

He Puka Kaupapa | Issues Paper 50

Te Arotake Tuatoru i te Evidence Act 2006

The Third Review of the Evidence Act 2006



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

Te Aka Matua in the Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

Kia whanake ngā ture o Aotearoa mā te arotake motuhake
Better law for Aotearoa New Zealand through independent review

The Commissioners are:

Amokura Kawharu – Tumu Whakarae | President

Geof Shirtcliffe – Tumu Whakarae Tuarua | Deputy President

Claudia Geiringer – Kaikōmihana | Commissioner

The Hon Justice Christian Whata – Kaikōmihana | Commissioner

Kei te pātengi raraunga o Te Puna Mātauranga o Aotearoa te whakarārangi o tēnei pukapuka. A catalogue record for this title is available from the National Library of New Zealand.

ISBN 978-1-99-115992-2 (Online)

ISSN 1177-7877 (Online)

This title may be cited as NZLC IP50. This title is available on the internet at the website of Te Aka Matua o te Ture | Law Commission: www.lawcom.govt.nz

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Have your say

The Issues Paper sets out the potential issues we have identified with how the Evidence Act 2006 is working in practice.

We want to know what you think about the issues and options we have identified.

This paper covers a wide range of topics and asks many questions. You are welcome to focus only on those topics that concern you or about which you have views. There is no need to answer all the questions. When answering questions, we ask that you provide details to explain your views.

The feedback we receive will help inform our recommendations to the Government in our final report.

Submissions must be received by **30 June 2023**.

WAYS TO MAKE A SUBMISSION

There are different ways you can make a submission on this paper:

- Complete a submission form from our website and send this to us by email or post at the addresses below.
- Email us at evidence@lawcom.govt.nz.
- Write to us at:

The Third Review of the Evidence Act

Law Commission

PO Box 2590

Wellington 6140

WHAT HAPPENS TO YOUR SUBMISSION?

Te Aka Matua o te Ture | Law Commission will use your submission to inform our review, and we may refer to your submission in our publications. We will also keep all submissions as part of our official records. Information given to the Commission is subject to the Official Information Act 1982 and the Privacy Act 2020.

We will publish the submissions we receive on our website once we have published our final report. Your submission will be publicly available, but if you are submitting as an individual, we will not publish your name without your agreement.

If you do not want us to publish or refer in our publications to all or parts of your submission, please tell us which parts should be withheld and the reasons. We will take your views into account in deciding:

- whether to withhold or release any information requested under the Official Information Act;
 - whether and how to make your submission publicly available on our website; and
 - whether and how to refer to your submission in our publications.
-

Acknowledgements

Te Aka Matua o te Ture | Law Commission gratefully acknowledges the contributions of the individuals and organisations who have helped shape this paper, especially those who kindly shared their expertise and views with us in the preliminary engagement stage of this review.

We acknowledge the contribution of members of our Expert Advisory Group and Judicial Advisory Committee who have generously given, and continue to give, their time and expertise to assist with this review.

The members of the Expert Advisory Group are:

- Associate Professor Anna High, University of Otago
- Echo Haronga, barrister
- Adjunct Professor Elisabeth McDonald MNZM, University of Canterbury
- Jack Oliver-Hood, barrister
- Mark Lillico, Crown Law Office
- Associate Professor Scott Optican, University of Auckland
- Tania Singh, Public Defence Service

The members of the Judicial Advisory Committee are:

- The Hon Justice Christine French
- The Hon Justice Matthew Downs
- Judge Stephen Harrop

We are also grateful for the support and guidance of the Māori Liaison Committee to Te Aka Matua o te Ture | Law Commission.

We emphasise nevertheless that the views expressed in this Issues Paper are those of the Commission and not necessarily those of the people who have helped us.

Nō reira, ko tēnei mātou e mihi nei ki a koutou, kua whai wā ki te āwhina i a mātou. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

The Commissioner responsible for this project is Amokura Kawharu. The preparation of this Issues Paper has been led by Principal Legal and Policy Adviser Nichola Lambie. The legal and policy advisers who have worked on this Issues Paper are Dena Valente, Jesse Watts and Ruth Campbell. The law clerks who have worked on this Issues Paper are Kaea Hudson and Sophie Colson.

HE AITUĀ

The Commission acknowledges the passing of Justice Simon France in April 2023. Justice France made significant contributions to the law of evidence in Aotearoa New Zealand. We also acknowledge the passing of Andrew Beck in 2022 and his contribution to this review as well as his wider contributions to the law of Aotearoa New Zealand.

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CHAPTER 1

Introduction

- 1.1 Te Aka Matua o te Ture | Law Commission is conducting its third and final statutory review of the operation of the provisions of the Evidence Act 2006 (the Act).
- 1.2 The Act brings together most of the rules of evidence in a single statute. It governs what evidence can be admitted in criminal and civil court proceedings and how evidence can be given.¹ Evidence is used to establish the facts on which proceedings are determined, so the rules of evidence are of vital importance to securing just processes and outcomes.
- 1.3 The purpose of this Issues Paper is to seek feedback on how the Act is operating in practice. We have identified a range of potential issues with the Act, from relatively narrow operational issues through to significant and potentially contentious issues that question the underlying policy of some important rules of evidence. The feedback we receive on this Issues Paper will be critical in helping us to decide what recommendations to make in our final report to the Government.

BACKGROUND

- 1.4 The Act is based on the Commission's 1999 Report on the law of evidence and its proposed Evidence Code (the Evidence Code),² which was the product of a decade-long review of evidence law in Aotearoa New Zealand. At that time, the law of evidence was largely found in judicial decisions (case law), which were supplemented by some statutory provisions.³ The purpose of the Commission's review was "[t]o make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy resolution of disputes".⁴ With that purpose in mind, the Commission was asked to examine the law of evidence and make recommendations for its reform with a view to codification.⁵
- 1.5 The Evidence Code was intended to replace most of the common law and statutory provisions on the admissibility and use of evidence in court proceedings with one

¹ Some courts, including te Kooti Whenua Māori | Māori Land Court, te Kōti Taiao | Environment Court and te Kōti Whānau | Family Court are not bound by the Evidence Act 2006.

² Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999); Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999).

³ Including, but not limited to, the Evidence Act 1908: Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.2].

⁴ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at xviii.

⁵ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at xviii.

comprehensive scheme.⁶ The Evidence Bill introduced by the Government in 2005 largely reflected the Commission’s recommendations. The Bill was considered by the Justice and Electoral Committee, which made a number of changes to the Bill. The underlying legislative purpose, however, remained the same: the simplification and drawing together of the laws of evidence in one place.⁷

- 1.6 An important change made to the Bill at select committee stage was to insert a requirement that the Commission review the operation of the Act every five years to make sure it is working well in practice. This requirement for a five-yearly operational review was included in section 202 of the Act. The Commission completed its first review in 2013 (the 2013 Review).⁸ 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. It made a range of recommendations for reform, some of which were adopted in the Evidence Amendment Act 2016.
- 1.7 The Commission completed its Second Review of the Act in 2019 (the Second Review).⁹ As in the 2013 Review, it found the Act was generally working well but that several important further amendments were warranted. Some of these recommendations have since been implemented by the Sexual Violence Legislation Act 2021. The Government intended to progress or further consider some other recommendations as part of the development of an evidence amendment bill. At the time of writing, no such bill has been introduced to Parliament.
- 1.8 In the Second Review the Commission also recommended the repeal of section 202 of the Act, noting that no other area of the law is subject to regular statutory review by the Commission in this way. The Government accepted this recommendation, and the Statutes Amendment Act 2022 repealed section 202. This will not, however, prevent future reviews of evidence law (or discrete aspects of it).

SCOPE AND TIMING OF THIS REVIEW

- 1.9 The scope and timing of this review is governed by section 202 of the Act (now repealed) and by the Minister of Justice’s letter referring this review to the Commission dated 23 February 2022.¹⁰ These require the Commission to consider:
 - (a) the operation of the provisions of the Act since the Commission’s last operational review (the Second Review, which was completed in 2019); and
 - (b) whether repeal or amendment of any provisions of the Act is “necessary or desirable”.

⁶ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [7]–[8].

⁷ Evidence Bill 2005 (256-2) (select committee report) at 1.

⁸ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013).

⁹ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019).

¹⁰ Letter from Hon Kris Faafoi (Minister of Justice) to Amokura Kawharu (President of Te Aka Matua o te Ture | Law Commission) regarding the third statutory review of the Evidence Act 2006 (23 February 2022).

- 1.10 The Commission must report to the Minister on the above matters by 23 February 2024.¹¹
- 1.11 We published terms of reference for this review on 28 September 2022. The terms of reference confirmed the scope of this review pursuant to section 202 of the Act and highlighted some of the key areas this Issues Paper would address.¹²
- 1.12 As confirmed by the terms of reference, this review will not consider amendments to the Act made by the Sexual Violence Legislation Act 2021 given the recency of those amendments.

OUR PROCESS SO FAR

- 1.13 Given this is an operational review of the Act and not a “first principles” review of the rules of evidence, our process so far has focused on identifying potential issues with the Act’s operation, deciding which of those issues warrant consideration in this review and exploring some possible options for reform. Examples of such issues include possible problems with the wording or interpretation of a particular provision or combination of provisions that may be resulting in uncertainty or inconsistency in practice. We have also identified some issues where there is concern that the underlying policy of a provision is not reflected in the wording of that provision or is not being achieved in practice. In some circumstances, an issue requires us to re-examine the underlying policy of a provision.
- 1.14 We identified potential issues with the operation of the Act through research and preliminary feedback from stakeholders. We examined appellate case law, commentary and research published since 2018.¹³ Operational issues are not always evident from case law and commentary. We also therefore invited preliminary feedback on potential issues for inclusion in this review from the judiciary, interested organisations and individuals within the legal profession and academic community. The Minister of Justice’s letter of referral also suggested the following issues for our consideration:¹⁴
- (a) whether the process for determining whether improperly obtained evidence is admissible in criminal proceedings (section 30) gives sufficient weight to the impropriety;
 - (b) whether there should be additional controls on the admissibility of statements made by defendants to fellow prisoners;
 - (c) whether the provisions controlling anonymous evidence given by undercover police officers require amendment; and
 - (d) whether any clarifications are needed regarding privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists.
- 1.15 We developed a set of criteria to determine what issues to include in this Issues Paper. We have generally only included an issue if it meets all the following criteria, or if we think

¹¹ The Commission must report to the Minister within two years of the date on which the reference occurs (that is, within 2 years of 23 February 2022): Evidence Act 2006, s 202(2).

¹² The terms of reference are available on the Commission’s website: www.lawcom.govt.nz.

¹³ Pursuant to s 202(1)(a) of the Evidence Act 2006, we focused our research on the five years since the publication of the Issues Paper in the Second Review in March 2018.

¹⁴ Letter from Hon Kris Faafoi (Minister of Justice) to Amokura Kawharu (President of Te Aka Matua o te Ture | Law Commission) regarding the third statutory review of the Evidence Act 2006 (23 February 2022).

that it cannot be properly assessed against these criteria without first seeking submissions on the issue from interested parties:¹⁵

- (a) First, the issue is more than minor or technical in nature (that is, the issue has the potential to cause a real problem in practice).
- (b) Second, the issue relates to the operation of the Act since the last review, or the issue pre-dates the last review but is of such significance that we think it should be included in this review, given the repeal of section 202.
- (c) Third, the issue was not comprehensively considered in the Commission’s earlier reviews of the Act, or new material (such as subsequent case law or commentary) suggests there is a need to revisit the conclusions reached by the Commission in its earlier review(s).

1.16 We have also considered how the Act recognises and provides for te ao Māori. In Chapter 2, we examine whether the Act adequately provides for the admission of evidence of mātauranga Māori, including tikanga Māori, and seek feedback on other potential issues with how the Act recognises and provides for te ao Māori.¹⁶

1.17 In preparing this Issues Paper we met with our Expert Advisory Group and the Judicial Advisory Committee established by the Chief Justice for this review. We have been guided on our approach to ao Māori issues by the Commission’s Māori Liaison Committee.

PROPOSED APPROACH TO ASSESSING POTENTIAL AMENDMENTS

1.18 When considering whether to recommend any amendments to the Act, we must consider whether such action is “necessary or desirable”.¹⁷ Not every issue with the Act will meet this threshold, and we have not reached a preliminary view on many of the issues discussed in this Issues Paper. We therefore encourage submitters to provide feedback on both the nature and extent of potential issues in practice as well as preferred reform options. The feedback we receive will be important in our analysis of the case for reform.

1.19 Consistent with the Commission’s approach in the Second Review, we intend to assess the case for reform in relation to each issue by reference to the purpose statement in section 6 of the Act. This will require considering the extent to which any potential amendment would better achieve the Act’s purpose, which is:¹⁸

... 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

¹⁵ We have also included one technical drafting issue in this Issues Paper (relating to litigation privilege and confidentiality, discussed in Chapter 13). We have included this issue for completeness on the basis that the drafting issue appears to be relatively uncontroversial and there is a clear legislative solution.

¹⁶ In accordance with our statutory obligation to take into account te ao Māori under s 5 of the Law Commission Act 1985.

¹⁷ Evidence Act 2006, s 202(1)(c); Letter from Hon Kris Faafoi (Minister of Justice) to Amokura Kawharu (President of Te Aka Matua o te Ture | Law Commission) regarding the third statutory review of the Evidence Act 2006 (23 February 2022).

¹⁸ Evidence Act 2006, s 6. For discussion of the purpose provision, see Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [1.22]–[1.38].

- (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.
- 1.20 It is important to recognise that legislative amendment is not the only way to address an issue with the operation of the Act. In assessing whether reform is necessary or desirable we will, therefore, also consider whether the issue is best left to be resolved by the courts on a case-by-case basis, or whether non-legislative measures, such as practice rules or guidance, are more appropriate alternatives to law reform. Such options can be more flexible and responsive to changing circumstances or emerging best practice than legislative amendment.
- 1.21 Finally, we recognise it is always important when making recommendations for legislative amendment to ensure, as far as practicable, that they do not have unintended consequences. The risk of unintended consequences may, in some cases, weigh against reform, particularly where there is limited evidence of an issue causing significant problems in practice.

STRUCTURE OF THIS PAPER

- 1.22 The remainder of this Issues Paper is organised into chapters that, apart from Chapters 2 and 15, follow the structure of the Act:
- (a) Chapter 2 considers te ao Māori and the Act.
 - (b) Chapters 3 to 13 consider issues concerning the rules of admissibility in Part 2 of the Act.
 - (c) Chapter 14 considers issues concerning the trial process rules in Part 3 of the Act.
 - (d) Chapter 15 considers several other issues that relate to specific stand-alone topics.
- 1.23 While most of the issues discussed in this Issues Paper primarily concern rules of evidence in criminal proceedings, a number of issues will be of particular significance in civil proceedings. These include issues relating to:
- (a) the admissibility of hearsay evidence in civil proceedings (Chapter 3);
 - (b) legal advice privilege, litigation privilege and settlement privilege (Chapter 13); and
 - (c) cross-examination duties in civil proceedings (Chapter 14).
- 1.24 We ask questions throughout this Issues Paper to seek your views. You are welcome to focus only on those topics you wish to provide feedback on. There is no need to answer all the questions. You can also raise any other issues with the operation of the Act that we have not addressed in this Issues Paper.

QUESTION

Q1

Are there any issues with the operation of the Act that are not addressed in this Issues Paper that you think we should consider?

CHAPTER 2

Te ao Māori and the Evidence Act

INTRODUCTION

In this chapter, we consider and seek feedback on issues relating to:

- how the Act provides for the admission of mātauranga Māori and tikanga Māori; and
- other potential issues with how the Act recognises and provides for te ao Māori.

BACKGROUND

- 2.1 When developing the Evidence Code, Te Aka Matua o te Ture | Law Commission examined issues of potential concern to Māori and considered how the Evidence Code should address those issues. This included consideration of how evidence of Māori custom is admitted in court, whether the confidentiality of communications on marae and with kaumātua, Māori spiritual leaders and rongoā practitioners should be protected, and how the process for giving evidence should accommodate the specific needs of Māori.¹
- 2.2 As a result, while the Evidence Code did not expressly recognise te ao Māori or make specific provision for tikanga or te Tiriti o Waitangi | Treaty of Waitangi (the Treaty), several provisions in the Evidence Code and the resulting Act were drafted in a way that was intended to address potential issues of concern.
- 2.3 The Commission revisited these potential issues of concern in its Second Review of the Evidence Act 2006.² However, at that point there had been “surprisingly little case law relating to the Act and te ao Māori”, which made it difficult to draw any conclusions about how well the provisions of the Act were recognising Māori interests.³ The Commission

¹ These and other issues were discussed in Te Aka Matua o te Ture | Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 1997).

² See Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at ch 2. The first review of the Act was undertaken in a shorter timeframe and did not identify any issues of particular concern to Māori.

³ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9].

sought feedback on whether any provisions of the Act were creating difficulties for Māori,⁴ and noted in its Report that submitters did not point to specific practical issues nor suggest that there were barriers to admitting evidence of Māori custom or protecting the confidentiality of communications with kaumātua or rongōā practitioners.⁵

- 2.4 The Commission did, however, conclude in the Second Review that there was scope to promote greater recognition of tikanga Māori in courtroom procedure. It recommended the Act be amended to make it clear that courts can regulate procedures for giving evidence in a manner that recognises tikanga.⁶ The Government accepted this recommendation in principle, noting that the courts already do this to a certain extent using their inherent and implied powers. Its view, however, was that further consideration of the potential operational impacts was required.⁷
- 2.5 In this chapter, we examine whether the Act adequately accommodates the admission of evidence of mātauranga Māori (Māori knowledge), including tikanga Māori. We also seek feedback on whether there is any new material that suggests other potential issues that have been previously identified by the Commission should be revisited.

ADMISSIBILITY OF MĀTAURANGA MĀORI AND TIKANGA MĀORI

- 2.6 The Act's rules of admissibility have their origins in the English common law. It has long been recognised that some rules, specifically the hearsay and opinion rules, can create challenges for the admission of relevant evidence relating to mātauranga Māori and tikanga Māori⁸ due to the oral tradition in te ao Māori.
- 2.7 The Commission is considering tikanga Māori and its position in Aotearoa New Zealand's legal landscape in a separate project. In this operational review, our focus is on the existing rules of evidence and whether they properly allow for the admission of mātauranga Māori and tikanga Māori. We note the observations of te Kōti Mana Nui | Supreme Court in *Ellis v R* that suggest treating tikanga as a question of fact to be proved by evidence will not always be the most feasible or appropriate method for bringing tikanga before the courts.⁹ Nonetheless, as a matter of procedural and substantive fairness, it is important that the Act is able to admit such evidence when appropriate, particularly in light of the changing legal, political and social landscape. The courts are increasingly being called upon to consider and recognise Māori rights and interests, including those arising under tikanga and the Treaty, as well as the general application of

⁴ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at ch 2.

⁵ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [2.11].

⁶ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019), recommendation 2.

⁷ Government Response to the Law Commission Report: The Second Review of the Evidence Act 2006 | *Te Arotake Tuarua i te Evidence Act 2006* (September 2019) at 7.

⁸ Including mātauranga ā-iwi and tikanga ā-iwi.

⁹ See discussion at [2.20] below of the observations made by the Supreme Court in *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

tikanga Māori.¹⁰ Evidence of tikanga and mātauranga, such as tribal history, is often central to determining these cases.

- 2.8 We discuss the different pathways for admitting evidence under the Act below, especially in light of the Supreme Court’s decision in *Ellis v R*,¹¹ and then examine relevant case law to see how the Act is operating in practice.

Admitting evidence under the Act

- 2.9 A fundamental principle of the Act is that all relevant evidence is admissible, unless it is excluded or inadmissible under any provision of the Act or any other Act.¹² Evidence is relevant if it “has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding”.¹³
- 2.10 The two rules in particular that have the potential to exclude relevant evidence of mātauranga Māori and tikanga Māori are:
- (a) the rule against hearsay; and
 - (b) the rule against opinion evidence.

The rule against hearsay

- 2.11 A “hearsay statement” is a statement that was made by a person other than a witness that is offered in evidence to prove the truth of its contents.¹⁴ The general rule under the Act is that hearsay statements are not admissible.¹⁵ This is premised on the belief that such statements may be unreliable and misleading (relying as they do on the witness’ memory of what they heard and not the speaker’s/maker’s intention) and cannot be tested under cross-examination (beyond asking the witness, for example, whether they could have misheard or misinterpreted the maker’s words).¹⁶ We discuss the hearsay provisions in more detail in Chapter 3.
- 2.12 The rule against hearsay is subject to exceptions. In particular, a hearsay statement can be admitted if the circumstances relating to the statement “provide reasonable assurance

¹⁰ See discussion in Natalie Coates “The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence” in John Burrows and Jeremy Finn (ed) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2021) 65 at 86–87. For example, *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 considered “ground-breaking” issues concerning history, tikanga, the Treaty settlement process, and the extent to which the court should intervene in those arenas (at [2]). In *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120, Palmer J expressed a view that questions of tikanga are likely to arise more frequently in the courts in future (at [36]).

¹¹ *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

¹² Evidence Act 2006, s 7(1).

¹³ Evidence Act 2006, s 7(3).

¹⁴ Evidence Act 2006, s 4 (definition of “hearsay statement”).

¹⁵ Evidence Act 2006, s 17.

¹⁶ Te Aka Matua o te Ture | Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 1997) at [5].

that the statement is reliable”, and the maker of the statement is unavailable as a witness (for example, because they have died).¹⁷

- 2.13 The Commission acknowledged the difficulties the rule against hearsay can pose for Māori in its 1991 Preliminary Paper on hearsay:¹⁸

The hearsay rule has always posed problems for the reception of evidence of Māori custom. Such evidence is usually of an oral nature and, as the law at present stands, is technically inadmissible as hearsay unless it falls within one of the common law or statutory exceptions.

- 2.14 At that time, the Commission envisaged that its proposals, which underpin the Act’s current hearsay provisions, would “eliminate the current problems concerning evidence of Māori custom”.¹⁹ In particular, the proposals would make it easier for the law to take proper account of reliable oral sources in te ao Māori, anticipating that the threshold of reasonable assurance of reliability may well be met in the case of evidence from a recipient of a long-standing oral tradition.²⁰

The rule against opinion evidence and the admissibility of expert evidence

- 2.15 Under the Act, a statement of opinion is not admissible in any proceeding.²¹ This is subject to exceptions, including for opinions that are given by an “expert” witness.²² The Act defines an expert as “a person who has specialised knowledge or skill based on training, study or experience”.²³ Expert opinion evidence is only 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.²⁴

- 2.16 In its initial work on the Evidence Code, the Commission’s expectation was that the exception for expert evidence would continue to provide for the admission of “[r]elevant evidence about experiences of Māori that is beyond the knowledge of the fact finder”.²⁵ Earlier case law had already confirmed that expert evidence from those qualified in terms

¹⁷ Evidence Act 2006, ss 16(2) and 18. See also s 20, which enables the hearsay rule to be varied by the High Court Rules. Currently, the High Court Rules provide an exception for “statements of belief” in affidavits filed in relation to interlocutory applications if certain conditions are met: High Court Rules 2016, r 7.30. Hearsay evidence was admitted under this rule in *Witehira v Ram* [2020] NZHC 2326 at [24], an application for an interim injunction to prevent disposal of the applicant’s daughter’s body following a disagreement on how the deceased’s body was to be dealt with.

¹⁸ Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [60].

¹⁹ Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [60]. We note that in that paper the Commission proposed abolishing the hearsay rule in civil proceedings, subject to a general power to exclude evidence that is unfairly prejudicial, misleading, confusing or time-wasting (at [3]). In its Evidence Report, however, the Commission recommended retaining but liberalising the hearsay rule for both criminal and civil proceedings, noting there is a need for judicial control over the admission of hearsay: Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [64].

²⁰ Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [60].

²¹ Evidence Act 2006, s 23.

²² Evidence Act 2006, s 25. Section 24 also permits a witness to state an opinion in evidence if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard or otherwise perceived.

²³ Evidence Act 2006, s 4 (definition of “expert”).

²⁴ Evidence Act 2006, s 25(1).

²⁵ Te Aka Matua o te Ture | Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 1997) at [34].

of Māori culture was admissible.²⁶ It was expected that the Evidence Code and resulting Act would continue this approach.²⁷

Other mechanisms for admitting evidence of mātauranga Māori and tikanga Māori

2.17 Several other mechanisms are available under the Act, but these are generally limited to undisputed evidence:

- (a) **Agreed statements of fact:** Evidence that may not otherwise be admissible can be admitted with the agreement of all parties.²⁸ In *Ellis v R*, an agreed statement of facts was filed following a wānanga with independent pūkenga (experts). Appended to the agreed statement of facts was a statement of tikanga authored by Tā Hirini Moko Mead and Tā Pou Temara, which was supported by the tikanga experts who attended the wānanga.²⁹
- (b) **Notice of uncontroverted facts:** A judge or jury can take notice of “facts so known and accepted either generally or in the locality in which the proceeding is being held that they cannot reasonably be questioned”.³⁰ In addition, a judge can take notice of, or direct a jury in relation to, facts “capable of accurate and ready determination by reference to sources whose accuracy cannot be reasonably questioned”.³¹ While this sets a high bar, te Kōti Pira | Court of Appeal has previously taken judicial notice of “the fact that whanaungatanga is one of the fundamental precepts of tikanga, and indeed Māori society”.³²
- (c) **Reliance on published material:** Published documents can be admitted in matters of “public history” if the judge considers that the sources of information are reliable.³³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal reports have been admitted under this provision, including in situations where a party is “unable to give anything but a hearsay account” of relevant historical events.³⁴ This allows a court to rely on historical facts as found by the Tribunal in situations where they might otherwise be unable to engage in a historical fact-finding process based on the evidence before them.³⁵ In some cases, questions of tikanga might be dealt with through submissions, with reference to published material. Glazebrook J in *Ellis v R*

²⁶ See, for example, *Ministry of Agriculture and Fisheries v Hakaria and Scott* [1989] DCR 289 at 294.

²⁷ See discussion in Te Aka Matua o te Ture | Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at [36]; Te Aka Matua o te Ture | Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 1997) at [34]–[35]; Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C15].

²⁸ Evidence Act 2006, s 9.

²⁹ *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [35]–[37]. See also discussion below of *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882.

³⁰ Evidence Act 2006, s 128(1).

³¹ Evidence Act 2006, s 128(2).

³² *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [38].

³³ Evidence Act 2006, s 129.

³⁴ *Winitana v Attorney-General* [2019] NZHC 381 at [7]–[8]. See also *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 653; and *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [45]. In *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 Glazebrook J also suggested relevant Te Aka Matua o te Ture | Law Commission publications and widely available tikanga compendiums could be relied on in accordance with s 129 (at n 153).

³⁵ *Winitana v Attorney-General* [2019] NZHC 381 at [9].

observed that this might be appropriate “[i]n simple cases where tikanga is relevant and uncontroversial”.³⁶ A recent example of this approach is te Kōti Matua | High Court case of *Doney v Adlam*.³⁷ In that case, the Court had adjourned proceedings to enable the engagement of a tikanga expert but counsel were unable to do so in the time available.³⁸ In the absence of expert evidence, the Court relied on several authoritative texts, books, articles and case law, both historic and contemporary, to consider the application of tikanga principles in that case.³⁹

- 2.18 Other mechanisms exist outside the Act. The High Court can appoint pūkenga as independent court experts for opinion or advice on tikanga.⁴⁰ Such a mechanism might helpfully be engaged if there is a lack of relevant information before the court as to relevant tikanga or conversely if there is a significant amount of expert evidence before the court. In *Ngāti Whātua Ōrākei Trust v Attorney-General*, Palmer J declined to appoint pūkenga given the ample expert evidence offered by the parties,⁴¹ however later observed that “[i]n retrospect, I consider it would have been beneficial to appoint an independent pūkenga to conduct the conference of tikanga experts, and an independent chair of the historian experts”.⁴²
- 2.19 The High Court can also refer any question of fact relating to Māori rights or interests in land or personal property, or any question of tikanga, to the Māori Appellate Court.⁴³

The Supreme Court’s decision in *Ellis v R*

- 2.20 The Supreme Court canvassed the different avenues outlined above for ascertaining tikanga in *Ellis v R*. Glazebrook J observed that “[t]he best approach will be contextual, depending on the issues, the significance of tikanga to the case as well as matters of accessibility and cost”.⁴⁴ However, the Court emphasised the need to preserve the integrity of tikanga. In the Statement of Tikanga appended to the judgment, Mead and Temara explained that, when tikanga comes before the courts, the courts must “use processes and practice that encourage the preservation of the integrity of tikanga”.⁴⁵
- 2.21 The Supreme Court also expressed caution about the “orthodox approach” of treating tikanga as something to be proved as a matter of fact by expert evidence, in the same

³⁶ *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [125].

³⁷ *Doney v Adlam* [2023] NZHC 363.

³⁸ *Doney v Adlam* [2023] NZHC 363 at [81].

³⁹ *Doney v Adlam* [2023] NZHC 363 at [81]–[107].

⁴⁰ High Court Rule 9.36, discussed in *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [36] where the Court observed that, “[e]ven if r 9.36 did not apply, appointment of pūkenga by the High Court would be possible under its inherent jurisdiction”. A power to appoint pūkenga also exists under the Marine and Coastal Area (Takutai Moana) Act 2011, s 99. Pūkenga were appointed by the court in accordance with that provision in *Re Ngāti Pāhauwera* [2021] NZHC 3599 (at [327]–[328]) and in *Re Edwards (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 (at [309]–[310]).

⁴¹ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120.

⁴² *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [93].

⁴³ Te Ture Whenua Maori Act 1993, s 61.

⁴⁴ *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [125]. See also comments from Winkelmann CJ at [181].

⁴⁵ Statement of Tikanga at [120], appended to *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

way as foreign law.⁴⁶ Glazebrook J observed that while tikanga may need to be established and ascertained by evidence or through another suitable process, it is “not appropriate to refer to it as having to be proved as a question of fact”.⁴⁷ Williams J was also “somewhat uncomfortable” with the application of the evidential approach to indigenous law, noting that this was likely “simply a convenient and efficient way of getting unfamiliar material before the judge who then had to apply it”.⁴⁸ Williams J observed that there are multiple available techniques for assisting the courts to understand and, if necessary, apply tikanga.⁴⁹

How is the Act operating in practice?

Operation of the rules against hearsay and opinion evidence

2.22 Few cases have expressly addressed the admissibility of mātauranga Māori and tikanga Māori under the rules against hearsay or opinion evidence in the Act.

2.23 The first case to do so appears to be *R v Saxton*, a case decided after the Act had been passed but before it came into force.⁵⁰ In that case, the defendant sought to rely on evidence of customary rights in relation to pounamu. Te Kōti-ā-Rohe | District Court noted that, while the Act did not apply in that case, the hearsay provisions in the Act “seem to allow the admission of evidence of this kind”.⁵¹ This was accepted by counsel on appeal.⁵² Another case that directly addressed this issue was *Proprietors of Wakatū Inc v Attorney-General*. The Attorney-General objected to the admission of evidence containing traditional, oral accounts of the collective histories of whānau, hapū and iwi on the basis that it was inadmissible and irrelevant hearsay and opinion evidence.⁵³ The High Court admitted the evidence, concluding:⁵⁴

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 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.

⁴⁶ In *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733, Elias CJ had suggested that what constitutes Māori custom or tikanga in the particular case “is a question of fact for expert evidence” (at [95]). In *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120, Palmer J accepted a submission that “tikanga is law proved as a matter of fact” (at [36]). These observations were repeated in *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (no 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [47].

⁴⁷ *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at n 151.

⁴⁸ *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [273]. See also comments from Winkelmann CJ at [181].

⁴⁹ *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [273].

⁵⁰ *R v Saxton* DC Christchurch CRI-2004-002-000741, 25 October 2007.

⁵¹ *R v Saxton* DC Christchurch CRI-2004-002-000741, 25 October 2007, n 41.

⁵² *R v Saxton* [2009] NZCA 498, [2012] 1 NZLR 331 at [78]. The Court of Appeal “appeared to agree with counsel that evidence of custom would be admissible under the Evidence Act 2006”: Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA18.03(1)].

⁵³ *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461, [2012] BCL 396 at [41].

⁵⁴ *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, [2012] BCL 396 at [41], and confirmed at [42].

- 2.24 We noted these cases in the Second Review but said that the lack of case law made it difficult to draw conclusions about how the operation of the Act's provisions are recognising Māori interests in practice.
- 2.25 Since then, the High Court considered the application of the hearsay provisions in relation to tribal history in *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General*, a case concerning claims relating to the Crown's acquisition and subsequent confiscation of ancestral land from Ngāti Te Ata in 1864 and subsequent events.⁵⁵ The Court noted the "difficulty in resolving disputed facts relating to events which took place some 160 years ago", and that "factual findings concerning those historical events can only be made on the basis of admissible evidence put before the Court in these proceedings".⁵⁶ The Court noted that, unlike the situation in *Wakatū*, where the relevant facts could largely be drawn from a reasonably comprehensive documentary record, evidence of detailed discussions and relationships between the parties was "scant to say the least".⁵⁷ Many of the facts were in dispute and were the subject of competing expert historian evidence.⁵⁸
- 2.26 In relation to that evidence, the Court's observations record the difficulty in applying current categories of evidence to mātauranga:⁵⁹
- Some of the evidence I heard was strictly hearsay. There was nevertheless no formal objection taken by any party to the evidence adduced at trial. I accordingly proceed on the basis the evidence was admitted by agreement pursuant to s 9 of the Evidence Act 2006. Where appropriate however, I have taken these matters into account when considering the weight to be given to particular items of evidence. This has been particularly necessary in the case of some of the historical materials, which are not complete and thus the full context to certain events and communications is unknown.
- 2.27 While recourse to section 9 in that case enabled the Court to consider the evidence, such an approach will not provide a solution in all cases. Section 9 would not, for example, be available in cases where the evidence is contested. A question also arises as to whether this is an appropriate application of section 9, which was intended to require *express* agreement of the parties in relation to agreed statements of fact.⁶⁰

Ascertaining tikanga through expert evidence

- 2.28 While few cases have examined the operation of the rules against hearsay or opinion evidence in relation to mātauranga Māori and tikanga Māori, there are ample examples of

⁵⁵ *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882.

⁵⁶ *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882 at [15].

⁵⁷ *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882 at [142].

⁵⁸ *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882 at [15].

⁵⁹ *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882 at [18].

⁶⁰ Section 9 allows a judge to admit evidence that is not otherwise admissible "with the written or oral agreement of all parties". The legislative history of this provision indicates that the language was intended to require express consent of the parties rather than implied consent. See discussion in Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV9.02].

expert evidence from pūkenga being admitted in cases since 2018 in a range of different contexts, including:⁶¹

- (a) in cases involving disputes between iwi, hapū⁶² and whānau;⁶³
- (b) in cases against the Crown,⁶⁴ including cases relating to individual rights and entitlements;⁶⁵
- (c) in a judicial review of a preliminary determination of the Waitangi Tribunal;⁶⁶ and
- (d) in a criminal proceeding, where evidence of tikanga practices was relevant to the defendant's defence.⁶⁷

Is legislative reform necessary or desirable?

2.29 Our review of available cases suggest that the expert evidence provisions of the Act are routinely engaged to admit evidence of mātauranga Māori and tikanga Māori from pūkenga.

2.30 There is, however, less clarity as to whether there is scope for the admission of mātauranga Māori or tikanga Māori outside the expert evidence provisions in the Act. We have identified few cases that have examined this issue and no cases that have embarked on an assessment of whether such evidence is in fact hearsay or whether it can be admitted as an exception to the rule against hearsay because it meets the reliability threshold. While section 9 (admission by agreement) has provided a pragmatic approach to date, we do not think it provides an adequate or principled response to this issue.

⁶¹ Not included in this list are the claims recently considered under the Marine and Coastal Area (Takutai Moana) Act 2011. As we explain below, claims under this Act are not subject to the rules in the Evidence Act 2006. Nonetheless it is notable that these cases involve extensive evidence from pūkenga, given the centrality of tikanga to the statutory tests. See, for example, *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [321] and [324]. See also *Re Edwards (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [131] and [308]; *Re Reeder* [2021] NZHC 2726 at [46]; and *Paul v Attorney-General* [2022] NZCA 443 at [51].

⁶² For example, *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 concerned a dispute between two groups of beneficiaries of the Ngāti Rehua-Ngātiwai ki Aotea Trust about the whakapapa of two people. The Court was asked to determine whether the dispute should be resolved by arbitration in accordance with a mediation agreement previously entered by the parties. The Court heard expert evidence from a pūkenga and hereditary rangatira in Ngāti Rehua-Ngātiwai ki Aotea tikanga (at [48]).

⁶³ For example, *Cowan v Cowan* [2022] NZHC 1322 involved a dispute between whānau as to the proposed sale of the family home. The Court ruled expert evidence from a tikanga expert was admissible on the basis that it was relevant to the plaintiffs' damages claim, as they argued that they had suffered financial damage and psychological loss because their customary rights to their papakāinga had not been recognised by their family (at [8]–[9]).

⁶⁴ For example, *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 3319, [2022] 2 NZLR 178 was a judicial review of a decision by the Ministry of Health declining to provide the applicant with personal details of Māori living in Te Ika-a-Māui | North Island who had not yet received any dose of the COVID-19 vaccine. Expert evidence was given as to what tikanga required in this context (at [108]).

⁶⁵ For example, *Ulrich v Attorney-General* [2022] NZCA 38 concerned the ownership of land once gifted by two brothers of Ngāti Kahu descent to the Crown for use as a Māori school. When the school closed, the land was offered back to "successors" of the original owners in accordance with the Public Works Act 1981. This meant the land was offered back to the grandson of one of the original owners, but not the son of the other original owner, because he was not the residual beneficiary under his father's will. Leave was granted to offer expert evidence that contended that these actions contravened Te Whānau Moana and Ngāti Kahu tikanga (at [37] and [39]).

⁶⁶ *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654. It was argued that the Tribunal's determination was unlawful as it was inconsistent with tikanga and in breach of the Treaty (at [95]). Expert evidence on whether the Tribunal's preliminary determination breached tikanga was received by the Court and was not contested or challenged (at n 78).

⁶⁷ This case is subject to publication restrictions until final disposition of trial.

2.31 As the courts are increasingly being asked to consider tikanga and mātauranga in proceedings subject to the Act,⁶⁸ it is desirable to consider whether further clarity is required as to the appropriate approach to such evidence. As judicial awareness of commonly understood tikanga Māori increases, the need to ascertain that tikanga by way of evidence in every case may diminish over time. This does not, however, reduce the need for the Act to properly accommodate such evidence in appropriate cases.

2.32 The approach under the Act can also be contrasted with the more flexible approach to evidence in other jurisdictions where the Act does not apply and Māori interests are often central, including in te Kooti Whenua Māori | Māori Land Court, te Kōti Taiao | Environment Court and claims under the Marine and Coastal Area (Takutai Moana) Act 2011.⁶⁹ By way of example, in *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*, the Environment Court explained that the rules about hearsay, opinion evidence and witness bias are normally applied for good reasons, however:⁷⁰

Against that, we have to bear in mind that Ngati Awa, and Māori generally, have a culture in which oral statements are the accepted method of discourse on serious issues, and statements of whakapapa are very important as connecting individuals to their land. In the absence of other evidence from experts on tikanga Maori, the evidence of tangata whenua must be given some weight (and in appropriate cases considerable, perhaps even determinative, weight). In the end the weight to be given to the evidence in any case is unique to that case.

2.33 The Court went on to state that:⁷¹

In these proceedings we heard a good deal of hearsay evidence from Ngati Awa witnesses ... which also included opinion evidence - for example that the 100 acre block is or is not waahi tapu. All those witnesses were biased, in the legal sense, in that they had an interest in the

⁶⁸ An upcoming case in which tikanga Māori and evidence about historical events is likely to be central to the issues in dispute concerns Ngāi Tahu's claim of rangatiratanga and pūtake-mauka rights and entitlements in their takiwā in relation to wai māori (freshwater): *Tau v Attorney-General* [2022] NZHC 2604. Ngāi Tahu says wai māori is a taonga and the assertion of its rights and entitlements is grounded in tikaka (tikanga in the Ngāi Tahu dialect) and riteka (ritenga in the Ngāi Tahu dialect). It contends these rights and entitlements have been constrained, encumbered, eroded, or removed by the conduct of the Crown and seeks declarations to recognise, restore or accommodate them (at [1]). The trial is unlikely to be before 2025 (at [72]).

⁶⁹ Te Ture Whenua Maori Act 1993, s 69(1) provides that the Māori Land Court and the Māori Appellate Court may receive as evidence any statement, document, information, or matter that, in the opinion of the Court, may assist it to deal effectively with the matters before it, whether or not that would be legally admissible in evidence. Resource Management Act 1991, s 276 provides that the Environment Court may receive anything in evidence that it considers appropriate to receive. The Marine and Coastal Area (Takutai Moana) Act 2011, s 105 provides that the Court may receive as evidence any oral or written statement, document, matter or information that the Court considers to be reliable, whether or not that evidence would otherwise be admissible.

⁷⁰ *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 at [56]. For an example of the approach taken in the Māori Land Court, see *Stone v Couch – Rāpaki MR 875 39A* (2020) 65 Te Waipounamu MB 61 (65 TWP 61) at [56]–[57]. In relation to claims under the Marine and Coastal Area (Takutai Moana) Act 2011, the High Court has acknowledged that the proper authorities on tikanga are the living people who have retained the mātauranga, the knowledge and wisdom passed down to them by their ancestors: *Re Edwards (No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [308]; and *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [325].

⁷¹ *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 at [57]. See also *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496, where the High Court rejected the Environment Court's criticisms of evidence given by kaumātua as to the presence of kōiwi in the swamps of Takamore on the basis that it was hearsay, general in nature, and lacked any specificity by way of oral tradition or historical foundation. The High Court observed that it was "difficult to see, given we are concerned with an oral history which pre-dates European presence, more specificity is reasonably possible", and "[t]he fact no European was present with pen and paper to record such burials could hardly be grounds for rejecting the evidence" (at [67]–[68]). Further, reducing oral history to "assertion rather than evidence" was "not at all the proper approach to oral history such as this" (at [78]).

proceedings. Despite that, we have considered the evidence of all the witnesses, whether they qualify as experts on tikanga Māori or not.

Options for reform

2.34 We have identified two options for reform should legislative reform be considered necessary or desirable to future proof the rules of evidence in light of the ongoing relevance of tikanga and mātauranga in proceedings to which the Act applies. These options could be considered as alternative reform options or both options could be progressed together.

Option 1: Tailored exception to the rules against hearsay and opinion evidence

2.35 This option is based on the Australian approach. There, concerns about the effect of these rules on the admission of evidence from Aboriginal people and Torres Strait Islanders have resulted in the adoption of tailored exceptions for evidence about traditional laws and customs.⁷² Commonwealth legislation (which is replicated in most states and territories) now provides:⁷³

Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

2.36 A similar exception applies in relation to the rule against opinion evidence.⁷⁴ We are interested in exploring whether similar exceptions would be appropriate in Aotearoa New Zealand to clarify that the hearsay and opinion rules do not apply to evidence of tikanga Māori. We are also interested in exploring whether such exceptions should also address mātauranga Māori, thereby covering a wider field of knowledge, such as tribal histories that are passed on through the generations.

2.37 We note, however, that rules on hearsay and opinion evidence in Australia are similar but not identical to New Zealand law, so this option would require careful consideration to determine if it is appropriate in the New Zealand context and, if so, how the exception should be drafted. This would need to include consideration of the different situations when it would be appropriate to admit evidence of either tikanga Māori or mātauranga Māori of a person who would not otherwise meet the definition of expert under the Act.⁷⁵

2.38 There may be merit in adopting a broad exception to the hearsay and opinion rules that would include other cultures where traditional knowledge systems and methods of storing knowledge are oral in nature. As the Supreme Court recognised in *Deng v Zheng*, cases in which one or more parties have a cultural background that differs from that of a judge are common in New Zealand courts and are likely to become more common in

⁷² See discussion in Australian Law Reform Commission and others *Uniform Evidence Law: Report* (ALRC R102, NSWLRC R112, VLRC Final Report, December 2005), ch 19.

⁷³ See Evidence Act 1995 (Cth), s 72; Evidence Act 2011 (ACT); Evidence Act 1995 (NSW); Evidence Act 2008 (Vic); Evidence Act 2001 (Tas); and Evidence (National Uniform Legislation) Act 2011 (NT).

⁷⁴ See Evidence Act 1995 (Cth), s 78A.

⁷⁵ The Act defines “expert” as a person who has specialised knowledge or skill based on training, study or experience: Evidence Act 2006, s 4 (definition of “expert”).

future.⁷⁶ It may be desirable for the Act to more clearly acknowledge and accommodate oral traditions in other cultures. This may be most appropriate where such knowledge systems employ sophisticated techniques for recording history or knowledge orally, as is the case in relation to mātauranga Māori, so that concerns about reliability and verification that underpin the rule against hearsay have less or no relevance. We welcome feedback on this point.

Option 2: Prescribing interpretative guidance

- 2.39 The second option is to introduce statutory guidance as to the need to interpret and apply the provisions of the Act having regard to te ao Māori.⁷⁷
- 2.40 Currently, the Act does not expressly refer to te ao Māori or tikanga Māori. This is despite attention being given to te ao Māori issues in the development of the Evidence Code and a clear desire to ensure the Act appropriately accommodates te ao Māori. Since the Act was passed, the courts have increasingly been engaging with tikanga and considering Māori rights and interests, including those arising under the Treaty. It is important that the Act can respond to these changes.
- 2.41 An advantage of expressly requiring the courts to have regard to te ao Māori would be to assist the courts in their application of the rules of evidence in cases involving Māori interests and help normalise the admission of such evidence in appropriate cases.
- 2.42 Other legislation under which Māori interests are relevant to court proceedings already make similar provision. The Resource Management Act 1991 provides that the Environment Court shall recognise tikanga Māori where appropriate,⁷⁸ and Te Ture Whenua Maori Act 1993 provides that a judge of the Māori Land Court or the Māori Appellate Court may apply such rules of marae kawa as they consider appropriate.⁷⁹
- 2.43 This option is more general in nature than Option 1, but arguably that is appropriate if the intention is to future proof the Act in a general sense. Option 2 would enable the reliability of hearsay evidence or the application of the expert evidence provisions to be considered through a te ao Māori lens and in light of mātauranga Māori methodologies for storing and transmitting information.
- 2.44 Option 2 would also apply more broadly to other provisions of the Act. It would guide a judge to consider questions of relevance under section 7 from a te ao Māori perspective, which may be different to the judge's own perspective. For example, the whakapapa of a person or a place may not initially seem relevant to the judge but it may well be relevant to the kaumātua giving evidence or to the parties themselves. It could also assist the court when deciding whether to exclude evidence under section 69, discussed below.
- 2.45 A disadvantage, however, of including any interpretative guidance of general effect is that its application can be uncertain and may result in unintended consequences for the application of other specific provisions in the Act.

⁷⁶ *Deng v Zheng* [2022] NZSC 76 at [78(a)].

⁷⁷ A similar option was considered in the Second Review but was not progressed: Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [2.27]–[2.34].

⁷⁸ Resource Management Act 1991, s 269(3).

⁷⁹ Te Ture Whenua Maori Act 1993, s 66(1).

QUESTION

Q2

Should the Act be amended to address the admissibility of tikanga and mātauranga in proceedings to which the Act applies? If so, should the Act be amended to:

- a. introduce statutory exceptions to the rules against hearsay and opinion evidence for evidence of tikanga Māori (and potentially mātauranga Māori); and/or
- b. introduce guidance as to the need to interpret and apply the provisions of the Act having regard to te ao Māori?

OTHER POTENTIAL ISSUES WITH HOW THE ACT RECOGNISES AND PROVIDES FOR TE AO MĀORI

Operation of section 30 (improperly obtained evidence) and racial bias

- 2.46 Section 30 governs the admissibility of improperly obtained evidence and is examined in detail in Chapter 7. An issue raised with us through preliminary feedback is that the current application of section 30 fails to discourage poor policing practices and that has a disproportionate impact on Māori.
- 2.47 A more specific concern relates to the application of section 30 when racial bias has impacted the gathering of evidence in a particular case. Māori and other ethnic minorities are stopped and searched by Police disproportionately.⁸⁰ New Zealand Police has acknowledged this issue and appointed an independent panel to conduct research into fair and equitable policing.⁸¹ While racial bias in policing is a broad issue that cannot be addressed solely – or even substantially – through the law of evidence (as evidence law is only concerned with breaches of rights retrospectively and only if proceedings are initiated), it is nonetheless important that section 30 responds appropriately when racial bias has impacted the gathering of evidence subsequently presented in court.
- 2.48 In *Kearns v R*, the Court of Appeal considered an argument that evidence obtained through an exercise of search powers was improperly obtained on the basis that the search was motivated by racial bias.⁸² The Court found there was an evidential basis to support the allegation that the defendant was approached by a constable (leading to a search of his vehicle) because of his race or skin colour.⁸³ The District Court judge had therefore erred in failing to determine whether the evidence disclosed by the search had been improperly obtained, for example, in breach of section 19 of the New Zealand Bill of Rights Act 1990 (freedom from discrimination). The case was remitted back to the District Court to be reheard.

⁸⁰ Eugene Bingham, Felipe Rodrigues and Chris McKeen “Unwarranted: The little-known, but widely-used police tactic” (2020) Stuff <www.stuff.co.nz>.

⁸¹ Ngā Pirihimana o Aotearoa | New Zealand Police “Police embark on new phase of research into Fair and Equitable policing” (2 June 2022) <www.police.govt.nz>.

⁸² *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835.

⁸³ *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835 at [38]–[42].

- 2.49 It appears *Kearns* has only been considered in one case subsequently. In that case, the Court of Appeal recognised an argument that evidence was obtained pursuant to a search motivated by institutional bias could be a matter of general and public importance justifying a second appeal.⁸⁴ Unlike in *Kearns*, however, there was no evidential foundation for the argument in that case.
- 2.50 We seek submissions on whether the application of section 30 in cases of potential racial bias is sufficiently clear as a result of *Kearns*. In particular, we are interested in whether counsel are confident raising issues of racial bias where appropriate and how judges approach such matters at trial (which may not always be reflected in judgments).

Protecting confidential communications

- 2.51 When developing the Evidence Code, the Commission considered how marae discussions and communications with kaumātua, tohunga and rongoā practitioners should be treated.⁸⁵ It was anticipated that section 69, which gives the court discretion to exclude confidential communications, would provide the necessary discretion in appropriate cases. The Second Review did not identify any concerns with how this provision is operating, and we have not identified any relevant cases since then. However, we seek feedback on this issue to see whether there have been any other significant developments in recent years that suggest this area should be revisited, or significant concerns about how the law is operating in practice.

Judicial warnings on cross-cultural identification bias and the risk of assessing credibility based on cultural stereotypes

- 2.52 During the development of the Evidence Code the Commission was alive to research that indicated that:
- (a) attempts to identify a person of a different racial appearance are generally less reliable than attempts to identify a person of the same racial appearance; and
 - (b) assessments of witness credibility can be influenced by cultural stereotypes.
- 2.53 The Act does not include specific directions on these matters. A judge can, however, give a warning in criminal proceedings in which the case depends wholly or substantially on the correctness of visual identification as to the special need for caution when relying on such evidence.⁸⁶
- 2.54 In the Second Review, the Commission examined research and case law on these two matters and considered whether to reform the Act to provide for judicial directions on cross-cultural identifications and/or demeanour assessments.⁸⁷ Ultimately, the Commission did not recommend reform, emphasising the need for any judicial direction

⁸⁴ This case is subject to publication restrictions until final disposition of trial.

⁸⁵ Te Aka Matua o te Ture | Law Commission *Evidence Law Reform: Te ao Māori Consultation* (unpublished consultation paper, 1997) at [106]–[107].

⁸⁶ Evidence Act 2006, s 126.

⁸⁷ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [2.35]–[2.63].

to be assessed on a case-by-case basis.⁸⁸ We invite feedback on whether there have been any developments in recent years that suggest this area should be revisited.

Giving evidence in court

- 2.55 In the Second Review, the Commission recommended the Act be amended to make it clear that courts can regulate procedures for giving evidence in a manner that recognises tikanga.⁸⁹ The Government accepted this recommendation in principle, noting that the courts already do this to a certain extent using their inherent and implied powers. However its view was that further consideration of the potential operational impacts was required.⁹⁰
- 2.56 This recommendation, if implemented, could meaningfully address several concerns we have identified with courtroom procedures and their disconnect with tikanga Māori. This may lend further support to the Commission’s recommendation in its Second Review.
- 2.57 The first issue relates to the way in which counsel and judges deal with challenges to pūkenga evidence. Often such evidence is not contested or challenged.⁹¹ However, that is not always the case, particularly in relation to competing claims among iwi or hapū. In such cases, the parties may present different or competing evidence. The conventional approach in an adversarial system is to highlight inconsistencies in evidence through cross-examination to show that a witness may be unreliable or untruthful. In te ao Māori, however, it may not be appropriate to attribute differences in accounts from pūkenga, or changing accounts over time, to questions of credibility or reliability. The conventional approach to cross-examination may therefore in some circumstances be regarded as inappropriate and potentially a breach of tikanga. As the Commission observed in its commentary on the Evidence Code:⁹²
- 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.
- 2.58 There is also a concern that, when cross-examination of pūkenga is conducted without regard to or understanding of the methodologies used within te ao Māori to gather and store information, or the tikanga processes associated with resolution of disputes in te ao Māori, this can result in misunderstanding and can waste court time. Effective cross-examination therefore demands sufficient expertise of mātauranga Māori and tikanga Māori by cross-examining counsel and the judge. Where that expertise is absent, there is an increased risk of breaching tikanga, misunderstandings and/or unnecessarily taking up court time.

⁸⁸ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [2.40].

⁸⁹ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019), recommendation 2.

⁹⁰ Government Response to the Law Commission Report: The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006 (September 2019) at 7.

⁹¹ For example, in *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120, some parties agreed among themselves that they would not cross-examine each other’s witnesses on the basis that “[t]he absence of cross-examination does not mean that the evidence is uncontested. Any contest of evidence will be dealt with through submission rather than cross-examination” (at [11(a)]).

⁹² Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C323].

- 2.59 The Act already permits a judge to have regard to the linguistic or cultural background of the witness in considering whether any question, or the way in which it is asked, is improper. The judge can disallow the question or direct that the witness is not obliged to answer it.⁹³ The Commission envisaged that this would “allow judges to exert some control over cross-examination that may be culturally offensive”.⁹⁴ The recommendation made in the Second Review would give the courts greater direction on their ability to facilitate the giving of evidence (including cross-examination) in a way that does not unnecessarily denigrate the mana of witnesses.
- 2.60 The issue is not whether pūkenga evidence can be tested in cross-examination, but rather how that evidence is tested. Our expectation is that the recommendation made in the Second Review would promote a tikanga-consistent approach to cross-examination of pūkenga. This would be similar to the way in which sophisticated principles and procedures have developed in other specific areas to address improper questioning of witnesses, including processes that seek to protect vulnerable witnesses from undue pressure or irrelevant inquiry.
- 2.61 The second issue relates to the availability of support people to witnesses giving evidence in court. Several submitters on the Second Review supported the ability for more than one support person to allow whānau to provide support in alternative ways. Again, we note that the recommendation made in the Second Review would facilitate the courts interpreting their discretion to appoint more than one support person in a way that is consistent with tikanga.⁹⁵
- 2.62 The third issue relates to procedures for relying on written briefs of evidence and was highlighted in the recent case of *Bamber v Official Assignee*.⁹⁶ On appeal from a District Court decision, it was argued that the Judge should have allowed kaumātua to speak to their affidavit evidence at the hearing, and that the failure to do so demonstrated a disrespect towards and a non-recognition of tikanga Māori.⁹⁷ On appeal the High Court acknowledged that, for completeness, it might have been preferable for the Judge to have permitted the kaumātua to speak during the hearing, but that it was within the Judge’s authority to determine the procedure for the case and to rely on affidavit evidence.⁹⁸

QUESTION

Q3

Are any other provisions in the Act failing to adequately provide for te ao Māori in practice? If so, how should the Act be amended to better recognise te ao Māori?

⁹³ Evidence Act 2006, s 85.

⁹⁴ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C323]. It suggested one way would be to encourage counsel to state a possible position to which the kaumātua is invited to respond, instead of directly questioning a kaumātua.

⁹⁵ Evidence Act 2006, s 79(1).

⁹⁶ *Bamber v Official Assignee* [2023] NZHC 260.

⁹⁷ *Bamber v Official Assignee* [2023] NZHC 260 at [21].

⁹⁸ *Bamber v Official Assignee* [2023] NZHC 260 at [43].

CHAPTER 3

Hearsay

INTRODUCTION

In this chapter, we consider and seek feedback on issues with the operation of the hearsay provisions relating to:

- the meaning of when a person is “unavailable as a witness”;
- the meaning of when a person “cannot with reasonable diligence” be found; and
- hearsay in civil proceedings.

BACKGROUND

3.1 The Evidence Act 2006 is based on the principle of orality.¹ This recognises the fundamental importance of transparency in the administration of justice through the courts, and rests upon the assumption that the fact-finder is likely to benefit from seeing and hearing witnesses give their evidence.² Evidence is therefore ordinarily given orally in court by witnesses who are available for cross-examination.³ To facilitate this, section 71 provides that every person is eligible and compellable to give evidence in court unless they fall into one of the narrow exceptions in sections 72 to 75 of the Act.⁴

3.2 An out-of-court statement that was made by a person who is not a witness can only be offered in evidence to prove the truth of its contents in limited circumstances. These are “hearsay statements”.⁵ The general test for admitting hearsay statements is contained in section 18 of the Act, which provides:

18 General admissibility of hearsay

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

¹ Codified in s 83 of the Evidence Act 2006.

² *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [1].

³ Evidence Act 2006, s 4 (definition of “witness”).

⁴ These exceptions include the Sovereign and other heads of state, judges, defendants and associated defendants.

⁵ Evidence Act 2006, s 4 (definition of “hearsay statement”).

(b) either—

(i) the maker of the statement is unavailable as a witness; or

(ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

...

3.3 Section 16(2) of the Act states that a person is “unavailable as a witness” for the purposes of the hearsay provisions if the person:

(a) is dead; or

(b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or

(c) is unfit to be a witness because of age or physical or mental condition; or

(d) cannot with reasonable diligence be identified or found; or

(e) is not compellable to give evidence.

WHEN A PERSON IS “UNAVAILABLE AS A WITNESS”

3.4 The Act narrowly prescribes situations when a person is unavailable as a witness for the purpose of the hearsay provisions. It does not confer any general discretion on the court to find that a person is unavailable for reasons other than those listed in section 16(2).

What is the issue?

3.5 Recent case law suggests the law remains unsettled as to whether the categories of unavailability for hearsay purposes can be interpreted in a way that includes situations where a person is excused by the court from giving evidence. This raises a broader question as to whether the categories of unavailability should provide for situations where a person has a good reason or “just excuse” for not giving evidence.

3.6 *Awatere v R* considered the interrelationship between the hearsay provisions and the Criminal Procedure Act 2011.⁶ That Act provides mechanisms for enforcing obligations on compellable witnesses to attend court and give evidence.⁷ Under section 165, if a person refuses to give evidence the court may order that they be detained in custody for a period not exceeding seven days.⁸ However, the court may exercise its discretion not to make such an order, thereby excusing a person from giving evidence, if they can offer a “just excuse”.⁹

3.7 In *Awatere*, the complainant left the courtroom in a distressed state during questioning by the prosecution after being declared a hostile witness.¹⁰ The Judge then ruled the

⁶ *Awatere v R* [2018] NZHC 883.

⁷ See Criminal Procedure Act 2011, ss 159, 161 and 165.

⁸ Criminal Procedure Act 2011, s 165(3)(a).

⁹ Criminal Procedure Act 2011, s 165(2)(a). See also s 159, which provides that it is not an offence to refuse to appear in court in response to a witness summons if the person has a “reasonable excuse”, and s 161, which provides that a judicial officer may issue a warrant to arrest a person who has failed to appear in response to a summons if “no reasonable excuse is offered” for that failure.

