* [2014] NZHC 2208 at [32]; *Commissioner of Police v Marwood* [2014] NZHC 1866 at [31] (the Court of Appeal rejected the High Court's approach to s 12 in that case: *Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733 at [36]; the

that is, amendment is unlikely to prevent entirely the practice of courts referring to the common law whenever the Act is silent on the question of admissibility or refers to it only in part;[58] and the courts' interpretation perhaps demonstrates difficulties with the substantive provisions of the Act themselves rather than section 12 itself.[59] For those reasons, we do not explore possible amendments to section 12 in this paper.

Use of evidence that is inadmissible for the prosecution

1.50 During the 2013 review of the Act, the Commission noted a potential conflict between sections 31 and 90,[60] as section 31 anticipates that a co-defendant will be able to offer the written statement of a defendant in evidence even when, pursuant to sections 28–30, such a statement is inadmissible for the prosecution.[61] When offering that document in evidence, the co-defendant may wish to "use" it when questioning a witness (such "use" being the normal way of offering a document into evidence); however, the wording of section 90(1)[62] appears to prevent the co-defendant from doing so.[63] The Commission ultimately did not recommend amendment as it was not aware of the relationship between the provisions causing any problems in practice.[64] Instead, it recommended the issue be kept under review.[65]

1.51 On reflection, we do not consider there is in fact any conflict between the wording of the two provisions. For such a conflict to arise, section 31 would need to be framed in a permissive manner, by *authorising* a co-defendant to offer evidence against another defendant. But that is not what section 31 says. Rather, section 31 addresses what the prosecution is not authorised to do: it cannot ride on the co-defendant's coat-tails if he or she offers evidence that would be inadmissible for the prosecution against a defendant. Given there is no textual conflict between the provisions, we do not propose to address the issue further during this review.[66]

Supreme Court did not comment on that point: *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260); and *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, [2013] ERNZ 605 at [48].

58 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [2.67]. By way of example (and as we discuss further in Chapter 7 at paragraphs [7.64]–[7.67]), the Supreme Court in *Marwood v Commissioner of Police* [2016] NZSC 139 [2017] 1 NZLR 260 appeared to employ s 7(1)(b) as well as s 11 to refer to a pre-Act jurisdiction to exclude evidence obtained in breach of the New Zealand Bill of Rights Act 1990 in civil proceedings.

59 At [2.65]. If the individual provisions of the Act are creating real difficulties in practice, it is better to amend those provisions. For example, we discuss s 30's application only to criminal proceedings (rather than to both criminal and civil proceedings) and explore the possibility of amending the Act to expressly contain a provision dealing with the admissibility of improperly obtained evidence in civil proceedings in Chapter 7, in light of *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260.

60 At [11.31]–[11.33].

61 Section 31 provides that "[e]vidence 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 another party." The section therefore recognises that evidence that is inadmissible for the prosecution against a defendant under ss 28–30 may be admissible when offered by another party to the proceeding (for example, where a co-defendant wishes to offer evidence that could incriminate the defendant to assist his or her defence).

62 Section 90 governs the process of using (and consulting) a document. Section 90(1) provides: "[a] party must not, for the purpose of questioning a witness in a proceeding, use a document that has been excluded under section 28, 29, or 30."

63 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.32].

64 At [11.33].

65 At 216, R30. The issue was included in term of reference 3(e) of this review. Section 31 was also included in term of reference 2(d).

66 Although there is no direct conflict between ss 31 and 90(1), we acknowledge the Act anticipates a co-defendant can offer evidence against a defendant in such a situation (subject to complying with any relevant admissibility rules), and that s 90(1) could potentially prohibit a co-defendant from seeking to offer evidence in this way. However, the position remains largely the same as when the Commission considered the issue in 2013: there is no evidence of the s 90(1) prohibition creating any real difficulties in practice.

Previous consistent statements

1.52 Section 35,[67] which sets out the previous consistent statements rule, was recently amended to address issues the Commission identified during its 2013 review.[68] While there is some concern over whether the amendments to section 35 have in fact addressed those issues,[69] we consider it would be premature to recommend further amendment to the section at this stage. We consider the recent amendments, which only came into force on 8 January 2017, should be left to the courts to bed in.

Propensity evidence

1.53 The admissibility of propensity evidence is a frequently litigated issue.[70] During the Commission's 2013 review of the Act, it examined a number of issues that had been raised in relation to the propensity provisions, but ultimately made no recommendations for reform in this area.[71] We have reviewed the case law since the 2013 review and are not aware of the propensity provisions causing any particular problems in practice.[72]

1.54 We initially considered raising the issue of whether the Act should be amended to provide guidance on the circumstances in which a jury direction on propensity evidence ought to be given.[73] In 2011, the minority of the Supreme Court in *Mahomed v R* provided guidance on that issue,[74] but the law was arguably left somewhat unsettled because the majority refrained from expressing their view on the issue.[75] However, from our review of the case law, the position is reasonably clear that a propensity direction will generally be required in the situations identified by the minority in *Mahomed*. Numerous appellate decisions have adopted that approach.[76] Furthermore, the Supreme

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67 Section 35 was included in term of reference 4(a) of this review.

68 The section was amended by s 11 of the Evidence Amendment Act 2016. During its 2013 review of the Evidence Act, the Commission examined the developing jurisprudence on the scope and application of s 35 in some detail, identifying what it saw as some significant issues with the section as then drafted: Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at ch 5. The Commission recommended repealing s 35 (at 91, R9); but this recommendation was not accepted by the Government. Instead, s 35 was amended to address the issues the Commission had identified.

69 For example, whether the inclusion of a new exception in s 35(2)(c) has adequately addressed issues over what is a "statement" for the purpose of s 35. Section 35(2)(c) now allows a previous consistent statement to be admitted if the statement "consists of the mere fact that a complaint has been made in a criminal case". Prior to this amendment, the fact of a complaint was prima facie inadmissible – it is now prima facie admissible as it falls within s 35(2)(c). The new exception was intended to sidestep the fine distinctions that had been drawn by the courts as to what amounts to a "statement". The distinction between the "fact of complaint" (which was caught by s 35(1)) and the "fact of speaking" (which fell outside the scope of s 35(1)) was not always clear; but now that both categories are prima facie admissible, the distinction should be of less importance. There is also a question whether the new exception in s 35(2)(b) for statements that form "an integral part of the events before the court" has achieved the intention of codifying the common law rule that permitted words spoken as part of the events in issue to be admitted as part of the "res gestae"; and whether the re-drafting of the exception for statements made in response to a challenge to a witness' veracity or accuracy (now in s 35(2)(a)) has created uncertainty over whether it was intended to signal a change in approach (for example, by the addition of the words "will be" and the removal of the words "necessary" and "recent").

70 Reference to the propensity provisions is included in terms of reference 2(g) and 4(c) of this review.

71 See Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.112]–[6.147].

72 For example, we are not aware of any particular issues that have arisen in relation to the application of the s 43 admissibility test in practice.

73 This was an issue the Commission considered in *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.138]–[6.142]. The Commission ultimately did not recommend that the Act be amended.

74 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [91]–[92] per William Young J (writing for himself and McGrath J).

75 At [17] per Tipping J (writing for himself, Elias CJ and Blanchard J). See Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV43.10(4)].

76 See for example *C (CA216/2017) v R* [2017] NZCA 601 at [23]; *Williams v R* [2017] NZCA 176 at [31]; *T (CA561/2014) v R* [2016] NZCA 235, (2016) 28 CRNZ 17 at [15]–[33]; *J (CA175/2015) v R* [2015] NZCA 594 at [21]; *S (CA71/2014) v R* [2014] NZCA 478 at [55]; and *KM (CA249/2013) v R* [2014] NZCA 120 at [20]–[21].

Court in *Taniwha v R* recently and unanimously endorsed the *Mahomed* minority approach.[77] We therefore do not think there is any residual uncertainty requiring legislative clarification.

QUESTION

Q2 Are there any issues associated with the Evidence Act 2006 that are not addressed in this Issues Paper? If so, please let us know.

STRUCTURE OF THIS PAPER

1.55 The order of the chapters in this Issues Paper is based on our assessment of the relative significance of the issues we have identified with the Act. We have taken this approach, rather than following the order the provisions appear in the Act, to give more prominence to those provisions that are most likely to require amendment.

1.56 The ordering of the material also reflects connections between the content and themes in different chapters:

- Chapters 1 and 2 are both overview chapters.
- Chapters 3 to 8 all consider issues concerning the admissibility and use of evidence.
- Chapter 9 deals with the rules of evidence relating to sexual and family violence. (Chapters 3, 11 and 12 also identify a number of relevant issues relating to the rules of evidence in sexual and family violence cases.)
- Chapters 10 to 12 are all broadly concerned with assisting juries with specialist knowledge.
- The final four chapters deal with specific stand-alone topics.

1.57 An Executive Summary covering the more significant issues canvassed in each chapter has been included at the front of the paper.

77 *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [65] per Arnold J for the whole Court. See also *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [14] per Tipping J for the whole Court ("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").

CHAPTER 2

Te ao Māori and the Evidence Act

IN THIS CHAPTER, WE:

- discuss the special significance of te ao Māori within New Zealand's legal framework;
- describe how the Law Commission endeavoured to take into account te ao Māori during the development of its Evidence Code; and
- invite submissions on whether any amendments to the Evidence Act are necessary or desirable to better recognise Māori interests.

BACKGROUND

2.1 Te Tiriti o Waitangi/The Treaty of Waitangi is regarded as one of New Zealand's key founding documents. It is undoubtedly of vital constitutional importance[78] and has been described as "part of the fabric of New Zealand society".[79] Over time, the Treaty has become increasingly relevant to the development process of policy and legislation (including law reform),[80] and as part of that process, there has been a growing recognition of te ao Māori (the Māori dimension)[81] and the need to acknowledge tikanga Māori[82] and address how it may operate within or alongside New Zealand law.[83]

78 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516 per Lord Woolf.

79 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

80 See Legislation Design and Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2014) at ch 4; and Cabinet Office *Cabinet Manual 2017* at [7.65]. The Law Commission Act 1985 requires the Commission to take into account te ao Māori in making recommendations for the reform and development of the laws of New Zealand: s 5(2)(a).

81 See Legislation Design and Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2014) at [2.4]: "New legislation should as far as practicable be consistent with fundamental common law principles and Te Ao Māori (which incorporates Māori language, customs, beliefs, sites of importance, and the importance of community, whānau, hapū and iwi)."

82 Tikanga Māori refers to the body of rules and values developed by Māori to govern themselves – the "Māori way of doing things": Joseph Williams *He Aha Te Tikanga Māori* (unpublished paper for the Law Commission, 1998) at 2, as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [71]. It is sometimes described as "Māori custom law". The fundamental values that inform tikanga Māori have been examined by Sir Hirini Mead and are also discussed in the Law Commission's Study Paper on Māori custom and values: see Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington, 2016) and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [124]–[166].

83 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [117]. See also *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [164] per Tipping, McGrath and Blanchard JJ ("the common law of New Zealand requires reference to … tikanga, along with other important cultural, spiritual and religious values"); and at [94] ("Maori custom according to tikanga is … part of the values of the New Zealand common law") and [101] per Elias CJ.

2.2 In a 2001 study paper, *Māori Custom and Values in New Zealand Law*, the Law Commission observed that:[84]

> If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Māori is, how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Māori, still encapsulated within a dominant culture in New Zealand society.

2.3 A number of New Zealand statutes make express reference to Māori interests, or the Māori dimension, or include general provisions of significance to Māori.[85] There are 44 statutes in force that include references to tikanga (21 of which include a statutory definition of tikanga),[86] and 41 statutes that contain references to the Treaty or its principles.[87]

2.4 There may be a number of different reasons for expressly referring to Māori interests in legislation (for example, in order to mandate consideration of Māori interests or the role of Māori as tangata whenua, acknowledge cultural differences, or promote Māori language or culture)[88] and the decision to do so can be influenced by factors such as whether Māori have a strong and relatively unified interest in the policy being developed and/or how it will be subsequently implemented, and whether Māori interests are considered better defined and protected through statute rather than by the courts.[89]

2.5 David Williams has observed that a "delicate balance"[90] is required of law-makers and decision makers: recognition of Māori interests should not entail "assimilation or absorption" of Māori customs and values into New Zealand law.[91]

TE AO MĀORI AND THE DEVELOPMENT OF THE EVIDENCE CODE

2.6 The Law Commission endeavoured to take into account te ao Māori during the development of its Evidence Code.[92] A number of discussion papers published by the Commission during the 1990s on aspects of evidence law were considered in draft by consultants who audited them for issues of

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84 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [402].

85 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at [4.9.4(2)]. See for example the Environment Act 1986 (preamble); Te Ture Whenua Maori Act 1993 (preamble); Hazardous Substances and New Organisms Act 1996, s 8; Resource Management Act 1991, s 8; and State-Owned Enterprises Act 1986, s 9. See also the Education Act 1989, which defines a wananga by reference to tikanga Māori (s 162(4)(b)(iv)); the Resource Management Act 1991, which defines kaitiakitanga and tikanga Māori (s 2); and Te Ture Whenua Maori Act 1993, which provides for decisions of the Māori Appellate Court on matters of tikanga Māori to be binding on the High Court (s 61(4)).

86 This figure is based on our search of principal Acts in force on the Parliamentary Counsel Office's "New Zealand Legislation" website <www.legislation.govt.nz> and excludes statutes that are in relation to settlements pursuant to the Treaty of Waitangi. We note that in a 2016 article, Judge Annis Somerville identified 79 statutes (including Treaty settlement Acts) that included references to tikanga (43 of which included a statutory definition of tikanga): Annis Somerville "Tikanga in the Family Court – the gorilla in the room" (2016) 8 NZFLJ 157 at 158 and appendices 1 and 2.

87 This figure is again based on our search of principal Acts in force on the Parliamentary Counsel Office's "New Zealand Legislation" website <www.legislation.govt.nz> and excludes Treaty settlement Acts and statutes that contain minor references to the Treaty, Waitangi Day or the Treaty of Waitangi Act 1975. We note that in a 2014 report, the New Zealand Productivity Commission identified 36 statutes (excluding Treaty settlement Acts and statutes that refer to Waitangi Day) that contain references to the Treaty or its principles: New Zealand Productivity Commission *Regulatory Institutions and Practices* (June 2014) at [7.3].

88 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at [4.9.4(2)].

89 See New Zealand Productivity Commission *Regulatory Institutions and Practices* (June 2014) at [7.6].

90 David Williams *He Aha Te Tikanga Māori* (unpublished draft paper for the Law Commission, 1998) at 5, cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

91 At 4.

92 As noted above (at n 80), the Commission is specifically required to take into account te ao Māori in making recommendations for the reform and development of the laws of New Zealand: Law Commission Act, s 5(2)(a).

interest or concern to Māori.[93] In 1997, the Commission prepared a consultation paper that set out possible issues of concern to Māori,[94] and obtained feedback from a number of Māori practitioners on its proposed reforms. The Commission also established a Māori Committee[95] to provide advice on Māori perspectives.[96]

2.7 We summarise below some of the te ao Māori issues the Commission considered when formulating its Evidence Code.

The status of oral evidence on Māori custom

Hearsay rules

2.8 In a 1991 preliminary paper, *Evidence Law: Hearsay*, the Commission noted the common law rules against hearsay posed particular problems for the admission of Māori custom in court proceedings.[97] This was because the common law usually insisted on witnesses giving first-hand evidence based on personal knowledge of matters of fact.[98] As knowledge of Māori custom is often passed down from generation to generation by way of oral tradition, testimony about the content of the custom was generally inadmissible as hearsay unless it fell within an existing common law or statutory exception.[99]

2.9 The Commission considered the common law hearsay rules were in need of fundamental reform,[100] as there were "too many cases where valuable evidence [was] excluded on the ground that it [was]

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93 At least five papers were reviewed by Georgina Te Heu Heu and one by John Chadwick.

94 Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 2 September 1997).

95 Comprising Rt Rev Bishop Manuhuia Bennett, Judge Michael Brown, Chief Judge ETJ Durie, Mason Durie, Archie Taiaroa and Whētu Weretā.

96 The Māori Committee is the equivalent of what is now known as the Māori Liaison Committee. For more information on the function and purpose of the Committee, see Law Commission "Engaging with Maori" <www.lawcom.govt.nz/engaging-māori>.

97 Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [60]. Māori custom law is part of the common law in New Zealand but what constitutes Māori custom in any particular case is a question of fact to be established by evidence, unless the particular custom has become notorious by frequent proof and so judicial notice can be taken of it. See *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95] per Elias CJ; Richard Boast "Māori Customary Law and Land Tenure" in Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) at [2.2.5]; and Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001). See also Joseph Williams "The Harkness Henry Lecture: Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1. For a discussion of some of the difficulties in treating customary law either as a question of fact or law, see Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at ch 13; and Jennifer Corrin "Accommodating Legal Pluralism in Pacific Courts: Problems of Proof of Customary Law" (2011) 15 E&P 1.

98 Evidence was considered hearsay (and therefore inadmissible) at common law if it was given by a witness who related what another person said or wrote out of court. The rationale for this exclusionary rule (which applied only to statements offered as the truth of what the other person said or wrote) was based on the perceived dangers of being unable to test a witness' evidence in cross-examination: see Law Commission *Hearsay Evidence* (NZLC PP10, 1989) at [5]–[8]; and Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.4].

99 Such as s 13 of the Evidence Amendment Act (No 2) 1980, which provided an exception for statements relating to the existence of Māori custom that amounted to oral hearsay in criminal proceedings. The exception was subject to s 8, which required (as a condition of admissibility) the maker of the statement to have had personal knowledge of the matters dealt with in the statement and to be unavailable to give evidence: s 8(a). There was also an exception to the hearsay rule (in s 42 of the Evidence Act 1908) that permitted published works on matters of "public history, literature, science, or art" to be admitted. Reports of the Waitangi Tribunal had been admitted under that section as evidence on matters of historical fact and Māori custom (see *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 (CA) at 653). The Law Commission recommended re-enacting the substance of s 42 in the Evidence Code: see s 115 of the Evidence Code (now s 129 of the Evidence Act); and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C401]. Since then, reports of the Waitangi Tribunal have continued to be admitted without challenge: see *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [45].

100 Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [11].

hearsay",[101] and the law in this area was "confusing, technical and artificial".[102] The Commission proposed a principled and much simplified approach to hearsay evidence: it recommended a general test for the admissibility of hearsay (now in section 18 of the Act), which required the statement to be sufficiently reliable (the "reliability" requirement) and the maker of the statement to be unavailable as a witness or for undue expense or delay to be caused in requiring them to testify (the "necessity" requirement).[103]

2.10 In doing so, the Commission anticipated its proposals would "eliminate the [then existing] problems [associated with] evidence of Māori custom",[104] by making it easier for the law to take proper account of reliable oral sources: instead of attempting to shoe-horn the custom into the terms of a specific exception, the evidence would be admissible as long as the requirements of reliability and necessity were met.[105]

Opinion and expert evidence rules

2.11 The Commission also considered whether its proposed rules on opinion and expert evidence would pose any problems for the reception of evidence of Māori custom,[106] which was sometimes classified as a matter of "opinion" (rather than "fact") if it was not based on personal experience.

2.12 At common law, the general rule was that witnesses were not permitted to offer their opinion as evidence. This rule was subject to exceptions – one of which permitted properly qualified expert witnesses to give opinion evidence on matters within their field of expertise.[107] In a 1991 preliminary paper, *Evidence Law: Expert Evidence and Opinion Evidence*, the Commission noted the common law approach to the question of whether a person was a "properly qualified expert" was wide and flexible. A formal qualification was not the only way of proving that a person possessed the requisite knowledge and skill; instead, the qualification of experts was a matter of assessment in the

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101 At [11].

102 At [12].

103 See ss 16–20 of the Evidence Code; and Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [45]–[70].

104 Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [60].

105 At [60]. The Commission anticipated that "[i]n civil cases the maker of a hearsay statement concerning, for example, a Māori custom will normally be unavailable and the evidence will be admissible (subject to the general exclusionary power), with the court then making an appropriate assessment of the weight to be given to the evidence. In criminal cases the evidence will be admissible if the circumstances relating to the statement provide reasonable assurance that it is reliable which may well be so in the case of evidence from a recipient of a long standing oral tradition. Once again the weight to be given to the evidence will be for the fact-finder to assess" (at [60]). Jennifer Corrin has suggested that this reform was in keeping with the views later expressed by the Law Commission in *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at [13.46]–[13.47], where the Commission suggested that a relaxed and permissive approach to the rules of evidence should be adopted in relation to the proof of Pacific custom law: see Jennifer Corrin "Accommodating Legal Pluralism in Pacific Courts: Problems of Proof of Customary Law" (2011) 15 E&P 1 at 14. Corrin notes that, although the Evidence Act 2006 does not contain a specific provision for the admission of Māori custom (unlike in some jurisdictions in Australia – the Australian Uniform Evidence Acts contain specific exceptions to the hearsay and opinion evidence rules in respect of evidence of Aboriginal and Torres Strait Islander traditional laws and customs: see ss 72 and 78A of the Evidence Act 1995 (Cth), adopted in New South Wales, Victoria, the Australian Capital Territory, and the Northern Territory; and the discussion in Australian Law Reform Commission *Recognition of Aboriginal Customary Laws* (ALRC R31, 1986) at [628]–[642] and Australian Law Reform Commission and others *Uniform Evidence Law* (ALRC R102, NSWLRC FR112, VLRC Final Report, December 2005) at ch 19), the Act "provides greater access to the courts to all parties by adopting a more relaxed approach to hearsay evidence": at 14.

106 Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at [36].

107 The other exception permitted a non-expert witness to give opinion evidence if it was a concise way of describing facts that the witness personally perceived, and if the facts could not conveniently be stated other than in the form of an opinion. See now s 24 of the Evidence Act.

circumstances of the individual case.[108] The Commission approved of this flexibility and ultimately recommended following the common law approach to qualification in its Code.[109]

2.13 In reaching that decision, the Commission was "satisfie[d] … that the law concerning expert evidence can and does take adequate account of te ao Māori".[110] By way of example, the Commission referred to *Ministry of Agriculture and Fisheries v Hakaria and Scott*,[111] where the Court recognised a kaumātua[112] as an expert competent to give expert evidence based on Māori tradition and custom. The Court rejected a submission that he could not be considered an "expert" because he lacked formal European qualifications, stating: "the presence or absence of formal European qualifications is irrelevant in a Maori scholar steeped in the lore of his people as Mr Pareta is. I accept his evidence as the product of true scholarship by any standards."[113]

Privilege for communications with kaumātua, tohunga and rongoā practitioners

2.14 When developing its recommendations in relation to the law of privilege, the Commission sought feedback in its 1997 te ao Māori consultation paper on:[114]

- whether the Commission's proposed definition of "minister of religion"[115] (for the purposes of a privilege for communications with ministers of religion) would cover Māori spiritual leaders (for example, kaumātua or tohunga[116]); and

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108 Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at [35]–[37].

109 See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C15]. The Commission suggested the following definition of "expert" (which was ultimately adopted in s 4 of the Evidence Act): "a person who has specialised knowledge or skill based on training, study, or experience": at 6.

110 Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at [36].

111 *Ministry of Agriculture and Fisheries v Hakaria and Scott* [1989] DCR 289 (DC).

112 "Elder": Māmari Stephens and Mary Boyce (eds) *He Papakupu Reo Ture: A Dictionary of Māori Legal Terms* (LexisNexis, Wellington, 2013) at 24; "a person of status within the whānau": John C Moorfield "Kaumātua" Te Aka Online Māori Dictionary <www.maoridictionary.co.nz>; and "[a word] often used to refer specifically to elderly people, both men and women, and especially to those with the mana to have an influence in community decision-making": Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 126.

113 *Ministry of Agriculture and Fisheries v Hakaria and Scott* [1989] DCR 289 (DC) at 294. For an example of evidence on Māori custom being admitted as expert opinion evidence via s 25 of the Evidence Act, see *S v S* [2012] NZFC 2685, where a professor of Māori Studies gave his opinion on how items become taonga. The Court considered the evidence was "substantially helpful" and that the professor was "a recognised and credible expert on taonga": at [54]. See also *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 at [5]; and *B v P* [2017] NZHC 338 at [33] and [61].

114 Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 2 September 1997) at [106]–[107]. In addition, the Commission raised the question of whether the privilege against self-incrimination is compatible with te ao Māori in a 1996 discussion paper (see Law Commission *The Privilege Against Self-Incrimination* (NZLC PP25, 1996) at ch 4); and also sought feedback on whether discussions and debate that take place on a marae should be privileged (and if so, when) (Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 2 September 1997) at [105]). In relation to the latter issue, the Commission received feedback from Māori practitioners expressing support for the content of marae discussions to be protected by privilege (perhaps by analogy with the common law privilege for settlement negotiations), in order to preserve the free and frank exchange of ideas within the marae context. It was suggested to the Commission that a definition of "marae discussions" in the Act would likely be needed; and although a precise definition was not suggested, some common features were identified (for example, the presence of kaumātua, the resolution of an issue as the purpose of the meeting, and the expression of some aspects of tikanga at the meeting). Unfortunately, we have been unable to locate any further files from the Commission's 1990s evidence project exploring the possibility of including a privilege for marae discussions in the Evidence Code. A privilege of that nature ultimately was not included in the Code. Although we do not know the reason for this with certainty, we think it is possible (as with the issues discussed in paragraphs [2.15]–[2.17]) that the Commission was concerned about defining "marae discussions" in legislation and thought it preferable for such discussions to potentially be protected by the general discretion in what is now s 69 (which gives judges a discretion to prevent disclosure, in a proceeding, of a "confidential communication", "any confidential information", and "any information that would or might reveal a confidential source of information"). We are making enquiries to try and find more information.

115 The Commission proposed that a person would be a "minister of religion" if the person "has a status within a church or spiritual community which requires or calls for that person to receive such confidential communications and to respond with religious or spiritual advice, benefit, or comfort": Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 2 September 1997) at [93].

116 "Priest; skilled leader; expert": Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (revised ed, Huia Publishers, Wellington, 2016) at 400; "an expert in any branch of knowledge, religious or secular": Māmari Stephens and Mary Boyce

- whether traditional Māori healers utilising rongoā[117] treat Māori for drug dependency or other conditions that may be relevant to criminal conduct, and if so, whether they should be included with medical practitioners and clinical psychologists for the purposes of medical privilege.

2.15 In relation to the proposed definition of "minister of religion", it was suggested to the Commission that the requirement for the person to have "a status *within a church or spiritual community*" would exclude kaumātua and that the italicised wording should be removed to remedy this. Another option suggested in the feedback from Māori practitioners was to protect communications with kaumātua by way of the general discretion to protect confidential communications (what is now section 69) rather than by way of a specific privilege. This was seen as preferable to attempting to incorporate a specific definition of "kaumātua" in the Act through the use of English terminology.

2.16 The Commission favoured the latter option in its proposed Evidence Code: it retained its proposed definition of "minister of religion" (subject to some minor modifications); and expressly noted in its commentary to the Code that "[a]dvice not within the term 'religious or spiritual advice' may of course still be protected by [section 69] (overriding discretion as to confidential information)".[118]

2.17 The Commission also received feedback that it would be difficult to define "rongoā" for the purposes of including a privilege for communications with rongoā practitioners in the Code. It was suggested to the Commission that a better solution was for the commentary to the Code to explain that it would be appropriate for communications with rongoā practitioners to be protected by the general discretion to protect confidential communications. The Commission ultimately did not include a privilege for communications with rongoā practitioners in its Evidence Code. Instead, the Commission limited the scope of medical privilege to information obtained by medical practitioners and clinical psychologists[119] and noted in its commentary to the Code that "[c]ommunications between patient and other health professionals" would be covered by the general discretion in section 69.[120]

(eds) *He Papakupu Reo Ture: A Dictionary of Māori Legal Terms* (LexisNexis, Wellington, 2013) at 84; and "an expert in any branch of knowledge, religious or secular, and a skilled practitioner of an art or craft. It includes (but is not limited to) those whose function is primarily ritual and priestly": Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 434. Dame Joan Metge has explained that the word tohunga is formed from "tohu", meaning "sign", so that tohunga can be interpreted as "one who is or has been marked out by signs". The word is used to refer to "specialists in a field or branch of knowledge and practice": Joan Metge *Commentary on Judge Durie's Custom Law* (unpublished paper for the Law Commission, 1996) at 5, as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [107], n 138.

117 "Traditional Māori medicine – a system of healing that was passed on orally": Rhys Jones "Rongoā – medicinal use of plants" (24 September 2007) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>; "a holistic system of healing that has developed out of Māori cultural traditions": Institute of Environmental Science and Research Ltd and Te Whare Wānanga o Awanuiārangi, in partnership with Ngā Ringa Whakahaere o te Iwi Māori *The Future of Rongoā Māori: Wellbeing and Sustainability: A Report for Te Kete Hauora, Ministry of Health September 2008* (March 2009) at 5; and "physical remedies derived from trees, leaves, berries, fruits, bark, and moss and used to treat particular ailments": Mason Durie *Whaiora: Māori Health Development* (Oxford University Press, Auckland, 1994) at 20. The exact number of rongoā practitioners and healers nationwide is unknown – there is a "great diversity of practice in the sector [and] [r]ongoā providers range from single individual healers, through to formal, contracted, and funded clinics operating as businesses alongside other health providers": Amohia Boulton and others "Enacting Kaitiakitanga: Challenges and Complexities in the Governance and Ownership of Rongoā Research Information" (2014) 5(2) The International Indigenous Policy Journal 1 at 7. As at 18 December 2015, there were 19 rongoā providers who were funded by the Ministry of Health and required to adhere to the rongoā standards in *Tikanga ā-Rongoā* (Ministry of Health, April 2014). For more information, see Ministry of Health "Rongoā Māori: Traditional Māori healing" (18 December 2015) <www.health.govt.nz>.

118 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C249].

119 Section 60 of the Evidence Code (see now s 59 of the Evidence Act).

120 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C251]. The Commission did not specifically refer to rongoā practitioners as an example. The examples the Commission gave were physiotherapists and occupational therapists: at [C251].

Support persons

2.18 In its Evidence Code, the Commission recommended complainants in criminal proceedings should be entitled to have a person near them to provide support while they give evidence,[121] and that all other witnesses may apply to a judge to have a support person near them while giving evidence.[122] The Commission also recommended that both complainants in criminal cases and any other witness should be able to apply to have more than one support person.[123] The possibility of a witness having more than one support person provoked a mixed response. A number of commentators did not favour the possibility.[124] However, the proposal received strong support from the Māori practitioners who provided feedback on the Commission's 1997 consultation paper,[125] as well as from the Māori Committee.[126]

Dangers inherent in cross-cultural identifications

2.19 As we discuss further in Chapter 8, the Commission's proposals in relation to identification evidence were intended to address concerns about the reliability of this type of evidence. When developing its recommendations, the Commission sought feedback in its 1997 te ao Māori consultation paper on what kind of guidance should be provided to judges to enable them to instruct juries appropriately on the risks associated with cross-cultural identifications (that is, an eyewitness identification of a person who is of another race).[127] The findings of psychological research at the time had suggested that "own-race recognitions [were] more accurate than other-race identifications" (a phenomenon known as "own-race bias").[128] The Commission received feedback from Māori practitioners suggesting the overseas research on this topic should be outlined in the Commission's (then) forthcoming paper, *Evidence: Total Recall? The Reliability of Witness Testimony*; and that this could be a matter that was referred to in standard jury instructions.

2.20 The Commission published *Total Recall*[129] alongside its publications on its proposed Evidence Code. The paper summarised current psychological research in the area of eyewitness identification (including "own-race bias"),[130] and provided the basis for the Commission's identification evidence proposals. In its Code, the Commission included a provision requiring judges (in particular cases) to warn juries about the special need for caution before convicting a defendant in reliance on

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121 Section 80(1) of the Evidence Code (see now s 79(1) of the Evidence Act).

122 Section 80(2) of the Evidence Code (see now s 79(2) of the Evidence Act).

123 Sections 80(1) and (2) of the Evidence Code (see now s 79(1) and (2) of the Evidence Act).

124 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [367].

125 The consultation paper sought feedback on whether witnesses should be entitled to more than one support person in some situations; and what guidance should be given to judges so they may appropriately consider the needs of Māori: Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 2 September 1997) at [116].

126 See Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [367].

127 Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 2 September 1997) at [163].

128 See Brian Cutler and Steven Penrod *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge University Press, New York, 1995) at 104. In 2001, Christian Meissner and John Brigham conducted a meta-analysis of three decades of research into the own-race bias phenomenon and concluded that, overall, "own-race faces" yielded a higher proportion of hits and a lower proportion of false identifications compared with "other-race faces": Christian Meissner and John Brigham "Thirty Years of Investigating the Own-Race Bias in Memory for Faces: a Meta-Analytic Review" (2001) 7(1) Psychol Public Policy Law 3. For more recent studies, see Luke Jackiw and others "Examining the Cross-Race Effect in Lineup Identification using Caucasian and First Nations Samples" (2008) 40(1) Can J Behav Sci 52; and United States National Research Council *Identifying the Culprit: Assessing Eyewitness Identification* (The National Academies Press, Washington, DC, 2014) at 96–97.

129 Law Commission *Evidence:Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999).

130 At [40], referring to Brian Cutler and Steven Penrod *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge University Press, New York, 1995) at 104.

the correctness of an identification.[131] The caution did not need to be in any particular words, but needed to alert the jury to certain matters.[132] The Commission explained that it had originally drafted a detailed judicial direction that contained references to the research contained in *Total Recall*, but the proposal was not supported by commentators (who argued in favour of shorter and simpler jury directions, and favoured a direction that would allow judges to tailor the direction to the circumstances of the particular case).[133] Instead of including a detailed judicial direction in its Code, the Commission suggested (in the Code commentary) some particular matters that could be mentioned in a warning if a judge considered it appropriate,[134] including "the fact that if the witness and defendant are of a different race/ethnicity, the identification may be less reliable".[135]

Assessing credibility based on demeanour

2.21 In its 1997 te ao Māori consultation paper, the Commission noted that jury assessments of witness credibility are often based on cultural and gender stereotypes, and that judges sometimes direct juries to draw conclusions from watching a witness, as well as from listening to them, despite research suggesting that assessments of credibility based on demeanour are likely to be unhelpful and misleading.[136] This topic was also the subject of a preliminary paper published by the Commission in 1997, *Evidence Law: Character and Credibility*.[137] In that paper, the Commission noted that:[138]

> To misinterpret the demeanour of a witness is always a danger, but it is a particular danger when the fact-finder is confronted with a witness belonging to a different culture. In New Zealand, Māori and Pacific Island witnesses may well display a demeanour in court which makes a fact-finder from a different cultural background less inclined to consider them truthful. But the reason why they behave in a particular manner may have nothing to do with unwillingness to tell the truth and may, for example, result from a lack of confidence in strange surroundings or a desire to please the questioner.

2.22 The Commission sought feedback on whether the Evidence Code should include a provision requiring a judge to consider warning the jury about the danger of misinterpreting the demeanour of witnesses,[139] for example, by assessing credibility based on racial stereotypes.[140] Although the feedback from Māori practitioners expressed some support for such a provision, the Commission ultimately did not recommend including this in its Code. The Commission did not discuss demeanour warnings in its commentary to the Code, but its view on the merits of including such a warning in legislation were recorded in its 1997 preliminary paper:[141]

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131 Section 112 of the Evidence Code (see now s 126 of the Evidence Act). Section 112 essentially re-enacted s 344D of the Crimes Act 1961, which set out a warning that a judge was to give to a jury where the principal evidence in a case related to identification. See Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [216] and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C398].

132 Section 112(2) of the Evidence Code. See now s 126(2) of the Evidence Act.

133 See Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [217].

134 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2 ,1999) at [C398]; adopted as a useful guide in *R v Turaki* [2009] NZCA 310 at [90].

135 At [C398].

136 Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 2 September 1997) at [61]. See the research referred to in Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [116].

137 Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [115]–[119].

138 At [117]. See also at [49].

139 At [119].

140 Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 2 September 1997) at [71].

141 Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [119]. The courts have subsequently taken the view that there is no invariable requirement for a judge to give a warning to the jury when the demeanour of a witness is at issue: see *E (CA799/2012) v R* [2013] NZCA 678 at [23]–[51] and *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116. Whether

> [T]he Commission doubts that such a provision would serve a useful purpose. In the first place, the question of a warning can be addressed only according to the circumstances of each case. Secondly, an evidence code is unlikely to provide an effective framework for correcting cultural perceptions within the legal system.

Questioning of witnesses

2.23 The Commission also sought feedback from Māori practitioners on whether the Code should provide specific guidance on questioning Māori witnesses.[142] It was suggested to the Commission that, although certain styles of questioning could be culturally insensitive to Māori (particularly cross-examination of kaumātua), it would be difficult to create a specific rule aimed at the questioning of Māori witnesses in ordinary civil or criminal proceedings. The Commission ultimately recommended a provision giving judges a wide discretion to control the questioning of all witnesses.[143] The provision (now section 85 of the Act) identifies a number of matters the judge may take into account, to provide guidance on situations where particular care in questioning may be necessary. One of those matters (in section 85(2)(c)) is "the linguistic or cultural background or religious beliefs of the witness".[144] In the commentary to the Code, the Commission explained that:[145]

> The question-and-answer format is not the way Māori traditionally resolve disputes or discuss issues. Thus cross-examination of kaumātua can amount to an insult to their mana, especially when questioning is directed at impeaching their credibility or exposing them to ridicule. While no sensible exceptions can be made for Māori or other cultural groups under the adversarial system, s 85(2)(c) will allow judges to exert some control over cross-examination that may be culturally offensive. One way is to encourage counsel to state a possible position to which the kaumātua is invited to respond, instead of directly questioning a kaumātua.

THE EVIDENCE ACT: 10 YEARS LATER

2.24 Over 10 years have passed since the Evidence Act came into force (and almost two decades since the Law Commission developed its Code). Perhaps surprisingly, very little case law related to the Act and te ao Māori has been generated in that period.

2.25 For example, we are aware of only one case where the admissibility of oral evidence of Māori custom under the Act has been addressed. In *Proprietors of Wakatū Inc v Attorney-General*, one of the parties objected to the admissibility of evidence containing traditional, oral accounts of the

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a warning is required depends on the nature of the evidence in the case and the way the trial unfolds, in particular "whether there is a real risk that witness demeanour will feature illegitimately in the jury's assessment of witness veracity or reliability": *Taniwha* at [43].

142 Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 2 September 1997) at [125].

143 Section 85 of the Evidence Code.

144 The words "or religious beliefs" were not in s 85 of the Evidence Code – they were added by the Select Committee: Evidence Bill 2005 (256-2) (select committee report) at 10.

145 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C323]. For some interesting observations about the questioning of kaumātua in the Waitangi Tribunal (which applies the provisions of the Evidence Act, subject to an ability to act on testimony or receive material whether or not it is legally admissible evidence: s 6 of the Treaty of Waitangi Act 1975), see RP Boast "Lawyers, Historians, Ethics and the Judicial Process" (1998) 28 VUWLR 87 at 103.

collective histories of whānau, hapū and iwi on the basis it was inadmissible and irrelevant hearsay and opinion evidence.[146] The High Court admitted the evidence, concluding:[147]

> In terms of the Evidence Act 2006, the admissibility gateways for traditional, oral evidence would appear to involve a mixture of rules relating to opinion and hearsay evidence, and general questions of relevance (probative value). As a matter of principle, and noting the approaches outlined in the various [Canadian and New Zealand pre-Evidence Act] cases referred to, I think it would be surprising if appropriate evidence of oral history was not admissible simply because it did not fit easily within the concepts of hearsay and opinion evidence as it is most commonly dealt with.

2.26 The lack of case law makes it difficult to draw conclusions about how well the operation of the Act's provisions are recognising Māori interests in practice. The topic was not considered during the Commission's 2013 review of the Act.

2.27 Our aim in this review is to determine whether any particular issues have arisen for Māori in relation to the Act, and if so, whether any amendments to the Act are necessary or desirable to better recognise te ao Māori. We invite submissions on those matters.[148] We are particularly interested in hearing how the provisions of the Act (which the Commission anticipated would accommodate particular issues relating to Māori) are working in practice. For example:

- Are the general opinion and hearsay provisions achieving what the Commission intended, by facilitating the admission of Māori custom in court proceedings?
- Does the general discretion in section 69 to protect confidential communications adequately protect communications with kaumātua and rongoā practitioners,[149] as the Commission anticipated?

2.28 The relationship between the Evidence Act and te ao Māori was discussed during the course of the September 2017 conference, "Reforming the Law of Evidence". Some conference participants suggested an amendment to the Act's purpose provision (section 6) to recognise te ao Māori expressly. We would be interested in feedback on this suggestion.

2.29 We are conscious that Māori have a particularly strong interest in the legislation – the Act plays a significant role in criminal proceedings and it is well-known that Māori are disproportionately represented within the criminal justice system, both as victims and offenders. As at June 2017,

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146 See *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 at [41].

147 *Proprietors of Wakatū Inc v Attorney-General* HC Nelson CIV-2010-442-181, 7 December 2010 at [45], set out in *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 at [41], and confirmed at [42]. The admissibility of oral evidence of Māori custom was also discussed in *R v Saxton* [2009] NZCA 498, [2012] 1 NZLR 331, but the Evidence Act did not apply in that case as the Act was not yet in force when the District Court hearing took place. Both the District Court and counsel on appeal appeared to accept that, if the Act had applied, the evidence would have been admissible: see *R v Saxton* at [78]; and *R v Saxton* DC Christchurch CRI-2004-002-741, 25 October 2007 at [54], n 41 ("the [hearsay] provisions of Subpart 1 of Part 2 seem to allow the admission of evidence of this kind").

148 We also welcome views on the form of any amendment, for example, whether it should be specific or broad. We note the appropriate level of specificity for any amendment would likely depend on a number of considerations: for example, a general amendment that promotes consideration of te ao Māori could perform an important symbolic function, but on the other hand could generate uncertainty and/or unintended consequences for the interpretation and application of other specific provisions in the Act. (In relation to statutes that refer to the Treaty or its principles, there appears to have been a trend in recent years towards the inclusion of more specific clauses that specify the action to be taken in satisfaction of Treaty principles instead of broadly stated clauses: see New Zealand Productivity Commission *Regulatory Institutions and Practices* (June 2014) at [7.3]; and Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, online ed, LexisNexis, Wellington, 2015) at 531.)

149 We have not included tohunga here as it is our understanding (based on the summary in paragraphs [2.14]–[2.15] above) that the privilege for communications with a "minister of religion" (in s 58) would cover communications with tohunga. If submitters hold a different view, we of course welcome comments.

Māori made up 15.3 per cent of New Zealand's population.[150] In the period between July 2016 and June 2017, Māori represented 41.3 per cent of adults convicted of offences,[151] and 50.4 per cent of the general prison population.[152] Over that period, Māori women made up 63 per cent of the female prison population.[153] 64.8 per cent of children and young people given orders in the Youth, District or High Court were Māori.[154] In that same period, Māori made up 16.8 per cent of victims generally and 22 per cent of victims of sexual assault and related offences.[155] Māori have also been overrepresented in family violence statistics, as both victims and offenders.[156] Relevant too in this context is the existence of bias towards Māori within the criminal justice system. Both the New Zealand Police and the judiciary have, for example, recognised the existence of unconscious bias in policing.[157]

2.30 The overrepresentation of Māori in the victim and offender populations for sexual and family violence also forms part of the context for paragraph 4 of our terms of reference. As we explained in Chapter 1, this requires us to examine the operation of the rules of evidence in cases involving sexual and family violence. We identify a number of relevant issues in Chapters 3, 9, 11 and 12 of this Issues Paper, and encourage responses to the questions set out in those chapters that offer views on how the experiences for Māori defendants, complainants and witnesses could be improved.

QUESTION

Q3 Are any of the Act's provisions creating particular difficulties for Māori? If so, how should the Act be amended to better recognise Māori interests?

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150 Stats NZ "National Population Estimates: At 30 June 2017" (14 August 2017) <http://archive.stats.govt.nz/browse_for_stats/population/estimates_and_projections/NationalPopulationEstimates_HOTPAt30Jun17.aspx>; and Stats NZ "Māori Population Estimates: At 30 June 2017 – tables" (15 November 2017) <http://archive.stats.govt.nz/browse_for_stats/population/estimates_and_projections/MaoriPopulationEstimates_HOTPAt30Jun17.aspx>.

151 Stats NZ "Adults convicted in court by sentence type – most serious offence fiscal year" (26 September 2017) <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7373>.

152 Department of Corrections "Prison facts and statistics – June 2017" (30 June 2017) <www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_june_2017.html>.

153 Department of Corrections "Fact sheet – Statistics for Māori offenders" (11 April 2017). This figure represents data from the 2016/2017 financial year.

154 Stats NZ "Children and young people given an order in court – most serious offence fiscal year" (26 September 2017) <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7382>. This figure represents data from the 2016/2017 financial year.

155 New Zealand Police "Victimisations (demographics)" (29 December 2017) <http://www.police.govt.nz/about-us/publications-statistics/data-and-statistics/policedatanz/victimisations-demographics>.

156 Family Violence Death Review Committee *Fifth Report Data: January 2009 to December 2015* (Health Quality & Safety Commission, June 2017) at 12–13. Māori were three times more likely to be deceased and offenders in Intimate Partner Violence deaths than non-Māori; Māori children (aged 0–4) were four times more likely to be killed by child abuse and neglect than non-Māori children; and Māori were four times more likely to be deceased and five times more likely to be offenders in intrafamilial violence.

157 In November 2015, the Commissioner of Police acknowledged the police force had been influenced by unconscious bias in their dealings with Māori: see Harata Brown "Police working on unconscious bias towards Māori" (29 November 2015) Māori Television <www.maoritelevision.com>; and Alison Harley "Commissioner: Police addressing bias in Māori relations" (28 November 2015) Newshub <www.newshub.co.nz>. More recently, in *K v R*, the Court of Appeal referred to an internal survey of frontline police officers (independently conducted in 1998 for the New Zealand Police and Te Puni Kōkiri), which concluded that, while cultural awareness within Police was improving, racially biased attitudes persisted in a minority of officers: *K v R* [2017] NZCA 51, [2017] 2 NZLR 835 at [25], referring to Gabrielle Maxwell and Catherine Smith *Police Perceptions of Māori: A Report to the New Zealand Police and the Ministry of Māori Development: Te Puni Kōkiri* (Institute of Criminology, Victoria University of Wellington, March 1998) at 36. The Court noted that, while the study was more than 15 years old, "the disparity in 'criminal justice outcomes' that triggered concerns explored in it and other studies remains unchanged, and in some respects had become worse": at [25], referring to DM Fergusson, LJ Horwood and MT Lynskey "Ethnicity and Bias in Police Contact Statistics" (1993) 26 ANZJ Crim 193 at 204; and DM Fergusson, NR Swain-Campbell and LJ Horwood "Arrests and Convictions for Cannabis Related Offences in a New Zealand Birth Cohort" (2003) 70 Drug and Alcohol Dependence 53.

CHAPTER 3

Evidence of sexual experience

IN THIS CHAPTER, WE CONSIDER:

- how the Act should deal with evidence of a complainant's disposition in sexual matters;
- whether section 44 should be extended to cover the complainant's sexual experience with the defendant;
- how the Act should deal with evidence of a false (or allegedly false) complaint of sexual offending;
- whether section 44 should be extended to civil proceedings; and
- the notice requirement in section 44A.

BACKGROUND

3.1 Section 44 of the Evidence Act is the New Zealand equivalent of what is referred to as the "rape shield" provision in some other jurisdictions.[158] It applies in sexual cases to control the extent to which complainants may be questioned about their previous sexual experience.[159]

3.2 Rape shield provisions are intended to protect complainants from unnecessarily intrusive and embarrassing questioning about their sexual history.[160] Intrusive questioning focused on the complainant's sexual history, rather than the behaviour of the defendant at the time of the alleged offence, can cause complainants to feel they are on trial, not the defendant.[161] The rape shield provision recognises that it is the evidence of the particular incident that should inform the outcome of the proceedings, not evidence of earlier, unrelated events in the complainant's life;[162] and that

158 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 325. See also Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [25]; Elisabeth McDonald "From 'Real Rape' to Real Justice? Reflections on the Efficacy of More than 35 years of Feminism, Activism and Law Reform" (2014) 45 VUWLR 487 at 490; and Peter Williams "Evidence in Criminal Law: Codification and Reform of the Evidence Act 2006" (2007) 13 Auckland U L Rev 228 at 236.

159 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53]. A "sexual case" is defined in s 4(1) of the Evidence Act 2006.

160 At [53]; and Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [320].

161 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [184].

162 At [184].

trials for sexual violence offences should not be "derailed by collateral inquiries of little or no actual relevance into the complainant's sexual experiences".[163]

3.3 A related aim of the provision is to prevent the use of erroneous assumptions about the complainant's sexual history:[164] namely that, because a complainant has a particular sexual reputation, disposition or experience, either (1) he or she is the kind of person who would be more likely to consent to the activity that is the subject of the charges; or (2) he or she is less worthy of belief than a complainant who does not have those characteristics.[165]

3.4 Against these purposes, the provision must balance in particular "the defendant's right to a fair trial and the right to present an effective defence".[166] These rights are affirmed by section 25 of the New Zealand Bill of Rights Act 1990 and recognised in section 6(b) of the Evidence Act.

3.5 Under section 44, evidence of a complainant's sexual experience with any person (other than the defendant) is inadmissible, except with the judge's permission. The judge must not grant permission unless the evidence reaches a heightened relevance threshold. There is a total ban on admitting evidence relating to the complainant's reputation in sexual matters. 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.
>
> (1A) Subsection (1) is subject to the requirements in section 44A.[167]
>
> (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.

3.6 As evidence of previous sexual experience is a form of "propensity evidence", section 44 has been situated in subpart 5 (veracity and propensity) of the Act. Relevant in this context is section 40, which sets out the general rule that propensity evidence is admissible, but also identifies certain kinds of propensity evidence that are governed by other parts of the Act. Section 40(3)(b) states that propensity evidence relating to a complainant's sexual experience may only be offered in accordance with section 44. Section 40(4) provides that propensity evidence that is "solely or mainly relevant to veracity" is governed by the veracity rules in section 37.

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163 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [112] per William Young J.

164 At [53] per McGrath, Glazebrook and Arnold JJ.

165 At [53] per McGrath, Glazebrook and Arnold JJ, citing *Bull v R* [2000] HCA 24, (2000) 201 CLR 443 at [53].

166 At [53] per McGrath, Glazebrook and Arnold JJ. See also Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [355]–[356].

167 Subsection (1A) was inserted, as from 8 January 2017, by s 14 of the Evidence Amendment Act 2016.

ISSUES FOR CONSIDERATION

3.7 The Supreme Court decision of *B (SC12/2013) v R* highlighted a number of ambiguities in the language of section 44,[168] which led the majority to conclude the section "needs further legislative clarification".[169] In this chapter, we consider the following issue raised in that decision:

- how should the Act deal with evidence of the complainant's disposition in sexual matters ("sexual disposition evidence")?

3.8 In addition, we consider:

- should the scope of section 44 be extended to cover the complainant's sexual experience with the defendant?
- how should the Act deal with evidence that the complainant has previously made a false (or allegedly false) complaint of sexual offending?
- should section 44 or an equivalent provision apply to civil proceedings?
- should section 44A be amended to require a written application to specify the grounds relied on for admission of the evidence?

SEXUAL DISPOSITION EVIDENCE

3.9 Section 44 does not refer to sexual disposition or the general propensity of the complainant in sexual matters.[170] An example of this type of evidence is the recording of sexual fantasies in a personal diary.[171] Another example could be evidence of sex toys in the complainant's bedside cabinet, which the complainant uses privately, but not with the defendant or others. This is evidence of the complainant's propensity in sexual matters, yet does not appear to be captured by the terms "sexual experience … with any person" in section 44(1) or "reputation" in section 44(2), because it may be revealed in a way that does not involve sexual experience *with any person*, or lead to a relevant reputation.[172]

3.10 Section 44's silence on sexual disposition evidence has created some uncertainty about how this type of evidence should be dealt with, as illustrated by *B (SC12/2013) v R* (discussed below from paragraph [3.14]).

Legislative history

3.11 Under the previous rape shield provision, section 23A of the Evidence Act 1908, there was explicit reference to evidence of the complainant's disposition. Section 23A provided that no evidence could be given relating to the sexual experience or reputation of the complainant in sexual matters, except by leave of the judge. The judge could not grant leave unless satisfied the evidence was of direct relevance to the facts in issue or the issue of sentence, and to exclude it would be contrary to the interests of justice. The provision was subject to the proviso that evidence must not be

168 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [112] per William Young J.

169 At [57] per McGrath, Glazebrook and Arnold JJ.

170 "Disposition" means a person's inherent personality and habitual behaviour. The Oxford Dictionary defines disposition as "[a] person's inherent qualities of mind and character" and/or "[a]n inclination or tendency": Oxford Online Dictionary "Disposition" (20 April 2017) <https://en.oxforddictionaries.com/definition/disposition>.

171 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [55] per McGrath, Glazebrook and Arnold JJ.

172 At [55]–[56].

regarded as being of direct relevance by reason only of "any inference it may raise as to the general disposition or propensity of the complainant in sexual matters".[173]

3.12 When the Law Commission reviewed section 23A in the mid-1990s, it emphasised the importance of the proviso "to ensure that courts do not admit any sexual history evidence which relates only to general disposition or propensity".[174] The Commission drafted a new provision[175] that sought to strengthen the proviso, but no longer referred explicitly to the general disposition or propensity of the complainant in sexual matters.[176] Instead, the Commission's proposed provision made it clear that evidence of *reputation* in sexual matters should never be considered of direct relevance to truthfulness.[177] The Commission considered its proposed provision was "sufficiently explicit" as to what evidence of a complainant's sexual history would be admissible,[178] and a proviso or equivalent was therefore "redundant".[179] It appears, then, that the Commission anticipated sexual disposition evidence would fall within that provision.

3.13 When the Evidence Bill 2005 was introduced, it did not include a clause that completely barred the admissibility of evidence of reputation in sexual matters as the Commission proposed; rather, such evidence (as well as evidence of sexual experience) was to be admissible if it was directly relevant.[180] The Bill also included a provision that said evidence of reputation or sexual experience would not be of direct relevance "merely because it raises, or may raise, an inference about the general propensity of the complainant in sexual matters".[181] However, this provision was deleted by the Select Committee, which considered that evidence of the complainant's reputation in sexual matters would always be irrelevant and should never be admitted.[182] The Act as enacted therefore does not refer to sexual disposition or the general propensity of the complainant in sexual matters at all.

B (SC12/2013) v R

3.14 In *B (SC12/2013) v R*, the complainant, her daughter and the defendant (B) had been drinking at the pub. When the complainant went home she found a dead mouse and phoned her daughter to come and dispose of it. Shortly afterwards, B arrived to dispose of the mouse and found the complainant in her nightwear.

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173 Evidence Act 1908, s 23A(3).

174 Law Commission *Evidence Law: Character and Credibility* (draft preliminary paper, 1996) at [296].

175 Section 21(2) of the Draft Truthfulness, Character and Propensity Sections for an Evidence Code, with Commentary, which provided: "In a sexual case, no evidence may be given and no question may be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters (a) for the purpose of supporting or challenging the general truthfulness of the complainant; or (b) for the purpose of establishing the complainant's consent; or (c) for any other purpose except with the leave of the court" (see Law Commission *Evidence Law: Character and Credibility* (NZLC PP27,1997) at 136–137). This draft provision substantially became s 46(3) of the Commission's proposed Evidence Code: Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 124–127.

176 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [184]: "The Commission remains of the view that the Code's redraft of the proviso in s 23A(3) is consistent with existing legislation and clarifies the policy behind the proviso … such evidence is of low probative value and should not be admissible. The re-drafting of the proviso makes this clear."

177 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [181] (emphasis added).

178 Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [352] (emphasis added): "Currently, in assessing the degree of relevance, the court may refer to the proviso in s 23A(3)(b), which states that no evidence or question is of direct relevance if it raises only an 'inference as to the general disposition or propensity of the complainant in sexual matters'. *While the Commission is of the view that the proviso has a very important function in the present legislation, it does not consider that an equivalent will be necessary in an evidence code. The reason is that the proposed section 21(2) is sufficiently explicit as to what evidence of and questions about a complainant's sexual history will be admissible.*"

179 Letter from Bill Sewell (Senior Researcher at the Law Commission) to Garth Thornton QC (Legislative Counsel) regarding the Evidence Code: Character and Credibility (2 July 1996).

180 Evidence Bill 2005 (256-1), cl 40.

181 Clause 40(3).

182 Evidence Bill 2005 (256-2) (select committee report) at 7. See cl 40.

3.15 The Crown alleged B performed oral sex on the complainant and then raped her; B said the sexual activity was consensual. His defence proposed to call evidence that some months before the alleged offending the complainant asked another man to dispose of a mouse, and when the man arrived he found the complainant in her nightwear in the middle of the day and smelling of alcohol – although nothing sexual occurred ("the proposed evidence"). The purpose of the proposed evidence was to encourage the jury to draw an inference, primarily from the complainant's attire, that the complainant invited men to her home on a pretext in order to engage in sexual activity with them.[183]

3.16 The trial judge refused to admit the proposed evidence under section 44(3). The jury acquitted B of the charge relating to the oral sex, but convicted him on the charge of rape. B appealed against his conviction, arguing the proposed evidence should have been admitted. The Court of Appeal dismissed the appeal and agreed the proposed evidence was inadmissible under section 44(2).[184] B then appealed unsuccessfully to the Supreme Court. Although the Court held unanimously that the proposed evidence was inadmissible, three separate judgments were delivered. Each judgment expressed a differing view on how the Act should treat evidence that reveals a complainant's disposition in sexual matters, but does not involve other persons.

3.17 The majority (McGrath, Glazebrook and Arnold JJ) characterised the proposed evidence as sexual experience with another person because: "it concerned the complainant's interactions (allegedly sexual) with a person other than the appellant on a previous occasion (experience)".[185] The fact no sexual conduct occurred did not take the incident outside the scope of sexual experience with another person.[186] The proposed evidence was inadmissible, however, because it did not satisfy the heightened relevance test of section 44(3).[187]

3.18 The majority nevertheless commented on cases of disposition. They noted that sexual disposition is a "distinct concept" from reputation or sexual experience, and that the absence of any reference to disposition in section 44 raises a question about how such evidence should be treated.[188] They tentatively suggested that evidence of sexual disposition may fall within the term "sexual experience" in section 40(3)(b), but not within the narrower phrase "sexual experience … with any person other than the defendant" in section 44(1).[189] In effect, because sexual disposition is not referred to explicitly in section 44, it is arguable that evidence of sexual disposition cannot be led at all.[190]

3.19 The Chief Justice held the proposed evidence was "evidence that relates directly or indirectly to the reputation of the complainant in sexual matters", and was therefore inadmissible under

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183 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [59] per McGrath, Glazebrook and Arnold JJ.

184 *B (CA862/11) v R* [2012] NZCA 602.

185 At [61]. Elias CJ criticised the majority's approach at [17]: "That stretch in interpretation might deal with the particular case but leaves uncertain the application of s 44 to other cases of disposition".

186 At [60]. The majority reasoned: "If the complainant had actively propositioned the proposed witness to have sexual intercourse with her and he had refused, evidence of that would undoubtedly be evidence of sexual experience with another."

187 At [62]. The only factor arguably suggestive of any sexual purpose was that the complainant was still wearing her nightie and dressing gown in the middle of the day when the man arrived. That fact on its own could not support an inference of sexual purpose.

188 At [55].

189 At [56]. The majority noted at [56]: "Disposition evidence is, of course, propensity evidence".

190 At [56]. They then stated: "Such an outcome seems consistent with the policy underlying s 44 and other rape shield provisions." Both Elias CJ and William Young J criticised this. Elias CJ said her interpretation of s 44(2)—encompassing sexual disposition—was consistent with the "sense of the legislation" that "any evidence of sexual propensity … is covered by the two aspects of s 44" (at [16]). If evidence of a complainant's sexual disposition was not covered by s 44, there would be an "unaccountable gap" in the protection afforded to complainants by the rape shield provision (at [16]). For William Young J's criticism see paragraph [3.24] below.

section 44(2).[191] This required her to interpret "reputation" widely to include not only the general perceptions of the complainant, but also "evidence as to the complainant's character and attitudes from which propensity in sexual matters is sought to be taken".[192]

3.20 In reaching her conclusion, Elias CJ reviewed the history and purpose of section 44 and stated:[193]

> The evident legislative purpose was to reject as irrelevant the propensity in sexual matters of the complainant. That purpose is fulfilled if "reputation" is interpreted, as I think is the sense of the provisions in any event, to include evidence relating to disposition or character in sexual matters.

3.21 She expressly disagreed with the majority's characterisation of the evidence as sexual experience with another person. While that "stretch in interpretation" might resolve the particular case, it created uncertainty in other cases of disposition.[194] In her view, the majority's suggested solution for cases of disposition created a "gap in s 44 and uncertainty in relation to the application of s 40(3)".[195]

3.22 William Young J held that, although "the policy behind s 44 was engaged",[196] the proposed evidence was neither sexual experience evidence nor reputation evidence; therefore section 44 did not apply.[197] He assessed the admissibility of the proposed evidence under section 7 and held it was not relevant and therefore inadmissible.[198]

3.23 He argued that "sexual experience" should be given its ordinary meaning, and that "the word 'experience' should be restricted to things that have happened, rather than encompass things that have not".[199] He said the proposed evidence could not amount to "sexual experience" because:[200]

> I do not consider that a woman who invites a man to her house when wearing a nightie and dressing gown thereby has a sexual experience with that man; this irrespective of what he thinks she may have in mind.

3.24 William Young J noted the Act's silence about sexual disposition evidence, but he also criticised the solution proposed by the majority. He argued there is no distinction between "sexual experience" in section 40(3)(b) and "sexual experience … with any person" in section 44(1); the former is simply "short-hand" for the latter.[201] He disagreed with the "reading up" of "sexual experience" in section 40(3)(b) to encompass non-experiences (such as fantasies recorded in a diary).[202]

3.25 On William Young J's view, section 44 does not capture evidence of sexual disposition (revealed through sexual experience not involving other persons) or (arguably) evidence of virginity or lack of experience. (Our review of the cases, however, did not reveal any instances of such evidence falling outside the scope of "sexual experience". On the contrary, there appears to be consensus

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191 At [15].

192 At [16].

193 At [20].

194 At [17].

195 At [17].

196 At [122].

197 At [111]–[120].

198 At [122]. The proposed evidence was not relevant because the complainant's supposed interest in having sex on the other occasion could not logically provide support for the theory that she consented to sex with B on the night in question.

199 At [119].

200 At [118].

201 At [119].

202 At [119]. William Young J cautioned that "reading up" the language used by the legislature could preclude defendants calling evidence relevant to their fair trial rights.

that evidence about virginity is captured by the term "sexual experience" in section 44(1), and may be admissible pursuant to section 44(3).)[203]

How should the Act deal with sexual disposition evidence?

3.26 Our preliminary view is that all evidence relating to the complainant's propensity in sexual matters should be captured by section 44. This is consistent with the policy of the provision to provide protection for complainants and to prevent erroneous assumptions being drawn from the complainant's sexual history. As *B (SC12/2013)* illustrates, however, because of ambiguities in the language of section 44 there may be cases where section 44 does not apply even though the policy of the provision is engaged. The majority suggest evidence of sexual experience that does not involve other persons may not be captured by section 44, even if it reveals the complainant's sexual disposition. This creates a gap in the coverage of section 44 and uncertainty in relation to section 40(3)(b).

3.27 We think it may be desirable to amend the Act to clarify that sexual disposition evidence falls within the scope of section 44. The following issue then arises: what admissibility rule should apply to this evidence? Should it always be inadmissible, or should it be admissible subject to meeting the heightened relevance test in section 44(3)? We invite submitters' views on this. We note that both the majority and the Chief Justice in *B (SC12/2013)* seemed to anticipate that sexual disposition evidence would always be inadmissible (on the majority's approach, because of the gap between section 44(1) and 40(3)(b);[204] and on the Chief Justice's approach, because it is evidence of reputation and therefore excluded by section 44(2)).[205] The Commission's view in the 1990s was that "evidence related to earlier events in the complainant's life … [was] of low probative value and should not be admissible".[206]

3.28 However, it may be possible to imagine situations where sexual disposition evidence could be of relevance to a trial: for example, where the evidence reveals a particular sexual proclivity that shares features with the alleged offending.[207] We are not sure this would ever meet the threshold of "direct relevance", but invite submitters' views on this.

3.29 If sexual disposition evidence should never be admissible, this could be achieved by:

(a) amending section 44(2) to extend its application to evidence relating to a complainant's disposition in sexual matters; or

(b) including a new subsection in section 44 that provides that no evidence can be given and no question can be put to a witness that relates directly or indirectly to the disposition of the complainant in sexual matters.

3.30 We note that if option (a) were adopted, this could be achieved by either defining "reputation" as including sexual disposition evidence or by replacing the word "reputation" with "reputation or disposition". The former approach would reflect the view taken by Elias CJ in *B (SC12/2013)* that

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203 *K (CA640/2016) v R* [2017] NZCA 336 at [17]; *B v R* [2015] NZCA 332 at [39]; *Lockhart v R* [2013] NZCA 549 at [59]; *V (CA428/2012) v R* [2013] NZCA 211 at [25(a)]; *Leef v R* [2011] NZCA 567 at [16]; *Grace v R* [2011] NZCA 590 at [10]; and *R v Tainui* [2008] NZCA 119 at [60]. In *K (CA640/2016) v R* [2017] NZCA 336 at [17], the Court of Appeal recently noted: "This Court has consistently held that evidence of a complainant's virginity relates directly to his or her prior sexual experience and is therefore captured by the prohibition in s 44(1) of the Evidence Act."

204 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [56].

205 At [15]–[16].

206 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [184].

207 For example, where the complainant records a very specific sexual fantasy in a diary, and the alleged offending involves those same features in circumstances where the defendant did not know of that diary entry at the time of the offending.

"reputation" includes evidence relating to disposition or character in sexual matters.[208] We note the majority and William Young J in *B (SC12/2013)* disagreed with this interpretation, instead confining "reputation" to the way in which the complainant is regarded by others.[209]

3.31 Of these two possibilities, we would prefer to replace "reputation" with "reputation or disposition". Considerable difficulties have always derived from the way evidence of disposition or character may be used in proceedings.[210] The Commission has previously noted the two evidential aspects of character: reputation, which is a question of public estimation; and disposition, which relates to the individual's inherent personality and habitual behaviour.[211] It is difficult to separate these two concepts;[212] and on occasion, the term "reputation" appears to have been used interchangeably with "character".[213] *B (SC12/2013)* illustrates this: the majority and William Young J confined "reputation" to public estimation, whereas Elias CJ interpreted "reputation" as an amalgam of public estimation and individual disposition. Our preliminary view is that "reputation" should be given its ordinary definition – the beliefs and opinions that other people hold about the complainant. This is the commonly understood meaning of the word, and therefore most consistent with the Act's purpose of enhancing access to the law of evidence.[214]

3.32 If sexual disposition evidence should be admissible subject to meeting the heightened relevance test in section 44(3), this could be achieved by:

(c) extending the application of section 44(1) to evidence relating to a complainant's disposition in sexual matters; or

(d) including a new subsection in section 44 that permits sexual disposition evidence only if it is of such direct relevance to the 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.

3.33 Option (c) could be achieved by either defining "sexual experience" as including sexual disposition evidence, or amending section 44(1) so that it includes evidence of sexual matters or behaviour not involving other persons – this would capture evidence relating to a complainant's disposition in sexual matters. The latter approach might need to be combined with an amendment that defines "reputation" by its ordinary meaning (discussed above at paragraph [3.31]), that is, the beliefs and opinions that other people hold about the complainant. This would clarify that sexual disposition evidence needs to be dealt with under section 44(1), not section 44(2).

QUESTION

Q4 What admissibility rule should apply to sexual disposition evidence: should it always be inadmissible, or admissible subject to meeting the heightened relevance test in section 44(3)? How should the Act be amended to achieve this?

208 At [15]–[16].

209 At [61] per McGrath, Glazebrook and Arnold JJ and [117] per William Young J.

210 Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [37].

211 At [28].

212 At [163].

213 At [99]. The Commission explained that in actions for defamation, the first aspect is paramount, since it is the public perception of an individual that the law of defamation protects. The second aspect is of primary significance when a party seeks to offer evidence to show an individual's propensity to commit certain offences (or act in a particular way): at [100]. Reputation has also traditionally been a factor indicative of a person's truthfulness: "[i]ts meaning in this context seems to be an amalgam of public estimation and individual disposition": at [100].

214 Evidence Act, s 6(f).

COMPLAINANT'S SEXUAL EXPERIENCE WITH THE DEFENDANT

3.34 New Zealand is one of the few jurisdictions where evidence of the complainant's sexual history with the defendant is admissible, even if it can be objected to.[215] The extension of the rape shield to include this type of evidence has been a contentious matter. In 1997, the Law Commission's first consultation on the matter gave rise to a clear split of opinion among the commentators, generally along gender lines.[216] Female lawyers and many community groups supported extending the rape shield, while a number of male practitioners were strongly against the proposal.[217]

3.35 The debate centres on the perceived relevance of the evidence. Those in favour of extending the rape shield argue that evidence of previous sexual experience between the complainant and defendant should not lead to an implication that the complainant is more likely to agree to the sexual activity on another occasion. Those opposed to extending the rape shield argue that the existence of a prior sexual relationship between the complainant and the defendant will often be, or inevitably is, relevant.

3.36 In its proposed Evidence Code, the Commission suggested evidence of the complainant's sexual history with the defendant must be of direct relevance in order to be admitted, although permission from the judge would not need to be sought.[218] 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 enquiry into that relevance.[219]

3.37 The Evidence Bill as introduced did not adopt the recommendation. Rather, Cabinet (and later the Select Committee)[220] "agreed to maintain the status quo" and restrict only evidence of the complainant's sexual experience with any person other than the defendant.[221] Under the Act, such evidence may be mentioned and given in open court without any prior consideration of the relevance of the evidence to the case. As with all evidence, the admissibility of the evidence can be challenged on the grounds of relevance (under section 7) or unfair prejudice (under section 8).

3.38 In 2008, the Ministry of Justice revisited the matter in a Public Discussion Document, *Improvements to Sexual Violence Legislation in New Zealand*.[222] Following consultation, the Task Force for Action on Sexual Violence published a report in 2009, which included a recommendation to extend the rape shield so that evidence about the previous sexual experience between the complainant and the defendant would be inadmissible without the prior agreement of the judge.[223] The Government response noted the Law Commission was undertaking an enquiry into alternative pre-trial and trial

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215 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [7.14], citing Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand: Public Discussion Document* (August 2008) at 22–25.

216 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [177]; and Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [177].

217 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [177].

218 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 124–127; and Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [179].

219 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [179].

220 Cabinet "Evidence Bill: Changes to Policy Decisions and Approval for Introduction" (21 March 2005) CAB Min (05) 10/7 at [36]; and Evidence Bill 2005: Bills Digest No 1258 (4 May 2005) at 9.

221 As had been the law under the previous rape shield provision, s 23A of the Evidence Act 1908.

222 Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand: Public Discussion Document* (August 2008) at 22–25.

223 Ministry of Justice *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together* (July 2009) at 65 (recommendation 50).

processes in sexual violence cases, which would consider the recommendations of the Task Force relating to evidential procedures in sex trials.[224]

3.39 In the 2013 review of the Act, the Commission also returned to the issue of extending the rape shield.[225] It concluded the review was "not the proper vehicle for a reassessment of policy on a first principles basis", but commented that it did not support the proposal put forward by the Ministry in 2008.[226] The Commission also said it would not be inclined to recommend amendment along the lines of the "halfway house" (see paragraph [3.36] above) originally recommended by the Commission in its proposed Code.[227]

3.40 The Commission briefly considered the rules of evidence as they relate to sexual violence cases in 2015 in its report *The Justice Response to Victims of Sexual Violence*.[228] However, in that review the Commission was concerned with matters of criminal procedure, and not with the substantive rules of evidence, such as the extension of the rape shield provision. The Commission did not therefore make recommendations in respect of the latter, but recommended that consideration be given to a future review of the laws of evidence in sexual violence cases.[229]

3.41 Because of the extended timeframe to complete this second review of the Act, we have been able to publish this Issues Paper and invite public feedback on the issues we have identified. Given it is now 21 years since the Commission consulted the public on the ambit of the rape shield, and nearly 10 years since the Ministry of Justice published its discussion document, we think it is timely to seek submitters' views on whether the rape shield should now be extended. Moreover, in this review the Commission has a wider mandate to review the rules of evidence relating to sexual and family violence.

3.42 The relevance of a previous sexual relationship or experience between the defendant and the complainant to the issue of consent is still a matter of debate.[230] We would like to know if submitters think the risk of illogical reasoning about the complainant's behaviour based on their previous sexual relationship or experience with the defendant justifies some controls on the admissibility of this evidence and, if so, to what extent submitters think this evidence should be restricted. For example, the evidence could be admissible if it satisfies a heightened relevance test. However, it may be artificial simply to extend section 44(1) to *all* evidence of previous sexual experience between a complainant and the defendant. This would require the prosecution to apply for the judge's permission to give evidence about *the fact* the complainant was previously in a relationship with the defendant. Is that level of control desirable? Would it be appropriate to control only evidence about the nature of the past experience, rather than the fact of it?

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224 New Zealand Government *Government Response to Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together* (September 2010) at [21]–[25].

225 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [7.13]–[7.22].

226 At [7.22]. It said that cases involving a prior relationship between the complainant and the defendant will almost always turn on the question of consent or belief in consent, and almost inevitably the existence of a prior sexual relationship will be of "direct relevance" to that question. If s 44 were extended, an application for leave to cross-examine the complainant on the prior relationship could be expected in the vast majority of such cases. This might increase pre-trial applications and appeals, adding to delays and compounding rather than alleviating problems for complainants in sexual cases.

227 At [7.20]–[7.21]. It thought 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 not being relevant to the issues at trial).

228 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.75]–[6.88].

229 At [6.87].

230 See for example Andrea Ewing "Case Note: Consent and 'Relationship Expectations' – *[C] v R* [2017] NZSC 145" [2017] NZCLR 357 and Anna High "*[C] v R*" [2018] NZLJ 47, referring to a recent decision of the Supreme Court in which the Court considered what constitutes consent and reasonable belief in consent in sexual violation cases.

QUESTION

Q5 Should the admissibility of evidence about the complainant's previous sexual experience with the defendant be subject to greater controls in the Act? If so, what controls or restrictions should there be?

FALSE OR ALLEGEDLY FALSE PRIOR COMPLAINTS

3.43 In *Best v R*,[231] the Supreme Court gave guidance on the interaction between section 37 (veracity), section 40 (propensity) and section 44 (sexual experience) in cases where a complainant has previously made a false or allegedly false complaint of sexual offending. The guidance changed the law and has attracted some criticism on the basis that it is overly complicated and blurs the distinction between propensity and veracity evidence.[232]

Relevant provisions

3.44 Section 37(1) sets out the admissibility test for evidence relating to a person's veracity:

> 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.

3.45 Section 40 sets out the general rule that propensity evidence is admissible,[233] but also identifies certain kinds of propensity evidence that are governed by other parts of the Act.[234] In particular, section 40(4) provides:

> 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.

3.46 In addition, section 40(3)(b) states that evidence relating to a complainant's sexual experience may only be offered in accordance with section 44.

3.47 In sex trials, evidence of a false or allegedly false prior complaint engages issues of veracity, propensity and sexual experience. Where the defendant alleges that sexual activity did not occur (and the complainant is lying), a previous false complaint may indicate the complainant has a propensity to make false complaints and create doubt in a jury's mind about the truthfulness of the present allegation.

3.48 There are difficulties, however, with admitting evidence of a prior false complaint. First, it may not be clear whether the prior complaint was false. The fact a complaint has not led to prosecution or a conviction does not necessarily mean the complaint was false: there may have been insufficient evidence or public interest to justify a prosecution, or there may have been a reasonable doubt in the mind of the jury.

3.49 Second, cross-examining the complainant about a previous complaint risks traumatising and re-victimising the complainant, in circumstances where the previous complaint may be of limited

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231 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.

232 Including Elisabeth McDonald "Selected evidence issues with regard to vulnerable witnesses" (paper presented to Reforming the Law of Evidence Conference, Wellington, 8 September 2017) at 14–16; and Kyle Simonsen "The *Best* approach to the admissibility of prior allegations of sexual offending – pun intended?" (LLB(Hons) Dissertation, University of Auckland, 2017).

233 Section 40(2).

234 Sections 40(3) and 40(4).

relevance.[235] This undermines one of the policies of section 44: to avoid unnecessarily distressing and embarrassing questioning about the complainant's sexual history.

3.50 Third, if the previous complaint involved sexual activity with a person who accepted the activity occurred but successfully ran a defence that it was consensual or that they had a reasonable belief in consent, there is a danger the jury may engage in propensity reasoning from the evidence of the complainant's previous sexual experience. This is precisely the kind of reasoning that rape shield provisions, like section 44, are designed to guard against. It may be difficult to control such lines of reasoning once the evidence is before the jury.[236]

The approach prior to *Best*

3.51 In its commentary to its proposed Code, the Law Commission expressly suggested evidence of a person's "reputation to lie about sexual matters" should be dealt with by the veracity rules, not by the rape shield provision:[237]

> Section 46(3) [now section 44(2)] 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.

3.52 This was not, however, the approach subsequently taken by the courts. In *R v C*, the Court of Appeal held that evidence of a complainant's reputation for making false allegations of sexual offending was not admissible under the Act.[238] The Court referred to Select Committee changes to the Commission's proposed provisions: in particular, the absolute bar on any evidence of reputation in section 44(2) and the deletion of a reference to evidence of reputation for untruthfulness under section 37.

3.53 The Court did, however, preserve a role for section 37 in some cases.[239] Where it was manifestly clear the complainant had previously made a false complaint ("clean cases"), the admissibility of the past complaint was to be assessed under section 37.[240] In those cases the sexual context was seen as "tangential" to the issue of veracity.[241] In other cases, where the truth or falsity of the past complaint was disputed, admissibility fell to be determined under section 44 as evidence of sexual experience.[242]

3.54 In 2013, the Commission reviewed the interaction between sections 37, 40 and 44.[243] It noted two issues with the approach in *R v C*. First, it was confusing and not semantically logical. The Commission maintained its earlier view that the fact a complainant has previously made a false complaint, or an allegedly false complaint, cannot logically relate to either the complainant's sexual

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235 *Best v R* [2015] NZCA 159 at [25].

236 See Kyle Simonsen "The *Best* approach to the admissibility of prior allegations of sexual offending – pun intended?" (LLB(Hons) Dissertation, University of Auckland, 2017) at 7.

237 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C212].

238 *R v C (CA391/07)* [2007] NZCA 439 at [21].

239 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV44.03].

240 *R v C (CA391/07)* [2007] NZCA 439 at [23]. The "clean case" approach had also been described in cases considered under s 23A of the Evidence Act 1908. See *R v MacDonald* CA166/04, 8 April 2005 at [36]; and *R v Kaa* CA7/05, 24 May 2005 at [20].

241 *R v C (CA391/07)* [2007] NZCA 439 at [23].

242 At [24]. In those cases, the sexual context was "not merely tangential".

243 Letter from Geoffrey Palmer (then President of the Law Commission) to Simon Power (then Minister of Justice/Minister Responsible for the Law Commission) regarding the briefing on the operation of the veracity and propensity provisions (29 March 2010) at [38].

experience or sexual reputation; therefore it must be beyond the scope of section 44. A false complaint can, by definition, relate only to the complainant's honesty or (in the language of the Act) veracity. The Commission noted, however, that the approach in *R v C* replicated the pre-Act law and signalled the courts were happy that the approach worked in practice. Although the Commission was not entirely comfortable with the approach as a matter of logic, it was not explicitly at odds with the terms of the Act.[244]

3.55 Second, the Commission thought the distinction in *R v C* between reputation for untruthfulness (inadmissible) and disposition to lie (veracity, dealt with under section 37) was less clear than the Court suggested and there "must surely be a degree of overlap between the two".[245] On this issue, the Commission was satisfied the Court in a subsequent case, *R v K*,[246] had resiled somewhat from this position, holding that evidence of reputation for untruthfulness may be admissible under section 37 after all. The Commission agreed this was appropriate.[247]

3.56 Although the Commission thought the approach in *R v C* was problematic, it therefore did not recommend any legislative response. The courts continued to apply the "clean case" approach to allegations of past sexual offending until the decision in *Best*.

The *Best* approach

3.57 In *Best*, the Supreme Court set out a new method for approaching evidence of false and allegedly false complaints of previous sexual offending where section 44 is potentially engaged:[248]

(a) First, there must be some evidential foundation that the previous complaint was in fact false before it can even be raised by the judge.

(b) If there is such an evidential foundation, the complainant should be asked in the absence of the jury to confirm whether or not the previous complaint was false.[249]

(c) The judge will need to consider whether the evidence is substantially helpful under section 37. The more evidence that needs to be called on the previous complaint (to establish whether or not it was false), the less likely it is the evidence will be substantially helpful in assessing veracity. Such a trial within a trial is not in accordance with the policy of section 44, which at least in part was to encourage the reporting of sexual offences by making it less of an ordeal for complainants to give evidence at trials for sexual offences.[250]

(d) If the substantial helpfulness test is met, there will need to be a separate assessment under section 44 as to whether it would be "contrary to the interests of justice" to exclude the evidence.

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244 At [39].

245 At [40].

246 *R v K (CA421/2008)* [2009] NZCA 176.

247 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [42].

248 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [76]–[78] per Glazebrook J (writing for herself, Elias CJ, Arnold and O'Regan JJ) and at [116], [125] and [133] per William Young J.

249 On the facts of *Best*, the majority (Elias CJ, Glazebrook, Arnold and O'Regan JJ) held that there was a sufficient evidential foundation for an enquiry into substantial helpfulness. William Young J (dissenting) considered there was nothing in the evidential material before the jury to suggest the complainant was not telling the truth. He expressed doubt about the likelihood of the complainant conceding the previous complaint was false, and concern about a process that might require the complainant to give evidence twice about the incident (at [139]–[141]).

250 At [71] per Glazebrook J.

(e) Even if that test is met (if it applies), section 44 may limit the way the evidence is led so that the concentration is on the falsehood of the complaint and not on the previous sexual experience.

3.58 This method departs from the prior approach in two respects. First, section 37 must now be considered in all cases involving allegedly false complaints of previous sexual offending. Previously section 37 applied only to manifestly clear or "clean cases" (and section 44 applied to all other cases).

3.59 Second, the proposed evidence may engage both sections 37 and 44:

- Previously the court was required to engage in a preliminary assessment of whether the previous complaint was likely to be false, in order to determine the route for its admissibility: either section 37 (in "clean cases") or section 44 (in other cases). *Best* makes the assessment of whether the previous complaint is likely to be false part of the "substantial helpfulness" enquiry.
- Even if the "substantial helpfulness" test is met, there needs to be a separate assessment under section 44 as to whether it would be contrary to the interests of justice to exclude the evidence. If the evidence is admissible, section 44 may still limit the way the evidence is led.

3.60 Since *Best*, the Court of Appeal in *Hohua v R* has confirmed that the bright line "clean cases" approach of *R v C* has been set aside in favour of a "more multi-elemental balancing exercise".[251]

3.61 Elisabeth McDonald has raised a concern that the Supreme Court's interpretation of sections 37, 40(4) and 44 in *Best* blurs the Act's distinction between propensity and veracity evidence.[252] She had previously raised this argument in relation to *R v C*.[253] In both cases, the Courts' interpretation of these provisions differed from the Commission's intended approach to evidence of allegedly false prior complaints: that such evidence is "solely or mainly relevant to veracity" and its admissibility should be assessed under the veracity rules not the propensity rules.[254] Although the Select Committee recommended some changes to the Commission's proposed provisions,[255] McDonald thinks the enacted provisions continue to express the Commission's intention. In particular, the wording of section 40(4) indicates section 37 *does* trump section 44.[256] On this view, a challenge to the veracity of a prosecution witness then triggers section 38, allowing veracity evidence about the defendant to be called.

3.62 McDonald disagrees with the Supreme Court's view in *Best* that, because section 40(4) says nothing about the relationship between sections 37 and 44, section 44 may operate alongside

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251 *Hohua v R* [2017] NZCA 89 at [14].

252 Elisabeth McDonald "Selected evidence issues with regard to vulnerable witnesses" (paper presented to Reforming the Law of Evidence Conference, Wellington, 8 September 2017) at 16.

253 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 332.

254 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C212].

255 Evidence Bill 2005 (256-2) (select committee report) at 40–41. The changes were in respect of evidence of "reputation".

256 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV43.03]; and Elisabeth McDonald "Selected evidence issues with regard to vulnerable witnesses" (paper presented to Reforming the Law of Evidence Conference, Wellington, 8 September 2017) at 16.

section 37.[257] She says this approach "seems to overlook that s 44 is specifically referred to in the propensity rule (s 40(3)(b))".[258]

3.63 Another possible concern with the approach in *Best* is that asking the complainant to confirm whether the previous allegation was false will subject the complainant to questioning that may re-victimise them. This would undercut the policy of section 44. The likelihood of the complainant conceding falsity is also questionable.[259]

3.64 From a policy point of view, however, the approach in *Best* is arguably more logical than the approach in *R v C*. It treats the admissibility of a false complaint in the same way as it treats evidence of an allegedly false complaint – as evidence primarily directed at the complainant's veracity. This aligns with the Commission's original intention. The approach in *Best* adds an extra layer of protection for complainants – even if the evidence is "substantially helpful" under section 37, section 44 may limit the way it can be used.

3.65 Although *Best* is arguably more complex to apply than the previous bright-line test, and arguably confusing,[260] our preliminary view is that it is preferable to have a logical rule that is more difficult to apply, than an illogical rule that is easy to apply.[261] We would like to know whether submitters agree with the approach in *Best*, and whether it should be reflected in the Act. If so, should the approach set out in *Best* be simplified or clarified?

QUESTIONS

Q6 Should the admissibility of a false complaint of previous sexual offending be treated differently from an allegedly false complaint?

Q7 Should false and/or allegedly false complaints be treated as evidence of veracity, sexual experience, or as both? If both, could the approach in *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 be simplified or clarified by amending the Act?

EXTENSION OF SECTION 44 TO CIVIL PROCEEDINGS

3.66 Section 44 applies only in criminal proceedings.[262] In civil proceedings there is no general mechanism governing evidence of sexual experience or reputation.

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257 The Supreme Court in *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 said at [56]–[57]: "It has been suggested by some commentators that … s 37 is the operative provision whenever evidence solely or mainly relevant to veracity is involved. They point out that s 40(3)(b) explicitly provides that propensity evidence about a complainant's sexual history is governed by s 44, while s 40(4) does not refer to s 44 and instead gives priority to the veracity rules. We do not agree. While s 40(4) provides that evidence primarily related to veracity is dealt with under s 37 and not under the propensity rules, there is nothing in s 37 or in s 40(4) to exclude the operation of s 44 in cases where it applies."

258 Elisabeth McDonald "Selected evidence issues with regard to vulnerable witnesses" (paper presented to Reforming the Law of Evidence Conference, Wellington, 8 September 2017) at 15.

259 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [139]–[141] per William Young J (dissenting).

260 Elisabeth McDonald "Selected evidence issues with regard to vulnerable witnesses" (paper presented to Reforming the Law of Evidence Conference, Wellington, 8 September 2017) at 14–16; and Kyle Simonsen "The *Best* approach to the admissibility of prior allegations of sexual offending – pun intended?" (LLB(Hons) Dissertation, University of Auckland, 2017) at 5.

261 Bearing in mind s 6(a) of the Act (providing for facts to be established by the application of logical rules).

262 Section 44 applies in a "sexual case", which is defined in s 4(1) as meaning "a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for,—(a) an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961; or (b) any other offence against the person of a sexual nature".

3.67 The Employment Relations Act 2000 and the Human Rights Act 1993 contain specific provisions to control such evidence in sexual harassment proceedings. Section 116 of the Employment Relations Act provides:

> Where a personal grievance involves allegations of sexual harassment, no account may be taken of any evidence of the complainant's sexual experience or reputation.

3.68 Section 62(4) of the Human Rights Act similarly provides:

> Where a person complains of sexual harassment, no account shall be taken of any evidence of the person's sexual experience or reputation.

3.69 Read literally, these provisions are stricter than section 44 of the Evidence Act because they exclude *all* evidence of sexual experience, even if it relates to the complainant's sexual experience with the defendant. In addition, unlike section 44(3), there is no judicial discretion to admit evidence that is "of such direct relevance … that it would be contrary to the interests of justice to exclude it". In practice, however, the provisions have not been interpreted to entirely exclude evidence of the complainant's sexual experience with the defendant.[263] In *Director of Human Rights Proceedings v Smith*, the Human Rights Review Tribunal held that section 62(4) could not be read literally – it could not prevent the introduction or testing of evidence of the complainant's sexual experience with the defendant that was directly relevant to matters in issue in the current proceeding.[264]

3.70 Arguably, there will be occasions outside these employment or human rights contexts, when a rape shield equivalent would be appropriate.[265] An example could be professional disciplinary proceedings such as those taken in the Health Practitioners Disciplinary Tribunal following allegations of sexual misconduct. We would like to know whether sections 7 and 8 are sufficiently controlling sexual experience evidence in civil proceedings, or whether section 44 or an equivalent rape shield provision should apply in all civil proceedings.

QUESTION

Q8 Should section 44, or an equivalent rape shield provision, apply in civil proceedings?

NOTICE REQUIREMENT IN SECTION 44A

3.71 In the 2013 review, the Commission recommended amending section 44 to require notice to be given of an application for leave to lead evidence as to the sexual experience of a complainant in a sexual case.[266] The rationale for the notice requirement was to enable decisions about admissibility to be made pre-trial.[267] The Commission recommended the notice requirement be modelled on

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263 Maria Dew and Christina Laing "Do we have a consistent approach? Sexual experience and reputation evidence in civil sexual harassment claims" (2017) 912 Law Talk 22 at 23; Christina Laing "Sexual Experience and Reputation Evidence in Civil Proceedings: A Case for Reform" (LLB(Hons) Dissertation, University of Auckland, 2018).

264 *Director of Human Rights Proceedings v Smith* [2004] NZHRRT 1, (2004) 7 NZELC 97,425. Given that the wording of s 62(4) of the Human Rights Act is similar to s 116 of the Employment Relations Act, the same interpretation may apply to s 116 of the Employment Relations Act: Maria Dew and Christina Laing "Do we have a consistent approach? Sexual experience and reputation evidence in civil sexual harassment claims" (2017) 912 Law Talk 22 at 22–23.

265 See Maria Dew and Christina Laing "Do we have a consistent approach? Sexual experience and reputation evidence in civil sexual harassment claims" (2017) 912 Law Talk 22 at 22–23.

266 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 138, R14.

267 See at [7.32]. It would also ensure that all parties and the complainant are provided with a fair opportunity to respond to the evidence or question: Evidence Amendment Bill (27-2) (select committee report).

the notice requirements in relation to hearsay evidence in section 22 of the Act, which would include the grounds relied on for admission of the evidence.[268] The Government accepted the recommendation and section 44A (application to offer evidence or ask question about sexual experience of complainant in sexual cases) was inserted into the Act by the Evidence Amendment Act 2016.[269]

3.72 Section 44A does not entirely reflect the Commission's recommendation. While the notice must include the name of the person who will give the evidence and the subject matter and scope of the evidence, surprisingly there is no requirement to specify the grounds relied on for admission of the evidence under section 44(3).

3.73 Given that the Government accepted the rationale for the Commission's recommendation, we think this omission may be an oversight.[270]

QUESTION

Q9 Should section 44A be amended to require a written application to include the grounds relied on for admission under section 44(3)?

268 See Evidence Act, ss 22(2)(d)–(i). The Commission also referred to legislation in the state of Victoria, where a notice requirement has been in place since 2009. Section 346 of the Criminal Procedure Act 2009 (Vic) requires the notice to 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. See Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [7.31].

269 Section 44A was inserted, on 8 January 2017, by s 15 of the Evidence Amendment Act 2016.

270 Evidence Amendment Bill (27-2) (select committee report) at 2.

CHAPTER 4

Conviction evidence

IN THIS CHAPTER, WE CONSIDER:

- the relationship between sections 8 and 49;
- the scope of the "exceptional circumstances" test;
- the evidential effect of conviction evidence once the exceptional circumstances test has been met; and
- whether the conclusive proof rule in section 49 should be retained.

BACKGROUND

4.1 Section 49, also known as "the conclusive proof rule",[271] applies only in criminal proceedings. The fact a person has been convicted of an offence is admissible as conclusive proof they committed the offence.[272] The party seeking to offer the conviction evidence must first inform the judge of the purpose for which they seek to use it.[273]

4.2 The conclusive proof rule is a "convenient way" of proving the commission of an offence that has already been established to the criminal standard of proof.[274] The rule prevents the re-litigation of resolved matters, which saves time and expense,[275] prevents complainants from having to give evidence multiple times,[276] and avoids a situation in which there might be conflicting verdicts as to a person's guilt or innocence.[277]

4.3 In "exceptional circumstances" the judge may allow a party to offer evidence tending to prove that the person convicted did not commit the offence.[278] Section 49 is also subject to the fact of conviction not being excluded by another provision in the Act. This includes the general exclusion

271 *Morton v R* [2015] NZCA 322 at [33] and [125].

272 Evidence Act 2006, s 49(1).

273 Section 49(3).

274 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [91] per Elias CJ citing Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [233]. Although the Commission did not recommend a conclusive proof rule (it recommended convictions should operate to establish a presumption of guilt rebuttable on the balance of probabilities), the courts have frequently cited its reasons for the admissibility of convictions as the policies underpinning the conclusive proof policy: see *V v R* [2017] NZSC 142 at [18], n 18.

275 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [233].

276 *Manukau v R* [2012] NZCA 222 at [15]; and *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [126].

277 *R v Cunnard* HC Nelson CRI-2011-442-26, 2 May 2011 at [12]; *McNaughton v R* [2011] NZCA 588 at [62]; and *Morton v R* [2015] NZCA 322 at [48].

278 Section 49(2)(a).

provision in section 8,[279] which requires the judge to exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding. In making this assessment, the judge must take into account the defendant's right to offer an effective defence.

4.4 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.

LAW COMMISSION'S 2013 REVIEW OF THE ACT

4.5 During the 2013 review of the Act, the Law Commission received a submission that section 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. There are two situations where this concern arises:[280]

(a) First, where there are multiple defendants and one defendant pleads guilty prior to trial. If the prosecution seeks to offer evidence of that conviction to prove essential elements of the charges in relation to the remaining co-defendants, this may limit the ability of the remaining co-defendants to present a defence that would otherwise be available. This situation may arise, for example, where the prosecution seeks to offer evidence of a co-conspirator's conviction following a guilty plea.[281]

(b) Second, 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

279 Section 8 provides:

> **8 General exclusion**
>
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

280 Discussed in Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [9.6] and [9.9].

281 As in *B v R* [2017] NZCA 575 (conspiring to manufacture methamphetamine); *R v Tanginoa* [2012] NZHC 3121 (conspiring to import methamphetamine); and *R v Bouavong (No 7)* [2012] NZHC 524 (various counts including supplying methamphetamine and conspiring to supply methamphetamine).

> as a party to the offence if the principal offence itself is not proved. A co-defendant can, however, 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. This was the situation that recently arose in *Morton v R*.[282]

4.6 The Commission did not recommend legislative reform.[283] It considered the Act contains two sufficient avenues for a co-defendant to challenge the use of conviction evidence if that would impact on his or her right to a fair trial: the "exceptional circumstances" test in section 49;[284] and section 8.[285] The Commission's assessment of the case law indicated courts were acutely conscious of a defendant's right to offer an effective defence when making decisions about the admissibility of conviction evidence.[286] It recommended the effect of section 49 on co-defendants be kept under review with any problems identified to be considered in the second review of the Act.

ISSUES FOR CONSIDERATION

4.7 Our review of the cases since 2013[287] indicates that section 49 continues to cause some difficulties, particularly in cases involving co-defendants. The most notable cases on section 49 are the Supreme Court's decisions in *Morton v R*[288] and *V v R*.[289]

4.8 In *Morton*, William Young and O'Regan JJ directly invited the Law Commission to reconsider section 49, stating:[290]

> Section 49 has the potential to produce effects which we think were not envisaged by those responsible for its drafting. … The exceptional circumstances test may prove not

282 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1.

283 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [9.12]–[9.13].

284 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).

285 Section 49 is subject to other admissibility provisions in the Act, including s 8. Section 8(2) explicitly provides that the "right of the defendant to offer an effective defence" forms part of the s 8 balancing process.

286 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [9.13].

287 Cases containing some relevant discussion of s 49 include: *P v R* [2017] NZCA 612; *T (CA251/2017) v R* [2017] NZCA 595; *V v R* [2017] NZSC 142; *B v R* [2017] NZCA 575; *V v R* [2017] NZCA 141; *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1; *Flavell v R* [2016] NZCA 58; *Kumar v R* [2015] NZCA 460; *R v O'Carroll* [2015] NZHC 2152; *R v Ma (No 2)* [2015] NZHC 717; *Morton v R* [2015] NZCA 322; *R v Morton* [2015] NZHC 1385; *R v Morton* [2015] NZHC 990 (Courtney J); *R v Morton (No 1)* [2015] NZHC 1847 (Whata J); *R v Morton* [2014] NZHC 2178 (Clifford J); and *R v CARC* [2014] NZHC 709.

288 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1. The defendant (M) was to be retried as a party to acts of rape committed by his four co-defendants. The co-defendants had previously been convicted as principals, and their conviction appeals dismissed. To secure a conviction against M, the Crown had to prove the co-defendants raped the complainant. Section 49(1) would permit this to be established conclusively by proof of the convictions and M did not challenge the admissibility of the convictions. M wanted to defend the charge on the basis he reasonably believed the complainant consented to sexual activity with the co-defendants. He sought to call evidence (from himself and his co-defendants) ostensibly directed to his reasonable belief in consent but primarily to the effect that the complainant had in fact consented. The primary issue was whether "exceptional circumstances" existed so M might be permitted to offer evidence tending to disprove the co-defendants' convictions. The Court divided over whether "exceptional circumstances" existed (the majority held they did), and divided again over whether a direction should be given under s 49(2)(b).

289 *V v R* [2017] NZSC 142. At trial the defendant had been found guilty on several assault charges, but the jury had been unable to agree on a charge of rape. V was retried on that charge. The defendant was granted leave to appeal to the Supreme Court on the question of whether the Court of Appeal was correct in its interpretation and application of s 49. He argued that he would be deprived of any defence to the charge of rape, if the jury was told as a matter of conclusive fact that he strangled and threatened to kill the complainant in the moments just prior to or just after the sexual offending. He argued it was inconceivable the jury would believe his evidence that the sexual intercourse was consensual in those circumstances. The Court held the "exceptional circumstances" test was satisfied and granted permission under s 49(2)(a) and a direction under s 49(2)(b).

290 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [70].

to be well-adapted to address the range of problems which will arise, if reliance on s 49 becomes routine. For these reasons we are of the view that s 49 warrants reconsideration by the Law Commission.

4.9 In our view, there appear to be three difficulties with the operation of section 49:

- The relationship between sections 8 and 49 is unclear. Can the conclusive effect of a conviction give rise to unfair prejudice under section 8, when conclusiveness is the precise effect mandated by section 49(1)? It is not the admissibility of the conviction that will necessarily cause unfairness, but the evidential effect of the conviction prescribed by section 49(1).
- It is not entirely clear what constitutes "exceptional circumstances" for the purposes of section 49(2)(a). The conclusive proof rule intentionally closes off argument on issues that have already been resolved to the criminal standard of proof, but at what point does that give rise to fair trial concerns for defendants?
- Section 49(2) does not clearly state what the evidential effect of a conviction is once the exceptional circumstances test is satisfied.

RELATIONSHIP BETWEEN SECTIONS 8 AND 49

4.10 The Court of Appeal recently remarked on the ambiguous relationship between sections 8 and 49 in *B v R,* noting: "[t]he interface between exclusion for unfair prejudice under s 8 and the orders available under s 49(2) to overcome potential prejudice has never been fully explored by this Court".[291] This followed comments on the relationship between the provisions by the Supreme Court in *Morton*.[292]

4.11 In *Morton*, William Young and O'Regan JJ commented that there is "scope for the view that an effect which is mandated by s 49(1) should not be regarded as unfairly prejudicial if the circumstances are not exceptional".[293] They suggested section 8 might operate in cases where there is "no practical necessity" for evidence of the prior conviction to be given.[294] In *V v R*, the Supreme Court again acknowledged the uncertain relationship between the conclusive proof rule and section 8, although it did not need to resolve the issue in that case.[295]

4.12 In recent cases involving co-defendants the courts have stated that the fact a co-defendant's conviction closes off some live issue that might otherwise have been relied on by the defence does not necessarily result in unfair prejudice.[296] Nor is it necessarily inconsistent with section 25 of

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291 *B v R* [2017] NZCA 575 at [17]. In that case, the defendant (B) faced a charge of conspiring with A and J to manufacture methamphetamine. He sought, and was granted, leave to appeal a pre-trial decision allowing the Crown to adduce certain evidence, including A's conviction following a guilty plea for conspiring with B and J to manufacture methamphetamine. The Court of Appeal was satisfied the evidence of A's conviction was admissible, but recognised unfairness could result from the effect of s 49(1) because of the limited scope of the evidence against all three men. It accepted that "exceptional circumstances" would likely be made out, but left the matter of whether to give a direction for the trial judge to decide.

292 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [14]. In *B v R*, the Court was satisfied that no unfair prejudice would result from admitting the evidence of an alleged co-conspirator's conviction (at [18]). In *Morton*, the Court found there were "exceptional circumstances".

293 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [14]. The High Court in *R v O'Carroll* [2015] NZHC 2152 had also previously stated at [17]: "s 49(1) provides that evidence of a conviction is conclusive proof of commission of the offence. It cannot be unfairly prejudicial to allow evidence to be adduced simply because the Act provides that it is conclusive".

294 At [14].

295 *V v R* [2017] NZSC 142 at [15]–[16].

296 See *B v R* [2017] NZCA 575; *Flavell v R* [2016] NZCA 58; *R v Ma (No 2)* [2015] NZHC 717 at [8]; and the earlier case of *R v Taniwha* [2012] NZCA 605 at [44]. In *B v R* the Court of Appeal reviewed the case law and held at [26]: "It is therefore settled

the New Zealand Bill of Rights Act 1990, which sets out minimum standards of criminal procedure, including the right to a fair hearing, to be presumed innocent until proven guilty and to present a defence.[297]

4.13 In some of the earlier case law considered by the Commission in the 2013 review, namely *R v Bouavong*[298] and *R v Tanginoa*,[299] the High Court more readily accepted that evidence of a co-defendant's conviction *was* unfairly prejudicial and inadmissible under section 8. In both cases, the Court held that offering the previous convictions in the manner proposed would deprive the defendants of the ability to offer an effective defence of their choosing, and would essentially deprive the defendants of their opportunity to test evidence offered against them on essential elements of the charge.

4.14 In both these cases the Court emphasised the priority of section 8 over section 49. In *Bouavong*, the Court said that consideration of whether the evidence should be excluded under section 8 was a "pre-condition" for the application of section 49.[300] In *Tanginoa*, the Court stated that section 49 creates a "gateway" for introducing evidence of a conviction, subject to the "clear priority" of section 8.[301] This was evidenced by the proviso in section 49(1) ("if not excluded by any other provision of this Act") and the mandatory language of section 8(1) ("[i]n any proceeding …").[302]

4.15 The Commission, in its commentary to the proposed Code, described the function of section 8 as follows:[303]

> Under s 8(1)(a) the test for excluding unfairly prejudicial evidence is not met if the evidence is simply adverse to the interests of, say, a defendant in a criminal proceeding, since any evidence from the prosecution is going to be prejudicial to the defendant. The evidence must be unfairly prejudicial. There must be an undue tendency to influence a decision on an improper or illogical basis, commonly an emotional one; for instance, graphic photographs of a murder victim when the nature of the injuries is not in issue. Evidence will also be unfairly prejudicial if it is likely to mislead the jury, for example, if it appears far more persuasive than it really is, as is occasionally the case with some types of expert and statistical evidence. The judge will need to consider whether any misleading tendency can be countered by other evidence that is likely to be available, or by a suitable direction to the jury. Whether evidence has an unfairly prejudicial effect must be considered in terms of the proceeding as a whole, and not just from the point of view of a particular party or a defendant.

4.16 The drafting of section 8 and the Commission's accompanying commentary indicate section 8 was intended to safeguard against unfairly prejudicial *evidence* (such as a graphic photo of a victim or misleading statistics) rather than unfairness arising from the effect of a provision, in this case the *conclusive effect* of the conviction.[304]

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that the fact the conviction evidence would close off an otherwise live issue that the defendant may have raised will not, of itself, result in unfair prejudice."

297 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [64]–[65] per William Young and O'Regan JJ.

298 *R v Bouavong (No 7)* [2012] NZHC 524.

299 *R v Tanginoa* [2012] NZHC 3121.

300 *R v Bouavong (No 7)* [2012] NZHC 524 at [60].

301 *R v Tanginoa* [2012] NZHC 3121 at [42] citing *R v Nguyen (No 2)* HC Auckland CRI-2008-092-17198, 17 September 2010 at [19]: "Section 49 is a gateway to introducing evidence of conviction. It is not … a substitute for the s 8(1) balancing exercise".

302 At [42].

303 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C59].

304 If s 49 contained a rebuttable presumption, for example, evidence of a conviction would not have an unfairly prejudicial effect on the proceeding.

4.17 We are interested to hear submitters' views on whether the relationship between sections 8 and 49 should be clarified in the Act, or whether this ambiguity is a matter best resolved by the courts.

QUESTION

Q10 Should the relationship between sections 8 and 49 be clarified in the Act? If so, how?

EXCEPTIONAL CIRCUMSTANCES

4.18 Prior to the Supreme Court's decision in *Morton*, the courts had taken a narrow view of the scope of the "exceptional circumstances" test, essentially restricting it to when new evidence put the safety of the conviction in doubt. The courts frequently stated that, although a defendant's fair trial rights are paramount[305] and although evidence of the conviction may impair (even "substantially impair")[306] a defendant's defence, the right to mount an effective defence does not necessarily require that the defendant be entitled to attack a relevant conviction.[307] The exceptions to the conclusive proof rule were narrow.[308]

4.19 As with "unfair prejudice" under section 8, the courts had held that the impairment of a defence arguably could not be exceptional if it was caused only by the conclusiveness of the conviction – that was the "natural corollary"[309] and "inevitable consequence"[310] of the provision. The use of a conviction to prove an element of an offence was considered "a paradigm function of s 49(1)".[311]

4.20 In *Morton* the Supreme Court divided over what constituted "exceptional circumstances". William Young and O'Regan JJ took a wider view of the scope of exceptional circumstances than had previously been taken by the courts, holding the test was satisfied because the conviction evidence would have the practical effect of depriving the defendant of a defence.[312] Their reasoning was motivated by fair trial concerns and, in particular, the defendant's right to present an effective defence. The Chief Justice also considered the test was satisfied, but on the basis that the evidence related to an issue that had not been determined by the conviction of the other defendants.[313] Glazebrook and Arnold JJ did not consider the "exceptional circumstances" test had been met – they considered the test was "a high one", justified by a number of policy considerations.[314]

4.21 Subsequently, the Supreme Court in *V v R* applied the wider view of "exceptional circumstances" in a case where the defendant's own convictions were said to curtail his practical ability to advance his defence. The Supreme Court held that the policy of section 49(1) is not engaged where the evidence of the conviction is directed at an element of an offence but the particular issue has not

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305 For example *R v Cunnard* HC Nelson CRI-2011-442-026, 2 May 2011 at [14]; and *Morton v R* [2015] NZCA 322 at [50].

306 *R v Morton (No 1)* [2015] NZHC 1847 at [34].

307 For example *Morton v R* [2015] NZCA 322 at [50].

308 See for example *R v Morton* [2015] NZHC 990.

309 *R v Morton* [2015] NZHC 1385 at [24]. See also *Goffe v R* [2011] NZCA 186, [2011] 2 NZLR 771 at [32] as cited in *R v Morton* [2015] NZHC 990 at [24].

310 *R v Morton* [2015] NZHC 990 at [23].

311 At [23]; and *Morton v R* [2015] NZCA 322 at [55].

312 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [66]–[68].

313 At [98] and [105].

314 At [125].

been determined in the previous trial.[315] If the policy behind section 49 is not engaged, there will be "exceptional circumstances" in a case where the defendant's right to present a defence would be curtailed if the conviction is treated as conclusive proof of the offending.[316] The Court further held:[317]

> We consider in any event that it would be an unusual case where evidence of a conviction is directly relevant to an element of an offence but where the relevant issue has not been determined in the previous trial. This means that, even without the Bill of Rights and the policy overlay, there would likely be exceptional circumstances in terms of s 49(2).

4.22 The cases above indicate there has been some difficulty in defining "exceptional circumstances". We are unsure, however, of the scale of this problem. We would like to hear how section 49 is generally operating in practice. Does the scope of "exceptional circumstances" often (or rarely) give rise to problems in practice?

4.23 We invite feedback on whether section 49(2) should be amended to clarify the scope of "exceptional circumstances", and if so, how. One possibility for amendment is to provide examples of exceptional circumstances in section 49(2). An example of an exceptional circumstance given in *Morton* is where A and B are charged with conspiring with each other to commit a crime and A pleads guilty. In this situation, B would have no defence unless the judge concludes there are exceptional circumstances under section 49(2).[318] Another example the Court gave is where there is reason to think the conviction may have been wrongly entered.[319]

QUESTION

Q11 Should section 49 be amended to clarify when the "exceptional circumstances" test will be met? If so, in what circumstances should the test be met?

THE EVIDENTIAL EFFECT OF THE CONVICTION ONCE THE EXCEPTIONAL CIRCUMSTANCES TEST IS SATISFIED

4.24 The courts have expressed different views about the evidential effect of a conviction after the "exceptional circumstances" test is satisfied. Section 49(2) is silent on this.

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315 *V v R* [2017] NZSC 142.

316 At [23].

317 At [23].

318 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [51]–[52]. In *B v R* [2017] NZCA 575, the Court of Appeal discussed this possible "exceptional circumstance". They considered that adducing evidence of the conviction to prove the fact of the conspiracy would not preclude the defendant from asserting he was not party to that conspiracy. The prosecution accepted, however, that even if the dates and names were redacted from the evidence of the conviction, the limited scope of the evidence against the co-conspirators (mainly text message and surveillance evidence) could lead an attentive jury to conclude that the defendant must have been one of the named co-conspirators. His assertions that these communications had an innocent purpose would have the effect of tending to disprove the existence of the conspiracy, an outcome that is precluded unless there are exceptional circumstances under s 49(2).

319 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [60]. Recently in *P v R* [2017] NZCA 612 at [35]–[36], the defendant argued there were exceptional circumstances under s 49(2) because there was "fresh" evidence throwing doubt on the validity of the conviction. The "fresh evidence" was an explanation from the defendant as to why he had pleaded guilty. The Court of Appeal did not accept this was fresh evidence as contemplated by the Supreme Court in *Morton*, saying: "It is not evidence that goes to exonerate him from the … offending".

4.25 In *Morton,* the Chief Justice considered a conviction remains conclusive once permission is given under section 49(2)(a), but is no longer treated as conclusive proof once a direction under section 49(2)(b) is given. She said:

> [96] The effect of a direction under s 49(2)(b) is that the conviction is not treated as "conclusive proof", so that the issue whether the person convicted committed the offence may be determined by the trier of fact in the proceedings. If the fact that person convicted committed the offence is an element of the offence being tried (as, for example, theft is an element where the charge is receiving), proof of the offence to the criminal standard will continue to lie with the Crown … .
>
> [97] The effect of permission under s 49(2)(a) is less extreme. The conviction remains conclusive that the person convicted committed the offence but contradictory evidence, if otherwise relevant in the proceedings, may be offered despite the fact that it "tends" to prove that the person convicted did not commit the offence.

4.26 William Young and O'Regan JJ, however, expressed concern that jurors would "struggle to make sense" of a conviction remaining conclusive once leave is granted under section 49(2)(a), as it could be difficult to explain that a conviction is conclusive while permitting evidence tending to suggest the contrary.[320] They stated:[321]

> One of our concerns is that in the absence of a s 49(2)(b) direction there is the possibility that the Judge would feel obliged to direct the jury that s 49(1) has the consequence that they must reject the narratives of the appellant and co-defendant. Another and related concern is that in the absence of s 49(2)(b) direction, evidence of the appellant and co-defendants indicative of consent on the part of the complainant would be inadmissible as inconsistent with the convictions.

4.27 Glazebrook and Arnold JJ (the minority) commented that, *even if* a direction is given under section 49(2)(b), there may still be difficulties for a jury:[322]

> … the jury will have heard evidence that indicates that the convictions were wrongly entered against the four offenders and will have been given a direction by the judge that the convictions are not conclusive proof that the offenders were guilty of raping the complainant. But at the same time they will have certificates of conviction indicating that the four offenders have been convicted of rape. Presumably, the jury will be entitled to consider the certificates alongside the other evidence. It is not at all obvious how the jury can be expected to make sense of all this, in particular, the fact that another jury has been satisfied beyond reasonable doubt that the offenders committed rape.

4.28 The Supreme Court in *V v R* applied the Chief Justice's interpretation of section 49(2) in *Morton*, distinguishing between the continuing conclusive effect of convictions under section 49(2)(a) and

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320 William Young and O'Regan JJ would have preferred a direction under s 49(2)(b) to be given in *Morton*, but because their general approach was closer to that of Elias CJ (who considered a direction should not be given) than Glazebrook and Arnold JJ, they adopted her approach to form a majority view (at [80]). The Court of Appeal in *V v R* [2017] NZCA 141 echoed this concern, saying: "there may well be difficulties in explaining to a jury that a conviction is conclusive proof that the person committed the offence while permitting evidence tending to suggest the contrary" (at [20(g)]).

321 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [79].

322 At [136].

the displacement of conclusive effect under section 49(2)(b).[323] However, the Court held that a section 49(2)(b) direction should accompany permission under section 49(2)(a) because:[324]

> … there would be little point in allowing [V] to present evidence in terms of s 49(2)(a) if the convictions remained conclusive. [V]'s ability to present his defence would remain curtailed. It is therefore appropriate that a direction be given under s 49(2)(b).

4.29 Prior to these decisions, the High Court had also been grappling with section 49(2)'s silence on the evidential effect of convictions. In *Bouavong* the High Court commented that section 49 contemplates three possible effects.[325] Under section 49(1), the Crown is permitted to adduce evidence of the convictions as *conclusive proof* that the person convicted committed the offence or offences. Under section 49(2)(a), proof of the convictions could be relied upon as a *rebuttable presumption* that the person convicted had committed the offence or offences. Under section 49(2)(b) the Crown *would not be permitted to rely at all upon the convictions* as evidence that the person convicted committed the offence.

4.30 In *R v K*, the High Court noted that section 49 does not explain the evidential effect of a conviction when there are "exceptional circumstances".[326] The Court suggested section 49(2) creates a *rebuttable presumption* and, because section 49(2)(a) does not expressly impose any reverse onus on the balance of probabilities, the jury may disregard the conviction if they have a reasonable doubt that the person committed the offence.[327] The Court suggested the effect of section 49(2)(b) is that the judge may direct the jury "to disregard the s 49(1) *presumption*".[328] The Court did not make a direction under section 49(2)(b), as directing the jury to ignore the convictions might leave them "confused as to what the convictions are to stand for".[329]

4.31 Our preliminary view is that the drafting of section 49(2) could be improved by stating clearly the intended evidential effect of a conviction if exceptional circumstances are established. For example, section 49 could be amended so that a direction under section 49(2)(b) automatically accompanies a finding that there are exceptional circumstances.

QUESTION

Q12 Should section 49 be amended to clarify the evidential effect of convictions when the "exceptional circumstances" test is satisfied? If so, how?

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323 *V v R* [2017] NZSC 142 at [29].

324 At [29]. More recently, the Court of Appeal in *B v R* [2017] NZCA 575 accepted that exceptional circumstances would likely be made out for the purposes of s 49(2)(a), but declined to make a direction under s 49(2)(b). The Court did not consider a direction would be justified, but left this matter for the trial judge to decide: at [39].

325 *R v Bouavong (No 7)* [2012] NZHC 524 at [56]. See also [94] where the High Court said: "That is so whether the conviction amounts to conclusive proof under s 49(1) or rebuttable evidence under s 49(2)(a)." See also [106]–[107] discussing the "presumptive effect of a conviction". *Bouavong* subsequently went to the Court of Appeal (*Bouavong v R* [2013] NZCA 484, [2014] 2 NZLR 23) and the Supreme Court (*Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493), however, the principal grounds of appeal relied upon by all appellants related to the application of s 66 of the Crimes Act 1961 and associated issues of jury unanimity, not s 49.

326 *R v K* HC Auckland CRI-2008-092-11859, 17 June 2010 at [50]–[51].

327 At [51]: "The fact, however, that a conviction can be challenged with leave suggests that it cannot then any longer be conclusive. Also, the trial Judge has a further ability to disregard the s 49(1) presumption altogether 'if satisfied that it is appropriate to do so'. Both suggest that, where the trial judge does not take that further step, the conviction can only have presumptive, not conclusive, force, and s 49(2)(a) does not impose expressly any reverse onus on the balance of probabilities. Its effect appears rather to be that the jury may disregard a conviction if K's evidence leaves them with a reasonable doubt about whether he did commit the offence for which the conviction stands."

328 At [51] (emphasis added).

329 At [53].

A PRESUMPTIVE PROOF RULE?

4.32 In addition to the options canvassed above (that is, clarifying the scope of the "exceptional circumstances" test and/or the evidential effect of convictions), a further option is to replace the conclusive proof rule in section 49(1) with a rebuttable presumption, as the Commission recommended in its proposed Evidence Code.[330] As Parliament rejected the Commission's recommendation for a presumption, this would be a significant change in policy.[331]

4.33 A presumptive proof rule would, however, continue to give effect to the same policy reasons identified by the Commission for the admissibility of convictions. It would also remove the need for the "exceptional circumstances" proviso (and the need to clarify the evidential effect of a conviction once that test is met): the defendant would be able to challenge the conclusiveness of the conviction as of right.

4.34 A presumptive proof rule could also specify the standard to be met before the presumption is displaced (for example, whether the defendant needs to raise an evidential burden or if the defendant has an onus on the balance of probabilities).

4.35 We note that no comparable jurisdiction has a conclusive proof rule. In England and Wales, section 74 of the Police and Criminal Evidence Act 1984 provides that a conviction is admissible to prove the person convicted committed the offence and will do so unless the contrary is proved. The presumption operates in tandem with section 78(1), which permits a court to exclude evidence if it would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

4.36 In Canada, section 657.2 of the Criminal Code 1985 provides that, in the absence of evidence to the contrary, previous convictions are admissible as proof a person has committed an offence in two specified circumstances.[332] A prior conviction is not conclusive proof and evidence of the conviction of a principal, for example, "does not foreclose a full exploration of the principal's guilt on the trial of the accessory".[333]

4.37 In Australia, the admissibility of previous convictions in criminal proceedings is governed by the common law.[334] The rule in *Hollington v Hewthorn,*[335] that the conviction of a third party is not admissible against an accused person at trial, has not been statutorily abolished in Australia and still applies in criminal proceedings.[336] The one recognised exception is that evidence of the conviction of a principal offender is admissible in the trial of an accessory after the fact.[337] It is, however, still

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330 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [236].

331 Evidence Bill 2005 (256-1), cl 45. The explanatory note to the Bill did not give reasons for the change: Evidence Bill 2005 (256-1) (explanatory note) at 12.

332 First, where an accused is charged with receiving, a conviction for theft is proof the property is stolen. Second, where an accused is charged with being an accessory after the fact, a conviction of another person of the offence is proof the offence was committed.

333 *R v Duong* (1998) 124 CCC (3d) 392 (Ont CA) at [43]. See also *R v Steadman* (2009) 81 WCB (2d) 32 (BC SC) at [41]; and *Halsbury's Laws of Canada – Criminal Offences and Defences (Gold)* (reissue, online ed, 2016) at [HCR-20].

334 The Queensland Court of Appeal summarised the law in *R v Kirkby* [1998] QCA 445, [2000] 2 Qd R 57.

335 *Hollington v F Hewthorn & Co* [1943] KB 587 (CA).

336 The decision has been overruled in several Australian jurisdictions in relation to civil proceedings. See Evidence Act 1977 (Qld), s 79; Evidence Act 1929 (SA), s 34A; Evidence Act 1910 (Tas), s 76; and Evidence Act 1958 (Vic), s 90.

337 *R v Kirkby* [1998] QCA 445, [2000] 2 Qd R 57 at [44] per McMurdo P. The exception does not allow admission of the principal offender's conviction at the trial of a person charged as a secondary party under ss 7(1)(b), (c) or (d) of the Criminal Code (which is similar to s 66(1) of the Crimes Act 1961).

open to the accused to rebut this prima facie evidence. Further, the trial judge retains a residual discretion to exclude the evidence, if satisfied that its admission would be unfair to the accused.[338]

4.38 On the other hand, our preliminary consultation has left us with the impression that the conclusive proof rule is firmly established and amending the provision may be an excessive response to the issues discussed. It may also create other difficulties. We recognise that the Supreme Court decision in *Morton* was the product of a very complex and unusual procedural history.[339] We are therefore interested to hear how section 49 operates in more straightforward cases, in order to better understand the scale of the problems associated with the conclusive proof rule and decide whether an amendment is warranted.

QUESTION

Q13 Should section 49 be amended to adopt a presumptive proof rule?

338 At [48] per McMurdo P, referring to s 130 of the Evidence Act 1977 (Qld).

339 The unusual procedural history of the case is set out at [16]–[34] of *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1.

CHAPTER 5

Right to silence

IN THIS CHAPTER, WE CONSIDER:

- the distinction between drawing adverse inferences from a defendant's exercise of the right to silence and drawing inferences of guilt;
- whether a judge sitting alone should be permitted to draw an adverse inference of guilt from a defendant's pre-trial silence;
- whether the ability to draw adverse inferences about a defendant's credibility from pre-trial silence should be conditional upon the defendant having been cautioned about that possibility;
- whether section 32 should be amended to specify the circumstances in which a challenge to credibility based on pre-trial silence can be made;
- the relationship between section 32 and the Act's veracity rules; and
- whether section 33 should be amended to specify the circumstances in which a judge may comment on the exercise of a defendant's silence at trial.

BACKGROUND

5.1 The "right to silence" has been described as a network of loosely linked rules or principles of immunity, differing in scope and rationale.[340] Broadly speaking, these rules reflect the principle that "every citizen has in general a right to refuse to answer questions from anyone, including an official".[341] The right can be seen as an essential component of a citizen's "right to be let alone"[342] and to be free from unwarranted State intrusion into his or her private life.[343]

340 *R v Hertfordshire County Council* [2000] 2 AC 412 (HL) at 419, referring to *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 (HL) at 30–31.

341 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398 per Cooke P. See also *Rice v Connolly* [1966] 2 QB 414 at 419: "the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority".

342 Thomas M Cooley *Cooley on Torts* (2nd ed, Chicago, 1888) at 29; and Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4 Harv LR 193 at 195. See also Timothy Garton Ash *Free Speech: Ten Principles for a Connected World* (Atlantic Books, London, 2016) at ch 7.

343 See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [37].

5.2 In New Zealand, the general right to silence is not subject to explicit legislative protection. Specific instances of the right, however, are given special protection.[344]

5.3 The focus of this chapter is on sections 32 and 33 of the Evidence Act, which govern the evidential use of a defendant's pre-trial silence and silence at trial.

5.4 Section 32 applies where a defendant has not answered questions put in the course of an investigation of an offence or has not disclosed a defence before trial. The section prevents a person from inviting the fact-finder to draw an inference that the defendant is guilty because of their pre-trial silence. Section 32(2)(b) imposes an obligation on the judge to direct the jury that they may not draw any such inference. The section provides:

> **32 Fact-finder not to be invited to infer guilt from defendant's silence before trial**
>
> (1) This section applies to a criminal proceeding in which it appears that the defendant failed—
>
> (a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning[345] before the trial; or
>
> (b) to disclose a defence before trial.
>
> (2) If subsection (1) applies,—
>
> (a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and
>
> (b) if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.
>
> (3) This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.

5.5 Section 33 is concerned with a defendant's silence *at* trial. The section prohibits anyone other than the defendant, the defendant's counsel or the judge from commenting on the fact that the defendant refrained from giving evidence at their trial. The section provides:

> **33 Restrictions on comment on defendant's right of silence at trial**
>
> (1) In a criminal proceeding, no person other than the defendant or the defendant's counsel or the Judge may comment on the fact that the defendant did not give evidence at his or her trial.

Pre-Evidence Act

Pre-trial silence

5.6 Prior to the enactment of the Evidence Act, the common law governed the admissibility and use that could be made of evidence that a defendant had exercised their right to silence prior to trial. In general, the common law prevented inferences of guilt from being drawn if a defendant was silent before trial.[346] The admissibility of evidence of pre-trial silence depended on whether the silence

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344 For example: s 23(4) of the New Zealand Bill of Rights Act 1990 guarantees the right to silence when a person has been arrested or detained; s 25(d) of that Act guarantees the right not to be compelled to be a witness or confess guilt at trial; and s 60 of the Evidence Act preserves the common law immunity against being compelled to answer any questions that may incriminate oneself (known as the "privilege against self-incrimination"). The history and scope of the common law privilege was discussed in Law Commission *The Privilege Against Self-Incrimination* (NZLC PP25, 1996) at [14]–[52]. See also the discussion in Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at ch 7.

345 "Investigative questioning" is defined in s 4 of the Evidence Act as "questioning in connection with the investigation of an offence or a possible offence by, or in the presence of,—(a) a member of the Police; or (b) a person whose functions include the investigation of offences".

346 There was, however, one exception. The common law permitted an inference of guilt to be drawn from a defendant's silence in the face of an allegation put by someone with whom the defendant was "on even terms" (in other words, a lay person who was not acting on behalf of an enforcement body such as Police). See *R v F* CA74/05, 14 April 2005 and the authorities referred to in Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [ED6.03(2)

was in response to an allegation or accusation, in response to questioning, or by way of a failure to disclose a defence before trial:

- The fact that the accused had exercised their right to silence in the face of an allegation or accusation made by or in the presence of a police officer was inadmissible, on the basis the probative value of the evidence was outweighed by its prejudicial effect.[347]
- The position in relation to an accused's silence in the face of police questioning (as opposed to allegations or accusations) was different. The fact the accused remained silent was admissible, as long as the jury was expressly told that the defendant had a right to silence and that silence was not indicative of guilt.[348]
- Where a defendant gave evidence at trial, evidence that they failed to take an earlier opportunity to advance a defence relied on at trial was admissible.[349] The common law also permitted the prosecutor and the judge to comment that the defendant's failure to take an earlier opportunity to explain their conduct or advance any defence reflected on the defendant's credibility.[350] The justification given for this approach was that the pre-trial silence was not being relied upon as evidence of guilt, but rather as an "answer to the defence – a test applied in order to determine its truth or falsity".[351]

5.7 In a 1992 preliminary paper, *Criminal Evidence: Police Questioning*,[352] the Law Commission discussed extensively the policies relevant to reforming the existing law concerning the right to silence. The Commission began its discussion by explaining that the right to silence, although "the subject of heated debate" and "of great symbolic importance",[353] was, at best, a qualified right. The Commission considered there were undoubted adverse consequences that may flow from a defendant remaining silent before or during trial, and the central question was whether those detrimental consequences should be added to or lessened. Discussion of the right to silence in absolute terms of preservation or abolition was artificial.[354]

5.8 The Commission noted the question whether adverse inferences could be drawn from pre-trial silence was relatively confined.[355] The debate surrounding the appropriate effect of a defendant's right to silence reflected two competing views:

- The right to silence protects the guilty, as common sense and daily experience suggest that a person who fails to respond to an allegation of criminality or questioning concerning an offence is often motivated by a desire to conceal the self-incriminating truth.[356]

(b)]. That common law position continues to apply under s 32 of the Evidence Act (see *Hitchinson v R* [2010] NZCA 388), as intended by the Law Commission: see Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [80].

347 *R v Duffy* [1979] 2 NZLR 432 (CA). See also Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [51].

348 *R v Coombs* [1983] NZLR 748 (CA); and *R v McCarthy* [1992] 2 NZLR 550 (CA). See also Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [54].

349 See *R v Coombs* [1983] NZLR 748 (CA); and Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [57].

350 *R v Hill* [1953] NZLR 688 (CA) at 694; *R v Foster* [1955] NZLR 1194 (CA) at 1200; *R v Ryan* [1973] 2 NZLR 611 (CA) at 615; and *R v Coombs* [1983] NZLR 748 (CA) at 751–752.

351 *R v Foster* [1955] NZLR 1194 (CA) at 1200. See also Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [59].

352 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992).

353 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [3].

354 At [4].

355 At [3].

356 At [26].

- Silence does not always indicate guilt, as there may be a number of reasons why an innocent person would wish to remain silent in the face of an official investigation.[357]

5.9 The Commission preferred the latter view – it did not consider that an inference of guilt could inevitably be drawn from silence either before or during trial.[358] After reviewing the existing law concerning the right to silence, the Commission proposed to strengthen the defendant's right to silence before trial through the enactment of a provision preventing all comment on a defendant's pre-trial silence.[359]

5.10 The Commission refined this recommendation in its subsequent publications on its Evidence Code in 1999.[360] The Commission proposed two clauses:

- A provision that prohibited the fact-finder from drawing an "inference that is unfavourable to a defendant" from a defendant's silence in the face of official questioning[361] before trial and from non-disclosure of a defence before trial.[362] If the trial was before a jury, the judge would need to direct the jury accordingly.[363]
- A provision that would prohibit anyone from inviting the fact-finder to draw unfavourable inferences from a defendant's pre-trial silence.[364]

5.11 The Commission intended the phrase "inference that is unfavourable to a defendant" to cover both inferences of guilt and inferences about a defendant's truthfulness,[365] thereby changing the law (which at that time allowed adverse comment on a defendant's failure to take an earlier opportunity

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357 At [27].

358 At [32] and [43]. The Commission reiterated this view in *The Privilege Against Self-Incrimination* (NZLC PP25, 1996) at [91]: "Silence can be consistent with innocence. For a number of reasons, an innocent person may not wish to try to persuade the official of his or her innocence. These include, fear, confusion, disability, poor communication skills, unawareness of the circumstances leading to investigation, and the attitude of the investigator".

359 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [78]. The Commission did not go so far as to suggest that evidence as to pre-trial silence should always be inadmissible, however. The Commission expressed the tentative view that the exclusion of evidence of silence was best dealt with on a case-by-case basis in terms of relevance and the general power to exclude evidence that is unfairly prejudicial: at [79]. The Commission remained of this view when it developed its Evidence Code. In *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [124], the Commission explained that the rules in the Evidence Code were aimed at controlling the use that may be made of evidence of a defendant's pre-trial silence, rather than regulating the admission of such evidence.

360 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [124]–[129]; and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C156]–[C162]. We also note that, in the course of developing its thinking concerning the right to silence before and during trial, the Commission became aware of the need for empirical data on how often accused exercised the right and what impact its exercise has on the case. To obtain such information, in 1992 the Commission conducted a survey over a three month period of all judges involved in jury trials in New Zealand. The results of the survey suggested that few people actually remain silent in response to questions asked during investigative questioning: of the 398 accused in the survey, 80 per cent of accused did not exercise their right of silence when questioned by Police before trial (and 70 per cent did not exercise their right of silence during the trial). See Law Commission *Report on the Analysis of the Right of Silence Survey* (August 1995), reproduced in Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) appendix 2.

361 "Official questioning" was defined widely in s 4 of the Evidence Code to include not just police officers, but also anyone whose functions include investigating offences – for example, insurance investigators and store security staff. See Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [125]; and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C30] and [C157].

362 Section 32 of the Evidence Code.

363 Section 32(1) of the Evidence Code.

364 Section 33 of the Evidence Code. See Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [122]. To preclude "a back-door attack" on a defendant's exercise of pre-trial silence (Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [126]), s 32(3) of the Code also prohibited the prosecution from cross-examining a defendant on the fact that he or she remained silent in response to official questioning before trial or failed to disclose a defence before trial. The Commission made it clear that this proposal was intended to give greater protection to the right to silence: see Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C159]: "In prohibiting the prosecution from cross-examining a defendant on the defendant's exercise of the right of silence before trial, s 32(3) clarifies the law on the side of rights."

365 See ss 32(2) and 33(2) of the Evidence Code.

to explain their conduct or advance a defence).[366] Although the Commission acknowledged the law was not creating major difficulties in practice,[367] it considered the distinction between an inference of guilt and a challenge to a defendant's credibility was "not free from difficulty",[368] given that in both situations the jury was being invited to draw an inference adverse to the accused on account of their exercise of the right to silence.[369] In other words, a challenge to a defendant's credibility would likely be interpreted by a jury as an invitation to infer guilt from pre-trial silence.

5.12 A number of aspects of the Commission's proposal were not carried through into the Evidence Bill 2005 (which dealt with pre-trial silence in one section instead of the two sections proposed by the Commission). Significantly, the proposed change to the common law to prevent adverse comment on a defendant's truthfulness was not accepted by the Government. Advice from the Ministry of Justice was that the prosecution should have the right to comment generally on the fact that a defence is raised for the first time at trial.[370]

5.13 Accordingly, clause 28 of the Evidence Bill (now section 32 of the Act) only prohibited inviting or drawing an inference of *guilt* from silence before trial, whether in response to official questioning or in not disclosing a defence before trial. The clause did not proscribe challenges to the defendant's credibility.[371] Finally, unlike the provision in the Commission's Code,[372] the clause did not expressly prevent judges from drawing adverse inferences from pre-trial silence. Clause 28 was ultimately enacted (with one minor amendment at the Select Committee stage).[373]

Silence at trial

5.14 Prior to the enactment of the Evidence Act, the defendant, their counsel and the judge were permitted to comment on the defendant's silence at trial.[374] This course of action was recognised by section 366(1) of the Crimes Act 1961.[375]

5.15 The case law established that a judge was entitled to explain to a jury that adverse inferences could be drawn from a defendant's failure to give or call evidence (once the prosecution established a prima facie case), if such evidence could provide the explanation that the defendant might be expected to give if they were innocent.[376]

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366 See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C162] and [C158]; and Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [125].

367 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [78].

368 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [128].

369 See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [59] and at [24], referring to Cooke J's observation in *R v Coombs* [1983] NZLR 748 (CA) at 752 that the distinction "is often too fine to be of practical value in a jury trial", as "in each situation the jury are being invited to draw an inference adverse to the accused on account of his exercise of the right to silence".

370 Cabinet Policy Committee "Evidence Bill: Paper 2: Admissibility of Evidence" (4 December 2002) POL Min (03) 8/12 at [33].

371 Nor did it prohibit the prosecution from cross-examining a defendant on their pre-trial silence.

372 Section 32(1) of the Evidence Code.

373 The term "official questioning" (Evidence Bill 2005 (256-1), cls 28(1) and 4) was changed to "investigative questioning" (and a broader definition included in cl 4) by the Select Committee to ensure that any enforcement officer performing an investigative function as part of their duties would be captured by the definition: Evidence Bill 2005 (256-2) (select committee report) at 1–2.

374 See the summary in Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [96]–[111].

375 Section 366(1) of the Crimes Act 1961 provided: "[w]here a person charged with an offence refrains from giving evidence as a witness, no person other than the person charged or his counsel or the Judge shall comment on that fact." This provision was inserted by s 4(1) of the Crimes Amendment Act 1966. Before this amendment, the judge was forbidden to comment adversely on the defendant's failure to testify.

376 *Trompert v Police* [1985] 1 NZLR 357 (CA); *R v Drain* CA249/94, 11 October 1994; and *R v Gunthorp* [2003] 2 NZLR 433 (CA). See also *R v Hines (No 3)* (1998) 16 CRNZ 236 (CA) at 244: "[there are] authorities which support the general proposition that where there is evidence, accepted as reliable, tending to show guilt an inference can be drawn from the withholding of any

5.16 The rationale for allowing an inference to be drawn was that if such evidence existed the defendant should proffer this as a witness, and therefore be subject to cross-examination to test that evidence. Although silence "certainly [did] not give rise to an inference of guilt", the prosecution evidence and natural inferences from it might "more easily be accepted if not contradicted by evidence from the accused or other evidence called for the accused".[377]

5.17 In its publications on the Evidence Code in 1999, the Commission said it considered the existing case law was unclear because it failed to specify the use that could be made of silence: "[c]onsequently, juries are not told whether they may draw an adverse inference about a defendant's guilt or whether silence is only a factor relevant to credibility."[378] The Commission favoured a bright-line rule. It proposed a provision in its Code that stated categorically that a defendant's silence at trial could not be used to "help establish the defendant's guilt".[379]

5.18 The Commission recognised its proposed rule marked a major change from the previous law.[380] Silence at trial would no longer be able to be used to add weight to the prosecution's case or, more particularly, to convert a prima facie case into one proved beyond reasonable doubt.[381]

5.19 Cabinet did not accept this recommendation.[382] Accordingly, the Evidence Bill 2005, as introduced, included a provision permitting the defendant, their counsel, or the judge to comment on the fact the defendant did not give evidence at their trial – in other words, preserving the previous law and essentially re-enacting section 366(1) of the Crimes Act.[383] That provision (now section 33) was ultimately enacted.

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answer that such evidence may be more readily taken as proof to the required standard. That is common sense and exactly what occurs in all probability whether or not the subject of any express direction to the jury".

377 *R v McCarthy* [1992] 2 NZLR 550 (CA) at 554.

378 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [132].

379 Section 34 of the Evidence Code. The proposed rule was not intended to apply in civil proceedings – this was made clear by s 35 of the Evidence Code. The Commission had taken a different view in an earlier preliminary paper, *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992). There, the Law Commission reviewed the relevant authorities in this area and noted that the distinction between inferring guilt from silence and using silence merely as a factor relevant to the weight to be given to other evidence had sometimes been criticised on the basis that the latter use still gave silence some evidential significance: at [111]. However, in the absence of any evidence that the existing law was creating any unfairness to either the defence or the prosecution, the Commission was not inclined to recommend any substantial change concerning comment on silence at trial: at [114]–[115]. The Commission had proposed leaving the law relatively unchanged in this area so that, in appropriate circumstances, the trial judge would be permitted to direct a jury that an adverse inference could be drawn from the fact the defendant had not testified: at [114].

380 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [133]; and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C163].

381 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [133]. See also Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C163]: "The effect of [the proposed rule] is that a defendant's silence at trial may indicate that there is no evidence to support speculative explanations by defence counsel of the Crown's evidence, or that the accused has not put forward any evidence that would require the Crown to negative an affirmative defence. However, silence can never be used to bolster prosecution evidence that would otherwise be insufficient to prove guilt beyond reasonable doubt. Even where the onus is on a defendant … the defendant's silence at trial should only affect the weight of the defence evidence. Lack of defence evidence may mean there is nothing to tip the balance against prosecution evidence that is sufficient to prove a defendant's guilt beyond reasonable doubt. Lack of defence evidence can never add weight to an insufficient prosecution case to help prove a defendant's guilt beyond reasonable doubt".

382 See Cabinet Policy Committee "Evidence Bill: Paper 2: Admissibility of Evidence" (4 December 2002) POL Min (03) 8/12 at [35].

383 Evidence Bill 2005 (256-1), cl 29.

ISSUES FOR CONSIDERATION

5.20 Sections 32 and 33 were not reviewed by the Commission during its 2013 review of the Act.[384] For this review the main question we need to consider is whether there is really any meaningful distinction between:

- drawing adverse inferences about a defendant's credibility from silence before trial (permitted under section 32) and drawing inferences of guilt (prohibited under section 32); and
- drawing inferences from a defendant's silence at trial when assessing the strength of the prosecution's case (permitted under section 33) and drawing inferences of guilt (prohibited under section 33).

5.21 The distinction has been described as a "fine one" at best,[385] given that both permissible uses of a defendant's pre-trial silence and silence at trial effectively invite the fact-finder to assign some evidential significance to a defendant's silence – this may well be interpreted by the fact-finder as an invitation to infer guilt. We identify options for reform in this chapter that are aimed at removing the need to engage in the exercise of deciding whether the line between a permissible and impermissible use of silence has been crossed in any given case.

5.22 In addition, we consider the following discrete issues:

- Should section 32 be amended to:
  - clarify whether a judge sitting alone is permitted to draw an adverse inference of guilt from a defendant's pre-trial silence?
  - make the ability to draw adverse inferences about a defendant's credibility from pre-trial silence conditional upon the defendant having been cautioned about that possibility?
  - specify the circumstances in which a challenge to credibility based on pre-trial silence can be made?
  - clarify the section's interaction with the Act's veracity rules?
- Should section 33 be amended to specify the circumstances in which a judge may comment on the exercise of a defendant's silence at trial?

DISTINCTION BETWEEN DRAWING ADVERSE INFERENCES AND INFERRING GUILT

5.23 As we explained above, section 32 as enacted prevents inviting and drawing inferences "that the defendant is guilty" from their pre-trial silence. The section makes no mention of inferences about a defendant's credibility. Section 33 re-enacts the substance of section 366(1) of the Crimes Act, leaving open the possibility of a defendant, their counsel, or a judge commenting on the defendant's silence at trial. The sections therefore preserve the pre-Evidence Act position.

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384 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013). The Commission was of the view that any proposals relating to judicial or counsel comment on the fact a defendant had chosen not to give evidence in court, or had failed to answer police questions when being investigated, would engage "fundamental policy matters" that were outside the scope of its technical review: at [1.40]. During this second review, we have not set out generally to revisit fundamental policy matters relating to the right to silence. Our principal focus is on areas where the provisions in the Act have created difficulties in practice. That said, where practical problems are identified, we see no reason why recalibration of the policy settings of the Act's provisions cannot be considered when developing options for reform.

385 See *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467 at [16] (referring to s 32); and Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA33.4] (referring to s 33).

5.24 In 2013, the Court of Appeal in *Smith v R*[386] confirmed the common law distinction continued under section 32. The Court reviewed the legislative history of the provision and the pre-Act common law, and concluded:[387]

> Section 32 is a proscription only on inviting or drawing an inference of guilt from silence before trial, whether in response to "investigative questioning" or in not disclosing a defence before trial. It does not proscribe challenges to the defendant's credibility because the defendant said nothing before advancing a defence in evidence at trial.

5.25 A number of cases since *Smith* have adopted this approach[388] and it appears well-settled that section 32 proscribes only the drawing of inferences that a defendant is *guilty* from their pre-trial silence and does not preclude challenge to, or comment upon, the defendant's credibility based on the belated proffering of an explanation at trial.

5.26 Although the courts have consistently recognised the distinction between a challenge to a defendant's credibility and an invitation to infer guilt since *Smith*, the courts have also described it as a "fine line" for prosecutors and trial judges to walk in practice.[389] The difficulty arises because a challenge to credibility based on pre-trial silence effectively invites the fact-finder to assign some evidential significance to a defendant's pre-trial silence – this can come perilously close to an invitation to infer guilt.

5.27 The same comment can be made in relation to the distinction between drawing inferences from a defendant's silence at trial when assessing the strength of the prosecution's case (permitted under section 33) and drawing inferences of guilt (prohibited under section 33). As the authors of *Cross on Evidence* observe, the distinction is a "fine one at best".[390]

5.28 The difficulty in distinguishing between permissible and impermissible uses of a defendant's silence has prompted some academic commentators to question whether there is really any meaningful distinction between drawing an adverse inference from a defendant's exercise of the right to silence and an invitation to infer guilt.[391] These concerns are not new. Writing in the 1970s, Rupert Cross described the distinction as "gibberish".[392] He considered that challenges to credibility based on a defendant's pre-trial silence and invitations to infer guilt effectively encouraged the jury to do exactly the same thing: draw inferences of *guilt* from the accused's silence.[393] He also doubted there was any real distinction between commenting on a defendant's failure to give evidence at trial

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386 *Smith v R* [2013] NZCA 362, [2014] 2 NZLR 421.

387 At [42].

388 *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467 at [16]; *Gurran v R* [2015] NZCA 347 at [45]; *Hastings v R* [2015] NZCA 180 at [45]; and *Hamdi v R* [2017] NZCA 242 at [22]. See also *McLaughlin v R* [2015] NZSC 164 at [13], where the Supreme Court confirmed that the impact on a defendant's credibility is not the subject of s 32 in declining leave to appeal a decision of the Court of Appeal (*McLaughlin v R* [2015] NZCA 339).

389 See *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467 at [16] where the Court described the dividing line as "fine and uncertain"; *Hamdi v R* [2017] NZCA 242 at [21]; *Reuben v R* [2017] NZCA 138 at [60]; and *Gurran v R* [2015] NZCA 347 at [47].

390 Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA33.4]. See also Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [111]; *R v Sullivan* (1967) 51 Cr App R 102 at 105 per Salmon LJ: "[t]he line dividing what may be said and what may not be said is a very fine one, and it is perhaps doubtful whether in a case like the present it would be even perceptible to the members of any ordinary jury"; and *RPS v R* (2000) 199 CLR 620 at [20] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

391 For example, the authors of *Adams on Criminal Law* have questioned whether there is really any distinction between an inference of guilt and "mere" damage to a defendant's credibility when they assert a defence: Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA32.03]. See also Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV32.03(2)]; but compare Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA32.3].

392 Rupert Cross "The Evidence Report: Sense or Nonsense – A very wicked animal defends the 11th Report of the Criminal Law Revision Committee" [1973] Crim LR 329 at 333.

393 At 333.

and inviting a direct inference of guilt.[394] Further, as explained above, it was this very concern that prompted the Commission to recommend in 1999 that the common law distinction be abolished.

5.29 The courts, on occasion, have appeared to share this concern. In *E (CA727/09) v R*, the Court of Appeal described the distinction between invitations to infer guilt and challenges to credibility as one that would "test the skills of a philosopher".[395] In *Petty v R*, a majority of the High Court of Australia rejected the legitimacy of a distinction between challenges to credibility based on pre-trial silence and invitations to infer guilt because it doubted the "theoretical distinction between the two modes of making use of the accused's earlier silence … would be observed in practice by a jury".[396]

5.30 The distinctions referred to in paragraphs [5.26]–[5.29], and the criticisms, suggest the rules are not logical, contrary to section 6(a) of the Act,[397] and may need clarification.[398] We consider the issue is worth revisiting during this review. Two decades have passed since the Commission consulted the public on the matter. We are interested in submitters' views on options for reform that would remove the need to engage in the exercise of deciding whether the line between a permissible and impermissible comment on a defendant's silence has been crossed in any given case. We set out three options below.