¹⁰ *Awatere v R* [2018] NZHC 883 at [13].

complainant’s statement to Police was admissible.¹¹ On appeal, the Kōti Matua | High Court held that the complainant’s police statement was hearsay.¹² The issue therefore became whether the hearsay statement could be admitted on the basis that the complainant was “unavailable as a witness”. The Court commented that, “as a matter of logic”, section 165 of the Criminal Procedure Act “could be read as modifying or glossing” the Act’s rules about compellability and therefore the meaning of “unavailable” under the hearsay rules.¹³ However, the Court found it unnecessary to determine the issue because the trial judge had made no formal ruling that the complainant had a “just excuse” under section 165 of the Criminal Procedure Act.¹⁴

- 3.8 In addition to *Awatere*, we are aware of two other recent cases that considered the application of the hearsay provisions to an out-of-court statement made by a person who was excused from giving evidence.¹⁵ Like *Awatere*, these cases suggested it could be possible that having a “just excuse” under the Criminal Procedure Act might constitute being “unavailable” for hearsay purposes, but neither case had to decide the issue.

Policy and legislative history

- 3.9 The hearsay provisions were based on Te Aka Matua o te Ture | Law Commission’s Evidence Code.¹⁶ When developing the Evidence Code, the Commission considered whether it should treat witnesses as unavailable in other situations. Specifically, the Commission considered people who were too frightened or traumatised to give evidence.¹⁷ Ultimately, it decided that “trauma” would be sufficiently covered by unavailability due to a mental condition (under what is now section 16(2)(c)), and that frightened witnesses could be accommodated through other measures.¹⁸ The Commission also decided against treating as unavailable a witness who was physically present in court but refused to give evidence.¹⁹
- 3.10 The Commission was, however, concerned about the effect of abolishing the spousal non-compellability rule for domestic violence complainants, who may be put at risk of retaliatory violence if compelled to give evidence.²⁰ The Commission had consulted on a proposal to give judges a discretion to excuse a witness if the judge was not satisfied that

¹¹ *Awatere v R* [2018] NZHC 883 at [16].

¹² *Awatere v R* [2018] NZHC 883 at [25].

¹³ *Awatere v R* [2018] NZHC 883 at [39].

¹⁴ *Awatere v R* [2018] NZHC 883 at [45].

¹⁵ These cases are subject to publication restrictions until final disposition of trial.

¹⁶ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 44–55. As part of its work on evidence law reform, the Commission had also published two preliminary papers on hearsay: Te Aka Matua o te Ture | Law Commission *Hearsay Evidence* (NZLC PP10, 1989) and Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991).

¹⁷ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 1, 1999) at [58].

¹⁸ Such as allowing anonymity or the use of screens or closed-circuit television. Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 1, 1999) at [58]. The courts can and do give permission to give evidence remotely when witnesses are fearful of retaliation. See, for example, *Rameka v R* [2019] NZCA 105 at [52].

¹⁹ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [59].

²⁰ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [344]. See also Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [229]–[231].

the witness could be protected from retaliation.²¹ That proposal received a mixed response, with some commentators of the view that such a discretionary rule should in fairness extend to all frightened witnesses, not just to victims of family violence.²² The Commission was concerned that extending such a rule to all frightened witnesses would “potentially allow a large number of crucial prosecution witnesses to be excused, which is clearly undesirable”.²³ Conceding the issue had caused “considerable difficulty”,²⁴ the Commission ultimately decided it was premature to include in the Evidence Code special rules dealing with the compellability of victims of family violence.²⁵ It did not address the consequences of such rules for the admissibility of hearsay statements.

- 3.11 The Evidence Bill as introduced did address partners at risk of family violence. Clause 71 provided a discretion to excuse those in “close personal relationships” with defendants from giving evidence. The consequence of a decision to excuse a person was that the person was deemed “unavailable” for hearsay purposes. A Cabinet paper on this matter referred explicitly to the court’s existing power to excuse a witness with just excuse from giving evidence as “bolstering” the proposal.²⁶ The clause was, however, removed at select committee stage due to concerns about incentivising coercion, the potential arbitrariness of determining what constitutes a close personal relationship, and the undesirability of admitting statements through the hearsay provisions without opportunity for cross-examination.²⁷

Is legislative reform necessary or desirable?

- 3.12 Our preliminary view is that legislative reform may be desirable to clarify the scope of the hearsay provisions. The question then becomes, as a matter of policy, how the Act should respond to situations where a person has a good reason or “just excuse” not to give evidence.
- 3.13 This question engages fundamental and competing public interests.²⁸ As a general rule, it is in the interests of justice that all relevant information should be available to the fact-finder. It is also important to consider the interests of the witness. In some cases, a witness may face adverse consequences if they give evidence, such as intimidation or retaliation. However, relying on hearsay statements means that a defendant is deprived of the opportunity to challenge that evidence in cross-examination. This engages a defendant’s

²¹ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [344].

²² Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [345].

²³ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [345].

²⁴ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [346].

²⁵ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [347].

²⁶ Cabinet Paper “Evidence Bill: Paper 5: Spousal Witness Immunity and Children’s Evidence” (18 March 2003) at [12].

²⁷ Evidence Bill 2005 (256-2) (select committee report) at 9.

²⁸ See, for example, discussion in Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [61]. These competing interests are recognised in s 6 of the Evidence Act 2006 which refers to the need to provide rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990, to promote fairness to parties and witnesses, and to protect other important public interests.

fundamental right to a fair trial, which is enshrined under the New Zealand Bill of Rights Act 1990 and includes the right to cross-examine witnesses.²⁹

Options for reform

- 3.14 There are, broadly speaking, two opposing legislative options for reform, which reflect the stark policy choice involved.

Option 1: Clarify that there is no jurisdiction to admit hearsay from people excused from giving evidence

- 3.15 This option gives priority to a defendant’s right to a fair trial by clarifying that a person who is available as a witness and compellable to give evidence must be available for cross-examination if their evidence is to be admitted in court. This option could be achieved by amending the Act to clarify that “compellability” for hearsay purposes is defined by sections 71 to 75 of the Act. This would respond to the question raised in *Awatere* and confirm that the term “compellable to give evidence” in section 16 is to be given its meaning in the Act rather than being modified or glossed by section 165 of the Criminal Procedure Act.³⁰
- 3.16 Under this option, concerns about witnesses who may have a good reason for not giving evidence would need to be addressed through the Act’s provision of alternative ways of giving evidence.³¹
- 3.17 There is some support for this approach. One commentator, writing on the High Court decision in *Awatere*, has argued that any extension of the exceptions to the rule against hearsay to encompass statements of witnesses who “choose not to give evidence” would tilt the balance too far against the accused by precluding cross-examination.³² They suggest that a decision by the court to excuse a person from giving evidence, or a failure of the existing sanctions to facilitate a person giving evidence, should not result in the admission of hearsay. Rather, “[i]t is simply the nature of criminal law that in some cases there will be insufficient admissible evidence on which to base a conviction”.³³
- 3.18 This option seems broadly consistent with Parliament’s intention when passing the Act. The policy history discussed above demonstrates that consideration was given to different situations where a witness may have a good reason for not giving evidence. Ultimately, greater weight was placed on the defendant’s fair trial rights, the importance

²⁹ New Zealand Bill of Rights Act 1990, s 25(f). See also s 27. The Commission observed in its 1999 Report that to a lesser degree there may be analogous rights in civil proceedings – for instance, the right not to be subjected to an adverse judgment unless a case has been made out, and the right to call and cross-examine witnesses: *Te Aka Matua o te Ture | Law Commission Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [18].

³⁰ *Awatere v R* [2018] NZHC 883 at [39].

³¹ Evidence Act 2006, ss 103–105 (general provisions about alternative ways of giving evidence); ss 106AA–106B (relating to family violence complainants); ss 106C–106J (relating to sexual case complainants or propensity witnesses); ss 107AA–107B (relating to child witnesses in criminal proceedings); ss 108 and 109 (relating to undercover police officers); and ss 110–118 (relating to anonymous witnesses). In relation to family violence complainants, see discussion in *Te Aka Matua o te Ture | Law Commission The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019), ch 9.

³² Cara Thorburn “Compellability of Complainants in Family Violence Prosecutions: “Just Excuse” and the Application of the Hearsay Rules” [2019] NZLJ 57 at 59.

³³ Cara Thorburn “Compellability of Complainants in Family Violence Prosecutions: “Just Excuse” and the Application of the Hearsay Rules” [2019] NZLJ 57 at 60.

of preserving the availability of cross-examination, and the availability of alternative ways of giving evidence.³⁴

Limitations of Option 1

3.19 This option would not provide for situations where the defendant, through threats or other actions, causes a person to have a just excuse to not give evidence (discussed under Option 2 below).

3.20 This option also leaves people who may have a good reason for not giving evidence in a difficult position. For example, where there is no way for the prosecution to prove a family violence charge without the complainant's evidence, and no way to admit the complainant's hearsay statement even if they have a good reason for not giving evidence, then the prosecution needs to summon that complainant under threat of imprisonment for not complying with the summons and, if necessary, have them declared hostile in court in order to admit their previous statement as evidence.³⁵ These issues have long been recognised.³⁶ As the Commission observed in its 1994 Preliminary Paper on privilege:³⁷

The public may well question the adequacy of a justice system in which a battered woman who refuses to testify against her partner is imprisoned for contempt while the defendant goes free.

3.21 This option also fails to resolve some of the anomalies under the Act. If, for example, a complainant who fears retaliation is successful in avoiding Police, then their reliable hearsay statement can be admitted on the basis that they “cannot with reasonable diligence be... found”.³⁸ Similarly, if a person is outside Aotearoa New Zealand, their fear of retaliation for giving evidence can be considered when determining whether it is “reasonably practicable” for them to be a witness.³⁹ If, however, they are found in Aotearoa New Zealand and are compelled to attend court but refuse to give evidence (regardless of the legal sanctions they face for refusing to do so), their hearsay statement is inadmissible regardless of its reliability.

3.22 The cases discussed above suggest that there will be situations where the court does not consider it to be in the interests of justice to exclude hearsay statements from a person who has a good reason for not giving evidence. This option would not accommodate these situations. It is also arguable that such a restrictive approach is not necessary to

³⁴ See, for example, Evidence Bill 2005 (256-2) (select committee report) at 9.

³⁵ This was illustrated in *Huritu v New Zealand Police* [2021] NZCA 15 at [7]. The complainant was arrested on warrant to secure her attendance at the trial, and then bailed to attend the retrial. A second warrant was executed for her arrest when she failed to appear, but she could not be found.

³⁶ See, for example, Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 122–125.

³⁷ Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [230].

³⁸ Evidence Act 2006, s 16(2)(d). See, for example, *Rameka v R* [2019] NZCA 105; *Huritu v New Zealand Police* [2021] NZCA 15.

³⁹ See, for example, *Zespri Group Ltd v Gao* [2020] NZHC 109, Schedule - Hearsay Rulings at [26]–[28]. In that case, genuine fears held by the makers of the hearsay statements were not sufficient to render them unavailable given the absence of efforts by the party to try and allay their concerns. The Court noted that confidentiality orders and alternative ways of giving evidence could have been explored, but in the absence of such efforts having been made, the threshold in s 16(2)(b) had not been met (at [28]).

preserve a defendant’s fair trial rights provided there are other adequate safeguards. We address this further under Option 2.

Option 2: A new discretion to admit a hearsay statement when a person has a good reason not to give evidence

- 3.23 This option would expand the situations in which a person’s hearsay statement could be admitted. It could be achieved by introducing a new category of “unavailability” in section 16(2) or providing a new alternative to the unavailability requirement in section 18(1)(b).
- 3.24 The objective of this option would be to ensure relevant and reliable information is available to the court when it considers a person should not be required to give evidence.
- 3.25 We have adopted the language of “good reason” in this discussion to avoid conflating this option with a finding of “just excuse” under section 165 of the Criminal Procedure Act.⁴⁰ Requiring a finding of “just excuse” under the Criminal Procedure Act to engage the hearsay provisions would result in procedural difficulties. A judge can only exercise their discretion under section 165 at the trial, and only if the person is present in court. Further, a determination under section 165 is also made for a separate purpose – to decide whether a witness should be detained in order to compel them to give evidence in court – not to decide whether their hearsay statement should be admissible. Different considerations are engaged, including, in the latter situation, the importance of the availability of cross-examination. For these reasons, under this option, we think a judge should be able to make a determination of “good reason” independently under the Act for the purposes of assessing the admissibility of a hearsay statement. The existing notice provision in section 22 of the Act requiring a party to give advance notice of an intention to offer a hearsay statement in evidence would apply. We discuss how “good reason” could be defined below.
- 3.26 This option departs from the original underpinning policy of the hearsay provisions, discussed above. However, we think it is appropriate to reconsider whether the Act strikes the right balance between the competing public policy interests, given the problems identified in the case law outlined above, the criticism of the decision to abolish spousal non-compellability in the Act given its impact on victims of family violence,⁴¹ and developments in international human rights law on this issue, which we discuss below.
- 3.27 This option would address concerns identified by some commentators,⁴² and is broadly consistent with more expansive approaches taken in comparable jurisdictions.⁴³ Of most assistance is the approach in England and Wales.

⁴⁰ While a finding can be made prior to trial that a person had a “reasonable excuse” for not responding to a witness summons under s 161 of the Criminal Procedure Act 2011, that decision is made by a judicial officer rather than a judge and, like decisions under s 165, is for a limited purpose (deciding whether to issue an arrest warrant to obtain attendance of a summoned person before the court).

⁴¹ Discussed in Elisabeth McDonald “Hearsay in domestic violence cases” [2003] NZLJ 174 at 176.

⁴² Elisabeth McDonald “Hearsay in domestic violence cases” [2003] NZLJ 174. McDonald argued that in all cases where there is a justifiable decision to excuse a witness a finding of “unavailability” for hearsay purposes must follow (at 175). Scott Optican has also suggested consideration be given to such a provision: Scott Optican “Evidence” [2021] NZ L Rev 313 at 343 and n 136; Scott Optican “Evidence” [2018] NZ L Rev 429 at 472.

⁴³ The approach in England and Wales (discussed below) has also been implemented in South Australia: Evidence Act 1929 (SA), s 34KA. In Australia, the categories of unavailability for hearsay purposes are similar to those in the Evidence

The fear-based approach in England and Wales

3.28 The Criminal Justice Act 2003 (UK) includes similar categories of unavailability for hearsay purposes as the Act, with one notable additional category, which applies when:⁴⁴

... through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

3.29 The term “fear” is to be “widely construed” and includes fear of the death or injury of another person or of financial loss.⁴⁵ Any application to admit hearsay evidence under the “fear” category may be granted only if the court considers that the statement ought to be admitted in the interests of justice.⁴⁶ In doing so, the court must have regard to the statement’s contents, any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and, in particular, to how difficult it will be to challenge the statement if the relevant person does not give oral evidence) and, in appropriate cases, the fact that special measures for the giving of evidence by “fearful witnesses” could be made.⁴⁷

3.30 The Criminal Justice Act also provides a residual discretion for the judge to admit hearsay evidence if satisfied that it is in the interests of justice, having regard to a range of prescribed considerations.⁴⁸

Grand Chamber consideration of the fear-based approach

3.31 The Grand Chamber of the European Court of Human Rights (Grand Chamber) considered whether the category for “fear” is compatible with fair trial rights (including the right to cross-examine)⁴⁹ in *Al Khawaja and Tahery v United Kingdom*.⁵⁰

3.32 The Grand Chamber observed there were two requirements that follow from the general principle that the accused should be given an opportunity to challenge and question a witness against them:⁵¹

Act 2006, but with additional categories that provide for situations where all reasonable steps have been taken by the party seeking to prove the person is not available to either find the person or secure their attendance, or to compel them to give evidence, but without success: Evidence Act 1995 (Cth), pt 2 s 4. This provides for situations where a witness makes it clear that they will resist attempts to make them attend or give evidence, and for situations where a person attends court but then refuses to provide evidence, whatever threats are made concerning the consequences arising out of a contempt of court: Stephen Odgers *Uniform Evidence Law* (17th ed, Thomson Reuters, Pymont, 2022) at 1793–1794. In Canada, hearsay is admissible if it has sufficient reliability and, in the circumstances, admission is “reasonably necessary”, which has allowed for greater use of hearsay evidence from witnesses who are technically “available”. See, for example, *R v Khan* [1990] 2 SCR 531 and *R v Rockey* [1996] 3 SCR 829.

⁴⁴ Criminal Justice Act 2003 (UK), s 116(2)(e), replacing Criminal Justice Act 1988 (UK), 23(3)(b).

⁴⁵ Criminal Justice Act 2003 (UK), s 116(3).

⁴⁶ Criminal Justice Act 2003 (UK), s 116(4).

⁴⁷ Criminal Justice Act 2003 (UK), s 116(4). The court can also have regard to “any other relevant circumstances”: s 116(4)(d).

⁴⁸ Criminal Justice Act 2003 (UK), s 114.

⁴⁹ The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), Art 6(1) and 6(3)(d).

⁵⁰ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber). This issue was also considered by the Supreme Court of the United Kingdom in *R v Horncastle* [2009] UKSC 14.

⁵¹ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [119].

First, there must be a good reason for the non-attendance of a witness. Second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6.

- 3.33 The Grand Chamber went on to discuss whether absence owing to fear is a “good reason” for non-attendance.⁵² A distinction was drawn between two types of fear: fear that was attributable to threats or other actions of the defendant or those acting on their behalf, and fear that is attributable to a more general fear of what will happen if they give evidence at trial.⁵³ In relation to fear attributable to the defendant or those acting on their behalf, the Grand Chamber considered that:⁵⁴

... it is appropriate to allow the evidence of that witness to be introduced at trial without the need for the witness to give live evidence or be examined by the defendant or his representatives – even if such evidence was the sole or decisive evidence against the defendant. To allow the defendant to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and witnesses. No court could be expected to allow the integrity of its proceedings to be subverted in this way. Consequently, a defendant who has acted in this manner must be taken to have waived his rights to question such witnesses under Article 6 § 3(d). The same conclusion must apply when the threats or actions which lead to the witness being afraid to testify come from those who act on behalf of the defendant or with his knowledge and approval.

- 3.34 The Grand Chamber acknowledged the concern that it was “notoriously difficult” for any court to be certain that a defendant had threatened a witness but considered that such difficulties were “not insuperable”.⁵⁵
- 3.35 In relation to the “more common” situation, where fear is attributable to a general fear of the consequences of giving evidence, the Grand Chamber observed:⁵⁶

There is ... no requirement that a witness’s fear be attributable directly to threats made by the defendant in order for that witness to be excused from giving evidence at trial. Moreover, fear of death or injury of another person or of financial loss are all relevant considerations in determining whether a witness should not be required to give oral evidence. This does not mean, however, that any subjective fear of the witness will suffice. The trial court must conduct appropriate enquiries to determine first, whether or not there are objective grounds for that fear, and, second, whether those objective grounds are supported by evidence ...

- 3.36 The Grand Chamber emphasised that the admission of hearsay statements “must be a measure of last resort”, and the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable.⁵⁷
- 3.37 The Grand Chamber went on to conclude that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission will not automatically result in a

⁵² *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [122]–[125].

⁵³ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [122].

⁵⁴ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [123].

⁵⁵ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [123], discussing *R v Horncastle* [2009] UKSC 14.

⁵⁶ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [124].

⁵⁷ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [125].

breach of fair trial rights relating to cross-examination. However, any court must “subject the proceedings to the most searching scrutiny”.⁵⁸ An important factor in any assessment will be the presence of “sufficient counterbalancing factors”, including the existence of strong procedural safeguards.⁵⁹

- 3.38 The Grand Chamber considered the safeguards in the Criminal Procedure Act (UK) were, in principle, strong safeguards designed to ensure fairness.⁶⁰ These include provision to admit evidence relevant to the credibility of the maker of the hearsay statement even where that evidence would not have been admissible had the person given evidence in court,⁶¹ the residual discretion to refuse to admit a hearsay statement if satisfied that the case for its exclusion substantially outweighs the case for admitting it,⁶² and the requirement that the judge stop the case if the hearsay evidence is “so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe”.⁶³

How would “good reason” be defined?

- 3.39 This option could introduce a discretion that simply applies when a judge is satisfied that a person has a good reason not to give evidence. Alternatively, more focused language could be adopted, such as the formulation of “fear” in England and Wales. The benefit of the latter approach is that existing case law would provide some guidance as to how it should be applied in the Aotearoa New Zealand context. It would, however, potentially be narrower than a general “good reason” formulation.
- 3.40 We have identified two broad subcategories that could potentially warrant inclusion within any new discretionary category:
- (a) **When a person is subjected to intimidation attributable to the defendant.** This would apply where a judge is satisfied that a person has been intimidated by or on behalf of the defendant. There are good reasons for including this subcategory, as noted by the Grand Chamber and set out at paragraph 3.33 above. It would also provide a clear deterrent to defendants engaging in intimidatory tactics that may otherwise interfere with the proper administration of justice. It may, however, be difficult to prove intimidation in any given case, so adopting this subcategory alone may have little utility in practice.
 - (b) **When a person fears retaliation if they give evidence.** This could have most application in situations where a complainant is in a violent relationship with the defendant, but it would not necessarily be limited to such situations. To avoid infringing a defendant’s fair trial rights, this subcategory would require a high threshold. It would therefore, not be appropriate to regard this as a complete answer

⁵⁸ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [147].

⁵⁹ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [147].

⁶⁰ *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [151]. The Grand Chamber also noted at [150] the general safeguards of a discretion to exclude evidence if its admission would have such an adverse effect on the fairness of the trial that it ought not be admitted (Police and Criminal Evidence Act 1984, s 78), and common law requirements in relation to jury directions on burden of proof and reliance on hearsay statements.

⁶¹ Criminal Justice Act 2003 (UK), s 124.

⁶² Criminal Justice Act 2003 (UK), s 126.

⁶³ Criminal Justice Act 2003 (UK), s 125. This safeguard had been recommended by the Law Commission of England and Wales in 1997.

to “the vexed issue”, identified in *Awatere*, of how the law of evidence, and the courts as a matter of practicality, deal with victims of family violence who, for reasons of fear, do not wish to give evidence.⁶⁴ For example, a fear of adverse social, emotional or financial consequences of giving evidence would be unlikely to qualify under this category.⁶⁵ As te Kōti Pira | Court of Appeal observed in the pre-Act case *R v Manase*, to admit hearsay evidence “simply because the witness would prefer not to face the ordeal or giving evidence or would find it difficult to do so ... would be to tilt the balance too far against the accused”.⁶⁶ Additionally, satisfying a judge that they have good reason under this subcategory may be as much of a hurdle for a complainant as giving evidence.⁶⁷ Even if a complainant is excused, the fact that their hearsay statement is relied on in court instead will not necessarily protect them from future violence.⁶⁸

- 3.41 People who may be too traumatised to give evidence can, we think, be considered under the existing category of unavailability that applies to people who are “unfit to be a witness because of age or physical or mental condition”.⁶⁹ As noted above, the Commission intended that this would sufficiently cover people who are too traumatised to give evidence.⁷⁰ Early case law interpreted this section as imposing a high threshold that required more than evidence that a person is “simply distressed or depressed”.⁷¹ However, in the recent case of *Downes v R*, the Court of Appeal preferred a different approach that appears to be more in line with the Commission’s original intention:⁷²

We do not consider that it is helpful to describe the threshold as “a high one”; the inquiry should focus on the statutory language without that gloss. The possibility that a pre-existing mental condition may have the effect of rendering a person unavailable to give evidence is expressly contemplated by the Act; whether it has that effect in a particular case turns on [an] “intensely factual” inquiry...

Is there a need for further safeguards?

- 3.42 A determination that a person has “good reason” not to give evidence would not mean that their hearsay statement will automatically be admissible. The statement would still need to meet the reliability threshold for hearsay statements in section 18(1)(a) and under

⁶⁴ *Awatere v R* [2018] NZHC 883 at [22]. Elisabeth McDonald notes that extending the definition of unavailability to cover witnesses who are fearful “is probably unnecessary”. However, that was on the assumption that a decision to excuse a person from giving evidence triggers the hearsay provisions in the Act: Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 149 and Appendix 1.

⁶⁵ For a discussion of the different reasons why a complainant might be reluctant to give evidence against an abusive partner, see Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [229]–[231] and Elisabeth McDonald “Hearsay in domestic violence cases” [2003] NZLJ 174 at 176.

⁶⁶ *R v Manase* [2001] 2 NZLR 197 (CA) at [30(b)].

⁶⁷ Elisabeth McDonald “Hearsay in domestic violence cases” [2003] NZLJ 174 at 176.

⁶⁸ As Elisabeth McDonald has said, “[t]hose who make sufficiently dire threats in order to decrease the amount of prosecution evidence are unlikely to be influenced by how the evidence was offered”: Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 148–149.

⁶⁹ Evidence Act 2006, s 16(2)(c).

⁷⁰ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [58].

⁷¹ *R v Alovili* HC Auckland CRI-2007-404-000162, 27 June 2008 at [26].

⁷² *Downes v R* [2022] NZCA 639 at [37].

section 8 the probative value of the statement must outweigh the risk of unfair prejudicial effect, taking into account the right of the defendant to offer an effective defence.

- 3.43 The veracity and propensity provisions in the Act already permit a defendant to offer evidence in relation to any “person”, which would appear to include the maker of a hearsay statement.⁷³
- 3.44 We are interested in views on whether additional safeguards would be desirable under this option. Like the approach in England and Wales, this option could require the judge to be satisfied that it is in the interests of justice to admit the hearsay statement.⁷⁴ Relevant considerations could be prescribed in statute and could include the availability of alternative ways of giving evidence. This would ensure that excusing a witness from giving evidence and relying on a hearsay statement is a measure of last resort. Another option would be for the judge to have the power to stop proceedings if satisfied that the hearsay evidence is so unconvincing that a conviction would be unsafe.⁷⁵

QUESTIONS

Q4

Should the Act be amended to clarify the application of the hearsay provisions? If so, should the Act be amended to:

- a. clarify that a court finding that a person has a just excuse not to give evidence under the Criminal Procedure Act 2011 does **not** affect the application of the hearsay provisions under the Evidence Act; or
- b. introduce a new discretion to permit the court to admit reliable hearsay statements when a person has a good reason not to give evidence?

Q5

If the Act were amended to introduce a new discretion, should this be:

- a. a general discretion for situations where a person has a “good reason” not to give evidence; or
- b. a narrow discretion founded on fear, similar to the approach in England and Wales?

Q6

If a new discretion to admit hearsay statements is introduced, what additional safeguards, if any, should be inserted into the Act?

WHEN A PERSON “CANNOT WITH REASONABLE DILIGENCE” BE FOUND

- 3.45 Section 16(2)(d) of the Act states that a person is “unavailable as a witness” for the purposes of the hearsay provisions if the person “cannot with reasonable diligence be

⁷³ Evidence Act 2006, ss 37(1) and 40(2).

⁷⁴ Criminal Justice Act 2003 (UK), s 116(4).

⁷⁵ This would be in addition to the power in s 147 of the Criminal Procedure Act 2011. See, for example, Criminal Justice Act 2003 (UK), s 125 discussed above.

identified or found”. If a person is unavailable as a witness, their hearsay statement is admissible provided that the circumstances relating to the statement provide reasonable assurance that the statement is reliable.⁷⁶

Is there an issue?

- 3.46 Preliminary feedback identified a concern about the lack of guidance in the Act or case law as to what is required to satisfy the “reasonable diligence” requirement in section 16(2)(d). There is concern that this may be a growing issue given the increasing practice of video recording police statements and interviews.⁷⁷ If a witness cannot be found, their hearsay statement could provide an important source of information for the fact-finder. In some cases, it may be the only direct evidence to support the charges. As discussed above, however, the use of any hearsay statement engages fair trial rights because it deprives the defendant of the opportunity to challenge that evidence in cross-examination.
- 3.47 This issue arose in *Huritu v Police*.⁷⁸ The defendant had been charged with assaulting the complainant. The complainant had been summoned to give evidence at the District Court trial and, when she did not appear, was arrested pursuant to a warrant and released on bail to appear at the rescheduled trial. When the complainant failed to appear on the morning of the rescheduled trial, a warrant for her arrest was issued and the trial judge gave police until that afternoon to locate her. Police unsuccessfully attempted to locate the complainant by visiting her house and that of a friend, and also by calling her. Later that day, the Court granted an application to admit the complainant’s hearsay statement on the basis that she could not with reasonable diligence be found.⁷⁹
- 3.48 The High Court rejected the defendant’s argument that a higher threshold of diligence should have been applied to locate the complainant in circumstances where without the hearsay statement, the defendant had no case to answer.⁸⁰ On further appeal, defence counsel invited the Court of Appeal to adopt a set of principles (based on a number of judgments of the Court of Appeal of England and Wales) to guide trial judges in the application of the reasonable diligence test.⁸¹ The Court declined to do so, finding that the question of whether a witness is or is not able to be found “is a simple question of fact” and that:⁸²

The question of whether reasonable diligence has been applied in attempting to find a witness requires an assessment of what has been done in the overall circumstances. There is no difficulty in the statutory language. What is required is simply an assessment as to whether what has been done amounts to reasonable diligence. We consider Ms Hoskin was correct to

⁷⁶ Evidence Act 2006, s 18(1).

⁷⁷ The Evidence Act 2006, part 3, subpart 5 provides for evidence to be offered by video record as an alternative way of giving evidence in chief at the trial. These records are known as evidential video interviews or EVIs. They are often used in relation to child witnesses and adult complainants in sexual offending cases. The Evidence Regulations 2007, part 4 also provides for mobile video records or MVRs in relation to family violence offending.

⁷⁸ *Huritu v Police* [2019] NZHC 2560; *Huritu v New Zealand Police* [2021] NZCA 15, *Huritu v New Zealand Police* [2021] NZSC 126 (dismissing application for leave to appeal).

⁷⁹ *Huritu v New Zealand Police* [2021] NZCA 15 at [7]–[8].

⁸⁰ *Huritu v New Zealand Police* [2021] NZCA 15 at [16]–[17] and [37].

⁸¹ *Huritu v New Zealand Police* [2021] NZCA 15 at [21] and [37]–[38].

⁸² *Huritu v New Zealand Police* [2021] NZCA 15 at [37]–[38].

submit that issue is to be determined by looking at the steps taken to find the witness and ought not to be influenced by a consideration of what role the witness will play in the trial if he or she is located and gives evidence.

- 3.49 The Court noted that a factual determination that a person is unavailable as a witness does not mean their hearsay statement will for that reason be admissible. There must still be reasonable assurance that the statement is reliable (section 18(1)(a)) and the probative value of the statement must outweigh the risk that the statement would have an unfairly prejudicial effect on the proceeding (section 8). The Court noted that the latter issue is to be assessed taking into account the right of the defendant to offer an effective defence.⁸³
- 3.50 Te Kōti Mana Nui | Supreme Court declined leave to appeal the decision. The Judges that considered the leave application affirmed the Court of Appeal's view that whether the reasonable diligence test was met required a factual inquiry.⁸⁴ They observed that:⁸⁵

There may be room for differing views about the reasonableness of the steps taken by the police in this case in light of their responsibilities, the complainant's earlier non-appearance and the history of the relationship between the applicant and complainant. That possibility does not, however, detract from the factual nature of inquiry to be undertaken. Further, the assessment made here is one which, on the face of it, comes within the policy of the legislative scheme.

How does the current approach compare with overseas approaches?

- 3.51 In England and Wales, the relevant statutory test is that the person “cannot be found although such steps as it is reasonably practicable to take to find him have been taken”.⁸⁶ As noted above, the Court of Appeal in England and Wales has provided some guidance on how this test is to be applied. These requirements start with the witness being given all possible support and made to understand the importance of their duty to give evidence.⁸⁷ If a witness is difficult to contact, then it may be necessary for the trial to be delayed in order for additional steps to be taken.⁸⁸ Unlike the New Zealand Court's approach in *Huritu*, multiple cases have found that the importance of the evidence to the case is a relevant factor.⁸⁹ Some cases have also found the seriousness of the charge to be relevant.⁹⁰
- 3.52 The test in Australia is similar to that in England and Wales, requiring that “all reasonable steps have been taken, by the party seeking to prove the person is not available, to find

⁸³ *Huritu v New Zealand Police* [2021] NZCA 15 at [39].

⁸⁴ *Huritu v New Zealand Police* [2021] NZSC 126 at [8].

⁸⁵ *Huritu v New Zealand Police* [2021] NZSC 126 at [11].

⁸⁶ Criminal Justice Act 2003 (UK), s 116(2)(d).

⁸⁷ *R v DT* [2009] EWCA Crim 1213 at [31]–[33] where the Court held that, if there was a problem with the cost of finding and caring for and a reluctant witness, then that needed to be shown with evidence. On the facts at hand, the Court found that matters had proceeded so informally before the Judge that no attempt had been made, and no evidence called, to try and explore what steps had been taken by the police to discover the whereabouts of the witness.

⁸⁸ *R v Jones* [2015] EWCA Crim 1317 at [18].

⁸⁹ *Halsbury's Laws of England* (5th ed, 2021, online ed) vol 28 Criminal Procedure at [627], n 12, citing *R v McEvoy* [2016] EWCA Crim 1654, *R v Juskelis* [2016] EWCA Crim 1817, and *R (on the Application of Rankin) v Ipswich Magistrates Court* [2016] EWHC 2851 (Admin).

⁹⁰ *R v Juskelis* [2016] EWCA Crim 1817.

the person or secure his or her attendance, but without success”.⁹¹ This requirement was considered by the New South Wales Supreme Court in *Huang v Wei*. The Court concluded that it was not possible to set out an all-encompassing list of relevant considerations (given the fact-specific nature of the inquiry), but suggested that at least some of the following considerations will be relevant:⁹²

- (a) The nature of the case (suggesting that a higher bar for criminal cases may be justifiable).
- (b) The importance of the evidence.
- (c) The inquiries that have been made and their outcome.
- (d) Who the party is that is making the inquiries and about whom the inquiries are being made.
- (e) The likelihood of any specific step yielding useful information.
- (f) The cost and delay that a particular step might cause.

3.53 The Court noted that the following factors might also be relevant:⁹³

- (a) Is the identity of the potential witness known?
- (b) Are the location or other contact details for the potential witness known?
- (c) What, if anything, is known about the person’s attitude to giving evidence?
- (d) The practicability of compelling the witness to give evidence.
- (e) When did the party applying for the benefit of the exception become aware of the existence of the witness and the evidence the witness could give?
- (f) The ability of the other party to respond to the evidence.

Is legislative reform necessary or desirable?

3.54 We seek feedback on whether the current approach to the reasonable diligence requirement is causing problems in practice, and whether reform is necessary or desirable. On the one hand, there is clear appellate authority that the inquiry is a simple question of fact. It may be that this is the best approach as it allows for the relevant matters to be considered on a case-by-case basis. On the other hand, the Court of Appeal’s decision in *Huritu* (and the Supreme Court’s subsequent refusal of leave) suggests that further guidance from these courts on this issue is unlikely to be forthcoming in the near future. Legislative reform may therefore be considered necessary or desirable if the lack of statutory guidance is resulting in inconsistency in approach or uncertainty as to what steps police should take to locate an intended witness.

3.55 Should reform be considered necessary or desirable, the Act could be amended to include further guidance on the “reasonable diligence” requirement. Such guidance could take the form of a list of relevant factors a court should consider when deciding whether

⁹¹ See for example: Evidence Act 1995 (Cth), Part 2 – Other Expressions, cl 4; Evidence Act 1995 (NSW), Part 2 - Other expressions, cl 4; Evidence Act 2008 (VIC), Part 2—Other expressions, cl 4.

⁹² *Huang v Wei* [2022] NSWSC 222 at [41].

⁹³ *Huang v Wei* [2022] NSWSC 222 at [42].

a person cannot, without reasonable diligence, be found. Consideration would need to be given to the following matters:

- (a) Whether the significance of the person's evidence to the proceeding should be a relevant factor. The New Zealand courts' current approach can be contrasted with approaches in Australia and England and Wales, as discussed above. The New Zealand courts' current approach is also inconsistent with the approach to assessing whether a witness' attendance would cause undue expense or delay under an alternative limb of the hearsay provisions (section 18(1)(b)(ii)).⁹⁴
- (b) Whether the Act should prescribe certain steps as a precondition (or presumptive requirement) to finding that reasonable diligence has been satisfied. This could include consideration of whether there should be an obligation to provide a potential witness with certain information, to maintain a level of contact with that person, and/or to take certain steps if the person indicates they are reluctant to give evidence. We note, however, that in *Huritu* the Court of Appeal rejected the suggestion that there should be a general expectation or positive obligation on police to maintain contact with witnesses to identify whether an arrest warrant will be necessary to secure their attendance at trial, citing the significant resourcing implications of doing so.⁹⁵
- (c) Whether the guidance would best be contained in a non-statutory instrument. This might be more appropriate if it is considered that the guidance should be more detailed in nature, for example, if it should address the steps that should be considered or taken in different situations.
- (d) Whether there should be an expectation that evidence should be offered in support of an application to offer a hearsay statement in reliance on section 16(2)(d), rather than relying on counsel's submissions. This would require the relevant police officer(s) to give evidence on the steps taken to facilitate the witness' attendance and to be available for cross-examination if appropriate.⁹⁶ Such an expectation could increase scrutiny on the steps that had been taken and could be justified given the potential significance of admitting hearsay statements.

3.56 The language of "reasonable diligence" used in section 16(2)(d), which can be traced back to a 1967 report on hearsay evidence,⁹⁷ may also warrant updating. There may be merit in adopting the language of "all reasonable steps" as used in Australia and England and Wales. This may assist in focusing the inquiry more directly on which steps were (and were not) taken to find the witness or, in the words of the Australian legislation, to "secure [their] attendance".

⁹⁴ See, for example: *Clout v Police* [2013] NZHC 1364 at [17]–[18]; *R v Leaitua* [2013] NZHC 2910 at [16]–[18].

⁹⁵ *Huritu v New Zealand Police* [2021] NZCA 15 at [40].

⁹⁶ Formal statements are admissible as evidence for the purpose of any pre-trial applications to the same extent as if it were oral evidence under s 86 of the Criminal Procedure Act 2011, but a party may apply for an order allowing the oral examination of a potential witness under s 90.

⁹⁷ Torts and General Law Reform Committee *Hearsay Evidence* (1967) at 9, which recommended expanding the list of people who are unavailable to give evidence to include people who "cannot with reasonable diligence be found".

QUESTION**Q7**

Is the operation of section 16(2)(d) causing problems in practice? If so, should it be amended to:

- a. prescribe factors that are relevant to determining whether the section 16(2)(d) threshold is satisfied; and/or
- b. amend the language used in section 16(2)(d) so that it requires “all reasonable steps” to be taken to find the person and/or secure their attendance at court?

HEARSAY IN CIVIL PROCEEDINGS

- 3.57 The Act determines the admissibility of evidence in both civil and criminal proceedings. In civil proceedings, the Act must also be read alongside the relevant rules of court, including the High Court Rules 2016 (HCRs), which regulate practice and procedure.⁹⁸
- 3.58 Under the HCRs, evidence in chief is usually given by the witness reading a brief of evidence⁹⁹ that is prepared in advance and served upon all other parties before trial.¹⁰⁰ Documents are normally received in evidence by their inclusion in the “common bundle”. The common bundle is prepared in advance of trial and contains all the documents each party intends to rely on.¹⁰¹ HCR 9.5(4) provides that a document in the common bundle is “automatically received into evidence (subject to the resolution of any objection to admissibility)” when a witness refers to it in evidence or when counsel refer to it in submissions (other than closing submissions).
- 3.59 The rule against hearsay applies in civil proceedings. If a witness’ evidence or a document in the common bundle contains a statement made by someone who is not a witness, and that statement is relied on for the truth of its contents, it will be a hearsay statement and inadmissible unless one of the exceptions in the Act applies.

What are the issues?

- 3.60 A review of the operation of the hearsay provisions in civil proceedings has identified apparent inconsistencies between the Act and the HCRs in relation to:
- (a) the process for challenging the admissibility of hearsay statements in civil proceedings; and
 - (b) the admissibility of hearsay statements that are not challenged by any party.

⁹⁸ Rules of evidence are prescribed in Part 9 of the High Court Rules 2016 and Part 9 of the District Court Rules 2014. For simplicity, in this chapter we refer to the High Court Rules only.

⁹⁹ Pursuant to s 83(1)(c) of the Evidence Act 2006 and r 9.12 of the High Court Rules 2016.

¹⁰⁰ High Court Rules 2016, r 9.7.

¹⁰¹ High Court Rules 2016, r 9.4.

Process for challenging hearsay statements in civil proceedings

- 3.61 The HCRs prescribe clear procedures for challenging the admissibility of evidence, including hearsay statements. In relation to briefs of evidence, HCR 9.11 states that any admissibility challenge must be notified to the party or parties concerned within 20 working days after receipt of the brief by the challenging party. If the issue is not resolved within 10 working days, notice that there is an admissibility issue must be given to the court by the challenging party.
- 3.62 In relation to documents in the common bundle, HCR 9.5(2) states that if a party objects to the admissibility of a document the objection “must, if practicable, be recorded in the common bundle, and must be determined by the court at the hearing or at any prior time that the court directs”.
- 3.63 These requirements are designed to ensure that any evidentiary issues are identified before trial.¹⁰² It gives the party offering the evidence an opportunity to remedy any accepted deficiencies in the evidence and prevents the challenging party from seeking to obtain some form of strategic advantage by delaying a challenge until trial.¹⁰³
- 3.64 The Act does not prescribe the process for challenging the admissibility of hearsay statements. This has led to disagreement among parties in civil proceedings as to whether a hearsay statement can be challenged at trial, outside the procedures prescribed in the HCRs. In *Zespri Group Ltd v Gao*, for example, the admissibility of hearsay statements contained in witness briefs was not challenged under the HCRs.¹⁰⁴ It was only in response to a query from the Judge on the second day of trial that the respondent advised that they were intending to advance a hearsay challenge but were reserving this for closing argument.¹⁰⁵ The Court considered what non-compliance with the HCRs meant in terms of the admissibility of hearsay statements under the Act and concluded:¹⁰⁶

The failure to adhere to rule 9.11 does not displace the mandatory statutory criteria of ss 17–18 of the Evidence Act. Nor does the absence of a r 9.11 objection displace the plaintiff’s own obligation to comply with the Evidence Act. Rule 9.14 expressly provides that nothing in part 9 subpart 1 of the Rules changes inadmissible evidence into admissible evidence. Issues of hearsay can be raised subsequent to the timeframe outlined in r 9.11.

- 3.65 This creates a conflict between the Act and the procedures set out in the HCRs. A hearsay objection does not need to be made in advance of trial, despite the clear obligation in the HCRs to raise admissibility challenges before trial. It has been suggested that this interpretation of the Act “appears to run contrary to the intention of the legislative provisions”.¹⁰⁷ It also appears inconsistent with the approach taken prior to the Act, when

¹⁰² Andrew Beck *A to Z of New Zealand Law* (online ed, Thomson Reuters, 2012) at [13.10.8.4].

¹⁰³ *Commissioner of Police v Drake* [2017] NZHC 2919 at [55].

¹⁰⁴ *Zespri Group Ltd v Gao* [2020] NZHC 109.

¹⁰⁵ *Zespri Group Ltd v Gao* [2020] NZHC 109, Schedule - Hearsay Rulings at [7].

¹⁰⁶ *Zespri Group Ltd v Gao* [2020] NZHC 109, Schedule - Hearsay Rulings at [12]. This was also the conclusion in *Taylor v Asteron Life Ltd* [2020] NZCA 354, [2021] 2 NZLR 561 at [66]–[68] (discussed below at paragraph 3.55); *Brauninger v Westend* [2020] NZHC 2512 at [46]; *Commissioner of Police v Drake* [2017] NZHC 2919 at [55]–[56]; *Blanchett v Keshvara* [2011] NZCCLR 34 (HC) at [13]; and *Burrell Demolition Ltd v Wellington City Council* HC Wellington CIV-2006-485-1274, 12 March 2008 at [127] and [131].

¹⁰⁷ Andrew Beck *A to Z of New Zealand Law* (online ed, Thomson Reuters, 2012) at [13.10.8.4].

a failure to object to documents in the common bundle pre-trial could mean that party was estopped from raising objections at trial.¹⁰⁸

- 3.66 Late challenges to hearsay statements have the potential to increase cost and delay, especially if an adjournment is needed to address admissibility issues.¹⁰⁹
- 3.67 The consequences for a party seeking to rely on hearsay statements can also be significant. Evidence may be ruled inadmissible at trial, despite the pre-trial silence of any other party.

Admissibility of unchallenged hearsay statements

- 3.68 The second inconsistency between the Act and the HCRs relates to the admissibility of hearsay statements that are not challenged by any party.
- 3.69 HCR 9.5(1) provides that each document in the common bundle, unless the court otherwise directs, is to be considered admissible. This does not, however, mean that hearsay statements in the common bundle are admissible to prove the truth of their contents. This is because the hearsay rules in the Act are described in absolute terms. A hearsay statement must meet one of the exceptions in the Act in order to be admissible. The Court of Appeal in *Taylor v Asteron Life Ltd* explained the relationship between the Act and the HCRs as follows:¹¹⁰

Rule 9.5(1)(a) read together with s 132 of the Evidence Act resulted in the document being received in evidence, and benefiting from the presumptions set out in r 9.5(1)(b) to (f). But the mere fact that the document has been received in evidence does not mean that it is received as evidence of the truth of its contents. That is a different proposition altogether. The document would be received as evidence of the truth of its contents only if it qualified as admissible hearsay evidence under s 18 of the Evidence Act ...

- 3.70 The status of an unchallenged hearsay statement is, therefore, unclear. Different outcomes are possible. On a strict interpretation of the Act, the court might exclude any hearsay statements it identifies on the basis that no argument has been made as to its admissibility under the statutory exceptions to the rule against hearsay.¹¹¹
- 3.71 An alternative approach would be to treat the parties, by failing to challenge the hearsay statement, as having agreed to its admission. In *Matvin Group Ltd v Crown Finance Ltd*, a decision was made not to call Mr C, whose brief had been served on the other parties prior to trial.¹¹² This meant that some of the evidence before the Court was hearsay. The High Court explained:¹¹³

¹⁰⁸ *Commerce Commission v Giltrap City Ltd* [2001] BCL 1008 (HC) at [25]–[28].

¹⁰⁹ See, for example, *Zespri Group Ltd v Gao* [2020] NZHC 109, Schedule - Hearsay Rulings at [14]. For a discussion of the courts' approach to making pre-trial admissibility rulings see Gillian Coumbe "Just prove it: Lay witness statements and admissibility in civil cases" (paper presented to Legalwise "Evidence and Advocacy Masterclass" webinar, 2 June 2022) at [94]–[108].

¹¹⁰ *Taylor v Asteron Life Ltd* [2020] NZCA 354, [2021] 2 NZLR 561 at [68].

¹¹¹ See, for example, *Apollo Bathroom and Kitchen Ltd (In liq) v Ling* [2019] NZHC 237 at [15]–[17]. In this case, the admissibility of hearsay statements was challenged, but only at trial after the Court drew attention to the hearsay nature of the evidence (at [17]). However, because no foundation was provided to support the admissibility of the statements under s 18, the case is potentially analogous to the situation where admissibility of hearsay statements is simply not addressed. See also comments in *Brauninger v Westend* [2020] NZHC 2512 at [45].

¹¹² *Matvin Group Ltd v Crown Finance Ltd* [2022] NZHC 2239 at [14].

¹¹³ *Matvin Group Ltd v Crown Finance Ltd* [2022] NZHC 2239 at [15].

... no-one at the hearing addressed how the decision not to call [Mr C] affected the admission of evidence in the trial. Written documents prepared by [Mr C] are in the bundle of documents. Witnesses for both Matvin and Crown and CAPGL gave evidence in chief and under cross-examination that recounted what [Mr C] had said and done. Such evidence would not be hearsay if [Mr C] had been called to give evidence. However because he ultimately was not called to give evidence much, if not all, of what other witnesses have said about him in their evidence, and the documents he prepared, are now hearsay. Since no-one at trial raised any objection to the affected evidence based on this change of status, I am proceeding on the basis the evidence remains admissible. However, the fact I have not heard explanations [Mr C] could offer for his conduct necessarily affects the weight I can place on what other witnesses have said about him or what the parties might have me understand from the documents he has prepared.

- 3.72 The Court in *Matvin* appeared to proceed on the basis that a lack of objection to hearsay evidence can amount to implied agreement to admit evidence. Section 9 of the Act does provide for evidence that may otherwise be inadmissible to be admitted with the agreement of the parties. However, section 9 was not discussed directly in *Matvin*, and in any event section 9 contemplates the existence of a written or oral agreement of the parties. It is debatable whether it was intended to apply when the parties simply do not turn their minds to the issue.¹¹⁴

Is legislative reform necessary or desirable?

- 3.73 The inconsistencies between how the Act operates and provisions in the HCRs is undesirable. It creates uncertainty and may increase cost and delay in civil proceedings when objections are not made in accordance with the HCRs or when hearsay statements remain unchallenged.
- 3.74 We therefore seek submissions on whether the Act should be amended to clarify the relationship between the Act and the HCRs and/or promote greater compliance with the hearsay rules in civil proceedings.

Options for reform

- 3.75 We have identified two possible options for reform. Either Option 1 alone or both options could be adopted (adopting Option 2 alone would not resolve the issue relating to admissibility of unchallenged hearsay statements).

Option 1: Limit the operation of section 17 in civil proceedings

- 3.76 Option 1 is to amend the Act to limit the operation of section 17 (the rule against hearsay) to apply in civil proceedings *only* if a party challenges the admissibility of a hearsay statement in accordance with the relevant rules of court (unless the judge dispenses with this requirement).
- 3.77 The effect of this option would be to adopt a presumption or starting point that a hearsay statement is admissible to prove the truth of its contents in civil proceedings. That presumption would be rebutted whenever a party challenges the admissibility of the hearsay statement. The court would then determine admissibility under the Act's hearsay

¹¹⁴ See *Lockhart v R* [2013] NZCA 549 at [60] and discussion in Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV9.02].

rules. If admissibility is not challenged, the reliability of the hearsay statement would be treated as a matter of weight by the fact-finder.

- 3.78 This option would avoid the need for the court to address admissibility issues with hearsay statements when no challenge has been made. We do not anticipate that this would result in any significant change in civil litigation practice. As noted above, this appears to be consistent with what the HCRs already envisage.
- 3.79 This option would also encourage objections to hearsay to be made in accordance with the HCRs, responding to the problem of late objections discussed above. The court should, however, be able to dispense with the requirement that any objection comply with the relevant rules of court. There will be situations where evidence is not known to be hearsay until the trial (for example, if a late decision is made not to call a witness), or where the significance of a hearsay statement is not clear until the trial. A discretion to hear a late challenge would also address the concern that requiring objections to comply with the rules of court could unintentionally increase cost and delay in the pre-trial stage, by incentivising parties to make unnecessary challenges in order to protect their position. Grounds for dispensing with this requirement could be similar to those in section 22(5), which prescribes the permitted reasons for dispensing with the requirement to give notice of hearsay in criminal proceedings.
- 3.80 This option could be limited to documents in the common bundle (section 132). This would recognise the significance of documentary evidence in civil proceedings¹¹⁵ and reflect the fact that documents in the common bundle are potentially more at risk of infringing the hearsay rules because they do not need to be produced by a witness.¹¹⁶ Te Komiti Mō Ngā Tikanga Kooti | The Rules Committee (Rules Committee) made a similar recommendation in its report, *Improving Access to Civil Justice*.¹¹⁷ It recommended that the Act and the HCRs be amended to allow documents in the common bundle to be admissible as to the truth of their contents.¹¹⁸ It explained that this would “remove the artificial recitation of documents in the briefs of evidence” to avoid infringing the rule against hearsay.¹¹⁹ It further explained that “presumptive admissibility of documentary evidence” would not mean its truth cannot be challenged, or that admissible documents will be given any weight by a trial judge.¹²⁰ Rather, “it merely puts the onus on a party seeking to dispute the narrative of events that emerges from contemporaneous documents to identify the documents it wishes to challenge, so that this can be addressed in the course of the trial itself if it becomes relevant to do so”.¹²¹
- 3.81 For the same reasons, we think a presumptive admissibility approach can be extended to briefs and oral evidence. Several of the cases identified above (*Zespri*, *Matvin* and *Apollo*)

¹¹⁵ See discussion in Te Komiti mō ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022) at [237]–[239].

¹¹⁶ If a document in the common bundle contains a statement made by someone who is not a witness, and that statement is relied on for the truth of its contents, it will be a hearsay statement under the Evidence Act 2006 and inadmissible unless one of the exceptions in the Act applies.

¹¹⁷ Te Komiti mō ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022).

¹¹⁸ Te Komiti Mō Ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022), Recommendation 22(b).

¹¹⁹ Te Komiti mō ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022) at [239].

¹²⁰ Te Komiti mō ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022) at [243].

¹²¹ Te Komiti mō ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022) at [243].

involved hearsay statements in witness briefs. Limiting a presumption of admissibility to documents in the common bundle would not, therefore, wholly address the issue of unchallenged hearsay statements.

- 3.82 This option, regardless of whether it is limited to documentary evidence, would result in different approaches to hearsay in criminal and civil proceedings. However, we think there are good reasons to distinguish civil and criminal proceedings in this context. The consideration of protecting a defendant's fair trial rights does not arise in civil proceedings. In addition, civil proceedings are typically heard by a judge rather than a jury, so the concern about a jury's "supposed inability to make a proper assessment of evidence which has not been tested by cross-examination" does not arise.¹²² Rather, judges "are expected to have the skills to sift the wheat from the chaff and assess whatever evidence is available in accordance with its true significance".¹²³ For these reasons, there has long been debate about applying the same strict approach to hearsay in civil proceedings.¹²⁴
- 3.83 This option does not go as far as to exclude the operation of the rule against hearsay in civil proceedings. Some comparable jurisdictions, including England and Wales, Scotland and Australia, have moved to limit or abolish the rule against hearsay in civil proceedings.¹²⁵ Such fundamental change is beyond the scope of this operational review. Parliament clearly intended, when passing the Act, to continue to apply the rule against hearsay to all proceedings in Aotearoa New Zealand. We are instead focused on improving the operation of the hearsay provisions in civil proceedings to better achieve the objectives in section 6 of the Act, which include avoiding unjustifiable expense and delay.¹²⁶

Option 2: Introduce a notice procedure for hearsay in civil proceedings

- 3.84 Unlike in criminal proceedings,¹²⁷ there is no requirement on a party seeking to offer a hearsay statement in evidence in a civil proceeding to give notice of their intention to do so. In criminal proceedings, this information enables the other party to decide whether to object and assists the judge in determining whether to admit the evidence.¹²⁸ Similar notice procedures apply to civil proceedings in England and Wales.¹²⁹

¹²² Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [7].

¹²³ Andrew Beck "Evidence Rules in Civil Proceedings: A Renaissance?" [2021] NZLJ 263 at 263. See also Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [7].

¹²⁴ The Commission originally proposed, in a preliminary paper on hearsay, abolishing the hearsay rule in civil proceedings, subject to a general power to exclude evidence that is unfairly prejudicial, misleading, confusing or time-wasting. It was of the view that, in a judge-alone civil case, "the judge, by reason of experience and training, should be able to assess the risks pertaining to hearsay evidence": Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [3] and [19]. Ultimately, the Commission did not adopt these proposals in its proposed Evidence Code and instead recommended a common set of hearsay rules for all proceedings.

¹²⁵ See Civil Evidence Act 1995 (UK), s 1 (effectively abolishing the rule against hearsay); Evidence Act 1995 (Cth) ss 63 and 64, adopted in other uniform evidence act jurisdictions and abolishing the rule in relation to first-hand hearsay; and Civil Evidence (Scotland) Act 1988, s 2.

¹²⁶ Evidence Act 2006, s 6(e).

¹²⁷ Evidence Act 2006, s 22.

¹²⁸ Evidence Bill 2005 (256–2) (select committee report) at 3–4.

¹²⁹ Civil Evidence Act 1995 (UK), s 2 and Civil Procedure Rules (UK), r 33.2.

- 3.85 When developing the Evidence Code, the Commission did not consider that notice was necessary in civil proceedings, explaining:¹³⁰

After evaluating the experience in other jurisdictions, the Commission remains of the view that an informal notice procedure will evolve as part of the discovery process in civil proceedings and there is no need for legislative intervention. It will be in the parties' best interest to give notice of their intention to call hearsay evidence so that any objections may be dealt with pre-trial. Cost sanctions would be likely to follow if a proceeding has to be adjourned to allow rebuttal evidence to be called, or abandoned and recommenced.

- 3.86 The cases discussed above call into question whether the Commission's expectations have been realised in practice.

- 3.87 Introducing a notice procedure would be consistent with the existing "substantial pre-trial obligation" on each party to ensure that evidence they intend to produce in court is admissible.¹³¹ It would encourage the parties to focus, in advance, on hearsay matters. It could also mitigate the risk that Option 1 has the undesired effect of incentivising undisciplined filing practices, such as including large numbers of inadmissible documents in the common bundle, thereby placing a significant burden on the opposing parties (and the court).

- 3.88 This option would, however, increase the cost of pre-trial procedures, especially in complex cases with voluminous briefs and common bundles. The party proposing to offer hearsay statements in evidence would need to identify those statements and the reasons why they are admissible under the Act, in advance of knowing whether a challenge to that evidence will be made. This might also increase the risk of tactical challenges to the proposed admission of what may be reliable and uncontroversial hearsay.

- 3.89 Such a requirement may also be unnecessary if the Act is amended to address the status of unchallenged hearsay and require objections to be made in accordance with the relevant rules of court. Further, it has been noted that cases including *Zespri* "demonstrate the increased readiness of the courts to enforce the rules of evidence", which "in turn will encourage greater discipline on the part of lawyers in preparing briefs".¹³²

¹³⁰ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55, Vol 1. 1999) at [68].

¹³¹ *Apollo Bathroom and Kitchen Ltd (In liq) v Ling* [2019] NZHC 237 at [19]. See also *Zespri Group Ltd v Gao* [2020] NZHC 109, Schedule - Hearsay Rulings at [12].

¹³² Gillian Coumbe "Just prove it: Lay witness statements and admissibility in civil cases" (paper presented to Legalwise "Evidence and Advocacy Masterclass" webinar, 2 June 2022) at [111].

QUESTION**Q8**

Should the Act be amended to address inconsistencies between the hearsay provisions in the Act and the High Court Rules? If so, should the Act be amended to:

- a. limit the operation of section 17 in civil proceedings so that it only applies where a party challenges the admissibility of a hearsay statement in accordance with the relevant rules of court (with the court retaining a residual discretion to dispense with this requirement); and/or
- b. require a party to give notice of their intention to offer a hearsay statement in evidence in a civil proceeding?

Do the issues discussed above have broader application?

3.90 The discussion above is focused on hearsay statements. These issues, however, may arise in other contexts where inadmissible evidence is offered in civil proceedings, such as opinion evidence (inadmissible under section 23) and irrelevant evidence (inadmissible under section 7). We have focused only on hearsay statements given the cases and commentary discussed above suggest the issues relate primarily to hearsay. We invite submissions, however, on whether these issues arise in other contexts.

QUESTION**Q9**

Do the inconsistencies between the Act and the High Court Rules create problems in respect of the operation of other admissibility rules in civil proceedings (such as sections 7 and 23)?

CHAPTER 4

Defendants' and co-defendants' statements

INTRODUCTION

In this chapter, we consider and seek feedback on issues relating to:

- defendants' exculpatory statements (sections 21 and 27);
- defendants' statements that are contained within a hearsay statement (section 27(3)); and
- co-defendants' non-hearsay statements (sections 27 and 22A).

DEFENDANTS' EXCULPATORY STATEMENTS

- 4.1 In a criminal proceeding, if a defendant elects not to give evidence, section 21 of the Evidence Act 2006 prevents them from offering their own hearsay statement.¹ The prosecution can, however, offer a defendant's statement "against" that defendant under section 27.² Case law establishes that "against" does not mean the statement must be wholly inculpatory to be admitted by the prosecution. Statements that contain both inculpatory and exculpatory statements (mixed statements) can be offered in their entirety.³
- 4.2 The Act does not require the prosecution to offer defendants' statements. However, the courts have nevertheless held (based on the inherent powers of judges to control criminal proceedings) that the prosecution *may* be required to offer evidence of a defendant's

¹ A hearsay statement is a statement made by a person other than a witness that is offered in evidence to prove the truth of its contents: Evidence Act 2006, s 4 (definition of "hearsay statement"). A defendant's statement produced for non-hearsay purposes (for example, simply to prove that the statement was made) may still be admissible: *Harwood v R* [2010] NZCA 545 at [41]–[42].