Option one: prohibiting all adverse inferences

5.31 The Act could be amended to prohibit any adverse inferences from being drawn from a defendant's pre-trial silence or silence at trial, along the lines of the Commission's 1999 proposals (in other words, abolishing the common law distinction).

5.32 In relation to pre-trial silence, a section similar in terms to section 89 of the Australian Uniform Evidence Acts could be adopted.[399] That section adopts the common law position laid down by the

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394 Rupert Cross "An Attempt to Update the Law of Evidence – The 11th Report of the English Criminal Law Revision Committee" (1974) 9 Israel L Rev 1.

395 *E (CA727/09) v R* [2010] NZCA 202 at [60]. See also *Hastings v R* [2015] NZCA 180 at [44].

396 *Petty v R* [1991] HCA 34, (1991) 173 CLR 95 at [6] per Mason CJ, Deane, Toohey and McHugh JJ.

397 See also paragraph [5.37] below.

398 Bearing in mind s 6(f) of the Act (enhancing access to the law of evidence).

399 Evidence Act 1995 (Cth), s 89, which provides:

> **Evidence of silence**
>
> (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:
>
> (a) to answer one or more questions; or
>
> (b) to respond to a representation;
>
> put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.
>
> (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
>
> (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
>
> (4) In this section:
>
> "inference" includes:
>
> (a) an inference of consciousness of guilt; or
>
> (b) an inference relevant to a party's credibility.

Largely similar provisions have been adopted in Victoria, the Australian Capital Territory, the Northern Territory, Tasmania and Norfolk Island: Evidence Act 2008 (Vic), Evidence Act 2011 (ACT), Evidence (National Uniform Legislation) Act 2011 (NT), Evidence Act 2001 (Tas) and Evidence Act 2004 (NI). In New South Wales, there is a similar provision in the Evidence Act 1995 (NSW), but this is made expressly subject to the operation of s 89A in that Act. Section 89A is discussed below at paragraphs [5.44]–[5.45].

High Court of Australia in *Petty* and prohibits any inferences "unfavourable to a party" from being drawn due to the fact a person failed or refused to respond to questions put or representations made by an investigating official. "Inference" is defined as including an inference of consciousness of guilt as well as an inference relevant to a party's credibility.[400] We note, however, that the same approach is not adopted in Australia in relation to silence *at* trial. Unfavourable inferences can, in certain circumstances, be drawn from an accused's silence at trial.[401] In most jurisdictions in Australia, the failure to give evidence can be the subject of comment by the judge or a co-accused, but not by the prosecution.[402]

5.33 In relation to silence at trial, a section similar in terms to section 4(6) of the Canada Evidence Act 1985 could be adopted.[403] That section prohibits the judge and prosecution from commenting on the failure of an accused to testify.

Option two: permitting appropriate adverse inferences

5.34 The Act could be amended to permit any appropriate adverse inferences to be drawn from a defendant's pre-trial silence or silence at trial and remove the current prohibition on inviting inferences of guilt. By way of example, sections 34–39 of the Criminal Justice and Public Order Act 1994 (UK) provide for the drawing of adverse inferences from silence in a number of situations.[404] In relation to pre-trial silence, section 34 permits the court or jury, when determining whether the accused is guilty of the offence charged, to draw "such inferences … as appear proper"[405] from the accused's failure to mention a fact relied on in their defence when questioned or charged.

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400 Evidence Act 1995 (Cth), s 89(4). See also Australian Law Reform Commission *Evidence* (ALRC R38, 1987) at [165]–[169].

401 See JD Heydon *Cross on Evidence* (10th ed, LexisNexis Butterworths, Australia, 2014) at [23025]; *Weissensteiner v R* (1993) 178 CLR 217; *RPS v R* (2000) 199 CLR 620; and *Azzopardi v R* (2001) 205 CLR 50. (The position is different in Victoria, however: see Jury Directions Act 2015 (Vic), ss 41–42 and the discussion in Stephen Odgers *Uniform Evidence Law* (12th ed, Thomson Reuters, Sydney, 2016) at [EA.20.420].) It has been suggested that the rationale for the different approaches towards pre-trial silence and silence at trial stems from the fact that they are "two different rights": Andrew Palmer "Silence in Court – The Evidential Significance of an Accused Person's Failure to Testify" (1995) 18 UNSW L J 130 at 137. The right to pre-trial silence is based on notions of what constitutes fairness in the State's methods of investigating and proving an alleged offence: "[t]o allow the Crown to prove its case by requiring the accused to convict him or herself from that person's own mouth was seen as oppressive": at 140, quoting *Environment Protection Authority v Caltex* [1993] HCA 74, (1993) 118 ALR 392 at 440 per McHugh J. The same rationale arguably does not apply to the right not to testify, which is simply a corollary of the fact that, while an accused is a competent witness at their own trial, there is no compulsion on them to give evidence: Andrew Palmer "Silence in Court – The Evidential Significance of an Accused Person's Failure to Testify" (1995) 18 UNSW L J 130 at 137. See also Barbara Hocking and Laura Manville "What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?" (2001) 1(1) MqLJ 63 at 68–69. As the Court of Appeal explained in *R v Drain* CA249/94, 11 October 1994 at 3–4: "There is a facile attraction in the proposition that because inferences may be drawn against an accused who remains silent at trial, there is a compulsion on him or her to give evidence. Such reasoning is fallacious; [this] 'confuses what is an aspect of the judicial reasoning process with a legal requirement to enter the witness box whatever the circumstances in order to be a witness in one's own case'". See also the justifications offered by the Victorian Scrutiny of Acts and Regulations Committee for differentiating between pre-trial and at-trial silence: Victorian Scrutiny of Acts and Regulations Committee *The Right to Silence: Final Report* (Parliament of Victoria, March 1999) at [3.4].

402 Evidence Act 1995 (Cth), s 20(2); Evidence Act 2011 (ACT), s 20(2); Evidence (National Uniform Legislation) Act 2011 (NT), s 20(2); Evidence Act 1995 (NSW), s 20(2); Evidence Act 1929 (SA), s 18(1)(b); Evidence Act 2001 (Tas), s 20(2); Evidence Act 1906 (WA), s 8(1)(c); and Evidence Act 2004 (NI), s 20(2). Compare the position in Victoria: Jury Directions Act 2015 (Vic), ss 41–42.

403 Canada Evidence Act RSC 1985 c C-5, s 4(6). The Supreme Court of Canada has also held that, in general, the pre-trial silence of an accused should not be the subject of adverse inference at trial (although there may be exceptions in particular circumstances): see *R v Chambers* [1990] 2 SCR 1293; and *R v Crawford* [1995] 1 SCR 858.

404 The enactment of these provisions was controversial at the time – two Royal Commissions had rejected such measures (see *Report of the Royal Commission on Criminal Procedure (Philips Commission)* (Command Paper 8092, 1981) and *Report of the Royal Commission on Criminal Justice* (Command Paper 2263, 1993), and there was widespread opposition within the legal profession: see Ian Dennis "Silence in the police station: the marginalisation of section 34" [2000] Crim LR 25 at 25; and the discussion in Ian Dennis *The Law of Evidence* (6th ed, Sweet & Maxwell, London, 2017) at [5–022].

405 Criminal Justice and Public Order Act 1994 (UK), s 34(2). The European Court of Human Rights has since made it clear that the drawing of inferences from a person's pre-trial silence is not necessarily incompatible with art 6 of the European Convention on Human Rights (which protects the right to a fair trial): see *Averill v United Kingdom* (2000) 31 EHRR 839 (ECHR); Ian Dennis *The Law of Evidence* (6th ed, Sweet & Maxwell, London, 2017) at [5–024]; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [20.11.23]. Section 34 has generated an

5.35 Section 35 deals with the accused's silence at trial.[406] The section allows for the drawing of adverse inferences where the accused fails to testify if certain conditions are satisfied: the physical or mental condition of the accused must not be such as to make it undesirable for them to give evidence;[407] and the court must be satisfied the accused is aware of their choice whether to testify and of the consequences of failing to testify.[408] The prosecution must also have made out a prima facie case on the basis of its own evidence.[409] When the conditions are satisfied, the inferences that may be drawn are such as "appear proper" from the failure of the accused to give evidence, and the court or jury may draw them in determining whether the accused is guilty of the offence charged.[410]

5.36 The Criminal Justice and Public Order Act does not provide guidance on what inferences might be "proper". The case law has established that what constitutes a proper inference depends upon the circumstances of the particular case, being a question to be decided by applying fairness and common sense.[411] Whether such an inference can form part of a chain of reasoning leading to a conclusion that the accused is guilty ought to depend on the issue in the case, the nature of the fact in question and the state of the other evidence.[412]

Option three: status quo

5.37 Alternatively, sections 32 and 33 could be left in their current form, thereby permitting adverse inferences about a defendant's credibility to be drawn from their pre-trial silence and permitting adverse inferences to be drawn from a defendant's silence at trial when assessing the strength of the prosecution's case. Invitations to infer guilt directly from a defendant's silence before or during trial would continue to be prohibited. The main disadvantage of this option is that it retains the seemingly illogical distinction between permissible and impermissible uses of a defendant's silence. On the other hand, there is long-standing authority in New Zealand to the effect that it is permissible, in some situations, to comment on a defendant's pre-trial or at-trial silence. It is arguable that a change to the status quo would generate unnecessary confusion or difficulties in practice.

QUESTION

Q14 Which of the following options should be preferred, and why:

a. amending sections 32 and 33 to prevent any adverse inference to be drawn from a defendant's pre-trial silence and/or silence at trial;

extensive and complex amount of case law – Diane Birch has argued that the law has become so complex that the costs of s 34 outweigh any evidential benefits it may provide: see Diane Birch "Suffering in silence: a cost-benefit analysis of section 34 of the Criminal Justice and Public Order Act 1994" [1999] Crim LR 769.

406 The provisions of ss 36 and 37 relate to the accused's failure to account for objects, substances or marks (s 36), or his or her presence at a particular place (s 37), in circumstances where such matters are reasonably believed by an investigating constable to be incriminating.

407 Section 35(1)(b).

408 Section 35(2).

409 This requirement is implicit in s 35: see Ian Dennis *The Law of Evidence* (6th ed, Sweet & Maxwell, London, 2017) at [13–010].

410 Section 35(3).

411 *R v Cowan* [1996] QB 373 (CA); and *R v Condron and Condron* [1997] 1 WLR 827 (CA).

412 Ian Dennis *The Law of Evidence* (6th ed, Sweet & Maxwell, London, 2017) at [5–036].

b. amending sections 32 and 33 to permit any appropriate adverse inferences to be drawn (and removing the prohibition on inviting inferences of guilt) from a defendant's pre-trial silence and/or silence at trial; or

c. retaining the status quo?

ADDITIONAL ISSUES

5.38 The issues discussed below proceed on the assumption that either option two or option three above (see paragraphs [5.34]–[5.37]) is adopted, that is: sections 32 and 33 permit adverse inferences to be drawn from pre-trial silence and silence at trial in certain circumstances. If option one is adopted (and sections 32 and 33 are amended to prevent any adverse inferences), then these other issues are also resolved.

Application of section 32 in a judge-alone trial

5.39 Section 32(2)(a) specifically prevents any person from inviting the fact-finder (that is, either a jury or a judge sitting alone without a jury) from drawing an inference of guilt from a defendant's pre-trial silence.[413] Section 32(2)(b) also attempts to prohibit the jury from actually drawing an adverse inference from pre-trial silence, by requiring a judge to direct the jury that it may not draw such an inference. However, there is no provision effectively mirroring section 32(2)(b) by specifically prohibiting a *judge* from drawing that inference. In other words, section 32 does not expressly prohibit a judge in a judge-alone trial from relying on a defendant's pre-trial silence as the basis for an inference of guilt.[414]

5.40 Under the Commission's 1999 proposals,[415] the Act would have explicitly prohibited both judges and juries from drawing unfavourable inferences from a defendant's pre-trial silence.[416] However, this proposal was not carried through into the Evidence Act. On one view, this might suggest the legislative intention was not to prohibit *all* fact-finders from using the fact of pre-trial silence to infer guilt.[417] We have, however, been unable to find any indication in the legislative material (including advice from government officials) that this was the intention.[418]

5.41 The courts have not yet squarely addressed the issue whether section 32 prohibits judges sitting alone from drawing an inference of guilt from a defendant's pre-trial silence. In *Rowley v R* the

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413 We use the term "pre-trial silence" in this section to refer to both situations described in s 32(1), that is, failures to respond to questions or statements made in the course of investigative questioning before trial, and failures to disclose a defence before trial.

414 See Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA32.02(2)].

415 Noted above at paragraph [5.10].

416 Section 32(1) of the Evidence Code ("the fact-finder must not draw an inference that is unfavourable to a defendant from the fact that the defendant did not answer a question put or respond to a statement made to that defendant in the course of official questioning before the trial, or the defendant's failure to disclose a defence before trial …").

417 See the suggestion in Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA32.02(2)]; and Jeremy Finn "Making the Procedure Fit the Crimes: Options for Procedural Change in Sexual Offence Cases" (2011) 17 Canta LR 47 at 60, who considered it was "at least arguable that judges sitting without a jury may draw adverse inferences from silence".

418 On the contrary, the Ministry of Justice's advice appeared to indicate an intention to prevent all fact-finders from drawing inferences of guilt from pre-trial silence. See Letter from Gordon Hook (Manager Criminal and International Law Team, Ministry of Justice) to the Hon Phil Goff (Minister of Justice) regarding the Evidence Bill: Differences between the Bill and Law Commission's Code (8 February 2005) at 4 ("The bill contains one clause intended to retain the current law. This clause prevents the fact-finder being invited to draw inferences of guilt from the fact that the defendant did not respond to official questioning before trial. Unfavourable inferences including inferences about the defendant's truthfulness can be made").

Court of Appeal "[accepted] but without deciding for the purposes of argument that s 32 applies to a Judge alone sitting without a jury".[419] In *Kingsley v Police*, the High Court considered the issue was one "for another day".[420]

5.42 We consider it may be desirable for the Act to clarify whether a judge sitting alone is permitted to draw an adverse inference of guilt from a defendant's pre-trial silence.[421] We express the preliminary view that judges sitting alone should be permitted to draw only the same inferences that are available to a jury relating to a defendant's pre-trial silence. There would seem to be no logical basis for permitting judges to draw inferences of guilt from pre-trial silence, yet preventing juries from doing so.

Police caution does not reflect reality of how pre-trial silence is used

5.43 The current approach to section 32 (whereby adverse inferences about a defendant's credibility can be drawn from pre-trial silence) sits uncomfortably with the content of the caution that is currently given to suspects by Police. The caution does not reflect the reality of how pre-trial silence is actually used: it does not mention the possibility of an adverse inference being drawn from pre-trial silence in a criminal proceeding.[422]

5.44 Arguably if some use is to be made of pre-trial silence, this possibility ought to be referred to in the caution.[423] We note that in New South Wales a 2013 amendment to the Evidence Act 1995 (NSW) introduced a provision that permits adverse inferences to be drawn from a defendant's failure to disclose a fact that is later relied on in their defence at trial, but only where:[424]

(a) a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and

(b) the special caution was given before the failure or refusal to mention the fact, and

(c) the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and

(d) the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.

5.45 The "special caution" must warn the person that they do not have to say or do anything, but "it may harm the person's defence if the person does not mention when questioned something the person later relies on in court"; and "anything the person does say or do may be used in evidence".[425]

5.46 A special caution has the clear advantage of alerting the person to the potential use that could be made of their silence. One concern that has been raised about special cautions of this nature,

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419 *Rowley v R* [2015] NZCA 233 at [57].

420 *Kingsley v Police* [2016] NZHC 1304 at [17]. Compare, however, *Edmunds v Police* [2014] NZHC 1498 at [31]: "Section 32(2) does not … expressly preclude the Judge in a Judge alone trial from relying on the defendant's pre-trial silence as the basis for an inference of guilt. This may suggest that a Judge alone, as opposed to a jury, may validly draw an inference of guilt from pre-trial silence. However, it is not necessary to resolve any debate over that aspect here".

421 See also the suggestion in Elisabeth McDonald "Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006" (2013) 44 VUWLR 573 at 592.

422 Section 23(4) of the New Zealand Bill of Rights Act 1990 requires everyone who is arrested or detained for an offence to be informed of their right to refrain from making a statement. The content of the caution that is required to be given is set out in the Chief Justice's Practice Note on Police Questioning (*Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006*) [2007] 3 NZLR 297).

423 Elisabeth McDonald "Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006" (2013) 44 VUWLR 573 at 585. See also Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EA32.3].

424 Evidence Act 1995 (NSW), s 89A(2), as amended by the Evidence Amendment (Evidence of Silence) Act 2013 (NSW).

425 Section 89A(9).

however, is that they may place "irresistible pressure" on the accused to speak.[426] Critics have argued that a special caution could lead to suspects providing false defences because they feel they need to provide a defence immediately,[427] falsely confessing,[428] and "tell[ing] foolish lies in an attempt to terminate questioning", rather than honestly stating that they do not recall certain facts.[429]

Clear when adverse inferences as to credibility can be drawn?

5.47 In addition, the fact that adverse inferences can be drawn from pre-trial silence to challenge a defendant's credibility is not immediately apparent on the face of the Act. Section 32 is silent on this matter.

5.48 The Act therefore does not provide guidance on the exact circumstances in which an adverse challenge to a defendant's credibility on the basis of pre-trial silence will be permitted. Guidance must instead be found in the case law. From our review of the cases that have considered the application of section 32, the courts have seemingly confirmed that a challenge to a defendant's credibility on the basis of their pre-trial silence is permissible where:

- a defendant has said nothing at all prior to trial and then advances a defence in evidence at trial;[430]
- a defendant *has* said something before trial, but does not disclose a defence that is later advanced at trial;[431] and
- a defendant *has* said something before trial, and there is a material inconsistency between that account and what the defendant advances in evidence at trial.[432]

5.49 We would like to know whether submitters consider sufficient guidance has been provided by the courts as to the circumstances in which an adverse inference about a defendant's credibility can be drawn from pre-trial silence, and if not, whether the Act ought to be amended to clarify the position.

Relationship between section 32 and the veracity provisions

5.50 Writing in 2012 and 2013 (but before the Court of Appeal's decision in *Smith* was delivered), Elisabeth McDonald noted a possible tension between section 32 and the Act's veracity rules.[433] She observed that, if section 32 is seen as permitting unfavourable inferences about a defendant's credibility to be drawn from a defendant's pre-trial silence, *including* inferences about a defendant's veracity, the evidence would be subject to the Act's veracity rules if the purpose of offering the evidence is

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426 Ashley Cameron "Common Sense or Unnecessary Complexity? The Recent Change to the Right to Silence in New South Wales" (2014) 19 Deakin LR 311 at 325, referring to Barbara Hocking and Laura Manville "What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?" (2001) 1(1) MqLJ 63 at 70.

427 Ashley Cameron "Common Sense or Unnecessary Complexity? The Recent Change to the Right to Silence in New South Wales" (2014) 19 Deakin LR 311 at 325.

428 See Steven Greer "The Right to Silence: A Review of the Current Debate" (1990) 53(6) Modern Law Review 709 at 726.

429 JD Heydon "Confessions and Silence" (1976) 7 Sydney Law Review 375 at 388.

430 *Smith v R* [2013] NZCA 362, [2014] 2 NZLR 421 at [42]; and *Gurran v R* [2015] NZCA 347 at [47].

431 *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467 at [15] (in *McNaughton* the appellant had made a pre-trial statement to Police but raised self-defence for the first time at trial); and *Reuben v R* [2017] NZCA 138 at [56].

432 *Hamdi v R* [2017] NZCA 242 at [21] (leave to appeal to the Supreme Court declined: *Hamdi v R* [2017] NZSC 134). Section 32 also is not engaged where a defendant exercised their right to silence prior to trial but in evidence claims misleadingly that there was no opportunity to speak up earlier: see *Gurran v R* [2015] NZCA 347 at [46].

433 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 262–263; and Elisabeth McDonald "Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006" (2013) 44 VUWLR 573 at 583.

to infer the defendant lacks veracity[434] (as evidence "solely or mainly relevant to veracity" to use the words of section 40(4)). If the evidence is offered by the prosecution, the evidence would be subject to section 37 (which requires veracity evidence to be "substantially helpful" to be admitted) and, if offered by the prosecution, subject to section 38 (which requires permission from the judge and requires the defendant to have first given evidence about their veracity or to have challenged the veracity of a prosecution witness).[435]

5.51 McDonald suggested that in most circumstances, it would be hard to argue that the fact of pre-trial silence would be substantially helpful in assessing the veracity of the defendant: silence may have some weight, but not in all cases – and less so where a defendant who elects not to make a statement is willing to subject himself or herself to cross-examination at trial.[436]

5.52 She also went on to acknowledge, however, that it was arguable that section 32 only permitted unfavourable inferences about a defendant's credibility to be drawn from pre-trial silence in the sense of *probative* credibility (that is, reliability) rather than *moral* credibility (veracity). Use of the defendant's pre-trial silence in this way would therefore fall outside the veracity rules.[437]

5.53 In our view, since *Smith*, the courts appear to have treated section 32 as permitting adverse inferences as to a defendant's credibility only in the more limited sense of *probative* credibility. We have been unable to identify any case where comment on a defendant's pre-trial silence was permitted in order to suggest that the defendant lacked veracity in the sense of having a general disposition to lie; nor any case where it was suggested that both section 32 and the veracity provisions were engaged.[438]

5.54 For that reason, we do not think the relationship between section 32 and the veracity provisions is causing any issues in practice. However, we would like to hear from submitters who are aware of any difficulties.

Circumstances in which comment under section 33 should be made

5.55 Section 33 is silent on the exact circumstances in which comment is appropriate. Guidance on that issue is instead found in the case law.

5.56 In 1993, the Court of Appeal in *R v McRae* had summarised the situations in which comment would be appropriate:[439]

- where the accused has been given leave to cross-examine a complainant as to credibility, in circumstances where the accused could be expected to give evidence;[440]

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434 "Veracity" is defined in the Act as "the disposition of a person to refrain from lying": Evidence Act, s 37(5).

435 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 262–263; and Elisabeth McDonald "Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006" (2013) 44 VUWLR 573 at 583.

436 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 263; and Elisabeth McDonald "Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006" (2013) 44 VUWLR 573 at 583.

437 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 263; and Elisabeth McDonald "Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006" (2013) 44 VUWLR 573 at 583–584.

438 We did identify a number of cases that involved s 32 and mentioned the term "veracity", but the courts in those cases appeared to be using the term as a synonym for probative credibility: see *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467 at [16] (referred to in *Hastings v R* [2015] NZCA 180 at [45]); *Edmunds v Police* [2014] NZHC 1498 at [33]; *Kingsley v Police* [2016] NZHC 1304 at [19]; *Reuben v R* [2017] NZCA 138 at [60]; and *Tihi v R* [2017] NZSC 143 at [6].

439 *R v McRae* (1993) 10 CRNZ 61 (CA) at 64.

440 *R v G* (1992) 8 CRNZ 9 (CA).

- when the accused relies on an exculpatory statement but gives no evidence to back up the statement;[441]
- when the accused through counsel has made a suggestion that someone else is responsible for the crime but gives no evidence in support of that proposition;[442] and
- when an attempt is made by the accused to get their version of events before the jury by putting factual allegations to Crown witnesses and those allegations are not accepted by the witnesses.[443]

5.57 The Court's guidance in *McRae* has been applied in several cases decided after the enactment of the Evidence Act.[444] For example, in *Mahomed v R*, the defendant relied on an exculpatory interview while suggesting inconsistently that his wife was responsible for the offending. The Court of Appeal, referring to *McRae*, described this as the "classic illustration" of when comment was appropriate.[445] The Court noted that the defendant was, by this means, seeking to explain away circumstantial evidence relied on by the Crown without testifying.[446]

5.58 Writing in 2011 in *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand*, Elisabeth McDonald and Yvette Tinsley suggested that section 33 could be amended to provide guidance on the circumstances in which a judge may make a comment on the exercise of a defendant's silence at trial.[447] They noted that some concerns had been expressed by complainants in sexual cases that it was unfair for a defendant to be able to cross-examine them while not being required to give evidence himself or herself.[448] The authors considered legislative guidance as to when an adverse inference may be drawn could be of assistance in sexual cases, and could be seen as responsive to complainants' concerns about unfairness.[449]

5.59 Although the authors did not consider any substantive change to the current approach to section 33 was required,[450] they noted that legislative guidance could be helpful in order to achieve greater consistency across cases and certainty for both the defendant and complainant.[451] For example, it could help clarify in advance of trial what may be the consequences for the defendant of electing not to be a witness.[452] Codification could also act as a helpful reminder to judges that drawing an inference is permissible in some cases.[453] They noted that, in practice, there seemed to be a

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441 *R v McRae* (1993) 10 CRNZ 61 (CA) at 64. See for example *R v Mou-Hi* CA82/96, 13 August 1996.

442 *R v Accused (CA78/88)* [1988] 2 NZLR 385 (CA). See also *R v Woodhouse* CA117/06, 12 October 2006 at [18].

443 *R v McRae* (1993) 10 CRNZ 61 (CA) at 64. See for example *R v Allen* CA274/04, 7 April 2005.

444 See for example *Mahomed v R* [2010] NZCA 419 at [74]; *Davis v R* [2011] NZCA 380 at [36]; *McLachlan v R* [2014] NZCA 462 at [37]; and *Kumar v R* [2016] NZCA 329, (2016) 28 CRNZ 32 at [66].

445 *Mahomed v R* [2010] NZCA 419 at [74] (leave to appeal on this ground was refused in *Mahomed v R* [2011] NZSC 5).

446 At [74]. See also *Kumar v R* [2016] NZCA 329, (2016) 28 CRNZ 32 at [66]; and *R v Bain* [2008] NZCA 585 at [44(c)].

447 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 361. See also Elisabeth McDonald "Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006" (2013) 44 VUWLR 573 at 589; and Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 267.

448 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 357.

449 At 361.

450 The authors noted that "[t]here is no current consensus that the common law approach to the use that may be made of silence at trial is inappropriate": at 361. See also Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 266. Compare Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EC15.02(2)], where the authors describe the law regarding the evidential use to which an accused's failure to testify may be put as "ambivalent".

451 At 362.

452 At 362. See also Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 267.

453 At 363.

general unwillingness on the part of judges to comment on a defendant's silence at trial, despite the authorisation to do so in section 33.[454]

5.60 We are interested in submitters' views on whether section 33 ought to be amended to specify the circumstances in which a judge may make a comment on the exercise of a defendant's silence at trial.[455]

QUESTIONS

Q15 Should section 32 be amended to:

a. clarify whether a judge sitting alone is permitted to draw an adverse inference of guilt from a defendant's pre-trial silence?

b. make the drawing of adverse inferences about a defendant's credibility from their pre-trial silence conditional upon the defendant having been cautioned about that possibility?

c. clarify the circumstances in which an adverse inference about a defendant's credibility can be drawn from their pre-trial silence?

Q16 Does the relationship between section 32 and the Act's veracity provisions create any difficulties in practice?

Q17 Should section 33 be amended to provide guidance on the circumstances in which it is appropriate to comment on the exercise of a defendant's silence at trial?

454 At 361, referring to EW Thomas "The Evidence Act 2006 and women" [2008] NZLJ 169 at 169 and *R v Haig* (2006) 22 CRNZ 814 (CA) at [104(d)]. See also *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [19] where the Court of Appeal observed that judges rarely comment on a failure to give evidence under s 33. The authors therefore recommended that s 33 be amended to codify the common law position that the fact-finder is permitted to draw an adverse inference from a defendant's failure to be a witness in circumstances where, taking into account the interests of justice, it would be appropriate to do so: recommendation 8.16. A similar recommendation had been made in 2009 by the Taskforce for Action on Sexual Violence, which released a report in 2009 with a number of recommendations to Government on how it could better prevent and respond to sexual violence: *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence* (Ministry of Justice, 2009) at 14, Recommendation 51(k) ("there should be an obligation on the judge in sexual violence cases to direct the jury that an adverse inference against the accused may be drawn where the accused has not given evidence at the trial").

455 We note that in 1992, the Law Commission briefly raised the possibility of "devis[ing] statutory but non-exhaustive guidelines" as to when and how comment on a defendant's silence at trial should be made: Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part I, 1992) at [119]. The Commission noted that, even if guidelines were formulated, there would still be occasions when it would be difficult for a defendant to predict when comment was likely to be made. The Commission suggested that one way of enabling the defendant to know whether comment would be made was to permit counsel, before deciding whether or not to call the defendant, to enquire from the judge whether comment was likely. A similar indication could be sought before final addresses: at [120].

CHAPTER 6

Unreliable statements

IN THIS CHAPTER, WE CONSIDER:

- whether the truth of a statement should be relevant to the assessment of reliability in section 28; and
- if so, whether cross-examination of the defendant in relation to the truth or falsity of their statement should be permitted at a pre-trial hearing or voir dire.

BACKGROUND

6.1 Sections 27–30 of the Evidence Act govern the admissibility of defendants' statements offered in evidence by the prosecution.[456] The general rule, set out in section 27, is that the prosecution may offer evidence of a defendant's statement[457] unless the evidence is excluded by the operation of section 28 (the "reliability rule"), section 29 (the "oppression rule")[458] or section 30 (the "improperly obtained evidence rule").[459] The focus of this chapter is on section 28 and on a particular issue that has been the subject of continuing debate: whether the truth of a statement is relevant to the assessment of reliability.[460]

6.2 Section 28 of the Act sets out the reliability rule. The section is concerned with threshold reliability, as opposed to ultimate reliability – in other words, whether a statement is sufficiently reliable to be considered by a jury. If the threshold for reliability is crossed, then it is ultimately for the jury to decide the weight to be given to the evidence, having assessed the credibility of the witnesses and all the surrounding circumstances going to reliability.

6.3 Section 28 applies where a defendant, co-defendant or judge raises the issue of the reliability of a defendant's statement. The judge must exclude the statement, unless satisfied that the "circumstances in which the statement was made" were not likely to have adversely affected its

456 However, s 30 applies to *all* evidence offered by the prosecution in a proceeding, not just defendants' statements.

457 The term "statement" is defined in s 4(1) of the Evidence Act 2006 as: "(a) a spoken or written assertion by a person of any matter; or (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter".

458 Section 29 applies where a defendant, co-defendant or judge raises the issue of a statement being influenced by oppression. The judge must exclude the statement unless satisfied beyond reasonable doubt that the statement was not influenced by oppression. We are not aware of any operational difficulties that have arisen in relation to that provision, and accordingly have not addressed s 29 in this Issues Paper.

459 Section 27(2). Section 30 is discussed separately in Chapter 7.

460 For example, if a person prone to delusions confesses to a murder and identifies the location of the victim's remains (which had previously been unknown), should the fact that the victim's remains were located be taken into account when assessing whether the person's statement is sufficiently reliable to go before a jury? This is the example referred to by the majority in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [81].

reliability.[461] Section 28(4) sets out a non-exhaustive list of matters to be taken into account when making that assessment.

6.4 Section 28 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.

Pre-Evidence Act

6.5 Prior to the enactment of the Evidence Act, the admissibility of statements made by a defendant was governed by the common law "voluntariness" rule[462] and section 20 of the Evidence Act 1908.[463] The combined effect of those rules was that a statement was inadmissible if it was obtained by violence or threats of oppression. However, a statement obtained as a result of less serious

461 Section 28(2).

462 Under this common law rule, confessions could be excluded on the basis of a lack of voluntariness. See *R v McCuin* [1982] 1 NZLR 13 (CA); and *Ibrahim v R* [1914] AC 599 (PC). In *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [20], the Law Commission observed that there was little detailed guidance in the case law about how the voluntariness rule was to be applied. It also noted that the term "voluntary" was somewhat misleading because it masked two fundamental values that the rule sought to protect: reliability and the protection against coerced self-incrimination: at [123].

463 Section 20 provided a limited exception to the voluntariness rule. It provided that "[a] confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing, if the Judge or other presiding officer is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made". The common law discretion to exclude unfairly obtained evidence and evidence obtained in breach of the New Zealand Bill of Rights Act 1990—described in Chapter 7—also applied to defendants' statements.

inducements (emanating from a "person in authority")[464] was admissible if those inducements were not likely to cause an untrue admission of guilt.[465]

6.6 In a 1992 preliminary paper, *Criminal Evidence: Police Questioning*, the Law Commission suggested that the law in this area should be simplified and clarified.[466] The Commission proposed the replacement of the existing rules with two new rules: one requiring the exclusion of unreliable statements (now in section 28) and the other requiring the exclusion of statements influenced by violence or oppression (now in section 29).[467]

6.7 The Commission proposed a reliability rule that would automatically exclude defendants' statements where the defendant "raises the issue of … reliability", unless the prosecution satisfied the court beyond reasonable doubt that the circumstances pertaining to the making of the statement were not likely to have affected its reliability.[468] The Commission refined this recommendation in its subsequent publications on its Evidence Code in 1999.[469]

6.8 The reliability rule proposed by the Commission identified certain matters that a court would be obliged to take into account when applying the rule.[470] Those matters were intended to encompass both the conduct of those who obtain the statements (usually Police) as well as internal factors affecting the reliability of the statement (for example, intoxication).[471] This meant the circumstances the court was to consider were not limited to the conduct of a "person in authority".[472]

6.9 The Commission acknowledged it might be difficult or impossible for a police officer to be aware of internal factors affecting reliability, but emphasised it was "not the purpose of the rule to attempt to shape police conduct or to impose a duty to make inquiries before commencing an interview".[473] Rather, the primary purpose of the reliability rule was "to screen out statements which it would be unsafe to admit in evidence because of the risk of unreliability".[474] The reliability rule was necessary because of the danger that a jury would give too much weight to a statement (in particular, a confession) merely because of the nature of the evidence (that is, because it had come directly from the defendant). That danger justified some judicial oversight.[475]

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464 Whether someone was a "person in authority" depended on the defendant's perceptions. If the defendant believed that the person to whom the statement was made possessed the ability to influence the course of the defendant's prosecution, he or she was a person in authority. See Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA28.07]; and Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [21].

465 See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [118].

466 At [117].

467 At [118]. Although the Commission spoke of "confessions" in its preliminary paper, it explained that it actually intended that *all* spoken or written communications and non-verbal conduct by the defendant (whether inculpatory or exculpatory) offered by the prosecution should be subject to the rules for admissibility: at [116]. For that reason, the Commission used the word "statement" instead of "confession" in its proposed rules.

468 See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 204 (s 3 of the Draft Rules for Criminal Proceedings for an Evidence Code).

469 See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 78–81; and Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [95]–[104].

470 Section 27(3) of the Evidence Code. See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 80.

471 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [130]. The Commission considered that internal factors (which were not considered under the voluntariness rule) were clearly relevant to the determination of reliability, as "the central issue in relation to reliability is the actual state of the defendant's mind at the time he or she confessed, rather than the source of the influence": at [130]. See also Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C133].

472 See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [129].

473 At [131].

474 At [127]. See also at [140]: "the basic aim of the rule is to exclude evidence which it is unsafe to place before the jury". The Commission also explained that the new reliability rule was intended to protect the same policies as the previous rules: at [117] and [124]. See also Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C127].

475 At [127].

6.10 The Commission also took the view that the truth of the content of the statement should be an irrelevant consideration with regard to the reliability enquiry.[476] It explained:[477]

> 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 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).

6.11 Section 31 of the Commission's Evidence Code (an independent section that applied to the reliability, oppression and improperly obtained evidence provisions) expressly provided therefore that the truth (or falsity) of a defendant's statement was to be disregarded when determining whether to exclude the defendant's statement under the reliability rule (as well as under the oppression and improperly obtained evidence rules).[478]

6.12 The reliability rule in the Evidence Bill 2005 as introduced departed from the Commission's proposals in one important respect: it stated the truth or falsity of a statement was relevant to the reliability enquiry.[479] The relevant clause provided that, where the reliability of a statement has been raised as an issue:[480]

> 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.

6.13 The Select Committee, however, subsequently reverted back to the Commission's recommendation on the irrelevance of truth when applying the reliability rule.[481] The Committee said:[482]

> 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.

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476 The Commission also considered that this should be an irrelevant consideration with regard to the oppression enquiry in what became s 29 of the Evidence Act.

477 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [109]. See also See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [127] and [136]. The Commission therefore envisaged that "subsequently discovered real evidence which confirms the truth of the statement" would not be admissible on a voir dire: at [C20] (Draft Rules for Criminal Proceedings for an Evidence Code).

478 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 88.

479 See Evidence Bill 2005 (256-1) (explanatory note) at 7. The Bill also substituted the "beyond reasonable doubt" standard suggested by the Commission with "on the balance of probabilities": at 7. That change in the standard of proof has been described as "indicative of reliability issues being regarded as less serious than oppressive conduct": *R v Hawea* [2009] NZCA 127 at [31(b)].

480 Evidence Bill 2005 (256-1), cl 24(2).

481 The Select Committee did not, however, revert back to the Law Commission's recommendation on the standard of proof (see n 479 above).

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

6.14 The Committee's recommendation (which was accepted) was to remove paragraph (b) above ("that the statement is true") from the reliability rule.[483] Despite the clearly stated view, however, the Bill as reported back did not include a provision stating categorically that the truth of a statement was irrelevant in assessing admissibility.[484] It is unclear why this did not occur.[485]

LAW COMMISSION'S 2013 REVIEW OF THE ACT

6.15 When the Commission conducted its 2013 review of the Act, it noted the lack of clarity in section 28 as to the relevance of truth had led to some conflicting decisions.[486] After considering the relevant case law, the Commission again recommended that truth should be irrelevant to the admissibility of defendants' statements under section 28.[487] The Commission said:[488]

> 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 jury and risks diverting the court's attention from questions of improper police conduct to large volumes of corroborating evidence.[489]

6.16 The Commission recommended inserting a subsection into section 28 that would provide that the truth of the statement was irrelevant to the application of that section, consistent with section 29(3).[490]

6.17 This recommendation was not included in the Evidence Amendment Bill 2015. In its initial briefing to the Select Committee, the Ministry of Justice explained that:[491]

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483 At 28.

484 Unlike what is now s 29(3), which provides: "[f]or the purpose of applying this section, it is irrelevant whether or not the statement is true."

485 See, however, the explanation suggested by Glazebrook J in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [420]: "The Select Committee was presumably aware of the views expressed by the Law Commission on a number of occasions that the Commission's version of s 28 was concerned only with the likelihood of unreliability and not with truth. The Select Committee may therefore have considered that its suggested amendment removing the requirement to consider truth sufficed to achieve its stated purpose."

486 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.80]–[3.84]. See also Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 231 and 251. For example, in a pre-trial appeal, *R v Cameron* [2007] NZCA 564 at [61], the Court had accepted that s 28 focuses on the circumstances in which the statement is made, rather than the truthfulness of the statement itself. That view was reaffirmed by the Court in *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [105]–[106] 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). This approach had also been applied by the High Court in *R v K* [2012] NZHC 1045 at [58]; *R v Patten* [2008] BCL 476 (HC); and *R v Jamieson* HC Timaru CRI-2008-076-328, 10 September 2008 at [29]. However, a second line of cases appeared to suggest that a statement's truth *was* relevant under s 28. In the same *Cameron* case, counsel for Mr Cameron raised similar issues on appeal from the subsequent conviction: *R v Cameron* [2009] NZCA 87. A different composition of the Court of Appeal stated that "[r]eliability is concerned with whether what was said was sound": at [35]. The Court also referred to corroborating evidence to assess reliability under s 28: at [36]. See also *R v McCallum* HC Auckland CRI-2006-004-17181, 29 August 2007 at [64]; and *Tahaafe v Commissioner of Inland Revenue* HC Auckland CRI-2009-404-102, 10 July 2009 at [41]. The Supreme Court tangentially referred to the issue in *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1. There, 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 was made: at [63]. A mix of the two approaches was applied in *Davies v Ministry of Health* HC Christchurch CRI-2011-409-26, 8 August 2011 at [25].

487 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.85].

488 At [3.85], referring to Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at 15–16 and 32.

489 By way of example, the Law Commission considered the statement, "I killed Mr Smith". The Commission explained that, if truth was relevant in determining admissibility, the judge would need to consider the central jury question. This 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: at [3.86].

490 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 59, R5.

491 Letter from Nora Burghart (Manager of Courts and Tribunals Policy. Ministry of Justice) to Jacqui Dean (Chairperson of the Justice and Electoral Committee) regarding the Evidence Amendment Bill – Initial Briefing (8 September 2015) at [12], available

The decision not to progress this recommendation in the Bill takes into account concerns that a blanket rule requiring courts to disregard the possible truth of a statement when assessing reliability was too restrictive. The apparent truth of a statement may be the only way to assess its reliability – for example if a confession reveals an aspect of the crime that no-one but the offender could know.

RELEVANCE OF TRUTH

6.18 In 2015, the issue whether the courts can have regard to the truth of a statement under section 28(2) resurfaced in *R v Wichman*.[492] In that case, four judges of the Supreme Court concluded that the truth or falsity of a statement was relevant when determining its reliability under section 28. The Chief Justice disagreed.[493]

6.19 We now summarise the Court's reasoning in *Wichman* and consider whether section 28 needs amendment in light of the Court's decision.

R v Wichman

6.20 At issue in *Wichman*[494] was the admissibility of a confession arising out of an undercover police operation. Police strongly suspected that Mr Wichman had killed his infant daughter, but considered there was insufficient evidence to justify prosecution. Police therefore targeted him with an elaborate undercover operation (a "Mr Big" operation), in which he was recruited as an associate of what he understood to be a criminal organisation (but in fact consisted of undercover police officers). Mr Wichman was told the organisation operated on the basis of loyalty, trust and honesty and also that it had the capacity (through an association with a corrupt police officer) to sort out problems with Police. During the final phase of the operation, Mr Wichman was questioned by the head of the organisation, "Scott". In the course of this discussion, he admitted that he had assaulted his daughter on two occasions. Shortly afterwards he was arrested and charged with manslaughter.

6.21 In the High Court, Mr Wichman argued that his confession was false, that he had been induced by money to become involved in the organisation, and that he had been afraid of Scott so had told him what he had wanted to hear. The High Court accepted that the issue of reliability had been raised under section 28(1), but concluded that the circumstances in which the admissions were made were not likely to have affected their reliability in terms of section 28(2).[495] The Court also considered whether the evidence had been improperly obtained in terms of section 30, and ultimately concluded that it had not.[496]

6.22 On appeal, the Court of Appeal held that the confession had been improperly obtained and should have been excluded under section 30.[497] The Court did not consider whether the evidence should

at <www.parliament.nz>.

492 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

493 The Chief Justice noted that the Bill had not picked up the Law Commission's proposed amendment to s 28, although it was uncertain whether Parliament would enact the Bill in its (then) current form: at [284].

494 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753. *Wichman* was one of three cases considered by the Supreme Court in 2015 that related to undercover police operations (the other two cases were *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204 and *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705).

495 *R v Wichman* [2013] NZHC 3260 at [75]–[87].

496 At [123]. The Court did, however, express some "misgivings" about the fairness of the undercover technique used by Police: at [122].

497 *M v R* [2014] NZCA 339, [2015] 2 NZLR 137.

have been excluded under section 28, as there had been no challenge to that aspect of the High Court's decision.[498]

6.23 The Crown successfully appealed against the Court of Appeal's decision. A majority of the Supreme Court (comprising William Young, Arnold and O'Regan JJ) concluded that the evidence was sufficiently reliable to be admitted under section 28(2)[499] and had not been improperly obtained.[500] The Chief Justice dissented, holding that the evidence was both unreliable and improperly obtained.[501] Glazebrook J also dissented, concluding that, while the evidence was sufficiently reliable under section 28,[502] it had been improperly obtained.[503]

6.24 When addressing the issue of admissibility under section 28, the majority (as well as Glazebrook J) concluded that section 28(2) required an assessment of both the circumstances in which the statement was made, as well as the actual truth of the statement.

6.25 The majority accepted that the Law Commission had envisaged that an unquestionably true confession[504] might be excluded under section 28.[505] However, they queried whether the truth of a statement should be irrelevant in situations where a statement is unreliable for reasons "internal" to the person who made them (for instance, consumption of alcohol or mental illness).[506] The majority said:[507]

> Let us assume that a person prone to delusions confessed to a murder and identified the location of the victim's remains which had previously been unknown. That person would be able to satisfy the rather low s 28(1) threshold. On a strict application of the approach favoured by the Law Commission ..., the finding [of] the victim's remains would go only to the truth of the confession and would be irrelevant as to reliability. This is not an approach we favour.

6.26 The majority also considered that section 28(2) was "not an entirely easy provision", and that its wording gave rise to a range of possible interpretations, ranging from an abstract enquiry as to whether the circumstances tended, in theory, toward unreliability, to one in which the apparent truthfulness of the statement could be used to assess its reliability.[508] The majority concluded:[509]

> We see the s 28(2) inquiry as particular in character. It is addressed to the reliability of "the" statement in issue rather than "a" statement in the abstract. We consider that the "circumstances in which the statement was made" encompass the nature and content of the statement and the extent to which those circumstances affected the defendant. We are also of the view that congruence (or the reverse) between what is asserted in

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498 See *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [59].

499 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [92]–[93].

500 At [110] and [124].

501 At [292] and [338].

502 At [457].

503 At [515].

504 For example, one which resulted in the location of the remains of a murder victim.

505 At [79].

506 At [80]–[81]. The majority noted that in *R v Cooney* [1994] 1 NZLR 38 (CA) at 44 the Court of Appeal had expressed some misgivings about such an approach.

507 At [81]. See also at [83]: "Such approach ... does not easily accommodate cases in which the circumstances relied on are internal to the defendant ... and is thus not a great fit for all the work which s 28 is required to perform". The majority also considered that it did not "sit entirely easily with the use of the word 'reliability'. It would be incongruous, to say the least, if an obviously true confession were to be excluded on the basis of a theoretical likelihood that the circumstances in which it was made may have affected its reliability".

508 At [82].

509 At [84].

the statement and the objective facts and the general plausibility (or otherwise) of the statement are relevant to the s 28(2) decision.

6.27 The majority emphasised, however, that the judge is not conducting "a mini-trial" and the decision as to whether a statement is in fact reliable was ultimately for the jury.[510] The majority then assessed the confession itself, concluding that the High Court Judge's finding that the confession was reliable was open to him.[511]

6.28 In her separate judgment, Glazebrook J considered that the absence of an explicit statement in section 28 (as in section 29) providing that the truth of a statement is irrelevant was a strong textual indication that truth could be taken into account.[512] On the other hand, the enquiry under section 28(2) was whether the "circumstances in which the statement was made were not likely to have adversely affected its reliability". This pointed towards the consideration being of the circumstances, not the statement's truth.[513]

6.29 Glazebrook J ultimately concluded that indicators of truth (or falsity) could be considered.[514] Accordingly, it was open to a court to take into account any evidence discovered as a consequence of the statement in assessing reliability under section 28.[515] She explained that "[l]ogically, if a statement is actually reliable, then there is not a real, substantial or significant risk of its reliability having been adversely affected".[516] She considered that, to exclude a confession that is true "merely because, absent the subsequently discovered evidence, it risked being unreliable would be contrary to the policy of s 28 and would not be conducive to public confidence in the criminal justice system".[517]

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510 At [84]. We note that the majority did not address the issue of whether it is appropriate to enquire into the truth or falsity of the defendant's statement at a pre-trial hearing or voir dire.

511 At [92]–[93]. In reaching this conclusion, the majority considered the "broad correlation between the admissions made by the respondent and [medical] evidence surrounding the death of [Mr Wichman's daughter]": see at [92].

512 At [427]. Furthermore, she noted that the particular conditions or characteristics of a defendant are taken into account under s 28(4), as are the nature of the questions and the threats or promises in the particular case. This suggested that the enquiry was "grounded in the particular circumstances of the case. The court is to have regard to the particular person and the particular confession, as well as a general inquiry into circumstances": at [427].

513 At [428]. Glazebrook J also noted that the legislative history "support[ed] the view that s 28 is only concerned with the circumstances in which the confession was made, as does most of the case law on s 28 to date": at [428].

514 At [432], referring to Richard Mahoney "Evidence" [2008] NZ L Rev 195 at 203–204 (see also Richard Mahoney "Evidence" [2009] NZ L Rev 127 at 139). She went on to make a number of observations about how the s 28(2) assessment should be conducted. She considered that: an assessment of the circumstances in which the statement was made should be made *before* considering actual reliability (at [434]); the stronger the circumstances pointing to a risk that the confession is unreliable, the stronger the indicators of actual reliability should be (at [435]); and internal indicators appearing to point towards reliability (such as emotion, general plausibility, and sensory details) should be regarded with caution, given their presence in proven false confessions (at [436]). She also considered that care must be taken in assessing a confession's consistency with other evidence, given that knowledge of that other evidence might not come from being a perpetrator but from other sources: at [436]. In summary, she considered that any finding on reliability should normally be made only where there is other clear and independent evidence of reliability: at [438]. She acknowledged, however, that a judge could decide that a statement is reliable enough to go to the jury, even if there were inconsistencies with other evidence: see at [438], n 490.

515 At [433].

516 At [429]. She acknowledged that the legislative history did not support this approach, but emphasised that the task of the Court was to interpret the words of the Evidence Act in light of their purpose. She considered that s 28 was concerned with reliability, not with proper police conduct: at [429] and [431]. As such, s 28 had a different context and, to some extent, a different rationale to the rules governing the admissibility of defendants' statements prior to the enactment of the Act: at [429]. She also considered it significant that Parliament had not accepted the Law Commission's recommendation in its 2013 review of the Evidence Act to amend s 28 to make the truth of a statement irrelevant: at [430]. She considered that, by not adopting this recommendation, Parliament had "arguably endorsed the view that the actual reliability of a statement may be relevant to s 28": at [430].

517 At [433]. She continued: "[t]he public would expect reliable and relevant evidence to be placed before the jury unless there were strong policy indications to the contrary. In particular it would seem odd that a jury might be deprived of a true confession through the operation of s 28, the very section concerned with the reliability of statements": at [433].

6.30 Like the majority, Glazebrook J emphasised that the judge is not conducting a mini-trial to determine the truth or falsity of the statement.[518] She also did not think that cross-examination on the truth of the statement in a pre-trial hearing or voir dire should be allowed, as the issue of reliability was "merely a threshold question".[519]

6.31 Applying her approach to section 28, she considered that a number of factors (including the attractiveness of the organisation,[520] Mr Wichman's youth,[521] his isolation at the time,[522] and the possibility of having charges against him removed[523]) increased the risk of a false confession. Considering those circumstances alone, she did not consider the confession was reliable enough to be admitted under section 28(2).[524] However, she considered the way in which the confession accorded with the medical evidence was a strong indication of its truth,[525] and concluded the evidence was sufficiently reliable to go before the jury (but went on to conclude the evidence should be excluded under section 30).[526]

6.32 The Chief Justice disagreed. She thought it was contrary to the text and purpose of the legislation to consider the actual truth of a statement when assessing reliability under section 28(2).[527] She explained that section 28(2), like the common law before it, operated as "a brake on admissibility of doubtful statements where the risk of unreliability is high because of the circumstances in which the statement was made".[528] She also emphasised that "[t]he concentration on the circumstances in which the statement is made ensures that most issues of reliability are left to the jury",[529] thereby avoiding collateral inquiries and intruding on the jury's task.[530]

6.33 The Chief Justice considered that the matters listed in section 28(4) provided a "textual indication" that the court is not concerned with the truth of the statement, as "[all the matters in subsection (4)] are concerned with circumstances at the time the statement was made".[531] In her view, it was clear that "consideration of any circumstance in which the statement was made … does not invite an assessment of whether the statement was in fact reliable".[532] She also noted that, since the enactment of the Evidence Act, most decisions on section 28 had continued to treat the circumstances, rather than the reliability of the statement itself, as the matter to be determined when applying section 28(2).[533]

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518 At [431] and [535].

519 At [439]. She expressly disagreed with the approach taken in an earlier case, *R v Patten* [2008] BCL 476 (HC), where cross-examination of the defendant as to the truth of a statement had been permitted: at [439], n 492.

520 At [441]–[443].

521 At [444]. Mr Wichman was 21 years old when he became the target of the undercover operation.

522 At [445].

523 At [446].

524 At [451].

525 The medical evidence—although not unequivocal in excluding attempted resuscitation as the cause of the child's injuries—pointed strongly to the child having been severely assaulted on that day and on at least one earlier occasion: at [7].

526 At [456].

527 At [285]. She did, however, express the view that the truth of a statement could be relevant to whether a question of reliability was *raised* under s 28: at [276] and [294]. For that reason, she considered that the Law Commission's proposed amendment to s 28 (stemming from its 2013 review of the Evidence Act) "may well be undesirable": at [284]. She also noted that the amendment was perhaps unnecessary, as it was already clear from the structure and language of the provision that truth was irrelevant to the s 28(2) assessment: at [284].

528 At [278]. See also at [144].

529 At [278]. See also at [144].

530 At [283].

531 At [271].

532 At [272].

533 At [280]. The Chief Justice went on to assess the confession itself, and concluded that there was "no basis on which the Court could be satisfied … that the circumstances in which the statement was made were not likely to have adversely affected its

6.34 Since *Wichman*, the approach of the majority and Glazebrook J has been followed by the Court of Appeal on several occasions.[534]

Should truth be relevant to admissibility?

6.35 *Wichman* has prompted us to consider afresh whether truth ought to be relevant to the determination of admissibility under section 28.

6.36 Our starting point is the rationale for the prohibition on enquiring into the actual truth of a confession prior to the Evidence Act. Under the common law, a judge was not permitted to enquire into the truthfulness of a statement obtained by inducements by a person in authority. In *Wong Kam-ming v R* the Privy Council explained that this was because an enquiry into the truth of a confession could potentially invite and encourage police impropriety, a result which would be repugnant to the integrity of the criminal justice system.[535] In short, the rationale for not enquiring into truth was to avoid encouraging improper police conduct.

6.37 The reliability rule proposed by the Commission in its 1999 Evidence Code departed from the previous rules governing the admissibility of defendants' statements in two important respects:

- First, the rule did not require the unreliability of a statement to have emanated from a "person in authority". The Commission did not think the admissibility of a potentially unreliable statement should turn on *who* obtains the statement.[536]
- Second, the rule envisaged a statement could be unreliable due to "internal" factors that police officers may be entirely unaware of, and which have nothing to do with police impropriety. (Prior to the Evidence Act, confessions could not be excluded on the basis that they were not voluntary due to reasons that were internal to the person.)[537]

6.38 These changes to the previous rules were deliberate and were intended to reflect what the Commission described as the "primary purpose" of the rule: to screen out statements that would be unsafe to place before a jury because of the risk of unreliability.[538] In other words, section 28 was principally concerned with *reliability*, not with improper police conduct.

6.39 Given that background, the rationale for the pre-Evidence Act prohibition on enquiring into the truth of a statement (control of police practices) did not sit comfortably with the policy underpinning the expanded reliability rule proposed by the Commission. In particular, we acknowledge the concerns raised by the majority in *Wichman* about the irrelevance of a statement's actual truth where internal factors are said to have affected the reliability of a defendant's statement.[539]

6.40 This was an issue the Commission raised in its 1992 preliminary paper, *Criminal Evidence: Police Questioning*.[540] The Commission recognised that its proposed reliability rule would make it possible for a statement to be excluded solely because a condition or characteristic of the defendant was likely to have affected the reliability of the statement (there being no suggestion of police

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reliability": at [292]. See also at [293]–[323].

534 See for example *L v R* [2017] NZCA 245 at [46]; *Walker v R* [2017] NZCA 188 at [58] and [66]; and *Mark v R* [2017] NZCA 223 at [22]. See also *R v RK* [2016] NZYC 323, [2017] DCR 180 at [29]–[32] and [35] ("[t]he standout features of the statement, which are obvious indications of unreliability are the significant discrepancies between RK's account of the offending and other evidence in the case.")

535 *Wong Kam-ming v R* [1980] AC 247 (PC) at 256–257.

536 See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [129].

537 At [130].

538 At [127].

539 See *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [80]–[81].

540 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992).

misconduct), even though subsequently obtained real evidence[541]—if taken into account—could demonstrate the truth of the statement.[542] The Commission queried whether courts should be able to take account of real evidence when assessing the risk of unreliability in such cases, and noted that one way of dealing with this issue was to incorporate an express exception into the reliability rule, which would allow the court to take account of subsequently obtained real evidence when assessing the risk of unreliability.[543]

6.41 The Commission expressed the provisional view, however, that such an approach would be "inconsistent with the way in which the [reliability] rule is framed [that is], in terms of the likelihood that the reliability of the statement has been affected, rather than its actual truth" and that "[i]t may also be that in practice the difficulty is not likely to be encountered".[544]

6.42 On reflection, and having regard to the concerns expressed by the majority and Glazebrook J in *Wichman*, we now consider it may be undesirable to require courts to ignore any actual indicia of the truth or falsity of a statement when assessing the risk of unreliability stemming from factors that are internal to the defendant. It does not appear to be consistent with the policy of section 28 (see paragraph [6.38] above) for an obviously true confession to be excluded solely on the basis of a theoretical likelihood that the circumstances in which it was made may have affected its reliability.[545] We welcome submitters' views on this (especially in view of the Chief Justice's dissenting view that truth is irrelevant).

6.43 We have also reflected on whether courts should be able to consider the truth or falsity of a statement when assessing the risk of unreliability stemming from *external* factors (for example, because of threats, promises or representations made to the defendant by another person).[546] On the one hand, there is a risk that such an approach could encourage police impropriety. However, as noted above,[547] section 28 is not concerned with improper police conduct – despite the Commission, on occasion, describing the reliability rule as promoting additional policies beyond that of reliability (for example, control of police practices).[548] Therefore permitting indicia of the truth or falsity of a statement to be considered when assessing the risk of unreliability stemming from external factors would arguably be more consistent with the underlying policy of section 28.[549]

Permissible scope of questioning at pre-trial hearing or voir dire

6.44 The question whether truth is relevant to the determination of admissibility under section 28 impacts on the permissible scope of questioning of a defendant during a pre-trial hearing[550] or voir

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541 By "real evidence", we mean physical objects (such as weapons, clothes, drugs and documents). If admitted, they may be offered as exhibits in a trial. See Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 17.

542 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [137].

543 At [138].

544 At [139].

545 See similar observations in Scott Optican "*Wilson*, *Kumar* and *Wichman*: An Examination, Analysis and Discussion of Undercover Police Scenario Cases in the Supreme Court" [2017] NZ L Rev 399 at 448.

546 Evidence Act, s 28(4)(d).

547 At paragraph [6.38].

548 See for example Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [131], where the Commission considered that "a secondary concern" of the rule was to ensure that suspects are questioned in a way that minimises the risk of unreliability, and in such cases was directed at deterring unacceptable police conduct. See also at [136], and the quotation in paragraph [6.15] above. This was noted by Glazebrook J in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [416], [421] and [424].

549 For the underlying policy of the provision, see paragraph [6.38] above.

550 The admissibility of a defendant's statement may be determined pre-trial under ss 78 and 101 of the Criminal Procedure Act 2011. To assist the court to determine admissibility, the court can make an order requiring any potential witnesses to file a formal statement, or make an order that the evidence of a potential witness be taken orally: s 80.

dire[551] that is held to determine admissibility.[552] If truth is relevant, should cross-examination of the defendant on whether their statement is true be permitted?[553]

6.45 In *Wichman*, the majority did not address the question whether cross-examination on the truth of the statement in a pre-trial hearing or voir dire should be permitted, although both the majority and Glazebrook J emphasised that the judge was not to conduct a mini-trial when assessing reliability under section 28.[554]

6.46 Glazebrook J did not think cross-examination on the truth of the statement should be permitted.[555] She considered that, where an accused gives evidence in a pre-trial hearing or in a voir dire, the Crown should "put to the accused for comment the matters that will be relied on to indicate that the statement is reliable", and "should not extensively challenge [a defendant's] assertion [that the statement was false]".[556] The exercise was to assess the contents of the statement and any obvious indication of reliability or unreliability in relation to other aspects of the case and any subsequently discovered evidence.[557]

6.47 We query whether it is appropriate for a defendant to be cross-examined on the truth of their statement at this stage. When determining admissibility under section 28, the judge is considering a threshold admissibility question as to whether evidence is sufficiently reliable to go before a jury. To permit cross-examination at this preliminary stage would arguably usurp the function of a jury.

6.48 We also note that—if cross-examination were to be permitted—this would create potential difficulties where a defendant combines arguments of unreliability under section 28 with oppression under section 29.[558] Section 29(3) expressly prohibits the truth of a statement from being considered when applying that section, and therefore bars cross-examination on truth.[559] The problem is summarised by Richard Mahoney as follows:[560]

> Must there be two hearings, with the defendant subject to cross-examination about the truth of his or her statement when the focus is s 28 (reliability), but, because of s 29(3), immune from such questioning in the voir dire dealing with s 29 (oppression)? Courts hate such duplicative hearings, so there is every likelihood that a single voir dire will be held. But it is really asking too much of a judge to permit cross-examination of the defendant about the truth or falsity of the statement when the issue is reliability (s 28), yet attempt to ignore that evidence when the judge comes to consider oppression (s 29).

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551 Where an issue of admissibility arises at trial, the judge may declare a "voir dire". A voir dire is where evidence from the defendant is heard (usually without the presence of the jury). At the voir dire, the defendant is able to testify without committing himself or herself to testifying at the trial proper. See Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [ED4.07].

552 See the observation in Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 231.

553 Prior to the enactment of the Act, for the reasons explained at paragraph [6.36] above, the position generally taken by the courts was that a defendant could not be cross-examined about the truth or falsity of his or her statement: see *Wong Kam-ming v R* [1980] AC 247 (PC). See also Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [ED4.07(4)]; and Richard Mahoney "Evidence" [2009] NZ L Rev 127 at 141.

554 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [84] per William Young J and at [431] per Glazebrook J.

555 At [439].

556 At [439].

557 At [431] and [535].

558 See Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA29.04(1)].

559 At [EA29.04(1)].

560 Richard Mahoney "Evidence" [2009] NZ L Rev 127 at 142.

QUESTIONS

Q18 Should the truth of a defendant's statement be considered when determining its admissibility under section 28? Does section 28 need to be amended to clarify the position?

Q19 If truth is relevant to the determination of admissibility under section 28, should cross-examination of the defendant in relation to the truth or falsity of their statement be permitted at a pre-trial hearing or voir dire?

CHAPTER 7

Improperly obtained evidence

IN THIS CHAPTER, WE CONSIDER:

- how the factors listed in section 30(3) should be interpreted;
- the use of evidence that has previously been excluded on the basis it was improperly obtained in other proceedings; and
- mechanisms for addressing concerns associated with evidence gathered during undercover operations.

BACKGROUND

7.1 The admissibility of improperly obtained evidence is governed by section 30.[561] The section applies to all evidence offered by the prosecution at trial. Under section 30(2), a judge who finds that evidence has been improperly obtained must consider whether its exclusion is proportionate to the impropriety. This must be done by 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".[562] Section 30(3) sets out a non-exhaustive list of factors that may be taken into account in the balancing process. Section 30 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.

561 Although s 30 provides specific admissibility guidance, s 8 of the Evidence Act 2006 remains of universal application in assessments of admissibility.

562 Evidence Act, s 30(2)(b). Section 30(2)(b) was amended by s 10 of the Evidence Amendment Act 2016. Prior to that amendment, the subsection referred to 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. The replacement of "but also" with "and" was recommended by the Law Commission in *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 74, R8 to avoid the suggestion that an effective and credible system of justice is a counterpoint to impropriety that always points towards admissibility (see the discussion in that report at [4.18]–[4.20]).

(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 and 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 that 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[563] 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.

Pre-Evidence Act

7.2 Prior to the enactment of the Evidence Act and the New Zealand Bill of Rights Act 1990 (NZBORA), New Zealand courts had a common law discretion to exclude evidence in criminal cases on the grounds that it was improperly obtained.[564]

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563 The phrase "in consequence of" is used in both s 30(5)(a) and s 30(5)(b). In *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [47] a majority of the Supreme Court said that the effect of this is to require a causative link between the impropriety and the obtaining of the evidence. As for s 30(5)(c), the majority said there must "almost always" be a causative link between the unfairness and the impugned evidence. The test for causation that is frequently applied by the courts is whether there was a "real and substantial connection between the breach and the obtaining of the evidence": see *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [79]; *Elia v R* [2012] NZCA 243, (2012) 29 FRNZ 27 at [35]; and *N v R* [2017] NZCA 140 at [25] per Miller and Mallon JJ (compare, however, the view of Peters J at [25]). More recently, see *R v R* [2017] NZCA 611 at [51] and [74]. For criticism of the courts' approach to causation for the purposes of s 30, see Scott Optican "Evidence" [2015] NZ L Rev 473 at 527–528; and 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 at 537–540.

564 This jurisdiction to exclude was sometimes described as being based on either or both a discretion to exclude evidence on the grounds of unfairness and the power of a court to address an abuse of process. See *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [21]; Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at

7.3 Following the enactment of NZBORA, the courts developed a prima facie exclusionary rule for evidence obtained in breach of that Act.[565] The rule required such evidence to be excluded unless there was "good reason" for admitting it.[566] The most consistently stated rationale for this rule was that of "vindication of rights":[567] exclusion of evidence was seen as the only effective means of vindicating a breach of NZBORA.[568]

7.4 In a 1994 report, *Police Questioning*, the Law Commission proposed a single exclusionary rule that was intended to replace the rules governing the exclusion of evidence on the grounds of unfairness/abuse of process as well as the prima facie exclusionary rule for evidence obtained in breach of NZBORA.[569] The Commission proposed that evidence that was improperly obtained would be presumptively inadmissible, unless the court considered that exclusion would be contrary to the interests of justice.[570] The Commission refined this proposal in its subsequent Evidence Code in 1999.[571]

7.5 After the publication of the Code—but prior to the enactment of the Evidence Act 2006—the Court of Appeal in *R v Shaheed* replaced the prima facie exclusionary rule with a new "balancing test".[572] The test required courts to balance a number of non-exhaustive factors to determine whether exclusion of the evidence was a proportionate response to the breach of the right.[573]

7.6 The Court explained that the prima facie exclusionary rule had, in practice, often resulted in judges taking an unduly "narrow and almost mechanical approach" to the issue of admissibility, with exclusion "follow[ing] almost automatically" once a breach of NZBORA was established.[574] The Court considered that, although there were some good arguments in support of the rule,[575] the administration of justice would be brought into disrepute if "each and every substantial breach of

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[EVA30.1]; and *R v Shaheed* [2002] 2 NZLR 377 (CA) at [63] per Blanchard J. The majority in *Marwood* noted that "[s]ometimes these two bases were conflated": at [21] per William Young J (writing for himself, Glazebrook, Arnold and O'Regan JJ). In adopting this approach, New Zealand diverged from the common law position in England, where in general improperly or illegally obtained evidence was admissible in both criminal and civil proceedings: *Marwood* at [20]–[21]; and *Shaheed* at [62].

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

566 At 266 per Cooke P. The rule ran in parallel with the rules governing the exclusion of evidence on the grounds of unfairness/abuse of process: see *R v Williams* [2007] 3 NZLR 207 (CA) at [75].

567 Richard Mahoney "Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights" in Grant Huscroft and Paul Rishworth (eds) *Rights and freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's Ltd, Wellington, 1995) 447 at 448; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [29.4.1]. See for example *R v Te Kira* [1993] 3 NZLR 257 (CA) at 276 per Hardie Boys J; *R v Goodwin* [1993] 2 NZLR 153 (CA) at 194 per Richardson J and at 202 per Hardie Boys J; and *R v Tawhiti* [1993] 3 NZLR 594 (HC) at 597.

568 See Andrew Geddis and M B Rodriguez Ferrere "Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland?" (2016) 35 University of Queensland L J 251 at 261.

569 Law Commission *Police Questioning* (NZLC R31, 1994) at [102]. See also Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [155] (and later, Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [105]). The Commission's goal was to address the "lack of clarity in the guiding principles behind the current fairness discretion": Law Commission *Police Questioning* (NZLC R31, 1994) at [100]; and Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [103].

570 Law Commission *Police Questioning* (NZLC R31, 1994) at [102].

571 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 84. The Commission proposed a number of considerations that a judge must consider when considering whether to admit improperly obtained evidence (s 29(5) of its Evidence Code).

572 *R v Shaheed* [2002] 2 NZLR 377 (CA) (Elias CJ dissenting).

573 At [145]–[156] per Blanchard J.

574 At [140] per Blanchard J. See also the observations of Hammond J in *Police v Dibble* (1994) 11 CRNZ 321 (HC) at 333; and Richard Mahoney "Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights" in Grant Huscroft and Paul Rishworth (eds) *Rights and freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's Ltd, Wellington, 1995) 447 at 447.

575 Namely, it recognises the importance of a guaranteed right; exclusion may be the only effective means of vindicating a breach; it ensures that courts are not perceived as deciding cases on the basis of "ends rather than means"; and it makes it clear to Police that there is no utility in obtaining evidence via a breach of rights: at [142] per Blanchard J.

an accused's rights leads almost inevitably to the exclusion of crucial evidence which is reliable and probative of a serious crime".[576]

7.7 After reviewing various approaches taken in overseas jurisdictions,[577] the Court concluded that the proper approach was for the courts to conduct a balancing exercise "in which the fact that there has been a breach of the accused's guaranteed right is a very important but not necessarily determinative factor".[578]

7.8 The improperly obtained evidence rule in the Evidence Bill 2005, which was ultimately enacted as section 30, essentially codified the test outlined in *Shaheed*,[579] but extended its application beyond evidence that is obtained in breach of NZBORA.

Policy shift reflected in section 30

7.9 In summary, the "vindication of rights" was the primary rationale for the prima facie exclusionary rule adopted by the courts after the enactment of NZBORA. The Court of Appeal's departure from that rule in *Shaheed* reflected a deliberate shift away from that policy rationale. By adopting instead a test that involved a balancing of interests, the Court was giving neither a "vindication of rights" (or "rights-centred") approach nor a "deterrence-centred" approach particular primacy: the Court was focusing instead on a broad notion of the "overall interests of justice" in a criminal proceeding.[580] This focus on the overall interests of justice[581] continues to underpin section 30.[582]

LAW COMMISSION'S 2013 REVIEW OF THE ACT

7.10 When the Commission conducted its 2013 review of the Act,[583] it noted the application of the balancing test in section 30 had been subjected to some criticism by commentators.[584] The criticism was grounded in the lack of guidance as to how the section 30 test should be applied, including the weight, interpretation and application of the relevant factors listed in subsection (3).

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576 At [143] per Blanchard J.

577 Broadly speaking, the approaches taken in other jurisdictions could be categorised as either "deterrence-centred" (an approach that is intended to deter wilful police misconduct – for example, by requiring exclusion unless the action was pursued in good faith); "rights-centred" (an approach that gives primacy to the vindication of guaranteed rights – for example, by requiring exclusion even where the actor did not realise that a breach was occurring); or involving a balancing of interests, giving neither deterrence nor vindication any particular primacy: see at [119] and [138] per Blanchard J.

578 At [144] per Blanchard J.

579 Evidence Bill 2005 (256-1), cl 26. The Select Committee's recommended changes to the Bill included the insertion of subsection (6) and removing the words "in particular whether it is central to the case of the prosecution" from cl 26(3)(c): Evidence Bill 2005 (256-2) (select committee report) at 4.

580 See *R v Shaheed* [2002] 2 NZLR 377 (CA) at [119] and [138] per Blanchard J and at [172] per Gault J. For an analogous approach in relation to the jurisdiction to stay proceedings for an abuse of process, see *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705 at [43]–[50] per Arnold J (for himself, William Young, Glazebrook and Blanchard JJ).

581 See *R v Shaheed* [2002] 2 NZLR 377 (CA) at [119].

582 This also reflects the broad purpose in s 6 of the Act (to help secure the just determination of proceedings) and s 6(b) (recognising the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990). See also Scott Optican "Case Note: Every Silver Lining Has a Cloud – The Exclusion of Improperly Obtained Evidence in Civil Proceedings: *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260" [2017] NZ Crim L Rev 228 at 244: "the focus embodied in s 30 … centers neither on vindicating the individual rights of criminal suspects, deterring particular acts of police misconduct, nor on providing personalised remedies for police transgressions of law".

583 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013).

584 At [4.6]. See the articles cited at 70, n 262 of the report.

7.11 The Commission observed that the multi-faceted nature of the decision-making process under section 30 necessarily involved difficult questions of judgement that were not amenable to scientific precision.[585] It considered a "degree of uncertainty" was implicit in the balancing approach.[586]

7.12 The Commission noted that there were "undoubtedly some areas where interpretation of the factors in subs (3) has not yet fully settled",[587] but did not make any recommendations for legislative change.[588] At the time of writing its report, only one Supreme Court decision, *Hamed v R*,[589] had considered section 30 in detail.[590] The Commission anticipated that, over time, general principles would emerge to assist courts with the balancing exercise in section 30.[591] It did not want to impede the courts' progress to achieving clarity in this area by prematurely recommending change.[592]

ISSUES FOR CONSIDERATION

7.13 Since the Commission's 2013 review of the Act, a number of appellate decisions have considered the interpretation and application of section 30. In this chapter we summarise the main developments in the section 30 jurisprudence and consider the following issues:[593]

- How are the factors listed in section 30(3) to be interpreted? In particular:
  - Should the centrality of the evidence to the prosecution's case be considered?
  - How is the "seriousness" of an offence in paragraph (d) to be measured, and should this factor favour exclusion or inclusion?
  - Should the availability of alternative techniques in paragraph (e) favour exclusion or inclusion?
  - More generally, is a more prescriptive approach to section 30 required?
- What is the status of evidence that has previously been excluded on the basis it was improperly obtained in other proceedings? In particular:

585 At [4.17].

586 At [4.11].

587 At [4.16]. See paragraphs [7.14], [7.26] and [7.38] below.

588 Apart from a minor amendment to s 30(2)(b), which was ultimately adopted in the Evidence Amendment Act 2016: see n 562 above.