² The previous consistent statement rule and the rule against hearsay do not apply to defendants' statements offered by the prosecution against the defendant: Evidence Act 2006, s 27(3).

³ *R v G* [2009] NZCA 400 at [12]; *Kendall v R* [2012] NZCA 5 at [16]. See discussion in Te Aka Matua o Te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.46].

exculpatory statement where it is necessary to ensure trial fairness.⁴ Te Kōti Pira | Court of Appeal has recently suggested this will only occur in “exceptional cases”.⁵ As we discuss below, this has mainly occurred where the prosecution wishes to rely on part of a mixed statement. In such cases the court may require the prosecution to admit the entirety of the statement, including any exculpatory parts. In other instances, whether a defendant’s exculpatory statement is offered in evidence is a matter of prosecutorial discretion.

What are the issues?

4.3 Our initial research and preliminary feedback identified dissatisfaction with the current approach among some defence counsel and a commentator.⁶ They raised two separate but related issues:

- (a) First, there may be inconsistency regarding when prosecutors offer evidence of a defendant’s mixed or exculpatory statement. Defence counsel told us that the approach taken by prosecutors varies between regions, with some choosing to offer wholly exculpatory statements and others not. We also note that, while the case law on mixed statements appears reasonably settled, it continues to be argued in court, which may suggest continued uncertainty among counsel.
- (b) Second, there is some concern about the underlying policy reflected in section 21. Defence counsel from whom we received feedback and a commentator⁷ suggested that formal statements made by defendants (for example, to police) are relevant evidence that should be placed before the fact-finder as a matter of course. Otherwise, the fact-finder may assume the defendant has made no statement and draw adverse inferences from that, resulting in unfairness.

4.4 To facilitate feedback on these issues, it is necessary to briefly explain the background to sections 21 and 27 and how the case law has developed.

History of sections 21 and 27

4.5 At common law, a defendant’s out-of-court statement was treated as hearsay and was therefore inadmissible if it was relied on to prove the truth of its contents.⁸ However, statements against the defendant’s interests such as a confession or admission were admissible (either as an exception to the rule against hearsay or on the basis that they fell outside it).⁹ Where the prosecution wished to rely on such a statement, the whole

⁴ *R v King* [2009] NZCA 607, (2009) 24 CRNZ 527 at [16]–[19].

⁵ *S (CA481/2018) v R* [2019] NZCA 169 at [21].

⁶ Bernard Robertson “Evidence section” [2020] NZLJ 360 at 363.

⁷ Bernard Robertson “Evidence section” [2020] NZLJ 360 at 363.

⁸ See *R v Sturgeon* [2005] 1 NZLR 767 (CA) at [23]; Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [4].

⁹ *R v Sturgeon* [2005] 1 NZLR 767 (CA) at [23] and [25]; Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [92].

statement had to be offered, including any exculpatory parts.¹⁰ Wholly exculpatory hearsay statements were inadmissible.¹¹

- 4.6 Section 27 is based on Te Aka Matua o te Ture | Law Commission’s Evidence Code. The Evidence Code sought to largely codify the existing law on admissions and confessions but extended the rules to all statements made by the defendants, including exculpatory ones.¹²
- 4.7 Section 21 (preventing a defendant who does not give evidence from offering their own statement) did not appear in the Commission’s Evidence Code. The Commission intended that, where a defendant elected not to give evidence, they could rely on evidence of their own out-of-court statements if they satisfied the exception to the rule against hearsay.¹³ This requires the judge to be satisfied that the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable (section 18). Because a defendant is not compellable, they would be “unavailable” as a witness for the purposes of the hearsay rules. This would have been a departure from the common law position under which defendants could not offer evidence of their own hearsay statements. Cabinet disagreed with the Commission’s proposed approach and inserted section 21 into the Evidence Bill on the basis that defendants are not, in reality, “unavailable” to themselves.¹⁴

How have sections 21 and 27 been interpreted?

- 4.8 In *R v King*, the Court of Appeal considered section 21 and said that, while it “means what it says”,¹⁵ it was nonetheless open to the court to require the prosecutor to offer evidence of a defendant’s statement where it would be unfair not to do so (based on the powers of trial judges to control the criminal proceedings).¹⁶ Te Kōti Matua | High Court reached a similar conclusion in *R v Felise*.¹⁷ In that case, the Court permitted defence counsel to cross-examine two witnesses about statements made to them by one of the defendants. Because the prosecution had chosen to question the witnesses about some aspects of the discussion but not others, fairness required that the defendants be allowed to elicit the full import of the discussion.
- 4.9 The Commission considered these cases in its 2013 Review of the Act, in response to a concern these cases may have confused the application of section 21.¹⁸ The Commission concluded that, while the Act should be the “first port of call” in determining admissibility

¹⁰ *R v Tozer* [2002] 1 NZLR 193, (2001) 19 CRNZ 269 (CA) at [23].

¹¹ See *R v Sturgeon* [2005] 1 NZLR 767 (CA) at [23].

¹² Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [94].

¹³ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C90].

¹⁴ Cabinet Paper “Evidence Bill: Paper 2: Admissibility of Evidence” (4 December 2002) at [19]. We were unable to find any other information about the basis for inserting s 21.

¹⁵ *R v King* [2009] NZCA 607, (2009) 24 CRNZ 527 at [15].

¹⁶ *R v King* [2009] NZCA 607, (2009) 24 CRNZ 527 at [19] (referring to s 368(2) of the Crimes Act 1961 - now s 113 of the Criminal Procedure Act 2011). In that case, the interests of fairness did not require that evidence of the statement be led, as it was wholly exculpatory and consistent with other evidence.

¹⁷ See also *R v Felise (No 1)* HC Auckland CRI-2008-092-8864, 8 February 2010 at [14].

¹⁸ Te Aka Matua o Te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.47].

issues, trial judges retained their ability to control the criminal proceedings.¹⁹ The Act also needed to be interpreted consistently with the New Zealand Bill of Rights Act 1990 where possible. However, the Commission indicated that the approach in *King* and *Felise* “will only be appropriate in rare circumstances where the resulting unfairness to the defendant impacts on his or her right to a fair trial”.²⁰ The Commission considered it unnecessary to amend section 21, because the concerns expressed by submitters were not about the drafting of that section but rather the use of other powers of the court.²¹

4.10 The courts have been reluctant to find that the interests of fairness override the statutory purpose of section 21 in relation to wholly exculpatory statements.²² Since *Felise*, four High Court decisions have considered whether the prosecution was required to admit a defendant’s wholly exculpatory statement to police.²³ In all instances the Judge declined to make such an order, finding that the fairness rationale for the exception in *Felise* was not engaged. Rather, admitting the evidence would simply allow the defendant to put forward their version of events without being subject to cross-examination.²⁴

4.11 In 2021, the issue was raised in an application to te Kōti Mana Nui | Supreme Court for leave to appeal in *Foster v R*.²⁵ At trial, defence counsel sought leave to question a Crown witness about an exculpatory statement allegedly made to him by the defendant. The prosecution had not asked the witness any questions about the exchange. The defence argued, relying on *King*, that it would be unfair to apply section 21. The trial judge and the Court of Appeal rejected that argument, finding that section 21 prevented the defence from questioning the witness about the defendant’s statement.

4.12 The Supreme Court declined leave to appeal. The Judges who considered the leave application agreed with the Court of Appeal that there was a distinction between the evidence the defendant sought to offer, which was of a *wholly* exculpatory character, and mixed inculpatory and exculpatory exchanges between the defendant and other Crown witnesses, about which the prosecution had examined the witnesses. In the latter case, fairness required the prosecution to offer both the inculpatory and exculpatory aspects of the witness’ accounts.²⁶ The same argument did not apply to the wholly exculpatory statement. The Court said:²⁷

As the Court of Appeal pointed out, the obvious solution for the applicant if he wanted to give evidence of the alleged exchange ... was to give evidence himself.

4.13 *Foster* (although only a leave decision) tends to suggest that, where the prosecution wishes to offer evidence of inculpatory parts of a mixed statement, the interests of fairness will generally require that exculpatory parts of the statement are also offered.

¹⁹ Te Aka Matua o Te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.52].

²⁰ Te Aka Matua o Te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.53].

²¹ Te Aka Matua o Te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.53].

²² See *Boyd v Police* [2012] NZHC 713 at [16] and *Paewhenua v Police* [2015] NZHC 1831 at [47].

²³ *R v Boynton* [2013] NZHC 2415 (Judgment (No 2) of Toogood J [Defence application for order under s 368(2) Crimes Act 1961]); *Boyd v Police* [2012] NZHC 713 at [23]; *Paewhenua v Police* [2015] NZHC 1831 at [47]; *Frew v Police* [2022] NZHC 1961 at [39].

²⁴ See *Frew v Police* [2022] NZHC 1961 at [39].

²⁵ *Foster v R* [2021] NZSC 90.

²⁶ *Foster v R* [2021] NZSC 90 at [14].

²⁷ *Foster v R* [2021] NZSC 90 at [16].

On the other hand, the prosecution usually will *not* be required to offer evidence of wholly exculpatory statements by the defendant. This approach has been taken in subsequent cases.²⁸ However, the fact that the prosecution in one recent case sought to “cherry pick” the inculpatory parts of a “mixed” statement suggests some confusion may remain among counsel.²⁹

- 4.14 The higher courts have not determined whether the prosecution would be required to offer a mixed statement where it does not wish to rely on any part of it. *Foster* tends to suggest it would not. In one pre-*Foster* case, *R v Singh*, te Kōti-ā-Rohe | District Court ordered the prosecution to offer evidence of a mixed statement relevant to the issue of self-defence, even though the prosecution did not intend to rely on any part of the statement.³⁰ The Judge reasoned that:³¹

... the conclusion I am inevitably led to is that the Crown does not wish the statement in because it contains some material which might be of assistance to the defence, while adding nothing material to the Crown case. I do not accept that in the present circumstances, is an appropriate tactic. The result of allowing that would, in my view, provide unfairness to the accused, and would not be in the interests of justice.

- 4.15 Similar reasoning was later relied on by the High Court of Australia in *Nguyen v R*,³² which we discuss below.

Developments in Australia: *Nguyen v R*

- 4.16 The admissibility of defendants’ mixed statements was addressed by the High Court of Australia in *Nguyen v R*. The case concerned the admissibility of the defendant’s police interview, which raised the issue of self-defence. The prosecutor decided not to offer any part of the statement in evidence for tactical reasons. The Northern Territory legislation at issue permitted the admission of mixed statements but did not address whether the prosecution was required to admit them.³³
- 4.17 The majority considered that a prosecutor’s failure to offer a mixed statement in evidence could create unfairness by encouraging the fact-finder to speculate about whether the defendant had provided an account of their actions when challenged by police.³⁴ They therefore found that statements to investigating officers containing both inculpatory and exculpatory aspects should be tendered in evidence unless there is good reason not to do so (for example, where the defendant has refused to comment³⁵ or in rare cases where the reliability or credibility of the evidence is demonstrably lacking³⁶). They said it

²⁸ *Frew v Police* [2022] NZHC 1961 (relying on s 21 to disregard evidence about a defendant’s wholly exculpatory statement) and *R v Parata* [2021] NZHC 3573 at [48]–[50] (finding that “A defendant is entitled to rely on the exculpatory portions of mixed statements”).

²⁹ *R v Parata* [2021] NZHC 3573.

³⁰ *R v Singh* DC Tauranga CRI-2012-070-4867, 7 August 2013.

³¹ *R v Singh* DC Tauranga CRI-2012-070-4867, 7 August 2013 at [47].

³² *Nguyen v R* [2020] HCA 23.

³³ Evidence (National Uniform Legislation) Act 2011 (NT), s 81 (under which “admissions” and associated statements are admissible as an exception to the hearsay rule); *Nguyen v R* [2020] HCA 23 at [22], [25] and [42].

³⁴ *Nguyen v R* [2020] HCA 23 at [39]–[40].

³⁵ *Nguyen v R* [2020] HCA 23 at [41].

³⁶ *Nguyen v R* [2020] HCA 23 at [44].

was inappropriate for prosecutors to decline to admit such statements for tactical reasons, such as to force the defendant to give evidence.³⁷ The lower Court's decision that the prosecutor did not need to tender the statement was set aside.

- 4.18 *Nguyen* only addressed mixed statements in police interviews because of the factual and statutory context. However, it is notable that the prosecutor was not seeking to rely on any part of the statement (unlike in *Felise*). The majority's reasoning did not turn on unfairness associated with allowing the prosecution to offer parts of the statement and not others. Rather, it reflected a general concern to ensure that all available, cogent and admissible evidence is placed before the fact-finder³⁸ and to avoid unfairness to the defendant.³⁹ Similar reasoning could arguably apply to wholly exculpatory statements, although the Court did not consider that point.

Is legislative reform necessary or desirable?

- 4.19 We seek feedback on whether sections 21 and 27, combined with the case law requiring prosecutors to offer defendants' statements in certain circumstances, are causing problems in practice. We are particularly interested in views on:
- (a) whether there are inconsistent approaches by prosecutors and/or uncertainty among counsel regarding when defendants' mixed or exculpatory statements should be offered; and
 - (b) whether (and in what circumstances) failure to offer such statements may be causing unfairness to defendants or contributing to miscarriages of justice.
- 4.20 If the current approach is causing problems in practice, we invite submissions on how that should be addressed.

Inconsistency in prosecution practices

- 4.21 Case law establishes that, if the prosecution wishes to rely on parts of a mixed statement, the statement should generally be offered in its entirety. Despite this, the matter continues to be argued in court. This may suggest there is uncertainty among counsel. The courts have not generally required the prosecution to offer wholly exculpatory statements, but we were told prosecutors sometimes choose to do so as a matter of discretion. This may be resulting in inconsistent approaches and regional variation.
- 4.22 If the law is considered sufficiently clear but there is an issue with inconsistency in prosecution practice, legislative reform may not be necessary to address this. For example, prosecution guidelines could specify when prosecutors should offer in evidence (or consider offering) mixed or wholly exculpatory statements. Since prosecutors are not generally required to offer wholly exculpatory statements, guidelines may be more appropriate than legislative amendment to ensure a consistent approach.⁴⁰

³⁷ *Nguyen v R* [2020] HCA 23 at [45].

³⁸ *Nguyen v R* [2020] HCA 23 at [36].

³⁹ *Nguyen v R* [2020] HCA 23 at [39]–[40].

⁴⁰ Similarly, although the issue has not been addressed by the higher courts, in principle, it appears to us that mixed statements the prosecution does not wish to rely on should be treated the same as wholly exculpatory statements.

- 4.23 Alternatively, or in addition, the Act could be amended to require mixed statements relied on by the prosecution to be offered in their entirety to avoid further unnecessary litigation on this issue. This would reflect the well-settled approach in the case law.

Unfairness to defendants

- 4.24 Commentator Bernard Robertson has argued in support of the reasoning in *Nguyen*.⁴¹ He suggests prosecutors should be required to offer defendants' statements to police as a matter of course unless there is good reason not to or the parties agree otherwise. Defence counsel made similar comments to us through preliminary feedback, emphasising the relevance of formal statements to the matters in issue and the risk that the fact-finder will draw adverse inferences if they believe the defendant has not made a statement.
- 4.25 The policy behind section 21 is that defendants should not be able to rely on hearsay to place a factual scenario before the fact-finder rather than giving evidence at trial and facing cross-examination.⁴² The contrary argument is that, as the majority of the High Court of Australia found in *Nguyen*, failure to place all relevant evidence before a fact-finder (including exculpatory statements) may result in unfairness. For example, the fact-finder may presume the defendant has not made a statement maintaining their innocence and draw adverse inferences from that,⁴³ or the defendant may be unable to present an effective defence unless they give evidence at trial (which they may elect not to do for a variety of reasons).
- 4.26 If there is widespread concern that the policy approach in New Zealand is causing unfairness, legislative reform could be considered. For example, the Act could be amended to:
- (a) give the court discretion to admit a defendant's statement where it is necessary to avoid unfairness; and/or
 - (b) make defendants' statements in response to official questioning admissible as a matter of course.
- 4.27 Any such amendment would, however, allow a defendant (in certain circumstances) to put their own version of events before the fact-finder without having to submit to cross-examination. That may be considered unfair to complainants and other prosecution witnesses who are subject to cross-examination and contrary to the overall interests of justice. It could also, potentially, act as a disincentive for defendants to give evidence. These considerations must be balanced against any potential unfairness to defendants when deciding whether a policy change is justified.

⁴¹ Bernard Robertson "Evidence section" [2020] NZLJ 360 at 363.

⁴² See *Foster v R* [2021] NZSC 90 at [16]; *Frew v Police* [2022] NZHC at [39]; *R v Felise (No 3)* (2010) 24 CRNZ 533 (HC) at [13]; and *Boyd v Police* [2012] NZHC 713 at [23].

⁴³ While s 32 of the Evidence Act 2006 prevents any person from inviting the fact-finder to draw such an inference and requires the court to direct a jury not to do so, there remains a risk that the jury's perception will be affected in practice. We note defence counsel may be able to ask the relevant police witness in cross-examination whether the defendant made a statement (without referring to its content), which would mitigate the risk of adverse inferences being drawn from the defendant's presumed failure to make a statement at all. The jury would, however, remain unaware of the nature of the statement.

- 4.28 Allowing more defendants' statements to be admitted could also increase the number of cases where defendants put their veracity in issue or challenge the veracity of a prosecution witness (through an out-of-court statement) without opening the door to challenges to their own veracity.⁴⁴ We discuss that issue and possible amendments to address it in Chapter 9.
- 4.29 We note that, if the Act was amended in the manner described above, amendments to section 35 (previous consistent statements rule) may be required to reflect the same policy approach when the defendant gives evidence at trial.

QUESTION

Q10

Is the current approach to defendants' mixed or exculpatory statements causing problems in practice? If so, how should this be addressed?

DEFENDANTS' STATEMENTS CONTAINED IN HEARSAY

- 4.30 Section 27(3) states that the hearsay rules do not apply to defendants' statements offered by the prosecution in a criminal proceeding. This allows the prosecution to offer evidence of statements made by the defendant out-of-court (such as a written or video statement made to police or a statement allegedly made by the defendant to a prosecution witness) without having to establish that the exception to the rule against hearsay in section 18 applies. Under section 18, hearsay statements are only admissible if the circumstances relating to the statement "provide reasonable assurance that the statement is reliable".⁴⁵

What is the issue?

- 4.31 It is unclear how section 27(3) was intended to operate when a defendant's statement is contained within a hearsay statement. This is sometimes referred to as "double hearsay" or "second-hand hearsay" because both the maker of the statement (the defendant) and the person with first-hand knowledge of that statement are unavailable as witnesses.
- 4.32 This issue arose in the Red Fox Tavern case, with the High Court and Court of Appeal reaching different views. In 1987, the Red Fox Tavern was robbed at gun point and its publican was shot dead. Thirty years later, two people were charged with the robbery and murder. Several evidential issues had to be resolved pre-trial, including the admissibility of statements given by two people to police that recounted various admissions by, or conversations with, the defendants around the time of the robbery.⁴⁶ These two people had died since the robbery, so the statements were hearsay.⁴⁷

⁴⁴ Currently, the prosecution can only offer evidence about the defendant's veracity if "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": Evidence Act 2006, s 38(2)(a).

⁴⁵ Evidence Act 2006, s 18(1)(a).

⁴⁶ *R v W* [2018] NZHC 2457 at [19].

⁴⁷ *R v W* [2018] NZHC 2457 at [21].

- 4.33 The High Court determined that the portions of the hearsay statements that contained statements made by the defendants were exempt from the hearsay rules by virtue of section 27(3).⁴⁸
- 4.34 The Court of Appeal in *R v Hoggart* reached a different view, that section 27 does not apply to a defendant’s statement contained in a statement that is itself hearsay, and in such cases admissibility should be determined under the general exception to the rule against hearsay in section 18.⁴⁹ The Court observed that:⁵⁰

[A’s] statement is itself hearsay, being a statement intended to be offered in evidence as proof of its contents, including that W and Mr Hoggart made these statements to him. Because the safeguard of cross-examination is removed, the reliability threshold for the admission of the hearsay statement of [A] (as distinct from the defendants) under s 18 must be met.

Is legislative reform necessary or desirable?

- 4.35 *Hoggart* provides appellate authority on how section 27 is to be interpreted in relation to defendants’ statements contained within hearsay statements. The problem that commentators observe, however, is that this interpretation is difficult to reconcile with the plain words of section 27, which state clearly that the hearsay provisions (other than section 22A) do not apply to evidence of a defendant’s statement offered by the prosecution.⁵¹
- 4.36 There are good policy reasons for not preferring a literal interpretation of section 27 and instead requiring defendants’ statements within hearsay statements to be subject to the hearsay provisions in the Act. It is generally recognised that more specific guarantees of reliability may be needed to justify admitting second-hand hearsay evidence.⁵² In cases of multiple hearsay generally, the courts have observed that they must be concerned with the reliability of each statement in the chain.⁵³ This is because of the special significance accorded to cross-examination⁵⁴ and the reliance the adversarial system places on cross-examination as a way of testing the truth of the evidence.⁵⁵ If the person

⁴⁸ *R v W* [2018] NZHC 2457 at [39], [48] and [67].

⁴⁹ *R v Hoggart* [2019] NZCA 89 at [50].

⁵⁰ *R v Hoggart* [2019] NZCA 89 at [50]. This issue was not revisited by the Supreme Court on appeal. However, the Court did appear to endorse this approach when discussing what future steps would need to be taken to establish the admissibility of statements of two other potential witnesses (which included statements allegedly made by the defendant to them) who had died before the Court issued its decision: *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [139], [160], [327] and [386].

⁵¹ Anna High “The Red Fox Tavern trial and the Evidence Act” [2020] NZLJ 69 at 70 and Bernard Robertson “Student Companion – Evidence” [2019] NZLJ 157 at 157.

⁵² *Te Aka Matua o te Ture | Law Commission Hearsay Evidence* (NZLC PP10, 1989) at [61]. While some jurisdictions distinguish between first-hand and second-hand hearsay, the Commission’s preferred approach was to make all hearsay statements subject to the same rules, with the nature of the statement being relevant instead to the assessment of its reliability under s 18: *Te Aka Matua o te Ture | Law Commission Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [69] and *Te Aka Matua o te Ture | Law Commission Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C21] and [C76].

⁵³ *Zespri Group Ltd v Gao* [2020] NZHC 109, Schedule - Hearsay Rulings at [24]; *Key v R* [2010] NZCA 115 at [26].

⁵⁴ Including under the New Zealand Bill of Rights Act 1990, s 25(f).

⁵⁵ *Te Aka Matua o te Ture | Law Commission Hearsay Evidence* (NZLC PP10, 1989) at [7].

with first-hand knowledge of what the defendant said to them is unavailable, then the defendant:⁵⁶

... is denied the opportunity of exposing imperfections of perception, memory, communication and sincerity and challenging the person's testimonial qualification of first-hand knowledge ...

4.37 In light of this, two concerns arise with a literal interpretation of section 27:

(a) First, if the person who has first-hand knowledge of the defendant's statement is not available for cross-examination, it is important that the reliability of that statement is assessed. Section 18 provides for this. Section 27 does not. While reliability issues can be considered under section 8 (general exclusion), section 18 has been designed specifically to respond to the inherent concerns with hearsay statements.

(b) Second, if section 27 is interpreted as providing an independent route to admit a defendant's statement contained within a hearsay statement, then the prosecution could offer evidence of a defendant's statement made to a third party without ever calling that third party to give evidence in court, regardless of whether that witness is unavailable.⁵⁷ This interpretation is clearly at odds with the fair trial rights of the defendant and the principle of orality, upon which the Act is based.⁵⁸

4.38 Commentator Bernard Robertson says that this issue seems to have been overlooked and that, if that is the case, it should be corrected by Parliament.⁵⁹ Our review of the policy and legislative history of the Act has not identified any basis for believing the intention was to exempt defendants' statements within hearsay statements from the hearsay provisions.⁶⁰

4.39 We seek submissions on whether section 27 should be amended to clarify that, when a statement made by a defendant is contained within a hearsay statement, Subpart 1 (hearsay evidence) applies, consistent with the Court of Appeal's interpretation in *Hoggart*.

⁵⁶ Te Aka Matua o te Ture | Law Commission *Hearsay Evidence* (NZLC PP10, 1989) at [7] citing Law Reform Commission of Canada *Study Paper on Hearsay* (Toronto, 1974).

⁵⁷ It is the hearsay provisions that provide that statements made by a person who is not a witness are generally inadmissible in court (s 17), unless one of the exceptions applies (such as s 18). If the hearsay provisions do not apply to a defendant's statement contained within a third-party statement, then the rule against hearsay would also not apply.

⁵⁸ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [18] and [385]. See also discussion of the importance of cross-examination at [50] and [61].

⁵⁹ Bernard Robertson "Student Companion – Evidence" [2019] NZLJ 157 at 157.

⁶⁰ This issue is not directly addressed in the Commission's previous publications on hearsay or confessions. In Te Aka Matua o te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 227, the Commission's commentary on the draft provision which stated that the hearsay provisions do not apply to defendants' statements (subsequently included in what became s 27(3)) explained that: "To dispel any possible confusion that might arise, s 2(2) declares that the hearsay provisions of the Evidence Code do not apply to those defendants' statements to which Division 3 applies. This means that the rules in Division 3 will operate as a self-contained regime and not by way of exception to the hearsay rule. (Technically, this declaration may not be necessary)". This does not suggest that, when a defendant's statement is itself contained within a hearsay statement, the hearsay provisions would not also apply to that statement.

QUESTION

Q11

Should section 27 be amended to clarify that a defendant’s statement contained within a hearsay statement is subject to the Act’s hearsay provisions?

ADMISSIBILITY OF CO-DEFENDANTS’ NON-HEARSAY STATEMENTS

- 4.40 Section 27(1) states that a defendant’s statement offered by the prosecution is admissible against a co-defendant only if it is admitted under section 22A.
- 4.41 Section 22A preserves the common law “co-conspirators’ rule”, which provides an exception to the rule against hearsay for statements made in furtherance of a conspiracy or joint criminal enterprise. Section 22A therefore only applies to hearsay statements.
- 4.42 A hearsay statement is defined in the Act as a statement made by a person “other than a witness” that is “offered in evidence to prove the truth of its contents”.⁶¹ A statement is not a hearsay statement if the person who made the statement gives evidence in court, or if the statement is offered for a purpose other than proving the truth of its contents (for example, to establish that the statement was made, or to provide context).

What is the issue?

- 4.43 The Act does not address the admissibility of co-defendants’ non-hearsay statements. As the Supreme Court observed in *Winter v R*, given the wording of section 27(1), non-hearsay statements “would arguably not be admissible at all”.⁶² This issue has a long and complex history and was considered in the Commission’s Second Review of the Act.⁶³ Our initial research and preliminary feedback from stakeholders has, however, identified a need to revisit the matter.

The Commission’s Second Review

- 4.44 In its Second Review, the Commission identified that the combined effect of sections 27(1) and 22A is to impose greater restrictions on the admissibility of co-defendants’ statements than existed at common law.⁶⁴
- 4.45 That is because, even if the criteria in section 22A are satisfied, section 22A only applies to hearsay statements. Therefore, a defendant’s out-of-court statement will not be admissible against a co-defendant if:⁶⁵

⁶¹ Evidence Act 2006, s 4 (definition of “hearsay statement”).

⁶² *Winter v R* [2019] NZSC 98 at [62].

⁶³ For a discussion of the legislative history to the current wording of ss 22A and 27(1), see Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [14.2]–[14.9].

⁶⁴ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.11].

⁶⁵ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.8].

- (a) the defendant elects to give evidence at trial (and does not adopt the statement in their testimony);⁶⁶ or
 - (b) the prosecution intends to rely on the statement for a purpose other than proving the truth of its contents.
- 4.46 In contrast, at common law the co-conspirators' rule *would* have allowed the prosecution to admit a defendant's statement against a co-defendant regardless of whether the defendant gave evidence at trial.⁶⁷ Further, there was nothing at common law to prevent the prosecution from admitting a defendant's statement against a co-defendant for purposes other than proving the truth of its contents.⁶⁸ In other words, there was no general rule against admitting defendants' non-hearsay statements against a co-defendant, even if the co-conspirators' rule did not apply.
- 4.47 The Commission concluded there was no principled basis for limiting section 22A to hearsay statements and recommended replacing section 22A with a new section 27AA that would provide as follows:⁶⁹

27AA Admissibility of statement against co-defendant

In a criminal proceeding, a statement made by a defendant is admissible against a co-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 statement was made in furtherance of the conspiracy or joint enterprise.
- 4.48 The Commission briefly considered the suggestion of one submitter for a broader amendment to make all defendants' non-hearsay statements admissible against a co-defendant.⁷⁰ It concluded that this would be a significant change in policy and that there was insufficient justification for recommending such a change at that time.

Developments since the Commission's Second Review

- 4.49 The Supreme Court briefly commented on the operation of sections 27(1) and 22A and the Commission's proposed section 27AA in *Winter v R*.⁷¹ The Court observed that, while

⁶⁶ See the discussion in *Fa'avae v R* [2012] NZCA 528, [2013] 1 NZLR 311 at [42].

⁶⁷ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.10]. This is because the common law defined all out-of-court statements as hearsay regardless of whether the maker of the statement gave evidence. As a result, the co-conspirators rule, which operated as an exception to the rule against hearsay, would apply regardless of whether defendant gave evidence in court. See discussion of the operation of the common law hearsay rule in Te Aka Matua o te Ture | Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [58] and Te Aka Matua o te Ture | Law Commission *Hearsay Evidence* (NZLC PP10, 1989) at [5]–[6].

⁶⁸ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.10]. This is because a statement that is not admitted to prove the truth of its contents was not hearsay under the common law: Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at 3; Te Aka Matua o te Ture | Law Commission *Hearsay Evidence* (NZLC PP10, 1989) at [27]; and Te Aka Matua o te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 75.

⁶⁹ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at R26, [15.18] and Appendix 1.

⁷⁰ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.4] and [15.23]–[15.26].

⁷¹ *Winter v R* [2019] NZSC 98 at [60]–[63].

section 22A was intended to codify the common law, “the intention of codifying the common law was only partly achieved”.⁷²

- 4.50 The Supreme Court noted the Commission’s proposed section 27AA but observed that “[o]n the face of it, however, that would still not replicate the common law as explained in *Messenger*”.⁷³ The Court set out the following extract from *Messenger*, a Court of Appeal decision that articulated the common law co-conspirators’ rule on which section 22A is based:⁷⁴

... the existence of the conspiracy or joint enterprise must be shown to the requisite standard without the use of hearsay evidence. Statements made by other persons about what they are intending to do, against the background of their statements about what they have done, however, can be led as evidence of the state of mind of those other persons at the time of speaking. Such statements are led not to prove the truth of the participation of a person who is not a party to the conversation, but as facts from which the existence of the agreement or combination to engage in an illegal common enterprise may be inferred. The existence of a conspiracy can thus be shown by the statements of all alleged participants, including what they have said about the accused ...

- 4.51 The concern the Supreme Court identified in *Winter* appears to be that, while the current law fails to reflect the common law position in relation to co-defendants’ statements offered for a purpose other than to prove the truth of their contents, so too does the Commission’s proposed section 27AA. This is because, as the passage from *Messenger* recognises, the common law provided for the admission of such statements without the need to satisfy the threshold criteria for the co-conspirators’ rule. At common law, the co-conspirators’ rule operated as an exception to the rule against hearsay. When a statement was not hearsay (because it wasn’t relied on to prove the truth of its contents), the rule against hearsay didn’t apply and, by extension, there was no need to engage the co-conspirators’ rule.⁷⁵

Is legislative reform necessary or desirable?

- 4.52 We endorse the conclusion reached in the Second Review that legislative reform is desirable to address the admissibility of co-defendants’ non-hearsay statements. However, given subsequent observations in preliminary feedback, case law and commentary, we consider there are good reasons to revisit how this problem should be resolved. This is for several reasons:

- (a) First, it does not appear to have been Parliament’s intention when passing the Act (or when making subsequent amendments) to depart from the common law position on co-defendants’ statements. As the Commission has previously observed, in

⁷² *Winter v R* [2019] NZSC 98 at [20].

⁷³ *Winter v R* [2019] NZSC 98 at [63].

⁷⁴ *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [13]. Section 22A was introduced following the Commission’s recommendations in *Te Aka Matua o te Ture | Law Commission The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013). There, the Commission explained that its intention was to codify the threshold issues for the common law co-conspirators’ rule as set out in *Messenger* (at [3.111]–[3.112]).

⁷⁵ See also *R v Liev* [2017] NZHC 830 at [14], where Palmer J suggested that the drafting of s 27(1) was not consistent with the nature of the co-conspirators’ rule being an exception to inadmissibility only on the basis of hearsay.

amending what would become section 27, “the Select Committee mistakenly believed it was maintaining the common law position”.⁷⁶

- (b) Second, the proposed section 27AA would not restore the law to the common law position for the reasons discussed above. Instead, it would universally apply the same high threshold for co-conspirators' statements to all co-defendants' statements, whether or not the statement is hearsay.
- (c) Third, while there are good policy reasons for adopting a cautious approach to the admission of co-defendants' hearsay statements,⁷⁷ these reasons are not applicable (or at least not to the same extent) to non-hearsay statements. The concern underlying the rule against the admissibility of co-defendants' statements is the inherent unreliability of a statement blaming a co-defendant that was not made on oath and that is unable to be tested under cross-examination.⁷⁸ However, as the Commission identified in its Second Review:⁷⁹
- (i) If a co-defendant's statement is not hearsay because the co-defendant elects to give evidence at trial, the defendant will be able to test the reliability of the statement by cross-examining the co-defendant.
- (ii) If a co-defendant's statement is not hearsay because the prosecution intends to rely on it for a purpose other than proving the truth of its contents, unreliability is less likely to be a significant concern. We add that it is not clear to us that, just because a non-hearsay statement is made by a co-defendant, it should be subject to stricter rules than other non-hearsay statements.
- (d) Fourth, there is some evidence that the current law is not consistent with expectations or practice. In some cases, a co-defendant's non-hearsay statement is simply admitted without addressing the basis for doing so under the Act.⁸⁰ Other cases have relied on “fine linguistic distinctions”,⁸¹ suggesting a co-defendant's non-hearsay statement is a “verbal act” rather than a “statement” that would be captured by section 27(1).⁸² It has been suggested that these cases indicate that the current wording of the Act “doesn't let the legal system take an approach to the law that they thought was permitted”.⁸³
- (e) Fifth, it is unclear how the section 22A assessment would work in practice if all co-defendants' statements required the same treatment. As the Supreme Court pointed out in *Winter*, the court currently looks to non-hearsay co-defendants' statements when determining whether the threshold criteria are met to allow the prosecution to

⁷⁶ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.91]. See also Evidence Bill 2005 (256-2) (select committee report) at 4, which states that the Committee's view was that the Act would “maintain the current law relating to statements by co-defendants”.

⁷⁷ As recognised in *Winter v R* [2019] NZSC 98 at [40].

⁷⁸ *R v Wellington* [2018] NZHC 2080 at [66] and *R v Pearce* [2007] NZCA 40 at [26]. See also Evidence Bill 2005 (256-2) (select committee report) at 4.

⁷⁹ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.20].

⁸⁰ See, for example, *Singh v R* [2017] NZCA 136 at [90]–[91]; and *R v Ali* [2016] NZHC 2223 at [46]–[47].

⁸¹ *R v Wellington* [2018] NZHC 2080 at [64].

⁸² *Goffe v R* [2011] NZCA 186, [2011] 2 NZLR at [45]. See also *McKenzie v R* [2013] NZCA 378 at [24]–[26].

⁸³ “On co-defendants' statements and admissibility” (23 December 2019) Strictly Obiter <www.strictlyobiter.com>.

admit a co-defendant's statement to prove the truth of its contents. How would this test operate if all co-defendants' statements had to go through the same assessment?

- 4.53 We seek submissions on whether it would be preferable to retain section 22A in its current form and amend section 27 to clarify that a defendant's non-hearsay statement is admissible against a co-defendant, but that if the statement is hearsay, it is only admissible against a co-defendant if it is admitted under section 22A.

QUESTION

Q12

Should section 27 be amended to clarify that a defendant's non-hearsay statement is admissible against a co-defendant, but that if the statement is hearsay it is only admissible against a co-defendant if it is admitted under section 22A?

CHAPTER 5

Unreliable statements

INTRODUCTION

In this chapter we consider section 28 (the exclusion of unreliable statements) and seek feedback on issues relating to:

- the purpose and effect of section 28; and
- the standard of proof for admitting a statement under section 28.

BACKGROUND

- 5.1 Sections 27–30 of the Evidence Act 2006 govern the admissibility in criminal proceedings of defendants' statements offered by the prosecution. Section 27 (discussed in Chapter 4) establishes the general rule that the prosecution may offer evidence of a defendant's statement unless the statement is excluded by the operation of section 28 (unreliable statements), section 29 (statements influenced by oppression) or section 30 (improperly obtained evidence).
- 5.2 Sections 28–30 were intended to operate alongside each other to perform the roles previously fulfilled by the common law voluntariness rule and fairness discretion. As a scheme, sections 28–30 were designed to ensure defendants' statements are sufficiently reliable to be considered by the fact-finder and to control the methods used to obtain evidence against defendants. We discuss the background to sections 29 and 30 further in Chapters 6 and 7.
- 5.3 The focus of this chapter is on section 28, which provides for the exclusion of unreliable statements. Reliability of evidence is generally a matter for the fact-finder. However, the Act recognises that certain types of evidence should be screened for a threshold level of reliability before they are considered by the fact-finder.

- 5.4 Section 28 is one example.¹ It recognises the risk of wrongful convictions based on false confessions.² It applies if the defendant or a co-defendant raises the issue of reliability on “the basis of an evidential foundation”,³ or if the judge raises the issue of reliability.⁴ 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.⁵

THE PURPOSE AND EFFECT OF SECTION 28

- 5.5 A key question is whether section 28 is concerned only with the circumstances in which the statement was made or whether the actual reliability (or truth) of the statement can also be considered. This has long been debated.⁶ In *R v Wichman*, however, the majority of the Kōti Mana Nui | Supreme Court held that indications of actual reliability are relevant to the section 28 assessment.⁷ This raises an issue with the wording of section 28, which reflects earlier expectations as to how the section should operate. We invite submissions on whether amendment is desirable to clarify the purpose and effect of section 28 to make it simpler to apply.

Policy and legislative history

- 5.6 Section 28 largely reflects, with some amendments, Te Aka Matua o te Ture | Law Commission’s proposed Evidence Code provision.⁸ This provision encompassed aspects of the common law voluntariness rule as well as the fairness discretion.
- 5.7 Under the common law voluntariness rule, confessions obtained by a promise, threat or any other inducement by a person in authority were considered involuntary and were

¹ Other examples include hearsay evidence (Evidence Act 2006, s 18(1)(a)) and visual and voice identification evidence (ss 45(2) and 46). The Supreme Court has recently confirmed that indications of actual reliability can also be considered when assessing the probative value of evidence under s 8 (general exclusion): *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [69]–[70]. The Court found that reliability could affect the relevance assessment under s 7 as well, but evidence would only fail the relevance test due to reliability concerns if it was “so unreliable that it could not be accepted or given any weight at all by a reasonable jury or a judge in a judge-alone trial” (at [41] and fn 199).

² *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [282].

³ Evidence Act 2006, s 28(1)(a).

⁴ Evidence Act 2006, s 28(1)(b).

⁵ Evidence Act 2006, s 28(2). The section does not limit the factors that may be taken into account when assessing the reliability of a statement, but s 28(4) does list four mandatory considerations. These include the defendant’s physical, mental or psychological condition, their characteristics (including any mental, intellectual or physical disabilities), the nature of any questions put to the defendant and the nature of any threat, promise or representation made.

⁶ In 2013, the Commission recommended amendment to clarify that indications of actual reliability should not be considered under s 28, due in part to concerns that this would divert the court’s attention from questions of improper police conduct to large volumes of corroborating evidence: Te Aka Matua o Te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013), R5 and at [3.85]–[3.87]. This recommendation was rejected on the basis that a blanket rule would be too restrictive: Nora Burghart *Evidence Amendment Bill – Initial briefing* (Ministry of Justice, 8 September 2015) at [11]–[12]. In the Second Review the Commission revisited the issue and considered whether a different approach was necessary to discourage improper police practices but did not recommend reform: Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [6.7]–[6.23].

⁷ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [79]–[84]. This case is discussed in more detail in Chapter 6.

⁸ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 78 and 80. See also Te Aka Matua o te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part IV Proposals For Reform at [120].

generally inadmissible.⁹ Such confessions could only be admitted if the judge was satisfied that the means by which the confession was obtained were not likely to cause a false confession.¹⁰ Under this test, the actual truth of a confession was irrelevant. The focus was on the tendency of the inducement to affect the reliability of the statement rather than on the actual result.¹¹

- 5.8 While the voluntariness rule was focused on the actions of others,¹² at common law, factors internal to the defendant (such as fatigue, their psychological state or the influence of drugs or alcohol) could be taken into account under a separate discretion to exclude evidence that was obtained unfairly (the fairness discretion).¹³ The fairness discretion is now primarily reflected in section 30.¹⁴ Nevertheless, the Commission also incorporated aspects of the fairness discretion into its proposed Code provision on unreliability, by including factors internal to the defendant that might impact reliability (such as a mental disability or intoxication) as well as external factors (such as police conduct).¹⁵
- 5.9 The Commission therefore originally intended that what became section 28 would serve dual purposes, depending on whether police conduct was a factor. While its primary purpose was to ensure statements were only admitted if they were sufficiently reliable to be considered by the fact-finder (threshold reliability),¹⁶ it was also intended to deter unacceptable police questioning practices that created a risk of unreliability.¹⁷ The Commission explained that the actual truth of the statement was not intended to be relevant, because “[t]o require truth to be established at this preliminary stage would usurp the function of the jury”.¹⁸ Accordingly, the Evidence Code included a separate provision requiring that the truth or falsity of a defendant’s statement be disregarded.¹⁹

⁹ *Naniseni v The Queen* [1971] NZLR 269 (CA) at 271–274 and 276–277; Te Aka Matua o Te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [21]–[22].

¹⁰ This exception to the voluntariness rule was codified in the Evidence Act 1908, s 20. A version of this exception was first introduced by the Evidence Further Amendment Act 1895, s 17.

¹¹ *R v Fatu* [1989] 3 NZLR 419 (CA) at 430. See also *R v McCuin* [1982] 1 NZLR 13 (CA) at 15.

¹² Factors internal to the defendant could not render a confession involuntary: *Naniseni v The Queen* [1971] NZLR 269 (CA) at 274–275.

¹³ See the discussion in *Gebhardt v R* [2022] NZCA 54 at [65]–[70].

¹⁴ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C144].

¹⁵ Te Aka Matua o te Ture | Law Commission *Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [123], [130] and [134].

¹⁶ Te Aka Matua o te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [127].

¹⁷ Te Aka Matua o te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [131].

¹⁸ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [109]. See also Te Aka Matua o te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [127] and [136].

¹⁹ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 88. See also at [C155]: “subsequently discovered real evidence may not be offered at a hearing to determine the admissibility of a defendant’s statement, if the only purpose of that evidence is to confirm the truth of the statement”. Section 31 of the Evidence Code would also have applied when determining the admissibility of a defendant’s statement under the oppression and improperly obtained evidence provisions.

- 5.10 The Ministry of Justice appears to have taken a different view on the intended purpose of the unreliable statements provision in the Evidence Bill. The Departmental Report emphasised that the provision was concerned with the nature and reliability of the statement rather than the manner in which it was obtained.²⁰ Contrary to the Commission's recommendations, the Bill as introduced also provided for the admission of a statement under what became section 28 if the judge was satisfied that it was actually true.²¹ That provision was removed on the recommendation of the select committee, which considered the truth of a statement should not be used to justify its admissibility.²² The Bill was not, however, amended to expressly require evidence of the truth of a statement to be disregarded under section 28, as the Law Commission had recommended.²³

Previous Law Commission reviews

- 5.11 In its 2013 Review of the Act, the Commission recommended that section 28 be amended to provide that the actual truth of a statement is irrelevant.²⁴ This recommendation was rejected on the basis that a blanket rule would be too restrictive.²⁵ The Ministry of Justice's advice noted that the apparent truth of the statement may be the only way to assess its reliability, for example, where it contains information only the offender could have known.²⁶
- 5.12 In its Second Review of the Act, the Commission considered the relevance of truth, again following the Supreme Court's decision in *R v Wichman*.²⁷ As noted above, the majority in *Wichman* found that indications of actual reliability — such as the degree of congruence between what is asserted in the statement and the known facts, and the general plausibility of the statement — are relevant to the section 28 assessment.²⁸ The Commission endorsed the majority's approach.²⁹ The Commission reasoned that:³⁰
- (g) the policy underlying the section is to prevent a fact-finder from relying on a defendant's statement where it would be unsafe to do so; and
 - (h) the section covers unreliability stemming from internal factors (such as the defendant's mental condition) as well as external factors.

²⁰ Crime Prevention and Criminal Justice Group *Evidence Bill: Part 2 – Admissibility Rules, Privilege, and Confidentiality* (Ministry of Justice, June 2006) at 14.

²¹ Evidence Bill 2005 (256-1), cl 24(2)(b).

²² Evidence Bill 2005 (256-2) (select committee report) at 4.

²³ This is in contrast to Evidence Act 2006, s 29(3), which states “[f]or the purpose of applying this section, it is irrelevant whether or not the statement is true”.

²⁴ Te Aka Matua o Te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.87]–[3.89]. This was consistent with the select committee's recommendation and the approach in Evidence Act 2006, s 29(3).

²⁵ Nora Burghart *Evidence Amendment Bill – Initial briefing* (Ministry of Justice, 8 September 2015) at [11]–[12].

²⁶ Nora Burghart *Evidence Amendment Bill – Initial briefing* (Ministry of Justice, 8 September 2015) at [12].

²⁷ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

²⁸ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [83]–[84] per Young, Arnold and O'Regan JJ, and [433]–[438] per Glazebrook J.

²⁹ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [6.19].

³⁰ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [6.14] and [6.19].

5.13 The Commission suggested it may be undesirable to require the courts to ignore indications of the actual truth or falsity of a statement, particularly where the potential unreliability stems from internal factors.³¹ However, the Commission concluded it was unnecessary to amend section 28 to clarify that indications of actual truth can be considered. While submitters had mixed views on whether such an amendment was desirable,³² the Commission found that the guidance in *Wichman* was sufficiently clear.³³

Is the wording of section 28 sufficiently clear?

5.14 The way in which the courts now interpret and apply section 28 differs from how the Commission (and arguably the select committee) intended it to function and may be out of step with the wording of the section. We raise this issue for consideration again given that some time has now passed since *Wichman* and submitters may have new observations about how section 28 is applying in practice.

5.15 Section 28 contains a two-step process:

- (a) The defendant or the judge must raise “the issue of the reliability of the statement” (section 28(1)).
- (b) Once the issue of reliability has been raised, 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” (section 28(2)).

5.16 On the face of the statute, it is arguably unclear whether the “issue of reliability” in section 28(1) must be raised by reference to the circumstances in which the statement was made (as the section 28(2) assessment requires), or whether it is concerned with actual reliability or a mixture of both.

5.17 Section 28(2) can also be interpreted in various ways. Commentator Bernard Robertson has suggested that the approach in *Wichman* is inconsistent with the wording of section 28.³⁴ The majority in *Wichman* itself acknowledged that section 28(2) “is not an entirely easy provision and its language gives rise to a range of possible interpretations”.³⁵ This indicates there may be a lack of clarity about how the section is intended to function.

5.18 As discussed above, the Commission originally intended the provision to serve two purposes. In addition to ensuring threshold reliability, the provision was intended to have a secondary purpose of deterring unacceptable police questioning practices. This is arguably reflected in the wording of section 28, which largely adopted the Commission’s Evidence Code provision. Consistent with the approach under the common law voluntariness rule, the plain wording of section 28(2) appears to focus on the tendency

³¹ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [6.15].

³² Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [6.18].

³³ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [6.23].

³⁴ Bernard Robertson “Evidence section” [2019] NZLJ 198 at 200; Bernard Robertson “Student Companion - Criminal Justice/Evidence” [2021] NZLJ 166 at 166.

³⁵ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [82].

of the circumstances to affect the reliability of the statement rather on the actual result.³⁶ Indications of the actual truth or falsity of the statement such as other available evidence or general plausibility, are arguably not part of the “circumstances in which the statement was made” and may therefore be considered irrelevant.

- 5.19 The majority in *Wichman*, however, reached a different view. They interpreted the “circumstances in which the statement was made” as encompassing “the nature and content of the statement and the extent to which those circumstances affected the defendant”.³⁷ On this approach, if there are clear indications that the statement is in fact true, a court may conclude that the circumstances are not “likely” to have affected its reliability. In reaching this view, the majority noted the position was complicated by the fact that section 28 combined aspects of two separate common law rules: the voluntariness rule and the fairness discretion.³⁸ The section addresses unreliability caused by factors *internal* to the defendant (such as mental impairment) as well as *external* factors (such as police conduct).
- 5.20 It appears that this combining of both internal and external factors in section 28 may have led to a lack of clarity about the intent of the provision, as different policy considerations apply to each. A deterrent approach is only relevant where the reliability concerns arise from the conduct of law enforcement officers. Where that is the case, it may make sense to disregard the actual reliability of the statement to avoid endorsing an “ends justifies the means” approach (as the select committee appeared to recognise). Where the reliability concerns stem from internal factors, the sole issue is whether the statement is sufficiently reliable to be considered by the fact-finder. In that situation, there may be a better argument for considering indications of actual reliability (such as consistency with other evidence) to avoid depriving the fact-finder of relevant evidence if there is a reasonable assurance that it is reliable in fact.

Is legislative reform necessary or desirable?

- 5.21 The majority decision in *Wichman* suggests that section 28 is now solely concerned with threshold reliability (assessed by considering both the circumstances in which the statement was made and indications of actual reliability). Evidence will not be excluded for deterrent purposes if it is likely to be reliable in fact.
- 5.22 This means that the purpose of section 28 (as it is now understood) is narrower than that of the common law voluntariness rule and, to some degree, the Commission’s original intention. In Chapter 6, we suggest this may be addressed in part by ensuring that concerns about the investigatory techniques used to obtain a defendant’s statement can be addressed under section 30.³⁹ We note, however, that exclusion under section 30 depends on the application of a balancing test. By contrast, under section 28 exclusion is

³⁶ We note the wording of s 28 draws on its predecessor, s 20 of the Evidence Act 1908, under which the truth or otherwise of the statement was disregarded (see *R v Fatu* [1989] 3 NZLR 419 (CA) at 430 and *R v McCuin* [1982] 1 NZLR 13 (CA) at 15). Section 20 operated alongside the voluntariness rule and allowed a confession to be admitted if the means by which it was obtained were not likely to cause a false confession.

³⁷ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [84].

³⁸ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [80]. For further discussion, see Te Aka Matua o Te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [130].

³⁹ Or Evidence Act 2006, s 29 (statements influenced by oppression) in the limited circumstances when it applies.

required unless the circumstances in which the statement was made were not likely to have adversely affected its reliability. This means section 30 should not be used as a substitute for section 28. Caution should be exercised before declining to exclude evidence under section 28 based on indications of actual reliability.

- 5.23 We identified four cases applying the approach in *Wichman*.⁴⁰ These cases indicate that, despite now considering indications of actual reliability, the courts are continuing to take a relatively cautious approach to admitting defendants' statements when reliability concerns are raised. They also demonstrate that the approach in *Wichman* does not necessarily favour admission of the evidence — it may also favour exclusion where other evidence or the content of the statement suggest it is in fact unreliable.⁴¹
- 5.24 It is arguable, however, that the case law does not reflect the wording of section 28. We seek feedback on whether this is causing confusion in practice and whether amendment is desirable to make the section easier to understand and apply. Reform could also help to ensure that only clear indications of actual reliability are taken into account. On the other hand, reform may be unnecessary if submitters consider the decision in *Wichman* and subsequent case law provide sufficient guidance.

Options for reform

- 5.25 Should reform be considered necessary or desirable, we have identified three options for reform. These could be implemented in combination or alone. They would retain the current focus of section 28 on the circumstances in which the statement was made, while making it clear that any obvious indications of actual reliability can also be considered. We see this approach as consistent with *Wichman*.⁴² We suggest it remains appropriate to focus on the circumstances in which the statement was made, rather than referring solely to actual reliability. That is because:
- (a) Given the difficulties in accurately assessing the truth of confession evidence, which we discuss later in this chapter, if the circumstances indicate that the reliability of a statement is likely to have been compromised, then exclusion should be presumed unless there are clear indications that the statement is likely to be true.
 - (b) The fact that aspects of a statement are untrue should not always engage section 28. The defendant may, for example, be mistaken about something or choose to lie of their own volition.⁴³ Juries are routinely trusted to assess such evidence. If the defendant makes a free and informed choice about whether to make a statement and what to say, but it proves to be incorrect, we do not think this engages the policy concerns underlying section 28.

⁴⁰ *Lyttle v R* [2021] NZCA 46 at [178]–[208]; *R v Fawcett* [2021] NZHC 2406 at [226] and [291]–[293]; *Gebhardt v R* [2022] NZCA 54 at [78]–[84]. The fourth case remains subject to publication restrictions until final disposition of trial.

⁴¹ *Lyttle v R* [2021] NZCA 46 at [201]–[208]; *R v Fawcett* [2021] NZHC 2406 at [290]–[293] and [298]; *Gebhardt v R* [2022] NZCA 54 at [79]. The courts treated inconsistencies with other evidence or the general implausibility of the statement as indicative of unreliability.

⁴² See, for example, *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [84] per William Young J and at [434]–[438] per Glazebrook J.

⁴³ See *R v Fawcett* [2021] NZHC 2406 at [277], noting that the fact a statement contains lies will not on its own engage s 28.

Option 1: Clarify the meaning of “reliability” in section 28(1)

- 5.26 Section 28(1) could be amended to provide that the section applies where the defendant (on the basis of an evidential foundation) or the judge raises the issue of *whether the circumstances in which the statement was made may have adversely affected its reliability*.
- 5.27 This would clarify that the circumstances in which the statement was made are the primary concern under section 28(1), as they are under section 28(2). We suggest that, when raising an evidential foundation, it should be sufficient for the defendant to point to circumstances that, objectively assessed, may tend to affect the reliability of a statement. It should not be necessary to point to evidence that the statement in question is (in whole or part) untrue. Equally, the fact that a statement is implausible or inconsistent with other evidence should not be enough on its own to engage section 28 in the absence of any relevant surrounding circumstances (for the reasons noted above).

Option 2: Clarify the relevance of actual reliability under section 28(2)

- 5.28 Section 28(2) could be amended to provide that the judge may admit the statement if satisfied that the circumstances in which the statement was made were not likely to have, *or did not in fact*, adversely affect the reliability of the statement.
- 5.29 This amendment could occur alongside Option 1 or separately. It would confirm that the judge may have regard to whether the circumstances *actually affected* the reliability of the statement when determining whether to admit it, consistent with the approach in *Wichman*. However, it would also retain the reference to likelihood given that there will not always be clear evidence of actual reliability or unreliability. In such cases, the section 28(2) assessment would be based on an objective assessment of the circumstances alone.
- 5.30 There is a risk that this approach may over-emphasise actual reliability, with the result that insufficient weight is given to the circumstances in which the statement was made. However, the cautious approach taken by the courts since *Wichman* tends to suggest that is unlikely. We also note this risk would be reduced if the standard for admitting evidence under section 28(2) is raised to beyond a reasonable doubt, which we discuss below.

Option 3: Insert a new provision specifying optional considerations

- 5.31 A new subsection could be inserted providing that, in applying section 28(2), the judge may have regard to:
- (a) the contents of the statement; and/or
 - (b) the extent to which the statement is clearly consistent or inconsistent with other evidence.
- 5.32 This option would specifically permit the judge to consider the contents of the statement (for example, if it is inherently implausible or internally inconsistent) and any *clear* consistencies or inconsistencies with other available evidence.
- 5.33 If a new provision along these lines was inserted *without* Option 2, it could clarify that clear indications of actual reliability or unreliability may be considered while potentially reducing the risk that these considerations would be given undue weight (as section 28(2) would still focus on whether the circumstances were *likely* to have affected the reliability

of the statement). However, this approach would not directly resolve the issues with the language of section 28(2).

- 5.34 If Option 2 were implemented, this additional provision may still provide useful guidance on how actual reliability is to be assessed. It would also emphasise that consistencies or inconsistencies with other evidence should only be considered where they are clear, in recognition of the difficulties in accurately assessing the truth of confession evidence.
- 5.35 The risk of including such a provision is that it may encourage close analysis of the other evidence in the case, lengthening pre-trial hearings. We note this already occurs under the approach in *Wichman*.⁴⁴ It could also (like Option 2) result in too much emphasis being placed on these factors.

QUESTION

Q13

Should section 28 be amended to clarify its purpose and the relevance of actual reliability in light of *Wichman*? If so, should it be amended to:

- a. clarify that the “the issue of the reliability of a defendant’s statement” must be raised under section 28(1) by reference to the circumstances in which the statement was made; and/or
- b. provide that the judge may admit the statement under section 28(2) if satisfied that the circumstances in which the statement was made were not likely to have, *or did not in fact*, adversely affect the reliability of the statement; and/or
- c. insert a new subsection providing that, in applying section 28(2), the judge may have regard to:
 - i. the contents of the statement; and/or
 - ii. the extent to which the statement is clearly consistent or inconsistent with other available evidence?

THE STANDARD OF PROOF FOR ADMISSIBILITY

- 5.36 As noted above, section 28 provides for a reliability assessment in relation to defendants’ statements in recognition of the risk of wrongful convictions based on false confessions.⁴⁵ Once the issue of the reliability of a statement is raised, the judge must exclude the evidence unless satisfied on the “balance of probabilities” that its reliability is not likely to have been affected.⁴⁶

⁴⁴ See, for example, *R v Fawcett* [2021] NZHC 2406 at [239] and [290]–[301].

⁴⁵ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [282].

⁴⁶ Evidence Act 2006, s 28(2).

Does the “balance of probabilities” standard provide adequate protection against the risk of conviction based on false confessions?

- 5.37 The Commission in its Evidence Code had originally proposed a “beyond reasonable doubt” standard for establishing the reliability of a defendant’s statement.⁴⁷ This is the standard that applied under the common law voluntariness rule⁴⁸ and still applies under section 29 (statements influenced by oppression). When the Evidence Bill was introduced, clause 24 (now section 28) contained the lower “balance of probabilities” standard. This appears to have been preferred on the basis that the evidence would still need to be assessed by the fact-finder if admitted.⁴⁹
- 5.38 Preliminary feedback identified concerns among defence counsel that section 28 may provide inadequate protection against the risk of false confessions being admitted in evidence. Concerns related principally to the relatively recent adoption in New Zealand of “Mr Big” undercover operations⁵⁰ and the Complex Investigation Phased Engagement Model (CIPEM) for questioning suspects.⁵¹ These techniques have been the subject of considerable media scrutiny⁵² and have been found by the courts to have produced

⁴⁷ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 78.

⁴⁸ *R v McCuin* [1982] 1 NZLR 13 (CA) at 15.

⁴⁹ Cabinet Paper “Evidence Bill: Paper 2: Admissibility of Evidence” (4 December 2002) at [27].

⁵⁰ A “Mr Big” operation involves undercover officers inducting the suspect into a bogus criminal organisation. In the New Zealand examples, values such as honesty and loyalty are emphasised throughout the operation as well as the benefits (financial and otherwise) that the suspect will obtain by securing admission as a member. At the conclusion of the operation, the suspect is interviewed by “Mr Big” – the boss of the organisation – to determine whether they will be allowed to join the organisation. The suspect is encouraged to confess to any previous wrongdoing that could be used against them. They may be confronted with information – allegedly from police contacts – that they were involved in the crime police are investigating, and assured that, if they confess, any problems with police will be taken care of. Cases discussing the use of this technique include *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 and *Lyttle v R* [2021] NZCA 46.