589 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

590 The Commission noted this, but did not analyse *Hamed* in any detail.

591 At [4.17].

592 At [4.17]. The Commission expressed the view that, generally, judges appeared to be conscientious in their approach to s 30 and sought to articulate the factors that favour admission and exclusion; and endorsed a systematic process whereby courts clearly articulate their reasoning: at [4.14]–[4.15].

593 We note that in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 there was disagreement among the judges of the Supreme Court concerning the interaction of ss 28, 29 and 30. Broadly speaking, the majority appeared to treat ss 28–30 as dealing with distinct matters (so, for example, concerns about reliability should be addressed under s 28, rather than s 30), whereas Elias CJ and Glazebrook J considered that questions of reliability and oppression could be considered under both ss 28/29 and 30. Compare, however, *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [64] (see also at [145] per Elias CJ). We have not addressed the relationship between ss 28, 29 and 30 in this chapter because, in our view, the degree of division between the members of the Supreme Court in *Wichman* was not particularly marked. It seems that all members of the Court considered that: where issues of reliability or oppression are raised, they ought to be (but are not required to be) first addressed under s 28 and s 29; and if they are not first addressed under those sections (or if the evidence is held to be admissible under those sections), there is still room to consider issues of reliability and oppression under s 30 (both in terms of determining whether there was impropriety and in conducting the s 30(2) balancing test).

- When determining the admissibility of such evidence under section 30(2) in a subsequent proceeding, should the earlier exclusion be characterised as a "vindication of rights" favouring subsequent admission?
- Do the courts have the power to exclude such evidence in subsequent civil proceedings?

- Should the Chief Justice's Practice Note on Police Questioning apply to undercover police officers? Should other mechanisms for addressing concerns associated with evidence gathered during undercover operations be developed?

SECTION 30(3) FACTORS

Centrality of evidence to prosecution's case

7.14 When the Commission conducted its 2013 review of the Act, it observed that there was some uncertainty about whether the centrality of the evidence to the prosecution's case was a relevant factor under section 30(3).[594]

7.15 This uncertainty stemmed from the fact that the centrality of the evidence was identified in *Shaheed* as a relevant factor favouring admission[595] and was included in the first version of the Evidence Bill 2005 (as part of what is now section 30(3)(c) – the "nature and quality of the improperly obtained evidence"),[596] but was removed at the Select Committee stage because the Committee considered it duplicated other factors.[597]

7.16 Shortly before the Evidence Act came into force, the Court of Appeal in *Williams* acknowledged that this factor had not been included in section 30(3), but considered it could nevertheless be "of some relevance when assessing the nature and quality of the evidence".[598]

7.17 This view was both supported and rejected in *Hamed*.[599] Blanchard J took the view that the factor—despite not being included in section 30(3)—was still relevant to the section 30(2) balancing exercise as an independent factor (in other words, not as part of the section 30(3)(c) assessment of the "nature and quality" of the evidence).[600] He thought it was "simply unrealistic" not to take this into account when assessing whether exclusion was proportionate to the impropriety.[601] Similarly,

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594 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.16]. Although the Commission briefly identified this as an area of uncertainty, as noted above at paragraph [7.12], it did not recommend legislative amendment. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [29.5.21].

595 *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152] per Blanchard J: "It is … a matter which must be given weight in favour of admission if the disputed evidence is not only reliable but also central to the prosecution's case – that the admission of the evidence will not lead to an unfair trial and the case is likely to fail without it." See also *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [141]: "[t]he more crucial the evidence is, the more the public interest in conviction is engaged."

596 Evidence Bill 2005 (256-1), cl 26(3)(c): "the nature and quality of the improperly obtained evidence, in particular whether it is central to the case of the prosecution".

597 The Committee explained: "We recommend that clause 26(3)(c) be amended to remove the rule directing the court to have regard to the centrality to the case of the prosecution when deciding whether improperly obtained evidence is admissible. We consider that this should be deleted as an express provision as we find it difficult to envisage a circumstance where it would be relevant, given the seriousness test in paragraph" (Evidence Bill 2005 (256-2) (select committee report) at 4). For a critique of this reasoning, see Chris Gallavin and Justin Wall "*Hamed*: section 30" [2012] NZLJ 116 at 117.

598 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [141]. See also at [134].

599 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305. The Chief Justice did not expressly deal with the issue. Nor did Gault J, although his Honour generally agreed with Blanchard and McGrath JJ (see *T (CA438/2015) v R* [2016] NZCA 148 at [70]).

600 At [201].

601 At [201].

McGrath J considered the removal of the factor by the Select Committee did not "preclude consideration of this factor where it is relevant in the balancing exercise".[602]

7.18 However, Tipping J was uncomfortable with the proposition that there was a stronger case for admitting evidence that was of importance to the Crown's case.[603] He considered that to treat this as a relevant factor would be contrary to Parliament's clear intention – either as part of section 30(3)(c)'s reference to "nature and quality" or as an independent factor.[604] He explained:[605]

> In my view the expression "nature and quality", as descriptive of improperly obtained evidence, is limited to the character of the evidence itself and is not concerned with the importance of the evidence to the Crown's case. That seems to me to be the natural reading of those words in their context. That natural reading is supported by the legislative history. … The [Select] Committee considered that … reference [to the centrality of the evidence] was inappropriate. This was because of the temptation it would provide for investigating agencies to breach rights in order to obtain evidence, then claim the evidence was all that was available and so should be admitted as central to the prosecution case.[606]

7.19 Since the Commission's 2013 review, there have been a number of appellate decisions where the courts have treated the centrality of the evidence to the prosecution's case as a relevant factor when conducting the section 30(2) balancing exercise.[607]

7.20 The issue received some attention in 2016 in *T (CA438/2015) v R*.[608] In that case, the Court of Appeal observed that the view held by Blanchard and McGrath JJ in *Hamed* (that centrality was relevant to the section 30 assessment) had subsequently been preferred to that of Tipping J.[609] The Court itself did not express a firm view on this point, although it observed it could be "artificial" to conduct the section 30(2) balancing exercise without taking this into account.[610]

7.21 The Court also noted there was some uncertainty about whether this factor (if indeed relevant) was to be assessed as an independent factor under section 30(3), or as part of the assessment of the "nature and quality of the improperly obtained evidence" in section 30(3)(c).[611] The Court observed that, on one view, the section 30(3)(c) factor was focused on the evidence itself, and did

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602 At [260]. See also at [276]: "the centrality of the evidence to the prosecution also goes to its quality and is relevant to the balancing exercise".

603 At [236].

604 At [237].

605 At [237].

606 See speech of Nandor Tanczos during the Committee of the Whole House debate: (21 November 2006) 635 NZPD 6647.

607 See *Hoete v R* [2013] NZCA 432, (2013) 26 CRNZ 429 at [44]; *Lin v R* [2014] NZCA 47 at [18(f)]; *Holdem v R* [2014] NZCA 546 at [28(d)]; *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [523], n 667 per Glazebrook J ("[i]n my view nature and quality of evidence refers to its cogency. It may also refer to the importance of the evidence to the Crown case"); *M v R* [2016] NZCA 221 at [180]; *McGarrett v R* [2017] NZCA 204 at [39]; *N v R* [2017] NZCA 140 at [34]; and *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [31].

608 *T (CA438/2015) v R* [2016] NZCA 148. Leave to appeal to the Supreme Court was declined: *T (SC52/2016) v R* [2016] NZSC 76.

609 At [68], referring to *Te Moananui v R* [2010] NZCA 515 at [47(c)]; *Shirtliff v R* [2012] NZCA 336 at [18]–[19]; *Tye v R* [2012] NZCA 382 at [36]; and some of the cases referred to in n 607 above. The Court also noted that this factor is considered relevant to the balancing process in Canada (*R v Grant* [2009] 2 SCR 353, 2009 SCC 32 at [83]) as well as in Australia (under s 138(3)(b) of the Evidence Act 1995 (Cth)): at [70], n 74.

610 At [71].

611 At [49].

not include the importance of the evidence to the Crown.[612] The Court did not express a firm view on this point either.[613]

7.22 We are interested in whether submitters consider section 30 should be amended to clarify[614] whether and how the importance of improperly obtained evidence to the prosecution's case is taken into account in the section 30(2) assessment.

7.23 Our provisional view is that the centrality of the evidence to the prosecution's case ought to be a relevant factor favouring admission. This accords with the approach that has been taken by appellate courts since *Hamed*. We agree with the views expressed in *T (CA438/2015)* as well as by Blanchard J in *Hamed* that there is a degree of artificiality in conducting the section 30(2) balancing exercise without taking this into account. The more important the evidence is, the more the public interest in conviction is engaged. Accordingly, we suggest the following options:

- amending section 30(3) expressly to include the centrality of the evidence as a relevant factor, either by incorporating this into the wording of section 30(3)(c) or by listing this as a new factor; or
- maintaining the status quo, leaving the centrality of the evidence to be treated as a relevant factor, either under section 30(3)(c) or as an independent factor under section 30.

7.24 We are interested in submitters' views on the benefit (if any) of formally including this factor in the section 30(3) list (bearing in mind that section 30(3) is expressed non-exhaustively). As to whether this factor ought to be considered as part of the section 30(3)(c) assessment of the "nature and quality" of the improperly obtained evidence or as an independent factor under section 30(3), we note (as the Court did in *T (CA438/2015)*) that the courts have not taken a consistent approach to this issue.[615] We therefore invite submissions on whether the "nature and quality" assessment should focus on the evidence itself, or should also consider the importance of the evidence to the prosecution's case.

Seriousness of the offence

7.25 One of the factors expressly included under section 30(3) when undertaking the balancing exercise is "the seriousness of the offence with which the defendant is charged".[616]

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612 At [49]. The Court noted that such an approach was taken by Tipping J in *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [237]; and that Blanchard J also indicated at [201] that the relevance of the evidence to the Crown's case was additional to, and not a part of, s 30(3)(c).

613 However, the Court ultimately examined the nature and quality of the impugned evidence in that case "[a]s a separate exercise" to its assessment of the importance of the evidence to the Crown's case: at [50].

614 Bearing in mind that one of the purposes of the Act is to help secure the just determination of proceedings by enhancing access to the law of evidence: Evidence Act, s 6(f).

615 Some cases appear to have treated the centrality of the evidence to the prosecution's case as part of the s 30(3)(c) assessment (see for example *Holdem v R* [2014] NZCA 546 at [28(d)]; *Te Moananui v R* [2010] NZCA 515 at [47(c)]; and *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [523], n 667 per Glazebrook J) while others have treated it as an independent factor (see for example *Lin v R* [2014] NZCA 47 at [18(f)]; *T (CA438/2015) v R* [2016] NZCA 148 at [50]; *McGarrett v R* [2017] NZCA 204 at [39]; *N v R* [2017] NZCA 140 at [34]; *Hoete v R* [2013] NZCA 432, (2013) 26 CRNZ 429 at [44]; *Shirtliff v R* [2012] NZCA 336 at [18]–[19]; and *Tye v R* [2012] NZCA 382 at [36]). In *Murray v R* [2016] NZCA 221 at [180], the Court treated it as a factor "to be weighed along with the seriousness of the offending" in s 30(3)(d). Chris Gallavin and Justin Wall have suggested that "it is not imperative that [the centrality of the evidence] be paired with 'nature and quality' under para (c) as it may form part of the Court's wider discretion to consider what it believes relevant as reserved under the section": "*Hamed*: section 30" [2012] NZLJ 116 at 117. See also Editorial "Improperly obtained evidence" [2016] NZLJ 359.

616 Evidence Act, s 30(3)(d).

7.26 When the Commission conducted its 2013 review of the Act, there was some uncertainty about how this factor was to be applied.[617] This uncertainty centred around two issues: how "seriousness" is to be determined; and whether section 30(3)(d) is a factor that favours exclusion or admission.

7.27 In 2007, in *R v Williams*,[618] the Court of Appeal had described section 30(3)(d) as a factor favouring admission. The Court explained that weight was given to the seriousness of the offence "not because the infringed right is less valuable to a person accused of a serious crime", but in recognition of "the enhanced public interest in convicting and confining those who have committed serious crimes, particularly if they constitute a danger to public safety".[619] The Court considered that an offence was "serious" if the sentencing starting point was likely to be four years' imprisonment or more; or if the offence involved a threat to public safety.[620]

7.28 There is a view, however, that post-*Williams* case law resulted in "vague and uneven applications"[621] of section 30(3)(d). Courts differed about the relative seriousness of offences, even when discussing similar sets of charges and facts,[622] and section 30(3)(d) had sometimes been treated as a factor favouring exclusion rather than admission.[623]

7.29 This uncertainty was not resolved by the Supreme Court in its 2011 decision, *Hamed*.[624] In that case, the judges offered differing views on how the seriousness of an offence was to be measured. For example, Tipping J considered that seriousness should be measured by reference to the maximum penalty for the offence charged.[625] Blanchard J considered that seriousness needed to be determined by reference to the maximum penalty as well as the court's provisional assessment of the penalty that might actually be imposed.[626] The Chief Justice did not think that a "close assessment" of the seriousness of the offence was required, once a certain threshold of seriousness had been passed.[627] Several of the judges also described the seriousness of the offence as a factor that was "apt to cut both ways",[628] but did not further specify the circumstances in which that factor would favour admission or exclusion in any given case.[629]

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617 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.16]. Although the Commission briefly identified this as an area of uncertainty, as noted above at paragraph [7.12], it did not recommend legislative amendment. See also Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 246; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [29.5.26]–[29.5.27].

618 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207.

619 At [138], referring to *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152] per Blanchard J. The Court continued: "The public might justifiably think it too great a price to pay for evidence, which is reliable, highly probative and central to the Crown case, to be excluded in such cases" (at [138]).

620 For example, the carrying of a loaded weapon in public. See at [135].

621 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 at 531. See also 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 at 622–623.

622 For example, some judges focused on the maximum term available for the offences laid, while others emphasised any actual sentence that had been imposed, or the likely penalty that would be faced upon conviction. In *R v Yeh* [2007] NZCA 580 at [55], the Court described the four-year starting point in *Williams* as "a useful guideline", but one that "should not be applied as a mathematical formula". Instead, the Court said that the ascertainment of the level of seriousness required a consideration of all the surrounding circumstances: at [55].

623 See *R v Allen* HC Rotorua CRI-2007-087-1729, 10 February 2009 at [86]; and *R v Winitana* HC Auckland CRI-2009-263-163, 26 July 2011 at [97].

624 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305. See *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [22]: "no ratio emerges from *Hamed* with respect to s 30(3)(d)".

625 At [239]. See the criticism of this approach in Chris Gallavin and Justin Wall "*Hamed*: section 30" [2012] NZLJ 116 at 117.

626 At [197].

627 At [69].

628 At [230] and [239] per Tipping J, at [65] per Elias CJ and at [187] per Blanchard J. More recently, see *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [342] per Elias CJ.

629 See the criticism in 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 at 626.

7.30 In the 2015 decision of the Supreme Court, *R v Wichman* (discussed earlier in Chapter 6),[630] Glazebrook J expressed some doubt about the utility of the "seriousness of the offence" factor in the section 30 balancing exercise. She considered the seriousness of the offence in that case (manslaughter) was a neutral factor, because "[a]s the seriousness of a crime increases so does the public interest in prosecution. On the other hand, … the more serious the crime, the more … there is the need for rights to be protected and safeguards to be enforced".[631]

7.31 In 2016, the Court of Appeal in *Underwood v R*[632] sought to provide guidance on how the "seriousness of the offence" assessment should be conducted. In that decision, the Court considered both how "seriousness" should be determined and whether this factor favours exclusion or admission.

7.32 The Court held the four-year starting point adopted in *Williams* should no longer be used.[633] Instead, seriousness should be treated (like the other section 30(3) criteria) as an evaluative consideration.[634] The Court considered that penalty (whether the maximum or a starting point) was not always a reliable (or necessary)[635] guide to seriousness for section 30 purposes,[636] so judges should not be *required* to use penalty as a standard, although they may sometimes find it appropriate.[637] Where penalty was a suitable measure, the starting point for a sentence was ordinarily a better guide than the maximum, as it would reflect the aggravating and mitigating features of the particular offending.[638]

7.33 As to whether the seriousness of the offence favours exclusion or admission, the Court explained that the description of section 30(3)(d) as a factor that "cuts both ways" risked confusion.[639] The Court described the significance of the factor in the following way:

- When it is viewed alone (independently of the other considerations listed in subsection (3)), seriousness favours admission.[640] The rationale for this, as explained in *Williams* (see paragraph [7.27] above), is the "enhanced public interest in convicting and confining those who have committed serious crimes".[641]
- An absence of seriousness does not positively favour exclusion: instead, in such a case paragraph (d) simply has no role to play in the balancing exercise.[642]

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630 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

631 At [521].

632 *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433. This was a decision of the Permanent Court. It has not been appealed to the Supreme Court.

633 At [49].

634 At [49]. At [42], the Court noted that there were a number of considerations that could inform the assessment of seriousness including "the scale or extent of actual offending, contemplated offending, threats to public safety, perniciousness, classification, quantity or value of drugs involved, actual or potential harm to victims, use of violence, lack of provocation, invasion of bodily integrity, presence of weapons, premeditation, and conspiracy or concerted criminal activity".

635 The Court noted that some cases would not require a nuanced approach to seriousness, for example, where the generic offence is always serious (for example, murder) or more important considerations, such as gravity of the breach, determine where the balance lies: at [48(b)] and [45].

636 At [43]. See the reasons listed in that paragraph.

637 At [48]–[49].

638 At [46]. The Court saw no advantage in using the likely end sentence, as this could be influenced by aggravating and mitigating features of the offender that have little to do with the intrinsic seriousness of the offence. Furthermore, such an assessment would require trial courts to obtain and evaluate information that would otherwise not be needed until sentencing: at [47].

639 At [39].

640 At [41].

641 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [138], quoted in *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [32].

642 *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [41].

- Where other factors in subsection (3) favour exclusion (for example, where there has been a serious breach of an important right), these exclusionary considerations are sometimes aggravated if the offence is serious.[643]

7.34 The Court concluded that the assessment of seriousness required:[644]

> … a long-term perspective of the administration of justice, in which trials generally should be conducted on their merits but systemic integrity is paramount; that being so, seriousness cannot take primacy over other considerations, seriousness does not justify admission where the breach of rights causes an unfair trial, and a grave breach of an important right may justify exclusion although the evidence would not result in an unfair trial.

7.35 The guidance set out in *Underwood* is relatively new and, from our review of cases that have subsequently applied the decision,[645] does not appear to have attracted criticism or to have generated significant difficulties in practice. We note that in a recent decision, *W (CA597/2016) v R*, the Court of Appeal provided a helpful summary of the conclusions it reached in *Underwood*.[646] We are interested in whether submitters agree with the approach taken by the Court towards the "seriousness of the offence" assessment in section 30(3)(d).

Availability of alternative techniques

7.36 Another factor that may be considered when undertaking the section 30(2) balancing exercise is listed in section 30(3)(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".[647]

7.37 The availability of alternative techniques was identified in *Shaheed* as a relevant factor favouring exclusion:[648]

> The balance may be more likely to come down in favour of exclusion where other investigatory techniques, not involving any breach of rights, were known to the police to be available and not used. It is of some reassurance to the community where evidence is excluded in such circumstances that, if the same situation arises again, the police do have an available means of obtaining the evidence in a proper way.

7.38 By the time the Commission conducted its 2013 review of the Act, there was considerable uncertainty about the significance of this consideration in the section 30(2) balancing exercise.[649] The availability of alternative techniques had been treated both as a factor favouring exclusion

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643 At [40]. See also the discussion at [34]–[37].

644 At [49].

645 *L v R* [2017] NZCA 245 at [127] ("as this Court emphasised in *Underwood v R*, the integrity of our system of justice is paramount and seriousness should not take primacy as a factor in the s 30(2) exercise"); *McGarrett v R* [2017] NZCA 204 at [39] ("[seriousness] generally points towards inclusion") and at [39], n 30 ("[a]lthough … in some circumstances the seriousness of the offending will aggravate exclusionary considerations, as recognised by this Court in *Underwood*"); *M v Police* [2017] NZHC 836 at [56] ("[t]he Court of Appeal has reinforced that seriousness does not take primary consideration over the other factors"); *N v R* [2017] NZCA 140 at [34]; *Kahotea v R* [2017] NZCA 82 at [40]; *W v R* [2016] NZCA 580 at [57]; *PG v R* [2016] NZCA 390 at [50]; and *Asgedom v R* [2016] NZCA 334, (2016) 28 CRNZ 70 at [36]. Compare, however, *W v R* [2016] NZHC 2579 at [57], where Dobson J concluded that, applying *Underwood*, seriousness was not to be applied as a consideration in favour of inclusion of evidence. On appeal, the Court of Appeal explained that this conclusion was incorrect: "[t]he general principle is that seriousness generally, but not always, favours inclusion" (*W (CA597/2016) v R* [2017] NZCA 522 at [46]).

646 *W (CA597/2016) v R* [2017] NZCA 522 at [45] and [47].

647 Evidence Act, s 30(3)(e).

648 *R v Shaheed* [2002] 2 NZLR 377 (CA) at [150] per Blanchard J. Similarly, in *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [127], the Court described the availability of other investigatory techniques as "an aggravating factor rather than a mitigating one".

649 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.16]. Although the Commission briefly identified this as an area of uncertainty at [4.16], it did not recommend legislative amendment. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [29.5.28].

and admission, and the *unavailability* of lawful investigative techniques was sometimes treated as "ameliorat[ing] the gravity of any unlawful methods actually employed by the police".[650]

7.39 In *Hamed*,[651] the members of the Supreme Court disagreed over the significance of an absence of alternative investigatory techniques. Blanchard, Tipping and McGrath JJ were of the view that this was a factor pointing towards admission.[652] McGrath J explained that this was because "[i]f the public concluded that, in future, when a similar situation arose, the police could not effectively investigate it as a crime and be able to gather admissible evidence, strong doubts would reasonably arise over the effectiveness in particular of the justice system."[653]

7.40 The Chief Justice took a different view. She considered that a lack of alternatives was a "significantly exacerbating factor" as it emphasised the deliberate unlawfulness of the police conduct in taking the course of action that it did (covert surveillance).[654]

7.41 Since the Commission's 2013 review, a number of different approaches have been taken by the courts, although no case has considered the issue in any detail. The courts have—without explaining *why*—variously treated the availability of alternative techniques as a factor that favours exclusion,[655] admission,[656] or as a neutral factor.[657] The courts have also treated the absence of alternative techniques in a particular case as a factor favouring exclusion,[658] admission,[659] or as a neutral factor[660] (again, without explaining why they have adopted such an approach).

7.42 The current uncertainty as to how the section 30(3)(e) factor influences the section 30(2) assessment is undesirable and seems contrary to a number of limbs in the Act's purpose provision.[661] We are interested in submitters' views on whether the availability of alternative techniques should favour admission or exclusion (or either, depending on the context); and whether the absence of alternative techniques should be taken into account in the section 30(2) assessment (and if so, whether this should favour admission, exclusion, or either). We also invite submissions on whether section 30 ought to be amended to clarify the position, or whether it is preferable to leave the courts to offer clarity in this area.

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650 See 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 at 629. See also 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 at 534–537.

651 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

652 At [196] per Blanchard J, at [246] per Tipping J ("[t]his feature points towards, but not strongly towards, admission") and at [274]–[275] per McGrath J.

653 At [274]. For a criticism of this reasoning, see 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 at 632–633.

654 At [73]. For criticism of this approach, see Chris Gallavin and Justin Wall "*Hamed*: section 30" [2012] NZLJ 116 at 117: "[t]he deliberate nature of police action is a consideration rightly confined to para (b) and having been considered there, ought not to bleed over to this or other paragraphs."

655 See for example *M v R* [2015] NZCA 101 at [37], [54] and [60].

656 See for example *R v R* [2016] NZCA 200 at [35]–[36], relying on *Kueh v R* [2013] NZCA 616 at [50] (leave to appeal declined in *Kueh v R* [2014] NZSC 15); *McGarrett v R* [2017] NZCA 204 at [38]; and *Robinson v R* [2017] NZCA 347 at [26].

657 See for example *R v Falala* [2013] NZHC 1686 at [47] (although see the observation of the Court of Appeal in *SF v R* [2014] NZCA 313 at [46]: "We broadly agree with Asher J that it cannot be a particularly significant factor against admission that the police did not apply for a search warrant … , although we would not go so far as to say it was necessarily a 'neutral' factor").

658 See for example *R v Falala (No 2)* [2013] NZHC 1737 at [25].

659 See for example *Asgedom v R* [2016] NZCA 334, (2016) 28 CRNZ 70 at [36]; and the majority in *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [68] (compare, however, the dissenting judgment of Elias CJ, who did not consider that unfair pressure to obtain a confession should be viewed as an "investigatory technique" for the purpose of s 30(3)(e): at [192]. See also similar observations by Elias CJ in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [346]). See also *T (CA438/2015) v R* [2016] NZCA 148 at [57] where the Court treated the absence of alternative techniques that were known to be available to the police as a factor that was "either neutral or supportive of the admission of the impugned evidence to a modest extent".

660 See for example *R v Kuru* [2015] NZCA 414, (2015) 27 CRNZ 777 at [46]; and *Birkinshaw v R* [2016] NZCA 220 at [32].

661 In particular, s 6(a)–(c) and (f).

7.43 Our provisional view is that the proper focus of section 30(3)(e) is whether Police, knowing that they could obtain evidence lawfully, nevertheless chose to obtain it using improper means. Where alternative techniques were known to be available, this should usually operate only as a factor favouring exclusion of the impugned evidence.[662]

7.44 As for cases where no alternative techniques were known to be available, we note that academic commentators have argued that it is difficult to see how this can ever operate as a factor that favours *admission*.[663] It has been suggested that section 30 "provides no justification for rewarding improper police investigative activity simply because there was nothing else authorities could do under the circumstances".[664] The better view may well be that section 30(3)(e) is simply a neutral factor (neither favouring admission or exclusion) in a case where no alternative techniques were known to be available.

Is a more prescriptive approach to section 30 required?

7.45 The issues discussed above illustrate the difficulties that can arise from having a broad-based test for determining the admissibility of improperly obtained evidence. Arguably section 30 provides insufficient guidance on how the section 30 test should be applied, particularly in relation to the interpretation and application of the relevant factors listed in subsection (3).

7.46 As we noted above,[665] this criticism of section 30 was raised during the Commission's 2013 review of the Act.[666] The Commission acknowledged that criticism, but ultimately did not express support for a more prescriptive approach. After noting that opinion was divided as to whether uncertainty in the application of section 30 was unavoidable or could be ameliorated through greater prescription,[667] the Commission expressed the view that the multi-faceted nature of the decision-making process under section 30 necessarily involved difficult questions of judgement that were not amenable to scientific precision.[668] The Commission emphasised that the section 30 balancing process is necessarily fact specific,[669] and also observed that "[t]he evaluative nature of the s 30 balancing process mean[t] that different judges may come to different conclusions on the same evidence."[670] The Commission concluded "a "degree of uncertainty" was implicit in the balancing approach.[671]

7.47 We welcome submitters' views on whether—in light of the continued uncertainty surrounding the application of section 30—the section ought to provide more prescriptive guidance as to its application. For example, should the section specify which factors in section 30(3) favour admission or exclusion? Should the section specify how the various factors are to be weighed relative to one

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662 See also 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 at 535 ("the proportionality-balancing exercise should not treat positively any police failure to act lawfully, even where that failure did not occur intentionally or in bad faith") and at 544; and Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA30.5(f)].

663 See for example Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 248; and 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 at 535.

664 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 at 536.

665 At paragraph [7.10].

666 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.6].

667 At [4.6].

668 At [4.17].

669 At [4.11].

670 At [4.10]. Recently, in *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [46], a majority of the Supreme Court stated that, although the s 30 test did not "[turn] on the exercise of a discretion", the section required "an evaluative assessment – necessarily open-textured but nonetheless not discretionary in nature – as to the appropriateness of the remedy proposed".

671 At [4.11].

another? Would the courts' interpretation of section 30 be assisted if the section expressly stated the policy underpinning the section 30 test (see paragraph [7.9] above)?

QUESTIONS

Q20 Should the centrality of the improperly obtained evidence to the prosecution's case be considered under section 30? If so, should it be considered as part of the assessment in section 30(3)(c) or as an independent factor in section 30(3)? Does section 30 need to be amended to clarify the position?

Q21 Is the "seriousness of the offence" assessment in section 30(3)(d) sufficiently comprehensible in light of the guidance provided in *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433? Would the assessment be easier to undertake if the guidance in *Underwood* was reflected in the Act? If so, should the Act:

a. define what is meant by "seriousness"?

b. explain when section 30(3)(d) favours exclusion or admission?

Q22 Should the availability of alternative techniques favour admission or exclusion (or both)? Does section 30 need to be amended to clarify the position?

Q23 Should the absence of alternative techniques have any bearing on the section 30(2) balancing exercise? If so, should this favour admission or exclusion (or both)? Does section 30 need to be amended to clarify the position?

Q24 Is a more prescriptive approach required in section 30? If so, how could this be achieved?

USE OF PREVIOUSLY EXCLUDED EVIDENCE IN A SUBSEQUENT PROCEEDING

7.48 In a 2011 decision, *JF v R*, the Court of Appeal stated that, as a matter of principle, there was no blanket prohibition on admitting evidence in a subsequent proceeding when it had been previously excluded in an earlier proceeding on the basis it was improperly obtained.[672] The Court said the Evidence Act required a "fresh" and "proceeding specific"[673] balancing assessment to be conducted under section 30 in each criminal proceeding in which the prosecution sought to offer improperly obtained evidence.[674]

7.49 Since the Commission conducted its 2013 review of the Act, the exact status of evidence that has been previously ruled inadmissible in an earlier proceeding on the basis it was improperly obtained

672 See *JF v R* [2011] NZCA 645 at [17]–[28], relying on *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [4] (where the Court held that evidence that resulted in an acquittal in a previous criminal proceeding is admissible as propensity evidence in a subsequent trial).

673 At [19]–[20].

674 At [20].

has been subject to some uncertainty.[675] In *Marwood v Commissioner of Police*,[676] the Supreme Court considered the following issues:[677]

- When determining the admissibility of such evidence in a subsequent proceeding under section 30(2), should the earlier exclusion be characterised as a "vindication of rights" favouring subsequent admission?
- Do the courts have the power to exclude such evidence in subsequent civil proceedings?

Relevance of earlier "vindication of rights"

7.50 The Court of Appeal in *JF* (sitting as a divisional court) held that evidence ruled inadmissible in respect of one proceeding could be admitted in a subsequent trial.[678] In the course of its judgment, the Court stated that, because the assessment is proceeding-specific, the fact the defendant had already received a remedy for the breach of his or her rights (by way of the earlier exclusion) was irrelevant and could not be taken into account as a factor favouring admissibility in the later proceeding.[679]

7.51 Shortly after the Commission completed its 2013 review of the Act, a similar issue arose before the Court of Appeal (this time sitting as a permanent court) in *Clark v R*.[680] This was an appeal against a pre-trial ruling admitting evidence that had been previously ruled inadmissible in an earlier proceeding against the defendant on the basis it was improperly obtained. The issue on appeal was whether, in conducting the balancing exercise under section 30(2), the court was entitled to take into account the fact that the defendant had already had the benefit of having the evidence excluded on the earlier occasion. The Crown invited the Court to revisit the approach that it had taken to that issue in *JF*.

7.52 The Court disagreed with the view expressed in *JF*.[681] The Court held the fact of the earlier exclusion was a relevant (although not conclusive)[682] factor to be taken into account under section 30(2), because section 30(3)(f) states that the court may, in conducting the balancing exercise, have regard to "whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant". The Court considered the earlier exclusion was capable of

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675 *R v G* [2017] NZCA 317 at [28].

676 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260.

677 We also note that, prior to the Supreme Court's decision in *R v A* [2017] NZSC 42, [2017] 1 NZLR 710, there was considerable uncertainty as to whether evidence that had been previously excluded on the basis it was improperly obtained could be relied on in a subsequent investigation leading to a criminal proceeding (in that case, by including that material in an application for a production order): see *R v Saggers* [2009] NZCA 164 and *R v A* [2015] NZCA 628. In *R v A*, the Supreme Court firmly rejected the proposition that such evidence could never be relied on by Police in a subsequent investigation. The Court instead confirmed that a determination of inadmissibility in one context did not necessarily render it inadmissible in all other contexts. Since then, the Court's approach towards the use of previously excluded evidence in subsequent investigations has been applied in *R v G* [2017] NZCA 317 at [24]–[27] and *R v R* [2017] NZCA 149 at [19]–[23]. We are satisfied that this area of law is no longer in a state of flux. For that reason, we do not discuss the issue further in this chapter. We also note the Court's judgment is subject to a suppression order until final disposition of the trial.

678 *JF v R* [2011] NZCA 645.

679 At [41].

680 *Clark v R* [2013] NZCA 143, (2013) 26 CRNZ 214.

681 The Court did, however, endorse the other aspects of the Court's judgment in *JF*. See at [22]: "We agree that the analysis under s 30 is proceeding-specific." The Court went on to say that the fresh assessment mandated by s 30 will include revisiting the earlier decision as to whether the evidence was improperly obtained. In most cases, the Court said, "it is likely that the second court's finding on that issue will be consistent with that of the first court": at [23]. As for the weighting of the various factors listed in s 30(3), that too was to be undertaken afresh (although it was also likely the findings would be consistent): at [25].

682 At [28]: "That is not to say that the earlier exclusion will be conclusive. It is simply a relevant factor, the weight to be attached to which will depend on the facts of the particular case."

being viewed as an "alternative remedy" within the meaning of those words.[683] The Court did not consider the fact that the assessment is proceeding-specific meant that a court was required to ignore the fact of the earlier exclusion.[684]

7.53 The issue later received some attention from the Supreme Court in *Marwood* (discussed further below at paragraphs [7.60]–[7.64]). The High Court, in considering whether evidence that had previously been excluded on the basis it was improperly obtained should be admitted in a subsequent (civil) proceeding, considered it was "wrong in principle" for the court to view the previous exclusion as a sufficient vindication of rights.[685] However, both the Court of Appeal[686] and the majority of the Supreme Court disagreed with this observation. The majority considered that a previous exclusion of evidence was relevant in considering its admissibility in subsequent proceedings.[687] Writing for the majority, William Young J said:[688]

> [The High Court] implied that the vindication of the breach of s 21 represented by [the exclusion of the evidence] is entirely irrelevant, a proposition which we do not accept. To take that vindication into account when determining whether further relief is appropriate … most certainly does not mean s 21 of the New Zealand Bill of Rights ceases "to have effect".

7.54 The Chief Justice took a different view. She considered that the question of admissibility in subsequent proceedings should be considered on its merits, without any preconception derived from the outcome in the earlier proceedings, whether it was to admit or exclude evidence.[689] She was "in substantial agreement" with the approach that had been taken in the High Court, "that the outcome in the criminal proceedings was, if not completely irrelevant, then of little significance".[690]

7.55 Since *Marwood*, the majority's approach to the previous vindication of rights in both of those cases has been applied by the Court of Appeal on two occasions.[691] We are interested in submitters' views on whether they agree with the approach that has been adopted.

7.56 We query whether an earlier exclusion of evidence should be characterised as a "vindication of rights" that weighs in favour of admission in a subsequent proceeding. This perhaps places undue primacy on the vindication of individual rights as the policy underpinning section 30. As we noted above,[692] the 'balancing' approach set out by the Court of Appeal in *Shaheed*[693] (which is the

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683 At [26]. The Court considered that this conclusion was "consistent with the Legislature's express concern for an effective and credible system of justice": at [27]. In that case, the Court considered the earlier exclusion of evidence was a significant alternative remedy, given that it ensured that Mr Clark never faced trial and so avoided the possibility of conviction and a prison sentence: at [26].

684 At [27] ("nothing in the wording of s 30 or its underlying policies mandates such a blanket approach"). For a critique of the Court's judgment in *Clark*, see "Evidence Act review" [2013] NZLJ 169; and Brendan Horsley "Once out, always out?" [2013] NZLJ 185.

685 *Commissioner of Police v Marwood* [2014] NZHC 1866 at [61]. The approach adopted by the High Court—in taking the position that admission would diminish the importance of the right vindicated in the criminal proceeding—has been described as a "rights-driven" approach: see Alexandra Franks "Admissibility of excluded evidence in later proceedings" [2016] NZLJ 386 at 389.

686 See *Commissioner of Police v Marwood* [2015] NZCA 609, [2016] NZLR 733 at [56]. See also at [57]: "[e]xclusion is the appropriate vindication of a breach of a NZBORA right. Mr Marwood has already enjoyed that vindication".

687 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [51]–[52] per William Young J (for himself, Glazebrook, Arnold and O'Regan JJ).

688 At [51].

689 At [67].

690 At [68]. The relevance of a previous vindication of rights was also briefly considered in a subsequent decision of the Supreme Court, *R v A* [2017] NZSC 42, [2017] 1 NZLR 710 at [87], n 113 and [97] (compare at [125]). As we noted in n 677 above, that judgment is subject to a suppression order until final disposition of the trial.

691 *R v G* [2017] NZCA 317 at [31]; and *R v R* [2017] NZCA 149 at [22]. See also *A v R* [2017] NZCA 555 at [22].

692 At paragraph [7.9].

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

basis for what is now section 30) reflected a deliberate shift away from the "vindication of rights" rationale that had underpinned the prima facie exclusionary rule. As we have already observed, by adopting a test that involved a balancing of interests, the Court was giving neither a "vindication of rights" (or "rights-centred") approach nor a "deterrence-centred" approach particular primacy and was focusing instead on a broad notion of the overall interests of justice in a criminal proceeding.[694]

Exclusion of improperly obtained evidence in civil proceedings

7.57 Section 30 of the Evidence Act applies only to criminal proceedings. As such, do the courts have an ability to exclude evidence in a subsequent *civil* proceeding that was excluded in an earlier criminal proceeding because it was improperly obtained?

7.58 The issue arose for the first time in *Marwood*.[695] There, the Supreme Court held that it was open to a judge to exclude evidence that had been obtained in breach of NZBORA in a subsequent civil proceeding. We summarise the Court's reasoning below.

7.59 It is important to note at the outset that the proceeding in *Marwood* was not a typical civil proceeding: it was a proceeding taken by way of law enforcement and with a public officer as plaintiff.[696] It is not entirely clear whether the Court in *Marwood* intended to recognise a power to exclude improperly obtained evidence in a *wider* class of civil proceedings.[697] We raise the question whether there should be a power to exclude improperly obtained evidence in both types of civil proceedings below.[698]

Marwood v Commissioner of Police

7.60 In 2014, in *Commissioner of Police v Marwood*,[699] the Commissioner of Police commenced civil proceedings under the Criminal Proceeds (Recovery) Act 2009, seeking profit forfeiture orders against Mr Marwood, his partner Ms King and a trust associated with them (the respondents).[700] The claim was addressed to benefits that were said to have accrued to the respondents as a result of significant criminal activity (a sophisticated cannabis growing operation), and was largely based on evidence that had been excluded in earlier criminal proceedings against Mr Marwood. The evidence had been obtained following a search of a residential address, which was held to have been unreasonable (in breach of section 21 of NZBORA).[701]

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694 See at [119] and [138] per Blanchard J.

695 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260. We note that in *Collis v Police* [2014] NZHC 3259 at [25], the High Court granted leave to appeal to the Court of Appeal on the following question of law: "If evidence has been ruled inadmissible in criminal proceedings because of the invalidity of a search warrant, can the Court have regard to such evidence in the course of civil proceedings seeking disposal of items seized during the search conducted in reliance on the invalid warrant?" However, despite leave being granted, the appeal did not proceed because Mr Collis' application for legal aid was declined.

696 Applications for civil forfeiture orders are made by the Commissioner of Police: Criminal Proceeds (Recovery) Act 2009, s 43.

697 The authors of *Adams on Criminal Law* suggest that it is possible the majority intended to recognise a power to exclude improperly obtained evidence in a wider class of civil proceedings, because the majority relied on s 11 of the Evidence Act and held that the powers of a court to provide remedies for both abuse of process and breach of the New Zealand Bill of Rights Act 1990 were within the "inherent and implied powers of a court" as referred to in s 11: see Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA30.02(1)]. See also n 720 and n 721 below.

698 See paragraph [7.69].

699 *Commissioner of Police v Marwood* [2014] NZHC 1866.

700 Section 10(1)(d) of the Criminal Proceeds (Recovery) Act states that proceedings relating to profit forfeiture orders are civil proceedings.

701 As a result of the exclusion of that evidence in the criminal proceeding, there was insufficient evidence for the Crown to proceed to trial and Mr Marwood was discharged on counts of cultivating and dealing in cannabis.

7.61 In the High Court, the respondents argued that the evidence obtained as a consequence of the search should be excluded in the civil proceeding. The Court was therefore required to consider whether it had jurisdiction to exclude, in a civil proceeding, evidence that had been improperly obtained. The Court held that it had jurisdiction to do so,[702] and based its reasoning on the combined effect of NZBORA and certain provisions of the Evidence Act.[703] The Court considered that, if a jurisdiction to exclude evidence that had been obtained in breach of NZBORA were exercised, the exclusion of the evidence would be exercised "under" NZBORA itself, as a remedy for a breach of its provisions.[704] The Court did not consider this gave rise to any inconsistency with the provisions of the Evidence Act, as section 7(1)(b) expressly contemplated the exclusion of evidence "under [the Evidence] Act or any other Act".[705] The Court also considered it was significant that the drafting of section 7 did not indicate that it was intended to oust any relevant provisions of NZBORA in the civil context.[706] In addition, the Court said its conclusion was consistent with sections 6 and 12 of the Evidence Act.[707]

7.62 The Court of Appeal reversed the decision. The Court's starting point was the fundamental principle in section 7 that all relevant evidence is admissible unless it has been excluded under the Evidence Act or any other Act.[708] The Court said that section 30 could not apply to exclude the evidence, as that provision only applied to criminal proceedings, and that limitation was deliberate.[709] Accordingly, the evidence was admissible unless, "properly construed, the NZBORA itself provides for exclusion".[710]

7.63 The Court went on to reject the view taken by the High Court that NZBORA itself prescribes or provides for the consequences of a breach of its provisions. The Court noted that the power to exclude evidence on the grounds of unfairness pre-dated NZBORA, and was grounded in the common law, not statute.[711] That same discretion remained after NZBORA's enactment, and—following the enactment of the Evidence Act—was now covered by section 30.[712] It followed that, when evidence was excluded due to being improperly obtained, it was not excluded under

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702 *Commissioner of Police v Marwood* [2014] NZHC 1866 at [34]. The Commissioner had conceded—in the High Court—that the Court had an inherent power to exclude the evidence. The High Court described the concession as one that was "properly and responsibly made": at [34]. That concession was later withdrawn in the subsequent appeals.

703 The Court also relied on a decision of the Court of Appeal, *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29, as an example of the courts' ability to supplement the exclusionary provisions of the Evidence Act where necessary to do justice in cases that are not directly covered by the Act: at [23]. In *Fan*, the Court had held that a court's general discretion to exclude evidence on fairness grounds had survived the enactment of s 30. That decision has been subject to considerable criticism: see for example Don Mathieson "Fair Criminal Trial and the Exclusion of 'Unfair Evidence'" (2013) 25 NZULR 739; Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 239–241; and Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [2.49] and [2.65]–[2.66]. See also *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [502], n 622 per Glazebrook J.

704 *Commissioner of Police v Marwood* [2014] NZHC 1866 at [32].

705 At [32].

706 At [29].

707 Because s 6 describes the purpose of the Act as providing for, among other things, rules of evidence that "recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990": at [30]. As for s 12, the Court noted that this provision deals with cases for which 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 …". The Court considered that confirming the existence of a discretion to exclude evidence that had been obtained in breach of the New Zealand Bill of Rights Act would be in accordance with s 12 on the basis that "s 30 has dealt with the admission of improperly obtained evidence only in part": at [31].

708 *Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733 at [30].

709 At [36].

710 At [32].

711 At [33].

712 At [33].

NZBORA but was instead excluded under section 30.[713] The Court concluded that the admissibility of evidence in civil proceedings was therefore expressly governed by sections 7 and 8 of the Act.[714]

7.64 The Supreme Court disagreed with the Court of Appeal.[715] It held unanimously that there was jurisdiction to exclude the evidence.[716] The Court considered that, prior to the enactment of the Evidence Act, it would have been open to a judge to exclude evidence obtained in breach of NZBORA in proceedings "akin to the present (that is by way of law enforcement and with a public officer as a plaintiff)".[717] The Court said that such exclusion would have been by way of remedy for a breach of NZBORA and that the evidence could be said to have been excluded "under" NZBORA.[718] It followed that, for the same reasons as the High Court, exclusion of evidence obtained in breach of NZBORA in a civil proceeding was not inconsistent with the fundamental principle in section 7 that relevant evidence is admissible.[719] The Court also considered that section 11 of the Act[720] provided support for this approach, on the basis that the powers of a court to provide remedies for both abuse of process and breach of NZBORA were within the "inherent and implied powers of a court".[721]

Discussion

7.65 The Supreme Court's conclusion that exclusion of evidence obtained in breach of NZBORA is a remedy that is available "under" NZBORA itself has attracted some criticism. The authors of *Cross on Evidence* suggest that:[722]

> The Court's approach is not without difficulty. While linguistically one can refer to evidence excluded "under" the Bill of Rights Act, that Act has no remedies clause.[723] And, the exclusion of evidence for an infringement of that Act is a common law remedy – a point much emphasised by a Full Court of the Court of Appeal in *R v Shaheed* in abandoning the *prima facie* exclusionary rule in favour of a balancing test, in turn adopted as s 30 of the

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713 At [34]. The Court also held that the position it reached was consistent with that at common law, where the manner in which evidence is obtained does not bar its admission at trial: at [44].

714 At [36]. For that reason, the Court did not consider it was necessary to invoke the New Zealand Bill of Rights Act 1990 to fill a lacuna of the type envisaged by s 12: at [36].

715 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260.

716 At [38] per William Young J (for himself, Glazebrook, Arnold and O'Regan JJ); and at [60] per Elias CJ. The Court ultimately concluded, however, that exclusion of the evidence would not be proportionate to the breach of rights involved: at [50] per William Young J; and at [70]–[71] per Elias CJ.

717 At [35] per William Young J; and at [58]–[59] per Elias CJ.

718 At [35] per William Young J; and at [61] per Elias CJ.

719 At [35] per William Young J; and at [61] per Elias CJ.

720 Section 11(1) of the Evidence Act provides that "[t]he inherent and implied powers of a court are not affected by this Act, except to the extent that this Act provides otherwise."

721 At [37] per William Young J; and at [60] per Elias CJ.

722 Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA7.5]. See also Scott Optican "Case Note: Every Silver Lining Has a Cloud – The Exclusion of Improperly Obtained Evidence in Civil Proceedings: *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260" [2017] NZCLR 228 at 240; and Pheroze Jagose "Capital Letter: Supreme Court finds Bill of Rights Act breaches reach into civil cases" *The National Business Review* (online ed, 2 November 2016), who describes the Supreme Court's conclusion as "bold", given that remedies for breaches of the New Zealand Bill of Rights Act 1990 are "expressly a public law remedy, on which the [Act] itself is silent (and its draft remedies provision was not enacted)".

723 In contrast, the Canadian Charter of Rights and Freedoms 1982 contains a general remedies clause (s 24(1)) and also specifically provides for the exclusion of evidence obtained in breach of the Charter (s 24(2)). The White Paper on the proposed New Zealand Bill of Rights Act did contain a general remedies clause, closely modelled on s 24(1) of the Canadian Charter (Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6, art 25), but did not feature in the New Zealand Bill of Rights Bill 1989 as introduced. The precise reason for the withdrawal of an explicit remedies provision from the Act has not been identified: see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [26.5.1].

Evidence Act. Furthermore, the Law Commission specifically intended its evidence code would *not* operate to exclude improperly obtained evidence in the civil jurisdiction.

7.66 We also query whether the exclusion of evidence obtained in breach of NZBORA is a remedy that is available "under" NZBORA itself. That conclusion seems to suggest that NZBORA is an independent source of remedial authority (with the consequence that courts could grant remedies that they do not *already* possess as part of their jurisdiction). With perhaps the exception of the creation of *Baigent* damages,[724] we are not sure that the courts have approached the provision of remedies for breaches of NZBORA in this way.[725] The courts have tended to develop existing common law (and statutory) remedial powers,[726] rather than treating NZBORA as the source of a unique jurisdiction to provide remedies.

7.67 Our tentative view is that the courts' approach to the exclusion of evidence obtained in breach of NZBORA following the enactment of that Act (but prior to the enactment of the Evidence Act) is better characterised as a development of the pre-existing common law jurisdiction to exclude improperly obtained evidence. On that basis, any continuing ability for the courts to exclude such evidence in civil proceedings following the enactment of the Evidence Act would depend on whether the common law discretion survived the enactment of the Act.[727] As to that, we note that the Law Commission had intended to codify the law of evidence in its 1999 report;[728] and, in its commentary on what is now section 30, had envisaged that improperly obtained evidence would be "admissible in civil proceedings, subject to relevance and the general exclusion in s 8".[729] Against that background, it is arguable that a common law discretion to exclude improperly obtained evidence in civil proceedings was not intended to survive the enactment of the Act.[730]

7.68 At the same time, however, we acknowledge it may be contrary to the public interest for courts to be unable to exclude evidence that has been obtained due to police impropriety, even though personal liberty is not at stake (through the risk of conviction and imprisonment). Such an approach would arguably place insufficient value on the rights and freedoms protected by NZBORA.[731] We

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724 The Court of Appeal established that compensation is available as a public law remedy for an unjustified infringement of the New Zealand Bill of Rights Act in *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA) (Gault J dissenting).

725 No case has really examined that issue, but "[t]here are enough indications in the case law … to support the proposition that a court can only remedy a BORA breach using those remedies and procedures that it otherwise enjoys": Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [26.9.2].

726 For example, we note that a full bench of the Court of Appeal recently considered the issue of whether the higher courts of New Zealand have jurisdiction to make a formal declaration that an enactment is inconsistent with the New Zealand Bill of Rights Act 1990: *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 (leave to appeal to the Supreme Court has been granted, although the appeal has not yet been determined: *Attorney-General v Taylor* [2017] NZSC 131). The Court held that there was such a jurisdiction. In the course of doing so, the Court considered whether the Act itself confers jurisdiction to make declarations of inconsistency: at [70]–[109]. The Court concluded that the jurisdiction to make a declaration "*finds its source in the common law jurisdiction* of the higher courts to answer questions of law, which extends to incompatibility between legislation and a protected right", and was confirmed in the New Zealand Bill of Rights Act: at [109] (emphasis added). We note the Government has recently announced its intention to amend the New Zealand Bill of Rights Act to provide a statutory power for the senior courts to make declarations of inconsistency under the Act: <http://www.labour.org.nz/government_to_provide_greater_protection_of_rights_under_the_nz_bill_of_rights_act_1990>.

727 We also note that the existence of a pre-existing common law jurisdiction to exclude improperly obtained evidence in civil proceedings has been questioned: see the discussion in Scott Optican "Case Note: Every Silver Lining Has a Cloud – The Exclusion of Improperly Obtained Evidence in Civil Proceedings: *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260" [2017] NZCLR 228 at 236–237.

728 See Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [8]–[10].

729 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C152].

730 See also the observations in Scott Optican "Case Note: Every Silver Lining Has a Cloud – The Exclusion of Improperly Obtained Evidence in Civil Proceedings: *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260" [2017] NZCLR 228 at 238–239.

731 In this context, s 6(b) of the Evidence Act is particularly relevant – it provides that the purpose of the Act is to help secure the just determination of proceedings by "providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990".

are therefore interested in submitters' views on whether the Evidence Act should now be amended to contain an express provision dealing with the admissibility of improperly obtained evidence in civil proceedings.

7.69 If so, we are interested in submitters' views on whether the Act should recognise a power to exclude improperly obtained evidence in *all* civil proceedings, or only civil proceedings of a criminal nature (that is, proceedings taken by way of law enforcement and with a public officer as plaintiff).[732] As we noted above,[733] arguably the Court in *Marwood* only intended to recognise such a power in the latter class of proceedings.[734] Should an ordinary civil litigant be entitled to use the fruit of a flawed criminal investigation in civil proceedings against another party? Is it likely that a civil litigant would ever have in their possession improperly obtained evidence from a previous criminal proceeding?

7.70 We are also interested in submitters' views on whether admissibility in civil proceedings should be determined by way of a balancing process (akin to section 30), and whether any of the factors listed in section 30(3) ought to be applied by analogy. We note that in *Marwood*, the Supreme Court appeared to approve a proportionality-balancing test;[735] and that Elias CJ, in conducting that exercise, assessed the seriousness of the right breached (subsection (3)(a)),[736] the nature of the impropriety (subsection (3)(b))[737] and the nature and quality of the evidence (subsection (3)(c)).[738]

QUESTIONS

Q25 When courts determine the admissibility of evidence that has been previously excluded on the basis it was improperly obtained, should the earlier exclusion be treated as a relevant factor (favouring admission) in the section 30(2) balancing exercise? If so, should the earlier exclusion be viewed as an "alternative remedy" within the meaning of section 30(3)(f)?

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732 For another example of a civil proceeding falling within this latter category, see *Collis v Police* [2014] NZHC 1553. In that case, Mr Collis had successfully challenged the validity of a search warrant in which items associated with cannabis cultivation had been seized. The evidence gathered in the course of executing the warrant was ruled inadmissible in criminal proceedings brought in reliance on it, and the criminal charges were subsequently dropped. Mr Collis then sought the return of the items seized. Police refused to return the property and applied for an order that the District Court direct how Police should dispose of the items under s 199 of the Summary Proceedings Act 1957 (now see s 163 of the Search and Surveillance Act 2012). The District Court concluded the items should be disposed of by Police. On appeal to the High Court, the Court was required to assess the use of the excluded evidence for the purposes of subsequent civil proceedings. The High Court upheld the District Court's order (leave to appeal the High Court's decision on a question of law was granted in *Collis v Police* [2014] NZHC 3259 but, as noted in n 695 above, the appeal did not proceed.)

733 At paragraph [7.59].

734 It has also been suggested that the Court's conclusion was limited to situations where the evidence obtained in breach of the New Zealand Bill of Rights Act 1990 is to be adduced by the public officer or entity that perpetrated the breach: see Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EA30.2(a)].

735 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [50] per William Young J ("[t]he real question is whether relief by way of exclusion of evidence is proportionate to the breach of rights"); and at [64] per Elias CJ.

736 At [73]: "It is true that the warrant was executed at a home, but there was no suggestion of any incursion of privacy beyond that circumstance."

737 At [70]:"The error made by the police was in a judgment as to sufficiency of information, rather than any conscious evasion of the statutory criterion"; and [71]:"the sloppiness was not of a high level of seriousness". See also at [50] per William Young J.

738 At [72]:"it is relevant too that the important information obtained was real evidence".

Q26 Should the Act be amended to contain an express provision dealing with the admissibility of improperly obtained evidence in:

a. civil proceedings taken by way of law enforcement with a public officer as plaintiff?

b. civil proceedings more generally?

If so, should admissibility be determined by way of a balancing test, as in section 30(2)? Should any of the factors listed in section 30(3) apply by analogy?

ADDRESSING CONCERNS ASSOCIATED WITH EVIDENCE GATHERED DURING UNDERCOVER OPERATIONS

Should the Practice Note on Police Questioning apply to undercover officers?

7.71 Police questioning is governed by the Chief Justice's Practice Note on Police Questioning, which was issued under section 30(6) of the Act in July 2007.[739] Section 30(6) of the Evidence Act requires a judge to take into account guidelines set out in the Practice Note when determining whether evidence has been obtained "unfairly" (and therefore improperly obtained) for the purposes of section 30(5)(c).[740]

7.72 One of the main features of the Practice Note is that it advances the protection of individuals' rights by requiring Police to provide advice to a person in custody, or in respect of whom there is sufficient evidence to lay a charge, relating to the right to silence and the right to consult and instruct a lawyer without delay.[741] It also prevents the questioning of a person in custody or in respect of whom there is sufficient evidence to lay a charge that amounts to cross-examination.[742]

7.73 In *R v Wichman*[743] there was disagreement among the judges of the Supreme Court as to whether the Practice Note applies to undercover police officers. As we explained in Chapter 6, at issue in

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739 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297. Prior to the Practice Note, Judges' Rules that were adopted in the United Kingdom in 1912 applied in New Zealand and provided similar guidance. The judicial analysis of the Judges' Rules may still offer guidance on the interpretation and application of the Practice Note, although recently in *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 the Supreme Court considered there is still some question as to the extent to which decisions under the old Judges' Rules continue to apply or offer value to decisions under the Practice Note.

740 In *Richards v R* [2014] NZCA 520, the Court of Appeal confirmed that the Practice Note was not an enactment, and was accordingly only relevant to s 30(5)(c) of the Evidence Act. A breach of the Practice Note will not necessarily result in a finding of unfairness. Nor is a breach of the Practice Note required in order for evidence to have been obtained unfairly under s 30(5)(c). For example, in *Stevenson v R* [2012] NZCA 189, (2012) 25 CRNZ 755, the Court of Appeal confirmed that where police conduct amounts to entrapment, evidence obtained as a result of that conduct is obtained unfairly and liable to be excluded.

741 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297, r 2. These rights are also protected under ss 23(1)(b) and 23(4) of the New Zealand Bill of Rights Act 1990.

742 Rule 3. The current Practice Note is set out in full in Appendix 3.

743 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753. The issue had been raised in an earlier decision in 2015, *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204, but did not receive much attention in that case because the principal ground for exclusion that was put forward by the defendant was based on a breach of the New Zealand Bill of Rights Act 1990 (NZBORA). In that case, two police officers had posed as the defendant's cellmates and obtained incriminating statements from him following his arrest for a murder. The Supreme Court unanimously held that the statements had been obtained in breach of the right to refrain from making a statement in s 23(4) of NZBORA and should be excluded under s 30 of the Evidence Act. Because the majority found that the statements were obtained in breach of NZBORA, it did not consider it necessary to address the question of whether the Practice Note applied to undercover officers: at [71]. The Chief Justice, however, considered it was arguable that the Practice Note applied: at [83], [88] and [142]–[143]. (In determining that s 23(4) had been breached, the majority adopted the test of whether the undercover officer "actively elicited" information or "prompted, coaxed or cajoled" the suspect such that the questioning amounted to the "functional equivalent of an interrogation": at [43(c)] per Arnold J (for himself, William Young, Glazebrook and O'Regan JJ). Elias CJ agreed with the result but took a different approach to when

Wichman was the admissibility of evidence arising out of a "Mr Big" undercover police operation, in which the target admitted to shaking his infant daughter causing her death.[744]

7.74 In *Wichman* the majority set out the different approaches that could be taken to the issue of the Practice Note's application to undercover operations:[745]

> There are a number of ways of looking at this. One view is that the use of the Mr Big technique is an improper avoidance of the rules which govern police interrogation and objectionable on that score. We will refer to this as the "strict avoidance" approach. … Another view is that rules which govern the way police officers, acting as such, question suspects have no logical application, even indirect, to interactions between undercover police officers and suspects. We will describe this as "the irrelevance of the Practice Note" approach. There is also scope for views which lie somewhere in the middle.

7.75 The majority held the Practice Note has no direct application to the conduct of undercover police officers.[746] The majority said that, if it did, this would "have the potential to affect materially the way that undercover police officers engage with suspects and … would make it improbable that the police would launch further Mr Big operations".[747] The majority considered it was unrealistic to expect a police officer who assumes the role of Mr Big to caution a suspect at the moment admissions start to be made, and emphasised that "[o]nce a Mr Big operation has been legitimately launched, it can be expected to take on a dynamic of its own."[748]

7.76 In reaching that conclusion, the majority rejected a "strict avoidance" approach. It did not consider a Mr Big operation was objectionable merely because it would—unless terminated early—culminate in an interview that would involve interrogation without caution.[749] The majority did not subscribe to what it described as "the irrelevance of the Practice Note approach" either.[750] The majority accepted that there could be some circumstances where an undercover operation would amount to an improper circumvention of constraints on police interrogation because of how it was carried out.[751]

7.77 Both Glazebrook J and Elias CJ—in separate dissenting judgments—concluded that the Practice Note did apply to undercover police officers.[752] Glazebrook J considered that this conclusion was clear from the wording of the Practice Note,[753] was necessary to uphold the fundamental values of

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s 23(4) would be breached. She considered the undercover officers could only have avoided breaching s 23(4) if they had been purely "passive observers": at [125].)

744 See paragraph [6.20] above. The "Mr Big" technique, which originated in Canada but has been used by Police in New Zealand, generally involves undercover officers setting up a bogus criminal organisation, recruiting the target and gaining their trust by involving them in a series of apparently criminal acts in exchange for payment. This may occur over a period of some months. The operation then culminates in an interview with "Mr Big"—the head of the organisation—for the ostensible purpose of the target gaining full admission to the group. During the meeting, Mr Big tells the target that, in order to join the group, they must be completely honest about their past and promises that any problems associated with prior offending (such as prosecution) will be made to disappear.

745 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [108] per William Young J (for himself, Arnold and O'Regan JJ).

746 At [91]–[116].

747 At [101].

748 At [115(b)].

749 At [112].

750 At [112].

751 The example given by the majority was if, instead of arresting a defendant, Police released him on the basis he was likely to be arrested the next day, and overnight undercover police officers had interrogated him. The majority considered such conduct would be very likely to be held unfair. See at [114]. In the present case, the majority did not consider that the Mr Big operation involved an improper circumvention of constraints on police interrogation of suspects: at [115].

752 At [333] per Elias CJ and at [473]–[491] per Glazebrook J.

753 This was because the Practice Note states that it applies to Police, and a police officer remains a member of Police whether acting undercover or not: at [474].

the criminal justice system,[754] and was consistent with the approach taken in overseas jurisdictions.[755] She did not think that undercover operations would be unduly limited by the application of the Practice Note to such activities:[756]

> [W]here there is not a functional equivalent of an interrogation, there is no need to caution and any admission would not be unfairly obtained, at least on the grounds of breach of the Practice Note. Normal undercover operations, unlike the operation in this case, are not designed with a view to eliciting a confession through conducting what is effectively a police interview. Normal undercover operations are designed to gather evidence of wrongdoing. I thus do not consider that normal undercover operations will be unduly affected.

7.78 The Chief Justice agreed with the reasons given by Glazebrook J.[757] She also went on to observe that, if the views she expressed meant that Mr Big scenarios could not be undertaken, this was "the price of observance of fair process".[758] She noted that there was much in an undercover operation that was unexceptional and could properly be deployed in a police investigation. It was its "culmination in an interrogation without procedural safeguards against the background of a reality constructed by state deception" that she considered to be unacceptable.[759]

7.79 We note that the question of the Practice Note's applicability to undercover police officers raises a wider question about the legitimacy of undercover operations, and whether they require greater prospective regulation.[760] It is not within the scope of our terms of reference to consider that issue. That issue was instead expressly considered by the Law Commission and the Ministry of Justice in their recent joint review of the Search and Surveillance Act 2012, which was tabled in January 2018 and is currently awaiting a government response.

7.80 In their report, *Review of the Search and Surveillance Act 2012 – Ko te Arotake i te Search and Surveillance Act 2012*,[761] the Commission and the Ministry recommended the 2012 Act be amended to include a regime to regulate "covert"[762] operations.[763] The intention was to place prospective constraints on the circumstances and manner in which such operations can be conducted and to

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754 At [476]:"It would be most unsatisfactory if the fundamental protections in the Practice Note could be undermined by a police officer removing his or her uniform and pretending not to be a police officer." See also at [489]: "The fundamental protections enshrined in law … guard against the risk of wrongful conviction and abuse of criminal process. Those rights and protections should not be rendered nugatory through police deception."

755 At [477].

756 At [488]. She also considered that, even if undercover operations *would* be adversely affected, this was a function of the Practice Note and "the choice made as to the time at which rights with regard to cautions arise: in New Zealand when there is sufficient evidence to charge a person": at [489].

757 At [145] and [333]. She said at [333] that this accorded with the view she had tentatively expressed in *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204.

758 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [348].

759 At [348].

760 See the observations in Scott Optican "*Wilson*, *Kumar* and *Wichman*: An Examination, Analysis and Discussion of Undercover Police Scenario Cases in the Supreme Court" [2017] NZ L Rev 399 at 434; and in Bernard Robertson "Evidence" [2016] NZLJ 64 at 65.

761 Law Commission and Ministry of Justice *Review of the Search and Surveillance Act 2012 – Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2017).

762 The Commission and Ministry used the term "covert operations" instead of "undercover operations" to refer broadly to operations in which an enforcement officer or another person acting at the direction of an enforcement agency establishes, maintains or uses a relationship with any other person for the covert purpose of obtaining information or providing another person with access to information: see at [15.1] and 294, R55.

763 This recommendation was prompted, to some extent, by the majority's observation in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [127] that "[t]he case by case approach" the courts were required to take in relation to the appropriateness of particular police practices was "not well-suited to the establishment of general guidelines as to the circumstances in which a particular investigatory technique is deployed", and that "there may be some sense in devising a system (perhaps involving the courts) under which criteria for the deployment of such techniques are developed and perhaps for some form of supervision (perhaps in the form of a warrant process) to ensure that such considerations are properly weighed".

promote transparency and accountability around their use. At the same time, the Commission and the Ministry did not intend to prevent or discourage enforcement agencies from carrying out covert operations – they explained that their proposals were intended to "recognise that it is in the public interest that enforcement agencies be able to use covert operations, provided that use is subject to defined limits".[764]

7.81 The main features of the proposed regime included: a warrant regime, permitting enforcement officers to apply for a warrant issued by an independent officer to conduct a covert operation;[765] a requirement for agencies that conduct covert operations to publish a policy statement, providing guidance on the circumstances and manner in which such operations were to be conducted;[766] and an external auditing process.[767] The Commission and the Ministry did not specifically consider how undercover officers should conduct their questioning of suspects.[768]

7.82 Our provisional view is that it is difficult to see how the procedures contemplated by the Practice Note could be carried out during an undercover operation without exposing the subterfuge (and potentially endangering the safety of the undercover officers involved).[769] In light of our recent endorsement of the legitimacy of undercover operations in our review of the Search and Surveillance Act, we are hesitant to recommend any amendments that could materially hinder the way that such operations are conducted. At the same time, however, we are interested in submitters' views on whether there is room for any procedural constraints to be placed on the questioning of suspects in the undercover context without unduly compromising this investigative technique.

Other options for addressing concerns

7.83 Although it may be difficult to address the concern that undercover operations have the potential to undermine the rights protected by the Practice Note (particularly the right to refrain from making a statement),[770] there may be options for addressing other concerns associated with evidence gathered during undercover operations that are designed to secure incriminating statements[771] and/or involve recruiting the target into a fictitious criminal organisation. (Both of these features are present in "Mr Big" operations,[772] but are not necessarily features of other undercover operations.)

7.84 First, undercover operations aimed at securing incriminating statements may give rise to concerns about reliability.[773] Undercover officers may exert pressure on a target to disclose information – for

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764 At [15.87].

765 At 295, R54. The Commission and Ministry suggested that the independent issuing officer could be either a High Court judge or a commissioner appointed under the Search and Surveillance Act.

766 At 297, R60.

767 At 299, R61. The Commission and Ministry also recommended that the Search and Surveillance Act 2012 should include a regime for enforcement agencies to obtain assumed identity documents (for example, passports under false names) for use by undercover officers, and more comprehensive immunities from prosecution for enforcement officers acting under a covert operations warrant: at 14.

768 However, they did observe that covert operations should ideally be conducted in accordance with the following principles: evidence must be obtained in a manner that preserves the integrity of the criminal justice system and its actors; statutory rights of the suspect should not be breached expect where the rights are qualified, breach is necessary, and there is statutory authority to do so; the rights and privacy of those citizens not suspected of criminal conduct must be protected; the professional integrity of investigators must be demonstrated; and covert operations should be carried out in a manner that minimises the risk of obtaining unreliable evidence, such as false confessions: see at [15.83]–[15.84].

769 See similar observations in Scott Optican "*Wilson*, *Kumar* and *Wichman*: An Examination, Analysis and Discussion of Undercover Police Scenario Cases in the Supreme Court" [2017] NZ L Rev 399 at 450–452.

770 For the reasons set out in paragraph [7.82] above.

771 For example, by seeking to obtain a confession in relation to a crime that has already occurred.

772 The main features of the Mr Big technique are set out in n 744 above.

773 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [20]; *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [68]–[69].

example, the target may be offered financial incentives to join or remain in a criminal group,[774] and/or promised that if they admit to offending they will not be prosecuted.[775] The majority in *Wichman* observed that inducements of this kind create a real possibility of a false confession:[776]

> Inherent in a Mr Big operation is putting the suspect under pressure to confess in a context in which the suspect is led to believe that such a confession will bring about the benefits associated with membership of the organisation without resulting in adverse consequences. It is not inconceivable that an innocent target of a Mr Big operation might be induced to make a false confession. It is possible that, at least in some circumstances, the risk of a confession obtained from this sort of operation being false may be as great – if not greater – than the corresponding risk associated with a confession obtained during a custodial interrogation. The fact that a suspect is not in custody and does not perceive the questioner as having the coercive power of the state at their disposal is not a complete answer to concerns as to reliability. Nor does the fact that the technique relies on psychological rather than physical pressure mean that such pressure could not, in the right circumstances, be seen as coercive. We are very aware of this risk. As we have pointed out, there are examples from Canada that suggest that it has crystallised on occasion.

7.85 The concern that arises in relation to undercover operations that involve recruiting the target into a fictitious criminal organisation is the prejudicial effect of a jury being told about the target's willingness to engage in criminal activity.[777]

7.86 In 2014, a majority of the Supreme Court of Canada in *R v Hart* took the view that the existing law did not adequately address concerns about reliability and prejudice (as well as concerns about police misconduct) that arise "[w]here the state recruits an accused into a fictitious criminal organi[s]ation of its own making and seeks to elicit a confession from him".[778] The majority therefore adopted a rule under which any confession made by the accused to the state during the operation would be presumptively inadmissible, unless the Crown could establish on the balance of probabilities that the probative value of the confession outweighed its prejudicial effect.[779] Highly relevant to this issue is the reliability of the confession.[780] The majority also adopted a "more robust" conception of the doctrine of abuse of process.[781]

7.87 In *Wichman*, the majority observed that the Canadian approach was "not far removed from the position which obtains by reason of ss 28 and 8 of the Evidence Act".[782] The majority said:[783]

> Save in cases in which no practical issue as to reliability arises,[784] a defendant challenging a Mr Big confession should be able to satisfy the s 28(1) threshold with the result that the confession will only be admitted if the judge is satisfied on the balance of probabilities that the circumstances in which the admission was made did not adversely affect its reliability.

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774 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [157] and *L v R* [2017] NZCA 245 at [55] (although the Court of Appeal in *L v R* did not consider the inducements offered in that case were significant: at [60]).

775 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [158] and *L v R* [2017] NZCA 245 at [24].

776 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [74].

777 At [21]; and *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [73].

778 *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [85] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ. See also at [67]–[80].

779 At [85] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ. Cromwell J agreed with this approach: at [152].

780 At [10] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ.

781 At [84] per McLachlin CJ, LeBel, Abella, Moldaver and Wagner JJ. See also at [86]. Cromwell J agreed with this approach: at [152].

782 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [129].

783 At [129].

784 For instance, because the defendant took police officers to the previously undiscovered remains of a murder victim.

> As well, although the burden of proof is the other way round, the test under s 8 of the Evidence Act is also very similar to that adopted in *Hart*.

7.88 The majority considered the concerns about reliability and unfair prejudice were adequately addressed by the Evidence Act.[785]

7.89 We are interested in submitters' views on whether the Act sufficiently addresses the concerns about reliability and unfair prejudice that arise in relation to undercover operations designed to secure incriminating statements and/or involve recruiting the target into a fictitious criminal organisation (in particular, Mr Big operations). Do sections 28 and 8 provide sufficient safeguards, or are additional mechanisms needed?

7.90 It has been suggested, for example, that the Act could include "a more targeted, specific or guided judicial power to exclude various kinds of evidence generated by scenario activities than currently exists under the generic provisions of ss 28–30 of the Evidence Act".[786] One way of achieving this could be to create a bespoke reliability rule for Mr Big-like undercover operations, which requires the judge to consider the following matters when assessing the reliability of the confession:

- the length and scale of the undercover operation;
- the inducements offered to the target and the pressures to confess;[787] and
- whether any personal characteristics of the target made him or her particularly vulnerable to the undercover operations.[788]

7.91 Tailored jury instructions could also address some of the above concerns.[789] For example, in *Wichman*, Glazebrook J observed:[790]

> I consider that, as well as a direction on not misusing the evidence of fake criminal offending, there should also be a direction pointing out that there have been documented cases where there have been false confessions which have led to miscarriages of justice and that studies have shown people can rely too heavily on a confession even when there may be circumstances suggesting possible unreliability. The jury should be told to consider carefully whether they can rely on the confession in this case in light of the factors outlined by the defence.