⁵¹ CIPEM is an interview technique that uses a relaxed, conversational style to build rapport with the suspect or witness. The interviewers seek to get the suspect or witness talking by reframing the narrative, which can include introducing a “softer” accusation or rationalising, minimising and justifying the alleged offending. The use of the technique was discussed in *R v X* [2021] NZHC 2444. In that case there were multiple interactions with the suspect over several days and some parts of the discussions were not recorded. While the decision only considered exclusion of the defendant’s statement under s 30, not s 28, it found that the use of CIPEM in that case involved “excessive manipulation of the defendant” (at [121(d)]) and resulted in admissions that were “very flawed” and “not credible” (at [174]–[177]). This suggests the use of the technique also has the potential to raise s 28 issues in future.

⁵² See, for example, Blair Ensor and Mike White “Country’s top cop becomes involved in controversy over interviewing technique” (7 April 2023) Stuff <www.stuff.co.nz>; Mike White “Police guilty of manipulation, serious breaches, and ‘nonsense’ in failed Lois Tolley investigation” (26 February 2022) Stuff <www.stuff.co.nz>; Mike White “‘An abomination of an investigation’: How the Lois Tolley murder case collapsed” (19 March 2022) Stuff <www.stuff.co.nz>; Blair Ensor and Mike White “Top cop intimately involved in interviews that led to false murder confession” (21 May 2022) Stuff <www.stuff.co.nz>; Mike White “Framed for murder, part three: The trouble with ‘Mr Big’” (28 March 2022) Stuff <www.stuff.co.nz>; Mike White “‘I reckon we just f.....g lie’: Cops caught planning to deceive during murder investigation” (8 June 2022) Stuff <www.stuff.co.nz>; Mike White “The tragic and terrible case of Mauha Fawcett’s wrongful conviction” (11 June 2022) Stuff <www.stuff.co.nz>; Ruth Hill “‘Unfair’ interview process forced false confession, says judge” (5 September 2022) RNZ <www.rnz.co.nz>; Emile Donovan “How a murder case was unravelled by a police interview” (podcast, 30 October 2022) The Detail <www.rnz.co.nz>; Mike White and Blair Ensor “The ‘strategic hunters’, and the controversial police approach to solving cold cases” (3 December 2022) Stuff <www.stuff.co.nz>.

- unreliable statements in two cases.⁵³ The Independent Police Conduct Authority is currently investigating two complaints related to the use of CIPEM.⁵⁴
- 5.39 In Chapter 6 we suggest that concerns about the propriety of these techniques could be addressed in part under section 30 (improperly obtained evidence). However, where the primary issue is the reliability of the defendant’s statement, section 28 will apply. We invite submissions on whether the “balance of probabilities” standard for admitting evidence under section 28 remains appropriate.
- 5.40 We have not yet formed a preliminary view on this issue. On the one hand, the Kōti Pira | Court of Appeal has allowed appeals on the basis that defendants’ statements should not have been admitted under section 28 in *Lyttle v R*⁵⁵ (a Mr Big case) and *Gebhardt v R*.⁵⁶ This may suggest that section 28 is functioning as intended. On the other hand, in both *Lyttle* and *Gebhardt*, the Court of Appeal found clear indications that the statements were in fact unreliable.⁵⁷ In cases where the other available evidence is less clear, there may be a higher risk of a false confession being admitted under section 28.
- 5.41 Whether the current standard is resulting in the admission of false confessions in practice is difficult to assess on the case law. While there are instances where convictions based in part on a defendant’s statement have been overturned due to reliability concerns, these either involved events pre-Act⁵⁸ or challenges to the reliability of the statement based on new information obtained after the original trial.⁵⁹ The absence of case examples to date does not, however, mean that false confessions have not been admitted under section 28 (as there may be no way to prove this on appeal) or that this will not occur in future.
- 5.42 There have been several developments since the Act was enacted that may affect the assessment of whether the “balance of probabilities” standard is appropriate.
- (a) First, there is increasing recognition of the reliability risks associated with confessions and a growing body of evidence indicating they may be given undue weight by the fact-finder.⁶⁰ The prevalence of false confessions has been established by overseas

⁵³ *Lyttle v R* [2021] NZCA 46 at [175]–[176] and [207]–[208]; *R v X* [2021] NZHC 2444 at [174]–[177], although the statement was excluded under s 30 rather than s 28.

⁵⁴ Blair Ensor and Mike White “Police watchdog launches investigation into complaints about controversial interviewing method” (6 December 2022) Stuff <www.stuff.co.nz>.

⁵⁵ *Lyttle v R* [2021] NZCA 46.

⁵⁶ *Gebhardt v R* [2022] NZCA 54.

⁵⁷ *Lyttle v R* [2021] NZCA 46 at [203]–[207]; *Gebhardt v R* [2022] NZCA 54 at [79].

⁵⁸ *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277.

⁵⁹ *Fawcett v R* [2017] NZCA 597 at [22]–[24] (evidence excluded at retrial in *R v Fawcett* [2021] NZHC 2406 and charge dismissed in *R v Fawcett* [2021] NZHC 2969).

⁶⁰ See, for example, *Gebhardt v R* [2022] NZCA 54 at [71]; *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [394]–[396] and [401] per Glazebrook J; Susan Glazebrook “Mr Big Operations - Innovative Investigative Technique or Threat to Justice?” (paper presented to the Judicial Colloquium 2015, Hong Kong, September 2015) at 11; Joshua Stewart and others “The prevalence of false confessions in experimental laboratory simulations: A meta-analysis” (2018) 36 *Behav Sci & L* 12; Amelia Mindthoff and others “A Survey of Potential Jurors’ Perceptions of Interrogations and Confessions” (2018) 24 *Psychol Pub Pol’y & L* 430 at 442.

case studies (including cases involving DNA exonerations) and scientific studies.⁶¹ There have been recent cases in New Zealand where people who confessed to a crime later had their convictions overturned.⁶² False confessions may be influenced by a variety of factors, including situational factors (such as interrogation techniques) and dispositional factors (such as youth, poor mental health or cognitive impairment).⁶³ Research suggests false confessions can be convincing, containing details that it seems only the offender would know.⁶⁴ These details may be inadvertently disclosed to a suspect by law enforcement officers during an investigation (sometimes referred to as contamination).⁶⁵ Because of this, it can be difficult to accurately assess whether confessions are true.⁶⁶ They are, however, likely to be given significant weight by the fact-finder.⁶⁷

- (b) Second, the relatively recent use of techniques such as Mr Big undercover operations and the CIPEM for questioning suspects may make it more difficult to accurately assess the reliability of confessions. These techniques can involve significant interaction between investigators and suspects over an extended period of time, some of which may be informal and/or not recorded.⁶⁸
- (c) Third, as discussed above, the courts now consider indications of actual reliability when deciding whether to admit evidence under section 28. This does not appear to have been the intent at the time section 28 was enacted. In light of this, there may be a stronger argument for applying a higher standard for admission under section 28. Given the difficulties in accurately assessing the truth of confessions, indications of actual reliability may be misleading. For example, a confession may be consistent with other evidence due to contamination during the investigation or because the defendant knows the offender. It may therefore be appropriate to require more convincing evidence of actual reliability before admitting a confession on that basis.

⁶¹ See the discussion in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [394]–[402] per Glazebrook J; Susan Glazebrook “Mr Big Operations - Innovative Investigative Technique or Threat to Justice?” (paper presented to the Judicial Colloquium 2015, Hong Kong, September 2015) at 11; Joshua Stewart and others “The prevalence of false confessions in experimental laboratory simulations: A meta-analysis” (2018) 36 *Behav Sci & L* 12.

⁶² For example, Mahua Fawcett and Teina Pora.

⁶³ Jennifer Lackey “False Confessions and Testimonial Injustice” (2020) 110 *J Crim L & Criminology* 43.

⁶⁴ *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [28]–[29]; *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [436] per Glazebrook J; Saul Kassin “The Social Psychology of False Confessions” (2015) 9 *Social Issues and Policy Review* 25 at 39.

⁶⁵ Fabiana Alceste, Kristyn Jones, and Saul Kassin “Facts only the perpetrator could have known? A study of contamination in mock crime interrogations” (2020) 44 *Law & Hum Behav* 128.

⁶⁶ See, for example, Saul Kassin and others “‘I’d Know a False Confession If I Saw One’: A Comparative Study of College Students and Police Investigators” (2005) 29 *Law & Hum Behav* 211.

⁶⁷ *Gebhardt v R* [2022] NZCA 54 at [71]; *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [401] per Glazebrook J; Amelia Mindthoff and others “A Survey of Potential Jurors’ Perceptions of Interrogations and Confessions” (2018) 24 *Psychol Pub Pol’y & L* 430 at 442 (this study found that while potential jurors were more accepting than they once were of the idea that a person might falsely confess, they continued to treat confessions as relatively strong indicators of guilt).

⁶⁸ See, for example, *R v X* [2021] NZHC 2444 at [59]–[75]. Failing to record interactions with a suspect may amount to a breach of the Chief Justice’s Practice Note on Police Questioning so as to engage s 30 (*Practice Note on Police Questioning (s 30(6) Evidence Act 2006)* [2007] 3 NZLR 297), but that will not always be the case. The Practice Note does not apply, for example, to undercover operations (*R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [106]). Additionally, most of its requirements only apply when the person being questioned is in custody or there is sufficient evidence to lay a charge against them.

5.43 In *Wichman*, which concerned the admissibility of a confession made during a Mr Big operation, all members of the Court accepted that an innocent person in the defendant's position may have thought it worthwhile to confess.⁶⁹ Nonetheless, the evidence was admitted based on indications of actual reliability. In that type of situation, there is an argument that the balance of probabilities standard is inadequate to protect against the risk of conviction based on a false confession in light of the considerations discussed above. The counter-argument is that the case law to date does not show clear evidence of false confessions having been admitted following a challenge under section 28. The difficulty is that, if this has occurred, it would not necessarily be detected (in the absence of a later exoneration based on new evidence).

Should the standard be changed to “beyond reasonable doubt”?

- 5.44 Should reform be necessary or desirable to address the concerns discussed above, section 28 could be amended to adopt a standard of “beyond reasonable doubt”. This could occur in conjunction with the potential amendments discussed above in relation to the purpose of section 28 or alone.
- 5.45 Raising the standard of proof for admissibility could provide greater protection against the risk of wrongful conviction based on false confession evidence. It may not change the outcome in the majority of cases, but it would signal to the courts that they should err on the side of exclusion where there is limited evidence of reliability. If the court had any doubt that the circumstances surrounding a defendant's statement may have made it unreliable, the statement would be excluded.
- 5.46 It is arguable that requiring the court to be satisfied “beyond reasonable doubt” at the pre-trial stage may be too high a hurdle since it will not have all the evidence before it (particularly where other relevant evidence will be given by prosecution witnesses). This could lead to relevant and probative evidence being withheld from the fact-finder in circumstances where they might be better placed to assess it accurately at trial (with appropriate reliability warnings). That may, however, be considered an appropriate trade-off to protect against the risk of a miscarriage of justice.
- 5.47 We note there is precedent in the Act for applying a “beyond reasonable doubt” standard when assessing reliability at the admissibility stage. Where visual identification evidence was obtained without using a formal procedure and there was no good reason for not using one, it is only admissible if “the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification”.⁷⁰ We welcome feedback on whether that standard has caused difficulties in practice.

QUESTION

Q14

Should the “balance of probabilities” standard in section 28(2) be raised to “beyond reasonable doubt”?

⁶⁹ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [86] per William Young J for the majority, [318] per Elias CJ and [451] per Glazebrook J.

⁷⁰ Evidence Act 2006, s 45(2).

CHAPTER 6

Investigatory techniques and risks of unreliability

INTRODUCTION

In this chapter, we consider and seek feedback on whether sections 28–30 of the Act adequately respond to the risk that investigatory techniques used by law enforcement officers could produce unreliable evidence.

BACKGROUND

- 6.1 As we explain in Chapter 5, sections 28–30 of the Evidence Act 2006 were intended to operate alongside each other to perform the roles previously fulfilled by the common law voluntariness rule and the jurisdiction to exclude improperly obtained evidence based on trial fairness considerations.¹ Section 30 also fulfils an additional role of providing for exclusion of evidence obtained in breach of the New Zealand Bill of Rights Act 1990 (NZBORA) and other legislation. As a scheme, sections 28–30 were designed to ensure defendants' statements are sufficiently reliable to be considered by the fact-finder and to control the techniques used to obtain evidence against defendants.
- 6.2 Section 28 is principally concerned with whether a defendant's statement is sufficiently reliable to be considered by the fact-finder. As we discuss in Chapter 5, since the Kōti Mana Nui | Supreme Court's decision in *R v Wichman* the courts now consider indications of actual reliability (such as consistency with other evidence) when deciding whether to admit a statement under section 28.² This means a statement that is likely to be true may be admitted irrespective of the techniques used to obtain it (subject to sections 29 and 30).
- 6.3 Sections 29 and 30 are more directly concerned with the conduct of law enforcement officers. Section 29 (statements influenced by oppression) was intended to protect

¹ These rules are discussed in Chapter 5. For a broader discussion of these common law rules see Te Aka Matua o Te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) Part II: Confessions and Improperly Obtained Evidence.

² *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753. This case is discussed below.

people from coerced self-incrimination.³ It excludes defendants' statements that are influenced by conduct or treatment that must *always* be regarded as reprehensible.⁴ Specifically, it protects the right not to be subjected to torture or to cruel, degrading or inhuman treatment or punishment.⁵ Accordingly, the threshold for "oppression" is high,⁶ and once it is established the statement is automatically excluded. As far as we have been able to determine, only one statement has been excluded under section 29 since it was enacted.⁷

- 6.4 Section 30 (improperly obtained evidence) has the broader aim of maintaining an effective and credible system of justice.⁸ It is based on the balancing test adopted by the Kōti Pīra | Court of Appeal in *R v Shaheed*, which was used to determine the admissibility of evidence obtained in breach of the NZBORA.⁹ However, section 30 is triggered by a wider range of improper conduct. Evidence is deemed to be improperly obtained, so as to engage the section 30 balancing test, if it is obtained:¹⁰
- (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies;¹¹
 - (b) in consequence of a defendant's statement that would be inadmissible if offered by the prosecution; or
 - (c) unfairly.
- 6.5 The final limb — unfairly obtained evidence — is most often engaged where defendants' statements are obtained in breach of the Chief Justice's Practice Note on Police Questioning (which restated the earlier Judges' Rules, with some developments, for the

³ Te Aka Matua o te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [142]; Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C138].

⁴ Te Aka Matua o te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [143].

⁵ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C141].

⁶ *Field v R* [2010] NZCA 556, [2011] 1 NZLR 784 at [160].

⁷ *Tuigamala v R* DC Auckland CRI-2007-004-011451, 22 December 2008. In that case, immigration officers threatened the interviewee with jail time and told him to write a statement that they dictated to him (and that was inconsistent with his account). There was little discussion of the s 29 test and the decision was not appealed. In another case, *R v H* (CA 326-2008) [2008] NZCA 263, the Court considered there was a "real issue" as to whether a confession made by a woman with post traumatic stress disorder had been obtained by oppression. The case was remitted to the District Court to consider the application of s 29, but we found no record of the result.

⁸ Evidence Act 2006, s 30(2)(b); *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148] per Blanchard J for the majority.

⁹ *R v Shaheed* [2002] 2 NZLR 377 (CA). See Chapter 7 for further background on *Shaheed* and the Evidence Act 2006, s 30 balancing test.

¹⁰ Evidence Act 2006, s 30(5).

¹¹ That is: the legislative, executive, or judicial branches of the Government of New Zealand; or any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

purposes of section 30 of the Act).¹² But the categories of unfairness are not closed¹³ and may encompass any unfair conduct by state officials¹⁴ or private individuals.¹⁵

- 6.6 A finding that evidence has been improperly obtained does not result in automatic exclusion, as a finding of oppression does.¹⁶ Rather, the section 30 test seeks to balance competing public interests and maintain the integrity of the criminal justice system, as we discuss further in Chapter 7. The section permits judges to consider a range of factors, including the nature of the impropriety, the seriousness of the offence and the nature and quality of the evidence, when deciding whether to admit the evidence.¹⁷ Section 30 can also apply to any type of evidence, whereas sections 28 and 29 are limited to defendants' statements.

The Supreme Court's decision in *Wichman*

- 6.7 *R v Wichman* is the leading authority on the application of sections 28–30 to investigatory techniques used to obtain confessions.¹⁸ It concerned the admissibility of a statement the defendant made to an undercover police officer during a Mr Big undercover operation.¹⁹ All members of the Supreme Court accepted that the nature of the Mr Big operation had the potential to produce a false confession.²⁰ They reached different views, however, on whether and how this was relevant under section 30. The decision raises a question whether the courts can exclude evidence under section 30 due to the *risk* that the investigative technique used *could* produce unreliable evidence, regardless of whether that risk has crystallised in that particular case. We describe the courts' application of sections 28–30 in *Wichman* in some detail below, as we later seek feedback on whether the approach adopted by the majority of the Supreme Court is likely to cause problems in practice.

¹² *Practice Note on Police Questioning (s 30(6) Evidence Act 2006)* [2007] 3 NZLR 297. Evidence Act 2006, s 30(6) provides that, in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of s 30(5)(c), the judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

¹³ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [503] per Glazebrook J.

¹⁴ For example, in *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26, the defendant's statement was found to be unfairly obtained in part because the interviewing detectives led him to believe that "unless he told the detectives what they wanted to hear, he would face 20 years' imprisonment" (at [51]).

¹⁵ See *R v Reynolds* [2017] NZCA 611 at [48]–[53], where evidence obtained by a private individual through blackmail was found to be unfairly obtained.

¹⁶ *Te Aka Matua o te Ture | Law Commission Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [101].

¹⁷ A non-exhaustive list of factors is set out in s 30(3).

¹⁸ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

¹⁹ For a summary of the case, see *Te Aka Matua o te Ture | Law Commission Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [6.20]–[6.33]. Broadly, a "Mr Big" operation involves undercover officers inducting the suspect into a bogus criminal organisation. In the New Zealand examples, values such as honesty and loyalty are emphasised throughout the operation as well as the benefits (financial and otherwise) that the suspect will obtain by securing admission as a member. At the conclusion of the operation, the suspect is interviewed by "Mr Big" – the boss of the organisation – to determine whether they will be allowed to join the organisation. The suspect is encouraged to confess to any previous wrongdoing that could be used against them. They may be confronted with information – allegedly from police contacts – that they were involved in the crime police are investigating and assured that, if they confess any problems with police will be taken care of. In addition to *Wichman*, see *Lyttle v R* [2021] NZCA 46.

²⁰ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [86] per William Young J for the majority, [318] per Elias CJ and [451] per Glazebrook J.

- 6.8 The Court of Appeal in *Wichman* had excluded the defendant's statement under section 30.²¹ The Court took into account the risk of unreliability associated with the Mr Big technique at both stages of the section 30 assessment: first, when determining that the evidence was obtained unfairly and therefore improperly (the unfairness assessment);²² and second, when deciding that exclusion was proportionate to the impropriety (the balancing test).²³ In particular, in the context of the unfairness assessment, the Court emphasised that the defendant was incentivised to lie and was put under substantial psychological pressure to confess.²⁴ The Court considered the use of the Mr Big technique was "apt to induce a false confession in this case".²⁵ In reaching that view, the Court did not consider indications of the actual reliability of the statement but rather based its decision on the *risk* of unreliability given the circumstances in which the statement was made.²⁶
- 6.9 On appeal, the Supreme Court considered the admissibility of the statement under both section 28 and section 30 (section 28 had not been the subject of appeal in the Court of Appeal). The Court was split on the question of how the risk of unreliability associated with the Mr Big technique should be addressed. The majority held that indications of actual reliability could be taken into account under section 28.²⁷ They found it was open to the trial judge to decline to exclude the evidence under section 28 based on indications of that kind, including the tone of the discussion and the broad correlation between the admissions and other evidence.²⁸
- 6.10 As to the respective roles of sections 28–30, the majority said:²⁹

Sections 8, 28, 29 and 30 must be interpreted in a coherent way. Considering the application of ss 28, 29 and 30 to Mr Big operations, we see s 29 as addressing impropriety by undercover officers acting in role as criminals involving threats (actual or implicit) of violence to obtain confessions, s 28 as addressing the risk of unreliable confessions and s 30 as dealing with other matters (such as police impropriety, including possible non-adherence to, or circumvention of, the Practice Note). *Section 30 should not be treated as conferring a broad discretion to exclude defendants' statements for reasons addressed in ss 28 and 29. It follows that we consider the Court of Appeal ought to have addressed its concerns about the reliability of the respondent's statements under s 28 rather than s 30.* We accept, of course, that concerns as to reliability, and thus the cogency or otherwise, of the evidence in question may be relevant to the application of s 30, and particularly s 30(4) and that aspects of the operation that are relevant to the reliability assessment may also be relevant to the fairness assessment. ...

... Sections 28 and 8, in the context of the Act as a whole, proceed on the basis that *residual risks of unreliability (which do not warrant exclusion under s 28(2)) ... should be addressed by*

²¹ *M v R* [2014] NZCA 339, [2015] 2 NZLR 137.

²² *M v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [43] and [64]–[67].

²³ *M v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [80]–[83].

²⁴ *M v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [66]–[67].

²⁵ *M v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [80].

²⁶ *M v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [46] and [80]–[83].

²⁷ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [83]–[84]. See also at [433]–[438] per Glazebrook J, who dissented but agreed with the majority on this point.

²⁸ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [92].

²⁹ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [69]–[70].

the Judge in the course of the management of the trial, with warnings as to possible unreliability and directions as to illegitimate reasoning and the burden and standard of proof. In this context, it is difficult to see how such issues are material to the logically distinct question whether the police acted unfairly and thus improperly.

(Emphasis added.)

- 6.11 This passage must be read in the context of the Court of Appeal decision under consideration. That decision treated the risk the Mr Big technique may have produced an unreliable statement as relevant to the unfairness assessment in section 30. The majority of the Supreme Court, in the passage above, appears to suggest that approach was incorrect. Risks of unreliability not resulting in exclusion under section 28 (for example, because there are indications that the statement was actually true) should not be taken into account when determining whether the evidence is obtained unfairly so as to engage the section 30 balancing test.
- 6.12 The *Wichman* majority’s acceptance that “concerns as to reliability, and thus the cogency or otherwise, of the evidence in question may be relevant to the application of s 30, and particularly s 30(4)” indicates they saw actual reliability as being potentially relevant to the application of the section 30 balancing test (a point that is not controversial).³⁰ This, however, is separate from the prior question of whether risks of unreliability associated with the investigatory method are relevant to whether the evidence is unfairly obtained so as to engage the balancing test in the first place.
- 6.13 Given its view, the majority did not consider reliability risks under section 30. The majority’s section 30 analysis was limited to whether the operation involved improper circumvention of the constraints on police interrogation or was unfair due to the use of deception and participation in apparent criminal activity by police.³¹ They concluded that the statement was not improperly obtained and was admissible at trial.
- 6.14 Elias CJ and Glazebrook J took a different approach in their separate dissenting judgments. Elias CJ would have excluded the defendant’s statement under both sections 28 and 30.³² Glazebrook J agreed with the majority on the application of section 28, finding that the reliability of the statement had not *in fact* been adversely affected.³³ But she would still have excluded the evidence under section 30.³⁴ The two dissenting judges treated the risk of unreliability associated with the Mr Big technique as relevant to

³⁰ Evidence Act 2006, s 30(4) provides that “[t]he Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the judge determines that its exclusion is proportionate to the impropriety”. In other words, it relates to the application of the balancing test. One of the factors that can be considered when undertaking the balancing test is the “nature and quality of the improperly obtained evidence” (s 30(3)(c)). As we discuss in Chapter 7, it is well settled that this encompasses an assessment of the actual reliability of the statement (although it is not clear whether it also includes risks of unreliability associated with the investigatory methods used, which is more relevant to the nature of the impropriety rather than the nature and quality of the evidence).

³¹ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [98]–[130].

³² *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [345] and [347].

³³ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [457].

³⁴ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [523].

both the section 30 unfairness assessment³⁵ and the balancing test.³⁶ Glazebrook J reasoned that:³⁷

The Crown submits that the Court of Appeal should not have considered reliability under s 30(5)(c) as all reliability issues are dealt with under s 28. I do not accept that submission. Section 28 is concerned with the risk of unreliability and whether (as a threshold issue) this risk has eventuated so that the evidence should not go before the jury. Thus, while I accept that the Court of Appeal should have considered the threshold question of reliability under s 28 rather than under s 30, it does not follow that all reliability issues are dealt with under s 28.

As noted above, s 28 is not directly concerned with issues of police conduct. Where the police use a technique such as the Mr Big scenario technique there is, because of material inducements and promises of fixing charges, a significant risk of unreliability. The Courts cannot ignore the risks inherent in the technique, just because on the particular case the confession is reliable enough to go before the jury. That would be to sanction an “ends always justifies the means” analysis.

... I agree with the Court of Appeal that the substantial risk of unreliability inherent in the technique is one factor to be considered in deciding whether statements obtained through the Mr Big technique are obtained unfairly. The police should avoid techniques that create a real risk of false confessions (even if they increase the number of true confessions).

IS WICHMAN LIKELY TO CAUSE PROBLEMS IN PRACTICE?

- 6.15 As explained in Chapter 5, we received preliminary feedback expressing concern that sections 28–30 (as they are currently applied by the courts) do not adequately control the use of certain investigatory techniques to obtain statements from defendants — in particular Mr Big undercover operations and the Complex Investigation Phased Engagement Model (CIPEM) for questioning suspects. We discussed whether the standard of proof for admitting statements under section 28 should be raised to “beyond reasonable doubt” to respond to the risk of false confessions being admitted in evidence.
- 6.16 This feedback has also led us to consider whether sections 28–30 together, as interpreted by the courts, provide a coherent scheme for controlling the techniques used to obtain evidence where they give rise to a risk of unreliability. We have identified a possible gap in the operation of these sections resulting from the decision in *Wichman*.³⁸
- 6.17 As explained in Chapter 5, the majority’s finding in *Wichman* that indications of actual reliability can be considered under section 28 represents a significant departure from the common law position. Under the voluntariness rule, confessions obtained by a promise, threat or other inducement by a person in authority were considered involuntary and were inadmissible³⁹ unless the judge was satisfied that the means by which the confession

³⁵ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [326] and [332] per Elias CJ, and [510] and [515] per Glazebrook J.

³⁶ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [326] and [345] per Elias CJ and [511] and [522] per Glazebrook J.

³⁷ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [507]–[510] (citations omitted).

³⁸ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

³⁹ *R v McCuin* [1982] 1 NZLR 13 (CA) at 15; *Naniseni v The Queen* [1971] NZLR 269 (CA) at 271–274 and 276–277; Te Aka Matua o Te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [21]–[22].

was obtained were not likely to cause a false confession.⁴⁰ The actual truth of a confession was irrelevant - the focus was on the tendency of the inducement rather than the actual result.⁴¹ Accordingly, if the court considered that the investigatory techniques used by law enforcement officers involved an unacceptable risk of causing a false confession, the statement would have been excluded. A range of policies underpinned the voluntariness rule, including reliability, protecting against coerced self-incrimination, deterring unacceptable conduct in the gathering of evidence and protecting the integrity of the justice system.⁴² The rule required that suspects be given a meaningful choice about whether to speak to police.⁴³

- 6.18 Following *Wichman*, section 28 may not require exclusion in circumstances that would have resulted in exclusion under the voluntariness rule. This may lead to results that were not anticipated when section 28 was enacted unless other provisions (such as section 30) can fill the gap.
- 6.19 As we interpret the majority judgment in *Wichman*, it suggests that residual risks of unreliability not resulting in exclusion under section 28 are not relevant to the section 30 unfairness assessment. If that is correct, it may mean there are circumstances where the courts consider the investigatory techniques used carried an unacceptable risk of producing unreliable evidence, yet they cannot exclude the evidence under any of sections 28–30. This may be the case where:
- (a) the court considers the statement in question is sufficiently reliable *in fact* to go before the fact-finder (so the statement is not excluded under section 28); and
 - (b) the investigatory conduct concerned does not meet the high threshold for “oppression” under section 29; and
 - (c) there is no separate basis for finding that the statement was improperly obtained for so as to engage section 30 (such as a breach of the NZBORA or the Practice Note on Police Questioning).
- 6.20 This could occur, for example, in a Mr Big case if the court had serious concerns about the tendency of the techniques used in the operation to affect the reliability of any confession made, but could not exclude the statement under section 28 due to indications it was in fact reliable.⁴⁴
- 6.21 This potential gap has not yet been confronted in the case law since *Wichman*. While several subsequent cases have involved arguments that the investigatory techniques used carried an unacceptable risk of producing a false confession, in each case the court

⁴⁰ This exception to the voluntariness rule was codified in the Evidence Act 1908, s 20. A version of this exception was first introduced by the Evidence Further Amendment Act 1895, s 17.

⁴¹ *R v Fatu* [1989] 3 NZLR 419 (CA) at 430; *R v McCuin* [1982] 1 NZLR 13 (CA) at 15. We note this remains the position in the United Kingdom: see s 76(2)(b) of the Police and Criminal Evidence Act 1984 (UK) and the discussion in Paul Roberts *Roberts & Zuckerman’s Criminal Evidence* (3rd ed, Oxford University Press, Oxford, 2022) at [12.3(D)].

⁴² See discussion in Te Aka Matua o Te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [79]–[96] and [123]. See also *R v McCuin* [1982] 1 NZLR 13 (CA) at 15, citing Lord Halisham in *Wong Kam-ming v R* [1980] AC 247. The policy of the voluntariness rule has been recently commented on in Canada where the rule still applies: see *R v Beaver* 2022 SCC, CSC 54 at [47] and *R v Tessier* 2022 SCC, CSC 35 at [150] and [157]–[159].

⁴³ See the discussion in *R v Tessier* 2022 SCC, CSC 35 at [150] and [157]–[159].

⁴⁴ Noting that the majority in *Wichman* held the Chief Justice’s Practice Note on Police Questioning does not apply to undercover officers: *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [106].

excluded the evidence on other grounds. In *Lyttle v R* (another Mr Big case), the defendant's statement was excluded under section 28 because other available evidence supported the court's view that it was unreliable in fact.⁴⁵ In *R v X*, the use of CIPEM to question the defendant involved breaches of the Practice Note on Police Questioning.⁴⁶ Section 30 was engaged on that basis and the Court went on to determine that exclusion of the evidence was proportionate to the impropriety. In *R v Fawcett*, the Kōti Matua | High Court considered an argument by defence counsel that police conduct during Mr Fawcett's interviews contributed to his statement being unreliable.⁴⁷ However, the Court excluded the statement under section 28 on the basis of internal factors (the influence of foetal alcohol spectrum disorder) and did not consider how the impact of police conduct should be addressed under the Act.⁴⁸

IS LEGISLATIVE REFORM NECESSARY OR DESIRABLE?

- 6.22 We seek submissions on whether the potential gap identified above is causing concern or problems in practice. We are interested to know, for example, if there is confusion around whether or how the risk an investigatory technique could produce unreliable evidence can be addressed under the Act.
- 6.23 We also seek submissions on whether legislative reform is desirable to stipulate that the courts can have regard to the risk that an investigatory technique would produce unreliable evidence at both stages of the section 30 inquiry (that is, when determining whether the evidence was improperly obtained and when applying the balancing test). This would ensure that sections 28–30 together cover the same ground as the voluntariness rule at common law, as appears to have been the legislative intent.
- 6.24 Given the lack of case law since *Wichman* on the relevance of reliability risks under section 30, it is not yet clear what impact the decision will have. Reform may therefore be considered premature at this stage. There is potential, however, for this issue to have a significant impact in practice if our assessment of the current law is correct. Since this is our final statutory review and we are seeking submissions on other amendments to sections 28 and 30, this may be the best opportunity to clarify the intent of the sections if that is required.
- 6.25 Our preliminary view is that the courts should be able to consider the risk that an investigatory technique could produce unreliable evidence when assessing unfairness under section 30. This approach is already available on the current wording of section 30, but the decision in *Wichman* may prevent the courts from adopting it. If so, we suggest that would be undesirable. The administration of justice may be brought into disrepute if the courts are unable to exclude evidence they consider carries an unacceptable risk of producing unreliable evidence. It may encourage the use of similar techniques in future,

⁴⁵ *Lyttle v R* [2021] NZCA 46.

⁴⁶ *R v X* [2021] NZHC 2444 at [59]–[75] and [128]–[146].

⁴⁷ *R v Fawcett* [2021] NZHC 2406 at [238].

⁴⁸ *R v Fawcett* [2021] NZHC 2406 at [301]. Given that finding, the Court did not need to consider the application of s 30. However, after referring to the majority's approach in *Wichman* (at [304]), the Court noted: "Had I not had fundamental concerns about the statements' reliability because of Mr Fawcett's FASD, coupled with the lack of evidence corroborating his involvement, I doubt that the statements could be considered improperly obtained under s 30" (at [305]).

increasing the risk of unreliable evidence in general. This may have a detrimental effect on public trust and confidence in the justice system, as is already evident from public criticism of Mr Big operations and CIPEM. These are the types of concerns that section 30 is designed to address.

- 6.26 While trial judges can warn juries about residual risks that evidence may be unreliable,⁴⁹ such warnings only address concerns about actual unreliability - and hence the safety of conviction based on the evidence. Where the primary concern relates to the means used to obtain the evidence, reliability warnings are of little relevance.
- 6.27 In some cases, section 30 will be engaged on a separate basis. For example, the investigatory techniques used might also involve breaches of the Practice Note on Police Questioning.⁵⁰ In that situation, the courts have already shown a willingness to treat the evidence as unfairly obtained under section 30.⁵¹ However, the Practice Note on Police Questioning is limited in scope. Most of its requirements only apply when the person being questioned is in custody or there is sufficient evidence to lay a charge against them. The Practice Note does not apply to undercover officers⁵² or investigating agencies other than Police on Police Questioning. Nor does it cover every type of police conduct during questioning that may result in unfairness.⁵³

OPTIONS FOR REFORM

- 6.28 We set out below three options for amending section 30, which could be implemented together or separately. These options would all involve clarifying that the risk an investigatory technique would produce unreliable evidence can be considered under that section.
- 6.29 Should reform be considered necessary or desirable, amending section 30 may be an appropriate approach since it was specifically designed to address improper conduct in the obtaining of evidence that may have a detrimental impact on the integrity of the justice system. Section 30 also applies to any type of evidence (compared to section 28, which is limited to defendants' statements). While the cases we have discussed related to defendants' statements, concerns about risks of unreliability associated with investigatory techniques may arise in relation to other evidence. It is conceivable, for example, that techniques used to gather physical evidence may risk compromising the quality of that evidence. The options for reform discussed below would therefore enable risks of unreliability to be taken into account in relation to any type of evidence (although we expect defendants' statements would be the most common application).

⁴⁹ Evidence Act 2006, s 122.

⁵⁰ Any breach of the Chief Justice's Practice Note on Police Questioning is relevant to whether evidence is improperly obtained on the grounds that it was obtained unfairly: s 30(6). See, for example, *R v X* [2021] NZHC 2444. Questioning that involves placing undue pressure on a suspect but falls short of oppression may also amount to a breach of the Practice Note, as in *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26.

⁵¹ See, for example, *R v X* [2021] NZHC 2444.

⁵² *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [106].

⁵³ For example, the Supreme Court in *Chetty* found evidence to be unfairly obtained primarily because police had placed pressure on the defendant to confess by telling him that he would be charged with rape unless he confessed and that rape carried a maximum penalty of 20 years' imprisonment: see *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [51].

- 6.30 We have not suggested amending section 29 to include a wider range of investigatory conduct that could be considered “oppressive”. While section 29 sets a high bar,⁵⁴ its purpose is to protect the right not to be subjected to torture or to cruel, degrading or inhuman treatment or punishment.⁵⁵ We would expect it to apply rarely. Our preliminary view is that it is appropriate for oppression to be defined in a narrow way, since statements influenced by it are automatically excluded, and for section 30 to apply to a broader range of conduct.
- 6.31 We also considered whether a specific admissibility rule should be introduced to deal with Mr Big operations or other specified investigatory techniques. However, we suggest it would be preferable to amend the existing provisions in the Act to ensure they address the underlying concerns that may arise from these techniques. This would help to maintain a consistent approach and ensure that any new investigatory techniques developed in future (which raise similar concerns) can be accommodated.

Option 1: Amend section 30(6) to clarify that reliability risks are relevant to the unfairness assessment

- 6.32 Section 30(6) could be amended to provide that, in assessing whether evidence was unfairly obtained under section 30(5)(c), the judge may take into account the risk that the investigatory techniques used would produce unreliable evidence.
- 6.33 This amendment would clarify that, even if risks of unreliability do not result in exclusion under section 28 (for example, because there are sufficient indications that a defendant’s statement is reliable in fact), they can still be considered when deciding whether the evidence was unfairly obtained so as to engage the section 30 balancing test. This would align with the approach of the Court of Appeal⁵⁶ and the minority of the Supreme Court⁵⁷ in *Wichman*.

Option 2: Amend section 30(6) to specify additional matters relevant to the unfairness assessment

- 6.34 We also invite feedback on whether any or all of the factors in sections 28(4) and 29(4) (which are relevant to the reliability and oppression tests) should be specified in section 30(6) as relevant when assessing whether a defendant’s statement was unfairly obtained under section 30(5)(c) (the unfairness assessment). Those factors are:
- (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; and

⁵⁴ See, for example, *Field v R* [2010] NZCA 556, [2011] 1 NZLR 784 at [160].

⁵⁵ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C141].

⁵⁶ *M v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [43] and [64]–[67].

⁵⁷ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [326] and [332] per Elias CJ, and [510] and [515] per Glazebrook J.

- (d) the nature of any threat, promise or representation made to the defendant or any other person.
- 6.35 It may be argued that introducing these factors into section 30 would risk confusing its scope. However, we note that in practice the courts already take similar considerations into account under the unfairness assessment.⁵⁸ Expressly referring to these factors in section 30 could help to clarify that circumstances not resulting in exclusion under sections 28 or 29 can still be considered under section 30.
- 6.36 While the first two factors may appear more relevant to threshold reliability (under section 28), they also appear in section 29 (oppression). Like section 30, section 29 is concerned with the conduct of investigators. The key difference is that section 29 requires automatic exclusion because of the seriousness of the conduct involved, while exclusion under section 30 depends on the outcome of a balancing test. Whether conduct is considered unfair under section 30 may well depend on the circumstances in which it occurs (for example, the vulnerabilities of a suspect being interviewed).
- 6.37 If there is support for this approach, we are particularly interested in views on whether the condition or characteristics of the defendant should only be relevant to the section 30 analysis to the extent that they were apparent (or ought to have been apparent) to investigators. Given that section 30 is concerned with impropriety in obtaining evidence, it may be argued that matters purely internal to the defendant and not outwardly apparent should be irrelevant, with exclusion instead occurring under section 28 where appropriate. The contrary argument is that reliance on evidence obtained through exploitation of a person’s vulnerabilities, whether known or not, may undermine the privilege against self-incrimination (and, consequently, the credibility of the justice system). This may explain why this factor appears in section 29(4).

Option 3: Add reliability risks as a factor in the section 30 balancing test

- 6.38 Lastly, we seek submissions on the option of amending section 30(3) to provide that, when applying the section 30 balancing test, the court may take into account the extent of any risk that the investigatory techniques used would produce unreliable evidence.
- 6.39 The *actual* reliability of the evidence is already relevant to the balancing exercise (under “the nature and quality of the improperly obtained evidence” in section 30(3)(c)).⁵⁹ However, it is currently unclear whether the risk of unreliability associated with an investigatory technique, which is relevant to the seriousness of the impropriety rather than the nature and quality of the evidence itself, can be considered.⁶⁰ Although the list of factors in section 30(3) is non-exhaustive, our review of case law suggests the courts largely confine their analysis to the listed factors.

⁵⁸ For example, in *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26, the defendant’s statement was found to be unfairly obtained in part due to a representation the interviewing detectives made to the defendant, which led him to believe he faced 20 years’ imprisonment unless he told them what they wanted to hear (at [51]). The condition and characteristics of the defendant have also been considered by the courts when undertaking the unfairness assessment (see, for example, *Gosset v R* [2021] NZCA 187 at [74]–[76]; *B v R* [2014] NZCA 85 at [30]–[40]).

⁵⁹ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [151]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [140]. The third case remains subject to publication restrictions until final disposition of trial.

⁶⁰ Section 30(3)(b) refers to “the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith”. As we discuss in Chapter 7, however, the courts largely focus on whether the impropriety was deliberate, reckless or done in bad faith rather than undertaking a more general assessment of the nature of the impropriety.

6.40 Particularly if Option 1 is adopted, it may be desirable to clarify that the risk the conduct in question would produce unreliable evidence is relevant to the balancing test as well as to the assessment of whether evidence was obtained unfairly. Again, this is consistent with the approach taken by the Court of Appeal⁶¹ and the minority of the Supreme Court⁶² in *Wichman*.

QUESTION

Q15

Should the Act be amended to clarify that the risk that an investigatory technique could produce unreliable evidence can be considered under section 30? If so, should the Act be amended to:

- a. provide, in section 30(6) that, in assessing whether evidence was unfairly obtained under section 30(5)(c):
 - i. the judge may take into account the risk that the investigatory techniques used would produce unreliable evidence; and/or
 - ii. the judge must, in relation to a defendant's statement, take into account the factors listed in sections 28(4) and 29(4); and/or
- b. provide, in section 30(3) that, when applying the section 30 balancing test, the court may take into account the extent of any risk that the investigatory techniques used could produce unreliable evidence?

⁶¹ *M v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [80]–[83].

⁶² *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [326] and [345] per Elias CJ and [511] and [522] per Glazebrook J.

CHAPTER 7

Improperly obtained evidence

INTRODUCTION

In this chapter, we consider section 30 (improperly obtained evidence) and seek feedback on issues relating to:

- the operation of the section 30 balancing test;
- the wording of the balancing test;
- the application of the factors in section 30(3); and
- the role of causation in determining whether evidence is improperly obtained under section 30(5).

BACKGROUND

7.1 Section 30 of the Evidence Act 2006 governs the admissibility of improperly obtained evidence in criminal cases. There are two steps under section 30. The first step is to determine whether the evidence was improperly obtained.¹ Evidence is “improperly obtained” if it is obtained:²

- (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies;³
- (b) in consequence of a defendant’s statement that would be inadmissible if offered by the prosecution; or
- (c) unfairly.

¹ Evidence Act 2006, s 30(2)(a).

² Evidence Act 2006, s 30(5).

³ That is: the legislative, executive, or judicial branches of the Government of New Zealand; or any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law. This includes, for example, police officers and other law enforcement officials.

- 7.2 If the evidence was improperly obtained, the second step is to determine whether the exclusion of evidence is proportionate to the impropriety.⁴ This is to be determined 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. Section 30(3) contains a non-exhaustive list of factors that may be taken into account in undertaking the balancing exercise. If the judge finds that exclusion of the evidence is proportionate to the impropriety, they must exclude the evidence.⁵
- 7.3 We have identified a number of potential issues with the operation of section 30, which we explore later in this chapter. To facilitate submitter engagement with these issues, we first discuss the history and policy behind the section and explain how it has been applied by the courts.

History of section 30

- 7.4 Improperly obtained evidence was generally admissible at common law, subject to a discretion to exclude it on the ground of unfairness (the fairness discretion).⁶ After the New Zealand Bill of Rights Act 1990 (NZBORA) was enacted, the courts developed a prima facie exclusionary rule for evidence obtained in breach of NZBORA rights.⁷ Other improperly obtained evidence continued to be admissible subject to the fairness discretion. (Statements made by children or young people were - and still are - subject to a separate statutory exclusionary rule).⁸
- 7.5 Te Aka Matua o te Ture | Law Commission's Evidence Code proposed an improperly obtained evidence provision that was based on the prima facie exclusionary rule.⁹ The provision was not, however, limited to NZBORA breaches. It would have applied to a broader range of improperly obtained evidence, including evidence that was obtained unfairly.¹⁰
- 7.6 After the Evidence Code was published but before the Evidence Bill was drafted, te Kōti Pīra | Court of Appeal in *R v Shaheed* overturned the prima facie exclusionary rule.¹¹ The majority considered that, contrary to the Court's original intention, the rule had led to an unduly rigid approach by the courts, with exclusion following almost automatically from a

⁴ Evidence Act 2006, s 30(2)(b).

⁵ Evidence Act 2006, s 30(4).

⁶ The development of the common law relating to improperly obtained evidence is summarised in *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [20]–[22]. See also Te Aka Matua o Te Ture | Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [56]–[58].

⁷ *R v Kirifi* [1992] 2 NZLR 8 (CA) at 12; *R v Butcher* [1992] 2 NZLR 257 (CA); *R v Goodwin* [1993] 2 NZLR 153 (CA) at 266. See also the discussion in *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [23]–[27].

⁸ Oranga Tamariki Act 1989, s 221. Under this provision, statements made by children or young people who are suspected of an offence or have been arrested or detained, are inadmissible unless certain procedural protections are complied with.

⁹ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 84. The provision would have required exclusion of improperly obtained evidence unless it would be contrary to the interests of justice.

¹⁰ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 86.

¹¹ *R v Shaheed* [2002] 2 NZLR 377 (CA).

finding that NZBORA rights had been breached.¹² In practice, this had led the courts to shift the focus of their analysis to whether a breach had occurred. In particular, in search and seizure cases:¹³

The decision to exclude or not has often been effectively determined by the prior conclusion that what occurred was not reasonable and therefore in breach of s 21 or vice versa. Our perception is that frequently a balancing exercise is being carried out in the fact finding process or in the determination of what is reasonable in the factual circumstances. This may have led to some distortion – situations in which it would have been preferable to acknowledge that the search and seizure was unreasonable and then to determine by means of a balancing exercise whether the evidence ought nevertheless to be admitted. Where the police have without practical justification departed from the standards required by the law, it is better that the breach be marked by a statement from the Court that their behaviour was unreasonable; and that the decision whether or not to exclude the resulting evidence is then made on a principled basis in light of that conclusion.

7.7 The majority therefore concluded that a more flexible approach was appropriate when determining whether to admit improperly obtained evidence, with the breach of a right being “a very important but not necessarily determinative factor”.¹⁴ They adopted a balancing test to determine whether exclusion of the evidence was proportionate to the breach of rights.¹⁵ Blanchard J (whose approach was endorsed by the majority) explained:¹⁶

To be sure, there are some good arguments favouring a rule expressed in prima facie terms: it recognises the importance of a guaranteed right; exclusion may be the only effective means of vindicating a breach; it diminishes any appearance that the Courts are deciding cases on the basis of ends rather than means; and it makes it clear to the police that there is no utility in obtaining evidence via a breach of rights.

There is much force in these arguments, although the last of them is of greater relevance to a deterrence-centred regime. But a balancing test in which, as a starting point, appropriate and significant weight is given to the fact that there has been a breach of a quasi-constitutional right, can accommodate and meet them. Importantly, a prima facie rule does not have the appearance of adequately addressing the interest of the community that those who are guilty of serious crimes should not go unpunished. That societal interest, in which any victim’s interest is subsumed, rather than being treated as a separate interest, will not normally outweigh an egregious breach of rights – particularly one which is deliberate or reckless on the part of law enforcement officers. But where the disputed evidence is strongly probative of guilt of a serious crime, that factor too must be given due weight. A system of justice will not command the respect of the community if each and every substantial breach of an accused’s rights leads almost inevitably to the exclusion of crucial evidence which is reliable and probative of a serious crime. ...

¹² *R v Shaheed* [2002] 2 NZLR 377 (CA) at [140] per Blanchard J (giving the judgment of Richardson P, Blanchard and Tipping JJ). Blanchard J’s approach was also endorsed by Gault J (at [172]), McGrath J (at [192]) and Anderson J (at [200]–[201]).

¹³ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [141] per Blanchard J. See also *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [173] per Blanchard J.

¹⁴ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [144] per Blanchard J.

¹⁵ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [156] per Blanchard J (giving the judgment of Richardson P, Blanchard and Tipping JJ). See also per Gault J (at [172]), McGrath J (at [192]) and Anderson J (at [200]–[201]). Elias CJ dissented.

¹⁶ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [142]–[143] per Blanchard J.

- 7.8 Section 30 is based on the test set out in *Shaheed*.¹⁷ However, while *Shaheed* only applied to NZBORA breaches, section 30 applies to a broader class of improperly obtained evidence (as proposed in the Commission’s Evidence Code).¹⁸

Rationales for exclusion of improperly obtained evidence

- 7.9 There are three main types of rationale typically advanced for excluding improperly obtained evidence: rights-based, deterrence-based and integrity-based.¹⁹ Which of these rationales a legal system subscribes to influences the design of its exclusionary rules. These rationales are not, however, mutually exclusive. In practice, exclusionary rules often reflect a combination of these rationales, alongside notions such as fairness and procedural efficiency.²⁰
- 7.10 Rights-based rationales treat exclusion of evidence obtained in breach of a person’s rights as necessary either to compensate the affected individual for the breach or vindicate the right.²¹ Only exclusion of the evidence can put the person back in the position they would have been in had their rights not been breached (on a compensatory approach) or give proper meaning to the right (under a vindication of rights approach).²² Rights-based rationales may require exclusion where fundamental or constitutional rights have been breached while potentially permitting admission of evidence obtained through lesser improprieties.
- 7.11 Under a deterrence-based rationale, improperly obtained evidence is excluded to discourage future misconduct, both at individual and organisational levels. It is intended to prompt law enforcement agencies to take steps to ensure that officers comply with their obligations.²³ Over time, this is thought to improve practice and increase respect for the rights of suspects. A deterrence-based approach generally requires exclusion of improperly obtained evidence, although exceptions might be recognised where, for example, the misconduct was inadvertent or in good faith.
- 7.12 The third type of rationale focuses on preserving the integrity or moral legitimacy of the justice system. It reflects the view that for a criminal justice system to command the moral legitimacy and public respect necessary to justify punishing those who breach its norms,

¹⁷ Cabinet Paper “Evidence Bill: Paper 2: Admissibility of Evidence” (4 December 2002) at [29]; Joanna Davidson (Crown Counsel) to the Attorney-General “Legal Advice – Consistency with the New Zealand Bill of Rights Act 1990: Evidence Bill” (5 April 2005).

¹⁸ Evidence Act 2006, s 30(5); Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 86.

¹⁹ For a general discussion of these three rationales, see Paul Roberts *Roberts & Zuckerman’s Criminal Evidence* (3rd ed, Oxford University Press, Oxford, 2022) at [5.3(B)–(D)].

²⁰ Sabine Gless and Thomas Richter (eds) *Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules* (Springer International Publishing, 2019) at 279–280.

²¹ A rights-based rationale for exclusion was advanced by Andrew Ashworth “Excluding Evidence as Protecting Rights” [1977] *Crim L Rev* 723. See more recently the discussion in Dimitrios Giannoupolous *Improperly obtained evidence in Anglo-American and Continental Law* (Hart Publishing, Oxford, 2019) at 211–223.

²² The key difference between these two approaches is that compensation focuses on the individual affected, while vindication also recognises the public interest in ensuring rights are protected in a broader sense. See Mike Madden “A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence” (2015) 33:2 *Berkeley Journal of International Law* 442 at 453–455.

²³ See, for example, Andrew Choo “Improperly Obtained Evidence: A Reconsideration” (1989) 9 *Legal Stud* 261 at 271–272.

it must set an example by rejecting the use of illegal or unfair techniques to obtain evidence.²⁴ Further, if the justice system condones breaches of the law, this may invite general disrespect for the law so the public will be less inclined to follow it. The integrity rationale does not necessarily require automatic exclusion. In some circumstances, such as where the impropriety is trivial and the offence serious, the exclusion of the evidence may be seen as bringing the criminal justice system into greater disrepute than would its admission.²⁵

- 7.13 The integrity rationale may be viewed as encompassing both rights protection and deterrence considerations to an extent. Arguably, a justice system can only maintain its integrity and retain public confidence by providing a remedy for breaches of legally recognised rights and taking steps to deter future breaches by law enforcement agencies.²⁶
- 7.14 Exclusionary rules may also attempt to balance public interest considerations that tell against exclusion of improperly obtained evidence. These include concerns that public respect for the administration of justice will be diminished and public safety put at risk if those who commit serious crimes escape conviction.²⁷

New Zealand's approach

- 7.15 The integrity rationale is the primary basis for the balancing test adopted in *Shaheed* and reflected in section 30.²⁸ Blanchard J, writing for the majority in *Shaheed*, explained:²⁹
- Exclusion will often be the only appropriate response where a serious breach has been committed deliberately or in reckless disregard of the accused's rights or where the police conduct in relation to that breach has been grossly careless. A system of justice which readily condones such conduct on the part of law enforcement officers will not command the respect of the community. A guilty verdict based on evidence obtained in this manner may lack moral authority. Society's longer term interests will be better served by ruling out such evidence.
- 7.16 As noted above, however, the majority also suggested the balancing test would address concerns about the protection of rights and deterrence of future misconduct.³⁰
- 7.17 The text of section 30 is, on its face, consistent with this broad approach. Section 30(2)(b) emphasises “the need for an effective and credible system of justice”, while the factors set out to guide the balancing test include (among other things) the importance of the

²⁴ See the discussion in Dimitrios Giannopoulos *Improperly obtained evidence in Anglo-American and Continental Law* (Hart Publishing, Oxford, 2019) at 208–211.

²⁵ Andrew Choo “Improperly Obtained Evidence: A Reconsideration” (1989) 9 *Legal Stud* 261 at 278; *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143].

²⁶ See, for example, *R v Grant* [2009] SCC 32 at [76]; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [62] per Elias CJ.

²⁷ For further discussion of arguments against exclusion, see Andrew Choo “Improperly Obtained Evidence: A Reconsideration” (1989) 9 *Legal Stud* 261 at 265–266; Mike Madden “A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence” (2015) 33:2 *Berkeley Journal of International Law* 442 at 455–457; *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143].

²⁸ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148] per Blanchard J for the majority. See also *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [187] per Blanchard J and [230] per Tipping J. As noted above, the Government's approach in drafting s 30 was to generally reflect the approach in *Shaheed*.

²⁹ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148].

³⁰ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [142]–[143] per Blanchard J for the majority.

right breached and the nature of the impropriety.³¹ The courts have made it clear that an effective and credible system of justice will not lightly condone the reliance by police on evidence obtained in abrogation of a person’s rights.³²

- 7.18 Section 30 does not adopt a strict exclusionary approach. Rather, it attempts to balance the competing public interests in excluding improperly obtained evidence (in recognition of the seriousness of the impropriety) and in admitting it (to ensure people suspected of committing crimes are tried and, where appropriate, convicted on the basis of all relevant evidence). Accordingly, section 30(2)(b) requires the court to determine whether exclusion of the evidence is “proportionate to the impropriety”. The factors that may be taken into account when undertaking that balancing test include considerations pointing against exclusion such as the seriousness of the offence and the nature and quality of the evidence (section 30(3)).
- 7.19 New Zealand’s balancing test may therefore be seen as an attempt to address a variety of concerns, including maintaining the integrity of the justice system, protecting rights and deterring future improprieties while at the same time recognising legitimate public interest considerations that weigh in favour of admitting improperly obtained evidence.³³
- 7.20 In some cases, the Court of Appeal has rejected suggestions that particular evidence should be excluded under section 30 for deterrence purposes (or, to put it another way, to provide incentives to avoid future impropriety).³⁴ This may, however, simply mean that such considerations should not be the sole determining factor in the section 30 analysis. Other cases have suggested that deterrence is relevant under section 30.³⁵ The latter approach seems to us to be correct. An effective and credible system of justice is not one that permits repeated improprieties by law enforcement officers. To maintain the integrity of the justice system, it may be necessary to provide organisational incentives (through exclusion of evidence) to improve practices, thereby reducing the risk of future improprieties. This approach was recently confirmed by the Court of Appeal.³⁶
- 7.21 For the avoidance of doubt, we do not suggest section 30 should be used to punish law enforcement officers involved in an impropriety. That is a role better fulfilled through the relevant disciplinary regime or separate proceedings, where appropriate.

³¹ Evidence Act 2006, s 30(3)(a) and (b).

³² *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [28]. See also *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [66] per Elias CJ and at [191] per Blanchard J.

³³ This is similar to the approach in Australia, where the judicial integrity rationale is recognised as the primary basis for the exclusionary rule but deterrence and rights protection remain relevant: see the Hon T F Bathurst, Chief Justice of New South Wales “Illegally or improperly obtained evidence: in defence of Australia’s discretionary approach” Evidence Act CPD seminar, University of New South Wales Law School, Sydney, 2 March 2016) at [62].

³⁴ See, for example, *Young v R* [2016] NZCA 107 at [25] and *Rihia v R* [2016] NZCA 200 at [31].

³⁵ See, for example, *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [26], citing *R v Hoare* CA310/04, 21 April 2005 at [42] with apparent approval (“To allow evidence to be given in circumstances where the rules are broken will not encourage adequate training of and appreciation by Police officers of the constraints on them and of the rights of suspects”).

³⁶ This case remains subject to publication restrictions until final disposition of trial.

HOW IS SECTION 30 OPERATING IN PRACTICE?

A flexible approach to the balancing test

- 7.22 After section 30 was enacted but before it came into force, the majority of the Court of Appeal in *R v Williams* “attempted ... to lay down a structured approach to the *Shaheed* test that should lead to more consistent results”.³⁷ The majority anticipated its approach would continue to be relevant under section 30.³⁸ The majority described the *Shaheed* test as balancing the seriousness of the breach against public interest factors favouring admission of the evidence.³⁹ It separated the various factors identified in *Shaheed* into factors relevant to the seriousness of the breach (which were further separated into aggravating⁴⁰ and mitigating factors⁴¹) and factors relevant to the public interest in admitting the evidence.⁴²
- 7.23 In its first major decision on section 30, *Hamed v R*,⁴³ te Kōti Mana Nui | Supreme Court departed from this prescriptive approach to the balancing test, appearing to favour a more flexible approach to whether a factor supported admission or exclusion in a particular case.⁴⁴ Gault J acknowledged this would lead to variable decisions, observing that “[a]ll of the factors specified in s 30(3) call for value judgments that may well depend on inclinations of particular judges, as will the comparative weighting to be accorded those factors”.⁴⁵
- 7.24 The Supreme Court in *Hamed* was split on the admissibility of various types of improperly obtained evidence in relation to different appellants, with differently constituted majorities determining the result in relation to each. All of the disputed evidence was found to be admissible against the defendants charged with more serious offending,⁴⁶ despite most members of the Court acknowledging that police had committed serious improprieties.⁴⁷
- 7.25 *Hamed* formed the foundation for the development of section 30 jurisprudence. Since then, the courts have not attempted to provide a framework for the application of the balancing test or endorsed the approach set out in *Williams*.⁴⁸ Perhaps reflecting the

³⁷ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [147].

³⁸ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [150].

³⁹ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [134].

⁴⁰ Such as police misconduct (including recklessness) (*R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [119]–[120]).

⁴¹ Such as urgency (*R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [123]).

⁴² For example, the seriousness of the offence and the nature and quality of the evidence (*R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [134]).

⁴³ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

⁴⁴ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [59] per Elias CJ; at [189] per Blanchard J; at [230] per Tipping J (suggesting the seriousness of the offence “is apt to cut both ways”); and at [282] per Gault J.

⁴⁵ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [282].

⁴⁶ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [207] per Blanchard J, at [280] per McGrath J and at [286] per Gault J.

⁴⁷ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [72] per Elias CJ, at [203] per Blanchard J, at [252] per Tipping J and at [278] per McGrath J.

⁴⁸ See the discussion in *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [15]–[18], noting that the judgments in *Hamed* favoured discretion over a structured approach.

uncertainty created by the balancing test, there are many appeals relating to section 30⁴⁹ and frequent split decisions in the appellate courts.⁵⁰

Application of section 30 in recent case law – a snapshot case study

- 7.26 We have not reviewed all section 30 cases given their large number, the limited timeframe for this review and the potential lack of utility in doing so since the section 30 analysis is often brief.⁵¹ We have, however, undertaken a snapshot case study, reviewing High Court, Court of Appeal and Supreme Court decisions between 1 January 2019 and 31 December 2022 to gain a general sense of how section 30 is being applied.⁵² The results of this case study should be treated with some caution, as it does not present a full picture of all section 30 cases during the relevant period. In particular, many te Kōti-ā-Rohe | District Court decisions are not included due to the limitations of the databases we searched.
- 7.27 The case study identified 70 decisions in which evidence was found to be improperly obtained.⁵³ The evidence was admitted in 38 cases, admitted in part in two cases and excluded in 30 cases.
- 7.28 It appears the courts are considerably more likely to exclude improperly obtained defendants' statements compared to other evidence. Of the 17 decisions relating to defendants' statements, the evidence was only admitted in full in three cases and in part in one case. When the cases relating to defendants' statements are put to one aside, the remaining 54 cases⁵⁴ also present a different picture. The evidence was admitted in full in 35 cases, admitted in part in one case and excluded in 18 cases. This may suggest a general tendency to admit improperly obtained *physical* evidence under section 30 but to exclude defendants' statements.
- 7.29 We analysed the key factors relied on in each decision (to the extent this was evident) and how those factors affected the outcome (for example, whether they were treated as favouring admission or exclusion of the evidence). Unsurprisingly, there was significant variation in how the different factors were weighted depending on the facts of each case, but our analysis highlights some general trends. Of the 40 cases in which improperly

⁴⁹ As at 14 February 2023, a Lexis Advance search for appellate court cases citing s 30 returned 484 results in the Court of Appeal and 57 results in the Supreme Court (including decisions on applications for leave to appeal). The High Court also considers appeals from District Court decisions, but in a case search it is difficult to separate these from first instance High Court decisions. A search of High Court decisions returned 506 results.

⁵⁰ For example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305, *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26; *R v Perry* [2016] NZSC 102; *R v Alford* [2017] NZSC 42, [2017] 1 NZLR 710; *Kalekale v R* [2016] NZCA 259; *W v R* [2019] NZCA 558. The Supreme Court was also split 3:2 on the admissibility of improperly obtained evidence in another case from 2020 that remains subject to publication restrictions until final disposition of trial.

⁵¹ As at 14 February 2023, a Lexis Advance search for cases citing s 30 returned 1,225 results. These results do not include many District Court decisions.

⁵² This review was limited to cases available on LexisNexis, Westlaw and Capital Letter databases. First instance and appeal decisions were reviewed.

⁵³ In an additional 26 cases, the evidence was found not to be improperly obtained but the s 30 balancing exercise was conducted in case that conclusion was wrong. In all of those 26 cases, the evidence would have been admitted under s 30. We have not included those cases in our analysis of factors, since the fact that the evidence was not considered to be improperly obtained is likely to have affected the analysis.

⁵⁴ One case (*Elley v New Zealand Police* [2021] NZHC 2097) concerned the admissibility of both confession evidence and real evidence, so is counted in both categories.

obtained evidence was admitted in full or in part, the following factors were most often relied on as favouring admission:

- (a) The evidence was important to the prosecution case⁵⁵ (29 cases);
- (b) The offence was serious (24 cases);
- (c) The impropriety was of low seriousness or in good faith (15 cases);
- (d) There was urgency in obtaining the evidence (9 cases).

7.30 In the 30 cases where the evidence was excluded, the following factors were most often relied on as favouring exclusion:

- (a) There was a significant breach of an important right (27 cases);
- (b) The impropriety was serious (19 cases);
- (c) There were concerns about the reliability or probative value of the evidence (7 cases); and
- (d) Other investigatory techniques were available and not used (6 cases).

7.31 As noted above, of those 30 cases in which evidence was excluded, 13 related to improperly obtained defendants' statements. In most of those cases (11) the breach was of the requirements in the Practice Note on Police Questioning. The courts usually (in 11 cases) emphasised the importance of the rights breached and the significance of the intrusion on them. Concerns about the reliability of the statement were identified in five cases, and in all those cases the evidence was excluded.

ISSUES FOR CONSIDERATION

7.32 Below we consider a range of issues with section 30 that relate to:

- (a) the operation of the section 30 balancing test;
- (b) the wording of the balancing test;
- (c) the application of the factors in section 30(3); and
- (d) the role of causation in determining whether evidence is improperly obtained under section 30(5).

7.33 We set out in the Appendix to this chapter a model provision that illustrates how some of the options for reform discussed in this chapter could be incorporated into section 30. This model provision has been prepared to assist with consultation on section 30 given the many different issues and options for reform discussed in this chapter.

OPERATION OF THE BALANCING TEST

7.34 The Minister of Justice's letter referring this review to the Commission suggested we may wish to consider "whether the process for determining whether improperly obtained

⁵⁵ This factor is not specified in s 30(3) but is commonly relied upon either under s 30(3)(c) (the nature and quality of the evidence) or as a separate factor.

evidence is admissible in criminal proceedings (s.30) gives sufficient weight to the impropriety”.⁵⁶

- 7.35 Preliminary feedback we received identified concern that the balancing test, as applied by the courts, may:
- (a) mean that decisions about whether to exclude improperly obtained evidence are too unpredictable and inconsistent; and/or
 - (b) unduly favour admission of improperly obtained evidence.
- 7.36 Commentators have also critiqued the balancing test (and the lack of judicial guidance on its application) as leading to inconsistency and unpredictability.⁵⁷
- 7.37 These concerns are long-standing. The Commission observed criticisms of the balancing test in its 2013 Review of the Act.⁵⁸ It considered that “[t]he evaluative nature of the s 30 balancing process means that different judges may come to different conclusions on the same evidence”.⁵⁹ The Commission declined to recommend any significant amendments to section 30 at that point, predicting that further general principles would emerge over time to assist the courts with the balancing exercise.⁶⁰
- 7.38 The Commission’s Second Review of the Act again identified uncertainty around the application of section 30.⁶¹ The Commission ultimately did not recommend any amendment but suggested there “may be merit in conducting a broader review of the policy underlying section 30, in response to concerns expressed by submitters that the section is skewed too heavily in favour of admitting improperly obtained evidence”.⁶²

Is legislative reform necessary or desirable?

- 7.39 We seek submissions on whether the balancing test is operating appropriately and whether it should be retained. In determining whether reform is necessary or desirable, we will consider whether the section 30 balancing test adequately fulfils the purposes of

⁵⁶ Letter from Hon Kris Faafoi (Minister of Justice) to Amokura Kawharu (Tumu Whakarae | President, Te Aka Matua o te Ture | Law Commission) regarding the third statutory review of the Evidence Act 2006 (23 February 2022).

⁵⁷ Scott Optican “The Kiwi Way: New Zealand’s Approach to the Exclusion in Criminal Trials of Evidence Improperly Obtained by the Police (2021) 24 New Crim L Rev 254 at 269; Bernard Robertson “Student Companion – Evidence” [2020] NZLJ 99 at 99; Kent Roach “Reclaiming Prima Facie Exclusionary Rules in Canada, Ireland, New Zealand, and the United States: The Importance of Compensation, Proportionality, and Non-Repetition” (2020) 43(3) Manitoba Law Journal 1 at 26; Dimitrios Giannopolous *Improperly obtained evidence in Anglo-American and Continental Law* (Hart Publishing, Oxford, 2019) at 240–241; Bernard Robertson “Evidence” [2018] NZLJ 210 at 211; Nikita Mitskevitch and Tania Singh “W v R (CA597/2016) [2017] NZCA 522: A privacy dichotomy within the context of New Zealand’s human rights obligations and “seriousness” under s 30 of the Evidence Act” [2018] NZLJ 240 at 243.

⁵⁸ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.6]–[4.7].

⁵⁹ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.10], citing *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [282] per Gault J and noting that in that case “admissibility fell to be determined by differently constituted majorities on the different types of evidence”.

⁶⁰ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.17].

⁶¹ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [145]–[147].

⁶² Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act* (NZLC R142, 2019) at [7.5].

the Act. These include providing rules of evidence that recognise the importance of the rights affirmed by NZBORA⁶³ and promoting fairness to parties and witnesses.⁶⁴

- 7.40 Our analysis of recent case law (discussed above) suggests section 30 decisions more often lead to admission of improperly obtained evidence, particularly where physical evidence is involved (as opposed to defendants' statements). The importance of the evidence to the prosecution case and the seriousness of the offence are often treated as significant - and sometimes determinative - factors.
- 7.41 This does not necessarily mean the section 30 test is resulting in unfair outcomes or giving inadequate recognition to NZBORA rights. Ultimately it is a question of policy whether the section 30 test appropriately balances the various public interest considerations at play. More fundamentally, we acknowledge submitters will hold different views on whether it is appropriate to balance these interests at all.
- 7.42 We question, however, whether the current application of section 30 is inconsistent with *Shaheed* (and hence with the original policy intent of section 30). While the majority in *Shaheed* clearly anticipated some rebalancing, they also indicated that the new balancing test should not lead, in most cases, to results different from those reached under the earlier prima facie exclusionary rule.⁶⁵ Although a breach of rights might be "outweighed by the accumulation of other factors",⁶⁶ the public interest in convicting those guilty of serious crimes would "not normally outweigh an egregious breach of rights".⁶⁷
- 7.43 We also note, that despite the Commission's predictions in the 2013 Review, case law has not provided significant additional clarity on the application of section 30 in the intervening years. The appellate courts have generally avoided giving specific guidance. Some judgments explicitly acknowledge that the balancing test means different judges may reach different conclusions on the same facts. While some uncertainty is implicit in any balancing test, we question whether the current approach to section 30 is unpredictable to an unnecessary degree. It is a rule of law principle that the law be consistently applied, with like cases being treated alike.⁶⁸
- 7.44 To some extent, it may be possible to address concerns about inconsistent decision-making and (to a lesser degree) insufficient weight being given to improprieties while retaining the overarching balancing test in its current form. Later in this chapter, we discuss options for reform to help clarify the effect of the test and the application of the section 30(3) factors. If the balancing test is thought to be operating inconsistently or unfairly, these reforms may be considered adequate to address that.
- 7.45 We are, however, interested in views on whether the current balancing test, which places no onus on the prosecution to establish the case for admission of the evidence, is flawed.

⁶³ Evidence Act 2006, s 6(b).

⁶⁴ Evidence Act 2006, s 6(c).

⁶⁵ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [156].

⁶⁶ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [144].

⁶⁷ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143].

⁶⁸ See, for example, Karen Steyn "Consistency – A Principle of Public Law" (1997) 2(1) *Judicial Review* 22 at 22.

There is an argument that it gives no guidance to judges on what to do if they are unsure⁶⁹ and accords insufficient weight to a finding of impropriety. It may be considered inconsistent with the view expressed by the Court in *Shaheed* that, as a starting point, a breach of a constitutional right should be given significant weight.⁷⁰ Arguably, once a finding of impropriety has been made, the prosecution should be required to satisfy the court that it is appropriate to admit the evidence. Otherwise, the courts may be seen as endorsing an “ends justifies the means” approach. This may have a detrimental effect on public confidence in the justice system and increase the likelihood of future improprieties.

Option for reform

- 7.46 Should reform be considered necessary or desirable, an alternative approach would be to provide that, although section 30 involves a balancing exercise, the onus is on the prosecution to satisfy the judge that the public interest favours admission of the evidence. For example, section 30 could require the judge to exclude improperly obtained evidence unless satisfied that the public interest in admitting the evidence *outweighs* the public interest in exclusion. The model provision set out in the Appendix to this chapter illustrates how this could be implemented.
- 7.47 Placing an onus on the prosecution could encourage the courts to give “appropriate and significant weight” to the impropriety, as *Shaheed* envisaged.⁷¹ It could also, to some extent, promote greater consistency in the application of the balancing test by providing a common starting point for judges and emphasising the need for clear justification to admit improperly obtained evidence.
- 7.48 Our preliminary view is that an amendment of this kind would not mean a return to the pre-*Shaheed* prima facie exclusionary rule. Blanchard J in *Shaheed* explained the majority’s concerns about the prima facie rule in this way:

... in practice the exclusion of evidence has followed almost automatically once it has been established that there has been a breach which is more than trivial and that there is a sufficient connection between that breach and the availability of the challenged evidence. The use of the terminology of “rule”, “prima facie” and “exceptions” (to the rule) has often led, in our opinion, to a relatively narrow and almost mechanical approach by Judges, without going through a balancing of the relevant considerations, once they have determined that a breach of a right has occurred which was more than trivial and that the circumstances did not demand urgency. There has been a tendency to go no further than looking for a category of exception to the “rule”, rather than seeking to ascertain whether exclusion of the evidence would be a truly proportionate response to the breach.

- 7.49 The courts are now used to a much more flexible approach and to accommodating a broad range of factors in deciding whether to admit improperly obtained evidence. Under our option for reform, the list of relevant factors set out in section 30(3) would continue to apply (potentially with some amendments, as we discuss below). As is currently the case, the court would weigh these factors against each other and assess the overall public

⁶⁹ *R v Hanford* HC Auckland CRI-2007-057-1922, 24 July 2008 at [8]. See also the discussion in Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA30.06(1)] and *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835 at [35].

⁷⁰ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143].

⁷¹ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143].

interest. Further, after two decades of relevant case law, the courts would have more guidance on when it might be appropriate to admit improperly obtained evidence than was the case pre-*Shaheed*.

- 7.50 For these reasons, we think it is unlikely that adopting such an onus would result in a return to the rigidity of the prima facie exclusionary rule. We also doubt it would lead to the pre-*Shaheed* problem (discussed above) of judges compensating for the rigidity of the exclusionary rule by introducing variability into the meaning of “unreasonable” search and seizure. Provided any reform retains sufficient flexibility for judges to admit evidence where the public interest requires it, there is no reason that should eventuate.
- 7.51 Australian legislation places an onus on the prosecution very similar to the one in our option for reform.⁷² It provides that improperly obtained evidence “is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained”.⁷³ In Victoria, this approach is used to determine the admissibility of evidence obtained in breach of the Victorian Charter of Human Rights and Fundamental Freedoms.⁷⁴ Placing an onus on the prosecution reflected a change from the common law approach of discretionary exclusion.⁷⁵ The Australian Law Reform Commission justified it on the basis that:⁷⁶

After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained.

- 7.52 The introduction of an onus on the prosecution does not appear to have tipped the balance significantly in favour of exclusion in Australia. Indeed, a 2001 study found that improperly obtained evidence continued to be admitted in most cases.⁷⁷ The Australian Law Reform Commissions considered section 138 in 2005 and recommended no changes, noting their view that “the onus of proof in s 138 helps to provide an appropriate balance between the public interest in crime control and the rights of accused persons”.⁷⁸ Only one submitter was recorded as suggesting a change to the onus.⁷⁹

⁷² See the discussion in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission *Review of the Uniform Evidence Acts* (ALRC DP 69/NSWLRC DP 47/VLRC DP, 2005) at [14.78].

⁷³ Evidence Act 1995 (Cth), s 138(1); Evidence Act 2011 (ACT), s 138(1); Evidence Act 1995 (NSW), s 138(1); Evidence (National Uniform Legislation) Act 2011 (NT), s 138(1); Evidence Act 2001 (Tas), s 138(1); Evidence Act 2008 (Vic), s 138(1).

⁷⁴ *Director of Public Prosecutions v Kaba* [2014] VSC 52 at [334] (referring the equivalent Victorian provision, s 138 of the Evidence Act 2008 (VIC)).

⁷⁵ *Bunning v Cross* (1978) 141 CLR 54. See the discussion in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts* (ALRC DP 69/NSWLRC DP 47/VLRC DP, 2005) at [14.78].

⁷⁶ Australian Law Reform Commission *Evidence (Volume 1)* (ALRC 26 (Interim) Vol 1 (1985) at [964].

⁷⁷ Bram Presser “Public policy, police interest: A re-evaluation of the judicial discretion to exclude improperly or illegally obtained evidence” (2001) 25 Melb Univ Law Rev 757 at 776.

⁷⁸ Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission *Review of the Uniform Evidence Acts* (ALRC DP 69/NSWLRC DP 47/VLRC DP, 2005) at [14.79]. See also Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission *Uniform Evidence Law Report* (ALRC FR 102/NSWLRC FR 122/VLRC FR, 2005) at [16.92].

⁷⁹ Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission *Review of the Uniform Evidence Acts* (ALRC DP 69/NSWLRC DP 47/VLRC DP, 2005) at [14.76].

- 7.53 If anything, the Australian experience might therefore cause us to question whether shifting the onus in the manner discussed above would make any difference in practice. We are, however, interested in submitters' views on whether, in New Zealand's rather different constitutional context, it may result in a modest re-balancing of the current approach.
- 7.54 The other main argument against placing an onus on the prosecution is that it would accord less weight to the public interest in the investigation and prosecution of crime. This interest would still be considered, but it would need to be shown to *outweigh* the countervailing public interest in recognising the seriousness of the impropriety for the evidence to be admitted. It may be thought that this would result in too much evidence being excluded and crimes going unpunished.

QUESTIONS

Q16

Is the section 30 balancing test operating in a manner that:

- a. usually leads to admission of improperly obtained evidence?
- b. results in inconsistent or unpredictable judicial decision-making?
- c. gives greater weight to some of the s 30(3) factors than others?

If so, is this problematic?

Q17

Should the section 30 test be amended to place an onus on the prosecution to satisfy the judge that the public interest favours admission of the evidence (for example, by requiring exclusion of improperly obtained evidence unless the public interest in its admission *outweighs* the public interest in its exclusion)?

WORDING OF THE BALANCING TEST

- 7.55 When section 30 was enacted, section 30(2)(b) originally required a balancing process that “gives appropriate weight to the impropriety *but* takes proper account of the need for an effective and credible system of justice” (emphasis added). The Supreme Court in *Hamed* noted that the use of the word “but” seemed to suggest - incorrectly - that an effective and credible system of justice was a counterpoint to the impropriety that pointed towards admissibility.⁸⁰ The Commission in its 2013 Review agreed this was a drafting issue.⁸¹ Following its recommendation, section 30(2)(b) was amended to change the word “but” to “and”. This was intended to clarify that the need for an effective and credible system of justice is *not* a counterbalance to the impropriety and may favour exclusion or admission of improperly obtained evidence depending on the circumstances.
- 7.56 Some commentators, however, have suggested the wording of the test remains unclear:

⁸⁰ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [58] and [60] per Elias CJ and [229]–[230] per Tipping J.

⁸¹ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.18]–[4.20].

- (a) Associate Professor Scott Optican points out that the judgments in *Hamed* do not indicate when an effective and credible system of justice favours exclusion of the evidence and when it favours admission.⁸²
- (b) Tania Singh suggests that, despite the amendment, section 30(2)(b) still gives the impression that the impropriety is being weighed *against* an effective and credible system of justice, with the result that the need for an effective and credible system of justice is often equated with the need to preserve the public interest in prosecution.⁸³
- (c) Bernard Robertson states “it would be better to spell out what the aim is, rather than use general and allusive language”.⁸⁴

Is legislative reform necessary or desirable?

7.57 We agree with the observations in *Hamed* that an effective and credible system of justice encompasses both:⁸⁵

- (a) the public interest in bringing offenders to justice; and
- (b) the public interest in ensuring that the justice system does not condone improprieties in gathering evidence and gives substantive effect to human rights and the rule of law.

7.58 The reference in section 30(2)(b) to a balancing test that takes proper account of *both* the impropriety *and* the need for an effective and credible system of justice may still imply (despite the amendment) that these are the two considerations being “balanced” against each other. That is not the legislative intention. The reference to an effective and credible system of justice instead reflects the underlying rationale identified in *Shaheed* for the test as a whole. The “balancing” is rather between the public interest factors that favour excluding the evidence and those that favour admitting it, including those set out in section 30(3).

7.59 We seek submissions on the desirability of amending section 30(2)(b) to clarify this point. The alternative view might be that there is now clear appellate authority on the meaning of an effective and credible system of justice.⁸⁶ There is a risk that attempting to further refine the wording of the balancing test would create more uncertainty than it would solve.

Option for reform

7.60 If reform is considered desirable, one option would be to amend section 30(2)(b) to provide that the judge must:

⁸² Scott Optican “*Hamed, Williams and the exclusionary rule*” [2012] VUWLR 605 at 618.

⁸³ Tania Singh “Criminal Practice Section: The exclusion of improperly obtained evidence” [2021] NZLJ 59 at 59–60.

⁸⁴ Bernard Robertson “Evidence” [2018] NZLJ 210 at 211.

⁸⁵ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 per Elias CJ at [60]–[63], Blanchard J at [187]–[189], Tipping J at [229]–[230] and McGrath J at [258]. See also *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148].

⁸⁶ See *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 per Elias CJ at [60]–[63], Blanchard J at [187]–[189], Tipping J at [229]–[230] and McGrath J at [258], affirmed more recently in *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [37] and *Butland v R* [2019] NZCA 376 at [70]–[71] and [74].

... determine whether exclusion is proportionate to the impropriety by balancing the public interest in recognising the seriousness of the impropriety against the public interest in having the evidence considered by the fact-finder at trial.

- 7.61 Similar wording could be adopted alongside an onus on the prosecution to establish the case for admitting the evidence (the option explored above). For example, section 30(2) could require the judge to exclude the evidence unless satisfied that the public interest in having the evidence considered by the fact-finder at trial outweighs the public interest in recognising the seriousness of the impropriety.
- 7.62 Our proposed wording draws on *Williams* to identify the two public interests that are being balanced in section 30 as:⁸⁷
- (a) the public interest in recognising the seriousness of the impropriety; and
 - (b) the public interest in having the evidence considered by the fact-finder at trial.
- 7.63 We think framing the first public interest in terms of “the seriousness of the impropriety” is consistent with the various rationales for exclusion discussed earlier in this chapter and contemplated by *Shaheed*. The public interest may require exclusion of evidence obtained through serious improprieties to give proper recognition to any rights infringed, to maintain the integrity of the justice system by rejecting the use of improper methods to obtain evidence and/or to discourage the use of such methods in future.
- 7.64 The language of “impropriety” is consistent with the current drafting of section 30 (which already uses the word on six occasions). The factors relevant to an assessment of the seriousness of the impropriety are discussed in further detail in the next section but would include the importance of the right breached, the extent of the breach, whether the impropriety was deliberate, reckless or in bad faith, the availability of other investigatory techniques and any urgency in obtaining the evidence.
- 7.65 On the other side of the equation, the public interest in having the evidence considered by the fact-finder at trial reflects the concern that excluding improperly obtained evidence may allow those who commit crimes to escape conviction. This, in turn, may diminish respect for the administration of justice and put public safety at risk. Factors affecting this public interest are, again, discussed in the next section but would include the seriousness of the offence and the nature and quality of the evidence.
- 7.66 The formulations we have set out above seek to encapsulate with some specificity the competing public interests at stake. Our preliminary view is that this is desirable because it would give trial judges a better sense of the nature of the assessment that is required of them. The alternative view might be that there is a danger this approach may turn out to be unduly restrictive and may fail to capture all of the relevant public interests. We invite feedback on whether other public interest concerns may be relevant for which the approach we set out above would not provide.
- 7.67 An alternative approach that might meet this concern would be simply to refer to “the public interest in exclusion of the evidence” and “the public interest in the admission of the evidence”. This would be similar to Australian legislation, which refers to whether the desirability of admitting the evidence outweighs the undesirability of admitting the

⁸⁷ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [245]–[247] and [250].

evidence, but would offer less guidance to trial judges as to the nature of the public interest concerns.⁸⁸

- 7.68 We note that neither formulation set out above refers to the need for an effective and credible system of justice. While that phrase captures the primary rationale for the exclusion of evidence identified in *Shaheed*, we received preliminary feedback that its inclusion in section 30(2)(b) is unhelpful. It is unclear how it should influence the balancing exercise.
- 7.69 One view might be that there is nevertheless a risk that removing the reference to the need for an effective and credible system of justice would create confusion about the purpose of the section. An alternative approach would be to insert a separate subsection stating that the purpose of section 30 is to maintain an effective and credible system of justice. That approach would affirm that the need for an effective and credible system of justice remains a guiding principle underlying the statutory test.

QUESTIONS

Q18

Should section 30(2)(b) be amended to clarify what is being “balanced” against what? If so, should section 30(2)(b) provide that the judge must determine whether exclusion is proportionate to the impropriety by balancing the public interest in recognising the seriousness of the impropriety against the public interest in having the evidence considered by the fact-finder at trial (or similar if an onus is placed on the prosecution to establish the case for admitting the evidence)?

Q19

Should the current reference in section 30(2)(b) to the need for an effective and credible system of justice be removed? If so, should section 30 be amended to introduce a new subsection stating that the purpose of the section is to maintain an effective and credible system of justice?

APPLICATION OF THE SECTION 30(3) FACTORS IN THE BALANCING TEST

- 7.70 As mentioned, section 30(3) contains a non-exhaustive list of factors that may be taken into account in undertaking the balancing exercise. In this section, we first discuss the general approach to section 30(3) and whether it should provide greater clarity as to the relevance of the different factors. We then go on to address each section 30(3) factor in turn to identify any particular issues with the factor and to discuss how the factor should influence the balancing test. Some of the options for reform discussed below are reflected in the model provision in the Appendix to this chapter.

⁸⁸ Evidence Act 1995 (Cth), s 138(1); Evidence Act 2011 (ACT), s 138(1); Evidence Act 1995 (NSW), s 138(1); Evidence (National Uniform Legislation) Act 2011 (NT), s 138(1); Evidence Act 2001 (Tas), s 138(1); Evidence Act 2008 (Vic), s 138(1).

General approach to section 30(3)

- 7.71 In its Second Review, the Commission considered whether the application of the section 30(3) factors should be clarified but decided against amendment.⁸⁹ This was primarily on the basis that some uncertainty is implicit in the balancing test and the Commission did not wish to limit the ability of the courts to take a fact-specific approach.
- 7.72 Subsequent case law, however, suggests the application of some factors is less settled than the Commission understood to be the case at that time. As we discuss below, there remains significant confusion over the relevance of certain factors and inconsistency in how they are applied.
- 7.73 Currently, each factor is worded in an open way that does not indicate whether it favours admission or exclusion or whether the *absence* of a factor is relevant. We invite submissions on whether section 30(3) should be amended to clarify where each factor fits in the balancing exercise. This could help to ensure the factors are applied in a principled and consistent way, making the application of section 30 more predictable. On the other hand, it would reduce the flexibility of the provision and may constrain the ability of the courts to have regard to the particular facts before them.

Option for reform

- 7.74 If clarification is considered desirable, different approaches may be appropriate depending on whether other changes (investigated above) are made to the section 30 balancing test. If the option for reform discussed in relation to section 30(2)(b) above is adopted, section 30(3) could be amended to list which factors are relevant to the public interest in recognising the seriousness of the impropriety and which are relevant to the public interest in having the evidence considered by the fact-finder at trial.
- 7.75 A further option would be to separate the factors relevant to the first public interest (in recognising the seriousness of the impropriety) into factors that may increase or reduce this interest. This draws on the approach taken by the Court of Appeal in *Williams* of identifying aggravating and mitigating factors. It would clarify that not all of the factors relevant to that first public interest favour exclusion of the evidence. Specifically, the factors in section 30(3)(g) and (h) (apprehended physical danger and urgency) would *reduce* the seriousness of the impropriety, making it more likely the evidence would be admitted.
- 7.76 We question, however, whether this further reform option is necessary as it is likely to be clear to judges from the nature of sections 30(3)(g) and (h) that they do not support exclusion. Further, we are concerned that it would create additional complexity and result in unnecessary artificiality in what is ultimately a fact-dependent evaluative exercise. For example, it may be appropriate for some factors (such as the nature and quality of the evidence) to either increase or reduce the relevant public interest depending on the circumstances. We therefore do not consider this option further in this Issues Paper, although we welcome submissions on it.
- 7.77 If the wording of section 30(2)(b) remains in its current form but it is considered desirable to clarify the relevance of the factors, section 30(3) could be amended to specify which

⁸⁹ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act* (NZLC R142, 2019) at [7.47]–[7.48].

factors may favour admission of the evidence and which factors may favour exclusion. We think this option may be harder to achieve, however, as the extent to which (if at all) a particular factor supports or reduces the case for admission/exclusion on the particular facts is an evaluative one.

- 7.78 Any of these options for reform would require resolution of some outstanding questions about how particular factors should affect the balancing test. We discuss these issues further below.
- 7.79 We do not suggest making the list of factors exhaustive. While that would promote greater consistency and avoid reliance on inappropriate considerations, it may also be unduly restrictive. Our review of case law suggests the courts refer mainly to the factors identified in section 30(3) but that other factors are treated as relevant on occasion. The courts have considered, for example, the fact that there was a limited causative relationship between the breach and the obtaining of the evidence⁹⁰ and the fact that the evidence would only be used in rebuttal if required.⁹¹ Attempting to specify every potentially relevant factor may result in unintended gaps.

QUESTION

Q20

Should section 30(3) be amended to clarify the relevance of each factor? If so, how should this be done? For example, should section 30(3) be amended to specify:

- a. which factors are relevant to the public interest in recognising the seriousness of the impropriety and which are relevant to the public interest in having the evidence considered by the fact-finder at trial; or
- b. which factors may favour admission of the evidence and which factors may favour exclusion of the evidence?

The importance of any right breached and the seriousness of the intrusion on it

- 7.80 Section 30(3)(a) refers to the “the importance of any right breached by the impropriety and the seriousness of the intrusion on it”. It is arguably unclear from that wording whether the importance of any statutory requirements, rules of law or other procedural protections breached, and the extent of that breach, can be considered if they do not amount to a breach of rights under NZBORA. By “procedural protections” we refer to non-statutory guidelines such as the Chief Justice’s Practice Note on Police Questioning.
- 7.81 This factor, like the others in section 30(3), was adopted from *Shaheed*, which addressed the admissibility of evidence obtained in breach of NZBORA. However, section 30 is not only concerned with breaches of “rights” in this narrow sense. It also applies to evidence obtained in breach of enactments or rules of law aside from NZBORA (although

⁹⁰ *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [61] and [63].

⁹¹ In a recent Court of Appeal case that remains subject to publication restrictions until final disposition of trial.

sometimes such breaches will also result in NZBORA breaches⁹²) or obtained unfairly (including through breaches of the Practice Note on Police Questioning).

- 7.82 We consider the importance of any enactment, rule of law or procedural protection breached, and the extent of that breach, are relevant considerations whether or not NZBORA rights are engaged. These factors always need to be evaluated and weighed, even if it is to conclude the rule of law at issue in the particular case is one to which the courts attach comparatively *less* significance.
- 7.83 The courts have recognised that any breach of NZBORA will make exclusion more likely.⁹³ We do not disagree with that approach. In our view, however, it is also open to the courts to attach particular importance to other relevant rules of law where appropriate. For example, the Practice Note on Police Questioning provides important procedural protections during interrogations, some of which are long standing and arguably of constitutional significance. The fact that police questioning has been conducted in breach of those protections is significant, regardless of whether there is also a breach of an NZBORA right.⁹⁴
- 7.84 In practice, the courts have considered the importance of the protections in the Practice Note on Police Questioning and the extent to which they were breached under section 30(3)(a).⁹⁵ Amendment may therefore be considered unnecessary. However, the approach of the courts is not necessarily reflected in the wording of section 30(3)(a) (which refers to “any right”). It may be desirable to clarify the position for the avoidance of doubt, particularly if other changes to section 30(3) are progressed.
- 7.85 Finally, we note that section 30(3)(a) refers both to the “the importance of any right breached by the impropriety” and “the seriousness of the intrusion on it”. These are distinct considerations. For example, in NZBORA cases, the courts will often state that the right that has been breached is an important one. That does not detract from the fact that, even in NZBORA cases, the seriousness of the particular intrusion can vary widely from case to case (consider, for example, the difference between a strip search and a perimeter search of a farm property). This distinction between the importance of the right and the seriousness of the intrusion would also apply in cases involving breaches of other (non-NZBORA) statutory requirements, rules or law or procedural protections.

Option for reform

- 7.86 If reform is considered desirable, section 30(3)(a) could be amended to refer to the importance of any right, statutory requirement, rule of law or procedural protection breached and the extent of that breach. “Procedural protection” would include the requirements of the Practice Note on Police Questioning.

⁹² For example, searches that are unlawful (due to a failure to comply with the requirements of the Search and Surveillance Act 2012 or for other reasons) will generally also be “unreasonable” for the purposes of s 21 of NZBORA (see *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [49], [50], [172], [174], [226], [263] and [281]; *Hall v R* [2018] NZCA 279, [2019] 2 NZLR 325 at [50]).

⁹³ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [66] per Elias CJ and at [191] per Blanchard J; *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [28].

⁹⁴ See *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [49], citing *R v JZH* [2009] NZCA 363 at [30].

⁹⁵ See, for example, *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [53]–[55]; *R v X* [2021] NZHC 2444 at [156]; *Edmonds v R* [2012] NZCA 472 at [77].

- 7.87 If section 30(3) is amended to specify which public interest each factor is relevant to (or, alternatively, whether particular factors may favour admission or exclusion), this factor could be listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour exclusion of the evidence). We would expect this factor to be applied in an evaluative way, for example, if a breach was minor or technical it may be given reduced weight, meaning the public interest in exclusion is assessed as lower overall.

QUESTIONS

- Q21** Should section 30(3)(a) be amended to refer to the importance of any right, statutory requirement, rule of law or procedural protection breached and the extent of that breach?
- Q22** Should section 30(3)(a) be listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour exclusion of the evidence)?

Nature of the impropriety

- 7.88 Section 30(3)(b) refers to “the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith”. We have identified three possible issues with this factor and seek submissions on whether amendment is necessary or desirable to address them. The first two issues relate to the wording of section 30(3)(b). The third is whether the relevance of good faith or inadvertence should be clarified. We invite submissions on whether these issues are causing confusion or problems in practice.

Wording of section 30(3)(b)

- 7.89 The first potential issue is that the phrase at the start of section 30(3)(b) - “the nature of the impropriety” - may cause confusion. As discussed above, the public interest in recognising the “seriousness of the impropriety” may be viewed as one side of the balancing equation, with many of the factors currently set out in section 30(3) being relevant to that assessment. Given the similarity in language, it is arguably unclear how an inquiry into “the nature of the impropriety” might differ from this overarching public interest assessment.
- 7.90 While the phrase “nature of the impropriety” in section 30(3)(b) is wide, the examples given in the second part of the paragraph suggest it has a narrower focus on the knowledge and intent of the people or agency that acted improperly - in particular, whether their conduct was deliberate, reckless or in bad faith. This is how case law on section 30 generally approaches the factor. It is not clear what other types of considerations section 30(3)(b) would capture that are not already captured elsewhere.
- 7.91 The second potential issue is that, according to some of the preliminary feedback we received, the courts may be reluctant to make findings that law enforcement officers acted in bad faith, and this, in turn, may mean section 30(3)(b) is given insufficient weight. We invite feedback on whether this is the case. Our snapshot case study did not identify

any findings of bad faith. That is not necessarily surprising - it may simply reflect that intentional misconduct in the obtaining of evidence is relatively rare. If, however, there is a widespread concern that bad faith is rarely engaged, reframing the section 30(3)(b) factor to remove that language and shift the focus to the knowledge of the person or agency obtaining the evidence may assist. It may help to emphasise that knowingly acting improperly is always a serious matter and should be given significant weight in the balancing test.

Option for reform

- 7.92 If reform is considered desirable to address these issues, an option would be to amend section 30(3)(b) to refer to “the extent to which the investigatory techniques used were known, or ought to have been known, to be improper”. This would remove the potentially confusing or problematic references to “the nature of the impropriety” and “bad faith”, instead directing attention to the knowledge of the person or agency obtaining the evidence.
- 7.93 This wording could include conduct that is deliberate or reckless, as well as capturing carelessness and negligence (which are not currently mentioned). Our preliminary view is that carelessness or negligence may also favour exclusion, if to a lesser degree. This conclusion is supported by case law on section 30, which regularly refers to carelessness and negligence as favouring exclusion.⁹⁶ There is arguably a public interest in ensuring that carelessness or negligence in obtaining evidence is not condoned by the criminal justice system. Exclusion in such cases could also encourage training and procedural changes to prevent future breaches of a similar kind.

Relevance of good faith or inadvertence

- 7.94 Case law suggests there is uncertainty about whether and how the courts should have regard to the fact that an impropriety occurred in good faith or was inadvertent. In both *Shaheed* and *Williams*, the Court of Appeal indicated that good faith will usually be a neutral factor because “the good faith of law enforcement agencies is to be expected at all times and is not something which, if present, should then add weight to argument for the admissibility of evidence”.⁹⁷ This approach has been confirmed more recently by the Court of Appeal.⁹⁸ Notwithstanding this, some recent section 30 decisions, including in the Court of Appeal, treat good faith on the part of police (or the absence of bad faith) as favouring admission of the evidence.⁹⁹
- 7.95 We are interested in views on whether the approach in *Shaheed* and *Williams* is correct. One view is that the public is entitled to assume that law enforcement officers will not deliberately breach the law or act unfairly. Good faith or inadvertence is simply the absence of an aggravating factor (which will affect the overall assessment of the

⁹⁶ See, for example, *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [161]; *Murray v R* [2016] NZCA 221 at [174]–[176]; *Ferens v R* [2015] NZCA 564 at [61]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [120]; *Alexander v Police* [2019] NZHC 2920 at [49]–[50].

⁹⁷ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [149]. See also *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [130].

⁹⁸ *Fenwick v R* [2017] NZCA 422 at [15].

⁹⁹ See, for example, *Roskam v R* [2019] NZCA 53 at [42] and *Kelly v Police* [2017] NZHC 1611 at [44]. In total, 15 of the 40 cases we examined in our snapshot case study in which improperly obtained evidence was admitted appeared to treat good faith or the fact that the impropriety was of low seriousness as a factor favouring admission of the evidence.

seriousness of the impropriety). On this view, treating good faith or inadvertence as positively favouring admission could be seen as undermining the rule of law (by signalling that strict compliance by law enforcement officers is not required) and failing to deter future improprieties (by suggesting to law enforcement agencies that they do not need to improve their processes or educate officers about their responsibilities).

- 7.96 On the other hand, it is possible that variance in the case law on this point simply reflects the different factual scenarios at issue. There is a risk that legislative reform may reduce the flexibility of the courts to respond to the facts before them.

Option for reform

- 7.97 If section 30(3) is amended to specify which public interest each factor is relevant to (or, alternatively, whether particular factors may favour admission or exclusion), this factor could be listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour exclusion of the evidence).

QUESTIONS

Q23

Should section 30(3)(b) be amended to refer to “the extent to which the investigatory techniques used were known, or ought to have been known, to be improper”?

Q24

Should section 30(3)(b) be listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour exclusion of the evidence)?

Nature and quality of the evidence

- 7.98 Section 30(3)(c) refers to “the nature and quality of the improperly obtained evidence”. We are interested in views on whether case law is placing too much weight on the centrality of the evidence to the prosecution case when considering this factor at the expense of a proper consideration of the probative value of the evidence.
- 7.99 The history of the balancing test indicates this factor was intended to focus on the probative value of the evidence, including its reliability.¹⁰⁰ The reasoning was that, if the evidence is highly probative and reliable, there is a greater public interest in having it considered at trial.¹⁰¹ For example, physical evidence is less likely to be tainted by impropriety than defendants’ statements, so its reliability is often not in issue.¹⁰²
- 7.100 In *Shaheed*, the Court had also indicated that the centrality of the evidence to the prosecution case was a relevant factor.¹⁰³ When the Evidence Bill was introduced, section

¹⁰⁰ The Court in *R v Shaheed* [2002] 2 NZLR 377 (CA) envisaged this factor would encompass both the probative value of the evidence (including its reliability) and its centrality to the prosecution case (at [151]–[152]).

¹⁰¹ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [151]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [140].

¹⁰² *R v Shaheed* [2002] 2 NZLR 377 (CA) at [151]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [140]; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [276] per McGrath J.

¹⁰³ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152]. See also *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [141].

30(3)(c) originally included the words “in particular whether it is central to the case of the prosecution”. However, these words were deleted on the recommendation of the select committee.¹⁰⁴ The select committee found it difficult to envisage a circumstance where that would be a relevant factor since the seriousness of the offence was already listed as a separate factor.¹⁰⁵ Nandor Tanczos MP, one of the members of the committee, explained that the factor was removed because:¹⁰⁶

...the fact that the prosecution relies on that evidence to get the conviction makes it even more important that we exclude it, otherwise we create this enormous temptation for the investigating agencies to deliberately breach rights because that is the only evidence they will get.

- 7.101 Notwithstanding this, two members of the Supreme Court in *Hamed* considered that the importance of the evidence to the prosecution case could be taken into account under section 30 (in the context of discussing the nature and quality of the evidence).¹⁰⁷
- 7.102 In its Second Review, the Commission said the centrality of the evidence to the prosecution case is best understood as a separate factor, as the “nature and quality of the evidence” is primarily aimed at its reliability.¹⁰⁸ The Commission did not recommend specifically referring to the centrality of the evidence in section 30(3) as this would risk over-emphasising its importance.¹⁰⁹
- 7.103 Since then, some cases have continued to equate section 30(3)(c) with the centrality of the evidence to the prosecution case and treat this as a significant, if not determinative, factor.¹¹⁰ In our snapshot case study, the centrality of the evidence was the single most often relied on factor in admitting improperly obtained evidence (cited in 29 out of 40 cases), despite not being identified as a factor in section 30(3). While specific concerns about reliability were taken into account where relevant, usually in cases involving defendants’ statements, the probative value of the evidence was rarely referred to as favouring admission (although the tendency of the courts to admit physical evidence far more often than confession evidence suggests it may possibly be an unstated factor in some cases).
- 7.104 The current wording of section 30(3)(c) is arguably ambiguous. The “nature and quality of the evidence” can be interpreted as including its importance to the prosecution case (as, indeed, the courts have found) notwithstanding the amendment to the Evidence Bill. We are interested in views on whether it would be preferable for the courts to focus on the probative value of the evidence, including its reliability. Emphasising the centrality of the evidence to the prosecution case may be considered undesirable because:

¹⁰⁴ Evidence Bill 2005 (256-2) (select committee report) at 4.

¹⁰⁵ Evidence Bill 2005 (256-2) (select committee report) at 4.

¹⁰⁶ (21 November 2006) 635 NZPD 6638 (in committee).

¹⁰⁷ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [201] per Blanchard J and [276] per McGrath J. Tipping J disagreed (at [237]), suggesting it would be inconsistent with Parliament’s approach to consider the centrality of the evidence to the prosecution case (whether under s 30(3)(c) or as a separate factor). Elias CJ and Gault J did not address the issue.

¹⁰⁸ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act* (NZLC R142, 2019) at [7.24].

¹⁰⁹ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act* (NZLC R142, 2019) at [7.23].

¹¹⁰ There are several recent examples but these cases remain subject to publication restrictions until final disposition of trial.

- (a) Frequent admission of evidence on the basis that it is central to the prosecution case could encourage recklessness or laxity on the part of Police or other investigating agencies attempting to obtain evidence in situations where they have little other evidence against a suspect. It may be seen as condoning an “ends justifies the means” approach.
- (b) If the evidence is of relatively low probative value or questionable reliability, it may be inappropriate to treat its centrality to the prosecution case as favouring its admission. It may therefore be preferable in the usual course to focus on the probative value of the particular evidence in question and its tendency to establish guilt.
- (c) Evidence that is highly probative will often be central to the prosecution case. If the probative value of the evidence is considered as favouring its admission (consistent with the intent behind section 30(3)(c)), then also factoring in its centrality to the prosecution case may mean the significance of the evidence is given too much weight overall.

Option for reform

7.105 If reform is considered desirable, section 30(3)(c) could be amended to refer to the “probative value of the evidence, including its reliability” rather than “the nature and quality of the evidence”. This may help to focus attention on probative value rather than the centrality of the evidence to the prosecution case. We invite feedback on whether this wording would encompass all aspects of the nature and quality of the evidence that the courts ought to consider.

7.106 If section 30(3) is amended to specify which public interest each factor is relevant to (or, alternatively, whether particular factors may favour admission or exclusion), this factor could be listed as relevant to the public interest in having the evidence considered by the fact-finder at trial (or as a factor that may favour admission of the evidence).¹¹¹ This is in line with the approach in *Williams*.

QUESTIONS

Q25 Should section 30(3)(c) be amended to refer to the “probative value of the evidence, including its reliability” rather than “the nature and quality of the evidence”?

Q26 Should section 30(3)(c) be listed as a factor relevant to the public interest in having the evidence considered by the fact-finder at trial (or as a factor that may favour admission of the evidence)?

¹¹¹ We note that where there are concerns about the reliability of the evidence, this may result in exclusion under Evidence Act 2006, s 28 and/or s 8. Any residual concerns about the reliability of evidence that is being considered under s 30 could be taken into account as *reducing* the public interest in having the evidence considered by the fact-finder at trial. We also discuss in Chapter 6 and in the “Other factors” section below the option of introducing a separate factor allowing the risk of unreliability associated with an investigatory technique to be taken into account under s 30(3) (which would be relevant to the seriousness of the impropriety).

Seriousness of the offence

- 7.107 Section 30(3)(d) refers to “the seriousness of the offence with which the defendant is charged”. Case law discloses some uncertainty about how the seriousness of the offence is to be weighed, particularly where the reliability of the evidence is in question.
- 7.108 In *Hamed*, two of the Judges suggested the seriousness of the offence could favour admission or exclusion of the evidence depending on the context.¹¹² The Commission noted in its Second Review that there had been confusion about how the seriousness of an offence was to be measured and whether it favours admission or exclusion.¹¹³ The Commission considered, however, that this uncertainty had been resolved by the Court of Appeal’s decision in *Underwood*.¹¹⁴ In *Underwood*, the Court said earlier suggestions that the seriousness of the offence can “cut both ways” were misleading to the extent they suggested this factor can independently favour exclusion of the evidence.¹¹⁵ The Court said that seriousness *always* favours admission, although it acknowledged that where the offence is serious other factors favouring exclusion (such as the importance of the right and the nature of the breach) may assume greater importance.
- 7.109 Case law since 2016 indicates that *Underwood* may not have resolved matters. There appears to be continued confusion over the significance of the seriousness of the offence, in particular where the reliability of the evidence is in question.¹¹⁶ Two Court of Appeal cases decided in 2018 both involved breaches of the Practice Note on Police Questioning giving rise to reliability concerns. In one case, the seriousness of the offence was treated as favouring admission of the evidence (although this was outweighed by other factors)¹¹⁷ and in the other as favouring exclusion.¹¹⁸ Neither case discussed the reasons for their respective approaches.
- 7.110 We agree that, where the reliability of the evidence is in issue, that may impact how the seriousness of the offence should be weighed. The rationale for considering the seriousness of the offence is that it increases the public interest in having the evidence considered at trial. If, however, the reliability of the evidence is in question, there is less reason to believe that its admission will (or should) result in conviction, which reduces that public interest. As well, reliability concerns may be particularly compelling in cases involving serious offending because of the gravity of the consequences for the alleged offender.
- 7.111 Our preliminary view, however, is that the seriousness of the offence should not be treated as favouring *exclusion* of the evidence. All suspects are entitled to the same rights

¹¹² *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [65] per Elias CJ and [230] per Tipping J. This point was not directly addressed by the other members of the Court.

¹¹³ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act* (NZLC R142, 2019) at [7.25]–[7.28].

¹¹⁴ *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433.

¹¹⁵ *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [39]–[41].

¹¹⁶ See the discussion in Scott Optican “Evidence” [2018] NZ L Rev 429 at 492–494.

¹¹⁷ *Bowden v R* [2018] NZCA 618 at [28] (although the evidence was excluded after assessment of other factors).

¹¹⁸ *D (CA104-2017) v R* [2018] NZCA 173 at [36]: “Where the nature of the breach is such as to raise concerns about the reliability of the evidence, [the seriousness of the offence] weighs against the admission of the evidence”.

and procedural protections irrespective of the seriousness of the offence.¹¹⁹ Instead, where there are reliability concerns, it may be more appropriate to treat the seriousness of the offence as a neutral factor or to give it reduced weight (depending on the extent of the reliability concerns). The reliability concerns themselves may also be given greater weight. We invite feedback on this approach.

Option for reform

- 7.112 If there is support for clarifying to which public interest each section 30(3) factor is relevant (or, alternatively, whether particular factors favour admission or exclusion), the seriousness of the offence could be listed as relevant to the public interest in having the evidence considered by the fact-finder at trial (or as a factor that may favour admission of the evidence). This would indicate that the seriousness of the offence does not favour exclusion of the evidence. However, where there are concerns about the reliability of the evidence, it may still be appropriate to give the seriousness of the offence less weight or no weight, meaning that it will be more easily outweighed by the seriousness of the impropriety.

QUESTION

Q27

Should section 30(3)(d) be listed as a factor relevant to the public interest in having the evidence considered by the fact-finder at trial (or as a factor that may favour admission of the evidence)?

Other investigatory techniques

- 7.113 Section 30(3)(e) directs attention to “whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used”. Both the availability of and the absence of other investigatory techniques have been treated variously as favouring admission or exclusion of the evidence, or as a neutral factor.¹²⁰ For example, the majority of the Supreme Court in both *Hamed* and *Chetty* treated the *absence* of other techniques as favouring admission of the evidence,¹²¹ while some Court of Appeal and High Court cases have treated the *availability* of other techniques as favouring admission.¹²²
- 7.114 In its Second Review, the Commission indicated that the availability of other investigatory techniques will usually favour exclusion of the evidence, explaining:¹²³

¹¹⁹ See *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152]: “Weight is given to the seriousness of the crime not because the infringed right is less valuable to an accused murderer than it would be to, say, an accused burglar, but in recognition of the enhanced public interest in convicting and confining the murderer”.

¹²⁰ See the discussion in *Te Aka Matua o te Ture | Law Commission Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [7.38]–[7.41].

¹²¹ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 per Blanchard J at [196], Tipping J at [246], McGrath J at [274]; *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [68].

¹²² For example, *McGarrett v R* [2017] NZCA 204 at [38] and *Cooper v Police* [2020] NZHC 2514 at [38] (although in the latter case the officer was not aware of the availability of an alternative, so arguably s 30(3)(e) was not engaged).

¹²³ *Te Aka Matua o te Ture | Law Commission Second Review of the Evidence Act* (NZLC R142, 2019) at [7.36].

Where police knew of a legitimate way to obtain the evidence and chose not to use it, admitting the evidence may bring the justice system into disrepute.

- 7.115 On the other hand, the Commission considered that the absence of other known techniques will generally be a neutral factor.¹²⁴ It would be inappropriate to justify improper conduct on the basis that there was no legitimate way to obtain the evidence. It would also be inappropriate to treat the absence of alternatives as favouring exclusion, since the “nature of the impropriety” (including whether it was deliberate) is already considered as a separate factor.
- 7.116 The Commission did not recommend amending section 30 to clarify how the availability or absence of other techniques should be taken into account. This was largely because it considered that, while the availability of other techniques will usually favour exclusion, it may sometimes be a neutral factor. For example, the Commission suggested that where the “urgency” factor applies, this may “effectively cancel out the availability of alternative techniques”.¹²⁵
- 7.117 Since the Second Review, some cases have taken a different approach to the views expressed by the Commission. Two High Court decisions have treated the *availability* of alternative techniques as favouring admission of the evidence.¹²⁶ In addition, in a 2019 case the Court of Appeal treated the *absence* of other techniques as favouring exclusion of the evidence.¹²⁷ In that case, the type of evidence involved was governed by a specific statutory regime that only permitted it to be obtained by consent. Admitting the evidence would therefore have gone against the intent of the statutory regime. If accepted, this reasoning arguably applies more broadly — for example, in relation to warrantless searches not falling within the scope of the specific statutory powers in the Search and Surveillance Act 2012.¹²⁸
- 7.118 We can see some attraction to this reasoning. However, if both the availability *and* absence of other investigatory techniques can be treated as favouring exclusion of the evidence, the policy basis for this factor and its appropriate application in any given case arguably becomes unclear.
- 7.119 In light of these recent decisions, we seek submissions on whether it is desirable to clarify whether and how the availability or absence of alternative techniques is relevant to the balancing exercise or whether it is better to leave the issue to be clarified through the evolving case law.

Options for reform

- 7.120 If reform is considered desirable, we have identified two possible approaches:

¹²⁴ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act* (NZLC R142, 2019) at [7.38]–[7.39].

¹²⁵ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act* (NZLC R142, 2019) at [7.37].

¹²⁶ *Cooper v Police* [2020] NZHC 2514 at [38]. The other case remains subject to publication restrictions until final disposition of trial. In *Cooper*, the evidence was obtained through a warrantless search of the defendant’s vehicle in circumstances where the relevant warrantless power did not apply. The Court considered, however, that a different warrantless power could have been relied on, which favoured admission of the evidence (we note that it is not clear this should not have engaged s 30(3)(e) at all, because the judgment does not suggest the officer knew that the other warrantless power applied).

¹²⁷ This case remains subject to publication restrictions until final disposition of trial.

¹²⁸ See similarly Elias CJ’s dissenting judgment in *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [73].

- (a) **Option 1:** Repeal section 30(3)(e), leaving the deliberateness of the impropriety to be considered under section 30(3)(b); or
- (b) **Option 2:** Amend section 30(3) to clarify the relevance of other investigatory techniques.

Option 1: Repeal section 30(3)(e)

- 7.121 The concern underlying this factor appears to be that investigators should not deliberately stray outside the bounds of their lawful authority. Either lawful alternatives are improperly disregarded, or there are no lawful alternatives and police proceed anyway, knowing they are acting unlawfully. If the impropriety is inadvertent then neither of these apply.¹²⁹
- 7.122 One approach would therefore be to remove this factor altogether and focus instead on whether the conduct was deliberate under section 30(3)(b). The extent of investigators' knowledge about the bounds of their lawful authority and the other options available to them would be relevant to that assessment.¹³⁰ We are interested in feedback on whether section 30(3)(b) would adequately address the concerns section 30(3)(e) is aimed at.

Option 2: Clarify the relevance of other investigatory techniques

- 7.123 Alternatively, section 30 could be amended to clarify which public interest section 30(3)(e) is relevant to (or, alternatively, whether it favours admission or exclusion). As to the known *availability* of other techniques, our preliminary view is that, as the Commission said previously, this will be relevant to the public interest in recognising the seriousness of the impropriety and will generally favour exclusion of the evidence. We invite feedback on this approach.
- 7.124 It will still be up to the court to decide on the weight and significance to attach to this factor in the circumstances of the case. In our view, though, the availability of other techniques will generally be aggravating. It is likely to be rare that the presence of other factors such as urgency or physical danger would justify treating the known availability of alternatives as neutral. These factors may reduce the overall seriousness of the impropriety so that it is more readily outweighed by the public interest in admitting the evidence. But to also treat the known availability of alternatives as neutral may allow those factors to dominate the assessment of the impropriety.¹³¹ It may still be appropriate to treat the availability of alternatives as neutral in certain circumstances such as where the breach was inadvertent so the officers involved could not have been expected to pursue alternatives. The permissive wording of section 30(3) would allow for this.
- 7.125 As to the *absence* of known alternative techniques, our preliminary view remains that this should not be treated as favouring admission of the evidence. To do so would be contrary to the rule of law as it would encourage conduct that is outside the bounds of what

¹²⁹ See, for example, *Cooper v Police* [2020] NZHC 2514 at [31].

¹³⁰ This would also mean that, where the breach is inadvertent, the availability or absence of other techniques would not generally be relevant. We suggest that may be the best approach. For example, if investigators knew there were other investigatory techniques available but did not realise the technique they were using was improper, we see no reason to treat the availability of alternatives as favouring exclusion.

¹³¹ As discussed further below, we note that where there is urgency or physical danger, a warrantless power will often apply and should be relied upon if the officers involved are aware of it. If they are not aware of it, the "other investigatory techniques" factor will not apply in any event since it relates to other techniques *known to be available*.

Parliament has determined to be proper investigatory conduct. Where there is a lack of clarity about what the law is, that may be taken into account when assessing whether the impropriety was deliberate under section 30(3)(b) (and therefore how serious it was). Ordinarily, the absence of known alternative techniques will be a neutral consideration. In some situations, the absence of any known lawful means of obtaining the evidence may favour exclusion if it signifies a deliberate choice by Parliament that evidence should not be obtained in the circumstances at issue. Our preliminary view is that section 30(3) does not need to provide for this expressly, as it could be considered under section 30(3)(b) when assessing whether the impropriety was deliberate or as an “other matter”.

7.126 Finally, we note that the section currently refers to other techniques “not involving any breach of rights”. However, as we have discussed in relation to section 30(3)(a), section 30 is not limited to breaches of rights in the narrow sense. Nor do we see any reason to limit the application of this factor to cases involving breaches of rights. Accordingly, if section 30(3)(e) is retained, it may be desirable to clarify that it applies to other investigatory techniques not involving any *impropriety*.

QUESTIONS

Q28

Should section 30(3)(e) be repealed, leaving knowledge about the extent of lawful authority and other investigatory techniques to be examined as part of the section 30(3)(b) assessment of whether the impropriety was deliberate?

Q29

If section 30(3)(e) is retained, should it be:

- a. listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour exclusion of the evidence); and/or
- b. amended to clarify that it applies to other techniques not involving any *impropriety* (as opposed to any breach of rights)?

Alternative remedies

7.127 Section 30(3)(f) directs attention to “whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant”.

7.128 In *Shaheed*, the majority acknowledged that this factor would rarely be relevant because other remedies, such as a declaration that a right has been breached or a reference to the relevant oversight body, are unlikely to provide vindication of the right breached.¹³² An award of compensation or a reduction in sentence would likely lead to a “perception that the police could now breach the rules and still secure ... a result”.¹³³ Given these

¹³² *R v Shaheed* [2002] 2 NZLR 377 (CA) at [153].

¹³³ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [154].

observations, it is unclear why the availability of alternative remedies was included in section 30.¹³⁴

- 7.129 The courts have frequently reinforced the view expressed in *Shaheed* that there will rarely be any effective alternatives to exclusion.¹³⁵ Our snapshot case study identified just two cases (out of 70) in which the availability of alternative remedies was treated as relevant.¹³⁶ However, because the availability of alternative remedies is identified as a relevant factor in section 30(3), the courts routinely address it by stating that there is no adequate alternative remedy available.
- 7.130 We also note there is a lack of clarity about how the *absence* of alternative remedies is relevant to the section 30 assessment. It is sometimes treated as a neutral factor or irrelevant¹³⁷ and sometimes as a factor favouring exclusion of the evidence.¹³⁸

Option for reform

- 7.131 We invite submissions on whether it would be preferable to repeal section 30(3)(f) to simplify the application of the balancing test. In the rare case where an appropriate alternative remedy might be available, it could still be considered given the list in section 30(3) is non-exhaustive. Repealing section 30(3)(f) may also help to clarify that the *absence* of alternative remedies is not normally a factor that requires consideration. Our preliminary view is that this is properly treated as a neutral factor.
- 7.132 If this factor is retained and section 30(3) is amended to specify which public interest each factor is relevant to (or, alternatively, whether particular factors may favour admission or exclusion), the availability of alternative remedies could be listed as relevant to the public interest in having the evidence considered by the fact-finder at trial (or as a factor that may favour admission of the evidence). This may help to clarify that the *absence* of alternative remedies is not generally relevant.

QUESTION

Q30

Should section 30(3)(f) be repealed?

¹³⁴ See *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [152], noting the potential inconsistency between the inclusion of this factor and the approach in *Shaheed*. We found no indication in legislative materials that s 30 was intended to take a different approach to *Shaheed* in this regard.

¹³⁵ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR at [202] per Blanchard J and [247] per Tipping J; *R v Balsley* [2013] NZCA 258 at [34]. This view is also expressed in a recent case subject to publication restrictions until final disposition of trial.

¹³⁶ In one case, the fact that some evidence had already been excluded was treated as a meaningful vindication of the defendant's rights (*Baylis v R* [2019] NZCA 141 at [36]). In the other case (which remains subject to publication restrictions until final disposition of trial), the High Court suggested it would be open to a sentencing court to take the breach into account in sentencing. We note that taking this into account as a factor favouring admission would appear contrary to the discussion in *Shaheed* referred to above.

¹³⁷ *Ward v R* [2016] NZCA 580 at [58]–[59].