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785 At [130].

786 Scott Optican "*Wilson*, *Kumar* and *Wichman*: An Examination, Analysis and Discussion of Undercover Police Scenario Cases in the Supreme Court" [2017] NZ L Rev 399 at 461.

787 See for example in *R v Mack* 2014 SCC 58, [2014] 3 SCR 3 at [33] and [36].

788 See for example *M v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [67]; and *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [444] per Glazebrook J.

789 This would be consistent with section 6(b)–(d) of the Act. See also Scott Optican "*Wilson*, *Kumar* and *Wichman*: An Examination, Analysis and Discussion of Undercover Police Scenario Cases in the Supreme Court" [2017] NZ L Rev 399 at 463–464.

790 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [533]. She included some suggested directions in an Appendix to her judgment, which drew on suggestions made by a Canadian academic: see HA Kaiser "*Mack*: Mr Big Receives an Undeserved Reprieve, Recommended Jury Instructions Are Too Weak" (2014) 13 CR (7th) 251.

QUESTIONS

Q27 Should the Practice Note on Police Questioning (or aspects of it) apply to undercover police officers when they are engaged in the questioning of suspects? If so, how could the rules apply to them without unduly compromising the effectiveness of the undercover operation or the safety of the officers?

Q28 Do sections 28 and 8 adequately address concerns about reliability and unfair prejudice that can arise in relation to undercover operations designed to secure incriminating statements and/or involve recruiting the target into a fictitious criminal organisation? If not, should the Act be amended to address these concerns? How could this be achieved?

CHAPTER 8

Identification evidence

IN THIS CHAPTER, WE CONSIDER:

- whether the definition of "visual identification evidence" should be amended; and
- whether the relationship between the identification evidence and hearsay provisions in the Act requires clarification.

BACKGROUND

8.1 The identification evidence provisions in the Evidence Act were based on a growing body of scientific research in the 1990s indicating that identification evidence is not as reliable as commonly believed, and that juries often have difficulty assessing it. Studies suggested that many jurors appear to believe eyewitnesses too readily, have problems distinguishing between accurate and inaccurate eyewitnesses, and that the assumptions people make about reliability (such as witness confidence and an ability to recall peripheral details) are not necessarily correct.[791]

8.2 The provisions in the Act are intended to ensure that only reliable identification evidence is admitted. Section 45 controls the admissibility of visual identification evidence[792] in criminal proceedings.[793] The term "visual identification evidence" is defined in section 4:

> **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)

791 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [199]. In 1999, the Law Commission published a miscellaneous paper on eyewitness identification alongside its publications on its proposed Evidence Code: *Evidence: Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999). This paper summarised the findings of the most up-to-date psychological research in the area of eyewitness identification, and noted that a study of post-1990 wrongful convictions in the United States had shown eyewitness misidentification to be a factor in 52 per cent of the cases (at [28]).

792 We have not addressed the admissibility of voice identification—governed by s 46 and defined in s 4—in this chapter as we are not aware of any operational difficulties that have arisen in relation to those provisions.

793 Visual identification evidence is a species of opinion evidence (*Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [15]) because the witness is offering an opinion that the defendant was the person the witness saw in the relevant circumstances. As such, the provisions of the Evidence Act relating to opinion evidence apply in addition to s 45: *K v Police* [2017] NZCA 430 at [40]. Section 23 provides that a statement of opinion is inadmissible in a proceeding, except as provided by ss 24 and 25. Section 24 permits a witness to state an opinion in evidence if that opinion is necessary to communicate what the witness saw or perceived. In *K v Police*, the Court noted that most visual identification evidence will pass the requirements of s 24; however, where the person giving the evidence as to identification is purporting to do so as an *expert*, s 25 applies and the opinion will only be admissible if it is "substantially helpful": see at [41].

8.3 Under section 45, visual identification evidence obtained by way of a formal procedure followed by officers of an enforcement agency will be admissible in a criminal proceeding, unless the defendant proves on the balance of probabilities that it is unreliable.[794] The requirements for a formal procedure are outlined in section 45(3).[795]

8.4 If no formal procedure is followed, the visual identification evidence will be inadmissible unless there was a good reason for not following a formal procedure, or the prosecution can prove beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.[796] Section 45(4) sets out a number of circumstances that constitute "good reasons" for not following a formal procedure.[797] Section 45 relevantly provides:

> **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—[798]
>
> (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 suspect is compared to no fewer than 7 other persons who are similar in appearance to the suspect; 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 suspect; and
>
> (d) in which the person making the identification is informed that the suspect 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

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794 See Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [201] ("the scientific evidence suggests that a formalised procedure with specified standard features is more likely to produce a reliable identification"); and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C217]. An enquiry into reliability under s 45(1) extends to both the circumstances in which the witness identified the alleged offender, and the circumstances of the formal procedure: *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [20].

795 In New Zealand, the most frequently used formal procedure involves assembling a photomontage, which includes a photograph of the suspect.

796 Evidence Act 2006, s 45(2). See Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA45.7] for examples of circumstances that may be relevant to assessing reliability.

797 These are: a refusal of the suspect to take part in the procedure; the singular appearance of the suspect; a substantial change in the appearance of the suspect after the alleged offence occurred and before it was practical to hold a formal procedure; 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; 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 occurred and in the course of that officer's initial investigation; and 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.

798 This subsection was recently amended by the Evidence Amendment Act 2016 so that ss 45(3)(b), (c) and (d) refer to the "suspect" (rather than the "person to be identified"), following a Law Commission recommendation in *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 144, R15.

(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.

...

8.5 Section 126 of the Act requires judges to warn juries about the special need for caution before convicting a defendant in reliance on the correctness of an identification in cases where "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".[799] The section provides:[800]

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—[801]

(a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and

(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.

(3) If evidence of identity is given against the defendant in any criminal proceeding and the defendant disputes that evidence, the court must bear in mind the need for caution before convicting the defendant in reliance on the correctness of any such identification and, in particular, must bear in mind the possibility that the witness may be mistaken.

LAW COMMISSION'S 2013 REVIEW OF THE ACT

8.6 During the 2013 review of the Evidence Act, the Law Commission recommended a number of minor amendments to the identification evidence provisions, which were ultimately adopted.[802] Aside from this, the Commission also considered the case law surrounding the categorisation of visual identification evidence as either:[803]

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799 Section 126 essentially re-enacts s 344D of the Crimes Act 1961, which set out a warning that a judge was to give to a jury where the principal evidence in a case related to identification. The Law Commission had recommended that s 344D should be re-enacted in substance: see Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [216]; and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C398].

800 Section 126 was recently amended by the Evidence Amendment Act 2016 so that the substance of what was then in s 46A of the Evidence Act 2006 (a provision that reminded a judge sitting alone of the need for caution where a defendant disputes identification evidence against him or her) was moved to s 126, following a Law Commission recommendation in *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 151, R17.

801 The Law Commission's commentary to its proposed Evidence Code suggests some additional matters (which represented the findings of psychological research in the area of eyewitness identification, summarised in Law Commission *Evidence: Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999) at [32], [38], [45] and [47]) that may be included in a warning where appropriate, such as: the difficulty of assessing the reliability of identification evidence, particularly as witness confidence is not necessarily indicative of reliability; the quality of identification evidence may be influenced by events surrounding the witness' observation (such as the time of observation, lighting, distance, weather conditions); and identifications may be less reliable if the witness and defendant are of a different race or ethnicity. See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C398], adopted as a useful guide in *R v Turaki* [2009] NZCA 310 at [90]. More recently, the Supreme Court offered guidance as to the content of identification warnings in *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1.

802 See n 798 and n 800 above.

803 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [8.24].

- Resemblance evidence – where a witness gives evidence that a person shares certain features or attributes in common with the suspect ("the person I saw doing X looked like the suspect").
- Recognition evidence – where a witness gives evidence that the suspect is someone with whose appearance they are already acquainted ("the person I saw doing X was the suspect").
- Observation evidence – where a witness gives evidence about what a person does at the scene ("the person I saw was doing X").

8.7 The Commission noted that the first two categories of evidence had caused little concern. The case law confirmed that resemblance evidence does not come within the section 4 definition of "visual identification evidence",[804] so section 45 is not engaged, and no section 126 warning is generally required (although a warning may still be advisable in some cases).[805] Conversely, recognition evidence does fall within the section 4 definition,[806] so section 45 is engaged, and a section 126 warning is required.[807]

8.8 However, there had been divergent case law on observation evidence.[808] The Commission reviewed the relevant case law,[809] and summarised the final position that had been reached by the courts as follows:[810]

- a section 126 warning will be required for observation evidence if identification is still in issue;[811] and
- observation evidence does not fall within the section 4 definition of "visual identification evidence".

8.9 The Commission was satisfied with the position reached by the courts with respect to observation evidence and section 126 warnings and noted that, although some doubt had been cast on the view that observation evidence fell outside the scope of the section 4 definition (and so section 45),[812] it was not aware of this causing any problems in practice.[813] Accordingly, the Commission concluded no legislative change was required.[814]

ISSUES FOR CONSIDERATION

8.10 In this chapter, we consider the following issues:

- should the definition of "visual identification evidence" be amended to clarify whether identifications that are expressed with uncertainty are included?

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804 *R v Turaki* [2009] NZCA 310 at [58].

805 At [94]. See also *R v Young* [2009] NZCA 453; and *Ponga v R* [2014] NZCA 496 at [39]–[40].

806 *Uasi v R* [2009] NZCA 236, [2010] 1 NZLR 733 at [21]; *R v Turaki* [2009] NZCA 310 at [62]; *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [38]; and *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [16].

807 *Uasi v R* [2009] NZCA 236, [2010] 1 NZLR 733 at [21] and [25]; and *R v Turaki* [2009] NZCA 310 at [62].

808 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [8.26].

809 See *Uasi v R* [2009] NZCA 236, [2010] 1 NZLR 733 at [21] and [25]; *R v Turaki* [2009] NZCA 310 at [36] and [58]; *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [42]; *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [22], [31] and [40]; *E (CA113/2009) v R* [2010] NZCA 280 at [65]; and *Witehira v R* [2011] NZCA 658 at [45] and [47].

810 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [8.37].

811 *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [42].

812 In *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [22].

813 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [8.38]. The Commission suspected that "the same question is being asked as regards s 126 – is identification in issue, or was it merely the defendant's actions?"

814 At [8.39].

- does the relationship between the identification evidence and hearsay provisions require clarification?

8.11 We do not propose to re-examine the relationship between "observation evidence" and sections 4, 45 and 126, as we are not aware of any recent appellate controversy in relation to those issues.[815] Nor have we addressed an issue that arose in *Reti v R* concerning compliance with a formal procedure's requirements (set out in section 45(3)) where the identification witness is a foreign language speaker,[816] as we consider the standard of translation required in such situations is a matter best dealt with in Police's internal guidelines[817] rather than in primary legislation.[818]

THE DEFINITION OF "VISUAL IDENTIFICATION EVIDENCE"

8.12 A witness may make a visual identification tentatively. For example:

- a witness might identify a person from a photomontage as the person they saw at the time of the relevant events, but qualify that identification by nominating another person/other people from the photomontage (for example, "the person in photo X and the person in photo Y look like the suspect, but X is the most likely");
- a witness might nominate a single person from a photomontage as the person they saw at the time of the relevant events, but express uncertainty as to the accuracy of the identification (for example, "the person in photo X looks like the suspect, but I am not sure").

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815 For example, the Court's conclusion in *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [42] that observation evidence does not fall within the s 4 definition (and so does not engage s 45) appears to have been accepted in *R v H* [2017] NZCA 159. In that case, the Court was required to determine whether the evidence of an identification witness was properly characterised as "visual identification evidence" or "observation evidence" – the Court ultimately concluded that the evidence fell within the former category and therefore needed to meet the criteria for admissibility in s 45: see at [27]–[28]. We note, however, that there has been some criticism of the view that observation evidence falls outside the s 4 definition and so does not engage s 45: see Nick Chisnall "Reducing the risk of misidentification: It starts with the Evidence Act 2006's definition of 'visual identification evidence'" [2015] NZLJ 299.

816 In *Reti v R* [2016] NZCA 447, the complainant (who was a Mandarin speaker) picked Ms Reti out as the offender from a photomontage. The formal procedure was translated by the complainant's daughter. At issue on appeal was whether the requirement in s 43(3)(d)—that the person making the identification "is informed that the [suspect] may or may not be among the persons in the procedure"—had been met. There was evidence the attending police officer explained this to the complainant, in English, but the complainant was not an English speaker and her daughter did not give evidence. The question was therefore whether an inference could be drawn that the complainant was told the offender might not be in the photomontage: at [11]. The Court of Appeal did not think it necessary for the interpreter to give evidence to confirm what was said in order for s 45(3)(d) to be met. Rather, the translation could be proved like any other fact, including by drawing inferences from the available evidence: at [13]. In the Court's view, the facts of the present case justified the inference that, "absent something, such as something about the circumstances, that might displace it" the officer's explanation was faithfully translated: at [14]. Ms Reti applied for leave to appeal the decision, arguing that a high standard of interpretation is required to ensure compliance with s 45(3)(d): see *Reti v R* [2016] NZSC 169 at [10]. The Supreme Court accepted the standard of translation in the context of s 45(3)(d) may be a question of general or public importance, but ultimately declined leave to appeal because it considered the case turned on a factual question as to whether the inference drawn by the Court of Appeal was available: at [12]. It has been suggested that *Reti* places an unfair onus on the defendant to establish a lack of compliance with s 45(3)(d), as the defendant is left "in the difficult position of needing to point to something in the circumstances of the identification that would displace the presumption that the officer's instructions were faithfully translated, but the only people that can provide such evidence are the translator or the witness": Scott Brickell and Josh Lucas "Identification Issues: *Reti v R* [2016] NZSC 69 and *Barakat v R* [2016] NZSC 159" [2017] NZLJ 53 at 54–55. However, Brickell and Lucas also observe that the issue could be avoided in the future by defence counsel specifically asking whether a translator was used in the identification procedure and, if so, who that was, so further investigation and, if necessary, a pre-trial challenge can be made: at 55.

817 See New Zealand Police *Investigative Interviewing Witness Guide* (14 June 2012) at 32, available at <www.fyi.org.nz>.

818 For example, while it may well be prudent for Police to use professional translators in such situations, we doubt it would be appropriate to prescribe a process for conducting formal procedures with non-English-speaking identification witnesses in primary legislation (for example, by amending s 45 to oblige Police to use professional translation services when informing a foreign language speaker about the procedure for obtaining visual identification evidence). A cautious approach to amending the formal identification regime is likely necessary, given amendments to the procedure can have significant resourcing implications.

8.13 From our review of the case law, the status of these types of tentative identifications appears to have been the subject of some uncertainty, centred around the following issues:

- Do tentative identifications fall within the section 4 definition of "visual identification evidence" (and so engage the admissibility criteria in section 45)?
- If not, can the evidence be admitted under the alternative route of sections 7 and 8?

Relevant case law

8.14 In a 2009 decision, *R v Young*,[819] the Court of Appeal characterised a witness' tentative identification as evidence of resemblance, not of identification. In that case, the witness was shown a photomontage containing eight photographs and said "the main one I picked was number 2 [the defendant], although I picked 2 and 6 but I stated at the time that 2 was most likely".[820] The Court considered the evidence was a "significant circumstantial factor" (admissible without the need to satisfy the requirements of section 45) but not "positive identification evidence".[821]

8.15 In 2011, the Supreme Court in *Harney v Police*[822] held that the confidence with which a witness made an identification was to be treated as a factor that is relevant to the reliability of visual identification evidence (an assessment that can be made under both sections 45(1) and 45(2)).[823] The Court did not comment on whether a witness' confidence level was also relevant to the question of whether the identification amounted to "visual identification evidence" in section 4.

8.16 In 2013, the High Court briefly addressed this issue in *Morgan v Police*.[824] The Court thought it was reasonable to assume that the words "*to the effect* that a defendant was present" in the definition of "visual identification evidence" were intended to include cases where the person making the assertion admits to some uncertainty about the identification,[825] particularly in light of the Supreme Court's comments in *Harney* that witness confidence is relevant when assessing reliability.[826] The Court therefore concluded that the identification witness' choice of the defendant's photograph from a photomontage—although expressed with some uncertainty as to whether he was the principal offender[827]—amounted to a "qualified assertion" that he was the person the witness saw in this role.[828] As such, the evidence was "clearly within" the definition of visual identification evidence in section 4.[829]

8.17 The Court did not accept the respondent's argument that the evidence was properly characterised as "resemblance evidence" rather than identification evidence, so that the requirements of

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819 *R v Young* [2009] NZCA 453.

820 At [6] and [34].

821 At [34].

822 *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725.

823 The Court said at [33]: "The confidence with which the witness made the identification must accordingly be treated as one of the circumstances [in which the witness identified the alleged offender] under both subss (1) and (2). What is of paramount importance is that too much weight should not be given to this factor, especially when it is not an expression of confidence at the time the identification was first made. Certainly … the confidence level of the witness cannot, in itself, satisfy a reliability test".

824 *Morgan v Police* [2013] NZHC 2305.

825 At [28], referring to the view of Richard Mahoney and others in *The Evidence Act 2006: Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2010) at 28.

826 At [28], referring to *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [33].

827 The witness admitted she was not 100 per cent sure if the person in the photograph was the person she saw, saying that she could not tell "… exactly that was the exact guy…": see at [14].

828 At [28].

829 At [28].

section 45 did not need to be met.[830] The Court considered the idea of treating uncertain visual identification as no more than a further description of the offender was "novel"; and doubted the evidence could be characterised in this way.[831]

8.18 The next relevant case is the 2015 Court of Appeal decision in *Bassett v R*.[832] In that case, one of the identification witnesses said she was "85 per cent sure" that the photograph of the defendant in a photomontage was the offender. There did not appear to be any dispute that the evidence amounted to "visual identification evidence", as the admissibility of the evidence was assessed under section 45(1). In carrying out the assessment, the Court noted that the witness' statement of 85 per cent confidence did not necessarily make her visual identification evidence unreliable.[833] The witness positively identified the defendant, and the expressed confidence level did not render the identification so unreliable that it would be unsafe for a jury to consider it.[834]

8.19 Then, in a 2016 decision, *Meaker v R*,[835] the Court of Appeal held that evidence obtained by way of a photomontage—where the identification witness had eliminated five of eight photographs and felt unable to identify any of the remaining three (one of which was of the appellant) as one of the two offenders—did not amount to "visual identification evidence" at all. The Court explained that the evidence did not amount to an "assertion … that *a* defendant was present" at or near the place where the offence occurred, in terms of the section 4 definition. The Court concluded that the evidence was therefore "inadmissible as visual identification evidence";[836] and could not be admitted under the alternative route of sections 7 and 8.[837]

8.20 We pause here to make two observations. First, we do not consider the evidence at issue in *Meaker* was a "tentative identification" in the sense we described above (at paragraph [8.12]). This was not a case where an identification was made, but the witness qualified their answer: rather, the witness did not purport to identify a particular person at all.[838] Second, the Court's conclusion that the evidence was inadmissible was based on its view that sections 7 and 8 did not provide a "parallel"

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830 The respondent argued that, because the witness admitted she was not sure if the picture she selected was the offender, she must have singled out the photo by resemblance, rather than as a confident declaration of identification: see at [26(b)].

831 At [30]. The Court also considered it would be wrong in principle for the evidence in that case (which failed to meet the safeguards for reliability under s 45) to be nonetheless admissible as resemblance evidence: at [75].

832 *Bassett v R* [2015] NZCA 319.

833 At [29].

834 At [29].

835 *Meaker v R* [2016] NZCA 236.

836 At [15].

837 At [18] and [22].

838 See similarly, *H v R* [2017] NZCA 450 and *Higgins v R* [2017] NZCA 486. In *H v R*, the defendant (H) was alleged to have indecently assaulted two complainants. One of the complainants did not actually say that she saw H at the time of the relevant events. She said she was or had been asleep in her friend's bedroom while staying overnight at H's house, and a man had come into the room and touched her. The District Court Judge held the evidence was not "visual identification evidence" and was therefore admissible without needing to satisfy the requirements of s 45. On appeal, counsel for H argued this conclusion was wrong, because the complainant had "inferentially" identified H. The Court of Appeal did not accept this argument, as the complainant did not say the offender was H at all: at [31]. The Court concluded at [32]: "[i]n the absence of an assertion that [H] was the offender, we conclude that [the complainant] does not give visual identification evidence, inferential or otherwise". In *Higgins*, the appellant challenged his conviction on charges of sexual offending on the grounds that inadmissible visual identification evidence had been led at his trial. The complainant's evidence was that on two occasions, a man had entered her bedroom at night and touched her. On the first occasion, she said she saw a silhouette in the doorway and knew by the man's shape and voice that it was not her father. She said she believed the appellant was the perpetrator because he was the only other male adult in the house. As to the second occasion, she said the perpetrator had identified himself as "Christian" (the first name of the appellant). The Court of Appeal did not regard this as "visual identification evidence": at [12]. Rather, the evidence was "wholly circumstantial, involving inferential elimination of alternatives from two facts: the non-resemblance of the perpetrator to her father, and the only other male adult in the house being [the appellant]": at [12]. The Court relied on the distinction drawn between "positive identification evidence" and "resemblance evidence" in *R v Turaki* [2009] NZCA 310 at [57]–[58]. In the present case, the Court said the complainant's evidence was "manifestly circumstantial" because "[i]t relied upon a process of deductive reasoning based on facts other than the appearance of Mr Higgins": at [12]. It was "merely eliminative — as to his non-resemblance to her father": at [13].

pathway for admitting identification evidence (as this would make section 45 superfluous).[839] We agree with the proposition that visual identification evidence that fails to meet the requirements for admissibility in section 45 cannot be admitted under the alternative route of sections 7 and 8. At the same time, however, it is not entirely clear why that proposition had any application to the evidence at issue in *Meaker*, given the Court's earlier conclusion that the evidence was *not* "visual identification evidence", and so did not engage section 45.[840] We are not sure why such evidence cannot remain admissible, subject to sections 7 and 8, as circumstantial evidence.

8.21 Despite this, *Meaker* appears to have been relied on by defendants to challenge the admissibility of tentative identifications on the basis that they do not amount to "an assertion" in terms of the section 4 definition of "visual identification evidence"; and are therefore, as in *Meaker*, inadmissible.[841]

8.22 For example, in *Reti*, counsel for the appellant referred to *Meaker* in support of the argument that the identification in that case did not qualify as "visual identification evidence", because the witness did not assert that a single person was the offender.[842] The witness had identified photograph number five (Ms Reti) from a photomontage, but appeared to express some uncertainty in answer to questions on a form – for example, there was a reference to her answering "[photograph] 5 or 8" on two occasions, but she also said photograph number five "looks more like the person".[843] The Court of Appeal concluded that—having regard to evidence given by the witness and the attending police officer at Ms Reti's trial—the witness had in fact identified the appellant alone as the offender.[844] That being so, the Court did not need to address the question of whether an identification that nominates more than one person qualifies as visual identification evidence.[845]

8.23 In *Williams and Barakat v R*,[846] the witness was shown a photomontage and said she recognised the man in one of the photographs (Mr Barakat). The witness then said the person shown in the photograph "kind of looks like" the offender, but she was not sure, and that it was "hard to recognise" the offender because he was wearing a red bandana when she had met him.[847] Counsel for Mr Barakat, relying on *Meaker*, argued the identification did not amount to an "assertion" in terms of the section 4 definition of "visual identification evidence". The Court of Appeal rejected this argument. The Court considered the witness' identification amounted to an assertion of

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839 *Meaker v R* [2016] NZCA 236 at [18] and [22]. We note that in *R v Kingi* [2017] NZCA 449, the Court of Appeal clarified that *Meaker* does not stand as authority for the proposition that s 45 is the only route through which visual identification evidence can be ruled inadmissible, such that s 8 is not a relevant consideration: "[t]he finding in *Meaker* was that there are not parallel and alternative pathways to the admissibility of visual identification evidence under the Act … even if the evidence meets the threshold reliability test under s 45, it may nevertheless be excluded under s 8" (at [25]). See also *K v Police* [2017] NZCA 430 at [24]: "Section 45 is not a mini-code in the sense that it excludes the application of the other requirements for the admissibility of evidence set out in ss 7, 8 and 23–25 of the Act."

840 We note that in *K v Police* [2017] NZHC 1651, Downs J read *Meaker* as suggesting that evidence that is "highly analogous" to visual identification evidence, such as that in *Meaker*, cannot be admitted under the alternative route of ss 7 and 8. He did not read *Meaker* as suggesting that resemblance evidence, and other evidence falling short of the offender's actual identification, cannot remain admissible, subject to ss 7 and 8, as circumstantial evidence: see at [20] and [20], n 18.

841 See Glen Prentice "*Meaker v R* [2016] NZCA 235: Identification Evidence" [2016] NZLJ 313 at 317; and Scott Brickell and Josh Lucas "Identification Issues: *Reti v R* [2016] NZSC 69 and *Barakat v R* [2016] NZSC 159" [2017] NZLJ 53.

842 *Reti v R* [2016] NZCA 447 at [15].

843 See at [6].

844 At [16]. See also at [7]–[8]. The witness explained at trial that she was initially confused when she looked at the photomontage but when she "took a second look she recognised number five", and maintained that she was sure at the time of the identification that she had made the correct identification. The attending police officer confirmed that the witness identified Ms Reti alone when shown the photomontage. The officer said that she herself had written "5 or 8" on the form by mistake and had crossed it out: see at [7]–[8].

845 At [16]. Leave to appeal the Court of Appeal's decision to the Supreme Court was declined: *Reti v R* [2016] NZSC 169.

846 *Williams and Barakat v R* [2016] NZCA 461.

847 At [33]–[34].

identity and the witness' uncertainty went to reliability, not to the fact of identification.[848] The Court also considered the present case was "nothing like *Meaker* where there was no identification of a particular person at all".[849]

8.24 Mr Barakat applied for leave to appeal the decision to the Supreme Court. Again relying on *Meaker*, he argued the tentative nature of the complainant's identification was such that the Court of Appeal was wrong to characterise her evidence as "visual identification evidence".[850] The Supreme Court accepted that there may be a question of general importance about the meaning of "visual identification evidence" in section 4,[851] but the Court ultimately declined leave because it did not consider it appropriate to address this question in a pre-trial appeal.[852] The Court also referred to its observations in *Harney* that the confidence of a witness' identification was one of the circumstances to be considered when considering the reliability of the evidence under section 45.[853]

Discussion

8.25 The above summary demonstrates a degree of uncertainty as to whether tentative identifications amount to "an assertion … to the effect that a defendant was present at or near" the scene of the offending, in terms of the section 4 definition of "visual identification evidence". It may therefore be necessary or desirable to amend the definition of visual identification evidence to clarify the position.[854]

8.26 We are interested in submitters' views on whether tentative identifications should be characterised as:

- "visual identification evidence" (and therefore subject to the criteria for admissibility in section 45);
- "resemblance evidence" (and therefore not captured by section 45); or
- some other type of circumstantial evidence.

8.27 We also welcome views on whether and how the definition of "visual identification evidence" should be amended. For example, if qualified identifications are appropriately characterised as "visual identification evidence", one option is to amend the definition to expressly include "identifications of a particular person where the witness expresses uncertainty". On the other hand, it is arguable that the existing phrase "to the effect that…" sufficiently makes room for tentative identifications.[855]

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848 At [37].

849 At [37]. Referring to *Bassett v R* [2015] NZCA 319, the Court further held that, although no percentage could be put on the witness' level of surety, her expression of a degree of uncertainty did not render her evidence unreliable on the balance of probabilities for the purpose of s 45(1): at [45].

850 *Barakat v R* [2016] NZSC 159 at [10]. See also Scott Brickell and Josh Lucas "Identification Issues: *Reti v R* [2016] NZSC 69 and *Barakat v R* [2016] NZSC 159" [2017] NZLJ 53 at 55 for a summary of Mr Barakat's submissions: "It was … argued that statements that are expressed in uncertain terms or that do not clearly declare a position will not qualify [as "visual identification evidence"]. If this was not the case then almost any answer to the questions asked during the formal procedure, short of no identification, would meet the test, no matter how qualified the answer was. It was submitted that such an approach would be at odds with the language of the provisions, and with the legal policy lying behind the constraints on visual identification evidence".

851 At [11].

852 At [11]–[12].

853 At [11], referring to *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [33]. The Court also distinguished *Meaker* on the basis that, in the present case, the complainant had singled out an individual, albeit expressing her view tentatively: at [12].

854 Also bearing in mind s 6(a) and (f) of the Act.

855 We note that the authors of *The Evidence Act 2006: Act and Analysis* consider the words "*to the effect* that a defendant was present" in the definition of "visual identification evidence" may have been intended to include cases where the person making the assertion admits to some uncertainty about the identification: Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV4.44.01].

If qualified identifications ought to be excluded from the definition, the phrase "to the effect that…" could be removed and/or the definition could expressly exclude identifications of a particular person where the witness expresses uncertainty as to the accuracy of the identification. The requisite degree of uncertainty would likely need to be specified.

8.28 We note it is arguably more consistent with the underlying policy of the identification evidence provisions for tentative identifications to be characterised as "visual identification evidence" (and therefore subject to section 45).[856] The relevance of the evidence is that it tends to identify the defendant as the offender; and the purpose of the provisions is to avoid miscarriages of justice through mistaken identifications.[857] Section 45 aims at ensuring that only reliable identification evidence is admitted. (Witness confidence would, of course, remain relevant to that reliability assessment.[858])

8.29 We are also interested in submitters' views on whether there is a need to clarify the admissibility rules that apply to evidence falling outside the scope of the section 4 definition, in light of *Meaker*.[859] Should the evidence remain admissible under the alternative route of sections 7 and 8?[860]

QUESTIONS

Q29 Should the definition of "visual identification evidence" in section 4 be amended to clarify whether identifications that are expressed with uncertainty are included? If so, how?

Q30 Should evidence falling outside the scope of the definition of "visual identification evidence" remain admissible, subject to sections 7 and 8? Does the Act need to be amended to clarify the position?

RELATIONSHIP BETWEEN IDENTIFICATION EVIDENCE AND HEARSAY PROVISIONS

8.30 "Visual identification evidence" is not necessarily given directly by an eyewitness. The definition in section 4 can include an account of the identification by someone other than the identifier.[861] For example, evidence of the outcome of a formal identification procedure might be given by the attending police officer.[862]

8.31 Where visual identification evidence is of this sort, and the identifier is not a "witness" in the proceeding (for example, because the identifier becomes unwell and is unable to give evidence)[863]

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856 For the contrary view, see Scott Brickell and Josh Lucas "Identification Issues: *Reti v R* [2016] NZSC 69 and *Barakat v R* [2016] NZSC 159" [2017] NZLJ 53 at 55.

857 See *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [22]. Also relevant in this context is s 6(c) of the Act (promoting fairness to parties and witnesses).

858 *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725.

859 Bearing in mind s 6(f) of the Act (enhancing access to the law of evidence).

860 As we discussed in paragraph [8.20] above, *Meaker* appears to have cast some doubt on whether evidence falling outside the scope of the definition can be admitted under the alternative route of ss 7 and 8.

861 See paragraph (b) of the definition of "visual identification evidence" in s 4(1) of the Evidence Act.

862 The Court of Appeal in *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [66] held that it is preferable for evidence of the outcome of a formal identification procedure to be given by the attending police officer, rather than by the identifier.

863 See s 16(2)(c) of the Evidence Act.

the identification also arguably constitutes a "hearsay statement".[864] On the face of section 45(1), a potential conflict then arises with the hearsay rules in the Act. The problem, identified by Richard Mahoney in a 2008 article, is that while section 45(1) makes the evidence admissible if a formal procedure was followed (unless the defendant proves the evidence is unreliable), sections 17 and 18 make the evidence admissible only if the prosecution can show there is a reasonable assurance of reliability.[865]

8.32 The conflict was recently noted by the Court of Appeal in *R v R*.[866] In that case, a witness (O) gave Police a written statement that described the offender. O later picked the defendant out of a photomontage as the offender (the "photo identification"), but became unavailable as a witness (due to illness) prior to trial. In determining the admissibility of O's pre-trial statements, the Court accepted that her police statement and photo identification had to be considered together and both amounted to hearsay evidence, to be given by a police officer.[867] The Court held the circumstances relating to O's police statement provided reasonable assurance of reliability in terms of section 18's test for the admissibility of hearsay evidence.[868] At the same time, however, the Court noted the application of section 18 to O's photo identification was problematic:[869]

> Section 45 provides that if a formal procedure is followed, then the identification is presumed reliable and the evidence admissible unless the defence proves to the contrary on the balance of probabilities. In contrast, under s 18 it is a condition of admissibility that the prosecution show the circumstances relating to the statement provide reasonable assurance the statement is reliable. Those circumstances arguably involve wider considerations than the factors taken into account in a s 45 reliability assessment.

8.33 We note the authors of *The Evidence Act 2006: Act and Analysis* suggest that "[t]he combination of paras (a) and (b) [in section 17] means that hearsay made admissible by other provisions in the Act must nevertheless also comply with the hearsay rules, unless the operation of the hearsay rule is expressly excluded".[870] In contrast, the authors of *Cross on Evidence* suggest that, where both the identification evidence and hearsay provisions are engaged, the more specific rule in section 45(1) should prevail.[871] If a formal procedure was followed or there was good reason for not conducting one, the visual identification evidence would be presumptively admissible. The authors of *Cross* suggest this would be consistent with the common law position, where a report of an act of identification was not classified as hearsay, but rather as conduct of which observational evidence may be given by another.[872]

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864 "Hearsay statement" is defined in s 4 as 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".

865 Richard Mahoney "Evidence" [2008] NZ L Rev 195 at 209.

866 *R v R* [2017] NZCA 61.

867 At [9]. See similarly, *Clasen v Police* HC Auckland CRI-2011-404-108, 7 July 2011. In that case, no written statement was taken from the complainant, but he had walked around with a police officer near the scene of the offending and identified the accused in front of the officer. The complainant was overseas and unable to attend the defended hearing, so evidence of the complainant's identification of the offender was given by that officer. The Court considered that identification was "visual identification evidence by hearsay statement": at [11].

868 At [10]–[12]. See also *R v Kereopa* HC Tauranga CRI-2007-087-411, 11 February 2008, where the admissibility of a police statement of an eyewitness who died before trial (which was "plainly" a "hearsay statement": at [2]) was considered by reference to s 18 of the Evidence Act.

869 At [14]. The Court did not consider it necessary to resolve the conflict, however, as it considered the reliability thresholds under both sections 45 and 18 were met in that case: at [15]. However, the Court ultimately excluded O's police statement and her photo identification under s 8: see at [22]–[24].

870 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV17.01]. This approach also appears to have been adopted in *Clasen v Police* HC Auckland CRI-2011-404-108, 7 July 2011 at [11]–[14].

871 Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA45.9].

872 At [EVA45.9], referring to *R v Young* [2009] NZCA 453 at [26] and *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [67], citing *R v Ngahooro* [1982] 2 NZLR 203 (CA) at 208.

QUESTION

Q31 Should the Act be amended to clarify the relationship between the identification evidence and hearsay provisions? If so, how?

CHAPTER 9

Giving evidence in sexual and family violence cases

IN THIS CHAPTER, WE CONSIDER:

- whether prosecutors should be required to consult with family violence complainants about their preferred mode of evidence;
- whether family violence complainants should be entitled to pre-record their evidence (including cross-examination);
- whether any witnesses in sexual and/or family violence cases (in addition to the complainant) should be entitled to pre-record their evidence;
- whether a long term aim of any reforms in this area should be an entitlement for vulnerable witnesses to pre-record their evidence;
- whether the Act should be amended to allow pre-recorded evidence of sexual/family violence complainants and/or a recording of their evidence at trial to be used at any retrial;
- whether sections 106(4A)–(4C) and regulation 20B, which restrict access by defence counsel to video interviews in sexual or violent cases, have created any difficulties in practice; and
- whether there should be greater judicial control over the questioning of witnesses.

BACKGROUND

9.1 In any proceeding, the judge may direct that a witness is to give evidence "in the ordinary way" (set out in section 83 of the Evidence Act) or "in an alternative way" (set out in section 105).[873]

9.2 The ordinary way for a witness to give evidence is orally, in a courtroom before a judge, a jury (if there is one), the defendant, counsel and, potentially, members of the general public.[874] Alternative ways of giving evidence include a witness giving evidence from behind a screen or from a place outside the courtroom – for example, using closed circuit television. Another alternative way,

873 Evidence Act 2006, s 103(1).

874 Evidence Act, s 83. If both parties agree then it is also possible for a witness' statement to simply be read to the court as an affidavit or for the witness to read their statement aloud as their evidence-in-chief. These are also considered to be ordinary ways of giving evidence.

which is the focus of this chapter, is to give evidence by way of a video record made before the proceeding ("pre-recorded evidence").[875]

9.3 It is relatively common in sexual violence cases for the complainant to give their evidence-in-chief by way of a pre-recorded video.[876] It is standard practice for the complainant's original police interview to be recorded, and the video of that interview (the evidential video interview or EVI) is therefore available to be played at trial.[877] Once the judge and/or jury have watched the EVI, defence counsel almost always cross-examines the complainant. The Act permits a judge to direct that the complainant's cross-examination and re-examination be pre-recorded as well (at a separate pre-trial hearing), but, as we discuss below, this option is rarely used.[878]

9.4 Directions allowing a witness to give pre-recorded evidence, or evidence in another alternative way, can be made on the application of a party or on the judge's own initiative.[879] Before making a direction the judge must, by virtue of section 103, have regard to fair trial considerations, the views of the witness and the need to minimise stress and promote the recovery of the witness. A direction may be made on a number of grounds, including the age or maturity of the witness, any physical or mental impairment, the witness' fear of intimidation, the linguistic or cultural or religious background of the witness, the nature of the proceeding and the relationship of the witness to any party to the proceedings.[880] In addition, a direction can be given if the witness is outside the country when the proceedings are being heard or any other ground likely to promote the purpose of the Act (for example, if the witness is in hospital).[881]

9.5 Since January 2017, child witnesses in criminal proceedings have been entitled to give all parts of their evidence in an alternative way.[882]

ISSUES FOR CONSIDERATION

9.6 Pre-recording evidence has a number of benefits for witnesses and for the administration of justice.[883] For instance, it minimises the risk of victims being re-traumatised through their participation in the criminal justice process. It also alleviates the negative impact of delay between the filing of a charge

875 Alternative ways of giving evidence are dealt with in ss 102–106 of the Act. Section 102A governs the relationship between the Courts (Remote Participation) Act 2010 and ss 103 to 106. Section 103 enables the judge to make a direction that a witness is to give evidence in the ordinary way or in an alternative way, sets out the grounds for making such a direction and sets out matters the judge must have regard to in giving such directions. Section 104 provides that, before giving a direction, the judge must give each party an opportunity to be heard in chambers. Section 105 sets out the alternative ways of giving evidence. Section 106 governs video record evidence.

876 In 2015, the Law Commission noted, however, that "there are significant regional variations throughout the country in the use of the EVI as the complainant's evidence in chief", but pre-recording of evidence in chief happens more frequently than pre-recording of cross-examination, especially for adults: Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.39] and [4.58].

877 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.40]. The complainant is asked a series of questions by a member of Police who is trained in behavioural interviewing.

878 At [4.57]. When writing its 2015 report, *The Justice Response to Victims of Sexual Violence,* the Commission was aware of only two cases where adult witnesses had their cross-examination evidence pre-recorded: *R v Kereopa* [2008] DCR 29 (HC) and *R v Willeman (Tetraplegic: Interpreter)* [2008] NZAR 664 (HC). We are aware of a recent instance where the cross-examination evidence of a sexual violence complainant who was intellectually disabled (and presented as being at the level of development of a three to four-year-old) was pre-recorded: *R v Aitchison* [2017] NZHC 3222.

879 Evidence Act, s 103(1).

880 Section 103(3).

881 Section 103(3).

882 Section 107 (inserted on 8 January 2017 by s 31 of the Evidence Amendment Act 2016).

883 A countervailing consideration, in respect of pre-recording cross-examination evidence, is the fair trial rights of defendants. See below at [9.18].

and the trial. Lengthy delays may impact on the quality of the evidence, and the extent to which the witness is able to recall the facts may bear on their credibility.

9.7 Despite these benefits, and the enabling provisions in the Act, the current position is that the only pre-recorded witness evidence that tends to be presented at trial is the evidence-in-chief of complainants in some sexual violence cases.

9.8 In this chapter we briefly review approaches taken overseas to pre-recorded evidence. We then explore whether the Act could better facilitate the use of pre-recorded complainant evidence in sexual violence cases, including pre-recorded cross-examination. In addition we examine whether the Act should promote the use of pre-recorded evidence in relation to:

- complainants in family violence cases;
- other witnesses in sexual and family violence cases; and/or
- vulnerable witnesses generally.

9.9 We also consider:

- whether pre-recorded evidence and/or evidence recorded during the trial could assist in cases that involve a re-trial;
- whether the restrictions on defence counsel access to video interviews in sexual or violence cases are unduly burdensome; and
- whether there should be greater judicial control over the questioning of complainants and witnesses in sexual and family violence cases and/or vulnerable witnesses generally.

OVERSEAS APPROACHES TO PRE-RECORDED EVIDENCE

9.10 In Australia, the United Kingdom and Scotland there has been a trend towards enabling certain complainants and other witnesses to give pre-recorded evidence at trial. This includes evidence-in-chief, cross-examination and re-examination.

Australia

9.11 In Australia, several states entitle certain vulnerable witnesses to give their evidence-in-chief by way of a video record, unless a judge directs otherwise. These provisions often apply to complainants in cases involving sexual, violent or family violence offending and to particular witnesses, including children and cognitively impaired persons.[884]

884 In Victoria this is possible for a witness under the age of 18 or a witness with cognitive impairment in a criminal proceeding that relates to a sexual offence or assault: Criminal Procedure Act 2009 (Vic), ss 366–367. The New South Wales legislation entitles a domestic violence complainant and a vulnerable person (being a child or cognitively impaired person) to offer a video record as evidence-in-chief: Criminal Procedure Act 1986 (NSW), ss 289F, 306M and 306U. Legislation in the Australian Capital Territory provides that, in a proceeding for a sexual or violent offence, a video record of a police interview is admissible as evidence-in-chief in respect of a complainant, a similar act witness, or a witness who is a child on the day the video record is made or who is intellectually impaired: Evidence Act 2011 (ACT). In the Northern Territory, a recorded statement of a vulnerable witness may be admitted as evidence-in-chief in cases of sexual or serious violence and, if the prosecutor asks the court to admit a recorded statement, the court must accede to the request unless there is good reason for not doing so. A domestic violence complainant may also have their recorded statement of a police interview admitted as evidence-in-chief; however, the court may refuse to admit all or part of the statement if it is in the interests of justice to do so: Evidence Act (NT), ss 21A, 21B and 21H. In Tasmania, an affected child or a special witness may apply to offer a video record as their evidence-in-chief: Evidence (Children and Special Witnesses) Act 2001 (Tas).

9.12 Some states also, or alternatively, allow a witness' evidence to be pre-recorded (wholly or partly) at a pre-trial hearing. The judge, prosecutor, defence lawyer and accused are all in the courtroom, but there is no jury. The witness gives evidence and may be cross-examined and re-examined, and this is recorded and later played to the jury. Similar methods of taking pre-recorded evidence apply under legislation in Queensland, South Australia, Victoria, Western Australia, the Australian Capital Territory and the Northern Territory.[885]

England and Wales

9.13 In England and Wales, the Youth Justice and Criminal Evidence Act 1999 introduced a range of "special measures" to facilitate the gathering and giving of evidence. The court can make a "special measures direction" about the way certain vulnerable or intimidated witnesses are to give evidence. One special measures direction is that an EVI be admitted as evidence-in-chief.[886] The direction may also provide for any cross-examination and re-examination to be pre-recorded and admitted as evidence.[887]

9.14 The provision enabling pre-recorded cross-examination is not yet fully in force,[888] but is being tested at three Crown Court centres and the outcome of the pilot will inform national implementation.[889] The pilot commenced in December 2013 for child witnesses under the age of 16 and those eligible for assistance by reason of incapacity, and the provision has continued in force in those courts since then.[890] In January 2017 the pilot was extended to witnesses under the age of 18.[891]

9.15 The judges involved with the pilot have hailed it as a success and have encouraged its roll-out nationally.[892] The then Lord Chief Justice commended the pilot, saying:[893]

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885 Evidence Act 1977 (Qld), ss 21A, 21AI–21AO; Evidence Act 1929 (SA), s 13A; Criminal Procedure Act 2009 (Vic), s 368; Evidence Act 1906 (WA), s 106HB; Evidence (Miscellaneous Provisions) Act 1991 (ACT), div 4.2.2B; and Evidence Act (NT), s 21E. For further information see also: Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128 Vol 1, 2010) at [26.154]–[26.167].

886 Youth Justice and Criminal Evidence Act 1999, s 27.

887 Sections 16, 17 and 28(1). The court may make a direction if it is satisfied that the witness is "eligible for assistance". A witness will be eligible for assistance if the court is satisfied the quality of the evidence is likely to be diminished because of fear or distress about testifying in the proceedings. In determining whether a witness is eligible, the court must take into account the nature and alleged circumstances of the offence; the age of the witness; relevant matters regarding the social and cultural background of the witness, their domestic and employment circumstances and any religious or political opinions they hold; and any behaviour towards the witness by the defendant or others associated with the defendant. If the witness is eligible, the court must then determine which of the special measures (or a combination of them) would be likely to maximise the quality of the evidence, taking into account any views expressed by the witness and whether the measures might inhibit the evidence being effectively tested by a party to the proceedings.

888 See ss 28 and 68(4). Section 28 was not immediately implemented due to concerns about the procedural changes required, the available information technology at the time and the cost.

889 The three centres are Leeds, Kingston-Upon-Thames and Liverpool Crown Courts. See The Crown Prosecution Service "Special Measures – Legal Guidance" <www.cps.gov.uk>.

890 The Youth Justice and Criminal Evidence Act 1999 (Commencement No. 13) Order 2013, art 2.

891 The Youth Justice and Criminal Evidence Act 1999 (Commencement No. 15) Order 2016, art 2. The Ministry of Justice (UK) was planning to test the pre-recording of cross-examination on a broader set of witnesses in 2017—namely, intimidated witnesses who are victims of sexual and modern slavery offences—and then introduce a rollout of pre-recorded cross-examination for all vulnerable witness in England and Wales that same year. Those plans have been delayed, however, due to "quality issues" that arose when technology that will record and play back the cross-examination was tested. See Letter from Dr Phillip Lee MP (Parliamentary Under-Secretary of State for Justice) to Bob Neill MP (Chair, House of Commons, Justice Select Committee) regarding support of vulnerable and intimidated witnesses giving evidence (22 November 2017); and Monidipa Fouzder "Cross-examination support for vulnerable witnesses delayed" The Law Society Gazette (online ed, London, 1 December 2017).

892 See Joyce Plotnikoff and Richard Woolfson "Worth waiting for: The benefits of section 28 pre-trial cross-examination" (2016) 8 Archbold Review 6 at 6.

893 Lord Thomas of Cwmgiedd *The Lord Chief Justice's Report 2015* (Judiciary of England and Wales, 2016) at 9.

> … the judges unanimously commend it as greatly improving the administration of justice by reducing stress for the witnesses and encouraging early pleas of guilty. There is no doubt that national implementation will bring very significant benefits.

9.16 In 2016 the Ministry of Justice (UK) published a process evaluation report of the pilot.[894] The evaluation compared two groups of witnesses: the first group had their evidence-in-chief pre-recorded and then were cross-examined at trial and the second group had both their evidence-in-chief and cross-examination pre-recorded. The evaluation indicated better outcomes in the second group and noted the potential for pre-recorded cross-examination to save the court time, as trials were reportedly shorter and easier to manage[895] and appeared to increase the number of guilty pleas.[896] Practitioners involved in the pilot felt that questions were more focused and relevant, and that trauma for witnesses was reduced. Findings from witnesses supported this view, with more positive experiences reported by the second group and more negative experiences clustered among the first group.[897] Most practitioners thought there were benefits in terms of the ability to recall events for those whose cross-examination was pre-recorded.[898] Some problems with technology were reported by both practitioners and witnesses.[899]

Scotland

9.17 In 2017, the Scottish Government consulted on pre-recording all the evidence of child and other vulnerable witnesses.[900] While the initial focus of any legislative changes is likely to be on child witnesses, the consultation also sought views on potential changes for vulnerable adult witnesses. Respondents were asked whether they thought the ultimate longer term aim of any reforms should be a presumption that child and other vulnerable witnesses should have all their evidence taken in advance of a criminal trial.[901] The responses showed "overwhelming support" for this aim, and all responses from legal and enforcement agencies supported a presumption.[902]

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894 John Baverstock *Process evaluation of pre-recorded cross-examination pilot (section 28)* (Ministry of Justice, 2016).

895 At 65.

896 At 64.

897 At 66.

898 At 68.

899 These included technical issues with the equipment, sound quality, and rooms being unable to be used for any other cases: at 67.

900 Scottish Government *Pre-recording Evidence of Child and Other Vulnerable Witnesses: Consultation* (June 2017) available at <www.gov.scot/Resource/0052/00521861.pdf>. The focus of the consultation was on addressing identified legislative and practical gaps within the current arrangements for enabling pre-recording to occur. The consultation was part of wider work being undertaken to improve the court experiences of child and other vulnerable witnesses. In March 2015, the Scottish Courts and Tribunals Service's *Evidence and Procedure Review Report* called for Scotland to harness the opportunities that new technologies bring to improve the quality and accessibility of justice. The review proposed a number of ideas that could help transform the conduct of criminal trials, in particular in relation to the evidence of children and vulnerable witnesses. In October 2016, the Cabinet Secretary for Justice outlined his vision for the greater use of pre-recorded evidence. The 2016–2017 Work Programme set out the Scottish Government's plans to progress the recommendations of the Scottish Courts and Tribunals Service's *Evidence and Procedural Review Report*, including the necessary steps to enable child witnesses to provide pre-recorded evidence. In March 2017, the Lord Justice Clerk, Lady Dorian, also introduced a new High Court guideline (Practice Note) intended to improve the way evidence of children and vulnerable witnesses is taken: High Court of Justiciary Practice Note No. 1 of 2017 "Taking evidence of a vulnerable witness by a Commissioner".

901 Scottish Government *Pre-recording Evidence of Child and Other Vulnerable Witnesses: Consultation* (June 2017) available at <www.gov.scot/Resource/0052/00521861.pdf> at 14, Question 1.

902 Scottish Government *Pre-recording Evidence of Child and other Vulnerable Witnesses: Consultation Analysis* (December 2017) at 5–6. The consultation received 47 responses, comprised of 16 individuals and 31 organisations. There was a consistent view among respondents that a presumption by itself would not be sufficient to mitigate the stress of questioning child and vulnerable witness, and to obtain good quality evidence. Those opposed to a presumption asserted that witnesses should retain the choice to give evidence in person.

COMPLAINANTS IN SEXUAL VIOLENCE CASES

M v R

9.18 The New Zealand position in relation to pre-recorded cross-examination evidence was addressed by the Court of Appeal in 2011 in *M v R*. There, the Court was asked to determine whether the language of sections 103 and 105 of the Act permitted a judge to direct that the cross-examination of a complainant should be pre-recorded in a sexual violence case. The Court held that such a direction was possible, but considered it would need to be a "compelling case"[903] and that a judge should be "very slow to order pre-trial cross-examination in the absence of clear evidence" that full disclosure had occurred.[904]

9.19 The Court of Appeal emphasised the general rule of criminal law that a defendant is not required to show their hand (by disclosing what or how they propose to argue in defence) before trial.[905] By contrast, the prosecution is required to disclose all relevant information to the defence as soon as is reasonably practicable after a defendant has pleaded not guilty, unless there is good reason not to.[906] If pre-recording of cross-examination takes place before full disclosure has been made, the defence could lose the opportunity to question a witness on relevant aspects of the prosecution's case that are only subsequently disclosed to the defence. The Court also noted resource implications,[907] and the risk that a complainant may need to be recalled to give evidence if new matters come to light shortly before trial.[908]

Previous Law Commission reports

9.20 In its 2013 review of the Evidence Act, the Law Commission said that pre-recording complainant evidence (including cross-examination) in certain cases had merit and that this issue required further investigation. However, noting the discussion in *M v R*, the Commission concluded that pre-recording raised significant policy issues, and that its operational review of the Act was not the appropriate place for that enquiry.[909]

9.21 In 2015, the Commission looked at the issue again in its report *The Justice Response to Victims of Sexual Violence*. In relation to complainants in sexual violence cases, the Commission concluded the Act should provide greater support for the use of pre-recorded evidence-in-chief and encourage a more consistent approach to its use among courts.[910] Pre-recording would have the benefit of protecting the evidence from deterioration by delay, and could also ameliorate some of the anxiety of complainants waiting for trial.[911] The Commission recommended:

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903 *M v R* [2011] NZCA 303, [2012] 2 NZLR 485 at [41].

904 At [35].

905 The Criminal Disclosure Act 2008 does impose some limited disclosure obligations on the defence relating to evidence relied on where the defence intends to run an alibi defence and when the defence proposes to call an expert witness: ss 22 and 23.

906 Criminal Disclosure Act, ss 12–19.

907 For example, that a judge, court staff and a courtroom would need to be provided for the taking of the evidence: *M v R* [2011] NZCA 303, [2012] 2 NZLR 485 at [36].

908 At [40].

909 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.80].

910 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.46] and [4.52].

911 At [4.69].

- the Act should provide that an adult complainant[912] in a sexual violence case is *entitled* to give their evidence-in-chief in one or more of the alternative ways in section 105 or in the ordinary way outlined in section 83;[913] and
- the Act should require prosecutors to consult with complainants on the mode in which they prefer to give evidence.[914]

9.22 These recommendations reflect the fact that not all complainants will want or need an alternative mode of giving evidence, but the mode should be their *choice*.[915] To facilitate their choice, complainants need to be informed of the options.

9.23 In relation to pre-recording of cross-examination, the Commission noted that between 2010 and 2011 (prior to *M v R*) a number of cases in Auckland had successfully used pre-recording for the cross-examination of children.[916] Empirical research and a considerable volume of international commentary also strongly supported the practice.[917] Pre-recording cross-examination evidence protects complainants from delay-related harm and protects evidence against deterioration by the passage of time.[918] It may also reduce the risk of mistrial by allowing judges to control questioning more robustly in the knowledge that interventions can be edited out.[919] Witnesses also benefit from being able to take breaks more easily during the cross-examination process.[920]

9.24 The Commission therefore made recommendations that sought to encourage pre-recording cross-examination in sexual cases, while balancing the countervailing concerns expressed in *M v R*. It recommended that:

- the Act should include a provision to the effect that the starting point for all complainant witnesses in sexual violence cases is that they may pre-record their cross-examination evidence, unless a judge makes an order to the contrary;[921]

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912 Since January 2017, s 107 of the Evidence Act has provided that all child witnesses (including complainants) in criminal proceedings are entitled to use alternative ways of giving evidence for all parts of their evidence.

913 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 72, R3. The Australian Law Reform Commission and New South Wales Law Reform Commission have also recommended that "all Australian jurisdictions should adopt comprehensive provisions dealing with pre-recorded evidence in sexual offence proceedings, permitting the tendering of pre-recorded evidence of interview between investigators and a sexual assault complainant as the complainant's evidence-in-chief" (Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128 Vol 1, 2010) at 70).

914 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 72, R4.

915 Currently, the judge may direct that evidence is to be given in an alternative way, either on the judge's own initiative or on the *application* of a party: Evidence Act, s 103(1).

916 Following *M v R* [2011] NZCA 303, [2012] 2 NZLR 485, existing applications to pre-record the cross-examination of child complainants in Auckland were frozen.

917 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.76], citing Laura Hoyano "Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants" (2015) 2 Crim LR 107; John Spencer *Review of Public Prosecution Services* (September 2011); Emily Henderson "Communicative competence? Judges, advocates and intermediaries discuss communication issues in the cross-examination of vulnerable witnesses" (2015) 9 Crim LR 659; Emma Davies and others "Prerecording children's entire testimony" [2011] NZLJ 335; and Kevin Sleight "Managing Trials for Sexual Offences – A Western Australian Perspective" (paper presented to AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney, 7 September 2011).

918 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.77].

919 At [4.70].

920 At [4.70].

921 At 76, R5.

- relevant reasons for a judge to make an order to the contrary include those that pertain to the fair trial rights of defendants and circumstances where it would be impractical or excessively costly to pre-record the cross-examination;[922] and
- the Ministry of Justice should be responsible for issuing up-to-date memoranda outlining operational processes to be followed where cross-examination is to be pre-recorded in a hearing before trial.[923]

9.25 The Government is currently considering these recommendations. We continue to support our 2015 recommendations.

COMPLAINANTS IN FAMILY VIOLENCE CASES

9.26 The Family and Whānau Violence Legislation Bill 2017, which at the time of writing is awaiting its second reading in Parliament, aims to promote the use of pre-recorded evidence-in-chief for complainants in family violence cases. The Bill proposes inserting the following provision into the Evidence Act:[924]

> **106A Giving of evidence by family violence complainants**
>
> (1) This section applies to a complainant who is not a child and who is to give or is giving evidence in a family violence case (a **family violence complainant**).
>
> (2) A family violence complainant is entitled to give his or her evidence in chief by a video record made before the hearing.
>
> (3) The video record must be one recorded—
>
> (a) by a police employee; and
>
> (b) no later than 2 weeks after the incident in which it is alleged a family violence offence occurred.
>
> (4) If a video record is to be or has been used as the complainant's evidence in chief, a Judge must give a direction under section 103 about how the complainant will give the other parts of his or her evidence, including any further evidence in chief.
>
> (5) To avoid doubt, section 106 applies to a video record offered as the complainant's evidence in chief under this section.
>
> (6) If the prosecution intends to use a video record as a complainant's evidence in chief, the prosecution must provide the defendant and the court with a written notice stating that intention to do so.
>
> (7) Unless a Judge permits otherwise, the notice must be given no later than when a case management memorandum (for a Judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011.

9.27 The Bill further provides that, if a complainant opts to give pre-recorded evidence-in-chief, a defendant may challenge that decision by applying to a judge for an order that the complainant give evidence in the ordinary way or a different alternative way.[925] Before giving such a direction, the judge will need to have regard to the interests of justice in the particular case and the matters listed in sections 103 of the Act.[926]

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922 At 76, R6.

923 At 76, R7.

924 Family and Whānau Violence Legislation Bill 2017 (247-2), cl 124.

925 Section 106B(1) in cl 124 of the Family and Whānau Violence Legislation Bill.

926 Section 106B(4) in cl 124 of the Family and Whānau Violence Legislation Bill.

9.28 If enacted, the new provisions will apply in every "family violence case". By definition this does not include sexual violence cases.[927] If there is a sexual violence charge, the case is to be dealt with in the same way as other sexual violence cases that do not involve family members.

Evidence-in-chief

9.29 A notable feature of the Bill is that it will enable a video record of an on-scene interview with the complainant to be played as evidence-in-chief.[928] This addresses a particular problem in family violence cases – that the complainant may later recant their statement if they reconcile with the defendant. Further benefits of good quality on-scene video statements include:[929] reduced stress for complainants;[930] richer evidence for the courts;[931] earlier guilty pleas; improved productivity of police officers, by reducing the time they spend on written statements;[932] and reduced court time.

9.30 A potential issue with the Bill's entitlement to offer a video record as evidence-in-chief is that it does not require prosecutors to consult with complainants about their preferred mode of evidence. In its 2015 report, the Commission noted "an entitlement is worth little if the complainant does not know that it exists".[933] Accordingly, we see merit in including a requirement to consult the complainant about their preferred mode of evidence in a family violence case. As noted above,[934] the Commission made a similar recommendation in respect of complainants in sexual violence cases in 2015.

9.31 There is potentially a more significant issue, however, which concerns the requirement that a video record must be recorded "no later than 2 weeks after the incident in which it is alleged a family violence offence occurred".[935] The two week limitation means video statements are likely to be appropriate only in cases where the complainant calls Police following a specific incident and a police officer takes a video statement on the scene. In some other cases (for example, involving a pattern of sustained violence over many years), it may not be appropriate or possible to record

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927 Family and Whānau Violence Legislation Bill, cl 119(2).

928 Section 106A in cl 124 of the Family and Whānau Violence Legislation Bill. This aspect of the Bill follows a pilot undertaken by the New Zealand Police, in which Police recorded interviews with family violence complainants on smartphones at the scene of the alleged family violence incidents. The pilot encountered difficulties when the District Court in *Police v Winiata* [2016] NZDC 7509, [2017] DCR 282 held that smartphone recordings could not be played in court because the way in which the digital recordings were stored did not comply with the Evidence Regulations 2007. The regulations were amended shortly afterwards to permit these recordings to be admitted as evidence. The Evidence Amendment Regulations 2016 introduced a new pt 4 into the regulations, titled: "Mobile video record evidence in criminal proceedings concerning domestic violence". The changes came into effect from 9 January 2017. Subsequently, in June 2017, the Government and New Zealand Police announced another six month video statement pilot in Counties Manukau: Paula Bennett and Amy Adams "Police to test victim video statements" (press release, 19 June 2017); New Zealand Police "Video statement pilot announced" *Ten One* (online ed, 19 June 2017). The trial uses a smartphone app to record audio-visual victim statements at the scene. See also: Jono Galuszka "Police iPhone interviews of domestic violence complainants unplayable in court" *Manawatū Standard* (online ed, Palmerston North, 12 June 2016).

929 Amy Adams and Michael Woodhouse "Police to trial family violence victim video statements" (press release, 1 December 2015). For potential pitfalls of recording at the scene of the incident, see: James Greenland "Potential for all witness statements to be recorded, says lawyer" (7 December 2015) New Zealand Law Society <www.lawsociety.org.nz>.

930 For example, by allowing complainants to recount what has happened in their own home, where they feel comfortable, rather than at a police station.

931 A video record made shortly after the incident, in the complainant's home, is a more compelling account than a statement given to Police at a later time and presented to a judge as a paper statement. It enables the judge to see what the complainant was thinking and feeling at the time. See Carla Penman "Police film domestic violence statements" *Radio New Zealand* (online ed, Auckland, 19 September 2016).

932 During the initial pilot in Palmerston North, 89 women had their statements recorded on the scene. Most interviews were between six and 10 minutes long, whereas a written interview would usually take "well over an hour": Carla Penman "Police film domestic violence statements" *Radio New Zealand* (online ed, Auckland, 19 September 2016).

933 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.55].

934 At [9.20].

935 Section 106A(3)(b) in cl 124 of the Family and Whānau Violence Legislation Bill.

the complainant's statement within two weeks of the incident occurring. This raises the question of whether a complainant in a family violence case should be entitled to give their evidence-in-chief by way of an EVI, even if it is recorded more than two weeks after the incident.

9.32 Notably in Australia, legislation in New South Wales and the Northern Territory explicitly entitles family violence complainants to give their evidence-in-chief by way of a video record, unless a judge directs otherwise.[936] Other states, such as the Australian Capital Territory and Victoria, provide a similar entitlement in relation to violent offences.[937] None of these provisions contains a time constraint on when the video must be made.[938] Further, there are no time constraints on when an EVI must be made to enable it to be offered as evidence-in-chief in a sexual violence case. As we explain further below,[939] there are many significant parallels between the challenges faced by the complainants in these two kinds of cases.

Cross-examination

9.33 If a complainant cannot offer a video record that is recorded more than two weeks after the alleged offending as their evidence-in-chief, then the Bill's follow on requirement that the judge must give a direction about how the complainant will give other parts of his or her evidence (including cross-examination) also will not apply. This means that some family violence complainants will still need to apply to give their evidence in an alternative way under section 103, just like any witness in any proceeding – whereas family violence complainants who have their statement recorded on video within two weeks of the alleged offending will have the additional protection that the judge must automatically consider whether an alternative way of giving further evidence, including cross-examination, is appropriate.

9.34 In any case, the Bill does not entitle any family violence complainants to offer pre-recorded cross-examination as evidence. The starting point is that complainants will give their cross-examination in the ordinary way unless the judge directs otherwise.

9.35 Although the Family and Whānau Violence Legislation Bill has benefits for the administration of justice and for complainants in some family violence cases, it could arguably go further to support family violence complainants.

9.36 By way of comparison, as noted above,[940] several states in Australia expressly allow family violence complainants to offer pre-recorded cross-examination as evidence.[941] This occurs in one of three ways:

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936 Criminal Procedure Act 1986 (NSW), s 289F; and Evidence Act (NT), s 21H.

937 Evidence (Miscellaneous Provisions) Act 1991 (ACT), ss 40AA–40M; and Criminal Procedure Act 2009 (Vic), ss 366–367.

938 In the Northern Territory, s 21J(1)(a) of the Evidence Act (NT) provides that to be admissible the recorded statement of the domestic violence complainant must be made "as soon as practicable after the events mentioned in the statement occurred".

939 At paragraphs [9.38]–[9.52].

940 At paragraphs [9.11]–[9.12].

941 In Victoria, pre-recording all or part of a complainant's evidence is not one of the permitted alternative arrangements for giving evidence: see Criminal Procedure Act 2009 (Vic), s 360. In New South Wales, domestic violence complainants may give evidence-in-chief in the form of a pre-recording, however there is no ability to pre-record a complainant's cross-examination: see Criminal Procedure Act 1986 (NSW), pt 4B. In the Australian Capital Territory, the Evidence (Miscellaneous Provisions) Act 1991 (ACT) allows both sexual violence and family violence complainants to pre-record their evidence-in-chief (s 80), and in sexual cases the complainant may give their cross-examination in a pre-trial hearing by way of audio-visual link (pt 4.2). In a family violence offence proceeding, the complainant's evidence may be given in closed court in specified circumstances (s 78). In South Australia, the Evidence Act 1929 (SA) allows a "vulnerable witness" to apply for special arrangements, including pre-recording their cross-examination outside the trial court, and the court must order that special arrangements be made if it is practical to do so (s 13A). A "vulnerable witness" includes an adult sexual violence complainant, but does not explicitly include a family violence complainant (s 4). A family violence complainant might be a "vulnerable witness" if they are subjected to threats of violence or retribution in connection with the proceedings or have reasonable grounds to fear violence or retribution, or if the court considers they will be specially disadvantaged if not treated as a vulnerable witness (s 4).

- The court *may* (of its own motion or on the application of the family violence complainant) order that the complainant is to give their cross-examination in a special way, including by way of pre-recording the evidence at a pre-trial hearing.[942] Before granting the complainant's application, the judge may be required to consider certain factors.[943] This resembles the current approach (for any witness) in New Zealand under sections 103–106 of the Act.
- The judge *must consider* whether the whole of a family violence complainant's evidence is to be given in an alternative way, including by way of a pre-recording made at a special hearing.[944] No application by the complainant is required. This is the approach that appears to have been adopted in the Family and Whānau Violence Legislation Bill (in cases where the complainant has offered a video record as their evidence-in-chief).[945]
- The complainant may apply to have their cross-examination pre-recorded and, upon receiving an application, the judge *must* make an order that the complainant give their cross-examination evidence in the special way,[946] unless that is not in the interests of justice or the urgency of the proceedings makes pre-recording inappropriate.[947] In other words, the starting point is that a family violence complainant is entitled to have their cross-examination pre-recorded at a special hearing and replayed to the jury as evidence.

9.37 As noted above,[948] the Commission has recommended in its 2015 report that complainants in sexual violence cases should be entitled to have their cross-examination pre-recorded prior to trial, unless a judge directs otherwise. We consider that it may also be appropriate for the same starting point to apply in family violence cases.

Similarities between sexual and family violence complainants

9.38 Complainants in sexual and family violence cases face a number of similar challenges,[949] as we explain below.

Defendant known to the complainant

9.39 In family violence cases the complainant knows the defendant. Pressure or even threats by some defendants may distort the complainant's views at various stages of the court process, and there are likely to be other agendas that prevent both complainants and defendants from being

942 Evidence Act 1977 (Qld), s 21A; and Evidence Act 1906 (WA), s 106R.

943 In Western Australia, the judge must be satisfied that not treating the complainant as a special witness would mean the complainant is unlikely to be able to give evidence satisfactorily by reason of physical or mental impairment, or is likely to suffer severe emotional trauma, or be so intimidated or distressed as to be unable to give evidence or give evidence satisfactorily by reason of age, cultural background, a relationship to any party in the proceedings, the nature of the subject-matter of the evidence, or any other relevant factor (Evidence Act 1908 (WA), s 106R(3)).

944 Evidence (Children and Special Witnesses) Act 2001 (Tas), s 8(2A).

945 Section 106A(4) in cl 124 of the Family and Whānau Violence Legislation Bill.

946 Evidence Act (NT), s 21B. Section 21B applies to evidence of a "vulnerable witness" in respect of a sexual offence or a "serious violence offence". A "vulnerable witness" is defined in s 21A(1) and includes a complainant in a sexual violence or family violence case, as well as a witness who is a child, who has a cognitive impairment or intellectual disability, or whom the court considers to be vulnerable, having regard to the matters in s 21A(1A). These matters include: any relevant condition or characteristic of the witness, including age, education, ethnic and cultural background, gender, language background, maturity and personality; any mental or physical disability; any relationship between the witness and the defendant; and any other matter the court considers to be relevant. A "serious violence offence" is also defined in s 21A.

947 Evidence Act (NT), s 21A(2A)–21A(2C).

948 At [9.234].

949 See Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) (explanatory note) at 7: "There are many parallels between sexual offences and [violent offences]. Complainants in violent offences suffer from the same vulnerabilities commonly recognised as 'unique' to sexual offences".

objective.[950] There may be children whose interests need to be considered. If the parties are living apart, there is a high statistical probability that they will reconcile in the future.[951]

9.40 Similarly, most perpetrators of sexual violence will be known to the complainant and many are in a personal or family relationship with them.[952] Complainants may be financially or socially dependent on the defendant, and may not want the defendant to go to jail for a lengthy period.[953] At the end of the criminal trial process, however, the outcome for a defendant is either conviction or acquittal. If the outcome is a conviction, the likely result is a term of imprisonment. If the outcome is an acquittal, there are very few other options for a victim to seek justice in a form that can sit alongside the need or desire, if any, to have ongoing contact with the defendant.[954]

9.41 Unless evidence is pre-recorded or given in another alternative way, complainants in both cases will be required to face their alleged abuser in court.

Power imbalance

9.42 Family and sexual violence offences involve a power imbalance between the complainant and the defendant.[955] The offender obtains a degree of dominance over the complainant, leaving them fearful or intimidated and often feeling ashamed or embarrassed about the offending.[956]

9.43 For complainants in sexual cases, it may be embarrassing or shameful to discuss the offending. Similarly, a victim of family violence may also hide the abuse due to feelings of shame, low self-esteem or a sense that he or she is responsible for the violence.[957] At the centre of family violence is disempowerment and degradation.[958]

The private nature of the offending and the difficulty of corroboration

9.44 Sexual violence usually occurs in private and without any witnesses besides the complainant.[959] The complainant's testimony is therefore difficult to corroborate.[960]

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950 Susan Glazebrook "Family Violence – domestic measures for a global problem" (paper presented to the International Association of Women Judges' Asia-Pacific Regional Conference, Philippines, 13 May 2015) at 11–12, citing David Maher "Domestic Violence Offences: Sentencing, Family Violence Courts" (paper presented to the Lexis Nexis Criminal Law Forum, October 2005) at 1, and Russell Johnson "The Evolution of Family Violence Criminal Courts in New Zealand" (Police Executive Conference, Nelson, 8 November 2005) at 1.

951 Susan Glazebrook "Family Violence – domestic measures for a global problem" (paper presented to the International Association of Women Judges' Asia-Pacific Regional Conference, Philippines, 13 May 2015) at 11, citing David Maher "Domestic Violence Offences: Sentencing, Family Violence Courts" (paper presented to the Lexis Nexis Criminal Law Forum, October 2005) at 1, and Russell Johnson "The Evolution of Family Violence Criminal Courts in New Zealand" (Police Executive Conference, Nelson, 8 November 2005) at 1.

952 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [1.12]; and Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) (explanatory note) at 7.

953 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [1.12].

954 At [1.12].

955 Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) (explanatory note) at 7.

956 At 7.

957 Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128 Vol 1, 2010) at [18.4].

958 At [18.5].

959 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [1.9].

960 At [1.9]. We note, however, that the Evidence Act does not require prosecution evidence to be corroborated in criminal proceedings (except in relation to certain specified offences): see s 121(1).

9.45 Similarly, family violence often occurs in private, and therefore "family violence, by its nature, is often difficult to corroborate and prove".[961] The Australian Institute of Family Studies, in its research into allegations of family violence made in relation to parenting matters under the Family Law Act, noted:[962]

> Obtaining corroborative evidence is likely to be very difficult where the violence has occurred over an extended period of time, potential sources of proof may be lost, witnesses (where there were any) may no longer be available, injuries may have faded and the non-physical symptoms of trauma may not be obvious.

9.46 Although in some cases there may be a police report or medical records available, in other cases there will be no corroborating evidence because the complainant has not previously reported the violence or has sought to explain it away as "accidental".[963]

9.47 The private nature of sexual and family violence means complainants need to retain a detailed recollection of the incident to recall at trial, which may impede their long term recovery.[964] In family violence cases where there is a co-occurrence of violence against a partner and their children,[965] the witnesses may be victims themselves and may also find it distressing to retain and recall details of the incident.

Re-traumatisation in the courtroom

9.48 Studies have shown that victims of sexual violence are often at a higher risk of being re-traumatised by the criminal justice process than other victims of crime.[966] The complainant is required to share very personal details about their private life with others, including Police, the court and the perpetrator. The adversarial process for determining guilt beyond reasonable doubt, particularly cross-examination, creates a "highly competitive atmosphere" at trial and seeks to expose unreliable or dishonest witnesses, which can be traumatising for sexual violence complainants.[967]

9.49 Similarly, it can be traumatic for family violence complainants to re-tell their personal story in court.[968] Giving evidence "can be one of the most intimidating and distressing aspects of the legal

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961 Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128 Vol 1, 2010) at [18.9]; New Zealand Police "Prosecuting Family Violence" <https://fyi.org.nz/request/4125/response/13679/attach/7/Prosecuting%20Family%20Violence.pdf> at 10; Richard Chisholm *Family Courts Violence Review* (Attorney-General's Department, Australia, November 2009) at 27–28.

962 Lawrie Moloney and others *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A pre-reform exploratory study* (Australian Institute of Family Studies, 2007) at 117–118 as cited in Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128 Vol 1, 2010) at [18.9].

963 Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128 Vol 1, 2010) at [18.10].

964 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.33].

965 Cabinet Social Policy Committee "Reform of Family Violence Law: Paper Three: Prosecuting family violence" (August 2016) at [8], publicly available at <https://library.nzfvc.org.nz>.

966 Kerstin Braun "Legal Representation for Sexual Assault Victims – Possibilities for Law Reform?" (2014) 25(3) Current Issues in Criminal Justice 819 at 821–822.

967 At 821; Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 49; Ministry of Justice (United Kingdom) *Report on review of ways to reduce distress of victims in trials of sexual violence* (March 2014) at [33]; and House of Commons Home Affairs Select Committee *Child sexual exploitation and the response to localised grooming* (HC 68-1, 10 June 2013).

968 Ministry of Justice *Safer Sooner: Strengthening New Zealand's Family Violence Laws* (8 September 2016) at 13; Amy Adams and Michael Woodhouse "Police to trial family violence victim video statements" (press release, 1 December 2015); and Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128 Vol 1, 2010) at [18.4].

system for people who have been subject to family violence".[969] The complainant may be afraid to face their abuser, or there may be an inherent tension in giving evidence against a spouse or partner.[970] Like sexual violence complainants, their account will be questioned and challenged as part of the adversarial criminal justice process.[971]

Extra support needed in the court process

9.50 Complainants in sexual violence cases are more likely to require enhanced services and support during the criminal justice process.[972] They may, for example, require a support person or communication assistant, pre-trial court familiarisation visits, removal of gowns by judges and advocates, measures to avoid the complainant meeting the defendant, and greater privacy when giving their evidence.[973] Likewise, complainants in family violence cases often require "a greater level of support or protection throughout the court process than victims of some other crimes".[974]

Recanting

9.51 Prosecutions for family violence can be problematic if the case is built around the complainant's evidence. It is not uncommon for cases to be prosecuted during the "honeymoon" phase of the battering cycle, when the defendant is repentant and can persuade the complainant not to give evidence, or in a climate of fear, when the victim is concerned about repercussions from providing evidence.[975] Delay between the incident and making a formal statement at a police station provides the abuser with an opportunity to manipulate victims into recanting their initial complaint or watering down their statement.[976]

9.52 As most sexual violence complainants know the defendant, pressure from the defendant or concern for the defendant's wellbeing may also contribute to recantations by complainants.[977] Complainants may be reliant on the defendant for social or economic support and may not want the defendant to go to jail for a lengthy time if convicted.[978] Feelings of shame, self-blame and doubt may make

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969 Victorian Law Reform Commission *Review of Family Violence Laws: Report* (2006) at [11.1] as cited in Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128 Vol 1, 2010) at [18.7].

970 New Zealand Police Manual *Prosecuting Family Violence Deskfile* (obtained under Official Information Act 1982 request to the New Zealand Police, 8 June 2016) at 28.

971 One family violence complainant recently spoke out about her experience of the court process, saying it had been "very heavy and ugly" and "has added to the deterioration of my physical and emotional health". She felt the system was too focused on the offender rather than the victim. See Deena Coster "Court 'very heavy and ugly' experience for domestic violence victim" *Stuff* (online ed, 1 September 2017).

972 Ministry of Justice (United Kingdom) *Report on review of ways to reduce distress of victims in trials of sexual violence* (March 2014) at [41]–[42].

973 Ministry of Justice (United Kingdom) *Report on review of ways to reduce distress of victims in trials of sexual violence* (March 2014) at [41]–[43].

974 Cabinet Social Policy Committee "Reform of Family Violence Law: Paper Three: Prosecuting family violence" (August 2016) at [54], publicly available at <https://library.nzfvc.org.nz>; Susan Glazebrook "Family Violence – domestic measures for a global problem" (paper presented to the International Association of Women Judges' Asia-Pacific Regional Conference, Philippines, 13 May 2015); and Amy Adams and Michael Woodhouse "Police to trial family violence victim video statements" (press release, 1 December 2015).

975 New Zealand Police Manual *Prosecuting Family Violence Deskfile* (obtained under Official Information Act 1982 request to the New Zealand Police, 8 June 2016) at 5.

976 Grant Miller "Editorial: Police iPhones trial a positive development for family violence victims" *Manawatū Standard* (online ed, Palmerston North, 2 December 2015).

977 Heather J Hutanen *False Allegations, Case Unfounding and Victim Recantations in the Context of Sexual Assault* (Oregon, Attorney-General's Sexual Assault Taskforce, Position Paper, 10 January 2008) at 2.

978 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [1.12].

the complainant reluctant to share their experience and, depending on the response they receive from peers, family and the criminal justice system, they can be easily dissuaded or deterred from reporting the incident or participating in the criminal justice process.[979]

9.53 Given the extent of the similarities between the challenges faced by sexual and family violence complainants in giving evidence in court, we suggest that there may be sound policy reasons for approaching alternative ways of giving evidence in the same way in each kind of case.

Disclosure issues

9.54 As noted above at paragraphs [9.18]–[9.19], the Court of Appeal in *M v R* was concerned about the impact of pre-recording on the defence case, if pre-recording occurred before full disclosure had been made.

9.55 We are interested in hearing submitters' views on how the design and operation of the processes for pre-recording could address the practical problem that may arise if full disclosure is not made before cross-examination is pre-recorded.

9.56 One option, which was suggested by the Commission in 2015 in relation to sexual violence cases, is that an entitlement to pre-record cross-examination could be subject to an order made by a judge that there are good countervailing reasons why cross-examination is required to occur on the day of trial itself.[980] Countervailing reasons would include those that pertain to the fair trial rights of defendants; so for instance, where the judge is not satisfied that the criminal disclosure requirements have been met (or where pre-recording of cross-examination would be impractical or excessively expensive).[981] To give operational effect to these recommendations, the Ministry of Justice could be responsible for issuing up-to-date memoranda outlining processes to be followed where applications to undertake pre-recorded cross-examination are made and granted (for example, processes for recalling witnesses where later disclosure takes place).[982]

QUESTIONS

Q32 Should a family violence complainant automatically be entitled to:

a. give their evidence-in-chief by way of a pre-recorded video, regardless of whether the video is recorded within two weeks of the alleged incident?

b. offer pre-recorded cross-examination evidence?

If so, how could the Act mitigate the possibility that additional disclosure may occur after the pre-recording hearing takes place?

Q33 Should prosecutors be required to consult with complainants in family violence cases about their preferred mode of giving evidence?

979 Heather J Hutanen *False Allegations, Case Unfounding and Victim Recantations in the Context of Sexual Assault* (Oregon, Attorney-General's Sexual Assault Taskforce, Position Paper, 10 January 2008) at 2.

980 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.79] and 76, R5.

981 At [4.79] and 76, R6.

982 At [4.80] and 76, R7.

OTHER WITNESSES IN SEXUAL AND FAMILY VIOLENCE CASES

9.57 It may also be desirable to consider extending any entitlement to offer pre-recorded evidence to witnesses who will give propensity evidence about an allegation of sexual or family violence they have previously made. These witnesses may experience the same anxiety about testifying as complainants. In the Australian Capital Territory, a "similar act witness" may offer a video record as evidence-in-chief in a proceeding relating to a sexual or violent offence.[983] The court may still refuse to admit all or any part of the video record.[984]

9.58 Similarly, any entitlement to offer pre-recorded evidence could potentially also extend to the family members of a sexual or family violence complainant who are witnesses in the trial. One of the goals of pre-recording cross-examination is to aid the complainant's long term, psychological recovery. If a complainant is able to pre-record their evidence, but their family member cannot, the whole family (including the complainant) may be prevented from moving on from the trauma.

9.59 It is worth remembering, however, that the Evidence Act already allows such witnesses to give their evidence in an alternative way if the judge gives a direction to that effect either on the application of a party or at the judge's own initiative.[985] This may already provide a sufficient safeguard.

QUESTION

Q34 Should the Act entitle the following witnesses in sexual and/or family violence cases to pre-record their evidence (including cross-examination) unless a judge makes an order to the contrary:

a. propensity witnesses?

b. family members of the complainant?

OTHER VULNERABLE WITNESSES

9.60 Because of our terms of reference we have focused on witnesses in sexual violence and family violence cases. At the same time, however, we recognise there is a wider question about whether pre-recording evidence (evidence-in-chief and cross-examination) should be an entitlement that extends to all vulnerable witnesses – or to a broader range of vulnerable witnesses who meet defined criteria. The Evidence Act does not refer to "vulnerable witnesses". We use the phrase in this paper to include children, the elderly, people with physical, intellectual, psychological or psychiatric impairments, people with medical needs, and those with linguistic difficulties.[986]

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983 Evidence (Miscellaneous Provisions) Act 1991 (ACT), s 37. A "similar act witness" means a witness in a sexual or violent offence proceeding who gives evidence relating to an act committed on or in the presence of the witness by the accused, and is tendency or coincidence evidence under the Evidence Act 2011 (ACT), s 40D(2).

984 Evidence (Miscellaneous Provisions) Act 1991 (ACT), s 40F(2).

985 Evidence Act, s 103(1).

986 The Law Commission first considered the phrase "vulnerable witnesses" in its preliminary report *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996), and considered that "very young children, people with disabilities, those from minority linguistic or cultural backgrounds, and complainants in sexual cases" fell into this category (at [1]). We also note there is existing case law on the meaning of "vulnerable" that can provide guidance: see for example the case law concerning s 9(1)(g) of the Sentencing Act 2002 (which recognises offending against a particularly vulnerable victim as an aggravating

9.61 Research and overseas experiences, including the pilot in England, demonstrate that pre-recording evidence has benefits for witnesses and also for the administration of justice.[987] This is also arguably consistent with the broad purpose of the Evidence Act.[988]

9.62 We note the "overwhelming support" in Scotland to move towards a presumption that all vulnerable witnesses should have their evidence taken in advance of a criminal trial, as a means to improve their experience of court and the quality of their evidence, and the success of the pilot for child witnesses in England and Wales. We are interested to know whether New Zealanders also support moving towards greater use of pre-recorded evidence for all vulnerable witnesses.

9.63 At the same time, we are conscious there are some significant resourcing implications associated with pre-recording a witness' entire evidence. The experience in England and Wales highlights this. There are costs associated with the facilities and equipment needed to record the evidence and also with its secure digital storage. Do submitters support incrementally extending entitlements to pre-record evidence, for example by first extending an entitlement to family violence complainants?

QUESTION

Q35 Should reforms in the area of pre-recording aim to provide an entitlement for all vulnerable witnesses to have their entire evidence pre-recorded in advance of a criminal trial? If so, which vulnerable witnesses should an entitlement extend to?

VIDEO RECORDING EVIDENCE FOR USE AT RE-TRIAL

9.64 Elisabeth McDonald and Yvette Tinsley recommended in 2011 that, in cases of sexual offending, there should be a provision allowing for a complainant's evidence to be recorded by video at trial. Where evidence is recorded pre-trial (as an alternative way of giving evidence) or at the trial, the prosecution should be able to apply for the recording to be used at any re-trial.[989] This would allow a complainant to begin recovering from the traumatic experience sooner and offer "protection from secondary victimisation in the courtroom".[990] It may also preserve the highest quality evidence for trial in cases that are heavily reliant on the complainant's memory.

9.65 In deciding whether to allow this use of the video recording, the judge could take into account whether the defendant will be unfairly disadvantaged.[991] If necessary, the recording could be appropriately edited. If the recorded evidence is used in the re-trial, the Act could provide for supplementary evidence to be given in an alternative way.[992]

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factor in sentencing). That case law is discussed in Simon France (ed) *Adams on Criminal Law – Sentencing* (online looseleaf ed, Thomson Reuters) at [SA9.12].

987 Above at paragraphs [9.13]–[9.16].

988 See in particular, s 6(c) (promoting fairness to parties and witnesses), (d) (protecting important public interests) and (e) (avoiding unjustifiable expense and delay).

989 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 308.

990 At 307.

991 At 308, Recommendation 8.7.

992 At 308, Recommendation 8.8.

9.66 Similar provisions can be found in most Australian states,[993] and the Australian Law Reform Commission has recommended that federal, state and territory legislation should permit prosecutors to tender a video record of the original evidence of the complainant in any re-trial – including evidence recorded pre-trial or at trial.[994]

9.67 We understand that many New Zealand courtrooms are already equipped with cameras, but we recognise there would be costs associated with video recording the evidence of all sexual violence complainants at trial and also with its digital storage in case of a re-trial.

9.68 The Act currently does not appear to prevent the video recording of evidence at trial or its use at a re-trial. It also does not appear to prevent the use of pre-recorded evidence (including pre-recorded cross-examination) at a re-trial. If McDonald and Tinsley's proposal were adopted, however, it may be necessary or desirable to amend the Act expressly to permit:

- evidence to be recorded at trial and be used in a re-trial; and
- pre-recorded evidence to be used in a re-trial.

9.69 Such a provision could clarify fair trial rights for defendants[995] – for example, that they are not prevented from challenging the admissibility of any part of the evidence from the first trial or from offering evidence that did not form part of the first trial. Regulations could also be developed around the custody and storage of these recordings.

9.70 We would like to know if submitters support amending the Act to expressly permit evidence to be recorded for use at any re-trial. We are unsure how often pre-recorded evidence or evidence recorded at trial would realistically be used in a re-trial, given the evidence at a re-trial may change or new issues may be introduced between the two trials.[996] Although the proposal was made in relation to sexual violence complainants, it may also be appropriate to extend this to family violence complainants, given their similar characteristics and needs.[997]

QUESTION

Q36 Should the Act be amended to allow:

a. the evidence of sexual and/or family violence complainants to be recorded by video at trial for use at any re-trial?

b. the prosecution to tender any evidence recorded pre-trial in any re-trial?

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993 Evidence (Children and Special Witnesses) Act 2001 (Tas), s 7B; Evidence Act (NT), s 21E; Evidence (Miscellaneous Provisions) Act 1991 (ACT), s 40V; Evidence Act 1977 (Qld), s 21A(6); Criminal Procedure Act 2009 (Vic), s 374(2); Criminal Procedure Act 1986 (NSW), ch 6, pt 5, div 3; and Evidence Act 1929 (SA), s 13D.

994 Australian Law Reform Commission and New South Wales Law Reform Commission *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128 Vol 1, 2010) at 43, Recommendation 28-6.

995 Bearing in mind s 6(b) (recognising the importance of the New Zealand Bill of Rights Act 1990) and (c) (promoting fairness to parties and witnesses) of the Act.

996 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 307.

997 Above at paragraphs [9.38]–[9.52].

ACCESS TO EVIDENTIAL VIDEO INTERVIEWS

9.71 In 2011, McDonald and Tinsley recommended that the Evidence Act be amended so that defence counsel would not automatically be entitled to a copy of the EVI of a complainant in a sexual case, but could apply to the judge for a copy.[998] They were concerned about the possibility that these video records might be inadvertently lost or misused.[999] The Law Commission outlined this proposal in its 2013 review of the Act, but did not endorse it as further information was needed about whether actual practical difficulties had arisen from the operation of section 106(4)(a) of the Act (which conferred that automatic entitlement).[1000]

9.72 Although the Commission made no recommendations on the proposed amendment, the Government took up McDonald and Tinsley's recommendation.[1001] The Evidence Amendment Act 2016 consequently included a provision amending section 106, restricting defence counsel access to video recordings of child complainants and witnesses (including adult complainants) in sexual cases or violent cases.[1002] Instead of being entitled to a copy of the video record, defence counsel now need to apply to the judge for a copy.

9.73 At the same time, the Evidence Regulations 2007 were amended so that, unless the judge directs otherwise, the video record may only be viewed at the premises of Police or a Crown lawyer, or other premises with their agreement.[1003]

9.74 Before these amendments were enacted, the New Zealand Law Society expressed concern that the new restrictions would "impose a considerable burden on defence counsel in arranging access at times (for example, at weekends or in the evenings) when counsel are preparing for the trial while continuing to run the rest of their practice".[1004] The practical difficulties for counsel could have a consequent impact on the defendant's fair trial rights.[1005] The Law Society recommended that counsel should continue to be entitled to a copy of the video record, but should be prohibited from showing it to the defendant or providing access to a copy of it.

9.75 We have received feedback that indicates there have been problems with these restrictions. We would therefore like to hear about practical problems for defence counsel, as well as the impacts of these provisions on Police, Crown lawyers, complainants or anyone else.

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998 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 307, Recommendation 8.4.

999 They emphasised that their recommendation was directed towards the *risk* (or at least the perception of risk) that there will be some mishandling of copies of EVIs, rather than responding to existing problems in this regard: at 306.

1000 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.44].

1001 See the explanatory note to the Evidence Amendment Bill 2015 (27-1) introduced on 27 May 2015.

1002 Evidence Amendment Act 2016, s 29 amended s 106 to insert subss (4A)–(4C). The amendment came into force on 8 January 2017. Section 106 (as amended) is far more expansive than the original McDonald and Tinsley recommendation because it covers all child complainants and witnesses in all cases, and all adult witnesses in sexual and violence cases. On an application by the defendant, the judge may order that the video record (or part of it) be given to the defendant. However, before making an order the judge must consider whether the interests of justice require departure from the usual procedure, the nature of the evidence contained on the video record, and the ability of the defendant or the defendant's lawyer to view the video record or access the content of the video record by other means (for example, by viewing a transcript).

1003 Evidence Regulations 2007, reg 20B. Regulation 20B was inserted, as from 9 January 2017, by reg 9 of the Evidence Amendment Regulations 2016.

1004 New Zealand Law Society "Submission on the Evidence Amendment Bill" at [24].

1005 At [26]. We are also aware of a recent decision in which a defendant sought leave to appeal a ruling of the trial judge who declined to order a copy of the complainants' EVI be provided to the defendant's lawyer: *H (CA714/2017) v R* [2018] NZCA 34. It was argued on behalf of the defendant that a transcript of the interview would not be adequate for preparing his case (as it was important to view the visual record of the interviews of the complainants, who were very young children, in order to understand the body language, and the significance of silences and pauses); and that there were practical and logistical difficulties in viewing the interviews in a police station. The Court of Appeal declined to grant leave, as it had no jurisdiction to hear the proposed appeal.

9.76 In Chapter 16, we discuss the regulations and the restrictions on where and when defence counsel may view video records of child complainants and witnesses in sexual and violent cases.[1006] If the new restrictions on defence access are proving unduly burdensome, one option (which we discuss in that chapter) would be to amend the regulations to place obligations on Police and/or prosecutors to provide additional assistance to defence counsel. For instance, prosecutors could be required to offer a range of reasonable viewing times to defence counsel and/or the parties could be required to reach an agreement together as to the viewing location.

9.77 Another option would be to amend the Act so that defence counsel would be automatically entitled to access a copy of the EVI. Regulations could govern the protocol around possession and viewing of that copy. This option would reverse the very recent amendment to the Act. If this option is preferred, we would like feedback on how the risk of video records being inappropriately used should be mitigated. Are there technological solutions?

9.78 A variation on the above option would be to amend the Act along the lines suggested by the New Zealand Law Society, so that while counsel for the defence would be automatically entitled to a copy of the video record, they would be prohibited from showing it to the defendant or providing access to it. Regulations could impose such restrictions on counsel.

QUESTION

Q37 Have sections 106(4A) to (4C) and regulation 20B, which restrict access by defence counsel to video interviews in sexual or violent cases, created any difficulties in practice? If so, how could access to video records be improved while still mitigating the risk that they may be inappropriately used?

JUDICIAL CONTROL OVER WITNESS QUESTIONING

9.79 Under section 85 of the Act, judges may disallow questions or direct witnesses not to answer questions on certain grounds. A judge may intervene in cross-examination if he or she considers that a question asked is: "improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand".[1007] Without limiting matters that may be considered, the judge may have regard to: (a) the age or maturity of the witness; (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; (c) the linguistic or cultural background or religious beliefs of the witness; and (d) the nature of the proceeding.[1008]

9.80 Section 85 therefore gives the trial judge a wide discretion to control the nature of questions and the manner of questioning.[1009] The provision applies to all questioning of witnesses in civil or criminal proceedings.

1006 At [16.30]–[16.33].

1007 Section 85(1).

1008 Section 85(2). Section 85(2)(e) also addresses hypothetical questions. It provides: "in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding."

1009 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C320].

9.81 The provision raises two related issues:

- Does it adequately allow the judge to address the manner of questioning, as well as the structure and content of questions?
- Does it strike the right balance between the judge's power (or duty in some situations) to exercise control to protect vulnerable witnesses where this is necessary, and the defendant's right to examine witnesses giving evidence for the prosecution?

The manner of questioning

9.82 The terms "improper", "unfair" and "misleading" are broad in scope, and can be read as capturing both the manner of questioning, as well as the structure and content of any question. "Needlessly repetitive" may be seen to cover the badgering of a witness as well as unnecessary and time wasting repetition.

9.83 In 2011 Elisabeth McDonald and Yvette Tinsley recommended that the Act should be amended to include a provision that the judge may disallow a question if it is asked in a manner that is unduly intimidating or overbearing, by taking into account the matters in section 85(2).[1010] They said that even though the judge is best placed to influence the tone of the proceedings during a sexual case, research indicated that judges are cautious about interfering with the questioning of witnesses, particularly by defence counsel.[1011] They said although it can be argued that unduly intimidating or overbearing questions are already caught by the inclusion of "improper" or "unfair" in the provision, an amendment to the Act would give additional statutory guidance for counsel and judges.[1012]

9.84 The Commission considered this recommendation in the 2013 review of the Evidence Act.[1013] The 2013 report explained that the Commission's original Evidence Code had included the term "intimidating" in the list of grounds on which a judge may disallow a question,[1014] and that the Commission's intent with section 85 was to allow both the manner in which the question was asked and the content to be addressed. The commentary to the Code explained: "[i]t gives the judge a wide discretion to control the nature of the questions *and the manner in which they are put*."[1015]

9.85 The Commission noted in the 2013 report that the word "intimidating" had been removed by the Select Committee for the following reasons:[1016]

> 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.

9.86 The Commission took the view that it was not appropriate for it to revisit policy decisions made by Parliament in an operational review so made no recommendations on this issue in its 2013 report.

1010 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 317, Recommendation 8.10.

1011 At 314.

1012 At 317.

1013 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.17]–[11.23].

1014 Section 85(1) of the Evidence Code.

1015 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C320] (emphasis added).

1016 Evidence Bill 2005 (256-2) (select committee report) at 10.

9.87 In its 2015 report *The Justice Response to Victims of Sexual Violence*, the Commission revisited the issue of unduly intimidating or overbearing questions.[1017] The Commission said that if section 85 is reviewed again, this should be done as part of the second review of the Evidence Act so that the way the section operates within the context of the Act as a whole could be considered.[1018]

9.88 While we consider that any question that is unduly intimidating or overbearing is by definition "improper" or "unfair" and therefore already implicitly covered in section 85, there may still be merit in amending the Act to make this explicit. An amendment could draw attention to the issue of unacceptable conduct and provide additional guidance to counsel and the judiciary.

Complexity in structure and content of questions

9.89 The phrase "expressed in language that is too complicated for the witness to understand" in section 85 is concerned primarily with the structure and content of questions.

9.90 Children and other vulnerable witnesses find grammatically complicated questions difficult to understand. What are known as "tag" questions, which consist of a statement with a short question inviting confirmation, can be particularly difficult for a child or other witness with any learning impairment to answer.[1019] Even adult complainants and witnesses, when distressed, may find linguistically complex questions confusing and answer inaccurately. It is important therefore that section 85 gives the judge the ability to disallow questions that are too complicated for the witness to understand.

9.91 Our preliminary view is that section 85 covers issues around confusing linguistically complex questions (including tag questions). The judge may take the age or maturity of the witness, as well as any intellectual or psychological impairment, into account when assessing whether the question is too complicated for the particular witness to understand and answer. At the same time, however, section 85 only addresses whether specific questions asked of a specific witness are unacceptable. It is doubtful whether the section can be applied proactively to exclude certain types or categories of questions (such as tag questions) for vulnerable witnesses.

9.92 The Court of Appeal in *Metu v R* expressed reservations about the lawfulness of a blanket policy purporting to ban tagged questions, whether in cases involving child complainants or otherwise.[1020] In the District Court the judge had referred Mr Metu's counsel to a generic protocol that was being applied in trials involving children in Northland. The protocol indicated that the court was endeavouring to stop counsel from asking children certain types of questions that extensive research has shown will simply confuse and distress children and result in inaccurate answers.[1021]

9.93 Ultimately the Court of Appeal did not have to express its view on the lawfulness of the protocol, but, as noted, it questioned the legality of the approach. The Court confirmed: [1022]

1017 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.90]–[4.105].

1018 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.105].

1019 For example, "He was kind to you, wasn't he?" and "He didn't hurt you, did he?" See Adrian Keane "Cross-Examination of Vulnerable Witnesses – Towards a Blueprint for Re-Professionalisation" (2012) 16 E&P 175 at 178.

1020 *Metu v R* [2016] NZCA 124 at [23].

1021 The Whangārei District Court is currently part of the Sexual Violence Court Pilot led by District Court judges. The pilot involves all sexual violence cases proceeding to jury trial in the District Court at Auckland and Whangārei, as they enter the court system from December 2016.

1022 *Metu v R* [2016] NZCA 124 at [23].

> Leading questions including tagged questions are permitted in cross-examination of any witness subject to the ability of the presiding judge to control the manner of cross-examination in the interests of justice.

9.94 As already noted, section 85 is directed at specific questions being asked of a specific witness, and the judge is required to make a context specific assessment as to whether a question is unacceptable. Although guidance can be given to counsel in advance on the appropriate content and style of questions, section 85 probably does not permit judges proactively to preclude tag questions or other types of linguistically complex questions on policy grounds.

9.95 We are considering whether there is a need for greater proactive control of questioning. One option for improving questioning practices in relation to vulnerable witnesses, which we discuss briefly below, would be to develop the practice of more explicitly setting "ground rules" at a case review hearing before trial in cases involving vulnerable witnesses. We consider that where the judge has sufficient information about the age, communication difficulties, or any other impairment of a witness at the pre-trial stage, the judge would be able to indicate that certain types of questions would be unacceptable and, if asked, would likely be disallowed under section 85. Clearer guidance for counsel on questioning may be needed.

9.96 In England and Wales the Council of the Inns of Court provides such guidance. The Council has developed toolkits of online resources known as "the Advocates Gateway" to help advocates respond appropriately to vulnerable witnesses with communication needs.[1023] The approach taken is to provide resources that help advocates adopt an appropriate manner and tailor questions to the needs and abilities of the vulnerable witness. An appropriately tailored approach allows the witness to understand the questions and give answers that he or she believes to be correct.[1024]

9.97 Early observations from research currently being undertaken by Elisabeth McDonald and Paulette Benton-Greig (on the rape trial process and the extent to which current law and practice impede fair process and just outcomes) indicate that, in a sample of acquaintance rape cases, the majority of judicial interventions under section 85 were to control question form rather than question content (for example, to ask defence counsel to re-ask questions that were difficult to understand because they contained two propositions or were unclear as to what the complainant was actually being asked).[1025]

The duty to protect vulnerable witnesses

9.98 The judge has a wide discretion to intervene under section 85, and one aim of the section is "to enable the judge to ensure that no party or witness is unfairly disadvantaged by the way he or she is questioned".[1026] Section 85 accordingly establishes the trial judge as a protector for witnesses, particularly vulnerable ones.[1027]

9.99 Control of the manner of questioning of a witness by the judge must be balanced against the right of the defendant in a criminal case to a fair trial. In *Metu v R* the Court of Appeal said:[1028]

1023 The Inns of Court College of Advocacy "The Advocates Gateway" <www.theadvocatesgateway.org>.

1024 The Inns of Court College of Advocacy "The Advocates Gateway: General Principles from research, policy and guidance: planning to question a vulnerable person or someone with communication needs" (30 November 2015) <www.theadvocatesgateway.org>.

1025 The project, supported by a Marsden grant, is exploring "Rape Myths as Barriers to Fair Trial Practice".

1026 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C322].

1027 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV85.04].

1028 *Metu v R* [2016] NZCA 124 at [23].

> This right [to a fair trial] includes the right to challenge the prosecution witnesses and to put the defendant's version of events to them as the defendant or his or her counsel sees fit, subject… to the Judge's power, or duty in some instances, to exercise control if it should be necessary.

9.100 The right of a defendant to examine witnesses giving evidence for the prosecution is affirmed by the New Zealand Bill of Rights Act 1990.[1029] However, this is not an absolute right and there are already statutory restrictions in place, including those in section 85.[1030]

9.101 Judicial authority establishes that the judge has a duty to intervene in cross-examination, for example, where it is necessary to protect vulnerable witnesses from being intimidated or where they may not understand what is being put to them.[1031] The Court of Appeal has said that "the judicial power of control over a trial" includes "protecting vulnerable witnesses or those who face harassment in cross-examination".[1032] Cross-examination by counsel that is designed to humiliate, belittle or break any witness is not permissible.[1033]

9.102 Consultation leading to the Commission's 2015 report, *The Justice Response to Victims of Sexual Violence*, identified significant differences of opinion over where the line between robust cross-examination and unacceptable questioning should be drawn.[1034] The report noted markedly different views in relation to the nature and manner of questioning of witnesses by defence counsel in sexual violence cases. For example, representatives from the Criminal Bar Association told the Commission they did not believe that, in general, defence lawyers question complainants too aggressively. The Association said:[1035]

> … it is inevitable that when a witness gives evidence contrary to the other side's case theory that they will find themselves under some form of attack in cross-examination. The purpose of the rules of evidence is to ensure that that attack is focused on what is relevant and in issue.
>
> In some cases there is no avoiding the fact that that questioning attacks the very integrity of the witness. … it is to be expected that the process of being challenged about evidence will be very difficult for a witness.

9.103 In contrast, other submitters and consultees told the Commission that questioning was more aggressive than this suggested. One researcher in the area of sexual violence reported numerous examples in her research of defence counsel's "rudeness to, and bullying of, complainants".[1036] A prosecutor gave anecdotal evidence of defence counsel using body language and gestures to undermine complainants giving evidence (such as eye rolling towards the jury).

1029 New Zealand Bill of Rights Act 1990, s 25(f).

1030 Another important restriction is that in s 95 of the Evidence Act. Under s 95(1)(a) a defendant in a sexual case, or a civil or criminal case concerning domestic violence, is not entitled to personally cross-examine the complainant (including a child complainant). Under s 95(1)(b) a defendant is also not entitled to personally cross-examine any other child witness in the proceedings unless the judge gives permission.

1031 *Metu v R* [2016] NZCA 124 at [18].

1032 *Tahere v R* [2013] NZCA 86 at [29].

1033 *M v R* [2011] NZCA 84 at [32]–[34].

1034 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal trials and alternative processes* (NZLC R136, 2015) at 78–82.

1035 Letter from the Criminal Bar Association to the Law Commission regarding the alternative trial process reference (9 September 2015).

1036 Dr Linda Beckett (whose research was an evaluation of services/interventions in sexual violence cases and whether these had the capacity to meet the support and service needs created by sexualised violence without causing secondary victimisation). See Linda Beckett "Care in Collaboration: Preventing Secondary Victimisation through a Holistic Approach to Pre-Court Sexual Violence Interventions" (PhD in Criminology Thesis, Victoria University of Wellington, 2007).

9.104 Feedback to the Commission also indicated disagreement on whether judges were adequately using section 85 to manage questioning in sexual violence cases.[1037] Some consultees suggested that judges were reluctant to take too interventionist an approach because of the risk of creating grounds on which the case may be appealed. One District Court judge also told the Commission that many questions were asked in an inappropriate fashion. The judge suggested that judges should be prepared to apply some kind of filter to the questions asked and to require defence counsel to desist or reframe where necessary.

9.105 We are considering whether the discretionary language of section 85 adequately captures the duty the judge has in some situations to intervene to protect vulnerable witnesses (particularly children). Section 85 is permissive, but does not signal that intervention is required where witnesses, because of their personal characteristics or the nature of the proceedings, are particularly vulnerable to intimidation or to misunderstanding and responding inaccurately to unacceptable questions.

9.106 One option for ensuring better protection of vulnerable witnesses is to state explicitly the judge's duty to intervene when the manner of questioning, or the structure or content of questioning, is unacceptable. A new provision specifically addressing the questioning of child complainants and child witnesses (and possibly other potentially vulnerable complainants and witnesses) could, for example, be incorporated into the Act; possibly as a modification of section 85.

9.107 A new provision might provide that in certain types of proceedings the judge *must* disallow any question that the judge determines is misleading or too complicated for the child witness (and possibly other potentially vulnerable complainants and witnesses) to answer because of the witness' age or maturity or because of any intellectual, psychological or psychiatric impairment.

9.108 The breadth of the provision requires consideration. Should it, for example, include all the grounds currently listed in section 85(1) and all the factors the court must consider in section 85(2), or should the grounds and/or relevant factors be more limited? The class of complainants and witnesses who should come within such a provision also requires careful consideration. For example, should the class be restricted to child complainants and child witnesses, or should it also cover adult complainants and witnesses in certain types of proceedings? The class of complainants and witnesses might be determined by the nature of the proceedings, for example, complainants in sexual cases and criminal cases concerning family violence, or by reference to personal characteristics (such as intellectual, psychological or psychiatric impairments) or the linguistic or cultural background of the witness.

9.109 While a new provision of this type arguably does not change the law, because the judge already has an obligation to intervene, it could give clearer guidance to counsel and the judiciary.[1038]

Establishing questioning "ground rules" at a case review hearing

9.110 An alternative approach to control inappropriate questioning of vulnerable witnesses would be to consider more direction pre-trial. An enhanced case review hearing at which the "ground rules" for the trial (including guidance as to question scope) are set could be considered.

9.111 The approach currently taken in the Sexual Violence Court Pilot in the District Court in Auckland and Whangārei provides a useful model. All case reviews are dealt with by a judge and all defendants and their counsel must be present, unless specifically excused. Both Crown and defence

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1037 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal trials and alternative processes* (NZLC R136, 2015) at [4.97].

1038 Bearing in mind s 6(f) of the Act (enhancing access to the law of evidence).

counsel are required to engage in case management discussions and jointly complete the case management memorandum. At the review hearing the judge enquires into and gives appropriate directions in respect of the need for communication assistance.[1039] Often the need for interpreters or communication assistance has already been identified prior to the case review hearing, and discussion focuses on the report about the assistance the witness needs.

9.112 We understand that judges in the Pilot courts also take care at the case review hearing to ensure that counsel understand what is expected by the court with regard to style and type of questioning of vulnerable witnesses, particularly children. In cases where a communication assistant has been appointed, that person assists the court to ensure that the vulnerable witness understands the questions they are being asked and that the manner and conduct of questioning is appropriate for that witness. Communication assistants appointed in the Whangārei Sexual Violence Court Pilot are, for example, directed by the judge "to only intervene as often as is necessary to ensure the witness understands the question being asked or when the assistant feels that the question is framed in such a way that will not be understood by the witness".[1040]

QUESTION

Q38 Should there be greater judicial control over the questioning of witnesses? For example:

a. should the Act be amended to include a provision that the judge may disallow a question if it is asked in a manner that the judge considers unduly intimidating or overbearing?

b. should the Act be amended to allow a judge to exclude particular types of questioning (for example, tag questions)?

c. should there be a statutory duty on judges to intervene when the manner of questioning, or the structure or content of questioning is unacceptable? If so, in what kind of proceedings or in relation to whom should the duty apply?

d. do submitters support the approach of addressing the scope and nature of questioning of vulnerable witnesses at a pre-trial "ground rules" hearing? If so, in what kind of proceedings or in relation to whom would such a hearing be appropriate?

1039 The District Court of New Zealand *Sexual Violence Court Pilot: Guidelines for Best Practice* (2016).

1040 Communication Assistance protocol.

CHAPTER 10

Conduct of experts

IN THIS CHAPTER, WE CONSIDER:

- whether expert witnesses in criminal proceedings should be required to adhere to a code of conduct;
- whether expert witnesses in criminal proceedings should be subject to an obligation to confer with another expert witness if directed to do so; and
- whether section 26(2) should be amended to provide guidance on when the evidence of an expert who has failed to comply with the Code of Conduct in the High Court Rules 2016 can be given.

BACKGROUND

10.1 Section 26 of the Evidence Act applies only to experts giving evidence in *civil proceedings*. It requires them to comply with "the applicable rules of court" – that is, the Code of Conduct for expert witnesses ("the Civil Code"), which is found in the High Court Rules 2016.[1041] Section 26 provides:[1042]

> **26 Conduct of experts in civil proceedings**
>
> (1) In a civil proceeding, experts are to conduct themselves in preparing and giving expert evidence in accordance with the applicable rules of court relating to the conduct of experts.
>
> (2) The expert evidence of an expert who has not complied with rules of court of the kind specified in subsection (1) may be given only with the permission of the Judge.

10.2 The Civil Code provides that expert witnesses:[1043]

1041 The Code is recognised by r 9.43 of the High Court Rules 2016 (the equivalent provision for the District Court is contained in r 9.34 of the District Court Rules 2014) and is contained in sch 4 of the High Court Rules. It was inserted into the High Court Rules in 2002, by s 25 of the High Court Amendment Rules 2002 (prior to this, r 330A of the High Court Rules, contained in sch 2 of the Judicature Act 1908, required expert witnesses to comply with a Code of Conduct). The Code currently contains the only applicable rules of court relating to the conduct of experts, but s 26 is drafted in wide terms that are not specifically tied to the Code. Any future rules of court governing the way experts are to conduct themselves in giving expert evidence would be incorporated into the Act through s 26. See Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA26.01].

1042 What is now s 26 was not included in the Law Commission's Evidence Code. During the development of its Code, the Commission reviewed the law governing the admissibility of expert evidence but did not review the rules governing the conduct of expert witnesses: Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [71]–[90]. Despite this, what is now s 26 was inserted in the Evidence Bill 2005 by the Select Committee as cl 22A: Evidence Bill 2005 (256-2) (select committee report) at 2. The Select Committee explained at 2: "We recommend that the bill be amended to insert the following provisions, which parallel the appropriate High Court Rules".

1043 The Code is set out in full in Appendix 2 of this Issues Paper.

- have an overriding duty to assist the court impartially;[1044]
- are not advocates for the party engaging the witness;[1045]
- must acknowledge that they have read the Code and agree to comply with it;[1046]
- must state their qualifications as an expert, the issues their evidence addresses, whether the evidence is within their area of expertise, the underlying facts and assumptions on which their opinions are based, the reasons for their opinions, any literature they relied on to support their opinions, and any examinations, tests or investigations they relied on, as well as the details and qualifications of the person who carried them out;[1047]
- must qualify their evidence if they believe it would be incomplete or inaccurate without a qualification;[1048]
- must state that their opinion is not a concluded opinion if they believe there is insufficient research or data to do so;[1049]
- must comply with directions of the court to confer with other expert witnesses, try to reach agreement with the other expert, and produce a joint witness statement stating the matters on which they agree or disagree, including reasons for that disagreement;[1050] and
- must exercise independent and professional judgement when conferring with another expert witness, and must not withhold agreement because another person has instructed them to.[1051]

10.3 Section 26 must be read alongside section 25 of the Act, which provides the test for the admissibility of expert opinion evidence in both civil and criminal proceedings. Expert opinion evidence is admissible if the fact-finder is likely to obtain substantial help from the evidence in understanding other evidence, or in ascertaining any fact that is of consequence to the determination of the proceedings.[1052]

ISSUES FOR CONSIDERATION

10.4 We did not consider the topic of expert evidence during our 2013 review of the Act.[1053] During this second review we do not intend to revisit substantive policy issues relating to expert evidence, such as how expert evidence should be presented in court. Instead, we consider:

1044 High Court Rules 2016, sch 4, r 1.

1045 Sch 4, r 2.

1046 Sch 4, r 3(a).

1047 Sch 4, r 3(b)–(g).

1048 Sch 4, r 4.

1049 Sch 4, r 5.

1050 Sch 4, r 6(a)–(c).

1051 Sch 4, r 7.

1052 "Expert" and "expert evidence" are defined in s 4(1) of the Evidence Act 2006. "Expert" means "a person who has specialised knowledge or skill based on training, study, or experience" and "expert evidence" means "the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion".

1053 See Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [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. 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."

- whether expert witnesses in criminal proceedings (like experts in civil proceedings) should be required to adhere to a code of conduct;
- whether expert witnesses in criminal proceedings should be subject to an obligation to confer with another expert witness if directed to do so; and
- whether section 26 should provide guidance on when the evidence of an expert who has failed to comply with the Civil Code can be given.

SHOULD EXPERTS IN CRIMINAL PROCEEDINGS BE SUBJECT TO A CODE OF CONDUCT?

10.5 The current Civil Code governs the way that experts are to conduct themselves in giving evidence in civil proceedings.[1054] There is currently no code governing the conduct of expert witnesses in criminal proceedings. Despite this, the case law has established that equivalent principles to those found in the Civil Code apply to expert witnesses in criminal proceedings.

10.6 In 2005, the Court of Appeal in *R v Carter* held the following principles apply to expert witnesses giving evidence in criminal proceedings:[1055]

(a) an expert must state his or her qualifications when giving evidence;

(b) the facts, matters and assumptions on which opinions are expressed must be stated explicitly;

(c) the reasons for opinions given must be stated explicitly;

(d) any literature or other material used or relied upon to support opinions must be referred to by the expert;

(e) the expert must not give opinion evidence outside his or her area of expertise;

(f) if an expert witness believes that his or her evidence might be incomplete or inaccurate without some qualification, that qualification must be stated;

(g) an expert has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise; and

(h) an expert is not an advocate for any party.

10.7 Similarly, in *R v Hutton*,[1056] the Court of Appeal noted that, although the Civil Code did not apply to expert witnesses in criminal proceedings, expert witnesses in those cases still had the same obligations as those of an expert witness in a civil case.[1057] The Court referred to the principles set out in *Carter*, and said that counsel should "refer expert witnesses in criminal cases to this statement of principles and that witnesses should state at the outset of their evidence that they

1054 See *R v Seu* CA81/05, 8 December 2005 at [81]. The Code was introduced by the Rules Committee to reflect developments that were occurring in other jurisdictions, though the Rules Committee acknowledged that New Zealand was not experiencing problems in this area to the same degree as the other jurisdictions. See Andrew Beck "Litigation" [2002] NZLJ 281 at 283. In particular, the Rules Committee took note of the approach taken to expert witnesses under the English Civil Procedure Rules (particularly r 35) and the Federal Court Rules in Australia. See John Turner "New Expert Witness Rules Demand Greater Impartiality" (29 October 2002) International Law Office <www.internationallawoffice.com>.

1055 *R v Carter* (2005) 22 CRNZ 476 (CA) at [47].

1056 *R v Hutton* [2008] NZCA 126.

1057 At [169].

understand and accept them".[1058] In *Balfour v R*, the Court went even further, suggesting that such witnesses should "comply with the requirements of the [Civil Code]".[1059]

10.8 Given it is widely accepted that expert witnesses in criminal proceedings hold ethical obligations when giving evidence in court, it may well be desirable to reflect this position in the Act. For example, section 26 could be amended to require expert witnesses in criminal proceedings to adhere to:

- the Civil Code (either in whole or in part); or
- a new, separate code of conduct that applies only to expert witnesses in criminal proceedings.

10.9 We note that in both the United Kingdom and Victoria (Australia) there are separate legislative provisions/instruments governing how expert witnesses in civil and criminal proceedings are to give evidence. In the United Kingdom the Civil Procedure Rules impose a general duty on expert witnesses in civil proceedings to "help the court on matters within their expertise".[1060] This duty "overrides any obligation to the person from whom experts have received instructions or by whom they are paid".[1061] The United Kingdom Criminal Procedure Rules set out this same obligation for expert witnesses in criminal proceedings,[1062] but extend it by setting out particular examples of what it requires, namely "defin[ing] the expert's area or areas of expertise"; drawing attention to questions which if the expert answered would be outside the expert's area of expertise; and informing all parties and the court if the expert's opinion changes.[1063] In Victoria, the manner in which expert witnesses are to give evidence is governed by the Supreme Court of Victoria Practice Note (for experts in criminal proceedings), and the Expert Witness Code of Conduct in Form 44A of the Supreme Court Rules (for experts in civil proceedings). The Practice Note and Code of Conduct impose essentially the same obligations on both types of expert witnesses.[1064]

OBLIGATION TO CONFER

10.10 If the Act is amended to require expert witnesses in criminal proceedings to adhere to a code of conduct (whether the existing Civil Code or a new one), which obligations should they be required to adhere to? The Civil Code requires experts to comply with directions to confer with each other, and in some cases produce statements indicating the matters in which they agree or disagree.[1065] Should this same requirement apply to experts in criminal proceedings?

10.11 To date, the courts have not appeared to accept that experts in criminal proceedings owe an obligation to confer with other experts. Although the *Carter* principles (which currently apply to experts in criminal proceedings) essentially mirror the obligations contained in the Civil Code, they

1058 At [171]. See also *Lisiate v R* [2013] NZCA 129 at [53] (leave to appeal declined: *Lisiate v R* [2013] NZSC 80); *Robinson v R* [2014] NZCA 249 at [16]; *Singh v Police* [2016] NZHC 543 at [29]; and *T v Police* HC Wellington CRI-2007-485-37, 17 March 2009 at [273].

1059 *Balfour v R* [2013] NZCA 429 at [50].

1060 The Civil Procedure Rules 1998 (UK), r 35.3(1).

1061 Rule 35.3(2).

1062 The Criminal Procedure Rules 2015 (UK), r 19.2(2).

1063 Rule 19.2(3).

1064 Supreme Court of Victoria Practice Note SC CR 3 Expert Evidence in Criminal Trials, r 4 and Expert Witness Code of Conduct in Form 44A of the Supreme Court Rules, r 44.01(2) and (4).

1065 High Court Rules, sch 4, r 6.

do not include the obligation to confer.[1066] In *R v Seu*,[1067] the Court of Appeal rejected a submission that the Crown's expert witness was obliged to comply with the Civil Code and to confer with the other expert witness.[1068] The Court observed the Civil Code only applied to experts in civil cases, and that there was "no such obligation [to confer] even under the Code", in the absence of a court direction to that effect.[1069]

10.12 Currently, it appears that expert witnesses in criminal cases rarely engage in joint discussions on their own initiative.[1070] It has been suggested that this is because lawyers discourage contact, and because there is a lack of guidance on how experts are to arrange a joint discussion and/or whether they are permitted to do so.[1071]

10.13 Some of the advantages of empowering a judge to direct expert witnesses in criminal proceedings to confer include the following:

- Joint discussions and memoranda can lead to a "narrowing of issues between opposing experts", and potentially even "the elimination of peripheral issues".[1072] The simplification of expert evidence can greatly assist the court,[1073] and result in "time and cost savings to all concerned".[1074] The value of joint memoranda has been noted by both the Court of Appeal and the Supreme Court in relation to counterintuitive evidence.[1075] The Court of Appeal observed that such an approach has the advantage of "protecti[ng] against jury misapprehension that expert evidence could support a witness's credibility".[1076]
- An expert conference can encourage expert witnesses to be "less adversarial, and less prone to acting as advocates for the parties", and instead act as "independent and impartial experts who owe duties to the court"[1077] (thereby ensuring compliance with the obligation to act impartially).[1078]

10.14 On the other hand:

- There may be a "loss of control [for lawyers] where, in essence, the resolution of technical issues is handed over to a group of experts without cross-examination".[1079]

1066 Nor the obligation to exercise their own judgement while doing so (in r 7 of the High Court Rules). In *Balfour v R* [2013] NZCA 429 at [50], the Court stated the Civil Code applied to expert witnesses in criminal proceedings, but it is unclear from the judgment whether the Court intended all of the obligations within the Civil Code to apply to such experts, or whether the Court was simply affirming *Carter* and the cases that followed it.

1067 *R v Seu* CA81/05, 8 December 2005 at [81]. This case was decided prior to the enactment of the Evidence Act 2006, but has been referred to by post-Act cases such as *R v Hutton* [2008] NZCA 126.

1068 At [81].

1069 At [81].

1070 Emily Henderson and Fred Seymour *Expert Witnesses under Examination in the New Zealand Criminal and Family Courts* (School of Psychology, University of Auckland, March 2013) at 4.2.3.

1071 At 4.2.4.

1072 Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996) ch 13 at [42].

1073 Peter Sommer "Meetings between experts: A route to simpler, fairer trials?" (2009) 5 Digital Investigations 146 at 150 citing Lord Auld *Review of the Criminal Courts of England and Wales* (TSO, 2001).

1074 Emily Henderson and Fred Seymour *Expert Witnesses under Examination in the New Zealand Criminal and Family Courts* (School of Psychology, University of Auckland, March 2013) at 4.4.1. See also Andrew Beck "Litigation" [2002] NZLJ 281 at 283. This is also consistent with s 6(e) of the Act (avoiding unjustifiable expense and delay).

1075 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [113]; *M v R* [2011] NZCA 191 at [33]; and *R A v R* [2010] NZCA 57 at [32]. We discuss counterintuitive evidence further in Chapter 11.

1076 *R A v R* [2010] NZCA 57 at [32].

1077 Paul Michell "Pre-hearing expert conferences: Canadian developments" (2011) 30 CJQ 93 at 95.

1078 This is also consistent with s 6(c) of the Act (promoting fairness to parties and witnesses).

1079 Andrew Beck "Litigation" [2002] NZLJ 281 at 283.

- A criticism that has arisen in regards to defence expert witnesses being required by the court to take part in joint discussions prior to the proceeding is that too much of the defence case will be disclosed.[1080] Relatedly, there is concern that expert witnesses will be aware of certain aspects of the defendant's case, and could "inadvertently reveal privileged and other information".[1081]
- Expert witnesses (and lawyers, if they attend joint discussions) would need to be paid for their time, thereby increasing costs for the parties.[1082]

10.15 In 2017, the Supreme Court of Victoria issued a Practice Note on Expert Evidence in Criminal Trials,[1083] which permits the court to direct expert witnesses to discuss the expert issues relating to the case, and to prepare a joint statement.[1084] The joint statement has to cover the matters on which they agree and disagree, and provide reasons for their positions.[1085] Except for the statement, the content of the experts' discussion may not be referred to during the trial, unless the court permits this.[1086] The United Kingdom Criminal Procedure Rules contain a Practice Direction with an identical provision.[1087]

QUESTION

Q39 Should expert witnesses in criminal proceedings be required to adhere to a code of conduct? If so:

a. should a separate code be developed or should the current Code of Conduct in the High Court Rules 2016 apply to them (either in whole or in part)?

b. should they be subject to an obligation to confer with another expert witness if directed to do so?

1080 Peter Sommer "Meetings between experts: A route to simpler, fairer trials?" (2009) 5 Digital Investigations 146 at 152.

1081 At 152. We note a potential solution to this problem could be to require judges to "issu[e] directions that the terms of the discussion are bound … by an agreed list of questions": see Emily Henderson and Fred Seymour *Expert Witnesses under Examination in the New Zealand Criminal and Family Courts* (School of Psychology, University of Auckland, March 2013) at 4.4.1. (This currently occurs in civil proceedings in New South Wales, where parties are required to agree on the questions to be answered and the materials to be placed before the experts at the joint conference of the expert witnesses: Practice Note No SC Gen 11, Joint Conferences of Expert Witnesses (August 17, 2005), r 6.) Further, this concern must be viewed in light of s 23(1) of the Criminal Disclosure Act 2008, which already requires the defence to disclose any brief of evidence or report intended to be given by the expert witness (or a summary of this evidence) to the prosecution at least 10 working days before trial.

1082 Paul Michell "Pre-hearing expert conferences: Canadian developments" (2011) 30 CJQ 93 at 99–100. That said, the cost may well be off-set by the shortening of the trial because of the simplification of evidence: Emily Henderson and Fred Seymour *Expert Witnesses under Examination in the New Zealand Criminal and Family Courts* (School of Psychology, University of Auckland, March 2013) at 4.4.1.

1083 Supreme Court of Victoria Practice Note SC CR 3 Expert Evidence in Criminal Trials, r 2.1.

1084 Rule 12.

1085 Rule 12.2(b).

1086 Rule 12.3.

1087 The Criminal Procedure Rules 2015 (UK), r 19.6(3). We have been unable to find any commentary on the value or effectiveness of permitting the court to direct experts to confer in criminal proceedings in Victoria and in the United Kingdom. We note the Practice Note in Victoria commenced only recently, on 30 January 2017.

CLARIFYING THE CONSEQUENCES IF EXPERT WITNESSES FAIL TO COMPLY WITH THE CIVIL CODE

10.16 Currently, section 26(2) of the Act states that if an expert witness does not comply with the rules of the court (that is, the Civil Code) the expert evidence can only be given with the judge's permission. However, no guidance is given as to when the discretion should be exercised.[1088]

10.17 The discretion was recently considered by the Court of Appeal in *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*.[1089] The Court noted that "[t]rial judges enjoy substantial leeway in the exercise of their s 26 discretion to admit non-compliant evidence."[1090] The issue in that case was whether the expert witness had breached the obligation of impartiality.[1091] The Court observed that if evidence was partial, it would also probably be unreliable, and so would be inadmissible under the substantial helpfulness test under section 25.[1092] The Court ultimately concluded the trial judge had been right to rule the evidence inadmissible on the basis it was "neither helpful nor reliable" (and it would have been open to the judge to conclude the evidence was not impartial).[1093]

10.18 A similar approach had been taken in earlier High Court cases. In *MacDonald v Tower Insurance Ltd*,[1094] the Court observed that evidence that did not comply with the Civil Code was "unlikely to meet the test in [section] 25 of being substantially helpful".[1095] The Court considered the helpfulness, or utility, of the challenged evidence in that case;[1096] admitting evidence that met those criteria,[1097] and excluding evidence that did not.[1098] In *Allied Tours & Transfers Ltd v Coleman*,[1099] the Court ultimately concluded the expert in that case had complied with the Civil Code (the defendants had argued he had not complied with the requirement of impartiality),[1100] but noted that if he had not, his evidence nevertheless would have been admissible, as it was helpful in terms of section 25(1).[1101]

10.19 In summary, the current approach taken by the courts suggests that if an expert witness fails to comply with the Civil Code, his or her evidence will be admitted under section 26(2) if it satisfies the section 25 test of "substantial helpfulness". This approach reflects the fact that the Civil Code and section 25 are primarily aimed at addressing the same concerns:[1102]

> Aside from the duty to confer, many of the issues within the Code of Conduct will be covered by the operation of s 25 and the substantial helpfulness test. For example, qualification as an expert is a prerequisite to admissibility; and a statement as to the facts upon which the opinion is based is required under s 25(3).

1088 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV26.01].

1089 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750.

1090 At [100].

1091 Contained in High Court Rules, sch 4, r 1. The issue of whether the expert witness had breached the obligation to state facts that backed up their opinion was also considered (contained in High Court Rules, sch 4, r 3(d)).

1092 At [98]. See also *Commissioner of Inland Revenue v BNZ Investments Ltd* [2009] NZCA 47, (2009) 19 PRNZ 553 at [22]–[25].

1093 At [109].

1094 *MacDonald v Tower Insurance Ltd* [2014] NZHC 2876, (2014) 22 PRNZ 490.

1095 At [14].

1096 At [30], [37], [39]–[40] and [49]–[50].

1097 At [37] and [39]–[40].

1098 At [30] and [49]–[51].

1099 *Allied Tours & Transfers Ltd v Coleman* [2014] NZHC 212.

1100 At [33].

1101 At [36].

1102 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV26.01].

10.20 The lack of guidance provided to judges regarding when they should use their discretion to admit such evidence has been criticised.[1103] We are interested in submitters' views on whether the Act should be amended in this regard. For example, should section 26(2) be amended to provide that the evidence will be admissible provided it meets the test of "substantial helpfulness" in section 25? Or is amendment unnecessary, given the courts are adopting a relatively consistent approach to the issue?

10.21 We note that the section 26(2) discretion does not appear to have been directly considered in the context of criminal proceedings (where an expert fails to comply with the *Carter* principles).[1104] It may be desirable for the Act to provide guidance on when evidence will be admitted where an expert fails to comply with the *Carter* principles or (if the Act is amended to require experts in criminal proceedings to adhere to a code of conduct) a code of conduct. We express the provisional view that the same test should apply in civil and criminal cases, given that section 25 applies to both civil and criminal proceedings.

QUESTION

Q40 Should section 26 be amended to include guidance on how the discretion in section 26(2) should be exercised? If so, what guidance should be provided?

1103 At [EV26.01].

1104 We note that in *Lisiate v R* [2013] NZCA 129 (leave to appeal declined: *Lisiate v R* [2013] NZSC 80), the Court considered an argument that the expert witness had failed to comply with the *Carter* principles, and that this had occasioned a miscarriage of justice. The Court ultimately concluded that the failure to comply with the principles in that case did not occasion a miscarriage of justice. The Court did not directly consider whether the evidence should have been admitted under s 26(2), nor the test that should apply in such circumstances.

CHAPTER 11

Counterintuitive evidence in sexual and family violence cases

IN THIS CHAPTER, WE CONSIDER:

- the use of section 9 to admit agreed statements on counterintuitive evidence; and
- whether there is a need for new judicial directions addressing specific areas of counterintuitive evidence.

BACKGROUND

11.1 Counterintuitive evidence was defined by the Supreme Court in *DH v R* (in the context of cases involving allegations of child sex abuse) as evidence offered to correct "erroneous beliefs or assumptions that a judge or jury may intuitively hold and which, if uncorrected, may lead to illegitimate reasoning".[1105] For example, jurors may believe that if someone was sexually assaulted they would immediately tell someone, and that a complainant's failure to do so means it is less likely the assault occurred.[1106] By introducing information that explains that delay does not necessarily mean the complaint is false, there is a higher chance of a more accurate assessment of the complainant's evidence—that is, their reliability or credibility—occurring.

Relevant provisions

11.2 The Evidence Act provides three methods of presenting counterintuitive evidence to a jury:[1107]

1105 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [2]. See also *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833 at [2].

1106 Annie Cossins "Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England" (2013) 17 E&P 74 at 80 citing Louise Ellison and Vanessa Munro "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49(2) Brit J Criminol 202. See also Natalie Taylor "Juror attitudes and biases in sexual assault cases" (2007) 344 Trends and Issues in Crime and Criminal Justice (Australian Institute of Criminology) 1 at 5.

1107 Prior to the enactment of the Evidence Act, a mixture of common law and statutory rules permitted counterintuitive evidence to be offered at trial. The Evidence Act 1908 contained two sections relating to counterintuitive evidence. Section 23AC, the predecessor of s 127, permitted a judge to state that there may be good reasons why a victim of a sexual offence delays in making a complaint. Section 23G(2)(c) allowed an expert witness (in sexual cases where the complainant was under 17, or where the complainant was "of or over the age of 17 years and … mentally handicapped": see s 23C(b) of the Evidence Act 1908) to state whether evidence about the complainant's behaviour given by another witness was consistent or inconsistent with the behaviour of sexually abused children of the same age group. The admissibility of counterintuitive evidence relating to "battered women's syndrome" had also been considered by the courts in the context of family violence cases. In *R v Guthrie* (1997) 15 CRNZ 67 (CA) at 71, the Court of Appeal considered expert evidence explaining battered women's syndrome (in a trial where the defendant was charged with sexual offending against, as well as threatening to kill, his former partner)

- *Expert evidence*: counterintuitive evidence may be admitted under section 25 as expert opinion evidence.[1108]
- *Section 9 statements*: counterintuitive evidence may be admitted by way of an agreed statement under section 9 (which permits the admission of evidence with the agreement of all the parties).[1109]
- *Judicial directions*: the judge may give a judicial direction aimed at addressing misconceptions about the behaviour of complainants. The Act currently provides for this type of direction to be given in one situation: section 127 permits a judge to tell the jury there can be "good reasons" for a complainant in a sexual case to "delay making or fail to make a complaint in respect of the offence".[1110] The Evidence Regulations 2007 also contain a judicial direction (in regulation 49) that addresses juror assumptions about the accuracy and reliability of the evidence of very young children.[1111]

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was admissible because "[t]here was a real possibility of a lay person wondering why the complainant stayed with this man (or went back to him) in light of what she was now saying had occurred". Expert evidence about the dynamics of a "battering relationship" was also admitted in *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA) at 171–174.

1108 Definitions of "expert", "expert evidence" and "opinion" are found in s 4. Section 25(1) provides that "[a]n opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding." When developing its Evidence Code, the Law Commission had initially favoured repealing s 23G because it considered what is now s 25 would allow for such evidence to be admitted anyway (see Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at [54]) but ultimately included a specific rule in its Code that re-enacted the substance of s 23G(2)(c): see s 24 of the Evidence Code (Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 66). The Commission explained at [C111] that: "[p]art of [the] purpose is to correct erroneous beliefs that juries may otherwise hold intuitively. That is why such evidence is sometimes called 'counter-intuitive evidence': it is offered to show that behaviour a jury might think is inconsistent with claims of sexual abuse is not or may not be so; that children who have been sexually abused have behaved in ways similar to that described by the complainant; and that therefore the complainant's behaviour neither proves nor disproves that he or she has been sexually abused. The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance. This is similar to the use of expert evidence to dispel myths and misconceptions about the behaviour of battered women." However, the Commission's proposal to re-enact s 23G(2)(c) was not accepted by the Government and did not find its way into the Evidence Bill 2005. The then Associate Minister of Justice recommended to Cabinet that s 23G be "repealed and the admissibility of expert evidence in child sexual abuse cases [be] dealt with in the same way as expert evidence in any case": Cabinet Policy Committee "Evidence Bill (Paper 5: Spousal Witness Immunity and Children's Evidence)" (18 March 2003) POL Min (03) 8/15 at [40]. The paper said that "the explanatory note and speeches can state the intention to have the normal expert evidence rules apply": at [39].

1109 For examples of where the s 9 process has been used to admit counterintuitive evidence in sexual and family violence cases, see *A v R* [2016] NZCA 134 at [18]; *Metu v R* [2016] NZCA 124 at [12]; *J v R* [2015] NZCA 594 at [8]; and *R v A* [2009] NZCA 250 at [15].

1110 Section 127 provides:

> **127 Delayed complaints or failure to complain in sexual cases**
>
> (1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.
>
> (2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

1111 A trial judge may give the direction in a criminal jury trial involving a child under the age of six years, if the judge is of the opinion that the jury may be assisted by such a direction. Regulation 49 sets out a list of matters that should be dealt with in the direction. When the Law Commission was developing its Evidence Code, it had proposed that this direction would be located in the Code: see s 111(3) of the Evidence Code; and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C397]. The provision was intended to "direct attention away from discussions about the inherent reliability of very young children's evidence relative to that of older children or adults, and to focus instead on the way information has been obtained from them at all stages of the investigation and at trial": at [C397]. However, the Select Committee recommended that this provision be moved to the regulations, as the Committee was of the view that "the flexibility of regulations will more readily accommodate developments in understanding and technique related to children's evidence": Evidence Bill 2005 (256-2) (select committee report) at 13.

11.3 The main types of counterintuitive evidence that have been presented to juries under these provisions have concerned either the behaviour of children who have allegedly been sexually assaulted, or the behaviour of adult victims of family violence (as defendants in criminal proceedings).[1112]

Law Commission reports discussing counterintuitive evidence

11.4 The admissibility of evidence relating to myths and misconceptions in sexual cases was only briefly mentioned in the Law Commission's 2013 review of the Evidence Act.[1113] The Commission referred to a recommendation in *From "Real Rape" to Real Justice*, where Elisabeth McDonald and Yvette Tinsley had proposed that (in sexual cases) the parties should be encouraged to agree upon expert evidence or a written statement to educate the jury regarding common myths and misconceptions, which could be admitted by consent via section 9.[1114] The Commission said:[1115]

> 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.

11.5 The Commission subsequently published two further reports in which the issues of jury education, expert evidence, and directions to juries were considered: *The Justice Response to Victims of Sexual Violence*[1116] (the 2015 report) and *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*[1117] (the 2016 report).

11.6 Shortly before the Commission completed its 2015 report, the Supreme Court in *DH v R* confirmed the legitimacy of using judicial directions, section 9 statements, and expert evidence to counter fact-finders' erroneous beliefs or assumptions in sexual violence cases.[1118] The Commission discussed these three methods of countering myths and misconceptions in sexual cases in its 2015 report. The Commission observed that:[1119]

> The field of sexual violence is one that is commonly misunderstood by people without training or education in the area. Research has revealed that widely held assumptions about how frequently sexual violence occurs, and when, where and against whom it occurs, are usually incorrect and do not reflect the reality of sexual violence …. Although the jury is intended to apply combined common sense and life experience to ascertain the facts in a criminal case, one might suggest this function is inhibited when applied to an area of human conduct that is frequently subject to misconceptions and misunderstandings.

1112 Evidence to explain some aspects of the behaviour of adult complainants in sexual violence cases (for example, inconsistencies in accounts or the likelihood of physical resistance) have not, to the Law Commission's knowledge, been the subject of expert evidence in New Zealand.

1113 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.50]–[1.51].

1114 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 24, Recommendation 8.17.

1115 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.51].

1116 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

1117 Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016).

1118 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [110]. The Court did not think it appropriate to be prescriptive about how those beliefs or assumptions were best countered – judicial directions, s 9 statements and expert evidence were all possibilities. However, the Court considered "a cautious approach needs to be taken to the ambit of expert evidence given at trials of this kind to ensure that such evidence is confined to what would be substantially helpful, there is focus on live issues and that the evidence is not unduly lengthy or repetitive and is expressed in terms that address assumptions and intuitive beliefs that may be held by jurors and may arise in the context of the trial": at [110].

1119 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.12].

11.7 In relation to judicial directions aimed at addressing misconceptions in sexual cases, the Commission noted the Supreme Court in *DH* had raised the question whether certain topics (for example, retractions of a complaint, normalisation of complainant response, or complainant demeanour) would be amenable to being the subject of judicial direction to be included in the Evidence Act.[1120] However, the Commission did not recommend any new directions be included in the Act, as it felt it had insufficient information to determine what jury directions were needed, and how they could be most effective.[1121]

11.8 In relation to section 9 statements, the Commission noted that the admission of an agreed statement by consent could obviate the need for evidence to be given by an expert, as the evidence could instead be admitted in written form by the consent of both parties.[1122] The Commission recommended that in court proceedings involving charges of sexual violence, the parties should be encouraged to agree upon expert evidence or a written statement for the jury dealing with myths and misconceptions around sexual violence; and that wherever possible, a written statement should be admitted by consent as an agreed statement under section 9.[1123]

11.9 As for the giving of expert psychological evidence under section 25 of the Act, the Commission considered its use should be assessed on a "case-by-case basis according to whether there is someone who is well-placed to do it and whether the prosecution thinks it is required".[1124] Accordingly, the Commission made no recommendations to change the status quo in terms of the use of expert counterintuitive evidence.[1125]

11.10 In its 2016 report, the Commission comprehensively reviewed the literature on the dynamics of family violence and the remaining currency of the misconceptions or myths regarding the behaviour of victims and complainants.[1126] The Commission identified several ways in which traditional understandings of family violence have contributed to misconceptions,[1127] and recommended that judges, criminal lawyers, and Police should receive regular education on the dynamics of family violence.[1128]

1120 At [6.58], referring to *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [107].

1121 At [6.59]. Instead, the Commission recommended that judges who sit on sexual violence cases should have access to detailed and up-to-date guidance on the instances in which guiding judicial directions to the jury may be appropriate in sexual violence cases and examples of how those directions should be framed: at 121, R28.

1122 A [6.70], referring to *M v R* [2011] NZCA 191 at [33].

1123 At 121, R29.

1124 At [6.69].

1125 At [6.69].

1126 Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016). This was in the context of a reference that required the Commission to consider whether the law in respect of a victim of family violence who commits homicide could be improved. See in particular chs 2, 3 and 7. In the specific context of proposing reform to s 48 of the Crimes Act 1961 (self-defence), the Commission recommended: "The Evidence Act 2006 should be amended to include provisions based on sections 322J and 322M(2) of the Crimes Act 1958 (Vic) to provide for a broad range of family violence evidence to be admitted in support of claims of self-defence and to make it clear that such evidence may be relevant to both the subjective and objective elements in section 48 of the Crimes Act 1961" (at 110, R7). This recommendation is being considered by the Government. Given that recommendation, and the proposed reform of s 48 in 104, R5, the Law Commission was of the view that judicial directions would naturally follow, so that an "express jury direction is, therefore, unnecessary": at [7.99].

1127 See ch 2 of Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) and [2.56] in particular. The particular misconceptions identified are summarised below at paragraph [11.12].

1128 At 38, R1, R2, R3 and R4.

ISSUES FOR CONSIDERATION

11.11 In this chapter, we consider whether:

- parties in family violence cases should be encouraged to agree upon expert evidence dealing with myths and misconceptions around family violence and admit the evidence by way of an agreed statement under section 9; and
- there is a need for new judicial directions addressing specific areas of counterintuitive evidence in New Zealand, and, if so:
  - what particular myths and misconceptions should be the subject of judicial directions; and
  - whether these judicial directions should be located in the Evidence Act or in non-legislative guidelines.

AGREED STATEMENTS FOR COUNTERINTUITIVE EVIDENCE

11.12 As we noted above, in its 2015 report the Commission recommended that parties in sexual cases should be encouraged to agree upon expert evidence dealing with myths and misconceptions around sexual violence and admit the evidence by way of an agreed statement under section 9, wherever possible.[1129] In this section, we consider whether a similar recommendation may be appropriate in cases involving family violence. As the Commission identified in its 2016 report, the following misconceptions may be present in family violence cases:[1130]

- family violence comprises a series of discrete incidents of physical violence;
- a victim's fear of future violence is irrational or unreasonable;
- a victim can avoid future violence by simply leaving the relationship; and
- if a victim was violent as well, their fear was not real.

11.13 There are a number of benefits to offering counterintuitive evidence by way of a section 9 statement (which can be read out by the registrar or distributed to the jury in written form),[1131] compared to experts giving oral evidence on the topic.

11.14 For example, the evidence can be dealt with in a clear and succinct manner. We note the Supreme Court in *DH* cautioned that expert counterintuitive evidence should be "confined to what would be substantially helpful", "focus on live issues", and should not be "unduly lengthy or repetitive".[1132] The Supreme Court reiterated this concern in *Kohai v R*. There, the Court said that counsel should ensure that counterintuitive evidence is given as "briefly and clearly as possible" and should consider whether an "agreed statement of the essential propositions" may be an appropriate method of addressing myths and misconceptions.[1133]

1129 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 121, R29.

1130 Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at [2.56].

1131 Section 9 of the Evidence Act states that evidence admitted under s 9 can be "offered in any form or way agreed by all parties".

1132 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [110].

1133 *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833 at [18(b)].

11.15 Further, a section 9 statement obviates the need to arrange for an expert to come to court to give evidence. This gets around the difficulty that there is "a shortage of people who are able and willing to give counterintuitive evidence" in New Zealand,[1134] and may also shorten the proceeding and therefore reduce costs.[1135]

11.16 Agreement between experts by way of a section 9 statement can also avoid issues relating to the "battle of the experts".[1136] In *From "Real Rape" to Real Justice*, McDonald and Tinsley noted that, although it has been suggested that the presentation of counterintuitive evidence by opposing experts can make jurors "less likely to blindly accept the view of an expert" because they are confronted with more than one opinion,[1137] studies have shown that having two expert witnesses present counterintuitive evidence "does not sensitise jurors to flaws in expert evidence, but rather makes them sceptical about all expert evidence".[1138] There is also the risk that the presentation of counterintuitive evidence by opposing experts giving oral evidence could unduly elevate the significance of the evidence to the jury.

11.17 On the other hand, the presentation of counterintuitive evidence by way of a section 9 statement places limitations on the forensic testing of the evidence. As the Court of Appeal observed in *R A v R*,[1139] the benefit of an expert presenting counterintuitive evidence in court is that the expert is subject to cross-examination, which tests the evidence and potentially places jurors in a better position to evaluate the issue before them.[1140]

11.18 Furthermore, there may be situations where a section 9 statement is simply not appropriate. In *DH*, the Supreme Court noted that an important consideration in determining whether a section 9 statement is suitable is whether the subject of the statement is a matter on which there is general acceptance, or whether it is a more controversial topic.[1141] If the matter is generally accepted, it seems logical that it should be presented to the fact-finder by way of an agreed statement, but if there is disagreement then both parties should have the opportunity to present the side that is most beneficial to their client.

QUESTIONS

Q41 How common is it for parties in sexual or family violence trials to present an agreed statement under section 9 on counterintuitive evidence to the jury?