¹³⁸ *R v Balsley* [2013] NZCA 258 at [34]; *Ahuja v Police* [2019] NZHC 2010 at [71] (reversed in *Ahuja v Police* [2019] NZCA 643 but without comment on this point); *Police v Fox* [2017] NZDC 21454 at [31]; *Cameron v Police* [2015] NZHC 2957 at [54].

QUESTION

Q31

If section 30(3)(f) is retained, should it be listed as relevant to the public interest in having the evidence considered by the fact-finder at trial (or as a factor that may favour admission of the evidence)?

Risk to safety or urgency

- 7.133 Section 30(3)(g) refers to “whether the impropriety was necessary to avoid apprehended physical danger to the Police or others”. Section 30(3)(h) permits consideration of whether there was any urgency in obtaining the improperly obtained evidence. The Court of Appeal in *Shaheed* and *Williams* saw urgency as reducing the seriousness of the breach of rights.¹³⁹
- 7.134 Prior to *Shaheed*, urgency was recognised as a possible exception to the general rule that an unlawful search is “unreasonable” for the purposes of section 21 of NZBORA.¹⁴⁰ The Court of Appeal in *Williams* found that should no longer be the case.¹⁴¹ The Court considered it more appropriate to take urgency into account when determining the admissibility of the evidence under the balancing test.
- 7.135 Six years after the Act was enacted, the Search and Surveillance Act 2012 came into force. Under that Act, constables have express warrantless powers to address urgent situations and risks to the safety of any person. These include:
- (a) warrantless powers of entry and search to avoid the loss of an offender or evidential material;¹⁴²
 - (b) powers to take any action necessary to avert a risk to the life or safety of any person that requires an emergency response, or to prevent offending likely to cause injury to any person or serious damage to property;¹⁴³
 - (c) warrantless powers of search and seizure relating to possession of arms.¹⁴⁴
- 7.136 Since 2012, there have been examples in case law of urgency or risks to safety being relied on as favouring admission of the evidence even though the impropriety involved a search or seizure outside the scope of the warrantless powers in the Search and Surveillance Act.¹⁴⁵
- 7.137 It has been argued that urgency and apprehended physical danger should no longer affect the section 30 analysis as the relevant warrantless powers should be relied on. The authors of *Mahoney on Evidence* suggest the balancing exercise should not be used to

¹³⁹ *R v Shaheed* [2002] 2 NZLR 377 (CA) at [147]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [123].

¹⁴⁰ *R v Jefferies* [1994] 1 NZLR 290, discussed in *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [12] and [19].

¹⁴¹ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [20].

¹⁴² Search and Surveillance Act 2012, ss 8, 15 and 16.

¹⁴³ Search and Surveillance Act 2012, s 14.

¹⁴⁴ Search and Surveillance Act 2012, s 18.

¹⁴⁵ See, for example, *Waite v Police* [2019] NZHC 213 at [49] and [54]; *Smith v Police* [2019] NZHC 2371 at [67]–[68] and [89]; *Grant v Police* [2021] NZHC 2297 at [69]–[70] and [95].

legitimise illegal police conduct that does not fit within the boundaries explicitly set by the legislature.¹⁴⁶ Parliament has provided specific powers to address urgent situations to the extent it considered appropriate. If evidence has been found to be improperly obtained, Police (or another relevant agency) have acted outside those powers. If there are gaps in those powers, it may be more appropriate to address those through amendments to the empowering provisions rather than through the section 30 balancing test.

- 7.138 The contrary argument is that sections 30(3)(g) and (h) are necessary to ensure urgency and risks to safety can be considered in a range of situations. The operation of section 30 is not limited to cases involving entry, search and other powers set out in the Search and Surveillance Act. It is possible that urgency or danger to a person may, for example, be a factor in a police interview being conducted improperly. The warrantless powers in the Search and Surveillance Act also do not apply to law enforcement agencies other than Police - although they often have extensive warrantless powers under separate legislation (which are not limited to urgent situations).¹⁴⁷ Finally, sometimes a warrantless power would have been available in the circumstances but the officers involved failed to identify and invoke it.¹⁴⁸ Such a failure may be more understandable in high risk or urgent situations and less likely to signal systemic issues that should be addressed to prevent future breaches.

Options for reform

- 7.139 In light of the above, we seek submissions on whether sections 30(3)(g) and (h) should be retained or repealed. Because section 30(3) is non-exhaustive, if these factors were repealed, urgency or physical danger could still be considered in exceptional cases. However, repealing the factors would indicate that they are not ordinarily relevant to the balancing test.
- 7.140 We invite feedback on whether there are likely to be situations where evidence is obtained in urgent situations not adequately covered by warrantless powers (including by law enforcement agencies other than police).
- 7.141 If section 30(3) is amended to specify which public interest each factor is relevant to, sections 30(3)(g) and (h) (if retained) could be listed as relevant to the public interest in recognising the seriousness of the impropriety. Unlike the other factors on this side of the balancing equation, we would see these factors as *reducing* the seriousness of the impropriety and hence reducing the public interest in exclusion of the evidence. Alternatively, if the factors are simply divided into those that may favour admission or exclusion, sections 30(3)(g) and (h) could be listed as factors that may favour admission of the evidence.

¹⁴⁶ Elisabeth McDonald and Scott Optican *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EA30.12(9)].

¹⁴⁷ Many regulatory statutes contain warrantless entry, search and seizure powers. See, for example, the Customs and Excise Act 2018, part 4 and the Films, Videos, and Publications Classification Act 1993, part 7.

¹⁴⁸ See, for example, *Cooper v Police* [2020] NZHC 2514 at [40]–[41]. This is a separate consideration from the “other investigatory techniques” factor (Evidence Act 2006, s 30(3)(e)), which relates to alternatives *known* to be available but not used. In the situation we refer to here, other lawful powers were available but were *not known* to be available (because the urgent or high-risk nature of the situation limits the officers’ ability to give proper consideration to alternatives).

QUESTIONS

Q32 Should sections 30(3)(g) and (h) be repealed?

Q33 If sections 30(3)(g) and (h) are retained, should they be listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour admission of the evidence)?

Practicalities of policing

- 7.142 New Zealand Police provided preliminary feedback that it continues to have concerns about how readily the courts turn to section 30 over relatively technical breaches, given the practical realities of policing.¹⁴⁹
- 7.143 During the Commission’s Second Review, Police submitted that section 30 should be amended to enable consideration of the “practical realities of policing”. The Commission considered this submission but did not recommend amendment, noting these kinds of considerations are already taken into account in assessing the nature of the impropriety and whether there was urgency in obtaining the evidence.¹⁵⁰
- 7.144 Our preliminary view remains the same. We also add that considering matters such as resource constraints and the level of experience of officers appears to assume that section 30 is primarily concerned with the culpability of the individual officers involved. That is not the case. Section 30 is not punitive in nature.¹⁵¹ It is primarily aimed at maintaining the integrity of the justice system. This may involve incentivising systemic change to avoid future improprieties, but it does not aim to punish individuals.
- 7.145 It seems likely that, in some cases, the “practical realities of policing” will reflect systemic reasons for an impropriety, such as inadequate resourcing or training. The fact that an impropriety resulted from these types of systemic issues increases the likelihood that similar conduct will occur in future unless changes are made. Admitting evidence in such situations may indicate to the public that the justice system does not take the rule of law seriously.
- 7.146 Accordingly, our preliminary view is that no amendment to section 30 is required to enable greater consideration of the practicalities of policing. However, we invite submissions on whether there are situations where the practicalities of policing should be taken into account but are not currently.

QUESTION

Q34 Is any amendment to section 30 necessary or desirable to enable judges to take account of the practicalities of policing?

¹⁴⁹ Referring as an example to *Hall v R* [2018] NZCA 279 at [49], [50] and [65].

¹⁵⁰ Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act* (NZLC R142, 2019) at [7.42].

¹⁵¹ *R v Bailey* [2017] NZCA 211 at [19]; *Baylis v R* [2019] NZCA 141 at [36].

Other factors

- 7.147 In Chapter 6 we discuss the option of amending section 30(3) to clarify that the risk the investigatory techniques used would produce unreliable evidence can be taken into account as a factor in the balancing exercise. If section 30 is amended to specify which factors favour admission or exclusion, this factor (if adopted) could be listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour exclusion of the evidence). This is reflected in our model provision in the Appendix to this chapter.
- 7.148 This consideration of reliability risks would be in addition to the court having regard to the actual reliability of the evidence in question when assessing its probative value under section 30(3)(c). As discussed above, we suggest section 30(3)(c) is more relevant to the second public interest (in having the evidence considered by the fact-finder at trial).
- 7.149 Our review of the case law did not identify any other factors that we think ought to be included in section 30(3) (subject to our discussion on causation below). However, we welcome any feedback on that. We also invite feedback on any additional amendments that should be made to the factors.
- 7.150 It was suggested to us in preliminary feedback from stakeholders that section 30(3) should include a factor explicitly referencing the need to deter future improprieties. As noted above, we consider deterrence may be an appropriate policy goal under section 30. However, our preliminary view is that adding deterrence as a factor is unnecessary. Consideration of the other factors (such as those in sections 30(3)(a), (b) and (e)) is already likely to result in exclusion where the impropriety is sufficiently serious to warrant a deterrent approach. In particular, there is a risk that recognising the need for deterrence as a separate factor would duplicate the assessment under section 30(3)(b), which focuses on whether the impropriety was deliberate.
- 7.151 We also think it would likely be difficult in most cases for a judge to know whether deterrence is relevant and how it should be weighed. For example, if a police officer has conducted a warrantless search outside the scope of their warrantless powers or has omitted information from a search warrant application, how is a judge to assess the likelihood that similar breaches might occur in future or whether exclusion would have a meaningful deterrent effect? In a rare case where a judge does have information to suggest that exclusion may be necessary to create organisational incentives (for example, to correct inadequate training of or guidance to enforcement officers), that could already be considered as an “other matter”. We invite feedback on this approach.
- 7.152 Preliminary feedback also raised the possibility of referring to the extent to which the impropriety intrudes on expectations of privacy. We agree that this will be relevant to the seriousness of an impropriety where it involved a search (as opposed to, for example, improprieties during an interview process). Our preliminary view, however, is that it is already captured by section 30(3)(a) (the importance of any right breached and the extent of the breach). The courts consider reasonable expectations of privacy when determining whether there has been a breach of section 21 of NZBORA (unreasonable

search and seizure).¹⁵² Assessing the extent of the breach under section 30(3)(a) of the Act will therefore involve considering the privacy interests involved and the extent of the intrusion on them. Case law suggests this already occurs.¹⁵³ Furthermore, adding a separate factor relating to privacy interests may suggest that the right to be secure against unreasonable search and seizure has greater significance than other rights, which is not necessarily the case. Again, we invite feedback on this approach.

QUESTION

Q35

Are any other amendments to the section 30(3) factors necessary or desirable?

THE ROLE OF CAUSATION UNDER SECTION 30(5)

7.153 For evidence to be “improperly obtained” under section 30(5)(a) or (b), it must have been obtained “in consequence” of the breach. While there is no causative language in section 30(5)(c) in relation to the unfairness limb, the Supreme Court in *Chetty* held there must “almost always” be a causative link between the unfairness and the obtaining of the evidence.¹⁵⁴

Is it unclear how causation should be assessed?

7.154 The courts have applied various tests in deciding whether a causal link is established. Stevens J, surveying the case law on causation in *W (CA226/2019) v R*, said:¹⁵⁵

This Court has, understandably, described the “in consequence of” wording in s 30(5) in different ways. These include whether the connection between the breach and the evidence is “sufficiently immediate to establish causation” or whether the link between the impropriety and the evidence is “too attenuated” to be causative. Another variant is that evidence cannot be unfairly obtained “if it would have been obtained irrespective of the unfairness relied upon”. In *Boskell v R* this Court spoke of the need for the impropriety to have a “material or operative effect” on the defendant’s decision to speak to the police.

7.155 Another often-cited formulation requires a “real and substantial connection” between the breach and the obtaining of the evidence.¹⁵⁶

7.156 Where a sufficient causal connection is found, the Supreme Court has held that the strength of that causal connection may be taken into account as part of the balancing

¹⁵² *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [163] per Blanchard J, at [10]–[11] per Elias CJ (who took a broader view of what amounts to a “search” which would but not be limited to intrusions on reasonable expectations of privacy) at [263]–[265] per McGrath J and at [281] and [285] per Gault J. See also *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [48]–[50].

¹⁵³ See, for example, *Makaea v R* [2018] NZCA 284 at [45]; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [191] per Blanchard J.

¹⁵⁴ *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [46]–[47]. The Court said “almost always” because it recognised that, if the conduct in question has had a material detrimental impact on the court’s task, that might, in an appropriate case be sufficient to result in exclusion. (This was in the context of a breach of rule 5 of the Practice Note on Police Questioning, which requires video recording of interviews).

¹⁵⁵ *W (CA226/2019) v R* [2019] NZCA 558 at [113] (citations omitted).

¹⁵⁶ *Nichol v R* [2017] NZCA 140 at [25], citing *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [79] and *Elia v R* [2012] NZCA 243, (2012) 29 FRNZ 27 at [35].

process.¹⁵⁷ While the point was not expressly addressed, presumably the strength of the causal connection would be considered as an “other matter” under section 30(3).

- 7.157 In some cases, the courts have found a lack of causation in relation to a defendant’s statement made following an impropriety on the basis that the statement would have been made anyway.¹⁵⁸ This represents a strict approach to causation, where the court considers what would have happened “but for” the impropriety. For example, in *W (SC 38/2019) v R*, the defendant was detained but was not told of the reason for his detention, his right to instruct a lawyer or his right to refrain from making a statement before being questioned.¹⁵⁹ The majority of the Court of Appeal found that a section 30 analysis was not required because, despite these breaches, the defendant in fact knew why police wanted to question him and made the statement for his own purposes.¹⁶⁰ Mallon J dissented on the causation point, noting the need for caution in conducting hypothetical assessments that potentially excuse the impropriety.¹⁶¹
- 7.158 In other cases, the courts have taken a more generous approach to establishing causation. In *R v Perry*, the majority of the Supreme Court found a defendant’s statement to be improperly obtained and proceeded to the balancing test despite having “distinct reservations whether the associated impropriety can be said to have been causative of the decision made by the respondent to resume the making of his statement to the police”.¹⁶² On this approach, causation is essentially assumed unless there is clear evidence to the contrary. The emphasis is placed on the balancing test, in which the extent of the causal connection may be taken into account as one relevant factor.¹⁶³

Is legislative reform necessary or desirable?

- 7.159 The approach taken to causation has a significant impact on the outcome of section 30 decisions. If the court finds no sufficient causative link between the impropriety and the obtaining of the evidence, then the evidence is not “improperly obtained” and the balancing test is not engaged. The evidence will be admitted without further analysis under section 30, irrespective of the seriousness of the impropriety.
- 7.160 Given the different approaches taken by the courts and the importance of the causation assessment to the outcome in individual cases, we seek submissions on whether it is desirable to clarify the role of causation and, if so, what approach should be preferred.
- 7.161 On one view, a generous approach to causation (like that taken by the Supreme Court in *Perry*) is appropriate at the threshold stage of determining whether the evidence was improperly obtained.¹⁶⁴ A stricter approach that considers what would have occurred “but for” the breach requires an assessment that is necessarily speculative. In addition,

¹⁵⁷ *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [61].

¹⁵⁸ See, for example, *W (CA226/2019) v R* [2019] NZCA 558 at [132] (Mallon J dissenting at [139]) and *Swainbank v R* [2021] NZCA 93 at [59].

¹⁵⁹ *W (CA226/2019) v R* [2019] NZCA 558.

¹⁶⁰ *W (CA226/2019) v R* [2019] NZCA 558 at [132].

¹⁶¹ *W (CA226/2019) v R* [2019] NZCA 558 at [139].

¹⁶² *R v Perry* [2016] NZSC 102 at [56]–[57].

¹⁶³ *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [61].

¹⁶⁴ See, for example, Scott Optican “Evidence” [2015] NZ L Rev 473 at 527–528.

rationalising the admission of evidence solely on the basis that it would have been obtained anyway may be seen as inconsistent with the policy behind section 30. If evidence is obtained during a sequence of events associated with improper conduct, its admission may detrimentally affect the credibility of the justice system whether or not it might have been obtained anyway. Taking a strict approach to causation at this threshold stage risks disregarding breaches of important rights and procedural protections.

- 7.162 If a generous view of causation were adopted at the point of determining whether evidence has been “improperly obtained”, any attenuation of causation could still be taken into account in the balancing test (either as an “other matter” under section 30(3) or as a separate factor, as we discuss below). This would allow the courts to have regard to the fact that the causative link is tenuous when deciding whether to admit the evidence. However, engaging in the balancing test would mean there is a transparent consideration of the overall public interest before admitting evidence obtained in circumstances that may be seen as tainted by improper conduct.
- 7.163 If this approach is favoured, possible amendments include:
- (a) amending section 30(5)(a) and (b) to broaden the wording around the required causal link (for example, “in consequence of” could be replaced with “in connection with”); and/or
 - (b) amending section 30(3) to provide that the extent of the causative connection between the impropriety and the obtaining of the evidence is a relevant factor in the balancing test (consistently with the Supreme Court decision in *Chetty*).¹⁶⁵
- 7.164 Alternatively, the current wording could be retained if it is considered desirable for the courts to tailor their approach to causation to the particular case. It is arguable, for example, that a generous approach to causation is more appropriate in relation to defendants’ statements (given the danger of speculating about what a defendant may have done but for the breach). A stricter approach to causation may be considered desirable where physical evidence is involved to avoid unnecessary use of court time. The current approach of the courts allows different approaches to causation in different circumstances.

QUESTION

Q36

Are any amendments to section 30 necessary or desirable to clarify the approach to causation?

¹⁶⁵ *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [61].

APPENDIX – A MODEL PROVISION

- 7.165 Most of the issues discussed in this chapter relate to the application of the section 30 balancing test. To facilitate feedback on our options for reform, we set out below a model provision illustrating how some of these options could be incorporated. This model provision is not intended to indicate our preference for a particular approach. It does not address all the options discussed in this chapter (where there is more than one) nor the issue of causation.
- 7.166 The model provision includes subsections that could replace the current subsections 30(1)–30(3). Some existing provisions that we do not propose changing are included for context, with optional new text shown in italics.

- (1) *The purpose of this section is to maintain an effective and credible system of justice.*
- (2) 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.
- (3) 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,

EITHER

determine whether exclusion is proportionate to the impropriety by balancing the public interest in recognising the seriousness of the impropriety against the public interest in having the evidence considered by the fact-finder at trial.

OR (if an onus is placed on the prosecution)

exclude the evidence unless satisfied that the public interest in having the evidence considered by the fact-finder at trial outweighs the public interest in recognising the seriousness of the impropriety.

- (3) *For the purposes of subsection (2), when assessing the public interest in recognising the seriousness of the impropriety, the court may, among any other matters, have regard to the following factors:*
- (a) *the importance of any right, statutory requirement, rule of law or procedural protection breached and the extent of that breach;*
- (b) *the extent to which the investigatory techniques used were known, or ought to have been known, to be improper;*

- (c) *the risk that the investigatory techniques used would produce unreliable evidence;*
 - (d) *the extent to which the impropriety was necessary to avoid apprehended physical danger to the Police or others;*
 - (e) *the extent to which the impropriety was influenced by urgency in obtaining the improperly obtained evidence.*
- (4) *For the purposes of subsection (2), when assessing the public interest in having the evidence considered by the fact-finder at trial, the court may, among any other matters, have regard to the following factors:*
- (a) *the probative value of the evidence, including its reliability;*
 - (b) *the seriousness of the offence with which the defendant is charged.*
- ...



CHAPTER 8

Prison informants and incentivised witnesses

INTRODUCTION

In this chapter, we consider and seek feedback on whether the current approach under the Act is sufficient to address the risks posed by evidence from prison informants and other incentivised witnesses. We seek feedback on issues relating to:

- the admissibility of prison informant evidence;
- the use of judicial directions;
- the need for any additional safeguards; and
- the scope of any proposed amendments or additional safeguards.

BACKGROUND

8.1 Prison informant evidence is evidence in a criminal proceeding of a defendant's statement purportedly made to another person while they were detained and offered by that other person (the prison informant).¹ This type of evidence is also sometimes referred to as "jailhouse snitch" or "cellmate confession" evidence. Such evidence is typically inculpatory and offered by the prosecution, although sometimes the defendant might seek to offer prison informant evidence that is exculpatory in nature.²

¹ Anna High "The exclusion of prison informant evidence for unreliability in New Zealand" (2021) 25 IJE & P 217 at 217.

² See, for example, *Samuels v R* [2021] NZCA 358, concerning an application by the defendant to offer new evidence from a prison informant (based on conversations with the defendant while in prison, and with others who claimed to have information about the crime) which would give "an added dimension to motive" and "could have provided another avenue to cross-examine and hence undermine the reliability of the Crown's key witness" (at [25]). The Court rejected the application, holding that the evidence was "far from cogent or credible... It follows that the information [the informant] says he obtained... is double hearsay, inherently unreliable and inadmissible" (at [28]–[29]).

- 8.2 Prison informants often give their evidence in return for, or in the expectation or hope of, some advantage or benefit to them.³ These incentives can take various forms, ranging from the relatively trivial (improved prison conditions or preferential treatment from authorities in the future) to the more significant (early parole, reduced charges or sentence, or dismissal of charges).⁴
- 8.3 Similar incentives can exist in the criminal justice system beyond the prison environment. Some witnesses may give evidence of a defendant's alleged guilt in exchange for some advantage or benefit operating in the criminal justice context, even if the information they seek to share was not obtained in a detention setting. At the end of this chapter, we consider the implications of extending any reform measures to this broader class of "incentivised witnesses".

The nature of prison informant evidence

- 8.4 Prison informants can be the recipients of confessions or other inculpatory statements that may otherwise not be disclosed by the defendant.⁵ This type of evidence can therefore be "highly probative" of the defendant's guilt and an important tool in the prosecution's case.⁶
- 8.5 An emerging body of social science evidence points to two key risks associated with the use of prison informant evidence:⁷
- (a) First, prison informant evidence is typically characterised as being unreliable.⁸ This is because, as noted above, prison informants are often incentivised to give their evidence. Many informants have a history of dishonesty and may be capable of presenting a convincing account of the details of a defendant's alleged offending,

³ The presence of incentives has been recognised by the courts as a key reason for concern about prison informant evidence. See, for example, the Supreme Court in *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289: "Prison informants are likely to have motives to cooperate with the authorities, in terms of sentence, parole, money (including rewards) or perhaps just a slightly better relationship with the police" (at [33]); and *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382, where the Supreme Court acknowledged the "specific concerns" with the evidence of prison informants that should form part of the assessment for reliability, which can include "any incentives or expectations of preference at play" (at n 104 and [88(c)]). Commentors also note the role of incentives in prison informant evidence. See, for example, Anna High "Anna High "The exclusion of prison informant evidence for unreliability in New Zealand" (2021) 25 IJE & P 217 at 219; and Patrick Anderson "Snitched on or stitched up? – a review of the law in New Zealand in relation to jailhouse informant evidence" [2021] NZLJ 119 at 121.

⁴ Anna High "The exclusion of prison informant evidence for unreliability in New Zealand" (2021) 25 IJE & P 217 at 219.

⁵ "Criminals who later feel an overwhelming need to confess to or to boast about their unlawful exploits are unlikely to choose an upstanding, law-abiding stranger to hear the tales of their criminal behaviour... [I]nformants are seen by the accused to be 'one of us' and therefore trustworthy to hear a confession about criminal exploits": Marie Dyhrberg "Informants: finding the truth beneath self-interest" *New Zealand Lawyer* (New Zealand, 8 February 2001).

⁶ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at n 104.

⁷ This evidence was acknowledged and extensively referenced by the Supreme Court in *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [74]–[86] (majority) and [221]–[247] (minority).

⁸ As the Supreme Court has observed: "The notion that prison informants are unreliable witnesses is not new to the law. References in judgments to the perils of convicting in reliance on such evidence can be found in texts dating back to the 18th century": *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [211] (footnotes omitted). Commentors also describe prison informant evidence as unreliable in nature. See, for example, Anna High "The exclusion of prison informant evidence for unreliability in New Zealand" (2021) 25 IJE & P 217 at 217: "This is a notoriously unreliable class of evidence..." and Patrick Anderson "Snitched on or stitched up? – a review of the law in New Zealand in relation to jailhouse informant evidence" [2021] NZLJ 119 at 121: "Jailhouse informant evidence is notoriously unreliable and its use is by its very nature fraught with risk".

even under pressure in the trial setting.⁹ Additionally, they will frequently have access to information about a high-profile case through other sources (such as media coverage or word of mouth) and so be able to create a plausible account of a defendant's alleged actions or role.¹⁰ As one commentator has noted, “[t]he combination of having both a motivation and a ready willingness to lie creates an abnormally high risk of false evidence being provided”.¹¹

- (b) Second, juries may give the evidence undue weight, even when warned that it may be unreliable. Evidence suggests that juries find prison informant evidence highly persuasive.¹² This has been attributed variously to the “fundamental attribution error” (a psychological phenomenon whereby people attribute the behaviour of others to personal factors such as honesty or a desire to “do the right thing” rather than situational factors such as the promise of a reward);¹³ the fact that prison informants may be capable of lying convincingly;¹⁴ and the lack of proper records of incentives promised or received making it difficult to truly assess the motivations of the informant.¹⁵

8.6 While it is difficult to measure these risks with absolute certainty, the use of prison informant evidence has been linked to miscarriages of justice. In *W (SC 38/2019) v R*, te Kōti Mana Nui | Supreme Court referred to three major studies from the United States that made a link between prison informant evidence and wrongful convictions. Although they noted that such studies cannot be directly extrapolated to Aotearoa New Zealand, both the majority and the minority concluded that they carry considerable weight.¹⁶

8.7 In New Zealand, there have been cases of wrongful conviction that have rested in part on false prison informant evidence, including the cases against Mauha Fawcett, Teina Pora and Arthur Allan Thomas.¹⁷ These cases, and others where prison informant evidence has featured, can be high-profile and attract significant media and public attention.¹⁸ In November 2019, a petition entitled “Stop Jailhouse Informants From

⁹ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [83] and [240]–[241].

¹⁰ *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [33].

¹¹ Patrick Anderson “Snitched on or stitched up? – a review of the law in New Zealand in relation to jailhouse informant evidence” [2021] NZLJ 119 at 121.

¹² See the discussion of the majority in *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [74]–[86].

¹³ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [80], [237].

¹⁴ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [83], [240].

¹⁵ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [94]–[95], [242]–[243].

¹⁶ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382. The majority described them as providing “plainly scientific support” that the evidence of prison informants has contributed to miscarriages of justice (at [79], and discussion from [76]–[78]). The minority held that they demonstrated the “extent to which the risk of associated miscarriages of justice, a risk identified in numerous judgments, has been realised” (at [232]).

¹⁷ Phil Taylor “The murky world of jailhouse snitches” *New Zealand Herald* (online ed, 30 April 2018); Mike White “The tragic and terrible case of Mauha Fawcett’s wrongful conviction” (11 June 2022) Stuff <www.stuff.co.nz>.

¹⁸ Prison informant evidence also played crucial roles in the convictions of Scott Watson and David Tamihere, both of whom have appeals pending. Mike White “Scott Watson’s appeal over murder conviction delayed till next year” (19 August 2022) Stuff <www.stuff.co.nz>; Mike White “More DNA testing delays David Tamihere murder appeal” (31 January 2023) Stuff <www.stuff.co.nz>. Of particular significance in David Tamihere’s case was the evidence given by “Witness C”, later revealed to be Robert Conchie Harris, who was convicted on eight counts of perjury for the evidence he gave at Mr Tamihere’s 1990 trial: *Taylor v Witness C* [2017] NZHC 2610. Prison informant evidence also featured in

Causing Wrongful Convictions” was presented to Parliament. It called for an amendment to the Evidence Act 2006 to permit the use of prison informant evidence only where the Solicitor-General provides written approval. The petition is currently before the Justice Select Committee.¹⁹

The current law

- 8.8 The Act does not specifically address the admissibility of prison informant evidence. Instead, the general admissibility provisions in sections 7 and 8 apply.²⁰ This means that, to be admissible, prison informant evidence must be relevant, and its probative value must outweigh the risk that the evidence will have an unfairly prejudicial effect on the proceeding.
- 8.9 This reflects the position at common law, where prison informant evidence of a confession made by the defendant was admissible as an exception to the rule against hearsay.²¹ Prior to the enactment of the Act, cellmate confessions were relied upon in a number of high-profile cases,²² with the caveat that this type of evidence could still be excluded if it was of limited probative value and would cause considerable prejudice on the facts of a particular case.²³
- 8.10 Te Aka Matua o te Ture | Law Commission did not explicitly address prison informant evidence in its preliminary paper or final report on the Evidence Code. At select committee stage, the Ministry of Justice advised, in response to a submission raising concerns about the absence of restrictions for prison informant evidence, that sections 7 and 8 provided sufficient protection and that more specific safeguards were not required.²⁴
- 8.11 The Act does, however, recognise the reliability concerns associated with prison informant evidence that is admitted in court by providing for judicial directions under section 122. Section 122 requires a judge to consider giving a reliability warning in relation

the Palmiro MacDonald murder trial (which resulted in a hung jury after one prison informant's evidence was shown to be false), and the collapse of the case against three men accused of the murder of Lois Tolley. Jono Galuszka “Jailhouse snitch gives untrue evidence under oath, breaches protection deal” (9 August 2019) Stuff <www.stuff.co.nz>; Mike White “‘An abomination of an investigation’: How the Lois Tolley murder case collapsed” (19 March 2022) Stuff <www.stuff.co.nz>.

¹⁹ *Petition of Lois McGirr for Justice For All Inc and 190 others: Stop jail-house informant testimony from causing wrongful convictions* (2017/434, 13 November 2019).

²⁰ Section 27 of the Evidence Act 2006 is also relevant. It provides that the statement of a defendant, offered by the prosecution, is admissible. Admissibility under s 27 is subject to s 28 (exclusion of unreliable statements), s 29 (exclusion of statements influenced by oppression) and s 30 (improperly obtained evidence), but the Supreme Court has held that these are unlikely to apply to prison informant evidence. Section 28 addresses the circumstances in which a statement was made, whereas the primary concern with prison informant evidence is frequently whether the statement was made at all (*Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [36]); for prison informant evidence to be captured by s 30, it would have to be accepted that the system of prison informant evidence was inherently operating unfairly – an argument that has been rejected by the Supreme Court (*W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382) at [101] and n 161.

²¹ Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 218.

²² See, for example, *R v Cullen* (1990) 6 CRNZ 28 and *R v Chignell* [1991] 2 NZLR 257 (also reported as *R v Chignell and Walker* (1990) 6 CRNZ 103(CA)).

²³ Mathew Downs (ed) *Adams on Criminal Law: Archived Evidence Commentary pre-Evidence Act 2006* (online ed, Thomson Reuters) at [EC4.04(10)].

²⁴ Te Tāhu o te Ture | Ministry of Justice *Departmental Report for the Justice and Electoral Committee: Evidence Bill: Part 2 – Admissibility Rules, Privilege and Confidentiality* (June 2006) at 13.

to certain types of evidence, including, at section 122(2)(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”. This provision was added to the Evidence Bill at select committee stage in response to specific concerns about the reliability of prison informant evidence.²⁵

- 8.12 Section 122(2)(c) also requires the judge to consider giving a warning in relation to “evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant”, potentially covering a wider class of incentivised witnesses.

Previous Law Commission reviews

- 8.13 Previous Commission reviews only briefly touched on issues related to prison informant evidence. The 2013 Review of the Act considered whether section 122 should be amended to provide further guidance as to when a warning should be given, or as to the content of warnings.²⁶ The Commission concluded that further legislative guidance would be unhelpful. Section 122 covers a range of evidence, which makes it difficult to prescribe the circumstances in which a direction should be given, or the content therein. This was properly a role for the judge on a case-by-case basis.²⁷
- 8.14 The Commission’s Second Review of the Act noted the issue of prison informant evidence in response to two submissions arguing for it to be subject to specific controls in the Act.²⁸ The Commission noted the Supreme Court’s decision in *Hudson v R* as the leading authority on this issue at that point in time and agreed that this type of evidence “may pose significant risks and requires careful scrutiny”.²⁹ In the absence of problems in practice, however, it concluded that the issue of prison informant evidence was beyond the scope of an operational review.

ISSUES FOR CONSIDERATION

- 8.15 The issues we consider in this chapter relate to whether the current law, including the recent guidance from the Supreme Court,³⁰ is sufficient to address the risks posed by prison informant evidence. Below we consider:
- (a) the admissibility of prison informant evidence;
 - (b) the use of judicial directions in relation to prison informant evidence that is admitted at trial;
 - (c) whether additional safeguards are appropriate, either in addition to or as an alternative to reform of the Act; and

²⁵ Evidence Bill 2005 (256-2) (select committee report) at 12.

²⁶ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.107]–[11.115].

²⁷ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.107].

²⁸ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.22]–[18.23].

²⁹ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.26], citing *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [36].

³⁰ In *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 and *Roigard v R* [2020] NZSC 94.

- (d) whether any proposed amendments or additional safeguards should also apply to other incentivised witnesses.

ADMISSIBILITY OF PRISON INFORMANT EVIDENCE

- 8.16 While the Act does not specifically address the admissibility of prison informant evidence, a body of case law has developed on the topic. In *Hudson v R*, the Supreme Court confirmed that there was no presumption that prison informant evidence is inadmissible.³¹ Such a presumption would be inconsistent with the Act's intention that "reliability decisions should be made by a properly cautioned jury".³² The Court acknowledged the reliability risks of this type of evidence, however, and held that this was a class of evidence requiring "careful scrutiny".³³ The Court recognised there may be scope for the exclusion of prison informant evidence under sections 7 and 8 of the Act.
- 8.17 In *W (SC 38/2019) v R* and *R v Roigard*, heard by the Supreme Court concurrently, the Court examined the extent to which reliability issues could be considered in determining whether prison informant evidence was relevant under section 7 and whether its probative value is outweighed by the risk of unfair prejudice under section 8.³⁴ The Court considered that the exclusion of evidence under section 7 on the basis of unreliability will be rare and confined to cases where "the evidence is so unreliable that it could not be accepted or given any weight at all by a reasonable judge or jury".³⁵ However, the reliability of prison informant evidence could be considered under section 8, under which the judge is undertaking a gatekeeping role.³⁶
- 8.18 The Court agreed with the decision in *Hudson* that prison informant evidence required "careful scrutiny" under section 8 and outlined a framework for assessing prison informant evidence in the course of that balancing exercise.³⁷ Here, the majority and the minority differed in their approaches. The majority stated:³⁸
- (a) The concern in undertaking this evaluation is to determine whether the connection between the evidence and proof is worth the price to be paid by admitting it in evidence.
 - (b) In undertaking the gatekeeping role, reliability may be considered by the judge in balancing, in the usual way, the probative value of the proposed evidence against the risk of illegitimate prejudice. That reliability assessment should be made without applying any artificial limits or presumptions such as taking the evidence at its highest.
 - (c) The relevant factors will include consideration of the sorts of concerns about this evidence as has been discussed and which might include, for example, that the credibility of the witness in an informant context has previously been doubted, any incentives or expectations of preferences at play (including the inability of the

³¹ *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [35]–[36].

³² *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [36].

³³ *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [33].

³⁴ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382; *Roigard v R* [2020] NZSC 94.

³⁵ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [41] and n 199.

³⁶ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [69]–[70], [88] [91] and [191].

³⁷ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [86] and [192].

³⁸ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [88].

prosecution to confirm whether incentives have been offered or given), and the likely weight to be attached to this evidence.

(d) On the other hand, the exercise is not that of a mini trial. The judge will be making his or her assessment in the absence of the full picture of the evidence as it may emerge at trial.

(e) Finally, the constitutional role of the jury as fact-finder needs to be respected. As has been indicated, the statutory scheme and the authorities, particularly Hudson, which we are not overruling, envisage that the court will utilise other mechanisms such as clear judicial directions to the jury to address the generic risk of unfair prejudice.

8.19 The minority agreed with that approach but went further, proposing a more detailed framework to guide the scrutiny of prison informant evidence under section 8, based on what is known about the risks associated with this type of evidence.³⁹ Summarised, the considerations were as follows:

(a) Considerations relevant to probative value:

- (i) the significance of the evidence to a matter at issue;
- (ii) any indications the evidence is unreliable or untrue (such as its plausibility and whether it is consistent with other evidence);
- (iii) whether the evidence is incentivised (or any indications it might have been, such as the timing of the evidence);
- (iv) whether the witness had other motives to lie;
- (v) whether the witness has a record of lying; and
- (vi) other circumstances relevant to the collection of the evidence (such as indications the witness could have obtained relevant details from interactions with the police).

(b) Considerations relevant to risk of unfair prejudice:

- (i) collateral prejudice (if the evidence necessarily implies the defendant was in prison on an unrelated charges); and
- (ii) cumulative prejudice (the risk that if multiple witnesses in this category are called, a fact-finder may see their evidence as corroborating each other when properly assessed it does not).

8.20 Applying that framework, the minority reached different conclusions on admissibility.⁴⁰ The majority rejected this framework on the basis that the factors identified would cross the threshold into matters properly reserved for trial and cross-examination.⁴¹

8.21 The Court also considered that additional non-legislative safeguards were “important and necessary”,⁴² including further guidance for prosecutors on the use of prison informant

³⁹ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [191]. The framework is set out from [254]–[270].

⁴⁰ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [87].

⁴¹ “The application of [the minority] framework in this case has resulted in an approach which requires independent corroboration of the evidence in issue and which places emphasis on the need for the court in a case such as this one to ask whether the evidence of a confession has been constructed by the witness to cohere with facts they have gained from other sources. We see these aspects as matters for trial and cross-examination”: *Roigard v R* [2020] NZSC 94 at [54].

⁴² *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [91] and [218].

evidence that the Solicitor-General was in the process of considering.⁴³ The Solicitor-General subsequently published guidelines for prosecutors on the use of prison informant evidence in August 2021.⁴⁴ They set out guiding principles and a non-exhaustive list of factors affecting reliability that should be considered by prosecutors when deciding whether to offer prison informant evidence in court. The factors address the prison informant's motive (including whether the information was solicited or offered and any offers or promises made to the informant), the circumstances of the alleged interactions with the defendant (including the plausibility of the informant's account), the existence of confirmatory evidence, opportunity to concoct and the character and state of the informant (including their conviction history and whether and how they have given prison informant evidence in the past).⁴⁵

Is the current approach adequate to address the risks associated with prison informant evidence?

- 8.22 As discussed above, the risks associated with prison informant evidence are considerable. This was acknowledged by the Supreme Court in *W (SC 38/2019) v R*, which represents an “important shift in emphasis” in bolstering the role of the judicial gatekeeper with regard to reliability.⁴⁶ The division between the majority and minority, however, highlights disagreement as to how this gatekeeping role should be approached. Additionally, the Court itself called for further safeguards to address the risks of prison informant evidence, suggesting that it did not consider the current legal framework, even with the guidance set out in that decision, was sufficient to guard against these risks.
- 8.23 It is difficult to assess the extent of any continuing concerns in practice. Not enough time has passed to be able to identify the impact of the Court's decisions in *W (SC 38/2019) v R* and *Roigard* or the Solicitor-General's guidance, on admissibility decisions.
- 8.24 Preliminary feedback from stakeholders, however, suggests that there is still concern about this type of evidence and whether the mechanisms and processes in place are sufficient to protect against the risks it poses. Commentors have observed that further protections may be desirable, noting that the Supreme Court was constrained in its approach by the Act.⁴⁷
- 8.25 Accordingly, we seek submissions on whether the current approach, including the recent guidance from the Supreme Court and the Solicitor-General's guidelines for prosecutors, is sufficient to address the risks posed by prison informant evidence.

QUESTION

Q37

Is the current approach to the admissibility of prison informant evidence adequate to address the risks associated with this type of evidence?

⁴³ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [93].

⁴⁴ Te Tari Ture o te Karauna | Crown Law *Solicitor-General's Guidelines for Use of Inmate Admissions* (August 2021).

⁴⁵ Te Tari Ture o te Karauna | Crown Law *Solicitor-General's Guidelines for Use of Inmate Admissions* (August 2021). at [3.17.1]–[3.17.5].

⁴⁶ Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25 IJE & P 217 at 232.

⁴⁷ Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25 IJE & P 217 at 232; Scott Optican “Evidence” (2021) NZ L Rev 313 at 328.

Options for reform

- 8.26 If the current approach is considered inadequate to address the risks associated with prison informant evidence, a new statutory provision to control the admissibility of prison informant evidence could be inserted into the Act.
- 8.27 Introducing a new admissibility provision would run counter to the traditional common law approach and guiding principle of the Act that reliability is generally a matter for a properly cautioned fact-finder. There is precedent, however, for the Act to impose specific reliability thresholds for other types of evidence that carry significant reliability concerns, including section 28 (exclusion of unreliable statements), section 45 (visual identification evidence) and section 46 (voice identification evidence). These types of evidence, like prison informant evidence, are frequently identified as the categories of evidence most often associated with miscarriages of justice.⁴⁸ On the other hand, the decision of the Supreme Court in *W (SC 38/2019) v R* clearly signals a move to a more active gatekeeping role for judges in assessing reliability of prison informant evidence under section 8. This may mean a separate admissibility provision for this type of evidence is unnecessary.
- 8.28 There are also drawbacks associated with introducing more statutory controls on the admissibility of prison informant evidence. Many of these are practical. Requiring more intensive pre-trial consideration of admissibility would have associated administrative and logistical costs (although this may build on existing processes for pre-trial admissibility hearings). Additionally, both the courts and commentators have warned against turning the admissibility inquiry into a “mini trial”, noting that it takes place in the absence of the full picture of evidence that may emerge at trial in the context of the evidence as a whole, and through examination and cross-examination of witnesses.⁴⁹ Finally, there is a general risk that codifying the factors to be taken into account will create inflexibility of application.
- 8.29 If a new provision to control the admissibility of prison informant evidence is considered desirable, it could take the form of any or all of the options outlined below. We particularly welcome feedback on the factors outlined under Option 3 as matters to be taken into account when making a decision on admissibility.
- 8.30 We do not discuss the option of a complete exclusion of prison informant evidence, as has been argued for in some overseas jurisdictions.⁵⁰ We do not consider this to be a feasible option for two reasons. First, it would be incompatible with the scheme of the Act which takes as one of its fundamental principles that if evidence is relevant, it is admissible, with that assessment to be carried out on a case-by-case basis. Second, it would be a disproportionate response to the nature of the problem in New Zealand

⁴⁸ See Winkelmann CJ in *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [227]: “...many of these studies identify the same four leading categories of evidence as most often associated with miscarriages of justice: eyewitness misidentification, flawed forensic evidence, false confessions and false informant evidence. For each of these categories of evidence, except the false informant category, the Evidence Act provides either structured mechanisms to promote the collection of good quality evidence, or evidential thresholds that protect against the admission of unreliable evidence. In some cases it does both”.

⁴⁹ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [71]; Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25 IJE & P 217 at 233.

⁵⁰ See, for example, Russell D Covey “Abolishing jailhouse snitch testimony” (2014) 49 Wake Forest L Rev 101.

(where there is no evidence of a widespread snitching “scam” that has been identified in other jurisdictions).⁵¹

Option 1: A reliability threshold

8.31 This option would introduce a new reliability threshold for prison informant evidence. The Act could provide that 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, is only admissible if it meets a certain threshold of reliability. For example, the Act could require that the circumstances relating to the making of the defendant’s statement provide reasonable assurance that the evidence being offered is reliable. This would adopt the same reliability threshold as for hearsay statements (section 18). Alternatively, the reliability threshold could be more focused on ensuring reasonable assurance that the statement was in fact made at all (reflecting the observations of the Supreme Court in *Hudson*).⁵²

Option 2: A presumption of exclusion and a reliability threshold

8.32 This option would create a presumption of exclusion of prison informant evidence that could be displaced only if the judge is satisfied, to a certain threshold of reliability, that the circumstances relating to the statement provide reasonable assurance that the statement is reliable. This would operate similarly to the exclusion of unreliable statements (section 28).

8.33 The creation of a presumption of exclusion would recognise the extent of the risk of unreliability associated with this type of evidence by making exclusion the default position and requiring a clear justification for its use, thus aligning it with the way similarly risky and unreliable types of evidence are treated by the Act.

8.34 We welcome views on what standard should displace the presumption of exclusion under this option – whether it should be a test of “balance of probabilities” or one of “beyond reasonable doubt”. Both are used at various points in the Act.⁵³ A decision on this point would turn on the desired stringency of approach by the judge. “Beyond reasonable doubt” would signal a higher threshold for admitting this type of evidence, which may be justified on the basis of the risks it poses and the need for judges to carry out a more thorough examination of reliability in light of the problems fact-finders experience in weighing it appropriately.⁵⁴ “Balance of probabilities” would signal that this type of evidence requires careful consideration of whether the evidence should be put to a fact-finders who will make the final decision as to reliability.⁵⁵

⁵¹ Anna High “Cellmate confessions” [2021] NZLJ 81 at 83.

⁵² *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [36].

⁵³ The Act adopts a “balance of probabilities” threshold in ss 28 and 46 and one of “beyond reasonable doubt” in s 45. The Commission’s original proposals adopted a test of “beyond reasonable doubt” for all three sections. When the Evidence Bill was introduced, the test was one of a “balance of probabilities” across all three sections, and the change reverting to “beyond reasonable doubt” in s 45 was made at select committee stage. The reasons for this were not made clear, although in *Hohipa v R* [2015] NZCA 73, the Court suggested that it may reflect the “legislature’s estimation of the risks inherent in visual identification evidence” and that it was not incompatible to have two separate approaches to visual and voice identification evidence (at [67]).

⁵⁴ Outlined at [8.5] above.

⁵⁵ Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25 IJE & P 217 at 233.

Option 3: A statement of the factors to be taken into account when determining admissibility

- 8.35 Option 3 is to include in the Act a statement of relevant factors the court should take into account when determining whether prison informant evidence should be admitted in a proceeding. This option could be combined with Option 1 and/or Option 2. This would be similar to the approach taken in existing sections 28, 45 and 46, which all contain a subsection outlining a non-exhaustive list of matters for a judge to take into account when considering whether to admit or exclude evidence.
- 8.36 The differing approaches between the majority and the minority in *W (SC 38/2019) v R* highlight some of the difficulties with determining what the relevant factors should be under this option. The majority adopted a more circumscribed approach to the reliability assessment, and rejected the minority's more detailed approach on the basis that the factors identified by them would cross the threshold into matters properly reserved for trial and cross-examination.⁵⁶
- 8.37 Preliminary research and feedback suggests, however, that the minority's framework may be a more helpful guide to the circumstances that are relevant to the admissibility of prison informant evidence. Associate Professor Scott Optican notes that the minority approach represents a "more granular and schematic inquiry" that draws more directly on the social science evidence on the risks of prison informant evidence compared to the majority, which is more akin to the "typical" section 8 exercise.⁵⁷ Associate Professor Anna High, while not expressly accepting or rejecting either view, supports a broad inquiry encompassing the content of the evidence, the circumstances in which the evidence was offered and the circumstances relating to the veracity of the witness. High notes that a broad approach would be similar to the approach taken in other parts of the Act (for example, the hearsay reliability test).⁵⁸
- 8.38 Should the minority's approach in *W (SC 38/2019) v R* be preferred, the list of relevant factors could include the following (as far as they are relevant to the case):
- (a) the significance of the evidence to the facts at hand, including the importance of those facts to the proceedings and the probative nature of the evidence presented;
 - (b) any indications that the evidence is unreliable or untrue, including whether it is consistent with evidence that is already known or whether it has led to the discovery of other evidence;
 - (c) the circumstances in which the statement was allegedly obtained, including whether it could have been constructed on the basis of facts and information gained from other sources;
 - (d) whether the witness has been incentivised to give their evidence, and the nature of any such incentives offered or received;
 - (e) whether the witness has any other motives to offer unreliable evidence; and
 - (f) whether the witness has a record of lying.

⁵⁶ *Roigard v R* [2020] NZSC 94 at [54].

⁵⁷ Scott Optican "Evidence" (2021) NZ L Rev 313 at 328.

⁵⁸ Anna High "The exclusion of prison informant evidence for unreliability in New Zealand" (2021) 25 IJE & P 217 at 233.

- 8.39 The factors guiding the reliability test will depend on what information is available to help assess reliability – and this turns on the nature of record-keeping (discussed in more detail under additional safeguards below).

QUESTION

Q38

Should the Act be amended to include additional controls on the admissibility of prison informant evidence? If so, should the Act be amended to include:

- a. a reliability threshold; and/or
- b. a presumption of exclusion; and/or
- c. a statement of the factors to be taken into account by a judge when assessing reliability?

USE OF JUDICIAL DIRECTIONS

- 8.40 If prison informant evidence is admitted, section 122(2)(d) requires a judge to consider whether to warn the jury of the need for caution in deciding whether to accept prison informant evidence and the weight to be given to it. As with all section 122 warnings, the judge must only consider whether to give such a warning. This was the result of a conscious decision at select committee stage on the basis that the wording of the clause as originally drafted requiring a judge to give a warning was “too restrictive” and that “leaving this matter to the judge’s discretion would be more effective than making it mandatory”.⁵⁹ The Commission, in its 2013 Review, similarly concluded that it would not be helpful to amend section 122 to provide more direction as to when a warning should be given or what it should contain. This was properly a role for the judge on a case-by-case basis.⁶⁰
- 8.41 The Supreme Court in *Hudson* rejected the argument that there should be a standard form direction to be given in cases involving prison informant evidence but held that a direction will normally be required.⁶¹
- 8.42 This approach was affirmed by te Kōti Pīra | the Court of Appeal in *Baillie v R*, where it held that the considerations that justified “careful scrutiny” of prison informant evidence at the admissibility stage may also call for judicial directions if prison informants are called at trial.⁶² The Court stated that, for such witnesses, judges should consider whether to direct the jury:⁶³
- (a) to consider any promises or expectations of preference that may operate on the witness, and how powerful any such incentive may be in the witness’s circumstances;

⁵⁹ Evidence Bill 2005 (256-2) (select committee report) at 12.

⁶⁰ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.07].

⁶¹ *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [40]–[41].

⁶² *Baillie v R* [2021] NZCA 458 at [58].

⁶³ *Baillie v R* [2021] NZCA 458 at [59] (footnotes omitted).

- (b) to consider whether any disclosure to the police by the witness was delayed or was connected in time to an incentive;
- (c) to pay attention to any identified weaknesses in the evidence, such as (by way of example) inherent implausibility and inconsistency with other evidence that the jury accepts;
- (d) to be aware of any risk that details in the informant’s evidence may have been acquired not from the defendant but through the informant’s involvement in the police investigation or dealings with other witnesses. Where such risk exists, it may be appropriate to caution against treating the accounts of several such witness as mutually supportive;
- (e) to be aware of the risk that juries may mistakenly attribute the evidence of a prison informant to a desire to tell the truth rather than an incentive to give evidence that may gain the witness some advantage within the criminal justice system; and
- (f) that the ultimate assessment of reliability is theirs to make, but they must exercise caution when deciding whether to accept the evidence. Consistent with *W (SC38/2019)*, it may be appropriate in some cases to warn the jury of a risk that prison informant evidence may lead to miscarriages of justice.

Is section 122(2)(d) sufficient to address the risks associated with prison informant evidence?

- 8.43 Both the courts and commentators have been critical of the ability of judicial directions to address the risks of prison informant evidence, drawing attention to research that indicates that jury instructions (even when enhanced) have no effect on verdicts.⁶⁴ Despite these concerns, there appears to be little support to dispense with judicial directions completely. The majority in *W (SC 38/2019) v R* said the evidence “plainly provided support for the requirement in *Hudson* for careful scrutiny of the evidence of prison informants”.⁶⁵ The minority were more explicit, concluding that the statutory scheme of the Act proceeds on the basis that juries do listen to judicial directions, meaning it was not possible to “jettison” reliance upon those directions – and neither did the available studies make the case for doing so.⁶⁶
- 8.44 The minority judgment in *W (SC 38/2019) v R* highlighted that studies on judicial warnings had not fully explored the “form and timing” of the direction and whether that made a difference to juries’ reasoning.⁶⁷ We understand that, in practice, some judges will provide a warning or direction to the jury not just at summing up, but also before the evidence has been heard, either in opening remarks or immediately before the informant gives their evidence.
- 8.45 The case law also now provides more detailed guidance on judicial directions, with the Court of Appeal setting out in *Baillie* the factors that the judge should consider when directing the jury.

⁶⁴ See, for example, *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [84]–[85] and [246]; Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25 IJE & P 217 at 232; Patrick Anderson “Snitched on or stitched up? – a review of the law in New Zealand in relation to jailhouse informant evidence” [2021] NZLJ 119 at 123.

⁶⁵ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [86].

⁶⁶ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [246].

⁶⁷ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [246].

- 8.46 Given these developments, we seek submissions on whether section 122(2)(d) should be amended so as to enhance judicial directions to the jury or whether the current law, including the Court's guidance in *Baillie*, is sufficient to guard against the risks of unreliability associated with prison informant evidence when it is admitted at trial.

QUESTION

Q39

Is section 122(2)(d) sufficient to address the risks associated with this type of evidence in practice?

Options for reform

- 8.47 If reform is considered necessary or desirable, we have identified two possible options, one or both of which could be adopted:
- (a) **Option 1:** Amend the Act to require judges to provide a warning to the jury on reliability in every case involving prison informant evidence; and/or
 - (b) **Option 2:** Amend the Act to include the factors that a judge should consider including, or must include, in their warning.
- 8.48 Option 1 (and Option 2, if drafted as an imperative) would be contrary to the original policy intention of section 122. As noted above, one of the concerns behind section 122 appears to have been to ensure that judges have sufficient discretion as to warnings.
- 8.49 There is, however, precedent in the Act for more prescriptive judicial directions in appropriate cases. Section 126 governs judicial warnings about identification evidence and states that the judge *must* warn the jury of the special need for caution before convicting on the basis of visual or voice identification evidence. It may be that, given the emerging evidence on the risks of prison informant evidence discussed above, a similar, more prescriptive direction as proposed in Option 1 would now be appropriate.
- 8.50 If not drafted as an imperative, Option 2, on its own, would retain the original policy intention of section 122 and would continue to favour judicial discretion. It would, however, provide further guidance for judges as to what juries should (or must) be advised to consider. This could take the form of the factors set out by the Court of Appeal in *Baillie*. Option 2 could also include directing the jury to consider not just what was allegedly said, but whether any conversation occurred at all.⁶⁸ There is precedent in the Act for a more prescriptive approach, which may be justified on the basis of the risks posed by prison informant evidence. Section 126(2) on identification evidence sets out (without providing any standard wording) the considerations that a warning under this section must cover, including warning the jury that “a mistaken identification can result in a serious miscarriage of justice”.
- 8.51 The Act could be amended to state that the judicial warning need not be in any particular words (as with judicial warnings on identification evidence) and should reflect the specific

⁶⁸ In *Hudson*, the Supreme Court noted that, unlike other types of unreliable evidence where the primary controversy turns on the circumstances in which the statements were made, the issue with prison informant evidence is often whether the statements were made at all: *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [36].

circumstances of the case (as per the guidance from case law⁶⁹) but should (or must) do the following (based on *Baillie and Hudson*):

- (a) ask the jury to consider any incentives that may have been offered, received or expected by the witness, and the effect this might have had on the witness;
- (b) ask the jury to consider any identified weaknesses in the evidence, including any implausibility or inconsistency with other evidence the jury has heard;
- (c) alert the jury to the possibility that a witness may be convincing even when providing falsified evidence;
- (d) refer to the risk that details in the witness' evidence may have been acquired from other means;
- (e) note the problems juries can experience in considering such evidence, including the risk that juries may mistakenly attribute the evidence of such a witness to a desire to tell the truth, rather than the presence of an incentive; and
- (f) if the judge considers it appropriate, warn the jury of the risk that false prison informant evidence can lead to a miscarriage of justice.

QUESTION

Q40

Should section 122(2)(d) be amended to enhance judicial directions to juries on the reliability of prison informant evidence? If so, should it be amended to:

- a. require the trial judge to provide a warning to the jury on reliability in every case involving prison informants; and/or
- b. set out the factors that the judge should *or*, must include in their warning?

ADDITIONAL SAFEGUARDS

8.52 In *W (SC 38/2019) v R*, the Court considered that additional safeguards for the use of prison informant evidence were “important and necessary”.⁷⁰ It explored some of the safeguards introduced in various overseas jurisdictions, including the use of approval committees to review and agree to the use of evidence, record-keeping and disclosure requirements and policies restricting the use of prison informant evidence by prosecutors.⁷¹ It concluded that further guidance for prosecutors and a central register of prison informants were two safeguards that should be developed further.⁷² Other recent commentary has also noted the need, and expressed support, for additional safeguards in this area.⁷³

⁶⁹ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV122.06].

⁷⁰ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [91] and [218].

⁷¹ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [92]. The Court noted that the Solicitor-General was in the process of formulating such guidance at that time.

⁷² *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [93] and [218].

⁷³ See, for example, Scott Optican “Evidence” (2021) NZ L Rev 313 at 328–329; Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25 IJE & P 217.

- 8.53 The Solicitor-General has now produced guidance for prosecutors on the use of prison informant evidence, and a central register for prison informants has now been set up and is being maintained by Police.⁷⁴ We are interested in views on how these existing safeguards are operating in practice, and whether additional safeguards would be appropriate to address the issues of admissibility or the use of prison informant evidence at trial. Some possible options include:
- (a) **Further changes to prosecutorial policies and guidance:** It may be too soon to assess what impact the existing prosecutorial guidelines have had in practice. Similar prosecutorial policies overseas, however, go further by including restrictions on the number of informants who may be called⁷⁵ or containing more robust consequences for prison informants found to have given false evidence.⁷⁶
 - (b) **Oversight and approval of decisions to use prison informant evidence:** Some jurisdictions have oversight committees that consider the reliability of prison informant evidence and approve its use at trial.⁷⁷ In New Zealand, the petition on prison informants presented to Parliament and currently under consideration by the Justice Select Committee calls for a similar approach, in requiring the Solicitor-General to provide written approval for the admission of prison informant testimony.⁷⁸ High supports of the idea of establishing an office or committee to vet prison informant evidence ahead of trial, noting that it may also address some of the administrative costs associated with pre-trial hearings. She emphasises the importance of any such body being independent.⁷⁹
 - (c) **Record-keeping:** More information about incentives offered or received, the history of the person seeking to give evidence and the nature of the interaction between the potential informant and the police and prosecution⁸⁰ would enable greater scrutiny of reliability at admissibility stage and also assist the jury in their assessment of reliability.⁸¹ We would welcome views on how the Police register is operating in practice and whether additional information or alternative arrangements would assist. An approach based on record-keeping has its shortcomings, as identified by

⁷⁴ Mike White “Law Commission will examine ‘jailhouse snitches’” (1 October 2022) Stuff <www.stuff.co.nz>.

⁷⁵ Office of the Director of Public Prosecutions *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* (October 2007) at 22–5.

⁷⁶ The Manitoba Department of Justice’s in-custody informer policy requires that any in-custody informant found to have lied will be “vigorously prosecuted by a counsel independent of the prosecution”: see “Jailhouse Informants” in Office of the Director of Public Prosecutions *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* (October 2007) at 22–5.

⁷⁷ See, for example, “In-Custody Informers” in Ministry of the Attorney General – Criminal Law Division *Ontario Crown Prosecution Manual* (2017); “In-Custody Informer Policy: Guideline No.2:INF:1” in Manitoba Department of Justice *Policy Handbook* (5 November 2001).

⁷⁸ *Petition of Lois McGirr for Justice for All Inc and 190 others: Stop jail-house informant testimony from causing wrongful convictions* (2017/434, 13 November 2019).

⁷⁹ Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25 IJE & P 217 at 233.

⁸⁰ See, for example, Mike White “High-profile Crown prosecutor concealed meeting with secret witness in murder case” (27 March 2023) Stuff <www.stuff.co.nz>, detailing a case where meetings between a prosecutor and a prison informant witness were only discovered through notes in a police officer’s notebook.

⁸¹ By enabling the defence (via disclosure) to more effectively challenge the witness in cross-examination and to be able to more clearly present to the jury what incentives have been offered or received.

the Court in *W (SC 38/2019) v R*.⁸² There are many incentives that are less easily observed or recorded, and it may be difficult to convey to a jury the power that such incentives might hold in the prison system. It is also, obviously, more helpful in cases involving “repeat offenders” as opposed to one-off instances.