Q42 Should parties in family violence cases be encouraged to agree upon expert evidence dealing with myths and misconceptions around family violence and admit the evidence by way of an agreed statement under section 9?

1134 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.68].

1135 Consistent with s 6(e) of the Act (avoiding unjustifiable expense and delay).

1136 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 369.

1137 At 369.

1138 At 369.

1139 *R A v R* [2010] NZCA 57, (2010) 25 CRNZ 138.

1140 At [33], citing *R v DD* 2000 SCC 43, [2000] 2 SCR 275 at [42].

1141 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [113].

JUDICIAL DIRECTIONS ON COUNTERINTUITIVE EVIDENCE

11.19 As we explained above, in its 2015 report, the Commission considered whether new judicial directions relating to counterintuitive evidence in sexual violence cases should be included in the Evidence Act, but ultimately made no recommendations in that regard.[1142] While the Commission acknowledged that jury directions could play an important role in counteracting stereotyped thinking or misconceptions about sexual violence that jurors might have,[1143] it did not consider new jury directions should be included in the Act "without research into the prevailing misconceptions that affect jurors in sexual violence cases and how those misconceptions are most effectively targeted via judicial direction".[1144] We are not aware of any New Zealand research on point, but note that overseas research suggests that jurors are often affected by the following misconceptions in cases of sexual offending:

- a genuine victim would put up a fight,[1145] or scream or cry for help;[1146]
- a victim of sexual assault will suffer external and internal injuries;[1147]
- inconsistencies or omissions in evidence represent evidence of fabrication since truthful people remember all the details;[1148]
- a complainant who drinks or takes drugs is at least partially responsible for the offending;[1149]
- a complainant who dresses provocatively or acts flirtatiously is at least partially responsible for the offending;[1150] and
- continued association with the defendant means the sexual assault did not occur.[1151]

1142 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.59].

1143 At [6.54]. Two particular advantages of jury directions were outlined in *M v R* and *W v R* [2011] NZCA 191 at [29] (citing *R v DD* 2000 SCC 43, [2000] 2 SCR 275 at [67]) namely, the saving of time and expense, and the elimination of "any risk of superfluous or prejudicial content" since the direction is given by an impartial judicial officer.

1144 At [6.59].

1145 Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 E&P 299 at 314–315. See also Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 105.

1146 Natalie Taylor "Juror attitudes and biases in sexual assault cases" (2007) 344 Trends and Issues in Crime and Criminal Justice (Australian Institute of Criminology) 1 at 5. See also Annie Cossins "Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England" (2013) 17 E&P 74 at 80 citing Louise Ellison and Vanessa Munro "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49(2) Brit J Criminol 202; and Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 105.

1147 Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 E&P 299 at 314–315. See also Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 105; and Natalie Taylor "Juror attitudes and biases in sexual assault cases" (2007) 344 Trends and Issues in Crime and Criminal Justice (Australian Institute of Criminology) 1 at 5.

1148 Annie Cossins "Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England" (2013) 17 E&P 74 at 80.

1149 Holly Hill "Rape Myths and the Use of Expert Psychological Evidence" (2014) 45 VUWLR 471 at 473 citing Amnesty International UK *Sexual Assault Research Summary Report* (12 October 2005). See also Annie Cossins "Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England" (2013) 17 E&P 74 at 80 citing Emily Finch and Vanessa E Munro "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study" (2005) 45 Brit J Criminol 25; and Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 108.

1150 Holly Hill "Rape Myths and the Use of Expert Psychological Evidence" (2014) 45 VUWLR 471 at 473 citing Amnesty International UK *Sexual Assault Research Summary Report* (12 October 2005). See also Natalie Taylor "Juror attitudes and biases in sexual assault cases" (2007) 344 Trends and Issues in Crime and Criminal Justice (Australian Institute of Criminology) 1 at 5.

1151 Natalie Taylor "Juror attitudes and biases in sexual assault cases" (2007) 344 Trends and Issues in Crime and Criminal Justice (Australian Institute of Criminology) 1 at 5.

11.20 In light of this research, England, Wales and Australia are moving towards introducing more extensive judicial directions concerning counterintuitive evidence in sexual and family violence cases.

England and Wales

11.21 In England and Wales, directions that counter misconceptions in sexual cases are not legislated for, but are included in the *Crown Court Compendium Part 1*.[1152] The *Compendium* explains how directions are best delivered, lists areas on which it might be necessary to direct the jury, and provides an example direction for each area:[1153]

> 7. There is a real danger that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this. This must be done in a fair and balanced way and put in the context of the evidence and the arguments raised by both for the prosecution and the defence. The judge must not give any impression of supporting a particular conclusion but should warn the jury against approaching the evidence with any preconceived assumptions.
>
> 8. Depending on the evidence and arguments advanced in the case, guidance may be necessary on one or more of the following supposed indicators relating to the evidence of the complainant:
>
> (1) Of untruthfulness:
>
> (a) Delay in making a complaint.
>
> (b) Complaint made for the first time when giving evidence.
>
> (c) Inconsistent accounts given by the complainant.
>
> (d) Lack of emotion/distress when giving evidence.
>
> (2) Of truthfulness:
>
> (a) A consistent account given by the complainant.
>
> (b) Emotion/distress when giving evidence.
>
> (3) Of consent and/or belief in consent:
>
> (a) Clothing worn by the complainant said to be revealing or provocative.
>
> (b) Intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others.
>
> (c) Previous knowledge of, or friendship/sexual relationship between, the complainant and the defendant. In this regard it may be necessary to alert the jury to the distinction between submission and consent.
>
> (d) Some consensual sexual activity on the occasion of the alleged offence.
>
> (4) Of consent and/or belief in consent and/or lack of involvement:
>
> (a) Lack of any use or threat of force, physical struggle and/or injury. In this regard it will be necessary to alert the jury to the distinction between submission and consent.
>
> (b) A defendant who is in an established sexual relationship.

11.22 The following is an example of a direction from the *Compendium* that responds to juror expectations that a 'true' victim would have physically resisted:[1154]

> It is not suggested that, before or at the time that D had sexual intercourse with V he either threatened her with force or that he used any force upon her and V has accepted that she did not put up any struggle. It is also common ground that V did not suffer any injury. The

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1152 Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (November 2017) at 20-1.

1153 At 20-3.

1154 At 20-8.

defence say that this is because V fully consented to what took place. V on the other hand gave evidence that when D started to undo his trousers and then undid her jeans she was so frightened that she could not move: she said she was "petrified with fear". You will have to resolve this issue by looking at all of the evidence but it is important to recognise that the mere fact that D neither used nor threatened to use any force on V and that she did nothing to prevent D from having sexual intercourse with her and was uninjured does not mean that V consented to what took place or that what V has said about what happened cannot be true.

Experience has shown that different people may respond to unwanted sexual activity in different ways. Some may protest and physically resist throughout the event whilst others may, whether through fear or personality, whilst they did not consent, be unable to do so.

Australia

11.23 Various jurisdictions in Australia are similarly introducing or considering introducing judicial directions regarding counterintuitive evidence in both sexual and family violence cases.[1155] Both legislative and non-legislative options are being used.[1156] An example of a legislative direction is section 54D of the Jury Directions Act 2015 (Vic). The section applies if the trial judge considers there is evidence suggesting an inconsistency in a sexual offence complainant's evidence that is relevant to the credibility of the complainant. It states that the following information must be included in the direction:[1157]

(a) it is up to the jury to decide whether the offence charged, or any alternative offence, was committed; and

(b) differences in a complainant's account may be relevant to the jury's assessment of the complainant's credibility and reliability; and

(c) experience shows that—

(i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time; and

(ii) trauma may affect different people differently, including by affecting how they recall events; and

(iii) it is common for there to be differences in accounts of a sexual offence; and

Example

People may describe a sexual offence differently at different times, to different people or in different contexts.

(iv) both truthful and untruthful accounts of a sexual offence may contain differences; and

(d) it is up to the jury to decide—

1155 For example, in a joint report the Australian Law Reform Commission and the New South Wales Law Commission recently recommended the use of judicial directions in child sex abuse cases: *Family Violence – A National Legal Response* (ALRC R114, NSWLRC FR128, 2010) at 42, Recommendation 27–12. Similarly, the Australian Royal Commission into Institutional Responses to Child Sexual Abuse has recommended partially codified judicial directions in child sex abuse cases: Royal Commission into Institutional Responses to Child Sexual Abuse *Final Report: Preface and executive summary* at 212–213.

1156 For example, the Australian National Domestic and Family Violence Bench Book and the Family Violence Bench Book published by the Judicial College of Victoria contain information about the "myths" of family violence: Australian Government Attorney-General's Department *National Domestic and Family Violence Bench Book* at ch 4.1; and Judicial College of Victoria *Family Violence Bench Book* at ch 5.2.7.

1157 Section 54D of the Jury Directions Act 2015 (Vic) as amended by the Jury Directions and Other Acts Amendment Act 2017 (Vic). The relevant amendment came into force on 1 October 2017. A direction can also be given on various matters relating to family violence under s 58 of the Jury Directions Act.

(i) whether or not any differences in the complainant's account are important in assessing the complainant's credibility and reliability; and

(ii) whether the jury believes all, some or none of the complainant's evidence.

Discussion

11.24 Bearing in mind the overseas research and the developments in England and Wales and Australia, we question whether the Evidence Act should be amended in some way to encourage more extensive judicial directions to be given in relation to counterintuitive evidence in cases involving sexual or family violence.

11.25 We note that any new directions could be located in the Act itself, or could be included in non-legislative material.[1158] One advantage of non-legislative reform is that the directions could be amended as knowledge about the effect of rape myths on juror decision making evolves.[1159] On the other hand, the Act is publicly accessible, which could make it easier for parties to request that a specific direction on counterintuitive evidence be given. A further possible benefit of dealing with counterintuitive evidence through judicial directions, as opposed to relying heavily on agreed statements under section 9, is that the directions would promote a greater degree of consistency in approach.[1160]

QUESTION

Q43 Is there a need for new judicial directions addressing specific areas of counterintuitive evidence in New Zealand? If so:

a. what particular myths and misconceptions should be the subject of judicial directions?

b. should these judicial directions be contained in the Evidence Act 2006 or in non-legislative guidelines?

1158 For example, guidelines for the judiciary.

1159 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.59].

1160 As in England and Wales and some jurisdictions in Australia.

CHAPTER 12

Judicial directions on the impact of significant delay

IN THIS CHAPTER, WE CONSIDER:

- why section 122(2)(e) requires a judge to consider giving a direction to the jury about potentially unreliable evidence, in cases where there is a delay of more than 10 years between the alleged offending and the trial; and
- whether the Act should be amended to:
  - clarify the purpose behind section 122(2)(e); and/or
  - require a judge to consider giving a jury direction about potential forensic disadvantage to the defence, in cases where there is a delay of more than 10 years between the alleged offending and the trial.

BACKGROUND

12.1 Section 122 governs judicial directions about evidence that may be unreliable in criminal proceedings tried with a jury. The purpose of judicial directions is to inform juries about the limitations and risks that attach to certain forms of evidence.

12.2 If the judge is of the opinion that admissible evidence might be unreliable, he or she *may* warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it. However, in relation to five specified kinds of evidence the judge *must consider* giving a warning.[1161]

12.3 One of those five situations—set out in section 122(2)(e)—is evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously. Section 122(2)(e) is not confined to trials involving historical sexual abuse, but it commonly arises in that context.

1161 These are set out in s 122(2), namely: hearsay evidence; evidence of a statement made by the defendant, if that evidence is the only evidence implicating the defendant; evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant; evidence of a statement by the defendant to another person made while both the defendant and the other person were detained; and evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.

12.4 If a party requests a warning under section 122, the judge must comply with the request unless a warning might unnecessarily emphasise the evidence or there is a good reason not to.[1162] No particular form of words is required,[1163] and section 122 does not affect any other power of the judge to warn or inform the jury.[1164] If there is no jury, the judge must nevertheless "bear in mind the need for caution" before convicting a defendant in reliance on potentially unreliable evidence.[1165]

12.5 Section 122 provides:

> **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:
>
> (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.

ISSUES FOR CONSIDERATION

12.6 As a result of comments made by the Supreme Court in *CT v R*,[1166] an issue has arisen regarding the policy behind section 122(2)(e). The issue is whether a judicial direction under section 122(2)(e) should be confined to potential issues with the reliability of the particular evidence, or whether it

1162 In describing this provision, the Law Commission said: "Section 108(3) [now section 122(3)] enables a judge's common sense and judgment to override a request for a warning that may be ill-advised". See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C388].

1163 Section 122(4).

1164 Section 122(6).

1165 Section 122(5).

1166 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465.

should also cover disadvantage or prejudice to a defendant arising from a lengthy delay between the alleged offending and the trial.

12.7 In *CT*, the Supreme Court considered how evidence of conduct alleged to have occurred 40 years earlier should be dealt with in sexual cases, in terms of what the judge should say to the jury about that evidence and its probative value.[1167] The issue on appeal was whether the proceedings should have been stayed because of the risk of unfairness caused by delay and if not, whether the summing up given by the trial judge in relation to the delay was adequate to overcome any risk of unfairness arising from the effect of delay on the reliability of the evidence.

12.8 The Supreme Court spent some time discussing the policy behind section 122(2)(e).[1168] Previously, section 122(2)(e) had been interpreted as solely targeting reliability concerns arising from the effect of time on the memory of the witness.[1169]

12.9 In *CT*, however, the majority (comprising Elias CJ and McGrath and William Young JJ) took a wider view of the scope of section 122(2)(e). They suggested evidence may be unreliable "for reasons other than the effect of delay on the memory of the complainant".[1170] In particular, the defendant's inability to "check and challenge" the allegations could also be a relevant concern.[1171] They said reliability is not a narrow term and that a restrictive approach to directions under section 122 may not be wise or warranted.[1172] A section 122 direction is not limited to cases where the evidence itself may be unreliable due to the passage of time; a lengthy delay may raise issues bearing on the fairness of the trial as well.[1173]

12.10 Glazebrook and Arnold JJ disagreed with this interpretation, as the majority's approach suggested that "evidence could be considered possibly unreliable under s 122(2)(e) solely because of delay-related prejudice and even where there is nothing about the particular circumstances that would suggest that the evidence may be unreliable".[1174] They considered this amounted to a suggestion that it is dangerous to convict without corroboration in cases where the offending occurred more than 10 years previously.[1175]

12.11 The Law Commission considered *CT* briefly in its 2015 report, *The Justice Response to Victims of Sexual Violence*.[1176] The Commission reiterated the concern of Glazebrook and Arnold JJ that, depending on the courts' subsequent interpretation and application of section 122(2)(e), the decision in *CT* might make it more difficult for historical sexual violence cases to succeed in the absence of corroborating evidence. The Commission considered this would be an undesirable outcome and would run counter to the now widely accepted position that a jury should not be warned about the

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1167 The complainant alleged the offending occurred in the early 1970s when she was aged 10. At the time she was living with her family, including her brother-in-law, the defendant. In 2007 the complainant told Police that the defendant had sexually abused her. The defendant was interviewed by Police in 2011 and charged in 2012. Before his trial commenced, he applied for a stay of proceedings on the grounds of delay, stating potential witnesses had died or were uncontactable and that there was a dispute about whether the family home had a basement. The application was dismissed. The defendant renewed his application for a stay during the trial and the application was again dismissed.

1168 The Supreme Court accepted a stay should have been granted, but went on to consider whether the warning was adequate.

1169 For this reason the Court of Appeal had said that a s 122(2)(e) warning was not necessary where the defence alleged the complainant was lying, as lapse of time was irrelevant to fabrication. See *S (CA514/08) v R* [2009] NZCA 622 at [63]–[65]; and *N (CA298/2012) v R* [2013] NZCA 17 at [24]–[26].

1170 At [49].

1171 At [49].

1172 At [45].

1173 At [43].

1174 At [70].

1175 At [71]. Contrast Elias CJ and McGrath and William Young JJ at [43]: "s 122 is not inconsistent with s 121".

1176 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

danger of convicting in a sexual violence case in the absence of corroborating evidence.[1177] The Commission suggested our second review of the Evidence Act could examine section 122(2)(e) and whether its intended purpose and effect requires clarification by legislative amendment.[1178]

LEGISLATIVE HISTORY OF SECTION 122(2)(e)

Pre-Evidence Act

12.12 Prior to the Evidence Act, a mixture of statutory and common law rules governed judicial warnings about specific classes of evidence. In relation to unreliable evidence, the approach at common law was that judges needed to be "vigilant" to ensure difficulties relating to the reliability of evidence were properly brought to the attention of the jury.[1179] Whether a warning was given, however, and the form of the warning, were matters for the judge's discretion and dependent on the circumstances of the case.[1180]

12.13 If there had been a lengthy delay between the alleged offending and trial, the common law position was that judges should consider whether the delay created any *particular* concern in respect of the evidence. Concern might arise where it appeared the complainant's genuine recollection of events did not accord with historical reality,[1181] or where the passage of time had disadvantaged the defendant by impacting on his or her ability to adequately test the allegations (and the period of delay did not demand a stay). In such cases the judge needed to be vigilant to bring those difficulties to the attention of the jury.[1182] That was to be done in the manner appropriate to the circumstances of the case.[1183] Even in cases of extremely lengthy delay, there was no *requirement* to give a direction[1184] and prejudice was not assumed from the fact of delay.[1185]

12.14 In cases involving historical sexual violence, New Zealand courts were frequently asked by defence counsel to follow the approach adopted by the High Court of Australia in *Longman v R*.[1186] That case involved a complaint of sexual abuse that was made more than 20 years after the alleged offending.

12.15 In *Longman* the High Court held the jury should have been warned that it would be "dangerous to convict" on the complainant's evidence alone unless the jury, scrutinising the evidence with great care, was satisfied of its truth and accuracy ("the *Longman* direction").[1187] The rationale behind the direction was that a considerable delay puts the defendant at a disadvantage because he or she

1177 At [6.84]. See also Evidence Act 2006, s 121.

1178 At [6.85] and [6.87].

1179 *R v Meaclem* CA187-95, 13 November 1995 at 8.

1180 *R v Meaclem* CA187-95, 13 November 1995 at 8; *R v M* [2007] NZCA 217 at [31]; and *R v W* [2007] NZCA 408 at [69].

1181 *R v M* [2007] NZCA 217 at [33].

1182 *R v Meaclem* CA187-95, 13 November 1995 at 8.

1183 At 8.

1184 *R v M* [2007] NZCA 217 at [34].

1185 In *R v M* [2007] NZCA 217 the Court rejected a submission that the defendant had been disadvantaged by the passage of about 40 years since the alleged offending, even though scene plans were not available, the appellant's wife had subsequently died, medical records no longer existed and forensic scene examinations were not conducted. The Court said at [52]: "Had the allegations been made four years, rather than forty years, after the event, such problems could have existed in any event. They do not go to the heart of the issue. They do not deal with the matters which were of fundamental importance in the unique circumstances of this particular case including the general effluxion of time."

1186 *Longman v R* (1989) 168 CLR 79.

1187 At 91. See also Australian Law Reform Commission and others *Uniform Evidence Law* (ALRC 102, NSWLRC FR 112, VLRC Final Report, December 2005) at [18.78].

has lost the "means of testing the complainant's allegations which would have been open to him [or her] had there been no delay".[1188] It may no longer be possible to explore the alleged circumstances in detail or adduce evidence casting doubt on the complainant's story.[1189]

12.16 New Zealand courts repeatedly refused to adopt the *Longman* direction, both before and after the Evidence Act was enacted. The main reasons given for this refusal were:

(a) It was considered more appropriate in New Zealand for concerns of this nature to be dealt with in an application to stay the proceedings.[1190] The primary consideration in such an application can be whether the lapse of time between the alleged offending and trial would deprive the accused of a fair trial.[1191]

(b) The *Longman* direction was viewed as being inconsistent with the policy behind the Rape Law Reform Bill (No 2) 1984, the product of which amended the Evidence Act 1908 to include sections 23AB, 23AC and 23H. These provisions respectively abolished the common law requirement to warn the jury in sexual cases that it was "unsafe" or "dangerous" to convict on the uncorroborated evidence of the complainant;[1192] allowed the judge to tell the jury "there may be good reasons" for a victim of a sexual offence to refrain from or delay making a complaint;[1193] and stated that the judge should not instruct the jury on the need to scrutinise the evidence of young children generally with special care or suggest children have tendencies to invent or distort their evidence.[1194] These provisions were aimed at countering false stereotypes about the (lack of) credibility of complainants in sexual cases.

(c) It was noted that adopting the requirement in *Longman* to give a warning in all cases of long delayed complaints without consideration of the particular circumstances "would be to move against the trend evident in the statutory provisions and the view consistently expressed by this Court that the summing-up is to be tailored to the particular case".[1195]

The Law Commission's proposal

12.17 In the Commission's 1999 proposed Code and commentary, the Commission suggested a general requirement that, if the judge in a criminal proceeding tried with a jury was of the opinion that evidence may be unreliable, the judge must warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it.[1196] The Commission then listed three categories of evidence that were to be treated as potentially unreliable (requiring the judge to consider in every case whether to give a warning): hearsay evidence; evidence of a confession

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1188 *Longman v R* (1989) 168 CLR 79 at 91. For example witnesses may be unavailable, and relevant documents or independent evidence of the defendant's whereabouts and activity may be unavailable. The defendant's memory or physical or mental health may also have deteriorated.

1189 At 87.

1190 *R v Meaclem* CA187-95, 13 November 1995 at 5.

1191 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465; *R v O* [1999] 1 NZLR 347 (CA); *R v Accused (CA160/92)* [1993] 1 NZLR 385 (CA); *R v Accused (CA260/92)* [1993] 2 NZLR 286 (CA); *R v W* [1995] 1 NZLR 548 (CA); and *R v Williams* CA113/95, 11 August 1995.

1192 Evidence Act 1908, s 23AB. This followed the recommendations of the Evidence Law Reform Committee in its 1984 *Report on Corroboration* at 42–44. See also Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [464]–[465]; and Gerald Orchard "Sexual Violation: The Rape Law Reform Legislation" (1986) 12 NZULR 97 at 111. The substance of s 23AB has been re-enacted in s 121 of the Evidence Act 2006.

1193 Evidence Act 1908, s 23AC. This has been re-enacted in s 127 of the Evidence Act 2006.

1194 Section 23H of the Evidence Act 1908. This has been re-enacted in s 125(2) of the Evidence Act 2006.

1195 *R v Meaclem* CA 187-95, 13 November 1995 at 7.

1196 Section 108 in Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 242.

that is the only evidence of an offence; and evidence offered by a witness who may have motive to give false evidence that is prejudicial to a defendant.[1197]

12.18 The Commission debated whether to include testimony given many years after an alleged offence ("historical offences") and evidence based on recovered memory in the specific classes of evidence, but decided against this.[1198] In relation to historical offences, the Commission reasoned that evidence is not inherently unreliable because of delay and any particular[1199] concern could be dealt with by the general warnings provision.[1200] The Commission clearly distinguished between the issues of reliability and fairness in cases of delay:[1201]

> While the Commission agrees that lengthy delays may raise issues of fairness, it considers that the mere fact of delay does not make particular pieces of evidence unsafe or unreliable. Evidence offered by the prosecution or defence based on historical events may well be reliable and supported by other evidence. The Commission is therefore of the view that no specific mention should be made of evidence in "historical" cases, and that any particular concerns may be dealt with by the general warnings provision, which is sufficiently broad to respond to the circumstances of each case ….

Select Committee amendments

12.19 The Select Committee thought the Commission's proposal was "too restrictive" and considered that leaving the decision to give a warning to the judge's discretion would be more effective than making it mandatory.[1202] It recommended two further specific classes of evidence requiring the judge to consider a warning, including evidence about the conduct of the defendant that is alleged to have occurred more than 10 years previously.[1203]

12.20 The Committee's explanation for these recommendations was brief: "[w]e are concerned about the reliability of evidence provided in these situations, and think that the Judge should have the discretion to warn the jury on the question of reliability."[1204]

12.21 The reasons for the Committee's concern are unclear. The authors of *The Evidence Act 2006: Act and Analysis* suggest the Committee disagreed with the Law Commission to the extent the Commission considered delay *could* (but would not necessarily) render evidence unreliable by inhibiting accurate and full memory recall.[1205] In *CT*, however, the majority stated: "it does not seem very likely that the Committee's concerns were confined to the effect of time (and intervening events) on memory".[1206] Glazebrook and Arnold JJ disagreed: "if the Select Committee had in mind

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1197 Section 108(2) in Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 242.

1198 In the course of preparing the Evidence Code, the Commission undertook extensive research and consultation on the topic of memory and published a miscellaneous paper: *Evidence: Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999). The then current state of knowledge did not allow the Commission to recommend with confidence that as a general rule evidence based on recovered memories should be excluded or that recovered memory evidence should be included in the specified warnings list: see Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [477]–[479].

1199 The Commission emphasised that "[a] warning is necessary only if the judge forms the opinion that the evidence in the particular case is potentially unreliable": Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C385].

1200 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [476].

1201 At [476].

1202 Evidence Bill 2005 (256-2) (select committee report) at 12.

1203 The other recommended class was a statement by a defendant to another person while both are detained in custody.

1204 Evidence Bill 2005 (256-2) (select committee report) at 12.

1205 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV122.04(5)].

1206 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [48].

general fairness and prejudice issues for s 122(2)(e) as well as reliability issues, then we consider it would have made that clear (and it did not)".[1207]

12.22 Notably none of the submissions that the Committee received on clause 118 of the Evidence Bill (now section 122 of the Act) raised issues of general fairness or prejudice to defendants. Instead they were mainly concerned with the effect of a mandatory, as opposed to discretionary, unreliability warning.[1208]

THE OPERATION OF SECTION 122(2)(e)

12.23 Shortly after the Act came into force, the Court of Appeal in *R v Davies* was again asked to consider the applicability of *Longman* in New Zealand.[1209] The Court confirmed the pre-Evidence Act position that there was no requirement to direct the jury on prejudice to the accused. It held that the discretion reserved for judges in section 122 supported that position, and any change to that approach would now be a matter for Parliament.[1210]

12.24 Until *CT*, courts and commentators interpreted section 122(2)(e) much as they had approached judicial directions about unreliable evidence in cases of delay prior to the Act. They did not view section 122(2)(e) as concerned with issues of fairness, but rather considered it was directed at the unreliability of the evidence in the particular case.[1211] Since *CT*, we have identified a number of decisions that mention section 122 and involve conduct alleged to have occurred more than 10 years ago. Nearly all of those decisions involved allegations of historical sexual offending.[1212]

12.25 The failure to give a direction or the inadequacy of the direction was raised as a ground of appeal in most of those historic sex cases.[1213] From the decisions we identified, only two held that a miscarriage of justice had resulted due to the failure to give a direction or the inadequacy of the direction in terms of *CT*. They were *L v R* and *T v R*.[1214]

1207 At [72].

1208 The New Zealand Law Society "Submissions on the Evidence Bill" (2005) considered a mandatory warning could highlight the potentially unreliable evidence in circumstances that would be detrimental to the defence case. It questioned the utility of judicial directions about evidence in trials, and was concerned that it would lead to a new ground of appeal that the judge failed to give a mandatory unreliable evidence warning. The New Zealand Law Society submissions were endorsed by the submission of Robert Fisher QC (26 April 2006) and by the Departmental Report for the Justice and Electoral Committee "Evidence Bill: Part 3 – Trial Process" (Crime Prevention and Criminal Justice Group, May 2006).

1209 *R v Davies* [2007] NZCA 577.

1210 At [77].

1211 See Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV122.04(5)]; and Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.80].

1212 The one case we identified that did not involve historic sexual offending involved charges of obtaining property by deception: *R v Love* [2016] NZHC 2046.

1213 The four remaining cases were: *D (CA368/2017) v R* [2017] NZCA 464; *Stirling v R* [2016] NZCA 550; *R v P (CA553/2014)* [2015] NZCA 346; and *S (CA119/2015) v R* [2015] NZCA 270. In the following cases, a ground of appeal was the failure to give a reliability direction under s 122(2)(e) in terms of *CT*: *H (SC49/2016) v R* [2016] NZSC 103; *C (CA66/2015) v R* [2016] NZCA 342; *T (CA561/2014) v R* [2016] NZCA 235 (leave to appeal declined in *T (SC117/2016) v R* [2017] NZSC 6); *F (CA600/2014) v R* [2015] NZCA 616; *K (CA665/2014) v R* [2015] NZCA 566 (leave to appeal declined in *K (SC133/2015) v R* [2016] NZSC 26); *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26; *Oquist v R* [2015] NZCA 310; *D (CA95/2014) v R* [2015] NZCA 171 (leave to appeal declined in *D (SC60/2015) v R* [2015] NZSC 119); and *L (SC28/2014) v R* [2015] NZSC 42. In the following decisions, a ground of appeal was the inadequacy of the direction under s 122(2)(e): *Ross v R* [2017] NZCA 587; *H v R* [2017] NZCA 415; *M v R* [2016] NZCA 572; *Senior v R* [2016] NZCA 389; *Joblin v R* [2016] NZCA 287; *Prasad v R* [2016] NZCA 163 (leave to appeal declined in *Prasad v R* [2016] NZSC 146); *K v R* [2016] NZCA 98; *O'Reilly v R* [2015] NZCA 604; *J (CA175/2015) v R* [2015] NZCA 594; and *T v R* [2014] NZCA 602.

1214 *L v R* [2015] NZSC 42, [2015] 1 NZLR 658; and *T v R* [2014] NZCA 602. Several of the decisions held that, although the judicial direction was inadequate in terms of *CT*, there had not been a miscarriage of justice. For example, see *Ross v R* [2017] NZCA 587 at [57]–[58].

12.26 In *L v R* the trial judge had not given a reliability warning because the central issue was whether the complainant was honest. The Court of Appeal did not consider the evidence was so unreliable as to require a section 122 direction. Applying *CT*, however, the Supreme Court said this was "a clear case where a reliability warning should have been given".[1215] This was because cross-examination had revealed the complainant's evidence was unreliable in one major respect (the offending could not have occurred in a genie[1216] during a school production, because the school did not have a genie at the time alleged).[1217] The lapse of time made it more difficult to defend the charges. In particular, a letter from Mr L to the complainant had been destroyed. The complainant alleged it was a letter of apology (and admission) and Mr L alleged it was a letter denying wrongdoing. The Supreme Court said the unavailability of the letter prejudiced Mr L's ability to mount a defence on this crucial issue.[1218] The issues of reliability were not peripheral but went to the heart of the charges.[1219]

12.27 *T v R* was an appeal against convictions for sexual offending against the appellant's step-son and daughter during the 1980s and early 1990s. In light of *CT*, the Court of Appeal accepted the direction was inadequate:[1220]

> The warning given by Whata J in [Mr T]'s case was given before the judgment in *CT* was delivered. With the benefit of the judgment in *CT*, we are satisfied that Whata J's warning was not adequate. While it met the requirement of the "need for caution", it did not contain the requisite explanation for that need. In particular, there was no acknowledgment of the effect of the effluxion of time on memory or resultant unfairness to Mr T. Nor was there any reference to any other specific respects of prejudice to him, such as evidence relating to the size of the bathroom, which might have been raised by his trial counsel if the judgment in *CT* had been available.

12.28 The Court emphasised that, in explaining why caution is necessary, the trial judge may need to cover the effect of the passage of time on memory as well as other "specific respects" in which there may be prejudice to the defendant: "[w]hat is important is that what the Judge says must reflect the circumstances of the particular case."[1221]

SHOULD SECTION 122(2)(e) BE AMENDED?

12.29 We are concerned that *CT* may have introduced a near mandatory requirement to caution the jury about potentially unreliable evidence in cases of significant delay, including a warning as to the risk of unfairness or disadvantage to the defendant arising from difficulties in checking or answering the allegations. Although we are aware of only two cases where a miscarriage of justice resulted from the failure or inadequacy of the warning in terms of *CT*, we note that since *CT* was delivered in October 2014, there have been at least 19 cases where section 122(2)(e) was raised as a ground

1215 *L v R* [2015] NZSC 42, [2015] 1 NZLR 658 at [32].
1216 A "genie" is a crate at the top of a lighting ladder.
1217 At [29].
1218 At [30].
1219 At [32].
1220 *T v R* [2014] NZCA 602 at [22].
1221 At [20].

of appeal.[1222] In the seven years before *CT*, we have identified only 10 cases where section 122(2)(e) was raised as a ground of appeal (or in an application for leave to appeal).[1223]

12.30 As discussed above, we consider the approach in *CT* is not in keeping with the ordinary meaning of section 122(2)(e) or its legislative history. As its heading indicates, section 122 is a provision concerned with "evidence which may be unreliable". It is not a provision that is designed to address comprehensively the potential impact of a lengthy delay on a trial. The emphasis on unreliability does not fit comfortably with the inclusion of a direction about the risk of disadvantage to the defence in answering the Crown case. Nothing in the pre-Evidence Act case law, the Law Commission's proposal, the legislative history of the Evidence Bill or the wider statutory context in the Act suggests that Parliament intended this risk to be included. In fact, the near mandatory nature of the requirement in *CT* runs contrary to the Select Committee's strong opposition to requiring a mandatory direction in relation to any class of evidence.

12.31 Nevertheless, the question remains as to whether there are sound policy reasons to adopt the majority approach in *CT*.[1224] In considering this question it is useful to consider how Australia and England and Wales address the issue of judicial directions in cases involving a significant delay between the alleged offending and trial.

Australia

12.32 In Australia a need for legislative guidance on jury directions in cases involving significant delay arose from a "complex, voluminous and uncertain" body of common law and practice governing directions,[1225] including the troublesome *Longman* direction. The Evidence Act 1995 (Cth)[1226] sought to address the confusion arising from *Longman* by enacting a specific direction about "forensic disadvantage" to defendants:[1227]

> **165B Delay in prosecution**
>
> (1) This section applies in a criminal proceeding in which there is a jury.
>
> (2) If the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.
>
> (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
>
> (4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict

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1222 See above at n 1213.

1223 *Anson v R* [2014] NZCA 135; *Thompson v R* [2014] NZCA 136; *L v R* [2013] NZCA 191; *N v R* [2013] NZCA 17; *Fenemor v R* [2011] NZCA 206; *HP v R* [2011] NZSC 24 (application for leave to appeal); *S v R* [2009] NZCA 622; *R v Buddle* [2009] NZCA 184; *R v Stewart* [2008] NZCA 429; and *R v R* [2008] NZCA 318 (application for leave to appeal declined in *R v R* [2008] NZSC 81).

1224 Bearing in mind s 6(c) of the Act (promoting fairness to parties and witnesses).

1225 Victorian Law Reform Commission *Jury Directions* (VLRC Final Report 17, 2009) at [2.35]. The Commission explained this body of law "lacks organisation", it is "difficult to apply" and "conducive of judicial error" (resulting in many retrials being ordered on appeal), its complexity "does not assist effective communication with juries", it results in "unnecessary directions out of concern about appeals which further complicates the juries' task" and "some appeals against conviction succeed because of highly technical errors in the directions": at 4–8.

1226 The Evidence Act 1995 (Cth) has been adopted to varying degrees by most states, including: New South Wales, Tasmania, Victoria and the Northern Territory. In 2011 the Australian Capital Territory enacted its own Act, rather than simply applying the Commonwealth Act.

1227 Evidence Act 1995 (Cth). Largely similar provisions have been adopted in the Australian Capital Territory, New South Wales and the Northern Territory: Evidence Act 2011 (ACT), Evidence Act 1995 (NSW), Evidence (National Uniform Legislation) Act 2011 (NT).

the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.

(5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or inform, the jury.

(6) For the purposes of this section:

(a) delay includes delay between the alleged offence and its being reported; and

(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

12.33 While "significant forensic disadvantage" is not defined in the statute, general assistance can be drawn from case law:[1228]

- There must be more than a "theoretical or assumed disadvantage".[1229]
- There needs to be a "particular" significant forensic disadvantage.[1230] While it may not be possible to specify the exact disadvantage ("one can never know what is in a document now lost"[1231]), a "measure of precision in identifying the nature of the disadvantage alleged" is required.[1232] For example, it might be necessary to state what a witness is expected to have said or what a document is expected to have contained.[1233] It might require a demonstration of the obstacles confronting the defence as a result of the delay and that, in turn, "may call for some evidence to be led of the attempts made to overcome the difficulties identified".[1234]
- Where the disadvantage comprises lost evidence, it will usually be necessary to establish this is in fact the case rather than leaving it to supposition.[1235]
- The test is not the extent of delay but the consequences of the delay.[1236]

12.34 In Australia, a warning about "significant forensic disadvantage" is often used in place of a stay of proceedings, which will only be granted in "the most rare or exceptional circumstances".[1237] This can be contrasted with New Zealand where "it has been the practice to deal with the prejudicial effect of the lapse of time between offending and trial in the context of applications to stay prosecutions."[1238]

12.35 In addition to section 165B, some states in Australia have a separate statutory jury direction for "evidence of a kind that may be unreliable".[1239] Even if the evidence falls within one of these

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1228 Bill Neild *Jury directions in sexual assault trials: Murray/Ewen, significant forensic disadvantage and delay in complaint* (paper presented to the Public Defenders Criminal Law Conference, New South Wales, March 2017).

1229 *R v Cassebohm* [2011] SASCFC 29, (2011) 109 SASR 465 at [30].

1230 *Groundstroem v R* [2013] NSWCCA 237 at [56].

1231 *R v Cassebohm* [2011] SASCFC 29, (2011) 109 SASR 465 at [30].

1232 *PT v The Queen* [2011] VSCA 43 at [38].

1233 Bill Neild *Jury directions in sexual assault trials: Murray/Ewen, significant forensic disadvantage and delay in complaint* (paper presented to the Public Defenders Criminal Law Conference, New South Wales, March 2017) at [52].

1234 *PT v The Queen* [2011] VSCA 43 at [38].

1235 *Groundstroem v R* [2013] NSWCCA 237 at [64].

1236 At [61].

1237 *R v Jacobi* [2012] SASCFC 115; *Williams v Spautz* (1992) 174 CLR 509; *Jago v District Court of New South Wales* (1989) 168 CLR 23.

1238 *R v Meaclem* CA 187-95, 13 November 1995 at 5.

1239 Section 165 of the Evidence Act 1995 (Cth), Evidence Act 1995 (NSW), Evidence Act 2008 (Vic), Evidence Act 2011 (ACT), Evidence (National Uniform Legislation) Act 2011 (NT), and Evidence Act 2001 (Tas). The kinds of evidence that may be unreliable include: hearsay evidence; identification evidence; evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like; evidence given by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceedings; evidence in a criminal proceeding by a witness

categories, it is not presumed to be unreliable: there must also be circumstances indicating the evidence is actually unreliable.[1240]

England and Wales

12.36 In cases involving a "substantial delay" between the alleged offending and trial, the *Crown Court Compendium* in England and Wales suggests the jury may need to be directed on the relevance of the delay, including the impact on the preparation and conduct of the defence and the relationship with the burden of proof.[1241] A direction is only required where the potential difficulty arising from delay is significant or where it is necessary to be even handed between the accused and complainant.[1242] Whether a direction is given and the way it is formulated will depend on the facts of the case. Particular care is needed in sexual cases where the issue of delay may be perceived as having an effect on the credibility of a complainant.[1243]

12.37 The *Crown Court Compendium* recognises two situations that may require directions about delay:

- to explain the relevance of a victim's delay in complaining, including in sexual cases. This addresses the relevance of delay for complainants.[1244]
- to explain the effect of delay on the trial and that prolonged delay may lead to "forensic disadvantages". This is aimed at the impact of delay on defendants.

12.38 In *R v PS*, the Court of Appeal (Criminal Division) emphasised the danger of directions that amalgamate the consequences of delay for complainants and defendants:[1245]

> The risk of combining and interweaving the potential consequences of delay for the accused with the other delay-related considerations ("putting the other side of the coin") is that the direction, as the principal means of protecting the defendant, is diluted and its force diminished.

12.39 The direction on "the effect [of delay] on the trial" refers both to the impact of time on the memory of witnesses and to the fact that the passage of time may put the defendant at a "serious disadvantage" in conducting his or her defence.[1246] For example, the defendant may not be able to call witnesses that could have helped his defence because they have died or cannot be traced or cannot now remember what happened. Similarly, documents that could have helped his or her defence might now be lost or destroyed.

12.40 Finally, section 32 of the Criminal Justice and Public Order Act 1994 (UK) abolished the common law requirement for trial judges to warn juries it was dangerous to convict on the uncorroborated evidence of complainants in sexual cases. Reviewing the policy and purpose of the Act in *R v Makanjuola*, the Lord Chief Justice, Lord Taylor, stated the Act did not allow a presumption of

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who is a prison informer; oral evidence of questioning by an investigating officer of a defendant that is recorded in writing and has not been signed or acknowledged by the defendant; and in a proceeding against the estate of a deceased person – evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

1240 *R v Stewart* [2001] NSWCCA 260, (2001) 52 NSWLR 301 at [16].

1241 Judicial College *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (England and Wales, November 2017) at 10-13.

1242 At 10-13.

1243 At 10-13.

1244 In New Zealand, this is addressed in the Evidence Act, s 127.

1245 *R v PS* [2013] EWCA Crim 992, [2013] All ER (D) 97 (Jul) at [37].

1246 The direction on the effect of delay on the trial is set out in full in Appendix 4.

unreliability to attach to particular categories of witnesses, such as complainants in sexual cases.[1247] Rather, "[t]here will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable."[1248]

Preliminary view

12.41 The majority judgment in *CT* appears to interpret section 122(2)(e) as incorporating "forensic disadvantage". Our preliminary view is that this approach may not be appropriate in New Zealand.

12.42 First, it seems unnecessary because of the approach to stays (where a fair trial is not possible) and because, in cases that do proceed to trial, the judge is responsible for conducting the proceedings in a way that ensures the accused is tried fairly.

12.43 Second, while the inability to check and challenge allegations raises issues of trial fairness, we support the view expressed in our 1999 report that "the mere fact of delay does not make particular pieces of evidence unsafe or unreliable".[1249] We tend to agree with Glazebrook and Arnold JJ in *CT* that:[1250]

> Evidence is either reliable or it is not. The ability to test evidence may enable a fact finder to decide whether or not the evidence is reliable. It does not, however, change the underlying reliability or otherwise of the evidence.

12.44 This view appears to be consistent with the overseas approaches. In England and Wales, the guidance about the "effect of delay on trial" warns that diminished memory may make evidence "less reliable" and that the passage of time may also put the defendant at a serious disadvantage at trial; it does not suggest that forensic disadvantage may make the evidence less reliable. In Australia, there are separate statutory directions for unreliable evidence and for forensic disadvantage.

12.45 Third, we are concerned that *CT* may be interpreted as requiring a direction on forensic disadvantage in all cases involving a delay of more than 10 years, without having to point to any particular prejudice to the accused. The courts in New Zealand, prior to *CT*, and the courts in Australia and England and Wales, have required more than an assertion of general disadvantage. They have required the defendant to point to a particular prejudice likely to have resulted from the delay. Australia limits directions to cases where there is a "significant forensic disadvantage" to the defendant, and England and Wales limit the direction to cases where the potential difficulty arising from the delay is "significant" or "serious".[1251] We note the focus of our section 122 is intended to be a "particularised one", meaning the concentration is on the potential unreliability of the particular evidence in issue.[1252]

12.46 Fourth, given that section 122(2)(e) almost invariably arises in the context of historical sexual offending, the majority's approach in *CT* suggests evidence could be considered unreliable solely because of delay-related prejudice, even where there is nothing about the particular circumstances that indicates the evidence is unreliable.[1253] We remain concerned that this amounts to suggesting it is dangerous to convict without corroboration in cases where the offending occurred more than 10

1247 *R v Makanjuola* [1995] 3 All ER 730 (Crim App) at 733.

1248 At 733.

1249 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [476].

1250 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [63].

1251 Judicial College *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (England and Wales, November 2017) at 10-13 and 10-15.

1252 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C385]; and *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 per Glazebrook and Arnold JJ at [65].

1253 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [70].

years ago. As Glazebrook and Arnold JJ point out, it is difficult to see why this should be confined to historical offences. It is not unusual for there to be no corroboration of the evidence of actual sexual offending even in cases where the offending has occurred more recently.[1254] To suggest it is dangerous to convict without corroborating evidence would be inconsistent with legislative reforms designed to counter myths and misconceptions about complainants in sexual cases and to improve aspects of the criminal justice process that adversely or unfairly impact on victims of sexual offending.[1255]

12.47 In light of those observations, our preliminary view is that section 122(2)(e) should be confined to issues about the reliability of the particular evidence in the circumstances of the case. Concerns about disadvantage or prejudice to defendants arising from delay can be addressed first by an application for a stay of proceedings, and second, if the trial proceeds, the judge can draw any *particular* and *significant* disadvantage to the jury's attention as part of the duty to ensure a fair trial.[1256]

12.48 If this is the correct view, a remaining question is whether the Act should be amended to provide expressly for judicial directions about forensic disadvantage arising from delay – as in Australia. This would clarify that section 122(2)(e) is confined to issues with the reliability of the evidence, but would allow the court to draw the jury's attention to any particular forensic disadvantage separately. An alternative to a judicial direction in the Act would be a non-legislative response, such as the inclusion of a judicial direction about forensic disadvantage in guidelines for the judiciary – the approach taken in England in Wales.

12.49 On the other hand, however, we note David Hamer's view that "pro-defendant interventions" in cases of delay are not justified or logical.[1257] Hamer argues that missing evidence is as significant a problem for the prosecution as it is for the defence, and possibly a greater problem for the prosecution in view of the presumption of innocence which stacks the odds against the complainant:[1258]

> Even without any adverse inference working against the complainant, delay will often weaken the prosecution case. It is not only that the complainant's evidence is uncorroborated. As a result of the delay the complainant's account will often lack persuasive detail. This in turn makes it difficult for the defendant to test the complainant's evidence through cross-examination directed at revealing inconsistencies and contradictions. Uncorroborated, undetailed, untested complainant testimony will generally struggle to satisfy a jury beyond reasonable doubt of the defendant's guilt.

12.50 He suggests pro-defendant interventions suffer from another flaw: because the evidence is lost, its content is unknown. Loss of evidence can only cause *possible* prejudice to a defendant, and the loss may in fact be to the defendant's advantage:[1259]

> Would the missing witnesses have confirmed the defendant's alibi, or demonstrated the defendant's opportunity? Would forensic science examinations of the alleged scene of abuse have revealed semen stains or clean sheets? The answers remain unknown.

1254 At [71].

1255 Elisabeth McDonald "From 'Real Rape' to Real Justice: Reflections of the Efficacy of More than 35 Years of Feminism, Activism and Law Reform" (2014) 45 VUWLR 487 at 488.

1256 As suggested in *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [75] per Glazebrook and Arnold JJ.

1257 David Hamer "Delayed Complaint, Lost Evidence and Fair Trial: Epistemic and Non-epistemic Concerns" in Paul Roberts and Jill Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, Oregon, 2012) 215.

1258 At 217.

1259 At 221.

12.51 Hamer argues that delayed sexual violence cases do not threaten the fairness of a trial or increase the risk of wrongful conviction. The presumption of innocence acts as a safeguard for defendants and delay "tends to increase the risk of mistaken acquittal, not wrongful conviction".[1260] He suggests the best way to resolve these cases is to assess the strength of the evidence that is available.

QUESTIONS

Q44 Should section 122(2)(e) be amended to expressly confine its scope to the effect of delay on the reliability of the evidence?

Q45 Is there a need for judicial directions about disadvantage arising from delay? If so, should these directions be contained in the Evidence Act 2006 or in non-legislative guidelines?

1260 At 236.

CHAPTER 13

Veracity evidence

IN THIS CHAPTER, WE CONSIDER:

- whether any of the veracity provisions in the Evidence Act are redundant;
- whether the recent amendment to section 38(2)(a) has caused issues; and
- whether the term "veracity" and/or its accompanying definition should be changed.

BACKGROUND

13.1 The admissibility of veracity evidence is governed by sections 37–39 of the Act. Veracity is defined as "the disposition of a person to refrain from lying".[1261] Put simply, veracity evidence is generally concerned with whether a person is honestly recounting their version of events and is not being deliberately untruthful.[1262] The focus is on the person's inclination to tell the truth rather than the factual correctness or accuracy of their testimony.[1263] Under the Act, veracity evidence is generally inadmissible unless it meets a heightened relevance test or is offered by the defendant. The policy behind the rules is to prevent trials from being diverted into collateral issues.[1264] The rules are not intended to limit the ability of counsel to ask defendants or other witnesses directly whether their evidence was truthful.[1265]

13.2 Section 36 contains an exception to the veracity rules. It relevantly 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.
>
> ...

13.3 Section 37 sets out the general rule that veracity evidence is inadmissible unless it is "substantially helpful". It contains a non-exhaustive list of matters the judge may consider when deciding whether

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1261 Evidence Act 2006, s 37(5). This definition was amended as of 8 January 2017 by the Evidence Amendment Act 2016, s 12(2). The previous wording defined veracity as "the disposition of a person to refrain from lying, whether generally or in the proceeding".

1262 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.4]. Propensity evidence, which is concerned with whether a particular person has a tendency to act in a particular way or have a particular state of mind, is a distinct concept – 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: s 40(4).

1263 Evidence Bill 2005 (256-2) (select committee report) at 5.

1264 *Weatherston v R* [2011] NZCA 276 at [60]; and *Weatherston v R* [2011] NZSC 105 at [5].

1265 *Weatherston v R* [2011] NZCA 276 at [60].

the proposed evidence satisfies this heightened relevance test. It 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 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 a 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.

13.4 Sections 38 and 39 apply only to criminal proceedings. Section 38 governs the admissibility of evidence of a *defendant*'s veracity. It provides:

> **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, in court, given oral evidence about his or her veracity or 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.

13.5 Section 39 governs evidence of a *co-defendant*'s veracity. We are not aware of any issues that have arisen with section 39. The focus of this chapter is on issues relating to sections 36–38.

Pre-Evidence Act

13.6 Prior to the Act, the common law rules relating to evidence of character and credibility encompassed what is now known in the Act as evidence of "veracity" and "propensity".[1266] Generally parties in a proceeding were free to show that a witness was in error; however, there were more restraints on challenging or supporting a witness' truthfulness, such as: the rule prohibiting a party from

1266 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.2].

bolstering the credibility of a witness; the rule prohibiting a party from impeaching its own witness; and the collateral issues rule.[1267] In particular, the prosecution could only offer evidence of the defendant's bad character if the defendant put his or her own character in issue, or challenged a prosecution witness' character.[1268] Even if this occurred, the judge could still narrow or exclude the bad character evidence on the basis the potential prejudice outweighed its probative value.[1269]

13.7 In its codification proposals, the Commission recommended a general rule that evidence challenging or supporting a person's truthfulness would be admissible only if it were "substantially helpful" in assessing that person's truthfulness.[1270] The aim of this proposal was to create a test of "significant or heightened relevance so as to prohibit truthfulness evidence that is of limited value".[1271] The Commission provided a non-exhaustive list of factors to assist with determining substantial helpfulness.[1272]

13.8 The proposed Code abolished the collateral issues rule,[1273] but preserved the "retaliatory features" of the common law rules governing the admissibility of prosecution evidence about a defendant's bad character (in what became section 38(2) of the Act).[1274]

13.9 The Select Committee made several changes to the proposed provision:[1275]

- the term "truthfulness" was replaced with "veracity" to place the emphasis on the intention to tell the truth, rather than the factual accuracy of the evidence;
- reference to a person's reputation for being untruthful was deleted as it was considered irrelevant to an assessment of veracity;
- some wording was removed to clarify that the Evidence Bill would not change the practice of allowing parties to challenge the testimony of their own witness by calling other evidence, or by cross-examining witnesses called by another party;
- an amendment was made to reinstate the law limiting the opportunity for the prosecution to call evidence as to the defendant's bad character as the Commission's proposal was seen as skewed too far in favour of the prosecution;
- a clause was added giving judges more guidance when determining whether to allow the prosecution to offer evidence about the defendant's veracity;[1276] 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.

1267 For more detail, see Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.9]–[6.14].

1268 At [6.15].

1269 At [6.15].

1270 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C178].

1271 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [157].

1272 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C179].

1273 At [C177]. The collateral issues rule applied when cross-examination was directed to a matter that was not a fact in issue. It treated a witness' answer as final and prevented the cross-examining party from offering evidence to contradict the witness.

1274 At [C188].

1275 Evidence Bill 2005 (256-2) (select committee report) at 5–6.

1276 This clause incorporated factors suggested in the Law Commission's commentary to its proposed Code: Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C179].

LAW COMMISSION'S 2010 ADVICE TO THE MINISTER OF JUSTICE

13.10 In April 2010, the Law Commission provided advice to the Minister of Justice about the operation of the veracity and propensity provisions in the Act.[1277] The Commission's overall conclusion was that the picture was "very largely a positive one", although it noted some pre-Evidence Act practice creeping through.[1278] At that point, there had "not been many cases" decided under sections 37 to 39.[1279] The Commission did not consider any of the issues were pressing enough to require urgent action.[1280]

LAW COMMISSION'S 2013 REVIEW OF THE ACT

13.11 In its 2013 review of the Act, the Commission discussed several issues arising from the operation of the veracity provisions, but only recommended three amendments (all of which were enacted by the Evidence Amendment Act 2016):

- Changing the definition of veracity ("the disposition of a person to refrain from lying *whether generally or in the proceeding*") by deleting the italicised phrase.[1281] This amendment was intended to clarify the scope of the veracity provisions by making it clear that the rules are concerned with evidence that is extraneous to the subject matter of the proceedings. The rules were not intended to prevent a party from "offering evidence contradicting or challenging a witness's answers given in response to cross-examination directed *solely* to truthfulness".[1282]
- Amending section 37(3)(b), which permitted a judge to consider a person's convictions for "offences that indicate a propensity for dishonesty or lack of veracity" when deciding whether the proposed veracity evidence was substantially helpful, by removing the words "dishonesty or".[1283] This would allow courts to consider on the facts of individual cases whether the circumstances of prior offending were substantially helpful in assessing veracity.[1284]

1277 Letter from Geoffrey Palmer (then President of the Law Commission) to Simon Power (then Minister of Justice/Minister Responsible for the Law Commission) regarding Evidence Act Review: Operation of the Veracity and Propensity Provisions (29 March 2010). The impetus for the 2010 advice came from a report by the Law Commission in 2008. Shortly before the Act came into force (in July and August 2007), the Law Commission received a reference 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 Commission published an Issues Paper in 2007 and a final report in 2008: Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character* (NZLC R103, 2008). The report noted some issues with the provisions, but ultimately recommended no amendment to the veracity and propensity provisions (for an overview of these issues see Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.29]–[6.35]). The Commission proposed to continue monitoring the courts' interpretation of these provisions and give advice to the Government in 2010.

1278 Letter from Geoffrey Palmer (then President of the Law Commission) to Simon Power (then Minister of Justice/Minister Responsible for the Law Commission) regarding Evidence Act Review: Operation of the Veracity and Propensity Provisions (29 March 2010) at [9].

1279 At [28].

1280 At [30]. The one veracity issue it discussed in detail related to whether judges need to look at the principal purpose for which the evidence is being adduced in determining the scope of the veracity rule; that is, whether to establish a disposition to lie or refrain from lying, or some other collateral purpose. This issue related to two Court of Appeal decisions: *R v Davidson* [2008] NZCA 410 and *R v Tepu* [2008] NZCA 460, [2009] 3 NZLR 216. The Commission was satisfied with the outcome achieved by the Court of Appeal in those cases.

1281 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 112, R11. This change was enacted by s 12(2) of the Evidence Amendment Act 2016.

1282 At [6.68], referring to Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [161] (emphasis added).

1283 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 115, R12.

1284 At 115, R12. This change was enacted by s 12(1) of the Evidence Amendment Act 2016.

- Amending section 38(2)(a) 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 that puts veracity in issue.[1285] This was due to concern that a defendant's out of court statement was being treated as putting his or her veracity at issue.[1286] We discuss this issue later in this chapter.[1287]

HANNIGAN v R

13.12 Shortly after the Commission completed its 2013 review, the Supreme Court discussed the scope of the veracity rules in *Hannigan v R*.[1288]

13.13 In that case, the Supreme Court divided 4–1 with regard to the unorthodox questioning by the prosecution of its own witness, Mrs Hannigan. She had been called as a witness in the trial of her husband, Mr Hannigan, who was accused of setting fire to his own property in an attempt to obtain insurance payments. Fires occurred three times within one week, and the kitchen was destroyed in the third fire. The Crown sought to prove that Mr Hannigan had lit all three fires, and a crucial piece of evidence was Mrs Hannigan's account (which she had given in a police interview) of visiting the property on the day of the second fire and sitting in the car while her husband went inside the house.

13.14 At trial, Mrs Hannigan's evidence-in-chief was ambiguous as to whether her husband had actually entered the house on that day.[1289] Under cross-examination, however, she said he could not have gone inside the house because the house key was in her possession while she waited in the car. The prosecutor sought leave to draw Mrs Hannigan's attention to her earlier police statement during re-examination, to "ask questions around that prior statement" but "[c]ertainly not cross-examination."[1290] No request was made for her to be declared hostile. The trial Judge ultimately permitted this course of action.[1291]

13.15 Mr Hannigan was convicted of arson and appealed his conviction to the Court of Appeal, arguing the prosecutor's re-examination of Mrs Hannigan had amounted to an attack on her veracity under section 37 of the Act and constituted cross-examination under section 94 (requiring a prior determination that the witness was hostile).[1292] The Court of Appeal dismissed the appeal.[1293]

1285 At 121, R13.

1286 At [6.108].

1287 See paragraphs [13.27]–[13.31].

1288 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [119].

1289 She said that the usual practice for her and her husband when visiting their properties was to go inside and walk around, checking that nothing had been disturbed. Mrs Hannigan was asked "who went into the property?" to which she responded "Shane did. I stayed in the car".

1290 At [69].

1291 The prosecutor then took Mrs Hannigan through her police statement in detail, asking her if she recalled making it and to explain the discrepancies between it and her evidence in court. The prosecutor then referred to the inconsistencies in his closing address to describe Mrs Hannigan as "all over the place". He said he was "not suggesting [she was] a dishonest person … [but that] she was doing what she could to assist her husband".

1292 Mr Hannigan also argued that inadmissible propensity evidence had been led at his trial. This ground was rejected, and leave to appeal to the Supreme Court on this ground was declined: *Hannigan v R* [2012] NZSC 43 at [2].

1293 *Hannigan v R* [2012] NZCA 133. The Court did not consider the prosecutor's re-examination of Mrs Hannigan amounted to "offer[ing] evidence to challenge [her] veracity": at [32]. Nor did the Court accept that the prosecutor's closing address to the jury sought to impugn her veracity: at [33]. The Court concluded the prosecutor "was perfectly entitled to clarify, in re-examination, what [she] had said under cross-examination. And there could be no objection to the prosecutor re-examining in a manner which cast doubt on the reliability of [her] evidence": at [34].

13.16 On appeal to the Supreme Court, the majority (comprising McGrath, William Young, Chambers and Glazebrook JJ) held that the operation of the veracity rules in the Evidence Act was confined to evidence that was not admissible independently of those rules.[1294] They did not exclude evidence that was admissible as to the facts in issue. As Mrs Hannigan's earlier statement to Police was admissible (under sections 7 and 8 as a prior inconsistent statement),[1295] the offering of evidence about the statement in the form of the witness' responses to questions as to its contents could not infringe the veracity rules (in particular, the requirement in section 37(4)(a) for a witness to be declared hostile before a party can challenge their own witness' veracity).[1296] Accordingly, the appeal was dismissed.

13.17 Elias CJ dissented. She took the view that the challenge to Mrs Hannigan's evidence was unable to be explained except by reference to her lack of veracity.[1297] She considered that, although the veracity rules cover general propensity to be untruthful, they were also concerned with untruthfulness in the evidence given in the proceeding.[1298] (We note that legislative developments have overtaken this aspect of her judgment, as the words "whether generally or in the proceeding" have been removed from section 37(5).) The Chief Justice also considered it would have been necessary for a determination of hostility to precede the challenge to the veracity of the Crown's own witness under section 37(4)(a).[1299] She took the view that section 37(4)(a) was still to be observed where a previous inconsistent statement was offered both as proof of the truth of its contents and to challenge the veracity of the witness in the evidence given in the proceeding.[1300]

ISSUES FOR CONSIDERATION

13.18 In this chapter, we consider the following issues that have arisen since the 2013 review:

- whether any of the veracity provisions in the Act are redundant;
- whether the recent amendment to section 38(2)(a) has caused issues; and
- whether the term "veracity" and its accompanying definition should be changed.

REDUNDANT PROVISIONS?

13.19 As noted above,[1301] the Commission recommended amending the definition of "veracity" (by removing the words "whether generally or in the proceedings") to clarify the scope of the veracity rules. The Commission intended to make it clear that there is "no rule that prevents a party from

1294 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [119] per William Young J (delivering the reasons for the majority). See also at [135]–[136].

1295 At [79].

1296 At [119] and [138]. The majority also held that the prosecutor's re-examination of Mrs Hannigan had not constituted cross-examination. The majority concluded that not every leading question will amount to cross-examination requiring leave under s 94, and that it will be appropriate for counsel to ask their own witness leading questions with permission under s 89(1)(c) to explore ambiguities or apparent inconsistencies in the witness' evidence: at [106]–[107].

1297 At [53].

1298 At [53].

1299 At [49] and [55].

1300 At [50]–[51].

1301 At paragraph [13.11].

offering evidence contradicting or challenging a witness's answers given in response to cross-examination directed *solely* to truthfulness".[1302]

13.20 Like the Commission (and consistent with the policy behind the provisions),[1303] the majority of the Supreme Court in *Hannigan* took the view that the veracity provisions do not govern evidence that is relevant to the facts in issue.[1304] The majority described "the drift of the [Commission's] commentary" as "very much consistent with the overall approach to the veracity rules which we favour".[1305]

13.21 The Commission's recommended definition of "veracity" was adopted in the Evidence Amendment Act 2016, which came into force on 8 January 2017. That amendment—which was intended to clarify that the scope of the veracity provisions is limited to evidence that is extraneous to the subject matter of the proceedings—appears to have rendered certain provisions largely irrelevant.[1306]

Section 36(1) exception to veracity rules

13.22 First, section 36(1) sets out an exception to the application of the veracity (and propensity) provisions. It provides that those provisions do not apply to evidence of a person's veracity if veracity is one of the central issues being litigated. For example, in actions for defamation, evidence offered about the plaintiff's veracity will not be governed by the veracity provisions.[1307]

13.23 The inclusion of section 36(1) is arguably unnecessary: if evidence that bears on the issues in dispute will never fall within the scope of the veracity rules (which was the Commission's view and the majority's view in *Hannigan*), there is no need to include the section 36(1) exception.[1308] This point was acknowledged by the majority in *Hannigan*.[1309] The majority's response was that section 36(1) had been included by the legislature out of an abundance of caution.[1310]

Section 38(2) trigger

13.24 Second, the prosecution in a criminal proceeding may offer evidence about the defendant's veracity in limited circumstances, which are set out in section 38(2): if "(a) the defendant has, in court, given oral evidence about his or her veracity or 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".[1311] The inclusion of the italicised words is arguably unnecessary, given the veracity rules only

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1302 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.68], referring to Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [161] (emphasis added).

1303 See paragraph [13.1] above.

1304 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [120]: "The veracity rules contemplate evidence being adduced as to the veracity of a witness in relation to matters which have no other relevance to the case at hand. For example, if a witness has numerous previous convictions for perjury, evidence of those convictions will be admissible as to the veracity of that witness (providing the substantial helpfulness test in s 37(1) is satisfied) even though they do not directly bear on any factual question which is in issue in the proceedings. Likewise, if a witness has a reputation for, and a past history of, scrupulous honesty, evidence of that reputation and past history may be admissible (subject to … s 37(1) being satisfied) despite having nothing to do with the facts of the case at hand."

1305 At [137].

1306 The Commission did not discuss this issue during its 2013 review.

1307 The full wording of s 36(1) is set out above at paragraph [13.12].

1308 The contrary view is that s 36(1) appears to demonstrate the legislature's view that, but for the exceptions expressly provided for in s 36(1), the veracity rules *do* apply to evidence that both bears on veracity and is otherwise relevant to the issues in dispute between the parties. See Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV36.01].

1309 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [127]. See also Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2014) at [EV36.01].

1310 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [127].

1311 Emphasis added.

apply to evidence having no relevance to the facts in issue.[1312] Again, this point was acknowledged by the majority in *Hannigan*.[1313] The majority's response was that the words had been included by the legislature out of an abundance of caution.[1314]

Section 37(3) matters to consider when assessing substantial helpfulness

13.25 There is another provision that appears to be largely irrelevant post-*Hannigan*. Section 37(3) sets out matters the judge may consider when deciding whether the proposed evidence satisfies the "substantially helpful" threshold for admissibility:

> (3) In deciding … 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 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 a 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.

13.26 Section 37(3)(c) recognises that a witness' previous inconsistent statement may tend to show a lack of veracity. The authors of *The Evidence Act 2006: Act and Analysis* note that *Hannigan* renders section 37(3)(c) largely irrelevant because a witness' previous inconsistent statement will *almost always* have some relevance to the facts in issue, and consequently virtually all admissible previous inconsistent statements will fall outside the scope of the veracity rules.[1315]

QUESTION

Q46 Does the inclusion of sections 36(1), 37(3)(c) and/or 38(2) in the Act cause any confusion or difficulties in practice? If so, should any or all of these provisions be removed or amended?

1312 See Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV38.06(4)(b)], n 1445: "This is because the circumstances covered by the opening words of s 38(2)(a) (the defendant has offered evidence about his or her veracity or has challenged the veracity of a prosecution witness) can only ever exist … if the evidence or challenge is not about 'the facts in issue' in the case. If they are about the facts in issue, … nothing in the veracity rules has any relevance".

1313 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [127].

1314 At [127].

1315 Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV37.08(1)]. The authors' argument is as follows. In order for a statement to be admissible, it must be relevant to an issue in the proceeding (s 7(2)). The relevance of the witness' previous statement is to highlight an inconsistency with the evidence given by the witness at the hearing (in order to suggest the witness lacks veracity). For a witness' previous statement to amount to a previous *inconsistent* statement, it must be relevant to the *same issue* in the case (despite saying something different about that issue). Being about the same issue as the witness' evidence, *Hannigan*'s conclusion is triggered and the evidence of the previous inconsistent statement is not governed by the veracity rules.

THE SECTION 38(2)(a) TRIGGER

13.27 As noted above,[1316] in its 2013 review of the Act, the Commission recommended an amendment to section 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 that puts veracity in issue. This recommendation was accepted,[1317] and section 38(2) now reads (with the amendments in italics):

> (2) The prosecution in a criminal proceeding may offer evidence about a defendant's veracity only if—
>
> (a) the defendant has, *in court, given oral 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.

13.28 The amendment was intended to clarify an obscurity about whether a defendant's pre-trial statement to Police can be treated as putting his or her veracity at issue.[1318] The Commission had considered this issue in a 2008 report, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character*.[1319] It explained that a possible complication arises in circumstances where the defendant has made a statement to Police, and the prosecution, as it usually does, leads evidence of that statement as part of the prosecution case. While that statement is not sworn evidence by the defendant, it becomes evidence in the case, and, on one view the veracity of the defendant in that statement therefore comes into issue.[1320] If evidence regarding the defendant's veracity is relevant, arguably it should be admissible.

13.29 On the other hand, the Commission recognised:[1321]

> 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.

13.30 The Commission noted the precise Parliamentary intention underlying section 38(2) was uncertain and that "[t]here are policy issues involved, and some dissatisfaction."[1322] It recommended the obscurity be clarified[1323] and indicated a strict approach may be appropriate "[i]n the light of an apparent Parliamentary inclination to be conservative and to protect defendant's rights in this area".[1324] The 2008 report provided the basis for the Commission's 2013 recommendation to amend section 38(2)(a).

1316 At paragraph [13.11]. See Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 121, R13.

1317 Section 38(2)(a) was replaced, on 8 January 2017, by s 13 of the Evidence Amendment Act 2016. The previous version of s 38(2)(a) said "the defendant has *offered evidence* about his or her veracity or has challenged the veracity of a prosecution witness …". The specific wording of the amendment had not been included in the Commission's recommendation – the Commission's recommendation was that s 38 ought 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": *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 121, R13.

1318 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.108].

1319 Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008).

1320 At [3.38].

1321 At [3.38].

1322 At [9.15].

1323 At [9.15].

1324 At [3.38].

13.31 Due to the relatively short period in which the 2013 review of the Act needed to be completed, the Commission did not follow its usual consultation process of publishing an issues paper and inviting public feedback. We are aware of some criticism of the policy underlying the recent amendment to this provision.[1325] Given this feedback, we are interested to hear from submitters how the amendment to section 38(2)(a) is working in practice.

QUESTION

Q47 Are there any concerns about the amendment made by the Evidence Amendment Act 2016 to section 38(2)(a)? In particular, does the amendment reflect a logical and fair approach to determining whether the defendant has put their veracity in issue?

"VERACITY" AND ITS DEFINITION

The term "veracity"

13.32 We have heard anecdotally that the Evidence Act's use of the term "veracity" is confusing to a layperson and that a simpler word such as "honesty" or "truthfulness" should be used in the Act. We note that the Commission's original recommendation in its Evidence Code was that the term "truthfulness" should be used, to clarify that the sections were not concerned with reliability or accuracy.[1326] However, the Select Committee chose to replace "truthfulness" with "veracity", as it felt that "truthfulness" was more likely to be confused with factual correctness, whereas "veracity" "place[d] the emphasis upon the intention to tell the truth".[1327]

13.33 Given this background, we are reluctant to recommend replacing "veracity" with a different term without clear evidence that the existing term is creating difficulties in practice.[1328] However, if submitters consider the term has been causing problems and have suggestions for reform, we would like to hear about them.

The definition of "veracity"

13.34 We have also been told that the definition of veracity is difficult to understand, in part because it is defined in the negative as "the disposition of a person to *refrain* from lying".[1329] In practice, the courts appear to treat the definition of "veracity" as encompassing both a "disposition to lie" as well as a "disposition to refrain from lying". In *Hannigan* the majority noted:[1330]

> We treat a *disposition to tell lies* as being substantially the *opposite of a disposition* to *refrain from lying* (in terms of the definition of veracity in s 37(5)), and evidence indicative of a disposition to tell lies as necessarily bearing on the disposition of the person in question to refrain from lying.

1325 Criticisms of the provision were raised at our Advisory Group and Judicial Advisory Committee meetings in December 2017.

1326 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [156].

1327 Evidence Bill 2005 (256-2) (select committee report) at 5.

1328 We have been unable to locate any cases where the courts have expressed concerns with the Act's use of the term "veracity".

1329 Evidence Act, s 37(5).

1330 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [112], n 46 (emphasis added). See also *R v Katipa* [2017] NZHC 2169 at [8], [12] and [13]; and *Pou v R* [2014] NZCA 294 at [8], [38], [42], and [47].

13.35 In light of this statement, it appears there may be merit in amending the definition of veracity. The definition could refer to both a disposition to refrain from lying as well as a disposition to lie. Alternatively, the word "disposition" could be removed and replaced with a word such as "tendency". A further option would be to define "veracity" by reference to the intended scope of the veracity rules (as confirmed by the Supreme Court in *Hannigan*[1331] and the Commission during its 2013 review[1332]) – that is, evidence that is extraneous to the subject matter of the proceedings which is offered to challenge a witness' truthfulness.

QUESTION

Q48 Is the Act's use of the term "veracity" or its definition causing any confusion or difficulties in practice? If so, how could the Act be amended to eliminate this confusion or difficulty?

1331 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [120].

1332 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.68].

CHAPTER 14

Co-defendants' statements

IN THIS CHAPTER, WE CONSIDER:

- the admissibility of evidence offered by the prosecution of a defendant's statement against a co-defendant under the newly amended sections 27(1) and 22A.

BACKGROUND

14.1 The admissibility of defendants' statements offered in evidence by the prosecution is governed by section 27 of the Act.[1333] Section 27(1) provides that evidence offered by the prosecution of a defendant's statement is not admissible against a co-defendant, unless it is admitted under section 22A.[1334] The wording ("only if") in section 27(1) prevents other potential avenues of admissibility under the Act.[1335] Section 27 provides:[1336]

> **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, *and is admissible against a co-defendant in the proceeding only if it is admitted under section 22A*.
>
> (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) except section 22A, subpart 2 (opinion evidence and expert evidence), and section 35 (previous consistent statements rule) do not apply to evidence offered under subsection (1).

14.2 The italicised wording is new. It was inserted by the Evidence Amendment Act 2016,[1337] and replaced the phrase "but not against a co-defendant in the proceeding".[1338] Section 22A is also new.[1339] It applies only to "hearsay statements".[1340] The section provides:

1333 The term "statement" is defined in s 4 of the Evidence Act 2006 as: "(a) a spoken or written assertion by a person of any matter; or (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter".

1334 This limitation applies only to evidence *offered by the prosecution*. The subsection does not affect evidence offered by one defendant of a statement made by a co-defendant. See further Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.92]–[3.107].

1335 See Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA27.02].

1336 Emphasis added.

1337 The amendment came into force on 8 January 2017.

1338 Section 27 also contained a subsection (4), which read: "[t]o avoid doubt, this section is subject to section 12A". That subsection was repealed by the Evidence Amendment Act 2016.

1339 It was also inserted by the Evidence Amendment Act 2016, and replaces s 12A, which (as we discuss below) preserved the common law in relation to statements of co-conspirators and co-defendants in certain circumstances.