QUESTION

Q41

Are other safeguards necessary or desirable to address the risks associated with prison informant evidence? If so, what should they be?

OTHER INCENTIVISED WITNESSES

8.54 The discussion above is focused on prison informant evidence. In *W (SC 38/2019) v R* and *Roigard*, the Supreme Court acknowledged there is a broader class of incentivised witnesses but was divided as to whether its approach should apply to that group. The majority limited their approach to prison informants, leaving consideration of other incentivised witnesses for when those cases arise.⁸³ The majority further noted concerns about the implications of extending their approach to a broader class of incentivised witnesses in the criminal justice context, noting the need to recognise the value of informants in the criminal investigation process more generally.⁸⁴

8.55 The minority went further and would have applied its framework to what it described as “incentivised secondary confession evidence”, defined as:⁸⁵

[W]itnesses the Crown wishes to call who will give evidence alleging that the defendant has in some way admitted guilt in return for some advantage or benefit – an advantage or benefit that operates within the criminal justice context. The witnesses were not involved in the offending and, typically, their only source of knowledge for their evidence is the statements they claim the defendant made to them.

8.56 In *Baillie v R*, the Court of Appeal declined to expand the class of witnesses whose evidence “demands careful scrutiny”, holding “that issue should be reserved for another day and more extensive argument”.⁸⁶ It made two further points, however, of relevance to the issue of scope:

(a) First, there are definitional difficulties in identifying the class that should be subject to the “careful scrutiny” envisaged by the Supreme Court in *Hudson, W (SC 38/2019) v R* and *Roigard*. Even the definition of “prison informant” can be open to debate and “the wider the class the more extensive the range of incentives and more debatable their effects”.⁸⁷

⁸² *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [94]–[95].

⁸³ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [87].

⁸⁴ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at n 139.

⁸⁵ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [201].

⁸⁶ *Baillie v R* [2021] NZCA 458 at [69].

⁸⁷ *Baillie v R* [2021] NZCA 458 at [69].

- (b) Second, the considerations set out in *W (SC 38/2019) v R* and *Roigard* may sometimes affect secondary admissions evidence given by witnesses who are not prison informants. In these cases, the option to issue a reliability direction under section 122 remains open to judges on a case-by-case basis.⁸⁸

Should any reform or additional safeguards extend to other incentivised witnesses?

- 8.57 Whether other incentivised witness evidence should be subject to the same “careful scrutiny” as prison informant evidence is an open question that the courts have yet to determine. In light of this ongoing uncertainty and given this is our final operational review, we are interested in views on whether section 122(2)(d) or any amendments to the Act or additional safeguards that may be progressed on the basis of the discussion above should apply to a broader class of incentivised witnesses.
- 8.58 While we have not reached any view on this issue or on how a class of incentivised witnesses should be defined, we can demarcate two classes of witnesses within the criminal justice system that should be treated as distinct from prison informants and incentivised witnesses:
- (a) **Undercover police posing as prisoners:** For example, in *R v Kumar*, two undercover police officers were placed in a police cell with the defendant and elicited an inculpatory statement from him. This was dealt with by the courts under section 30 (improperly obtained evidence) and we believe raises a separate set of issues relating to the circumstances in which the defendant’s statement was obtained rather than the reliability of the evidence given by the informant. We address this in a different chapter.
- (b) **Co-defendants/accomplices:** Co-defendants and accomplices will often give evidence against a defendant to mitigate their own risk of criminal liability. The Act already addresses the statements of co-defendants under the hearsay provisions.
- 8.59 The material concern about prison informant evidence is that it is unreliable, and that unreliability does not necessarily stem from the fact that someone was in detention at the time the statement was made and received, but from the fact an incentive was in play. These incentives may be as powerful and compelling in the broader criminal justice system where similar power differentials exist between individuals and the authorities and where incentives can be advantageous (such as preferential treatment from the police or authorities for current or future offending, leniency from the courts on charging and sentencing or the payment of money in the form of a reward).
- 8.60 As noted by the majority in *W (SC 38/2019) v R*, many of the studies into the risks of illegitimate prejudice and miscarriages of justice with this type of evidence cover both classic prison informant evidence and other type of informants and it is not always clear which is the operating factor.⁸⁹ This indicates that this type of broader incentivised evidence may present similar concerns as prison informant evidence.
- 8.61 However, there may be reasons for limiting any approach to prison informants. There has been far more discussion and research into the risks posed by prison informant evidence

⁸⁸ *Baillie v R* [2021] NZCA 458 at [69].

⁸⁹ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [79].

as opposed to other types of incentivised witnesses. The culture of prison and the power dynamics at play in those settings may also be so unique so as to warrant particular and separate treatment. The Act already contains general mechanisms that can be used either to exclude or to issue a warning about, unreliable evidence on a case-by-case basis (sections 7, 8 and 122). As noted above, the majority in *W (SC 38/2019) v R* were concerned about the implications of extending their approach to a broader class of incentivised witnesses and the impact this may have on informants in the criminal investigation process more generally.

- 8.62 Extending section 122(2)(d) and any recommended amendments or safeguards beyond “classic” prison informants also raises definitional difficulties about where the line should be drawn. We recognise that seeking to articulate an exhaustive definition or list of exceptions may introduce potential inflexibility in the law compared with allowing it to develop on a case-by-case basis.

QUESTION

Q42

Should any amendments to the Act or additional safeguards extend to a wider class of incentivised witnesses beyond prison informants? If so, who should this class of incentivised witness cover?

CHAPTER 9

Veracity evidence

INTRODUCTION

In this chapter, we consider and seek feedback on issues relating to:

- the scope of the veracity provisions (section 37);
- the application of section 38(2) when the defendant puts veracity in issue; and
- the use of the term “veracity” in other parts of the Act.

SCOPE OF THE VERACITY PROVISIONS

- 9.1 The admissibility of veracity evidence is governed by sections 37–39 of the Evidence Act 2006. Section 37(1) sets out the general rule that a party may not offer evidence in a civil or criminal proceeding about a person’s veracity (defined as “the disposition of a person to refrain from lying”¹) unless the evidence is “substantially helpful” in assessing that person’s veracity.
- 9.2 The veracity provisions are based on Te Aka Matua o te Ture | Law Commission’s Evidence Code, but they differ in several key respects. The Commission had proposed a concept of “truthfulness” rather than “veracity”.² It defined truthfulness as being concerned with “a person’s intention to tell the truth”.³ It recommended a general rule that evidence about a person’s truthfulness is admissible only if it is substantially helpful in assessing that person’s truthfulness.⁴ The intention was to abolish the common law collateral issues rule, which prohibited a party from offering evidence intended to challenge a witness’ answers to questions asked in cross-examination about their truthfulness.⁵

¹ Evidence Act 2006, s 37(5).

² Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 102–113.

³ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 24.

⁴ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 108.

⁵ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C177].

- 9.3 At select committee stage the term “truthfulness” was replaced with “veracity” on the basis that “veracity” places the emphasis upon the intention to tell the truth whereas “truthfulness” is more readily confused with factual correctness.⁶ This necessitated the introduction of a new definition of “veracity” that focused on a person’s disposition to refrain from lying. Section 37(3), which purports to provide a non-exhaustive list of matters relevant to deciding whether the proposed veracity evidence is substantially helpful, was also inserted at select committee stage.
- 9.4 The changes at select committee stage gave rise to some early uncertainty as to the scope of the veracity provisions in the Act.⁷ Te Kōti Mana Nui | Supreme Court clarified much of this uncertainty in *Hannigan v R*.⁸ In that case, the majority of the Supreme Court confirmed that the veracity rules do not apply to evidence that is of direct relevance to the case, even if that evidence also bears on the veracity of a person.⁹ The scope of the veracity rules is therefore relatively narrow, only capturing evidence that would not otherwise be relevant to the facts in issue. The Court also said that only evidence of previously told lies can establish a disposition to lie for the purposes of the veracity rules.¹⁰
- 9.5 Preliminary feedback from stakeholders identified that some questions remain as to:
- (a) the application of the veracity provisions to evidence of a single lie told on a previous occasion; and
 - (b) the relevance, if any, of some of the statutory factors deemed to be relevant to an assessment of substantial helpfulness (sections 37(3)(c)–(e)).
- 9.6 We address these issues below and then discuss whether it is desirable to provide more complete guidance in the Act about the matters relevant to assessing whether veracity evidence meets the heightened relevance test of substantial helpfulness.

The application of the veracity provisions to single lies

- 9.7 Some cases have suggested that the reference in the definition of veracity to a person’s *disposition* to refrain from lying means that evidence that a person lied on a single occasion may not be controlled by the veracity provisions.
- 9.8 In *R v Tepu*, te Kōti Pīra | Court of Appeal said that a single allegation of lying does not, of itself, involve an allegation that a person has a “disposition to lie”, and that this “confuses lying on a particular occasion with a tendency or an inclination to lie more generally”.¹¹

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

⁷ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013), ch 6.

⁸ *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612.

⁹ *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [135] and [138].

¹⁰ *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [121]. The majority explained at n 46 that evidence indicative of a disposition to tell lies necessarily bears on the disposition of the person in question to refrain from lying, in terms of the definition of veracity in s 37(5).

¹¹ *R v Tepu* [2008] NZCA 460 at [19]. This decision concerned an allegation that the defendant lied in their statement to police about the events that were the subject of the charges. As noted above, the Supreme Court has since clarified that the veracity rules do not apply to evidence that is of direct relevance to the case even if that evidence bears on the veracity of a witness or defendant: *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [135].

9.9 The authors of *Mahoney on Evidence* have raised concerns with the suggestion that single lies are not controlled by the veracity provisions:¹²

... it would be problematic to take *Tepu* as deciding that veracity must always involve multiple lies. The Act contains various provisions which appear to reflect the legislature's view that a single incident can be a substantially helpful indicator of a lack of veracity.

9.10 Several provisions in the Act appear to contemplate that a single lie can be considered under the veracity provisions.¹³ For example, section 37(3)(a) refers to a “lack of veracity... when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration)” and section 37(3)(b) refers to “1 or more offences that indicate a propensity for a lack of veracity”.

9.11 This issue appears to have particular significance in the context of sexual cases, where the defence seeks to offer evidence of a single false complaint or other lie told by the complainant about their previous sexual experience. In *Best v R*, the Supreme Court considered the admissibility of an allegedly false complaint made previously by the complainant against another person.¹⁴ The Court proceeded on the basis that a single lie (or alleged lie) is controlled by the veracity provisions and that the number of false (or allegedly false) prior complaints was one factor to be considered, among others, in assessing whether the veracity evidence met the test of substantial helpfulness.¹⁵ The Court said that, if the complainant had *not* accepted the prior complaint was false, it was relevant that “the existence of one prior complaint is not... equivalent to a ‘habit’ of making false complaints”.¹⁶ The Court noted, however, that if the complainant *had* accepted the prior complaint was false, the evidence ought to have been admitted as substantially helpful veracity evidence, even though “there is only one prior false complaint and therefore no evidence of a pattern of lying about sexual activity”.¹⁷

9.12 The Court of Appeal considered this matter again in 2022 and indicated that proof of a single lie will seldom be capable of being substantially helpful in assessing a disposition to refrain from lying.¹⁸

How should the Act treat single lies?

9.13 Our preliminary view is that evidence of a single lie (that is not otherwise directly relevant to the facts in issue) should be treated as veracity evidence so that it will only be admitted if the heightened relevance test of substantial helpfulness is met. This is consistent with the Supreme Court's approach in *Best*, reflects the Commission's intention when

¹² Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV37.01(2)].

¹³ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV37.01(2)]. See also *Cross on Evidence* which notes in the context of s 37(3)(b), that “[i]t is clear from the provision, which refers to “one or more offences”, a single relevant conviction is capable of constituting substantially helpful veracity evidence”: Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA37.5].

¹⁴ *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.

¹⁵ *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [73].

¹⁶ *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [88].

¹⁷ *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [97] and [107].

¹⁸ This case is subject to publication restrictions until final disposition of trial.

developing the Evidence Code¹⁹ and is consistent with the propensity provisions (under which evidence of a single act or omission can constitute admissible propensity evidence).

- 9.14 We agree with the authors of *Mahoney on Evidence* that it would be problematic if section 37 were interpreted as necessarily requiring multiple lies. Further, we are concerned that such an interpretation could result in an approach whereby evidence of a single lie is not subject to the heightened relevance test of substantial helpfulness.²⁰ We also agree with the Court of Appeal’s recent observation that evidence of a single lie will seldom be capable of meeting the substantially helpful threshold. Nonetheless, there will be cases, for example, a single conviction for perjury of a serious nature, where this threshold is capable of being reached.
- 9.15 It does not necessarily follow that legislative amendment is the best way forward. One view is that this is a matter that is best left to the courts to consider and issue guidance on a case-by-case basis.²¹
- 9.16 We are therefore interested in views on whether the treatment of single lies under the veracity provisions is creating confusion or uncertainty in practice and whether any legislative clarification to the operation of section 37 would be desirable in this respect. If legislative reform is considered necessary or desirable, one option, which we consider below, would be to amend section 37(3) to provide more guidance on the evaluative matters that are relevant to whether veracity evidence is substantially helpful. This could include, as a relevant factor, the number of previous incidents or events, affirming the approach in *Best*.

QUESTION

Q43

Is there uncertainty as to the application of the veracity provisions to evidence of a single lie? If so, should the Act be amended to address that uncertainty?

Relevance of the matters listed in section 37(3)(c)–(e)

- 9.17 Section 37(3) of the Act purports to provide a non-exhaustive list of relevant considerations in deciding whether proposed veracity evidence is substantially helpful. It provides:

¹⁹ As discussed above, the Commission had proposed that any evidence about a person’s truthfulness (their intention to tell the truth) should be admissible only if it is substantially helpful in assessing that person’s truthfulness: *Te Aka Matua o te Ture | Law Commission Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 24–25 and 108–109. The Commission’s commentary makes it clear that evidence of single lies were intended to be captured (at [C180]). The concept of a “disposition” to lie was introduced at select committee stage.

²⁰ We note, by way of example, the case of *Ilaoa*, discussed in Elisabeth McDonald’s research into intimate partner rape trials. In that case, it was suggested in cross-examination that the complainant had lied in her residency application, a suggestion that she strongly denied. The admissibility and use of that evidence was, McDonald states, misguided. It should have been subject to s 37 but was not: Elisabeth McDonald *Prosecuting Intimate Partner Rape* (Canterbury University Press, Christchurch, 2023) at 235–237. McDonald also discusses another case, *Nguyen*, involving a single lie that was not assessed for admissibility under s 37 (at 146–149).

²¹ Elisabeth McDonald has noted that closer attention needs to be paid to identifying and considering the admission of evidence of the complainant’s veracity at the pre-trial stage in sexual cases, but does not consider that there are any major issues with regard to the drafting of the veracity provisions: Elisabeth McDonald *Prosecuting Intimate Partner Rape* (Canterbury University Press, Christchurch, 2023) at 247.

(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.

9.18 These matters reflect the common law exceptions to the collateral issues rule which was abolished by section 37.²²

9.19 It is questionable whether subsections 37(3)(c)–(e) are necessary following the Supreme Court’s clarification of the scope of the veracity provisions in *Hannigan*.

9.20 Subsection 37(3)(c) (previous inconsistent statements) was addressed by the Commission in the Second Review of the Act.²³ The Commission noted that the Supreme Court in *Hannigan* had confirmed that a previous inconsistent statement will almost always have some relevance to the facts in issue, and consequently will be admissible without having to satisfy the veracity provisions even if it also challenges a person’s veracity.²⁴ The Commission accordingly recommended that this subsection be repealed.²⁵ The Government accepted this recommendation²⁶ but the subsection has not yet been removed from the Act.

9.21 Sections 37(3)(d) and (e) (bias and motive to be untruthful) were not considered by the Commission in its Second Review. Preliminary feedback in this review identified a view that these subsections, which are rarely called upon in practice, are also redundant following *Hannigan*. There is a concern that their inclusion in section 37(3) is creating confusion in practice.

9.22 As noted above, the majority in *Hannigan* clarified that the veracity provisions do not apply to evidence that is of direct relevance to the case (even if that evidence bears on veracity).²⁷ Further, only evidence of previously told lies can establish a disposition to lie for the purposes of the veracity rules.²⁸ In other words, section 37 “permits the introduction of otherwise potentially inadmissible evidence to the effect a witness is

²² Simon France (ed) *Adams on Criminal Law – Evidence* (online loose leaf ed, Thomson Reuters) at [EA37.03(8)].

²³ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [14.9]–[14.17].

²⁴ *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [119].

²⁵ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019), R24.

²⁶ Government Response to Law Commission Report: The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006 (September 2019) at 6.

²⁷ *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [135] and [138].

²⁸ *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [121].

habitually truthful or untruthful”.²⁹ Unlike subsections 37(3)(a) and (b), which can be described as examples of the *type* of veracity evidence that may be substantially helpful, subsections (d) and (e) do *not* describe types of veracity evidence. Rather, evidence of a person’s bias or motive to be untruthful in a proceeding is generally considered to be directly relevant to assessing the reliability of their evidence and does not, therefore, engage the veracity provisions.³⁰

- 9.23 It could be possible to interpret sections 37(3)(d) and (e) as simply providing that, where there is evidence that a person has told lies, whether that evidence reveals a bias or motive to lie will be relevant to assessing whether that evidence is substantially helpful.³¹ But this potentially confuses two concepts (a *general* disposition to lie versus bias or motivation to lie *in the proceeding*). In any event, it does not appear that subsections 37(3)(d) and (e) add anything, in practice, to the guidance that has developed through case law on the assessment of substantial helpfulness, discussed below.³²
- 9.24 For these reasons, we seek feedback on whether subsections 37(3)(d) and (e) should also be repealed, in addition to subsection 37(3)(c).

QUESTION

Q44

Do subsections 37(3)(d) and (e) perform any useful role in practice? If not, should these subsections be repealed?

Should section 37(3) provide guidance on the factors relevant to assessing substantial helpfulness?

- 9.25 The issues identified above raise a broader question as to whether section 37(3) provides adequate guidance on how to approach the substantial helpfulness test. This is a

²⁹ *R v Katipa* [2017] NZHC 2169 at [8].

³⁰ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV37.09]–[EV37.10]. See, for example, *M (CA438/2010) v R* [2011] NZCA 84, where the Court of Appeal held that evidence of alleged bias on the part of an expert witness (that the witness lacked objectivity by reason of previous associations) did not engage the veracity provisions because it went to reliability of the witness’ testimony (at [30]–[37]). See also *McKay v R* [2019] NZCA 393, where the Court of Appeal observed at [30] that “challenging the truthfulness of a complainant’s evidence by reference to a possible motivation to lie” would not amount to a challenge to their veracity (for the purposes of s 38).

³¹ For example, in *R v Alletson* [2009] NZCA 205, the defence sought to offer as veracity evidence details of lies told by the complainant on previous occasions, which allegedly indicated a bias against the defendant (at [21]). The trial judge had described the lies as “childhood tittle-tattle” that did not show either a bias on the part of the complainant or a motive for her to be untruthful (at [22]). On appeal, the Court of Appeal noted that the motive in the earlier lies (to avoid getting into trouble) was different from what the defence said was the motive for the allegations that were the subject of the current charges (attention seeking) and upheld the trial judge’s assessment that the evidence did not meet the substantial helpfulness test (at [25]).

³² We have not identified any cases where veracity evidence has met the substantial helpfulness threshold because it revealed a bias or motive to lie. See, for example, *Harawira v R* [2019] NZCA 562, a sexual case in which the defendant sought to offer as veracity evidence to the effect that the 18-year-old complainant, when aged 15, had lied to her aunt about whether her mother had consented to her getting a belly button piercing. The trial judge had explained that, while this may have been evidence of a motive on behalf of the complainant to be untruthful, “if it is it is a motive in the context of a youngish teenage girl trying to get a belly-button piercing rather than a much more serious issue before the jury” (at [14]). The Court of Appeal agreed with the trial judge’s assessment (at [40] and [42]).

contextual exercise that involves careful evaluation of the circumstances in each case.³³ Subsections 37(3)(c)–(e) appear problematic for the reasons discussed above. But if they are repealed, that would only leave sections 37(3)(a) and (b), which are best described as examples of the *types* of veracity evidence that may (depending on the circumstances) be substantially helpful. They are examples only, because as the Supreme Court observed in *Best v R*, it is “not necessarily the case that the evidence of a type set out in s 37(3) will always be substantially helpful”.³⁴ As the Commission has previously observed, there is nothing to prevent a judge from taking account of “ordinary lies” that do not fall within section 37(3)(a) where the circumstances are such that the evidence reaches the “substantially helpful” threshold.³⁵

- 9.26 Sections 37(3)(a) and (b) do not give guidance as to the evaluative matters the court should consider when assessing whether veracity evidence is substantially helpful in a particular case. If section 37(3) is intended to fulfil that function, the list of relevant matters in section 37(3) is radically incomplete. In *Best*, the Court set out a range of matters that will be relevant when assessing substantial helpfulness in the context of a previous allegedly false complaint of sexual offending, none of which appear in the Act itself:³⁶

Factors to be considered in the assessment of substantial helpfulness may include any remoteness in time, similarity (or lack thereof) between allegations, the number of allegedly false prior complaints, the reason a complaint did not proceed or was withdrawn, whether the complaint was taken to a person of authority and whether the prior complaint was fraudulent or malicious.

In line with the policy behind s 37 ... the substantial helpfulness of a previous allegedly false complaint will also depend on how clear it is that the previous complaint is false, how much evidence would need to be canvassed to decide on whether the complaint is false and the likely outcome of the assessment of that evidence. The more evidence that would need to be called on the unrelated prior allegation and thus the extent of any ‘trial within a trial’ and the more uncertain the outcome of the deliberations on that evidence, the less likely the evidence is to be substantially helpful in terms of s 37.

- 9.27 In a different context, the Court of Appeal in *Horton v R* explained that, when evaluating whether evidence of prior convictions (captured by section 37(3)(b)) is substantially helpful in assessing veracity:³⁷

Relevant factors include the nature and seriousness of the convictions (particularly if any falsehood is disclosed), the age of the convictions, any overall pattern of offending, and the circumstances of the trial (that is, the particular way in which issues of veracity arise). Also relevant can be evidence of extenuating circumstances related to the convictions (such as significant material hardship on the part of the complainant) as that bears on the extent to which the conviction illustrates a wider propensity to lie.

- 9.28 Many of the factors mentioned in these decisions (such as remoteness in time of the previous acts or events, the number of previous acts or events, the nature and

³³ See, for example, the Supreme Court’s observations in *Horton v R* [2021] NZSC 99 at [11] in the context of prior convictions as veracity evidence.

³⁴ *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [72] (emphasis added).

³⁵ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.75].

³⁶ *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [73]–[74].

³⁷ *Horton v R* [2021] NZCA 82 at [30].

seriousness of those acts or events as well as the extent to which the acts or events are accepted by the person to whom the evidence relates) are arguably generally applicable to any assessment of substantial helpfulness.³⁸

- 9.29 If the purpose of section 37(3) is to provide guidance on matters to be considered in assessing substantial helpfulness, it might be desirable to consider including matters relevant to that purpose. Section 37(3) can be contrasted with sections 43(3) and 43(4), which provide guidance on the matters relevant to assessing the probative value and prejudicial effect of propensity evidence. If such guidance is desirable, consideration would need to be given as to how to address the current subsections 37(3)(a) and (b). These subsections provide examples of types of admissible veracity evidence, which would not fit neatly in a redrafted section focusing on guidance on relevant matters. It may, nonetheless, be helpful to retain these provisions in another subsection.
- 9.30 If, in contrast, the purpose of section 37(3) is to highlight the type of evidence that might be admissible veracity evidence, it might be desirable to rephrase subsection 37(3) to make this clear, especially if subsections (c)–(e) are repealed.

QUESTION

Q45

Should the Act be amended to provide guidance on the factors relevant to assessing whether veracity evidence meets the threshold of substantial helpfulness? If so, what factors should be included in the Act?

APPLICATION OF SECTION 38(2) WHEN THE DEFENDANT PUTS VERACITY IN ISSUE

- 9.31 Whereas section 37 governs veracity evidence in both civil and criminal proceedings, section 38 applies only to criminal proceedings. Section 38(2)(a) defines the limited situations in which the prosecution may offer evidence about a defendant's veracity. A defendant will "open the door" to evidence about their veracity being offered by the prosecution if:
- ... 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;
- 9.32 This means that section 38(2) is only triggered if the defendant (a) gives oral evidence in court and (b) puts veracity at issue in that evidence. If these requirements are met, the prosecution can offer veracity evidence about the defendant if the judge permits it³⁹ and it meets the substantially helpful threshold in section 37.
- 9.33 Section 38(2) codified two common law rules:⁴⁰

³⁸ In an early draft the Commission suggested including a requirement to consider the length of time that has elapsed since the acts or events: *Te Aka Matua o te Ture | Law Commission Evidence Law: Character and Credibility* (NZLC PP27, 1997) at cl 10(2). This factor did not appear in the final Evidence Code.

³⁹ Evidence Act 2006, s 38(2)(b).

⁴⁰ *Te Aka Matua o te Ture | Law Commission Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C188].

- (a) First, the rule that if the defendant offers good character evidence about themselves, the prosecution can introduce bad character evidence about the defendant in rebuttal. This rule was justified on the basis that the prosecution must have the right to correct any false impression made by the defence, so that the court is not misled and the policies of rational ascertainment of facts and the need for fair procedures that underlie the trial process are not subverted.⁴¹
- (b) Second, the “tit for tat” rule which provided that, if the defendant attacks the character of a prosecution witness, then the prosecution can “retaliate” by offering evidence of the defendant’s own bad character.⁴² The tit for tat rule has two principal rationales:⁴³
 - (i) It protects witnesses from “gratuitous attacks” and therefore encourages victims and other witnesses to come forward and give evidence.
 - (ii) It “sets the record straight” and prevents distortions that come from a one-sided view of character evidence.

What are the issues?

9.34 Concerns with the operation of section 38(2)(a) are not new. Three separate Commission reviews have identified and examined issues with section 38(2)(a).⁴⁴ Preliminary feedback from stakeholders identified that concerns with the current law remain.

Section 38(2) applies only when the defendant gives evidence in court

9.35 Section 38(2) is only triggered if the defendant elects to give evidence. Traditionally, this restriction was justified on the basis that, if the defendant does not give evidence, the fact-finder is not being asked to assess the credibility of their testimony, so evidence relating to their veracity is not relevant.⁴⁵ As a general rule, this meant that, prior to the Act, where the defendant’s case involved imputations on the character of prosecution witnesses, defendants with serious prior convictions did not give evidence and in that way avoided the risk of cross-examination on those convictions.⁴⁶

9.36 It is questionable whether this policy remains appropriate in light of modern trial practices. It may be inaccurate to say that the defendant’s credibility is not “in issue” if they do not give evidence in court, given that, for example, it is now common for the prosecution to

⁴¹ Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [189]–[190].

⁴² Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [196]–[197].

⁴³ Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [203]. See also Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.95]–[6.96].

⁴⁴ Te Aka Matua o te Ture | Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008); Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013); and Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019).

⁴⁵ Te Aka Matua o te Ture | Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [3.32] and [3.37]–[3.38] discussing the rule in *R v Butterwasser* [1948] 1 KB 4, [1947] 2 All ER 415; affirmed in *R v Kino and Mete* [1997] 3 NZLR 24; and *Williams v R* [2017] NZCA 329.

⁴⁶ Te Aka Matua o te Ture | Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [2.12].

play the defendant’s evidential video interview in court and invite the fact-finder to draw conclusions from it. If the defendant makes statements about their own veracity in that interview, those statements cannot be rebutted if the defendant does not give evidence. Similarly, the defendant can attack the veracity of the complainant in that interview and face no consequences for doing so. The approach taken under section 38 can be contrasted to the approach taken to makers of hearsay statements. While a person who makes a hearsay statement is not a witness, their veracity can still be challenged under section 37, unlike defendants who do not give evidence.

- 9.37 The current approach could, however, be justified on the basis that if the defendant does not give evidence, it is only the prosecution who can offer the defendant’s statement in evidence.⁴⁷ It might be considered unfair if the prosecution could trigger section 38(2) by offering a defendant’s statement in evidence and then rely on assertions made in that statement to offer veracity evidence about the defendant.⁴⁸
- 9.38 Nonetheless, in its 1997 paper on character and credibility, the Commission questioned whether it was anomalous to continue to follow the common law approach, which protects defendants who elect not to give evidence even if they attack the character of a prosecution witness.⁴⁹ It noted that this question was also under review in England and Wales. As we discuss below, subsequent reform has abolished the common law rule there. While the Commission’s final Evidence Report did not explicitly address the matter, the Evidence Code was broadly worded so that the prosecution would have been able to offer veracity evidence about the defendant (other than evidence of prior convictions) regardless of whether the defendant gave evidence.⁵⁰ This suggests the Commission’s intention was to depart from the common law approach.⁵¹
- 9.39 The Commission’s proposal was not accepted at select committee stage, and the Evidence Bill was amended to “reinstate the existing law that limits the opportunity for the prosecution to call evidence as to the defendant’s bad character”.⁵² Uncertainty remained, however, because the Act, as enacted, simply provided that the prosecution could offer evidence about the defendant’s veracity if “the defendant has offered evidence about his or her veracity or has challenged the veracity of a prosecution witness...”. This did not make it clear whether the defendant had to give evidence in court for the section to be triggered.
- 9.40 The Commission considered the application of section 38 in a 2008 Report and concluded that Parliament’s intention was uncertain and, in light of that, favoured a strict

⁴⁷ Evidence Act 2006, s 21.

⁴⁸ Te Aka Matua o te Ture | Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [3.38].

⁴⁹ Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [218].

⁵⁰ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 110 and [C188]. That provision made an exception in relation to evidence that the defendant had committed or been charged with an offence relevant to truthfulness (such as perjury). Such evidence would only be able to be offered if the defendant “offered evidence about the defendant’s truthfulness or challenging the truthfulness of a prosecution witness”, and the judge gave permission. At select committee, the relevant provision in the Evidence Bill was changed to limit the prosecution offering any veracity evidence about the defendant to where the defendant puts veracity in issue: Evidence Bill 2005 (256-2), cl 34(2)(a).

⁵¹ See discussion in Te Aka Matua o te Ture | Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [3.33]–[3.36].

⁵² Evidence Bill 2005 (256-2) (select committee report) at 6.

interpretation in line with the common law approach.⁵³ On this basis, the Commission recommended in its 2013 Review of the Act amending 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.⁵⁴ The Act was amended accordingly in 2016 to insert the words “the defendant has, *in court, given oral evidence ...*”.

- 9.41 In the Second Review the Commission questioned the policy underlying the 2016 amendment but concluded that it should be given time to ‘bed in’ and that it was not appropriate, at that time, to recommend changing the underlying policy reflected in section 38(2)(a).⁵⁵

Section 38(2) applies only when the defendant puts veracity in issue in their oral evidence

- 9.42 The wording of section 38(2)(a) indicates that it applies only where the defendant puts veracity in issue *in their oral evidence*. This means it does not apply where the defendant gives evidence however it is not their oral evidence, but some other aspect of the conduct of the defence case that puts veracity in issue. In the Second Review, the Commission said that, since it did not recommend any change to the policy underlying section 38(2)(a), it would be desirable to amend this aspect of section 38(2)(a) to clarify that the challenge to the veracity of a prosecution witness also needs to be given in oral evidence.⁵⁶
- 9.43 This approach is, however, apparently inconsistent with the Commission’s original policy intent.⁵⁷ It is also narrower than the previous common law rule. At common law, if the defendant gave evidence, the prosecution could give evidence about the defendant’s bad character if the defendant “personally or by his advocate” asked questions of prosecution witnesses with a view to establish the defendant’s own good character or if “the nature or conduct of the defence” was such as to involve imputations on the character of the prosecution witnesses.⁵⁸
- 9.44 The concern is that a narrow construct fails to appreciate the different ways in which the defendant can put veracity in issue. If defence counsel challenges the veracity of a prosecution witness during cross-examination, for example, the defendant faces no

⁵³ See discussion in Te Aka Matua o te Ture | Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [3.37]–[3.40] and [9.15].

⁵⁴ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.104]–[6.108] and R13.

⁵⁵ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [14.27].

⁵⁶ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019), R25 and [14.29]. This recommendation was accepted by the Government: *Government Response to Law Commission Report: The Second Review of the Evidence Act 2006 Te Arotake Tuarua i te Evidence Act 2006* (September 2019) at 7. At the time of writing, an evidence amendment bill progressing this recommendation has not been introduced to the House.

⁵⁷ See, for example, Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C189], which discusses the possibility of either the defendant or a defence witness impugning the truthfulness of a prosecution witness.

⁵⁸ Criminal Evidence Act 1898 (UK), s 1(f), applied by *R v Clark* [1953] NZLR 823 (CA) at 830. See discussion in Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [196]–[197]. The position in England and Wales is now governed by ss 101 and 106 of the Criminal Justice Act 2003 (UK).

consequences because they have not themselves challenged the veracity of a prosecution witness *in oral evidence*.

Is legislative reform necessary or desirable?

- 9.45 The gaps identified above suggest that the policies underpinning section 38 are not being achieved in some situations. As we have said, those policies are to allow the prosecution to correct any false impressions made by the defence about the defendant’s veracity and to protect witnesses from gratuitous attacks on their credibility.
- 9.46 As noted above, section 38(2) is both narrower than the common law in some respects (because section 38(2) requires the defendant to put veracity in issue in their oral evidence) and retains elements of the common law that have since been abandoned elsewhere (by requiring the defendant to give evidence before the section is triggered).
- 9.47 In England and Wales, the Criminal Justice Act 2003 (UK) allows the prosecution to offer evidence of the defendant’s bad character if “it is evidence to correct a false impression given by the defendant” or “the defendant has made an attack on another person’s character”.⁵⁹ The Criminal Justice Act goes on to expressly define the circumstances that are deemed to engage these rules. Specifically, the prosecution can offer evidence to correct a false impression if the defendant is responsible for the making of an express or implied assertion that is apt to give the court or jury a false or misleading impression about the defendant.⁶⁰ A defendant is treated as being responsible for the making of an assertion if:⁶¹
- (a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),
 - (b) the assertion was made by the defendant—
 - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
 - (ii) on being charged with the offence or officially informed that he might be prosecuted for it, and evidence of the assertion is given in the proceedings,
 - (c) the assertion is made by a witness called by the defendant,
 - (d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or
 - (e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.
- 9.48 In relation to attacks on another person’s character, the prosecution can offer evidence of the defendant’s bad character if:⁶²
- (a) [the defendant] adduces evidence attacking the other person’s character,

⁵⁹ Criminal Justice Act 2003 (UK), s 101(1)(f)–(g).

⁶⁰ Criminal Justice Act 2003 (UK), s 105(1)(a).

⁶¹ Criminal Justice Act 2003 (UK), s 105(2).

⁶² Criminal Justice Act 2003 (UK), s 106(1). Paragraph (a) is interpreted to cover evidence given by any witness called by the defendant and, presumably, evidence given by the defendant themselves: Ian Dennis *The Law of Evidence* (7th ed, Sweet & Maxwell, London, 2020) at [19–042].

(b) [the defendant] (or any legal representative appointed ... to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or

(c) evidence is given of an imputation about the other person made by the defendant—

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it.

9.49 We seek submissions on whether the Act should be amended to extend the application of section 38(2) to better achieve the policy underpinning that section. We are particularly interested in views on whether section 38(2) should be extended to situations, whether or not the defendant gives evidence, where the defendant makes an assertion about their own veracity or attacks the veracity of the complainant or another person:

(a) in their interview with Police (or other prosecuting agency) in relation to the charge; or

(b) in the conduct of their defence, including in offering evidence from defence witnesses and in cross-examination of prosecution witnesses;

QUESTION

Q46

Should section 38(2) be amended to extend the circumstances in which the prosecution can offer evidence about a defendant's veracity? If so, should section 38(2) apply, whether or not the defendant gives evidence, when veracity is put in issue by:

- a. assertions made in the defendant's statement to Police (or other prosecuting agency); and/or
- b. the conduct of their defence?

THE USE OF THE TERM “VERACITY” IN OTHER PARTS OF THE ACT

9.50 The term “veracity” is used in other sections of the Act outside the veracity provisions, including in:

(a) the section 4(1) definition of a hostile witness, which refers to a witness who “exhibits, or appears to exhibit, a lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge”;

(b) the section 16(1) definition of “circumstances” for the purposes of the hearsay provisions, which includes “any circumstances that relate to the veracity of the person”; and

(c) section 35 on previous consistent statements, where section 35(2)(a) provides that a previous consistent statement is admissible if it “responds to a challenge that will be or has been made to the witness's veracity or accuracy, based on a previous

inconsistent statement of the witness or on a claim of invention on the part of the witness”.

- 9.51 Section 4(1) states that “unless the context otherwise requires”,⁶³ “veracity has the meaning given in section 37”.⁶⁴

What is the issue?

- 9.52 Preliminary feedback from stakeholders identified a concern that “veracity” as defined in section 37 and used in section 16(1) is concerned with evidence extraneous to the facts in issue (that is, the general disposition of the person to refrain from lying), while in the section 4 definition of hostile witness and section 35, it is the veracity or truthfulness, of a witness in the particular proceeding that is the more relevant consideration.
- 9.53 For example, if the section 37 definition of veracity was applied to the section 4(1) definition of hostile witness, it would mean that a witness could only be declared hostile if they appeared to exhibit a general disposition to lie, or to be *habitually* untruthful. It would not apply where a witness simply showed a lack of truthfulness in the specific proceeding. This is inconsistent with the Commission’s original policy intent⁶⁵ and is unlikely to have been the intention when the definition of veracity was amended in 2016.⁶⁶ Similarly, applying the section 37 definition to section 35(2)(a) would also represent an unintended narrowing of the provision by only allowing previous consistent statement evidence to be offered in response to a challenge involving an allegation of lying generally.⁶⁷

Is legislative reform necessary or desirable?

- 9.54 It appears to be generally accepted that veracity can have different meanings across different provisions of the Act. In its Second Review the Commission declined to revisit this issue, on the basis that as a matter of statutory interpretation the wording of section 4 permitted the adoption of different meanings of veracity and no practical problems had been identified with this approach.⁶⁸
- 9.55 A review of cases and commentary since the Second Review has not identified any examples where the use of the word veracity in sections 4 and 35 is causing significant problems in practice. Discussion in the case law has largely focused on the use of

⁶³ Evidence Act 2006, s 4(1).

⁶⁴ Evidence Act 2006, s 4(1) (definition of “veracity”).

⁶⁵ The definition of “hostile” in the Commission’s proposed Evidence Code referred to a person who “exhibits, or appears to exhibit, a lack of truthfulness when giving evidence”, and “truthfulness” was defined as being “concerned with a person’s intention to tell the truth...”: Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 24.

⁶⁶ See Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV4.21.02(1)] and Simon France (eds) *Adams on Criminal Law – Evidence* (online loose leaf ed, Thomson Reuters) at [EA94.01].

⁶⁷ See Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington 2018) at [EV35.04(4)(a)] and Simon France (eds) *Adams on Criminal Law – Evidence* (online loose leaf ed, Thomson Reuters) at [EA35.11].

⁶⁸ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [14.44].

“veracity” in section 35, and it has generally been acknowledged that “veracity” is to be understood differently in that context.⁶⁹

- 9.56 In the absence of practical difficulties, the question of whether the Act should be amended becomes one of whether it is desirable to amend the Act to make explicit the different meanings attached to “veracity” instead of having to rely on case law. This could help to improve the clarity and accessibility of the law.⁷⁰
- 9.57 If reform is considered desirable, the Act could be amended to only use the term “veracity” in relation to the veracity rules in section 37.⁷¹ References to “veracity” in the section 4 definition of “hostile witness” and section 35 could be changed to refer instead to “honesty” or “truthfulness”. As noted above, the Commission’s proposed Evidence Code used the term “truthfulness”, but this was changed to “veracity” at select committee stage. Changing the language in sections 4 and 35 would have the advantage of very clearly distinguishing section 37, making it clear that the former sections rely on a different approach from “veracity” as understood in the veracity provisions. The drawback of such an approach is that it may open up further definitional issues by introducing new terms into the Act, including those which were explicitly rejected in its development.

QUESTION

Q47

Is the different approach to veracity taken in sections outside of the veracity rules causing problems in practice? If so, should the Act be amended to clarify the different meaning of “veracity” in relation to the definition of hostile witness in section 4(1) and the rules governing previous consistent statements in section 35(2)(a)?

⁶⁹ See, for example, *Body v R* [2019] NZCA 378 at n 4, where the Court of Appeal held that the cross-examination of the complainant concerning the contents of a letter of retraction was a challenge to her veracity for the purposes of s 35(2), explaining in a footnote: “As that phrase is understood in the context of s 35”.

⁷⁰ As per one of the stated purposes of the Evidence Act 2006 “enhancing access to the law of evidence” under s 6(f).

⁷¹ This would include retaining the reference to “veracity” under the definition of veracity under s 4(1) of the Evidence Act 2006, which refers to the veracity having “the meaning given in section 37”. The term “veracity” would also remain in the s 16 guidance on the interpretation of the hearsay rules.

CHAPTER 10

Propensity evidence

INTRODUCTION

In this chapter, we consider section 43 (propensity evidence offered by the prosecution about defendants) and seek feedback on issues relating to:

- the general operation of section 43(1);
- prior acquittal evidence;
- the unusualness factor in section 43(3); and
- the relevance of reliability.

BACKGROUND

10.1 Propensity evidence is defined as evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind.¹ As te Kōti Mana Nui | Supreme Court has observed, the rationale for admitting propensity evidence rests largely on the concepts of linkage and coincidence: the greater the linkage or coincidence provided by the propensity evidence, the greater the probative value that evidence is likely to have.² This is often referred to as “propensity reasoning”.

10.2 Section 43 of the Evidence Act 2006 controls the admissibility of propensity evidence offered by the prosecution about defendants. It provides that:

43 Propensity evidence offered by prosecution about defendants

(1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.

(2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.

¹ Evidence Act 2006, s 40(1)(a).

² *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [3] per Tipping J for the majority and at [51] and [81] per William Young J for the minority; affirmed in *Taniwha v R* [2016] NZSC 123 at [62].

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

THE GENERAL OPERATION OF SECTION 43(1)

10.3 Section 43 is one of the most frequently litigated provisions in the Act.³ This highlights not only the significance of propensity evidence to both the prosecution and the defence,⁴ but also the intensely fact-specific nature of the section 43(1) test.

What is the issue?

- 10.4 Preliminary feedback identified concern among some defence lawyers that the section 43(1) test, as applied by the courts, may:
- (a) set the threshold for admitting propensity evidence too low, resulting in propensity evidence about the defendant being admitted too readily; and
 - (b) prevent the development of precedent, resulting in unpredictable and inconsistent admissibility decisions under section 43.

³ As at 14 October 2022, a Lexis Advance search for cases citing s 43 of the Evidence Act 2006 returned 969 results. Most s 43 cases deal with the appropriate application of the s 43(1) test: Scott Optican “Evidence” [2019] 4 NZ L Rev 565 at 577.

⁴ Decisions on the admissibility of propensity evidence are usually highly significant in how a trial is conducted: Ian Murray and Anne Stevens KC *Criminal Law: Evidence Act Update* (paper presented to the New Zealand Law Society Criminal Law: Evidence Act Update Webinar, March 2022) at 7.

- 10.5 While these appear to be views shared by some commentators,⁵ they are not universally held. It is generally accepted that section 43 provides for a wider range of propensity evidence to be admitted than was possible under the common law similar fact evidence rule,⁶ and that the section 43(1) test is an intensely fact-specific exercise. There are mixed views, however, on whether this is of itself problematic, and whether further elaboration of the legislative test would be helpful.

How do the courts approach the section 43(1) test?

- 10.6 Early cases under the Act questioned how the section 43(1) test should be applied.⁷ In *Vuletich v R*, Baragwanath J observed that the Act provides no guidance on how a judge is to perform the weighing-up process required by section 43.⁸ He suggested there was a need to identify a clear standard or “objective measure”, without which a ruling “will depend on the fortuity of whoever among our many trial judges happens to be called upon to make it”.⁹ Baragwanath J’s tentative proposal was for a sliding scale approach, whereby the greater the risk of improper prejudice, the more compelling the probative value needed to be, and the stronger the prosecution’s case in respect of the issue, the higher the prospect of securing admission of the evidence.¹⁰ The need for a standard in applying the section 43(1) test was, however, rejected by the majority in *Vuletich* as being inconsistent with earlier case law and adding an unwarranted gloss to the statutory language.¹¹
- 10.7 The leading case on the operation of section 43 is the Supreme Court’s split decision in *Mahomed v R*.¹² That case has been criticised for failing to provide any further guidance on the operation of the section 43(1) test.¹³ The authors of *Mahoney on Evidence* observe that “[w]e are still left with the unpredictability over admissibility that was a feature of evidence law before the Act”.¹⁴ Richard Mahoney writing separately said that “[t]here can

⁵ For example, Bernard Robertson has suggested that it seems to be becoming routine in trials for sexual offending for the prosecution to offer evidence of other sexual offending, charged or uncharged: Bernard Robertson “Evidence” [2018] NZLJ 314 at 316. Richard Mahoney wrote in 2011 that “what has become clear is that a substantial sector of our judiciary no longer holds the same concern for the prejudicial effect of propensity evidence that was formerly deeply ingrained in our law ... the change we are living through seems to be inexorably heading in one direction only”: Richard Mahoney “Evidence” [2011] NZ L Rev 547 at 552.

⁶ See for example, Bernard Robertson “Evidence” [2018] NZLJ 314 at 316; Matthew Downs “A Commentary on the Presentation by Justice Virginia Bell AC: Propensity Evidence under the Evidence Act 2006” (paper presented at the Legal Research Foundation Conference – The Evidence Act 2006 10 Years On, Auckland, September 2016) at [41]; and Richard Mahoney “Evidence” [2010] NZ L Rev 433 at 434.

⁷ See, for example, *R v Stewart* [2008] NZCA 429, [2010] 1 NZLR 197 at [17]; *Vuletich v R* [2010] NZCA 102 at [52]; and *R v RM HC Napier CRI 2008-041-819*, 14 July 2008 at [67], where Priestley J observed that “The statutory prohibition on excluding propensity evidence if the risk of its unfairly prejudicial nature outweighs its probative value is clear. The route to that conclusion, however, is, as with similar fact cases, obscure”.

⁸ *Vuletich v R* [2010] NZCA 102 at [52].

⁹ *Vuletich v R* [2010] NZCA 102 at [61]–[62].

¹⁰ *Vuletich v R* [2010] NZCA 102 at [64]–[65].

¹¹ *Vuletich v R* [2010] NZCA 102 at [27] per Glazebrook J and [96] per Randerson J.

¹² *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

¹³ Scott Optican “The Supreme Court and the Law of Evidence” in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) 409 at 414–418. See also Richard Mahoney “Evidence” [2012] NZ L Rev 721 at 729.

¹⁴ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV43.04(2)].

be no clearer demonstration of the inevitability of continuing litigation involving propensity evidence than the point of contention which led to the 3:2 split in the Supreme Court in *Mahomed*".¹⁵

- 10.8 More recent appellate decisions have not raised the same concerns as earlier cases. This indicates that the courts are now reasonably comfortable with applying the section 43(1) test in the absence of any standard or more precise guidance. Te Kōti Pīra | Court of Appeal in *Grigg v R*, for example, considered that the propensity provisions "are comprehensive and admirably clear and concise".¹⁶ There the Court observed that, if a court applies the provisions to the case with which it is dealing, there should seldom be a need to refer to another case. The Court explained that the reason other cases are unlikely to assist is that the outcome in each case turns on the weight to be given to the matters set out in sections 43(3) and (4) of the Act.¹⁷ In a more recent decision, the Court of Appeal, citing *Grigg*, suggested that judges should avoid pointless attempts to reconcile one propensity ruling with another.¹⁸
- 10.9 This underpins a central difficulty with attempting to analyse the operation of section 43 through case comparisons. If each case turns on its own facts, and attempts at reconciling decisions in different cases are unhelpful, there is little utility in attempting to seek guidance from appellate case law. The assumption seems to be that the intensely fact-specific assessment does result in divergent outcomes¹⁹ but that this is the nature of the test and not necessarily problematic. As Te Aka Matua o te Ture | Law Commission explained in 2008:²⁰

Assessment of probative value, prejudice, and the ultimate weighing process to determine unfairness, in the end involve value judgements based on judicial knowledge and experience. There will not be absolute uniformity. Nevertheless, unless all previous convictions were to be admissible, that is unavoidable: any precise formula that did not involve the exercise of judgment would produce undue rigidity and therefore injustice.

Is section 43(1) operating as intended?

- 10.10 It is possible that the current approach under section 43 does not reflect the original policy objectives of the section. Section 43 is based on the Commission's Evidence Code. In its 1997 Preliminary Paper, the Commission explained that it was seeking to codify the law relating to similar fact evidence so that the defendant's propensity to behave in the

¹⁵ Richard Mahoney "Evidence" [2011] NZ L Rev 547 at 549.

¹⁶ *Grigg v R* [2015] NZCA 27 at [17].

¹⁷ *Grigg v R* [2015] NZCA 27 at [17].

¹⁸ This case is subject to publication restrictions until final disposition of trial.

¹⁹ The authors of *Cross on Evidence* observe that "admissibility determinations of propensity evidence are intensely fact-specific, as divergent outcomes in relation to photographs of young children as legitimate propensity evidence reveal": Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA43.3], referring to *SC v R* [2015] NZCA 195 and *B (CA313/2010) v R* [2010] NZCA 326, (2010) 25 CRNZ 6. Commentators have sometimes noted how similar cases have resulted in different outcomes. See, for example, Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020). McDonald noted some inconsistencies in the application of s 43 in the cases analysed (at 231) but did not make any reform recommendations given that the jurisprudence under s 43 is still developing and the number of cases analysed was small (at 243). See also Scott Optican "Evidence" [2015] NZ L Rev 473 at 482-486, describing case outcomes under the s 43 test as "highly idiosyncratic".

²⁰ Te Aka Matua o te Ture | Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [35].

manner of the offence charged should *in general be prohibited*, except if its probative value in relation to an issue in dispute *sufficiently outweighs* the danger that it may have a prejudicial effect on the defendant.²¹ The intention was that the admission of propensity evidence under the Evidence Code would be “strictly limited”.²²

- 10.11 Accordingly, the Commission’s original draft provision, published for consultation in its 1997 Preliminary Paper, required that probative value “substantially outweigh” prejudicial effect.²³ This wording was changed to “clearly outweighs” in the Commission’s Evidence Code.²⁴ That wording, the Commission explained, “in largely codifying the common law, recognises the prejudicial nature of propensity evidence for defendants in criminal proceedings by providing added protection”.²⁵ The Commission did not use the language of “clearly outweighs” for what became section 8 of the Act (general exclusion). That section provides that evidence must be excluded if “its probative value is outweighed by” the risk that the evidence will have an unfairly prejudicial effect on the proceeding.²⁶ This may suggest that some higher standard for propensity evidence was originally intended.
- 10.12 The word “clearly” in the Commission’s proposed Evidence Code provision was not included in the draft Evidence Bill. This was in response to a concern raised by the Solicitor-General that requiring that probative value “clearly outweighs” prejudicial effect would change the approach (that is, make it harder to admit propensity evidence than under the common law) rather than codify it.²⁷ This indicates that section 43 was not intended to result in a lower threshold for admitting propensity evidence than existed at common law.
- 10.13 Richard Mahoney has observed that there was nothing obvious in the wording of the Act that justified any dramatic change from the position already reached by the common law.²⁸ If anything, Mahoney said, the Commission appeared to have thought section 43 strengthened the position of defendants to resist negative propensity evidence from the prosecution (by providing *added protection*).²⁹
- 10.14 Despite this, the passing of the Act and the subsequent interpretation of section 43³⁰ has resulted in a “sea change” in the way that propensity evidence about a defendant is assessed. As the Commission explained in 2008, under the Act an assessment of propensity evidence:³¹

²¹ Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at 9–10 and [249].

²² Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [291].

²³ Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at 134.

²⁴ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 120 (emphasis added).

²⁵ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C201].

²⁶ Evidence Act 2006, s 8(1)(a). This language largely reflected the Commission’s proposed wording: Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 32.

²⁷ Cabinet Minute “Evidence Bill: Overview Paper” (8 October 2003) at 4.

²⁸ Richard Mahoney “Evidence” [2010] NZ L Rev 433 at 435.

²⁹ Richard Mahoney “Evidence” [2010] NZ L Rev 433 at 435.

³⁰ See, for example, *R v Healy* [2007] NZCA 451 at [46].

³¹ Te Aka Matua o te Ture | Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [3.71].

... no longer starts from a proposition that “mere propensity is not enough: there must be the additional features of some sort affording real probative value” (or some other permutation of the added probative value approach). It starts without common law similar fact baggage. It provides a new, and this time positive, starting point: propensity, per se, even “mere”, is enough, provided it can pass through a probative value/prejudicial effect control. The non-prescriptive factors in section 43(3) bearing on the question whether the propensity concerned can so pass through that control, familiar in similar fact cases, now apply to the propensity evidence presumed from the outset to be “in”, and not on top of propensity evidence presumed from the outset to be “out”. It no longer need be said propensity evidence needs additional probative features beyond mere propensity. The “mere” propensity can suffice provided it has sufficient probative force, after consideration of the necessary factors, to outweigh prejudice.

Is the wording of section 43(1) preventing the development of precedent?

- 10.15 The second concern we identified is that the absence of any standard in section 43 itself or in case law may be stifling the development of a body of precedent, which could then be applied to future cases to develop a more consistent and predictable approach under section 43. In *R v Healy*, an early case considering the newly enacted Act, the Court of Appeal observed that “[w]here the balance will ultimately lie in terms of section 43 is a matter that will be developed over time”.³² However, the Court’s subsequent rejection of a standard in applying the section 43(1) test in *Vuletich* and later statements in *Grigg*, discussed above, suggest that the inherently fact-specific assessment required by section 43 is not amenable to such developments. Associate Professor Scott Optican, rejecting the “state of jurisprudential resignation” described in *Grigg*, has argued that:³³

... fundamental common law methodology - together with basic tenets of jurisprudential constancy - demands some judicial effort at ensuring consistent application of the s 43 balancing test. Indeed, the whole point of judgments giving statements of principle as to how s 43 should be approached is to create precisely that kind of regularity. Accordingly, while every prosecution application to adduce propensity evidence about a criminal defendant will depend on specific application of s 43 itself, judges should still examine precedents to see how elaborated principles of adjudication have played themselves out in the facts and circumstances of decided case law.

- 10.16 On this issue too, there are different views. For example, the authors of *Cross on Evidence* state:³⁴

The Act provides no guidance on how the weighing-up process is to occur, but doubt attaches to whether it could. The assessment of probative value as against unfairly prejudicial effect is a task familiar to courts and one, it is respectfully suggested, best left to them. Unsurprisingly then, a ‘sliding scale’ approach to s 43 has been rejected. This means it is not correct to regard “powerfully probative” evidence as presumptively admissible unless s 43(4) would make that course unfair.

³² *R v Healy* [2007] NZCA 451 at [52].

³³ Scott Optican “Evidence” [2015] NZ L Rev 473 at 485–486. See also discussion in Richard Mahoney “Evidence” [2010] NZ L Rev 433 at 442 where he observed “I find nothing in s 43(1) to help me understand just when probative value outweighs prejudicial effect. Does “very strong” probative value outweigh “very serious” prejudicial effect? Perhaps “fairly strong” probative value outweighs “quite high” prejudicial effect. Who can tell? We will never progress in our treatment of evidence about a defendant’s propensities until our appellate courts grasp the nettle and articulate what the weighing up process really involves”.

³⁴ Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA43.15].

Is legislative reform necessary or desirable?

- 10.17 The policy concern that section 43 sought to address was the need to balance the competing interests of ensuring a fact-finder has all the relevant evidence before them, and guarding against the risk that the fact-finder might make unwarranted and dangerous assumptions about the defendant along the lines of “once a thief, always a thief”.³⁵
- 10.18 It is ultimately a policy question as to whether the issues identified above warrant legislative reform. It depends on whether section 43 is striking the right balance between the competing interests discussed above. We do not express any preliminary views on these issues or on whether reform is necessary or desirable, and we welcome submissions on these matters.
- 10.19 Should reform be desirable, consideration will need to be given to the impact of any reform on evidence that falls within the definition of propensity evidence, but is offered for a purpose other than propensity reasoning. This includes evidence frequently referred to as “background”, “relationship” or “narrative” evidence. Such evidence is still subject to section 43, even if it is not offered to support propensity reasoning.³⁶ This does not appear to create any significant problems in practice,³⁷ which is due in part to the fact that the courts do not rigidly apply the section 43(3) factors to propensity evidence offered for a non-propensity purpose,³⁸ and that there is “little or no practical difference” between the two balancing tests in sections 8 and 43.³⁹
- 10.20 If, however, section 43 were amended to introduce a heightened test for admission of propensity evidence, it may be necessary or desirable to explicitly address the application of that test to propensity evidence offered for a non-propensity purpose. On one view, section 43 is designed to address the risks inherent in propensity reasoning, and arguably those risks do not arise to the same extent when propensity reasoning is not engaged or if the evidence is directly relevant to the relationship between the defendant and the complainant.⁴⁰ On the other hand, given that section 43 is intended to protect a defendant’s fair trial rights, it may be appropriate to retain a broad application for the propensity provisions, regardless of whether the threshold should change.

Options for reform

- 10.21 Should reform be considered necessary or desirable, we have identified two possible options. Both options are based on comparable provisions in Australia and seek to raise

³⁵ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [167] and [169].

³⁶ *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [60]–[61] per William Young J for the minority. While the minority’s express comments on this matter are often cited, as Bernard Robertson notes, in fact the whole Court treated the evidence as falling within the definition in s 40(1) despite it being what is described as “relationship” propensity evidence: Bernard Robertson “Evidence” [2020] NZLJ 16 at 20.

³⁷ For example, Elisabeth McDonald notes that the current approach does not prevent evidence of other relevant behaviour by the defendant towards the complainant from being admitted as relationship propensity evidence in family violence cases even if that propensity evidence is different to the index offending: Elisabeth McDonald *Prosecuting Intimate Partner Rape* (Canterbury University Press, Christchurch, 2023) at 229.

³⁸ See Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA40.02(1)].

³⁹ *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [66]–[67] per William Young J. See also [5] per Tipping J.

⁴⁰ See, for example, *P (CA354/17) v R* [2018] NZCA 361 at [34], citing *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [90].

the threshold for the admission of propensity evidence and, in doing so, facilitate the development of appropriate precedent under section 43.

Option 1: Amend section 43(1) to require probative value to “substantially” outweigh the risk of unfair prejudice

- 10.22 This option more closely reflects the Commission’s original draft provision.⁴¹ We have suggested “substantially” over “clearly” given the former is already used in other provisions of the Act and is consistent with the language adopted in Australia.
- 10.23 In some Australian jurisdictions, propensity evidence (referred to as “tendency” and “coincidence” evidence) cannot be used against the defendant “unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant”.⁴² This is regarded as a more stringent test than simply requiring probative value to outweigh prejudicial effect, skewing the test towards exclusion of propensity evidence.⁴³ We note that some Australian jurisdictions have recently departed from this threshold in response to concerns raised by the Australian Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission found that tendency and coincidence evidence in child sexual offending cases was being excluded too readily.⁴⁴ In order to facilitate greater admissibility of propensity evidence in criminal proceedings involving child sexual offending, some states have replaced the phrase “substantially outweighs” with “outweighs”.⁴⁵
- 10.24 The Australian experience highlights the risks inherent in adopting a higher threshold for propensity evidence. These risks would need to be carefully considered before recommending any reform measures. We note, however, that New Zealand courts have not encountered the same difficulties as in Australia in relation to the admission of propensity evidence in cases involving sexual offending against children and young people. Instead, as we explore below, it is now generally accepted that such offending is inherently unusual, which supports the admission of such evidence under section 43(3)(f). Adopting a higher threshold for assessing probative value and unfair prejudice may, therefore, be unlikely to create the same problems that have been observed in Australia.