1340 "Hearsay statement" is defined in s 4 of the Evidence Act as 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".

22A Admissibility of hearsay statement against defendant

In a criminal proceeding, a hearsay statement is admissible against a defendant if—

(a) there is reasonable evidence of a conspiracy or joint enterprise; and

(b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and

(c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.

Pre-Evidence Act

14.3 Prior to the enactment of the Evidence Act, the common law prevented a defendant's out-of-court statement from being used to implicate another defendant in the same proceeding.[1341] The rationale for this prohibition was that an out-of-court statement by one defendant was inadmissible hearsay against another defendant.[1342] The common law hearsay rules also prevented an out-of-court statement by a defendant from being admitted against that same defendant, unless the statement was a confession.[1343]

14.4 In its 1999 Evidence Code, the Law Commission recommended a departure from the common law position. The Commission proposed that a defendant's statement offered by the prosecution would be prima facie admissible against both that defendant and a co-defendant.[1344] The Commission also proposed that defendants' statements offered by the prosecution would not need to comply with the Code's hearsay rules.[1345] The Commission thought it was preferable for defendants' statements to be dealt with under a self-contained regime (what is now sections 27–30 of the Evidence Act) rather than requiring courts to consider whether the statement was a "confession" and thereby fell within the common law exception to the hearsay rule.[1346] Furthermore, under the Code, out-of-court statements of testifying witnesses would not be regarded as "hearsay statements"[1347]—unlike the position at common law[1348]—and the Commission considered the prosecution was unlikely to know,

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1341 See *R v Spinks* [1982] 1 All ER 587 (Crim App); and Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [111].

1342 See *R v Fenton* CA223/00, 14 September 2000 at [31]. Evidence was considered hearsay (and therefore inadmissible) at common law if it was given by a witness who relates what another person said or wrote out of court. The rationale for this exclusionary rule (which applied only to statements offered as the truth of what the other person said or wrote) was based on the perceived dangers of being unable to test a witness' evidence in cross-examination: see Law Commission *Hearsay Evidence* (NZLC PP10, 1989) at [5]–[8]; and Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.4].

1343 See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [14]; and Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EV27.3].

1344 Evidence Code, s 26. See Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [114]; and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C124]. This was for three reasons. First, under the (then) existing law, juries would hear evidence of a defendant's statement that implicated a co-defendant anyway, but the judge would direct them to ignore the statement to the extent it implicated the co-defendant. The Commission did not think it was realistic for juries to put this information out of their minds. Second, the Commission considered it "offen[ded] common sense to exclude from the jury's consideration the evidence of accomplices, who are often the only witnesses to the crime". Finally, the Commission considered there was no compelling reason not to rely on evidence that the prosecution had obtained fairly, in establishing the case against all of the defendants: Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [117].

1345 Evidence Code, s 26(2). The Commission had recommended in its Code that hearsay statements would be subject to a general exclusionary rule: they would not be admissible unless they were allowed under the Code or any other legislation (s 17 of the Evidence Code; see now s 17 of the Evidence Act). The general test for admissibility of hearsay is now contained in s 18 of the Evidence Act: the statement must be sufficiently reliable, and the maker of the statement must be unavailable as a witness (or undue expense or delay would be caused in requiring him or her to be a witness).

1346 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21 Part II, 1992) at [113]. See also Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA27.3].

1347 Evidence Code, s 4 (see now s 4 of the Evidence Act 2006).

1348 The Law Commission's reason for excluding out-of-court statements of witnesses from the definition of "hearsay statement" is explained in Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C19]: "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".

at the stage it might want to offer a defendant's statement in evidence, whether the defendant was going to testify.[1349] Eliminating the application of the hearsay rule would avoid unnecessary argument on that point.

14.5 The Commission's recommendations were adopted in the Evidence Bill 2005 as introduced. However, the Select Committee amended what became section 27 so that a defendant's statement would be *inadmissible* against a co-defendant in joint criminal trials.[1350] The Committee was concerned that the admission of such a statement against a co-defendant 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".[1351]

Evidence Amendment Act 2007

14.6 The Select Committee had amended section 27 to prevent a defendant's statement from being used in the prosecution's case against a co-defendant, believing this would maintain the common law position.[1352] However, concerns were soon raised by commentators that section 27 as enacted did not capture two well-recognised common law exceptions to the rule against using defendants' statements against co-defendants:

- the "co-conspirators' rule",[1353] which permitted statements made or acts done by one or more alleged offenders in the absence of the co-defendant but in furtherance of the common purpose to be admitted against the co-defendant as evidence of their truth;[1354] and
- the common law rule permitting a defendant's statement to be admitted against a co-defendant in circumstances where the co-defendant "accepted" the statement.[1355]

14.7 The Evidence Amendment Act 2007 was subsequently enacted to insert section 12A into the Evidence Act to preserve these exceptions.[1356] Section 12A provided:

> 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.

14.8 Section 12A was intended to be a temporary provision, with codification to be considered during the Commission's 2013 review of the Act.[1357]

1349 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C125].

1350 Section 27(1), as enacted, provided that: "[e]vidence 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".

1351 Evidence Bill 2005 (256-2) (select committee report) at 4.

1352 At 4.

1353 This expression is something of a misnomer, as the rule extended beyond cases in which the crime of conspiracy is charged, to cases in which two or more alleged offenders are acting in furtherance of a common purpose: see *R v Qui* [2007] NZSC 51, [2008] 1 NZLR 1 at [24]–[29]; and *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [15].

1354 See *R v Buckton* [1985] 2 NZLR 257 (CA). See also *R v Qui* [2007] NZSC 51, [2008] 1 NZLR 1 at [15].

1355 See *R v Christie* [1914] AC 545 (HL) at 554; and *R v Duffy* [1979] 2 NZLR 432 (CA) at 435.

1356 The Evidence Amendment Act 2007 also made s 27 expressly subject to s 12A: s 27(4) of the Evidence Act 2006 (since repealed by the Evidence Amendment Act 2016).

1357 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.110].

Law Commission's 2013 review of the Evidence Act

14.9 When the Commission conducted its 2013 review of the Act, it recommended deleting section 12A and inserting a new provision in the Act (what is now section 22A).[1358] The Commission recommended the new section retain the exception in section 12A(a) (by codifying the approach that had been set out by the Court of Appeal in *R v Messenger*);[1359] but not the exception in section 12A(b).[1360] Those recommendations were adopted in the Evidence Amendment Act 2016 and are now reflected in the new sections 27(1) and 22A.[1361]

ADMISSIBILITY OF NON-HEARSAY STATEMENTS?

14.10 Section 27 is expressly made subject to section 22A. If the prosecution wishes to use a defendant's statement against a co-defendant it must pass through section 22A. There is no alternative route to admission. However, the new section 22A applies only to "hearsay statements".[1362] The apparent effect of this is to prohibit the prosecution from using a defendant's statement, which is not hearsay, against a co-defendant.[1363] In particular, sections 27(1) and 22A seemingly prohibit an out-of-court statement of a defendant (that would otherwise meet the requirements of section 22A) from being admitted against a co-defendant where:[1364]

1358 At 67, R6.

1359 The Commission proposed codifying three threshold issues that a judge must determine in the Act, which had been set out by the Court of Appeal in *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [11]: 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.

1360 The Commission pointed out that—absent s 12A—the Crown had (at least) two avenues to seek admission of the defendant's statement in the case of the co-defendant: first, under the hearsay provisions (where the co-defendant seeks to make use of the defendant's statement in relation to their case, and the statement is sufficiently reliable in terms of s 18(1), the defendant's statement will be admissible in its entirety, allowing the prosecution to rely on aspects of the statement that are unfavourable to the co-defendant's case: see for example *Obiaga v R* [2016] NZCA 270); and second, s 27(1) provided a route to admissibility if a co-defendant made an assertion that amounted to a "statement" in response (see *R v Christie* [1914] AC 545 (HL) at 554; *R v Duffy* [1979] 2 NZLR 432 (CA) at 435). The Commission considered there was no longer a need for the exception in s 12A(b) given the existence of these two avenues: Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.122].

1361 See paragraphs [14.1]–[14.2] above.

1362 This is clear from the heading of s 22A ("[a]dmissibility of *hearsay* statement against defendant") and the opening words of the section ("… a *hearsay* statement is admissible against a defendant if …"). See also s 22, which provides that, if a party proposes to rely on s 22A to "offer a hearsay statement", written notice must be provided to every other party in the proceeding.

1363 This problem was noted by Palmer J in *R v Liev* [2017] NZHC 830 at [14]: "The drafting of s 27(1) creates a question. It states the evidence of any statement by a defendant is *only* admissible against a co-defendant if admitted under s 22A. Yet s 22A only deals with the admissibility of hearsay statements. Can other statements by a defendant, that are not hearsay, be admitted against a co-defendant? The drafting of s 27(1) suggests not. That may be consistent with the previous version of s 27(1). But it doesn't sit well with the nature of the co-conspirators' rule as an exception to inadmissibility only on the basis of hearsay."

1364 At first blush, the apparent effect of ss 27(1) and 22A is also to prohibit the in-court testimony of a defendant from being used by the prosecution in its case against a co-defendant. However, we note that the previous version of s 27(1) stated that a defendant's statement (offered in evidence by the prosecution) was admissible against that defendant, but "not against a co-defendant in the proceeding". Because of the broad definition of "statement" in s 4, it could have been argued that the prohibition in s 27(1) applied both to hearsay statements *and* the in-court testimony of a defendant: see Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA27.03]. Yet the authors of *The Evidence Act 2006: Act and Analysis* assert that s 27(1) was only concerned with out-of-court statements by a defendant. The rule of inadmissibility against a co-defendant set out in s 27(1) therefore had no application to a statement made by one defendant while he or she is giving evidence – such a statement was available for use against all defendants: Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV27.03]. The authors of *Adams on Criminal Law – Evidence* also suggest it is unlikely the legislature intended s 27(1) to mean that the prosecution could not rely on one defendant's testimony as evidence against a co-defendant: at [EA27.03]. They suggest that s 27(1) appeared to be an example of where the opening words of s 4(1) applied, such that "the context otherwise requires" that "statement" in s 27(1) referred only to a pre-trial, out-of-court statement by a defendant. The authors of *Adams* also noted this interpretation was apparently accepted in *Fa'avae v R* [2012] NZCA 528, [2013] 1 NZLR 311 at [42], where the Court of Appeal held that when

- the defendant elects to give evidence at trial (and does not adopt that statement in his or her testimony)[1365] – as the statement would no longer be made by a person "other than a witness";[1366] and/or
- the prosecution intends to rely on the statement for a non-hearsay purpose (for example, to invite the jury to draw inferences from what was said) – as the statement would not be offered to "prove the truth of its contents".[1367]

14.11 Whether or not this is problematic depends on whether:

- the position would have been different under the pre-Evidence Amendment Act 2016 law; and/or
- there is any principled basis for the admissibility of a defendant's statement made in furtherance of a conspiracy or joint enterprise to depend on whether the maker of the statement testifies at trial or whether the prosecution intends to rely on the statement for a hearsay purpose (that is, to prove the truth of its contents).

14.12 We address those issues below.[1368]

The position under the pre-section 22A law

14.13 The co-conspirators' rule has been described by the courts as an exception to the rule against hearsay evidence.[1369] The rationale offered by the courts for the admission of what would otherwise be hearsay was based on implied agency: statements made by one member of a joint criminal enterprise in furtherance of the common criminal purpose were attributed to all members on the basis that there is implied authority in each to speak on behalf of the others.[1370]

14.14 As we explained above,[1371] the (pre-Evidence Act) common law classified out-of-court statements of witnesses as "hearsay". The co-conspirators' rule therefore would have permitted an out-of-court statement of a defendant to be admitted against a co-defendant, regardless of whether the defendant testified at trial.[1372] If the statement was not offered to prove the truth of its contents, it would not have fallen within the common law definition of "hearsay"[1373] – there would have been no need to satisfy the co-conspirators' exception to the hearsay rule at all.

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a defendant gives evidence at trial and confirms the contents of a pre-trial statement, this confirmation becomes evidence given in court and therefore admissible against all defendants in the proceeding. In short, although it was not entirely clear from the wording of the previous s 27(1), the section did not appear to prohibit a defendant's in-court testimony from being admissible against a co-defendant. There does not appear to be any reason why the same approach to the word "statement" in the new s 27(1) would not be adopted (that is, that "the context otherwise requires" —in the opening words of s 4(1)—the phrase to refer only to out-of-court statements). We consider it is unlikely the new wording will be interpreted as prohibiting the prosecution from relying on a defendant's in-court testimony against a co-defendant.

1365 See *Fa'avae v R* [2012] NZCA 528, [2013] 1 NZLR 311.

1366 See the definition of "hearsay statement" in s 4 of the Evidence Act.

1367 See the definition of "hearsay statement" in s 4.

1368 We note that we do not address the broader question of whether the prosecution should be permitted to use *any* out-of-court statement of a defendant (D1) (whether or not it was made in furtherance of a conspiracy or joint enterprise) against a co-defendant (D2) in the event that D1 testifies at trial and does not adopt his or her out-of-court statement. The pre-Evidence Amendment Act 2016 provisions would not have permitted this course of action, and without evidence that this was/is causing problems in practice, we do not intend to revisit that approach.

1369 See *R v Qui* [2007] NZSC 51, [2008] 1 NZLR 1 at [15]; and *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [3].

1370 See *R v Qui* [2007] NZSC 51, [2008] 1 NZLR 1 at [24], referring to *R v Humphries* [1982] 1 NZLR 353 (CA) at 356, *Tripodi v R* (1961) 104 CLR 1 at 7 and *Ahern v R* (1988) 165 CLR 87 at 95.

1371 At paragraph [14.3] above.

1372 See for example *R v Cattell* CA247/87, 2 March 1988.

1373 See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C20].

14.15 The position under section 12A was less clear. While the section stated that it preserved the common law co-conspirators' rule, out-of-court statements of witnesses were no longer regarded as hearsay under the Act.[1374] Given that section 12A preserved an exception to the rule against *hearsay* evidence,[1375] it is not entirely clear how the section could have applied to such statements.[1376] However, in *Kayrouz v R*[1377] the Court of Appeal assessed the admissibility of out-of-court statements made by the appellant's co-offender (which the Crown alleged were made in furtherance of a conspiracy) under the rubric of section 12A, even though the co-offender (who had pleaded guilty at the commencement of trial) was a witness in the appellant's trial.

14.16 As for statements of defendants offered for a non-hearsay purpose, the Court of Appeal in *Goffe v R* emphasised that it was only if a statement was actually a "hearsay statement" that one had to consider the application of section 12A.[1378] Accordingly, if the prosecution did not seek to prove the truth of the contents of a statement, it was not hearsay and therefore "not subject to the need to satisfy the conditions for the [co-conspirators] exception against hearsay".[1379] However, in its judgment the Court did not address how this conclusion was to be reconciled with the wording of section 27(1), which contained a ban (subject to section 12A) on the prosecution using a defendant's statement against a co-defendant.[1380]

Principled basis for differential treatment?

14.17 Although it is not entirely clear whether section 12A would have permitted non-hearsay statements of a defendant made in furtherance of a conspiracy or joint enterprise to be admitted against a co-defendant, we are not convinced there is any principled basis for the admissibility of the statement to depend on whether it is hearsay.

14.18 We think the basis for admitting defendants' statements under the co-conspirators' rule as an exception to the rule against hearsay evidence is questionable. As we noted above, the supposed justification for admitting what would otherwise be hearsay is that of implied agency:[1381] a member

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1374 See paragraph [14.4] above.

1375 See for example *D (CA425/2016) v R* [2016] NZCA 566 at [5]; *Goffe v R* [2011] NZCA 186, [2011] 2 NZLR 771 at [49]; *Ngamu v R* [2010] NZCA 256, [2010] 3 NZLR 547 at [17]; *Bailey v R* [2015] NZCA 37 at [2]; and *R v Ali* [2016] NZHC 2223 at [50].

1376 For example in *R v Su* HC Auckland CRI-2006-092-16424, 10 July 2008, the High Court noted in passing that a conversation between a Mr Smethurst (who had pleaded guilty prior to trial) and a Mr Su was likely to be admissible against Mr Su at his trial under s 12A "*if* Mr Smethurst were not to give evidence": at [10] (emphasis added). Similarly, in *R v Weston* [2014] NZHC 2351 at [65], the Crown argued that a conversation between a Mr Fraser (who had pleaded guilty before trial) and an associate was likely to be admissible under s 12A against a co-offender at his trial "if Mr Fraser did not give evidence".

1377 *Kayrouz v R* [2014] NZCA 139.

1378 *Goffe v R* [2011] NZCA 186, [2011] 2 NZLR 771.

1379 At [45].

1380 It is possible the Court did not think the prohibition in s 27(1) applied to statements offered for a non-hearsay purpose. We note the authors of *Adams on Criminal Law – Evidence* suggest that only a very narrow class of statements falls within the s 27(1) prohibition. They refer to *R v Preston* [2016] NZCA 568, [2017] 2 NZLR 358 at [43], where the Court of Appeal said that it is only when the speaker intended to convey the meaning relied upon (by the party offering the evidence) that what is said will amount to a "statement" in s 4 of the Evidence Act. In contrast, when the speaker did not so intend, but reliance is nevertheless sought to be placed upon inferences sought to be drawn from what was said, there has been no "statement". The authors of *Adams* suggest that, applying *Preston*, it is only when the prosecution's purpose in offering evidence of what a defendant has said is to prove the truth of what the defendant intentionally asserted that the prosecution is offering a "statement" by the defendant at all. This is the sole class of evidence that is the target of s 27(1). Where the prosecution relies on what the defendant said for some other purpose (for example, to invite the jury to draw inferences from what was said), there is no "statement" and therefore nothing in s 27(1) to prevent the prosecution from using what was said against a co-defendant, subject to ss 7 and 8 and any other relevant admissibility rules in the Act: see Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA27.02(1)]. See also *McKenzie v R* [2013] NZCA 378 at [22]–[25] (leave to appeal declined in *McKenzie v R* [2013] NZSC 109); *R v Holtham* [2008] 2 NZLR 758 (HC) at [22], [44] and [53]; *Hitchinson v R* [2010] NZCA 388 at [31]–[34]; and similarly, *S v R* [2017] NZCA 136 at [90]–[93], *Payne v R* [2012] NZCA 529 at [12]–[13] and *Lal v R* [2012] NZCA 20 at [7]–[14].

1381 See paragraph [14.13] above.

of a conspiracy or joint criminal enterprise is deemed by law to have implied authority from other members of that enterprise to act or speak to further the common purpose.

14.19 However, "being party to a conspiracy [or joint criminal enterprise] does not *of itself* provide reasonable assurance that any statements made in furtherance of the conspiracy [or joint criminal enterprise] are reliable".[1382] Joseph Levie, writing in 1954, said:[1383]

> [t]he agency argument … fails because it shows no reason for exempting conspirators' utterances from the hearsay rule. … The rules of agency govern the substantive law of conspiracy; they decide who is a member of the conspiracy. As such they are involved in determining *against whom* the evidence may be admitted. The point is that they are not relevant in determining *why* it should be admitted.

14.20 Levie argued the true reason for admitting such evidence "is the very great probative need for it".[1384] He explained:[1385]

> Conspiracy is a hard thing to prove. The substantive law of conspiracy has vastly expanded. This created a tension solved by relaxation in the law of evidence. Conspirators' declarations are admitted out of necessity.

14.21 If co-conspirators' evidence is admitted out of necessity, it remains subject to all of the dangers of hearsay.[1386] This perhaps explains why the courts (no doubt mindful of that fact) have essentially "import[ed] a reliability standard commensurate with the general hearsay exception in the Act"[1387] by setting out a number of threshold issues that a judge must determine (now codified in section 22A) before permitting evidence to be admitted under the co-conspirators' rule.

14.22 We express the preliminary view that, rather than classifying the co-conspirators' rule as a general exception to the hearsay rule, it is more logical to regard the rule as providing an independent means of admitting a defendant's out-of-court statement against a co-defendant.[1388] On that basis, a defendant's out-of-court statement made in furtherance of a conspiracy or joint enterprise would be able to be used in the prosecution's case against a co-defendant, irrespective of whether the defendant elects to give evidence at trial or whether the prosecution intends to prove the truth of its contents. In our view, this outcome could be achieved by removing the word "hearsay" from section 22A (and moving its notice requirement out of the hearsay notice provision in section 22).[1389] We are interested in submitters' thoughts on this view.

1382 Sean Kinsler "The Co-conspirators Exception to the Hearsay Rule in New Zealand: *R v Qui*" (2007) 13 Auckland U L Rev 200 at 202 (emphasis added). See also *R v Ngamu* [2008] DCR 647 at [22].

1383 Joseph Levie "Hearsay and Conspiracy: A Re-examination of the Co-Conspirators' Exception to the Hearsay Rule" (1954) 52 Mich L Rev 1159 at 1165 (original emphasis). An alternative justification for admitting co-conspirators' statements was put forward by John Henry Wigmore in *Wigmore on Evidence* (3rd ed, 1940) at [1080a]. His theory was that such statements are admitted because they are trustworthy (and accordingly the need for cross-examination is less acute). He argued that since the interests of all conspirators are identical, an admission of one against his interest is against the interest of each. Joseph Levie criticised this theory. He argued that it "fail[ed] to distinguish between declarations showing the existence of a conspiracy and declarations concerning its membership or aims": see Joseph Levie "Hearsay and Conspiracy: A Re-examination of the Co-Conspirators' Exception to the Hearsay Rule" (1954) 52 Mich L Rev 1159 at 1165.

1384 At 1164.

1385 At 1166.

1386 At 1166.

1387 Sean Kinsler "The Co-conspirators Exception to the Hearsay Rule in New Zealand: *R v Qui*" (2007) 13 Auckland U L Rev 200 at 202.

1388 Bearing in mind s 6(a) of the Act (providing for facts to be established by the application of logical rules).

1389 Section 22(2)(i).

QUESTION

Q49 Should a defendant's out-of-court statement made in furtherance of a conspiracy or joint enterprise be able to be used in the prosecution's case against a co-defendant, irrespective of whether it is hearsay?

CHAPTER 15

Privilege

IN THIS CHAPTER, WE CONSIDER:

- whether legal advice privilege should apply to third party communications to a client or legal adviser; and
- the termination of litigation privilege and settlement negotiation privilege.

BACKGROUND

15.1 Privilege has always been acknowledged by the common law as the basis on which a person can refuse to disclose relevant evidence.[1390] The Evidence Act's privilege provisions (sections 53–67) protect certain classes of relationships, by limiting the disclosure of information that was shared in the context of the relationship.[1391]

15.2 This chapter considers issues that have arisen in relation to section 54 (legal advice privilege), section 56 (litigation privilege), and section 57 (settlement negotiation privilege).

EXTENSION OF LEGAL ADVICE PRIVILEGE TO THIRD PARTY COMMUNICATIONS

15.3 In this section, we consider whether the scope of section 54 should be extended to protect third party communications. We use the phrase "third party communications" to refer to third party communications and documents provided to a client or legal adviser, where the dominant purpose of the communication or document is to enable legal advice to be provided to the client.

Legal advice privilege

15.4 Section 54 of the Act protects legal advice privilege, which covers communications between a person and their legal adviser (this includes lawyers, registered patent attorneys, and overseas practitioners).[1392] The privilege ensures that lawyers are able to use their legal skills to assist people

1390 Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVAPart2Subpart8.1 Introduction].

1391 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [248].

1392 Evidence Act 2006, s 51(1). "Overseas practitioner" is further defined in s 51(1). Prior to the Act, legal advice privilege was referred to, in conjunction with litigation privilege, as legal professional privilege: Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV53.07]. Under the common law, legal advice privilege was absolute: *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 (PC) at [54]. However, it did not apply if the communication or information was made for a dishonest purpose, or to enable anyone to commit an offence; or if the judge considered it was necessary to disallow the privilege to enable a defendant to present an effective defence: Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [321]–[326]. In a 1994 preliminary paper the Law Commission proposed extending legal advice privilege to anyone who provided legal advice as part of the normal duties

with their affairs, without being subject to scrutiny from others.[1393] Section 54 relevantly provides:[1394]

> **54 Privilege for communications with legal advisers**
>
> (1) A person who requests or 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 requesting or obtaining professional legal services from the legal adviser; or
>
> (ii) the legal adviser giving such services to the person.
>
> (1A) The privilege applies to a person who requests professional legal services from a legal adviser whether or not the person actually obtains such services.
>
> ...

Discussion

15.5 During the Commission's 2013 review of the Act, it noted that section 54 only protected communications by third parties if they were "acting as the client's agent".[1395] It had been brought to the Commission's attention that this position did not "reflect the realities of modern day practice", where third parties were often used "as more than mere agents, where advice is sought on detailed commercial or financial arrangements".[1396] The Commission considered whether section 54 should be amended so that it would apply to third party communications,[1397] but ultimately concluded the issue went beyond the scope of its review,[1398] and suggested it be considered "in circumstances that allow widespread consultation and consideration of the likely consequences of any extension".[1399]

15.6 This second review of the Act provides the opportunity to consider again the issue of extending section 54 to include third party communications.

15.7 We note that the courts appear to have adopted the position that section 54 only extends to communications by a third party if they are an agent. In *Brandlines Ltd v Central Forklift Group Ltd*,[1400] the High Court noted it was clear, from pre-Act authorities, that legal advice privilege could only apply where a third party was acting "as an agent in communicating with the client's solicitor" and "the communication was for the purpose of obtaining or providing legal advice".[1401] This required the third party to have assumed "the role of the client in communicating the information

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of their occupation, such as specialist tax accountants, and commercial and company advisers: Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [159]–[167]. The Commission also proposed that the privilege should be qualified, so it could be overridden when the need for disclosure outweighed the need for the privilege. In its subsequent publications on its Evidence Code in 1999, the Commission revised this approach, noting that it ran contrary to recent House of Lords and High Court of Australia judgments, and would lead to more interlocutory applications, causing litigation to become lengthier and more expensive: Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at 70. The Commission recommended an absolute privilege that applied to "legal advisers" and "employed legal advisers": at 70. The Commission also recommended that the two existing common law exceptions to legal advice privilege be retained (these are now contained in s 67 of the Evidence Act): at 86. The Commission's proposals were largely adopted in the Evidence Bill 2005 (256-1). See also Mathew Downs *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA54.2].

1393 *Three Rivers DC v Bank of England (Disclosure) (No 4)* [2004] UKHL 48, [2005] 1 AC 610 at [34].

1394 This section was recently amended by the Evidence Amendment Act 2016 so that s 54(1) refers to "requests or obtains" (instead of "obtains"), following a Law Commission recommendation in *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 166, R20.

1395 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.9].

1396 At [10.10].

1397 At [10.10].

1398 At [10.27].

1399 At [10.29]. This was not possible under the 2013 review (due to the statutory requirement to complete the review within 12 months), as no issues paper was released. The Commission instead conducted targeted consultation.

1400 *Brandlines Ltd v Central Forklift Group Ltd* HC Wellington CIV 2008-485-2803, 11 February 2011.

1401 At [33].

to the solicitor" (and to have been authorised to do so).[1402] Similarly, in *Robert v Foxton Equities*,[1403] the High Court noted the wording of section 54 supported the view that privilege could only attach to a third party who was "operating under an agency agreement that encompasses them obtaining professional legal services".[1404]

15.8 There are a number of arguments in favour of extending section 54 to include third party communications:

- It would remove the "artificial distinction" that currently exists, which was highlighted in the Australian context in *Pratt Holdings v Commissioner of Taxation*.[1405] There, Finn J noted that a documentary communication would be privileged if a client prepared it and gave it to their legal adviser, or if the client authorised an agent to prepare and make the documentary communication to the legal adviser on their behalf.[1406] However, such a documentary communication would not be privileged if the client directed a third party to prepare it in order to allow the client to communicate it to a legal adviser.[1407] Finn J considered the third party's "legal relationship with the party that engaged it" was irrelevant to the privilege, and that what actually mattered was the "function it performed for that party", namely enabling the client to obtain the legal advice it needed.[1408]
- It would be in line with the policy underpinning legal advice privilege, which is to "facilitate access to effective legal advice".[1409]
- Given the complexity of present day commerce, clients often need to obtain expert advice so they can provide their legal adviser with a sufficient understanding of the facts, enabling the legal adviser to give informed legal advice.[1410] If a client is unable to rely on a third party to "remedy his or her own inability or inadequacy" they may be disadvantaged compared to another person who has the knowledge and resources enabling them to communicate the issue directly to their legal adviser.[1411]
- It would "ensure harmonisation with Australia", which could provide real benefits, given that many "larger-scale business settings" will have a trans-Tasman element.[1412]

15.9 On the other hand:

- Extension of the privilege to third party communications arguably would undermine the view that legal advice privilege "should be as narrow as its principle necessitates"[1413] and impact too greatly on the fundamental principle contained in section 7 of the Act, "that all relevant

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1402 At [34].

1403 *Robert v Foxton Equities* [2014] NZHC 726, [2015] NZAR 1351.

1404 At [41]. The Court observed that this interpretation was supported by s 51(4), which states that a reference to a "communication made or received by a person" in subpart 8, includes "a communication made or received … by an authorised representative of that person on that person's behalf": at [42]. See also *Aquaheat New Zealand Ltd v Hi Seat Ltd (in liq and rec) and LIA Ltd (in liq and rec)* [2014] NZHC 1173, [2014] NZCCLR 21.

1405 *Pratt Holdings v Commissioner of Taxation* [2004] FCAFC 122, (2004) 136 FCR 357.

1406 At [1].

1407 At [1].

1408 At [41].

1409 At [43].

1410 At [103].

1411 At [42].

1412 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.22].

1413 *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [165].

evidence should be before the court".[1414] There is also the possibility that parties may "try their luck" and withhold any and all information that they have given to, or received from, third parties.[1415]

- Extension of legal advice privilege could blur its relationship with litigation privilege. Legal advice privilege attaches to communications between a person and their legal adviser, whereas litigation privilege attaches to communications with, and information prepared by, "any person". In its 2013 review of the Act, the Commission observed that this difference reflected the "different origins and purposes of the privileges".[1416] Extending legal advice privilege could diminish this distinction, a concern that was noted by the Australian Law Reform Commission in 2005.[1417]
- The courts have adopted a consistent view on the scope of section 54.[1418] Any change to the current position could result in uncertainty and unforeseen consequences.
- Extension of the privilege may not be justified if there is no evidence of problems in practice with the current scope of legal advice (which the Commission noted was the case in 2013).[1419]

QUESTIONS

Q50 Is the current scope of legal advice privilege creating any problems in practice?

Q51 Should section 54 be amended so that legal advice privilege attaches to third party communications and documents provided to a client or legal adviser, where the dominant purpose of the communication or document is to enable legal advice to be provided to the client?

TERMINATION OF PRIVILEGE

15.10 In this section, we consider whether (and if so, when) litigation privilege and settlement negotiation privilege should terminate.

Litigation privilege

15.11 Section 56 of the Act protects the privilege for preparatory materials (also known as litigation privilege). This privilege covers any information or communication that is made for the dominant purpose of preparing for a proceeding. The policy behind this section is to ensure that each party

1414 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.23]. We note that in *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC1, [2013] 2 AC 185 at [62], the United Kingdom Supreme Court observed that any extension to legal advice privilege would have significant implications, which "would be very difficult to identify, let alone to assess". In the New Zealand context, for example, the impact of such an extension of legal advice privilege on the privilege for tax advisers in the Tax Administration Act 1994 would need to be considered: see Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.27].

1415 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.26].

1416 At [10.8].

1417 Australian Law Reform Commission and others *Uniform Evidence Law* (ALRC R102, NSWLRC FR112, VLRC Final Report, December 2005) at [14.103].

1418 See paragraph [15.7] above.

1419 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.28].

is "free to prepare [their] case as fully as possible without the risk that [their] opponent will be able to recover the material generated by [their] preparations".[1420] Section 56 relevantly provides:

> **56 Privilege for preparatory materials for proceedings**
>
> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the **proceeding**).
>
> (2) A person (the **party**) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
>
> (a) a communication between the party and any other person:
>
> (b) a communication between the party's legal adviser and any other person:
>
> (c) information compiled or prepared by the party or the party's legal adviser:
>
> (d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.
>
> ...

Settlement negotiation privilege

15.12 Section 57 of the Act reflects the common law "without prejudice" rule, and protects any communications between parties that are intended to be confidential, and are part of an attempt to settle a dispute ("settlement negotiations"). The policy behind this section is twofold. First, parties should be encouraged to settle their disputes knowing that they can speak freely and that nothing can be disclosed in litigation if the discussions break down.[1421] Second, the law should acknowledge the parties' agreement to discuss matters on a confidential basis.[1422]

15.13 Section 57 relevantly provides:

> **57 Privilege for settlement negotiations, mediation, or plea discussions**
>
> (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—

1420 *Three Rivers DC v Bank of England (Disclosure) No 4* [2004] UKHL 48, [2005] 1 AC 610 at [52]. Prior to the Act, the common law rule was that reports or documents obtained by a party and his or her legal adviser were privileged, if the document was prepared for the "dominant purpose" of "enabl[ing] the legal adviser to conduct or advise regarding the litigation": *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA) at 602. See also Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA56.3]. In its 1994 preliminary paper on privilege, the Law Commission proposed that the privilege for preparatory materials should be qualified: Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [102]–[107]. Judges would have discretion to override the privilege, "in the interests of justice", when the need for privilege was outweighed by the need for disclosure of the communication: at [156]. This proposal was quite controversial, however, and an absolute privilege was ultimately recommended in the Commission's publications on its Evidence Code in 1999: Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [258]. The Commission's proposals were adopted in the Evidence Bill 2005 (256-1), and no changes were made during the legislative process: Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA56.2].

1421 *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713 at [11].

1422 At [11].

(a) the terms of an agreement settling the dispute; or

(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; or.

(d) the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation 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 the settlement negotiations or mediation.[1423]

The Commission's 2013 review of the Act

15.14 The question whether (and if so, when) litigation privilege and settlement negotiation privilege should terminate was considered by the Law Commission during its 2013 review of the Act.[1424] The Commission noted it was unclear on the face of sections 56 and 57 whether the privileges terminate and, if so, when they do.[1425] While it was well-established that legal advice privilege does not terminate (applying the adage "once privileged, always privileged"),[1426] it was less clear whether the same approach was to be adopted for litigation privilege and settlement negotiation privilege; or whether privilege ended once the litigation that created the privilege concluded or settlement had been reached.

15.15 In relation to litigation privilege, the Commission noted that—shortly before the Evidence Act was enacted—the Supreme Court of Canada in *Blank v Minister of Justice* had held that litigation privilege comes to an end once the litigation that created the privilege terminates.[1427] However, the issue had not been conclusively determined in New Zealand.[1428]

15.16 Similarly, the Commission noted the question of whether (and if so, when) settlement negotiation privilege terminates had not yet been resolved.[1429] The issue had only been addressed by the High Court in *Jung v Templeton*.[1430] There, the Court suggested the privilege does not terminate when settlement is reached.[1431]

1423 Section 57(3)(d) is relatively new. It was inserted on 8 January 2017 by the Evidence Amendment Act 2016, following a Law Commission recommendation for a general exception to settlement negotiation privilege (that is, the privilege does not apply if the need for disclosure outweighs the need for the privilege): Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 182, R22. Some concern has arisen that the new exception will be interpreted too widely (see James McGeorge "Settlement negotiation privilege" [2014] NZLJ 13 at 15); however, since the courts have had little time to consider the new provision (we are aware of only one case that has considered it – *Intelact Ltd v Fonterra TM Ltd* [2017] NZHC 1086), we consider the best approach is to allow s 57(3)(d) to bed in. For that reason, we do not consider the new provision further in this chapter.

1424 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.58].

1425 At [10.58].

1426 At [10.59], referring to Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers Ltd, Wellington, 2010) at [EV67.06].

1427 At [10.60], referring to *Blank v Minister of Justice* [2006] SCC 39, 2006 2 SCR 319.

1428 The approach in *Blank* was adopted in a pre-Evidence Act case, *Snorkel Elevating Work Platforms Ltd v Thompson* [2007] NZAR 504 (HC) at [13]. After the Act was enacted, *Blank* was referred to by the Court of Appeal in *MA v Attorney-General* [2009] NZCA 490, but the question of termination did not require a decision in that case. Similarly, in *Reid v New Zealand Fire Services Commission* [2010] NZCA 133, (2010) 19 PRNZ 923, leave was granted to appeal to the Court of Appeal on the issue of when litigation privilege should terminate, but the appeal was never heard. See Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.60].

1429 At [10.62].

1430 *Jung v Templeton* HC Auckland CIV-2007-404-5383, 30 September 2009.

1431 At [64]. This was because, despite the Law Commission's apparent intention that the privilege would end once a settlement had been reached (see Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 153), the

15.17 The Commission ultimately did not recommend amendment in this regard. It was unaware of the question of termination having caused problems in practice, and thought the issue was best left for the courts to decide.[1432] The Commission suggested the issue should be reconsidered at the next five year review.[1433]

Discussion

15.18 A number of recent cases have considered when litigation privilege should terminate, without reaching a definitive conclusion. In *Houghton v Saunders*,[1434] Dobson J held that, "[c]onceptually, a privilege recognised because of the need for a 'zone of privacy' while proceedings are ongoing comes to an end when the proceedings do."[1435] His Honour considered there was a need for an exception when there was a connection between the concluded proceedings and another ongoing proceeding:[1436] if the subject matter of both cases was sufficiently interrelated, the litigation strategy would be similar and the purpose of the privilege would be frustrated if it terminated before the second case concluded.[1437]

15.19 Later, in *Osborne v Worksafe New Zealand*,[1438] Dobson J briefly considered the question of termination.[1439] He did not refer to his earlier decision in *Houghton*.[1440] He observed that although the adage "once privileged, always privileged" applied to legal advice privilege, the rationale for litigation privilege was different, so a different approach may be justified; however, he did not determine the issue conclusively.[1441]

15.20 In *Nisha v LSG Sky Chefs New Zealand Ltd (No 16)*,[1442] the Employment Court[1443] observed that there "may still be some doubt" in New Zealand as to whether litigation privilege ends with the conclusion of the relevant litigation,[1444] but ultimately rejected the submission that a document, once privileged, is always privileged.[1445]

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wording of subs (3)(a) was changed by the Select Committee when the Evidence Bill 2005 was going through the House.

1432 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.65].

1433 At [10.65] and 175, R21.

1434 *Houghton v Saunders* [2013] NZHC 1824.

1435 At [21].

1436 At [20]–[21], referring to the observation in *Blank v Minister of Justice* 2006 SCC 39, [2006] 2 SCR 319 at [34] that "[litigation] cannot be said to have 'terminated', in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat".

1437 At [21]. Dobson J said he would hear further argument as to whether the two proceedings could be said to involve "the same legal combat" (which was the test laid out in *Blank v Minister of Justice* 2006 SCC 39, [2006] 2 SCR 319 to establish whether proceedings were similar enough so that the exception would apply): at [23]. However, no subsequent judgments in this litigation refer to this issue.

1438 *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293.

1439 At [20]–[23]. This was because s 56 was held to be inapplicable on other grounds. See the discussion at [17]–[19].

1440 Instead, he noted at [21] that *Blank v Minister of Justice* 2006 SCC 39, [2006] 2 SCR 319 had been applied in *Snorkel Elevating Work Platforms Ltd v Thompson* [2007] NZAR 504 (HC) prior to the enactment of the Act.

1441 *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293 at [22]–[23].

1442 *Nisha v LSG Sky Chefs New Zealand Ltd (No 16)* [2015] NZEmpC 127.

1443 The Employment Court is not required to apply the provisions of the Evidence Act; however, the Court in that case decided to follow the guidance provided by s 56: at [16] and [19].

1444 At [27]. The Court did not refer to *Houghton*.

1445 At [37]. The Court considered the position was as established by the Canadian Supreme Court in *Blank v Minister of Justice* 2006 SCC 39, [2006] 2 SCR 319 and followed by the High Court in *Snorkel Elevating Work Platforms Ltd v Thompson* [2007] NZAR 504 (HC): at [37]. Applying *Blank*, the Employment Court then went on to conclude that the privilege had not expired in the present case, as the Employment Court proceedings were "so closely related to [proceedings in the High Court] … that documents which attracted litigation privilege … in those concluded High Court proceedings retain that status in the current proceeding": at [39].

15.21 In *NZH Ltd v Ramspecs Ltd*[1446] the High Court did not need to discuss the parties' submissions as to whether the correct legal position in New Zealand is that litigation privilege ends with the conclusion of the relevant litigation, as it considered the prior and current proceedings involved the "same legal combat" (so the privilege could not be said to have terminated in any event).[1447] The Court noted, however, that section 56 (as well as sections 54 and 57–60) states that a party "has" a privilege, and that section 53 (which provides for enforcement of privilege) does not suggest the privilege ceases.[1448]

15.22 In summary, there is still uncertainty as to whether litigation privilege terminates with the end of the litigation it is connected to. We note there may be merit in leaving the matter to be determined conclusively by the Court of Appeal or Supreme Court. On the other hand, in the interests of promoting clarity and certainty,[1449] it may be desirable to amend the Act to clarify the position. For example, the Act could provide that:

- litigation privilege terminates when the litigation it is connected to ends (with an exception for ongoing, related litigation); or
- litigation privilege never terminates (so the adage "once privileged always privileged" applies).

15.23 In contrast to litigation privilege, we are not aware of any litigation that has occurred in relation to the termination of settlement negotiation privilege since 2013. We therefore would like to hear from submitters as to whether the question of termination is causing any problems in practice; and if so, whether the Act should be amended. Do submitters agree with the obiter suggestion in *Jung* that settlement negotiation privilege does not terminate?

15.24 We note that the position as to whether and when privilege should terminate would not necessarily need to be the same for litigation privilege and settlement negotiation privilege. As the Commission observed during its 2013 review, the two privileges serve different purposes.[1450] Litigation privilege is about protecting the adversarial process. As such, once that need has been exhausted (that is, once the litigation has ended), it may well be that there is no need for the privilege to endure (although in practice it may be difficult to assess when litigation concludes).[1451] In contrast:[1452]

> The settlement negotiation privilege … 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.

1446 *NZH Ltd v Ramspecs Ltd* [2015] NZHC 2396.

1447 At [25] and [27].

1448 At [32].

1449 Bearing in mind s 6(f) of the Act (enhancing access to the law of evidence).

1450 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.62].

1451 At [10.62]–[10.63].

1452 At [10.64].

QUESTIONS

Q52 Should the Act be amended to clarify whether (and if so, when) litigation privilege terminates? If so, which of the following options should be preferred, and why:

a. amending the Act to provide that litigation privilege does not terminate; or

b. amending the Act to provide that litigation privilege ends when the litigation it is associated with ends (with an exception for ongoing, related litigation). If this option is preferred, how should the exception be framed?

Q53 Is the question of whether (and if so, when) settlement negotiation privilege terminates causing any problems in practice? If so, should the Act be amended to clarify the position?

CHAPTER 16

Regulations

IN THIS CHAPTER, WE CONSIDER:

whether the Evidence Regulations 2007 need to be reviewed in light of:

- developments in recording technology;
- changes in policy around pre-recorded complainant evidence; and/or
- difficulties associated with:
  - the security and use of transcripts;
  - restrictions on defence access to certain video records; and
  - extending most of the regulations to military proceedings.

BACKGROUND

16.1 Our terms of reference require us to consider whether the Evidence Regulations 2007 should be the subject of a separate review. To answer this question we need to determine whether they are readily understood and fit for purpose. We are not conducting the actual review of the regulations at this time.

16.2 The regulations are made under the Evidence Act 2006 and the Summary Proceedings Act 1957.[1453] They primarily deal with procedural matters associated with video recorded evidence and evidence given by children in criminal proceedings.

16.3 The regulations are divided into five parts. Parts 3 and 5 concern transitional matters and offences respectively. The remaining parts address:

- Part 1 – procedural requirements for video recording witness interviews for later use as evidence in criminal proceedings and certain military proceedings;
- Part 2 – the content of warnings by a judge to a jury in relation to the evidence of a child under the age of six; and

1453 The empowering provisions are s 201 of the Evidence Act 2006 and s 212 of the Summary Proceedings Act 1957. There are also other specific statutory provisions that authorise, contemplate or supplement the provisions of the Evidence Regulations 2007, namely ss 105, 106, 119A, 119B and 125 of the Evidence Act. See also s 70 of the Court Martial Act 2007.

- Part 4 – specific procedural requirements for video recording an interview with an adult complainant on a mobile device, for later use as evidence in criminal proceedings concerning domestic violence.

ISSUES FOR CONSIDERATION

16.4 We are not aware of any difficulties arising from the application of Parts 2, 3 or 5 of the regulations. We have, however, identified several issues concerning Parts 1 and 4. Our main concern is whether the regulations have appropriately accommodated, and will continue to accommodate, developments in recording technology. Our preliminary view is that this issue alone is significant enough to require a review of the regulations. We also consider that a review may be necessary, if a policy decision is made to amend the Act to entitle certain complainants to record their evidence at a pre-trial hearing and offer this as evidence at trial.[1454] To give effect to this policy, the regulations would need to be amended to provide appropriate safeguards around the use, storage and security of the recordings.

16.5 If a review of the regulations was considered necessary in light of the above issues, we suggest the review might also usefully consider:

- whether the restrictions around the use and security of transcripts of video records provide sufficient privacy protection for witnesses;
- whether there is a need to amend the regulations to better facilitate the viewing of certain video records by defence counsel; and
- whether the regulations should continue to apply to the military, in whole or in part.

16.6 We discuss each of these issues in turn. In addition to these issues, we welcome feedback on any other problems arising from the application of the regulations.

QUESTION

Q54 Are there any issues associated with the application of the Evidence Regulations 2007 that are not addressed in this paper? If so, please let us know.

DEVELOPMENTS IN RECORDING TECHNOLOGY

16.7 When the regulations were drafted a conscious decision was made not to use the term "videotape", which had been a central feature of its predecessor, the Evidence (Videotaping of Child Complainants) Regulations 1990.

16.8 Despite this shift, regulations 13 to 18 still describe a process that assumes a physical storage device will be used to record a witness' interview (such as a videotape, CD or DVD) rather than

1454 In Chapter 9 we outlined the advantages of certain complainants—for example, in sexual violence and family violence cases—being able to offer pre-recorded evidence at trial (including cross-examination evidence recorded at a pre-trial hearing).

storing the interview electronically. By way of example, regulation 13(1)(a) states that if the recording equipment fails "the video record must be removed from the video recording equipment".[1455]

16.9 There is some flexibility around compliance with the technical requirements of the regulations that lessen the impact of this outdated language. This is provided by section 106(8) of the Evidence Act which states:

> The Judge may admit a video record that is recorded and offered as evidence substantially in accordance with the terms of any direction under this subpart and the terms of regulations referred to in subsection (2), despite a failure to observe strictly all of those terms.

16.10 Although section 106(8) has been applied liberally by the courts,[1456] it cannot always provide a means of admitting material stored in a manner not contemplated by the regulations.

16.11 For example, in *Police v Winiata* the District Court held that an interview with a complainant that was recorded on a smartphone at the scene of a family violence incident and then stored in a cloud-based secure storage system, Evidence.com, could not be admitted at trial.[1457] The prosecution had sought to admit the recording of the interview as the complainant's evidence-in-chief, together with some supplementary questions. A large amount of technical evidence was given by experts at the hearing about the reliability of these recordings and the electronic storage of them.[1458] An expert explained that Evidence.com allows Police to either share a link with defence counsel through which the video evidence can be viewed online or alternatively the link can allow the recipient to download the video evidence to their own device.[1459]

16.12 The District Court held the regulations had not been complied with because regulation 15 required the master copy of the video evidence to be placed in safe custody with Police. The effect of using a cloud-based storage system meant the real master copy was in the custody of a foreign corporation outside New Zealand.[1460] The Court considered the process used was "a step too far" to be able to say there had been substantial compliance under section 106(8) of the Act.[1461] The Court noted "the Regulations do not seem to have caught up with current practice around video recorded evidence",[1462] and that the issue was one for the legislature rather than the courts.[1463]

16.13 In response to *Police v Winiata*, Part 4 was inserted into the regulations in 2016. Part 4 facilitates police use of mobile video records as evidence. The regulations define "mobile video record" as a video recording of an adult complainant's evidence, made by a police officer on a mobile device with the intention that it be adduced in criminal proceedings concerning domestic violence.[1464] Part

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1455 Another example is reg 17(1) which provides that a master copy must be "sealed with a certificate" and "placed in safe custody with the Police".

1456 In *R v S* [2011] NZCA 128 the issue on appeal to the Court of Appeal was whether video records of the child complainants were inadmissible because: (a) no promise was sought from either complainant to tell the truth; (b) the time on the clock in the interview room was not visible; (c) interviews had been conducted by two interviewers; and (d) a break had been taken in each interview during which the complainants left the room and could be heard speaking with other people. The Court of Appeal was satisfied there had been substantial compliance with the regulations. In *R v Walker* [2014] NZCA 26, the issue on appeal to the Court of Appeal was whether the video interviews of two adult women were admissible because of non-compliance with reg 8(c). Neither video showed the complainant promising to tell the truth. In reliance on the substantial compliance rule the trial judge allowed the non-compliance with reg 8(c) to be remedied at the trial by each complainant affirming the truth of what she had previously said in the video interview. The Court of Appeal approved this approach.

1457 *Police v Winiata* [2016] NZDC 7509, [2017] DCR 282.

1458 At [13]–[23].

1459 See AXON Help Center "Sharing and unsharing evidence: Sharing an Evidence File" <https://help.axon.com/hc/en-us/articles/221368648-Sharing-and-unsharing-evidence>.

1460 At [57].

1461 At [58].

1462 At [50].

1463 At [58].

1464 Regulation 53.

4 states that mobile video records must be stored on a storage system or facility that has been pre-approved by the Commissioner of Police.[1465]

Discussion

16.14 One of our concerns with Part 4 of the regulations is that it is limited, by virtue of the definition of mobile video record, to the evidence of adult complainants in criminal cases concerning domestic violence. This means the potential benefits of using technologies such as Evidence.com cannot be extended to other police video interviews. This may be placing undue constraints on the adoption of new technologies.

16.15 We are also concerned about the relationship between Parts 1 and 4 of the regulations. Part 4 does not deal comprehensively with mobile video record evidence. Instead it adopts 10 of the regulations in Part 1 and states that those provisions apply with "any necessary modifications".[1466] This type of cross-referencing can lead to uncertainty. The point is illustrated by considering the example of an expert reviewing a mobile video record.

16.16 The regulations state that an expert may review a mobile video record in order to provide expert advice, as long as certain requirements in Part 1 of the regulations are met.[1467] This includes a requirement that an expert who is given possession of a video recording must keep the record in safe custody.[1468] This language is still framed as if there is a physical copy of the recording that is handed over to the expert, and could easily cause confusion. This is a significant issue because the regulations make it an offence for an expert to fail to comply with any of the requirements on the use of, the supply of, or access to video records.[1469] It undermines the rule of law to have an offence of failing to comply with an obligation if that obligation is not readily accessible and understood.[1470]

16.17 Our preliminary view is that the regulations need to be simplified and use technology-neutral language to ensure there is room to accommodate new technologies. For instance, a video recording could be defined to include electronic recordings;[1471] police officers could be required to "provide access" to recordings, as opposed to providing physical copies; and video records could be "stored securely" as opposed to being "placed in safe custody with the Police".[1472] If such changes were made, there may be no need to retain a separate part for mobile video records, which would also simplify the regulations. A consistent approach across all video records rather than general rules combined with specific rules for mobile video records would also greatly increase the readability and accessibility of the regulations. A review of the regulations could explore the viability of such an approach including:

- whether there are sound policy reasons to limit mobile video record evidence to adult complainants in domestic violence cases; and

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1465 Regulation 55(1). It appears that Evidence.com is still being used by Police, in at least one location: New Zealand Police "Video statement pilot announced" (press release, 19 June 2017) <www.police.govt.nz>.

1466 Regulation 56(1) states "Regulations 20, 20A, 20B, 20C, 24A, 24B, 24C, 24D, 24E, and 28 apply (with any necessary modifications) to mobile video records."

1467 This is the combined effect of regs 20A and 56.

1468 Regulation 20A(3)(b).

1469 Regulation 63. This was inserted on 9 January 2017 by reg 20 of the Evidence Amendment Regulations 2016. Regulation 63 provides "[a] person who fails to comply with any requirements on the use of, the supply of, or access to video records (including mobile video records) specified under these regulations commits an offence and is liable on conviction,—(a) in the case of an individual, to a fine not exceeding $2,000: (b) in the case of a body corporate, to a fine not exceeding $10,000."

1470 Andrew Ashworth and Jeremy Horder *Principles of Criminal Law* (7th ed, Oxford University Press, 2013) at 56–57.

1471 Regulation 13 is an obvious candidate for amendment with its requirement that when recording equipment fails during a video interview "the video record must be removed from the video recording equipment".

1472 Regulations 17(1)(b) and 18(1)(b).

- whether adopting more generic terminology in the regulations could have unintended consequences.

QUESTION

Q55 Are there any difficulties in the application of the regulations in light of recent developments in recording technology?

PRE-RECORDING THE EVIDENCE OF COMPLAINANTS

16.18 In Chapter 9 we discussed the option of an entitlement for complainants, particularly in sexual violence and family violence cases, to offer pre-recorded evidence (including cross-examination recorded at a pre-trial hearing before a judge) at the trial.

16.19 We noted that, following *M v R*,[1473] pre-recording is used cautiously (if at all) in New Zealand. If this position changes, the regulations would probably need to be amended to provide rules for this.

16.20 Currently the application of the regulations is limited to recordings of witness interviews made by police officers in the course of an investigation that may later be used as the witness' evidence-in-chief. The rules are primarily designed to ensure the integrity of the evidence. For example, a video record must contain the entire interview and have a visible means of measuring and recording time. These requirements ensure that videos that may be used as evidence are not edited without the supervision of a court.[1474]

Discussion

16.21 If a policy decision is made to entitle complainants to offer evidence recorded at a pre-trial hearing, then it would be logical to amend the regulations to provide rules around the custody, storage, and use of the resulting video records. Pre-recorded evidence is likely to contain the same kinds of sensitive material that are contained in video records of police interviews. The same privacy concerns are therefore likely to arise.[1475] A review of the regulations could explore whether the same restrictions should apply to pre-recorded complainant evidence or whether variations on the restrictions are required. This would align with a broader review, of the type suggested in paragraph [16.17] above, of whether more generic or technology-neutral language could be used in the regulations. It would first be necessary, however, for Parliament to make its decision on the issue of whether certain complainants should be entitled to offer pre-recorded evidence.

QUESTION

Q56 If the Act was amended to entitle certain witnesses to pre-record their evidence (including cross-examination), what restrictions would need to be placed around the storage and use of the video records of that evidence?

1473 *M v R* [2011] NZCA 303, [2012] 2 NZLR 485.

1474 Regulations 8(f) and (g).

1475 See the explanatory note to the Evidence Amendment Bill 2015 (27-1) introduced on 27 May 2015. The explanatory note suggested the reason for limiting defence counsel access to video records of interviews was a fear of possible misuse.

SECURITY AND USE OF TRANSCRIPTS

16.22 Copies of some categories of video records are provided to defence counsel under section 106 of the Act.[1476] Regulations 29–33 impose several rules for the custody and use of these lawyers' copies. The video record must be kept in safe custody, can only be used for specified purposes, must not be given to any person without the permission of the judge, may only be viewed by the defendant in the presence of his or her lawyer, and must be returned to Police after the final determination of proceedings.[1477] It is an offence to use, supply, or allow access to a video interview other than as provided in the regulations.[1478]

16.23 These rules do not apply to the transcripts of video records in criminal proceedings. In criminal cases, access to a transcript is available as an alternative to access to the video record itself.[1479] Following a plea of not guilty, transcripts of video records are automatically provided to the defendant or the defendant's lawyer.[1480] In contrast to video records, there appears to be little the court can do under the Act or the regulations to control access to a transcript of a video record in criminal cases, or to control how the transcript is stored and used after it has been provided.

16.24 The one restriction that applies to both copies of video records and transcripts is the general requirement that copies of video records and transcripts must be dealt with in a way that preserves the privacy of the persons recorded on them.[1481] However, this requirement applies only to lawyers, Police, the responsible department, the Family Court and authorised advisers – even though the transcript must be given "*to the defendant* or the defendant's lawyer" following a not guilty plea.[1482]

16.25 The policy behind imposing the more detailed restrictions on access to the video records was to prevent their misuse.[1483] If an unauthorised person were to have access to either the video interview or a transcript of that interview, it would be a clear breach of the privacy of those persons recorded on it, particularly the interviewee. This could be particularly invasive because such interviews commonly include sensitive information relating to sexual or violent incidents. A video record of an interview is arguably more sensitive than a transcript due to the potentially vivid and confronting nature of video evidence. Video evidence allows the viewer to both see and hear the witness' account directly. However, the fact a video record is potentially *more* sensitive does not necessarily mean a transcript does not merit protection. A transcript of a video record can be just as sensitive as the video record itself, containing many suppressed or highly personal details.

1476 Section 106(3) provides that if the prosecution is going to offer a video record as an alternative way of giving evidence, then a copy must be given to the defendant's lawyer unless the judge directs otherwise. This does not apply where the video is of a child complainant or a witness (including an adult complainant) in a sexual or violent case: s 106(4A). The defendant may apply to the judge to receive a video interview of a child complainant or a witness in a sexual or violent case (s 106(4B)), and on receiving such an application the judge must have regard to the maters listed in s 106(4C), including the ability of the defendant or his or her lawyer to access the content of the video record by way of a transcript of the video (s 106(4C)(c)).

1477 Regulations 31–32.

1478 Regulation 63.

1479 Evidence Act, s 106(4C)(c).

1480 Regulation 28.

1481 Regulation 37 requires that a copy of a video interview must be kept in a way that preserves the privacy of the persons recorded on it. Regulation 48 provides that a reference in this subpart (Part 1, Subpart 4) to a master copy, a copy of a master copy, a working copy, or a copy of a working copy must also apply, with any necessary modifications, to any transcript or copy of a transcript in the custody of a lawyer for a party to a proceeding to which the transcript relates; Police; the responsible department; the Family Court; or an authorised advisor. Regulation 37 therefore applies to transcripts too.

1482 Regulation 28(1).

1483 Evidence Amendment Bill 2016 (27-2) (select committee report) at 3. In its submission on the Evidence Amendment Bill, the New Zealand Law Society said that these restrictions on defence counsel access to video interviews would impose a considerable burden on defence counsel, and would also result in an increase in the volume of pre-trial applications for copies of the videos: New Zealand Law Society "Submission to the Justice and Electoral Committee on the Evidence Amendment Bill 2016" at [24]–[25].

16.26 Access to transcripts in criminal cases also seems to be markedly unregulated when compared with access to transcripts disclosed in family and civil cases. In Family Court proceedings, a transcript of a video record may only be supplied to a responsible department or to a Family Court,[1484] and the copy must be kept in safe custody[1485] and returned to Police on request.[1486] Except in limited circumstances, the regulations prevent the department or Family Court from copying the transcript or showing it to anyone else.[1487]

16.27 In civil proceedings, the judge may only order disclosure of a video record if satisfied that it will not prejudice any criminal proceedings for which it may be offered as evidence, and if it is in the interests of justice to do so having regard to various matters.[1488] If the judge makes an order for disclosure, this must be accompanied by directions for the way in which disclosure is to be made, which may include directions for Police to provide the parties with a transcript of the video record.[1489] The video record and/or the transcript must be kept in safe custody, must not be copied without permission of the judge, must not be given to or shown to any other person without the permission of the judge, and must be returned to Police.[1490]

Discussion

16.28 We are aware of anecdotal reports that the lack of regulation surrounding access to transcripts of evidential video interview video records in criminal cases has seen some transcripts circulated freely, sometimes by defendants in prison.

16.29 It may therefore be worth exploring the possibility of extending the regulations that restrict access and use of video records and use of transcripts in civil cases, so that they also apply to transcripts in criminal cases. This could be done in whole, or in part. For example, the defendant could be entitled to have/view the transcript but could be restricted from copying it or giving it or showing it to any other person. Regulations could also govern its safe custody and return to Police.

QUESTION

Q57 Do the regulations governing transcripts of video records in criminal proceedings sufficiently preserve the privacy of those people they relate to? If not, how could the regulations be improved?

1484 Evidence Act, s 119A(1)(b); and regs 21–24.

1485 Regulation 23(2).

1486 Regulation 24(5).

1487 Regulation 24.

1488 Evidence Act, s 119A. Section 119B sets out matters the judge must have regard to for the purposes of considering the interests of justice under s 119A(2)(b) and (4), namely: the relevance of the video record to the proceeding; the likely extent of harm to the witness whose evidence is contained in the video record from disclosure of that record; the nature of the criminal proceeding; the availability of other means of obtaining the evidence; the public interest in protecting the privacy of witnesses; and any other matter that the judge considers relevant.

1489 Section 119A(3).

1490 Regulation 24C.

DEFENCE COUNSEL ACCESS TO VIDEO RECORDS

16.30 Prior to 8 January 2017, if the prosecution wished to offer a witness' evidence in the form of a video record, then the defence was entitled to receive a copy of the video record prior to trial.[1491] On application by the prosecution, the judge could direct otherwise.[1492]

16.31 As discussed in Chapter 9, the Act and the regulations were amended by the Evidence Amendment Act 2016 to reverse this position in relation to video records of child complainants and witnesses in sexual and violent cases.[1493] Now the defence is entitled to view, but not receive, a copy of such a video record. Under the regulations the viewing must take place at premises under the control of Police or a Crown lawyer, premises agreed to by Police or a Crown lawyer, or other premises as directed by a judge or judicial officer.[1494] The regulations provide that a judge may nonetheless order that the defence be given a copy of the video record, following an application by the defendant.

Discussion

16.32 In Chapter 9, we discussed the potential issues around the new restrictions imposed by the Amendment Act. If the new restrictions on defence access to certain video records are proving unduly burdensome, then one option would be to amend the regulations to place obligations on Police and/or prosecutors to provide additional assistance. For instance, prosecutors could be required to offer a range of reasonable viewing times to defence counsel and/or the parties could be required to reach an agreement together as to the viewing location.

16.33 Our preliminary view is that this issue is unlikely to be so significant as to justify reviewing the regulations on its own. However, it should be looked at as part of a wider review of the regulations.

QUESTION

Q58 Is the recent restriction on defence access to certain video records in regulation 20B unduly burdensome? If so, how could the regulations be amended to ameliorate the practical difficulties?

MILITARY PROCEEDINGS

16.34 In 2016, the regulations were amended to assist the Defence Force in using video record evidence in military proceedings under either the Armed Forces Discipline Act 1971 or the Court Martial Act 2007. The amendment states that, if the Evidence Act provisions relating to video record evidence apply in the military proceeding, then the regulations also apply to those proceedings, with two exceptions.[1495] Significantly, one of the exceptions is that Part 4—concerning mobile video record evidence—does not apply.[1496] The amendment explains that if the regulations apply then

1491 Section 106(4) of the Evidence Act, as it was prior to 8 January 2017. On 8 January 2017, sections 106(4A)–(4C) were inserted into the Act by the Evidence Amendment Act 2016, which reversed this position.

1492 Section 106(4) of the Evidence Act, as it was prior to 8 January 2017.

1493 Evidence Act, s 106(4)–(4C) and reg 20B.

1494 Regulations 20B(a)–20B(c).

1495 Regulation 3A. The second exception is that reg 4(1)(b) does not apply. This deals with proceedings commenced by a police employee.

1496 This is reiterated in reg 52(4).

any reference to Police should be read as including the Military Police and any reference to a Crown lawyer should be read as a lawyer acting for the Defence Force.

Discussion

16.35 As discussed above, we are not convinced that the limited application of Part 4 is justified. There may be good policy reasons to enable the Defence Force to offer electronic recordings in evidence and to use new digital technology such as Evidence.com. We also consider that practical problems may arise from applying the regulations, which were designed solely with criminal proceedings in mind, to military proceedings with very few modifications.

16.36 We understand that there is considerable law reform work already underway concerning how the Defence Force investigates and prosecutes offending in the military justice system. This includes the Military Justice Legislation Amendment Bill, which is currently before the Foreign Affairs, Defence, and Trade Committee.[1497] In light of the wider work-stream we suggest that it may be timely to review whether the regulations should continue to apply to military proceedings or whether it would be better to have separate tailor-made regulations. We envisage that this aspect of any review would require assistance from, and close co-operation with, military personnel.

QUESTION

Q59 Are there any problems, or anticipated problems, in the application of the regulations to military proceedings?

1497 Military Justice Legislation Amendment Bill 2017 (299-1) (explanatory note). This Bill aims to update the military justice system and to align it with the criminal justice system in certain respects. For instance, it grants victims of certain specified offences the same rights and protections they would have received in the criminal justice system, and aligns provisions governing whether an accused is unfit to stand trial with the provisions in the Criminal Procedure (Mentally Impaired Persons) Act 2003. Notably it also alters the onus of proof so that, like in the criminal justice system, it is on the prosecution rather than the accused.

Appendix 1

TERMS OF REFERENCE

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

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

1 As required by s 202 of the Act, the Law Commission will consider:

(a) The operation of the provisions of the Act, taking into account the matters already considered in the first statutory review of the Act;

(b) Whether those provisions should be retained or repealed; and

(c) Whether any amendments are necessary or desirable.

2 The review will focus on the operation of the following provisions where, in several cases, Courts have indicated the provision requires particular attention, including:

(a) Section 26 (conduct of experts): in light of *Lisiate v R* [2013] NZCA 129, (2013) 26 CRNZ 292.

(b) Section 28 (unreliable statements): in light of *R v Wichman* [2015] NZSC 198.

(c) Section 30 (improperly obtained evidence): in light of *R v Wichman* [2015] NZSC 198 and *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204 (criminal proceedings) and *Commissioner of Police v Marwood* [2015] NZCA 608 and *Marwood v Commissioner of Police* [2016] NZSC 139 (civil proceedings).

(d) Section 31 (prosecution may not rely on certain evidence offered by other parties): in light of *Boskell v R* [2014] NZCA 538.

(e) Section 32 (fact-finder not to be invited to infer guilt from silence before trial): operational issues such as the relationship between s 32 and veracity provisions, and whether s 32 applies to judge alone trials.

(f) Sections 37 and 38 (veracity): in light of *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612.

(g) Section 40 (propensity): in light of *Mahomed v R* [2011] NZSC 52 and *Taniwha v R* [2016] NZSC 121.

(h) Sections 44 and 40(3)(b) (sexual experience): in light of *B (SC12/2013) v R* [2013] NZSC 151.

(i) Section 49 (conviction as evidence in criminal proceedings): in light of *Morton v R* [2016] NZSC 51.

(j) Section 122 (judicial directions about evidence that may be unreliable): in light of *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 and *L v R* [2015] NZSC 53, [2015] 1 NZLR 658.

3 It will revisit matters identified in the first statutory review that the Law Commission recommended be kept under review at the second statutory review:

(a) Section 4 (definition of "witness").

(b) Sections 10 and 12 (the status of the common law).

(c) Section 49 (conviction evidence in trials of co-defendants).

(d) Sections 56 and 57 (termination of privileges).

(e) Sections 31 and 90 (the relationship between these provisions: co-defendants seeking to offer a defendant's statement in evidence may seek to "use" it when questioning a witness and s 90(1) may prevent them from doing so).

4 The review will consider the rules of evidence as they relate to sexual violence and family violence, including, in particular:

(a) Section 35 (previous consistent statements).

(b) Section 37 (veracity).

(c) Section 40 (propensity).

(d) Section 44 (sexual experience).

(e) Section 122(2)(e) (judicial directions about evidence which may be unreliable: the alleged conduct of the defendant occurred more than 10 years previously).

(f) Section 125(2)(b) (judicial directions about children's evidence: suggestions as to tendencies of children to invent or distort).

(g) Section 127 (delayed complaints or failure to complain in sexual cases).

5 The review will consider whether the Evidence Regulations 2007 are comprehensible and fit for purpose, or whether they require review in the future.

6 The review will consider s 202 (Law Commission periodic review of Act).

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

Appendix 2

CODE OF CONDUCT FOR EXPERT WITNESSES (SCHEDULE 4, HIGH COURT RULES 2016)

Duty to the court

1 An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.

2 An expert witness is not an advocate for the party who engages the witness.

2A If an expert witness is engaged under a conditional fee agreement, the expert witness must disclose that fact to the court and the basis on which he or she will be paid.

2B In subclause 2A, **conditional fee agreement** has the same meaning as in rule 14.2(3), except that the reference to legal professional services must be read as if it were a reference to expert witness services.

Evidence of expert witness

3 In any evidence given by an expert witness, the expert witness must—

(a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it:

(b) state the expert witness' qualifications as an expert:

(c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise:

(d) state the facts and assumptions on which the opinions of the expert witness are based:

(e) state the reasons for the opinions given by the expert witness:

(f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:

(g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.

4 If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.

5 If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

Duty to confer

6 An expert witness must comply with any direction of the court to—

(a) confer with another expert witness:

(b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses:

(c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.

7 In conferring with another expert witness, the expert witness must exercise independent and professional judgment, and must not act on the instructions or directions of any person to withhold or avoid agreement.

Appendix 3

PRACTICE NOTE – POLICE QUESTIONING (S 30(6) OF THE EVIDENCE ACT 2006) [2007] 3 NZLR 297

The courts will continue to apply judicially-developed guidelines for police questioning. The former Judges' Rules are (with some developments) restated here for the purposes of s 30(6) of the Evidence Act 2006. The obligation to advise that legal advice may be available without charge under the Police Detention Legal Assistance Scheme is new. As well the advice requirements under s 23 of the New Zealand Bill of Rights Act 1990 are brought into the required caution. Giving such advice prior to a suspect being arrested or detained does not obviate the necessity to repeat the advice upon arrest or detention. The practice note also favours the use of video recording of statements. In other respects, the practice note is not intended to change existing case law on application of the Judges' Rules in New Zealand and does not preclude further judicial development. The guidelines in this practice note supplement enactments relevant to police questioning and must be read consistently with those enactments. In particular they do not affect the rights and obligations under the New Zealand Bill of Rights Act 1990. The practice note takes effect on the commencement of section 30 of the Evidence Act 2006.

(1) A member of the police investigating an offence may ask questions of any person from whom it is thought that useful information may be obtained, whether or not that person is a suspect, but must not suggest that it is compulsory for the person questioned to answer.

(2) Whenever a member of the police has sufficient evidence to charge a person with an offence or whenever a member of the police seeks to question a person in custody, the person must be cautioned before being invited to make a statement or answer questions. The caution to be given is:

  (a) that the person has the right to refrain from making any statement and to remain silent

  (b) that the person has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions and that such right may be exercised without charge under the Police Detention Legal Assistance Scheme.

  (c) that anything said by the person will be recorded and may be given in evidence.

(3) Questions of a person in custody or in respect of whom there is sufficient evidence to lay a charge must not amount to cross-examination.

(4) Whenever a person is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence must be fairly explained.

(5) Any statement made by a person in custody or in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording, unless that is impractical or unless the person declines to be recorded by video. Where the statement is not recorded by video, it must be recorded permanently on audio tape or in writing. The person making the statement must be given an opportunity to review the tape or written statement or to have the written statement read over, and must be given an opportunity to correct any errors or add anything further. Where the statement is recorded in writing, the person must be asked if he or she wishes to confirm the written record as correct by signing it.

Appendix 4

JURY DIRECTION ON DELAY

The direction on the effect of delay on the trial, set out in Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (November 2017), provides:

Delay: the effect on the trial

8 Where there has been a substantial delay between the alleged offence(s) and the current criminal proceedings, it will probably be necessary to direct the jury as suggested below. However, the length of the delay, the cogency of the evidence and the circumstances of the case may all affect the need for or the content of such a direction, which may well need to be discussed with the advocates in the absence of the jury before closing speeches. Thus what follows should not be regarded as a blue-print.

(1) The passage of time is bound to have affected the memories of the witnesses.

(2) A person describing events long ago will be less able to remember exactly when they happened, the order in which they happened or the details of what happened than they would if the events had occurred recently.

(3) A person's memory may play tricks, leading him genuinely to believe that something happened (to him) long ago when it did not. This will only arise in the rare case where it is suggested V suffers from Recovered Memory Syndrome, and expert evidence must always be called on this point.

(4) The jury must therefore consider carefully whether the passage of time has made the evidence about the important events given by any of the witnesses concerned less reliable than it might otherwise have been because (depending on the evidence in the particular case) they cannot now remember particular details/they claim to remember events in unlikely detail/their memories appear to have improved with time.

(5) The passage of time may also have put D at a serious disadvantage. For example (again depending on the evidence in the particular case):

(a) D may not now be able to remember details which could have helped his defence.

(b) Because, after all this time, V has not been able to state exactly when and/or where D committed the crimes of which D is accused, D has not been able to put forward defences, such as showing that he could not have been present at particular places at particular times, which he may have been able to put forward but for the delay.

(c) D has not been able to call witnesses who could have helped his defence because they have died/cannot now be traced/cannot now remember what happened.

(d) D has not been able to produce documents which could have helped his defence because they have been lost/destroyed/cannot be traced.

(6) [If appropriate]: The fact/s that

(a) D is of good character and/or

(b) No other similar allegations have been made in the time that has passed since the events alleged

is/are to be taken into account in D's favour.

(7) The jury should take all these matters into account when considering whether the prosecution have been able to prove, so that the jury are sure about it, that D is guilty.