Option 2: Require the propensity evidence to have “significant” probative value

- 10.25 This is a variation on the sliding scale approach suggested in early section 43 cases and would require, in all cases, the court to be satisfied that the proposed propensity evidence has “significant probative value”.
- 10.26 Like Option 1, this language arguably more closely reflects the original policy objective of the propensity provisions. The Commission explained in its 1997 Preliminary Paper its

⁴¹ Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at 134.

⁴² Evidence Act 1995 (Cth), s 101(2). This requirement is based on the Uniform Evidence Law and has also been adopted in Victoria: Evidence Act 2008 (VIC), s 101(2).

⁴³ Law Reform Commission of Western Australia *Admissibility of propensity and relationship evidence in WA* (Report 112, 2022) at 17.

⁴⁴ Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* (August 2017) at VI.

⁴⁵ Evidence Act 2011 (ACT), s 101(2); Evidence Act 1995 (NSW), s 101(2); Evidence (National Uniform Legislation) Act 2011 (NT), s 101(2); Evidence Act 2001 (TAS), s 101(2). Also see recommendations in Law Reform Commission of Western Australia *Admissibility of propensity and relationship evidence in WA* (Report 112, 2022).

expectation that the courts should continue to approach evidence of character with considerable caution, admitting only such evidence that is likely to be substantially probative or helpful and upon which they can rely.⁴⁶

- 10.27 This option is consistent with current approaches in Australia.⁴⁷ There, the requirement is that tendency or coincidence evidence has “significant probative value” (in addition to the requirement in some Australian jurisdictions that the tendency or coincidence evidence substantially outweighs any prejudicial effect). The requirement for “significant probative value” directs attention to the extent to which the evidence can “rationally affect the assessment of the probability of the existence of a fact in issue”.⁴⁸ The Australian High Court has held that, in the context of tendency evidence, this is a two-stage process. First, the evidence, by itself or together with other evidence, must strongly support proof of a tendency. Second, the tendency strongly supports the proof of a fact that makes up the offence charged (that is, a fact in issue).⁴⁹

QUESTION

Q48

Is the current threshold for admitting propensity evidence about the defendant under section 43(1) causing problems in practice? If so, should section 43(1) be amended to:

- a. require probative value to “substantially” outweigh the risk of unfair prejudice; and/or
- b. require the propensity evidence to have “significant” probative value?

PRIOR ACQUITTAL EVIDENCE

- 10.28 The Act does not specifically address the status of evidence that has previously been led at a trial against the defendant and resulted in an acquittal (prior acquittal evidence). In *Fenemor v R*, the Supreme Court confirmed that the Act treats prior acquittal evidence the same as other propensity evidence about a defendant.⁵⁰ The Court held, however, that when assessing the prejudicial effect of prior acquittal evidence on the defendant, the judge must consider whether the fact that the propensity evidence is prior acquittal evidence gives rise to any, or any additional, unfair prejudice. To the extent that it does,

⁴⁶ Te Aka Matua o te Ture | Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [8].

⁴⁷ Evidence Act 1995 (Cth), ss 97(1)(b) and 98(1)(b). This has also been adopted in New South Wales, Victoria, Australian Capital Territory and Northern Territory: Evidence Act 1995 (NSW), ss 97(1)(b) and 98(1)(b); Evidence Act 2008 (VIC), ss 97(1)(b) and 98(1)(b); Evidence Act 2011 (ACT), ss 97(1)(b) and 98(1)(b); Evidence (National Uniform Legislation) Act 2011 (NT), ss 97(1) and 98(1)(b). See discussion in Stephen Odgers *Uniform Evidence Law* (17th ed, Thomson Reuters, Pyrmont, 2022) at [EA.97.120] and [EA.98.120]. Some jurisdictions have introduced a presumption that certain tendency evidence has significant probative value in proceedings involving child sexual offending in response to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice* (August 2017): see Stephen Odgers *Uniform Evidence Law* (17th ed, Thomson Reuters, Pyrmont, 2022) at [EA.97A.30] and [EA.98.200].

⁴⁸ *Hughes v The Queen* [2017] HCA 20 at [16].

⁴⁹ *Hughes v The Queen* [2017] HCA 20 at [41].

⁵⁰ *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [4].

the judge should consider how this additional dimension affects the overall balance between probative value and unfair prejudice.⁵¹ The Court explained:⁵²

In carrying out that evaluation, the focus will be on whether it is unfair to expect the defendant to respond again to the evidence in question in light of the fact that it was not regarded as sufficient to result in a conviction on the earlier occasion.

- 10.29 The Court drew a distinction between *any* prejudice and *unfair* prejudice, noting that there will always be some prejudice to a defendant in having to address the same allegations a second time.⁵³ There must therefore be something about the circumstances of, or leading to, the acquittal that gives rise to prejudice that is unfair.⁵⁴ The Court did not seek to elaborate in the abstract on when it would be unfair to a defendant to admit prior acquittal evidence, observing that case law would likely provide further guidance over time.⁵⁵

What is the issue?

- 10.30 Appellate case law since the Supreme Court's decision in *Fenemor* appears to indicate that only in the rarest of cases will the acquittal dimension have a meaningful impact on the assessment of the prejudicial effect under section 43. This has led to calls for further guidance as to when and under what circumstances acquittal evidence should be excluded under section 43.⁵⁶
- 10.31 In the years immediately following *Fenemor*, several Court of Appeal decisions ruled prior acquittal evidence inadmissible given the unfair prejudice posed by the acquittal dimension.⁵⁷ These cases suggested that relevant factors included the passage of time and the completeness of the records from the previous investigation and trial, as this impacted on the defendant's ability to respond to the prior acquittal evidence at the present trial.⁵⁸ Other relevant factors included the risk of overwhelming the trial with the prior acquittal evidence and the consequential impact that this could have on jury decision-making.⁵⁹

⁵¹ *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [8].

⁵² *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [9].

⁵³ *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [10].

⁵⁴ *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [10].

⁵⁵ *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [12].

⁵⁶ Scott Optican "Evidence" [2019] NZ L Rev 565 at 582.

⁵⁷ *Mead v R* [2013] NZCA 59; *RPG v R* [2015] NZCA 275; and *Saumanaia v R* [2017] NZCA 224.

⁵⁸ In *Mead v R* [2013] NZCA 59, the prior acquittal evidence related to a 1990 acquittal for rape. Neither the court file nor the police file was available, only a statement made by the complainant in relation to the incident in 2012. A risk of unfair prejudice was said to arise from the non-availability of earlier evidence for the purposes of cross-examination in the present trial (at [19]).

⁵⁹ In *RPG v R* [2015] NZCA 275, the prior acquittal evidence related to more serious offending than the present charges and had already been the subject of three earlier trials. While the propensity evidence was highly probative, it created a risk that it would overwhelm the present trial given that all the evidence from the earlier trials would need to be offered, and that it would be difficult for the jury not to give that disproportionate weight in their assessment of the present charges (at [25]).

- 10.32 More recent cases, however, appear to take a different approach to assessing prior acquittal evidence.⁶⁰ These cases suggest that it will be rare for prior acquittal evidence that is otherwise admissible under section 43 to be excluded for reasons connected to the acquittal dimension.
- 10.33 In *Brooks v R*, the acquittal evidence related to a trial 23 years earlier.⁶¹ Most of the records were lost – all that remained was the complainant’s original statement to police and a police statement from another witness in the form of recent complaint evidence. It was argued that the combination of the lapse of time and absence of files rendered the evidence unfairly prejudicial. The Court of Appeal was split, with the majority ruling in favour of admission.
- 10.34 The majority observed that consideration of the acquittal dimension “extends to the reasons for the acquittal, the nature of the evidence and any circumstances making it unfair to respond again to the evidence”.⁶² The majority stated that “the unavailability of the prior record may lead to unfair prejudice, but it is not sufficient in itself”.⁶³ To support this view, the majority noted that the jury’s reasons for acquitting the defendant will frequently not be discernible from the record.⁶⁴ Further, while an inference might be drawn from an acquittal that the jury did not find the complainant’s account sufficiently persuasive to prove the charge beyond reasonable doubt, that inference is not sufficient in itself since it is merely the opinion of the previous jury.⁶⁵ Ultimately, the majority considered that:⁶⁶
- ... a defendant seeking to exclude prior acquittal evidence must point to something more than the absence of a record. The court will not assume that the missing record must have been advantageous for the defendant at the new trial. To the extent that *Mead* held otherwise, we respectfully disagree.
- 10.35 The minority (Peters J) would have ruled the acquittal evidence inadmissible on the basis of the delay and its adverse effects on the accuracy of memory, including on the defendant who could not recall details of the earlier trial, as well as the fact that almost all relevant contemporaneous information was unavailable.⁶⁷ This meant that defence counsel could not mount an effective response to the evidence, which would put the defence at a distinct disadvantage.⁶⁸ The suggestion that it was “speculative” to suggest the missing material would have benefited the defendant did not, in the Judge’s view, withstand scrutiny.⁶⁹

⁶⁰ In addition to *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161 discussed below, we are also aware of several other Court of Appeal and Supreme Court cases that are subject to publication restrictions pending final disposition at trial.

⁶¹ *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161.

⁶² *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161 at [28], citing *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [10].

⁶³ *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161 at [35].

⁶⁴ *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161 at [35(a)].

⁶⁵ *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161 at [35(b)].

⁶⁶ *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161 at [35(c)].

⁶⁷ *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161 at [58] and [75].

⁶⁸ *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161 at [60].

⁶⁹ *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161 at [62]–[63].

Is legislative reform necessary or desirable?

- 10.36 We are interested in views on whether there are concerns about how prior acquittal evidence is assessed under section 43 and, if so, whether section 43 should be amended to include specific guidance on assessing the prejudicial effect of prior acquittal evidence. *Brooks* appears to suggest that prior acquittal evidence may be admitted even in situations where there is a significant lapse in time between the events that resulted in the acquittal and the present case and even where much of the record of that earlier investigation and trial are lost. Something more is required.⁷⁰
- 10.37 Optican is critical of the current approach and of the majority's decision in *Brooks* in particular, arguing that it establishes "an onerous and overly granular standard of unfair prejudice that, in most cases, the defence will struggle to meet and judges (who are so inclined) will readily find unsatisfied".⁷¹ The Supreme Court declined leave to appeal the decision in *Brooks*, considering that the application "attempts to reargue the application of settled law to the facts of this case".⁷²

Option for reform

- 10.38 Should reform be considered necessary or desirable, section 43 could be amended to require the judge, when assessing the prejudicial effect of prior acquittal evidence, to consider certain factors. For example, the Act could require a judge to consider whether the defendant is able to fairly respond to the allegations in the present proceedings, having regard to the lapse of time since the earlier investigation and the present trial, the material available in relation to them and any other relevant matter.⁷³
- 10.39 The purpose of such an amendment would be to elevate the significance of these matters in the court's assessment of unfair prejudice. This could better recognise the unfairness that arises in situations where, when a full hearing of the evidence has previously resulted in an acquittal, defence counsel is unable to rely on that same material to respond to the prior acquittal evidence. Where the relevant records from a trial many years ago are largely absent, it should be open to the court to find that the unfair prejudice outweighs the probative value of the evidence without requiring the defence to point to a specific piece of information in the absent records that had some material bearing on the acquittal. This may, however, not go far enough, and we welcome views on this.

⁷⁰ An example of where the acquittal dimension has been found to result in unfair prejudice under the current approach is *R v F* [2022] NZHC 2710. In that case, the prior acquittal evidence was excluded in circumstances where it related to allegations made over 10 years ago, the court file could not be located and it appeared that the defendant had called a witness at the trial who potentially gave alibi evidence, or at least evidence relevant to the acquittal, and that witness had since died (at [44]). The Court said that was "a good example of how unfair prejudice can arise in relation to a prior acquittal" (at [44]).

⁷¹ Scott Optican "Evidence" [2019] 4 NZ L Rev 565 at 582-583. Don Mathias suggests this case "is an indication of how difficult this evaluative judgement can be": Don Mathias "Probative value and prejudicial effect: when weighing is not balancing" (08 October 2019) Criminal Law Casebook – Developments in Leading Appellate Courts <www.donmathias.wordpress.com>.

⁷² *Brooks v R* [2019] NZSC 107 at [16].

⁷³ Another option, suggested by Scott Optican, is a presumption of unfair prejudice where there are significant gaps in, or the complete absence of, records connected with the earlier case: Scott Optican "Evidence" [2019] 4 NZ L Rev 565 at 582. Our suggested reform would elevate this matter to a mandatory consideration, which avoids altering the existing structure of s 43.

- 10.40 Further consideration would need to be given to what constitutes prior acquittal evidence for such an amendment and whether it should include, for example, charges that are withdrawn prior to trial and charges that are dismissed.

QUESTION

Q49

Is the approach to prior acquittal evidence under section 43 causing problems in practice? If so, should it be amended to provide guidance on the factors that should be considered when assessing the prejudicial effect of prior acquittal evidence?

THE UNUSUALNESS FACTOR IN SECTION 43(3)

- 10.41 Section 43(3) lists factors the judge may consider, among other matters, when assessing the probative value of propensity evidence. One factor, in section 43(3)(f), is the “unusualness factor”, that is:

the extent to which the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.

What is the issue?

- 10.42 There have long been questions about how “unusualness” should be assessed.⁷⁴ There is no guidance in the Act and there was little discussion of this factor in the Commission’s early work on reforming the law of evidence. As a result, different approaches to determining unusualness have emerged in the case law.
- 10.43 There appear to be three different approaches to assessing unusualness:⁷⁵
- (a) Some cases focus on whether the *type of offending* is unusual, compared to other types of offending.
 - (b) Some cases focus on the *characteristics of the offending* (that is, whether the characteristics that are common to both the propensity evidence and the alleged offending disclose something distinctive and different to the usual run of cases of that nature).
 - (c) Other cases focus on the *nature of the offending*, compared to normal standards of behaviour.
- 10.44 In its Second Review of the Act, the Commission considered whether the approach to assessing unusualness should be clarified. It noted criticisms with the approaches that focus on the type of offending and nature of offending but observed a trend in that the

⁷⁴ See, for example, discussion in Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thompson Reuters, Wellington, 2012) at 195–197 and *Preston v R* [2012] NZCA 542 at [52].

⁷⁵ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.29]. See also Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA43.14].

courts seemed to be focusing on the characteristics of the offending. In light of this, the Commission concluded it was unnecessary to amend section 43(3)(f).⁷⁶

- 10.45 Cases since the Second Review and preliminary feedback have, however, confirmed that there remain multiple approaches to assessing unusualness.⁷⁷ A series of cases, for example, has established that sexual offending against children is inherently unusual by focusing on the nature of the offending compared to normal standards of behaviour.⁷⁸ Other recent cases have also assessed unusualness by reference to the type or nature of the offending rather than by focusing on distinctive characteristics common to the propensity evidence and alleged offending. In *R v Ahlawat*, the Court of Appeal accepted a submission that arson “is itself conduct which is inherently unusual”.⁷⁹ In *Goel v R*, the defendants faced a number of charges relating to bribery and corruption of officials.⁸⁰ The Court of Appeal confirmed that the various charges were cross-admissible as propensity evidence, observing that “[t]he type of conduct alleged, (bribery and corruption of public officials) is unusual in New Zealand”.⁸¹
- 10.46 In contrast, other cases have focused on the unusualness of the common characteristics of the propensity evidence and the alleged offending.⁸² This approach appears to be used when the alleged propensity is specific rather than general in nature.

Is legislative reform necessary or desirable?

- 10.47 We seek submissions on whether the continued application of different ways to assess unusualness under section 43(3)(f) is a problem that warrants reform. On the one hand, having different approaches can result in uncertainty as to how the courts might approach this factor. However, the different approaches appear to be engaged in different situations. Where there is a general propensity, the courts will typically look at whether the nature or type of offending can be considered unusual compared to normal standards of behaviour or other types of offending. Where a specific propensity is alleged, the courts will consider whether the common characteristics in the propensity evidence and alleged offending are sufficiently distinctive or unusual.
- 10.48 Should reform be considered necessary or desirable to clarify the approach to unusualness, the question then becomes how the Act should be amended. Each approach can be criticised for different reasons. An approach that focuses on the type or nature of offending has been criticised because of its lack of focus on the circumstances of the offending and the risk that it may lead to findings that are not based on empirical

⁷⁶ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.33].

⁷⁷ Many cases we are aware of are subject to publication restrictions until final disposition at trial. Some of these cases are discussed in Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA43.07(5)].

⁷⁸ See, for example, *Rowell v R* [2020] NZCA 9 at [13]–[16]; *R v C* [2021] NZHC 1715 at [46]–[48]. See also *Armishaw v R* [2019] NZCA 456 at [36]; *Faaosofia v R* [2020] NZCA 405 at [32]; *R v Stevens* [2020] NZHC 760 at [31]–[36]; *T v R* [2022] NZHC 189 at [19]; *R v F* [2022] NZHC 1341 at [48]; and *Kennedy v R* [2022] NZHC 2977 at [27].

⁷⁹ *R v Ahlawat* [2021] NZCA 610 at [37].

⁸⁰ *Goel v R* [2022] NZCA 263.

⁸¹ *Goel v R* [2022] NZCA 263 at [63].

⁸² Cases we are aware of that apply this approach are subject to publication restrictions until final disposition of trial.

evidence.⁸³ However, an approach that focuses on the distinctiveness of the common characteristics is criticised as reverting to the stricter, common law similar fact rule.⁸⁴ The courts have observed on several occasions that the propensity rule “is not confined to a similar way of achieving a particular goal”.⁸⁵ Adopting this approach over all others would, however, constitute a significant change in practice. It may, therefore, be desirable to leave this matter to the courts to develop through case law in response to specific circumstances, rather than through legislative amendment.

- 10.49 Another reform option could be to simply repeal the unusualness factor altogether. This option may be appropriate if it is considered that the concerns identified with the approaches that focus on the type or nature of offending are insurmountable and would leave the distinctiveness of the common characteristics to be assessed under section 43(3)(c), which relates to the extent of the similarity between the propensity evidence and the facts in issue. This would, however, constitute a significant change in practice.

QUESTION

Q50

Is section 43(3)(f) causing problems in practice? If so, should it be:

- a. amended to clarify how unusualness should be assessed; or
- b. repealed altogether?

RELEVANCE OF RELIABILITY

What is the issue?

- 10.50 It is unclear whether a judge who is determining the admissibility of propensity evidence under section 43 should assess the reliability of that evidence.⁸⁶
- 10.51 Under the common law, the judge had to assume the truth of the propensity evidence where the allegations were denied by the defendant.⁸⁷ Section 43(3)(e) of the Act now permits judges to consider whether the allegations made by a propensity witness “may be the result of collusion or suggestibility”. The Court of Appeal has therefore treated the reliability of the propensity evidence as relevant to admissibility where collusion or suggestibility is in issue.⁸⁸

⁸³ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.30], citing concerns identified in Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 194-197.

⁸⁴ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.31].

⁸⁵ *R v Vernon* [2009] NZCA 551 at [23] and *R v Khan* [2010] NZCA 510 at [24].

⁸⁶ Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at EA43.07(1)(b); and Andrea Ewing “Disputed Propensity Evidence” [2013] NZ L Rev 35.

⁸⁷ *R v H* [1995] 2 AC 596 (HL), discussed in Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington) at EV43.04(7).

⁸⁸ *R (CA458/2015) v R* [2015] NZCA 457 at [4] and [22]–[23].

10.52 The Act is otherwise silent on the wider relevance of reliability to a judge's assessment under section 43. There has been no general acceptance in case law of the proposition that the judge must consider the reliability of the proposed propensity evidence.⁸⁹ To the contrary, the Court of Appeal has observed that:⁹⁰

The general rule ... is that challenges to the credibility and reliability of propensity witnesses are to be resolved at trial and that the Court should not usurp the jury's role at a pre-trial stage.

10.53 In *George v R*, the Court of Appeal explained the relevance of reliability to an assessment under section 43 as follows:⁹¹

There may be appropriate cases for hearing oral evidence on a contested propensity application. As a general rule the briefs of proposed evidence are accepted at face value, given the Court's pre-trial threshold or gate-keeping function which is not to be confused with the jury's ultimate inquiry into reliability or credibility. An example is when the evidence can be shown to be inherently improbable by reference to objectively provable facts. ... Otherwise challenges to the reliability or credibility of propensity witnesses, as with any other class of witness, are to be resolved at trial. The issue for determination before trial is solely one of the admissibility of the proposed propensity evidence to be measured according to the relevant statutory criteria.

The Supreme Court's decision in *W (SC 38/2019) v R*

10.54 The approach to reliability under section 43 established in the cases above is called into question indirectly by the Supreme Court's decision in *W (SC 38/2019) v R*.⁹² While that case considered the extent to which reliability may be considered under section 8 (general exclusion), the test in section 43 is very similar. Previously, the Supreme Court has observed that there is "little or no practical difference" between the section 43 and section 8 balancing tests.⁹³

10.55 In *W (SC 38/2019) v R*, the Court observed "it is clear from the statutory scheme that an evaluation of probative value may include considerations of reliability".⁹⁴ The Court went on to explain:⁹⁵

In undertaking the gatekeeping role, reliability may be considered in assessing the probative value of the evidence as part of weighing that value as against the risk of the unfairly prejudicial effect of the evidence. The reliability assessment should be made without adding any artificial limits such as a requirement to take the evidence at its highest. Matters such as inconsistencies, difficulties with the chain of evidence, the circumstances in which the evidence arises, inherent implausibility as well as incentives to lie can all be considered.

⁸⁹ See discussion in Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at EA43.07(1)(b) and cases cited therein.

⁹⁰ *Fraser v R* [2019] NZCA 662 at [27], citing *Lyons v R* [2015] NZCA 318 at [28]; and *W (CA290/2017) v R* [2017] NZCA 405 at [19].

⁹¹ *George v R* [2017] NZCA 318 at [26].

⁹² *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382.

⁹³ *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [66]–[67].

⁹⁴ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [48] per Ellen France J for the majority. At [191] Winkelmann CJ for the minority states "We agree with the reasons of the majority as to the extent to which reliability may be considered in determining issues of admissibility under s 8 of the Evidence Act".

⁹⁵ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [70] (citations omitted).

- 10.56 While *W (SC 38/2019) v R* concerned the reliability of prison informant evidence, the Supreme Court has since confirmed that, as a general point, a court may have regard to the evidence’s reliability when weighing the probative value of evidence for the purposes of section 8.⁹⁶
- 10.57 In the context of section 43, the Supreme Court’s comments were referred to and applied in *R v Wallace*, a te Kōti Matua | High Court decision that considered an application to admit propensity evidence, which was challenged on the basis that the evidence was not reliable or credible.⁹⁷ The Court explained that:⁹⁸

My assessment of the probative value of the evidence may include considerations of reliability, but that reliability assessment should be made without applying any artificial limits or presumptions, while having regard to the division between the roles of judge and jury and the fact that the assessment is being undertaken at a preliminary stage without the full context.

Is legislative reform necessary or desirable?

- 10.58 In light of the Supreme Court’s decision in *W (SC 38/2019) v R*, it would be inconsistent to continue to apply a higher bar to the consideration of reliability under section 43 compared to section 8. Applying the Supreme Court’s approach to section 43 would also be consistent with the Commission’s original recommendations in the Evidence Code.⁹⁹ It would address concerns previously identified by the authors of *Mahoney on Evidence*, who argue that:¹⁰⁰

... it is unreasonable to limit a judge’s enquiry to these topics [collusion and suggestibility] alone. After all, the overriding focus of s 43(3) is the assessment of probative value, and reliability is surely a central part of any such enquiry. Given that s 43(3)(e) has altered the common law by now requiring a judge to consider the truth of the allegations made by the propensity accusers, there does not appear to be any reason to restrict that enquiry to the possibility of collusion and suggestibility. Other factors, such as the veracity of the propensity accusers, should likewise be available for consideration. It is suggested that when propensity evidence consists of allegations which the defendant denies, the judge determining admissibility should make an overall assessment of the reliability of these allegations.

⁹⁶ See, for example, *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at n 60. See also the reference to *W (SC 38/2019) v R* in *R v Opetaiā* [2021] NZHC 99 at [82] and n 90, in support of the Court’s acceptance that the probative value of a hearsay statement under s 8 is affected by the circumstances going to its reliability.

⁹⁷ *R v Wallace* [2020] NZHC 2559 at [29]–[31]. On appeal the Court of Appeal upheld the High Court’s decision and agreed that the evidence was sufficiently reliable and that no unfairness arose from it being offered as propensity evidence: *Wallace v R* [2020] NZCA 678 at [25].

⁹⁸ *R v Wallace* [2020] NZHC 2559 at [34].

⁹⁹ The Evidence Code included a requirement, in relation to propensity evidence, that “there is sufficient evidence for a fact-finder acting reasonably to find that the defendant was the person involved”: Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 120. That requirement was not included in the Evidence Bill due to concerns that it would exclude too much propensity evidence rather than with the reliability assessment the wording would have imposed: Cabinet Paper “Evidence Bill: Changes to Policy Decisions and Approval for Introduction” (8 March 2005) at [9]–[12].

¹⁰⁰ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2012) at [43.04(7)(b)]. For an opposing view, see Andrea Ewing “Disputed Propensity Evidence” [2013] NZ L Rev 35. Ewing argued that disputed propensity evidence should be subject to a low minimum threshold of reliability rather than requiring reliability be assessed in every case as part of the judge’s assessment of the probative weight of the propensity evidence (at 39). However that article pre-dates the Supreme Court’s decision in *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382.

- 10.59 As noted above, we have identified one example of the Supreme Court's approach in *W (SC 38/2019) v R* being applied by the High Court in the context of section 43. This indicates that reform may not be necessary to ensure the courts take a consistent approach under sections 8 and 43. We are, however, aware of another Court of Appeal decision that took a different approach to the relevance of reliability under section 43 and was decided after these decisions.¹⁰¹ As a result, a degree of uncertainty may remain. Another factor that may support reform of the Act is that section 43(3) already exclusively refers to two specific aspects of reliability (collusion and suggestibility).
- 10.60 If amendment is considered necessary or desirable, one option would be to amend section 43(3)(e) to read: "the reliability of the allegations described in paragraph (d), including whether they may be the result of collusion or suggestibility".

QUESTION**Q51**

Should section 43(3)(e) be amended to clarify that, when assessing the probative value of propensity evidence, the judge may consider the reliability of the proposed propensity evidence?

¹⁰¹ This case is subject to publication restrictions until final disposition of trial.

CHAPTER 11

Identification evidence

INTRODUCTION

In this chapter, we consider and seek feedback on issues relating to the definition of visual identification evidence.

DEFINITION OF VISUAL IDENTIFICATION EVIDENCE

- 11.1 Section 4 of the Evidence Act 2006 defines “visual identification evidence” as an assertion 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”.¹
- 11.2 The Act contains special provisions for visual identification evidence. These provisions, based on Te Aka Matua o te Ture | Law Commission’s proposed Evidence Code, reflect scientific research that highlights reliability concerns with this type of evidence.²
- 11.3 Section 45 controls the admissibility of visual identification evidence. It requires a formal procedure to be followed in obtaining visual identification evidence of a person alleged to have committed an offence unless there was a good reason for not following a formal procedure, for example, because it could not have been reasonably anticipated that identification would be an issue at trial.³
- 11.4 Section 126 requires the trial judge to warn the jury of the special need for caution when 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”.⁴

What is the issue?

- 11.5 There is conflicting case law on whether the Act’s identification evidence provisions apply if a defendant admits to being present at the scene of an offence but denies being the

¹ Evidence Act 2006, s 4(1).

² Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [188].

³ Evidence Act 2006, s 45(4)(d).

⁴ Evidence Act 2006, s 126(1).

perpetrator. For example, the defendant might claim that they were mistakenly identified as the person seen holding the weapon or committing the assault.

- 11.6 In the first five years after the Act was passed, two conflicting approaches emerged in appellate case law. The source of this conflict is the definition of “visual identification evidence” in section 4, which is focused solely on identifications of a person who was at the scene, not identifications of a person who was committing an act.⁵ Uncertainty arose when the defendant admitted to being at the scene but not to committing the relevant act.
- 11.7 On one line of authority (the restrictive approach), the definition of visual identification evidence is not engaged if the defendant admits they were present at the scene of an offence but disputes their role in the offending.⁶ This approach makes a strict distinction between “visual identification evidence” (identifications of a person who was at the scene) and “observation evidence” (identifications of the actions of a person).⁷
- 11.8 Another line of authority favours a more inclusive approach.⁸ In *Peato v R*, the Kōti Pira | Court of Appeal gave the definition of “visual identification evidence” a purposive reading to include evidence identifying the defendant as the perpetrator of a crime, in circumstances where the reliability of the identification is at issue, notwithstanding an admission or other evidence placing the accused at or near the scene.⁹ It considered this to be consistent with the common law approach and the fact that the Commission’s intention when developing the Evidence Code had been to replicate or extend, rather than restrict, this approach.¹⁰
- 11.9 Later cases attempted to reconcile these two approaches, suggesting that, on both lines of authority, the question to be asked in each case is “whether identification was in issue, or whether it was merely the accused’s actions”.¹¹
- 11.10 The Commission considered the conflicting case law in its 2013 Review of the Act.¹² It considered the position under the case law was that observation evidence does not come within the definition of visual identification evidence (following the restrictive approach) but that a section 126 warning will be required for observation evidence if identification is still in issue.¹³ While it noted that some doubt had been cast on this interpretation of the

⁵ See, for example, discussion in *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [26]–[27]; *Pink v R* [2022] NZCA 306 at [49]; *Witehira v R* [2011] NZCA 658 at [46]–[47]; Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at EA4.44.01((1)(c)); and Nick Chisnall “Reducing the risk of misidentification: it starts with the Evidence Act 2006’s definition of “Visual Identification Evidence”” [2015] NZLJ 299.

⁶ *R v Turaki* [2009] NZCA 310 at [65]–[73] and [92]–[93], and *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [42]. These cases were written by the same panel of judges and published in the same month.

⁷ However, the Court of Appeal in *Turaki* and *Edmonds* went further than noting the difference between contested identification and contested conduct. Rather, they held that the scope of excluded observation evidence also included an offender’s alleged participation in a group attack once their presence is admitted: *R v Turaki* [2009] NZCA 310 at [93]; *R v Edmonds* [2009] NZCA 303 at [130]–[131].

⁸ *R v Uasi* [2009] NZCA 236, [2010] 1 NZLR 733; *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788.

⁹ *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [29]–[31].

¹⁰ *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [36]–[39].

¹¹ *E (CA113/2009) (NO 2) v R* [2010] NZCA 280 at [65]; *Witehira v R* [2011] NZCA 658 at [41]–[47].

¹² Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [8.23]–[8.40].

¹³ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [8.37].

section 4 definition by cases following the inclusive approach, it was not aware of any problems in practice and accordingly considered no legislative change was required.¹⁴

Ongoing issues

- 11.11 Despite attempts to reconcile the conflicting case law, problems have persisted.
- 11.12 In *R v Eruera*, the prosecution argued that, because the defendant had admitted their presence at the scene, the evidence of two eyewitnesses was not identification evidence but observation evidence and therefore section 45 was irrelevant.¹⁵ Te Kōti Matua | High Court considered the conflicting case law and preferred the inclusive approach. It reasoned that whether evidence is subject to section 45 should depend not on a strict classification process but rather on whether the concerns that are traditionally raised by identification evidence are present.¹⁶
- 11.13 In contrast, the Court of Appeal in *R v Howard* applied the restrictive approach.¹⁷ On the facts, however, the Court held that the evidence was visual identification evidence because the defendant disputed that he was present at the scene.¹⁸
- 11.14 In another case where the defendant had admitted to being at the scene, te Kōti-ā-Rohe | District Court applied the restrictive approach in determining that the prosecution could offer evidence that had not gone through a formal identification process from a witness who identified the defendant as a person involved in a group assault. This was on the basis that the evidence was observation evidence and not caught by the definition of visual identification evidence and did not, therefore, have to comply with section 45.¹⁹ That decision was appealed, but the Court of Appeal did not address the issue as it allowed the appeal on a different point.²⁰
- 11.15 Commentators have expressed concern about the conflicting case law and about the persistence of the restrictive approach.²¹ The authors of *Mahoney on Evidence* argue the restrictive approach has produced an “unsatisfactory” and “watered down” interpretation of section 126.²² They suggest the inclusive approach “better promotes the purpose for the statutory scheme in sections 45 and 126 more clearly, and rightly

¹⁴ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [8.38]. The Commission declined to revisit this issue in the Second Review of the Evidence Act because it deemed there was no recent appellate controversy in relation to the issues: Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [8.11].

¹⁵ *R v Eruera* [2015] NZHC 2655 at [59].

¹⁶ *R v Eruera* [2015] NZHC 2655 at [67].

¹⁷ *R v Howard* [2017] NZCA 159 at [26].

¹⁸ *R v Howard* [2017] NZCA 159 at [27].

¹⁹ *R v Ake* DC Tauranga CRI-2012-070-5921, 7 August 2014 at [15]–[16]. The decision is discussed in Nick Chisnall “Reducing the risk of misidentification: it starts with the Evidence Act 2006’s definition of “Visual Identification Evidence”” [2015] NZLJ 299 at 300.

²⁰ *Ake v R* [2015] NZCA 334 at [4].

²¹ See, for example, Nick Chisnall “Reducing the risk of misidentification: it starts with the Evidence Act 2006’s definition of “Visual Identification Evidence”” [2015] NZLJ 299 at 299. He also argues that until the restrictive approach is unequivocally overturned the Act’s expanded formal procedures in s 45 will not be utilised in all cases carrying a risk of misidentification (at 302).

²² Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at EV126.02(3).

acknowledges the possibility that identification may be an issue even where the defendant admits to being present at the scene of the offence”.²³

The Court of Appeal’s decision in *Pink v R*

11.16 In 2021, this issue was again considered by the Court of Appeal in *Pink v R*.²⁴ The Court commented that cases where the defendant admits to being present in a group but denies any personal wrongdoing cause difficulties due to how the definition of visual identification was drafted.²⁵ After examining the earlier authorities, it observed that:²⁶

... it can be safely concluded from the authorities that there is no bright line distinction between visual identification evidence in the strict sense and observation evidence. That is to say, it is wrong to suggest that an identification warning is only required when the defendant denies being at the scene. A warning may still be required where the defendant admits being present and it is a live issue as to whether he or someone else present was the perpetrator.

11.17 The Court then applied this approach to the facts. The witnesses said they had seen the defendant swinging the axe and bringing it down on the man lying on the ground. The defendant admitted to being present at the scene and holding the axe used in the attack but claimed he was intervening to confiscate the axe and stop the attack. The Court said that, if that was the extent of the dispute, there was a “very strong argument” for saying no identification warning was required under section 126.²⁷ That was because, on that version of events, the witnesses’ mistake was not as to who the witnesses had seen with the axe, but rather what they had seen the defendant do with it. However, the Court found that in both cross-examination and its closing address, the defence had implicitly advanced the possibility that the eyewitnesses may have come on the scene before the defendant confiscated the axe and therefore had seen someone else wielding it. This meant that identification was a live issue. The Court therefore concluded section 126 was engaged.²⁸

Is legislative reform necessary or desirable?

11.18 Given the conflicting case law and criticisms in the commentary described above, we think that reform is desirable to clarify the application of the identification evidence provisions in situations where a defendant admits to being at the scene.

11.19 Our preliminary view is that the protections in the identification evidence provisions should apply whenever the identity of the perpetrator is in issue. We agree with the Court of Appeal that, even when the accused admits their presence at the scene, the risk of mistaken identification can be just as real.²⁹ While the Court of Appeal in *Pink* provided

²³ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at EA4.44.01((1)(c)).

²⁴ *Pink v R* [2022] NZCA 306.

²⁵ *Pink v R* [2022] NZCA 306 at [49].

²⁶ *Pink v R* [2022] NZCA 306 at [59].

²⁷ *Pink v R* [2022] NZCA 306 at [62].

²⁸ *Pink v R* [2022] NZCA 306 at [61]–[63]. As noted in *Pink*, a similar situation involving an implicit misidentification argument by a defence counsel also occurred in *Witehira v R* [2011] NZCA 658.

²⁹ *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [35], cited in *Pink v R* [2022] NZCA 306 at [53].

guidance on the proper approach to section 126 directions, our view is that it would be preferable to clarify this in the Act in relation to both section 45 and section 126.

- 11.20 Should reform be considered necessary or desirable, one option is to amend the definition of “visual identification evidence” to add a new paragraph to address the following situation (based on existing wording of subsection (a) of the definition with variations on the language in italics):

evidence that is an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant *was the person observed performing an act* constituting direct or circumstantial evidence of the commission of an offence.

- 11.21 The effect of this amendment would be two-fold. First, under section 45, a formal identification procedure would need to be followed when a witness says they saw the defendant commit the offence, unless there is good reason not to.³⁰ While this could risk creating an undue burden on enforcement agencies, the existing guidance in the Act and case law on the meaning of “good reason” could accommodate these concerns. A good reason for not following a formal procedure exists if no officer involved in the investigation or the prosecution could reasonably anticipate that identification would be an issue at trial.³¹ It is already well established that identification based on strong recognition evidence (for example, when the witness is well acquainted with the defendant) can satisfy this ground.³² Our view is that there would arguably be a “good reason” for not following a formal procedure if the defendant admits to being at the scene and does not suggest the witness was mistaken as to who they saw commit the offence. In this situation, identity is not in issue but rather the witness’ recollection of what they saw the defendant do. If, however, the defendant claims the witness is mistaken as to who they saw commit the offence, they will have put identification in issue. If there are concerns that the existing guidance on “good reasons” is not sufficient to address these situations, clearer guidance could be included in section 45(4). We welcome submissions on this point.
- 11.22 Second, the court would be required to direct the jury under section 126 when the case depends “wholly or substantially” on the correctness of witness testimony identifying the defendant as the person who committed the offence. We do not anticipate that this would result in any significant change in practice, in light of *Pink*, but we welcome submissions on this point.

³⁰ Evidence Act 2006, s 45(1).

³¹ Evidence Act 2006, s 45(4)(d).

³² Evidence Act 2006, s 45(4)(d). See *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [73], and *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [26]. See also *Howard*, in which the defendant was found to be well acquainted with the witness even though the defendant alleged mistaken identity: *R v Howard* [2017] NZCA 159 at [35]–[39]. Another relevant section is s 45(4)(e): “if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence occurred and in the course of that officer’s initial investigation”. See *R v Carroll* [2018] DCR 602, [2016] NZDC 15549 in which, as backup reasoning to an argument founded on observation evidence, the District Court suggested that s 45(4)(e) could apply to a situation in which a police officer witnessed an assault on another person, followed the perpetrator and was subsequently assaulted by the same person.

QUESTION**Q52**

Should the definition of “visual identification evidence” be amended to more explicitly include evidence of a person asserting that they observed the defendant act in the commission of an offence?

REQUIREMENTS FOR FORMAL VISUAL IDENTIFICATION PROCEDURES

- 11.23 Visual identification evidence is admissible if a “formal procedure” is followed unless the defendant proves on the balance of probabilities that the evidence is unreliable.³³ Section 45(3) prescribes a range of requirements the formal procedure must satisfy. In practice, a formal procedure can take the form of an identification parade or a photo lineup.³⁴
- 11.24 Preliminary feedback has identified a general concern that the formal procedure requirements in section 45(3) no longer reflect best practice. A particular concern is that the Act does not require the visual identification process to be video recorded. While a written record of the procedure carried out is required under section 45(3)(e), this may not be as comprehensive or accurate as a video record. For example, it may be difficult to ascertain the degree of confidence with which an identification is made if there is no video record of the process.
- 11.25 Te Kāhui Tātari Ture | the Criminal Cases Review Commission (CCRC) is undertaking consultation until 26 May 2023 concerning best practice for visual identification procedures, as part of its wider examination of issues concerning eyewitness identification evidence. The CCRC’s preliminary review suggests eyewitness identification evidence is a risk factor in miscarriage of justice cases.
- 11.26 In light of the CCRC’s work, we do not explore further whether formal procedure requirements for visual identification evidence are causing concern or problems in practice. Submitters are welcome, however, to provide information on the current requirements or best practice should they wish to do so, which we can then assess as part of finalising our advice to the Minister.

³³ Evidence Act 2006, s 45(1).

³⁴ An identification parade involves the presence of at least eight similar looking persons, usually including the suspect. The witness views the lineup through one-way glass. A photo lineup involves a witness viewing photographs of at least eight similar looking persons and also potentially includes the suspect. Photo lineups are much more common in Aotearoa New Zealand than identification parades: Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at 45.05(1).

CHAPTER 12

Medical privilege

INTRODUCTION

In this chapter, we consider section 59 (medical privilege) and seek feedback on issues relating to:

- the scope of the exception created by section 59(1)(b); and
- when somebody is acting “on behalf of” a medical practitioner or clinical psychologist under section 59(5).

BACKGROUND

- 12.1 A privilege is an exception to the general rule that relevant and otherwise admissible evidence can be compelled to be given to a court.¹
- 12.2 Section 59 of the Evidence Act 2006 creates a privilege in criminal proceedings for communications made to, and information obtained by, medical practitioners and clinical psychologists² in the course of the examination, treatment or care of a person but only in relation to drug dependency or other conditions or behaviour that may manifest itself in criminal conduct (medical privilege).³
- 12.3 Medical privilege also extends to people “acting in a professional capacity on behalf of a medical practitioner or clinical psychologist”.⁴
- 12.4 The privilege contained in section 59 is intentionally narrowly defined. As the privilege conferred is absolute, Te Aka Matua o te Ture | Law Commission, when developing the Evidence Code, considered that it was preferable to have clarity and certainty as to its

¹ *C v Complaints Assessment Committee* [2006] NZSC 48 at [13].

² Clinical psychologist is defined in s 59(6) of the Evidence Act 2006 as someone registered with the Psychologists Board (as per the Health Practitioners Competence Assurance Act 2003) permitted to diagnose and treat persons suffering from mental and emotional problems. Medical practitioner is to be given its ordinary meaning under the Health Practitioners Competence Assurance Act 2003.

³ Evidence Act 2006, ss 59(1)(a) and 59(2)–(4). Where a patient is being examined or treated for a number of conditions, s 59 can apply if *an* underlying cause is a condition that *may* manifest itself in criminal conduct: *R v Parkinson* [2017] NZCA 600.

⁴ Evidence Act 2006, s 59(5).

application.⁵ Section 69 of the Act confers a general discretion to exclude confidential information, which provides “fall-back protection” for information not captured by section 59.⁶

Purpose and origins of medical privilege

12.5 Medical privilege is justified on two grounds:⁷

- (a) First, society has an interest in encouraging people to seek medical attention and to communicate openly and honestly with healthcare professionals in doing so. If patients were aware that their disclosures could be used as evidence against them in court, it is argued, this would prevent people from seeking medical attention, or inhibit communication when they did so.
- (b) Second, individuals prefer, and should expect, privacy when it comes to intimate details of disease and illness.

12.6 When developing the Evidence Code, the Commission identified a further policy reason justifying the existence of a privilege in the specific context of a person seeking treatment for drug dependency or other behaviours that might manifest themselves in criminal conduct. In these cases, compliance with the law is more likely to be achieved through medical treatment than through criminal prosecution.⁸

12.7 As with all privileges, the concern is with balancing these interests against the public interests in securing the administration of justice by placing all relevant evidence in front of a court.⁹

12.8 Some form of medical privilege has existed in statute since the late 19th century.¹⁰ The modern form of medical privilege emerged from the Torts and General Law Reform Committee’s policy review of professional privilege in the law of evidence in 1977.¹¹ The Committee’s recommendations were taken forward in sections 32 and 33 of the Evidence Amendment Act (No 2) 1980, under which a privilege existed in respect of communications to medical practitioners in both civil and criminal proceedings. The scope of the privilege in criminal proceedings was limited to communications made in the course of examination or treatment for drug dependency or other condition or behaviour that

⁵ Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [308].

⁶ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.123].

⁷ Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [290]–[293].

⁸ Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [305].

⁹ Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [1].

¹⁰ See s 7 of the Evidence Further Amendment Act 1885 (No 14) for the first statutory medical privilege provision. This section was confined to civil proceedings 10 years later by s 9 of the Evidence Further Amendment Act 1895 (No 10) before being taken forward as s 8 in the Evidence Act 1908. Medical privilege in criminal proceedings was subsequently re-enacted (following consideration of the Torts and General Law Reform Committee) in s 33 of the Evidence Amendment Act (No 2) 1980.

¹¹ Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I “Report on Medical Privilege”.

might manifest itself in criminal conduct.¹² The privilege was broadened to include clinical psychologists in 1989.¹³

- 12.9 In its development of the Evidence Code, the Commission took forward the existing statutory privilege in criminal proceedings, widening it to include all information obtained in the course of examination and treatment for drug dependency and other conditions that might manifest itself in criminal behaviour, and to cover disclosure in any criminal proceedings, not just proceedings where the person being treated was the defendant.¹⁴ It also removed the existence of a medical privilege in civil proceedings¹⁵ and recommended not extending the privilege to apply beyond medical practitioners, clinical psychologists, and those acting in a professional capacity on behalf of those professions.¹⁶ These recommendations were enacted as section 59.

SCOPE OF THE SECTION 59(1)(B) EXCEPTION

- 12.10 Section 59(1)(b) creates an exception to medical privilege:

[This section] does not apply in the case of a person who has been required by an order of a Judge, or by other lawful authority, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or for any other purpose.

What is the issue?

- 12.11 We have received preliminary feedback that it is not clear whether court-ordered *treatment* (as opposed to court-ordered *examination* or *test*, as set out in statute) is captured by section 59(1)(b). For example, it is not clear whether the exception would apply to information obtained during a rehabilitative counselling programme that a person has been directed to attend by the court as part of an extended supervision order (ESO). This uncertainty arises from the open-ended phrasing of “for any other purpose”, which, on a plain wording interpretation, could be taken to apply to any other purpose as ordered by the court, including treatment.
- 12.12 A related concern with the scope of section 59(1)(b) is that it appears to permit information obtained for one purpose (for example, an assessment in the context of a preventive detention application) being used for another unconnected purpose (for example, to support criminal charges in unrelated offending).¹⁷ This issue was identified in the Commission’s 2013 Review of the Act but not resolved due to the lack of submissions addressing this point and the lack of opportunity to consult with healthcare

¹² Evidence Amendment Act (No 2) 1980, s 33(3).

¹³ Evidence Amendment Act 1989 (No 104), s 4.

¹⁴ Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [307].

¹⁵ On the basis that relevant cases would be better served by a proposed discretionary provision to apply to confidential information generally: Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [302].

¹⁶ Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [308]. In particular, the Commission considered the status of rongoā practitioners and concluded that communications with these practitioners would be protected by the general discretion to protect confidential information: Te Aka Matua o te Ture | Law Commission *Evidence: Code and Commentary* (NZLC R55 Vol 2, 1999) at 157.

¹⁷ See, for example, *R v King* CA162/05 18 July 2005 where evidence of admissions of further offending made to a psychiatrist and psychologist for the purpose of an assessment for preventive detention was admissible in the defendant’s retrial, where additional charges were added based on the information disclosed.

professionals.¹⁸ The Commission recommended the issue be considered in the context of a wider review of issues arising in relation to the Criminal Procedure (Mentally Impaired Persons) Act 2002 (CPMIP Act). We are not aware of any subsequent consideration of medical privilege, in the context of a review of the CPMIP Act or otherwise.

Policy and legislative background

- 12.13 The exception's original objective appears to have been to ensure that relevant information obtained by a medical practitioner during a court-ordered assessment could not be withheld from the courts on the grounds of medical privilege. The first mention of such an exception was in section 9(2) of the Evidence Further Amendment Act 1895, which granted a privilege "unless the sanity of the patient be the matter in dispute". This language was carried over to section 8 of the Evidence Act 1908.
- 12.14 Commenting on medical privilege in civil proceedings in 1977, the Torts and General Law Reform Committee observed that "public policy undoubtedly requires that such an important legal issue as testamentary capacity should not be hamstrung by medical privilege".¹⁹ The Committee did not explicitly discuss similar concerns in relation to criminal proceedings, but section 33 of the Evidence Amendment Act (No 2) 1980 introduced an exception for privilege in criminal proceedings using the wording of "examination, test or other purpose".
- 12.15 In its Evidence Code, the Commission proposed retaining such an exception, commenting that this "excludes from protection consultations that are ordered by a court or other lawful authority".²⁰ The Commission's proposed Code provision mirrored the language of the 1980 Act,²¹ with the change to "any *other* purpose" being a drafting decision made when the Evidence Bill was introduced to Parliament.²²

Subsequent developments

- 12.16 The scope of section 59(1)(b) has not been discussed in any detail in the case law.²³ In its 2013 review, the Commission was made aware of variation in practice amongst psychiatrists arising from uncertainty as to the precise operation of section 59(1)(b).²⁴ Some psychiatrists were taking the view that a literal reading of section 59(1)(b) meant that privilege did not apply at all to any person required to undergo assessment by a

¹⁸ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.111]–[10.119].

¹⁹ Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I, "Report on Medical Privilege" 13; Evidence Amendment Act (No 2) 1980 s 32(2)(a) dealt with medical privilege in civil proceedings and held that it did not apply "in respect of any proceeding in which the sanity, testamentary capacity or other legal capacity of the patient is the matter in dispute".

²⁰ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [270] (emphasis added).

²¹ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 156.

²² Evidence Bill 2005 (256-1) cl 55(1)(b).

²³ See, for example, the limited reference to s 59(1)(b) in *R v Tamati* [2021] NZHC 1451 HC. This did not comment on the meaning of "any other purpose".

²⁴ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.107].

court and therefore the person's complete medical records could be freely examined and presented to the court. The Commission held that:²⁵

The submitters do not consider that any substantial change of this nature was intended when the Evidence Act was passed. We agree that the intention at the time was clearly to maintain the substance of the privilege in criminal proceedings and to broaden its scope, rather than narrowing it in the dramatic way that the above interpretation would do.

- 12.17 The Commission recommended amending section 59 to make it clear that the section 59(1)(b) exception applies only to communications, observations and information collected or generated during a court-ordered assessment and does not affect the privilege that attaches to other medical records of the privilege-holder. This was enacted as section 59(1A) through the Evidence Amendment Act 2016.
- 12.18 As noted above, the 2013 Review also identified a concern that the possibility of information imparted during a court-ordered examination being disclosed in subsequent proceedings was having a detrimental effect on those examinations.²⁶ The concern was that the broad nature of the exception might hamper free and frank discussion because of a fear that any information may be used in court against them. The Commission did not reach a conclusion or make any recommendations on this point, for the reasons noted above.²⁷

Is legislative reform necessary or desirable?

- 12.19 It is unlikely that the section 59(1)(b) exception was intended to apply so broadly as to apply to all court-ordered examinations, assessments or treatment. If, as the early policy and legislative history suggests, the intention was to ensure that information gathered during a court-ordered medical assessment was not shielded from view by a privilege, it seems unlikely that the section 59(1)(b) exception was intended to apply to court-ordered treatment. In considering a similar issue of interpretation as part of the 2013 Review, the Commission was clear that the intention at the time the Act was passed was to maintain the substance of medical privilege, and to broaden its scope – not to narrow it.²⁸
- 12.20 Interpreting the section 59(1)(b) exception as including court-ordered treatment would also be inconsistent with the policy underlying medical privilege. The privilege is clearly directed at encouraging people to seek medical attention, to be open and truthful with the healthcare professionals caring for them and to protect privacy. The additional policy rationale identified by the Law Commission – that, in some circumstances compliance with the law is more likely to be achieved through treatment than censure applies equally, or perhaps more so, if a person's drug dependency or other condition has already manifested in criminal conduct and led them to have contact with the criminal justice system to the point that treatment has been court-ordered.
- 12.21 There is also the risk of unintended consequences should the section 59(1)(b) exception be interpreted as extending to court-ordered treatment. For example, this could mean that information obtained during compulsory examination, care and treatment under the

²⁵ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.109].

²⁶ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.111].

²⁷ At para [12.12].

²⁸ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.109].

Mental Health (Compulsory Treatment and Assessment) Act 1992²⁹ would not be privileged. This would be a broad carve-out from medical privilege and is unlikely to have been intended.

- 12.22 As to whether the section 59(1)(b) exception should permit information obtained for one purpose to be used for another, the concern is that this unduly undercuts the objectives of the privilege itself (aimed at ensuring candour between doctors and patients) and goes further than is necessary to achieve the objectives of the exception (aimed at ensuring a court has access to the information it requires to reach a determination). There are mixed views on whether the exception does, in fact, impact on what a patient chooses to disclose during a court-ordered assessment.³⁰ Nonetheless, we think it is arguable that the scope of the exception is not consistent with reasonable expectations of privacy. Furthermore, it has the potential to result in inconsistent approaches. If an admission of unrelated offending is made in a court-ordered examination, for example, it could be used against the defendant in separate proceedings, but the same admission made in an independently sought examination would be privileged.
- 12.23 Our preliminary view is, therefore, that it would be desirable to amend section 59(1)(b) to clarify the circumstances in which the exception applies. We seek views on how this would best be achieved.

Options for reform

- 12.24 We have identified two possible options for reform:
- (a) **Option 1:** Amend section 59(1)(b) to remove the words “or for any other purpose”.
 - (b) **Option 2:** Amend section 59(1)(b) to remove the words “or for any other purpose” *and* limit the exception by reference to the purpose for which the information or communication is obtained.
- 12.25 Option 1 would clarify the existing uncertainty as to the status of court-ordered treatment by expressly limiting the section 59(1)(b) exception to cases where a person “has been required by an order of a judge, or by other lawful authority, to submit himself or herself to the medical practitioner or clinical psychologist for *any examination or test*” (emphasis added). This would be consistent with the policy intent of ensuring that relevant medical obtained during a court-ordered assessment is still able to be presented to and heard by the court.
- 12.26 This leaves open definitional issues as to what constitutes an examination or test for the purposes of the Act. Our preliminary view is that it is appropriate that the courts are able

²⁹ The Mental Health (Compulsory Treatment and Assessment) Act 1992 governs the compulsory assessment or treatment of individuals experiencing a mental disorder. Applications for compulsory treatment orders are heard by a Family Court or District Court Judge (s 17) who will then make a determination of whether or not a compulsory treatment order is necessary (s 27) and if so, whether the order will be for community or inpatient treatment (s 28).

³⁰ In *R v X (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181, the majority did not believe that there was a firm enough evidential basis for the assertion that there was a risk of harm to the relationship between patients and forensic nurses such that it would inhibit individuals from participating in the examination. Ronald Young J delivered a dissenting judgment where he took the view that any suggestion that the process will be used to obtain information “by the back door” would compromise the assessment process. The Law Commission has also noted scepticism about the argument that the existence (or non-existence) of a privilege makes a difference to people’s behaviour, largely due to the lack of empirical evidence to support it: Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [291].

to consider these issues on a case-by-case basis: it may not be easy to clearly delineate in legislation when a healthcare professional is acting for the purposes of examination, or for the purposes of treatment.

- 12.27 Option 1 would, however, reduce the flexibility of the section, which may be undesirable if there are other types of information or communications that a court may need to rely on to reach a determination and that do not fall within a definition of examination or test.
- 12.28 Option 2 would adopt the same change as Option 1 but go further to address the broader concerns about information obtained for one purpose being used for another. Although it represents a more fundamental shift in the purpose and application of the section 59(1)(b) exception, it could more closely reflect both the intentions behind the creation of medical privilege (to create an absolute privilege directed at not discouraging people from seeking medical attention and to ensure open and honest communication with healthcare professionals) and the intentions behind the creation of an exception from privilege (to ensure that relevant information obtained during a court-ordered assessment is available to the court and not shielded by privilege). It would also align with the general professional and ethical obligations of medical professionals – that disclosure of confidential information must be necessary (the goal cannot be achieved without it) and proportionate (only the information that is relevant to the goal should be disclosed and only as much as is necessary to achieve it).³¹
- 12.29 Under this option, section 59(1)(b) could be redrafted to state that privilege does not apply to the *use, in a proceeding*, of any information obtained or communications made in the course of an examination or test ordered by a judge or other lawful authority *for the purpose for which* that examination or test was ordered. Under this approach, only information relevant to the purpose for which it is sought would be exempt from privilege. For example, in the context of an assessment of fitness to stand trial, only information relevant to the determination of fitness to stand trial would be exempt from privilege and disclosable in subsequent proceedings. Any other information disclosed as part of that assessment would continue to be privileged as long as the other requirements of section 59 were met. This approach would align with exceptions to other privileges in the Act that are more tightly constrained and focused on the use of information for a specific purpose in proceedings, for example, section 57(3)(c) on privilege for settlement negotiations, mediation or plea discussions.³²
- 12.30 An alternative approach would be to redraft the section 59(1)(b) exception with reference to specific statutory powers of the court – for example, to state that the privilege does not apply to information and communications made in the course of a test or assessment ordered under section 38 of the CPMIP Act, section 88 of the Sentencing Act 2002, and section 107F of the Parole Act 2002.³³ The main difficulty with this approach is that it would require an exhaustive definition of the precise circumstances in which court-ordered examinations and tests would not be subject to privilege, which could result in unanticipated gaps.

³¹ See, for example, Rules 10 and 11 of the Health Information Privacy Code 2020.

³² Evidence Act 2006, s 57(3)(c): “This section does not apply to... 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”.

³³ These are the circumstances in which court-ordered assessments will most frequently arise.

QUESTION

Q53

Should section 59(1)(b) be amended to clarify the scope of its application? If so, should it be amended to:

- a. remove the words “or for any other purpose”; or
- b. remove the words “or for any other purpose” *and* limit the exception by reference to the purpose for which the information or communication is obtained?

ACTING “ON BEHALF OF” A MEDICAL PRACTITIONER OR CLINICAL PSYCHOLOGIST

12.31 Section 59(5) states that:

A reference in this section to a communication to, or information obtained by, a medical practitioner or clinical psychologist is to be taken to include a reference to a communication to, or information obtained by, a person acting in a professional capacity on behalf of a medical practitioner or clinical psychologist in the course of the examination or treatment of, or care for, the person by that medical practitioner or clinical psychologist.

What is the issue?

12.32 There is uncertainty as to when a person is “acting on behalf of” a medical practitioner or clinical psychologist and therefore whether communications to or information obtained by that person is privileged. The courts have interpreted this provision narrowly, and the issue has been raised before te Kōti Mana Nui | Supreme Court but not resolved.

Policy and legislative background

12.33 Section 59 is narrowly drafted with regard to the class of relationships to which medical privilege attaches. Historically, the privilege only attached to medical practitioners.³⁴ It was extended to clinical psychologists following the recommendation of the Torts and General Law Reform Committee that “when clinical psychologists are able to register under an Act of Parliament, privilege should attach to the communications made to them by patients”.³⁵ This was on the basis that clinical psychologists were engaged in the same activities as psychiatrists (“the treatment or diagnosis of mental or emotional problems”).³⁶

12.34 The Committee recognised that other “para-medical personnel” could be involved in the care and treatment of patients either acting in their own right or in the capacity of assisting the medical practitioner in the performance of their task. With regard to the

³⁴ See s 7 of the Evidence Further Amendment Act 1885 (No 14); s 9 of the Evidence Amendment Act 1895 (No 10); and s 8 of the Evidence Act 1908.

³⁵ Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I “Report on Medical Privilege” at 16.

³⁶ Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I “Report on Medical Privilege” at 15.

former category, the Committee considered some of the various categories of para-medical personnel individually but concluded the privilege should only be extended to clinical psychologists (at the point they became regulated under statute).³⁷ With regard to the latter category, those acting to assist the medical practitioner, it concluded that the rationale behind privilege was not reduced simply because it might be another health professional fulfilling a particular part of a doctor's treatment programme. Accordingly, it recommended an extension of privilege to people in para-medical categories while "acting on behalf of" a medical practitioner (or clinical psychologist). This formula "envisaged tasks both preliminary as well as following actual examination or treatment by the doctor and was intended to extend to the doctor's receptionist".³⁸

- 12.35 The Commission also considered but rejected a wider and more functional definition in its preliminary paper on privilege under which it would be sufficient that the person seeking assistance genuinely believed that the person consulted was appropriately qualified to offer professional assistance.³⁹ It rejected that approach as "entailing needless uncertainty" and ultimately recommended retaining the existing approach.⁴⁰
- 12.36 In its 2013 Review, the Commission considered submissions that section 59 be amended to extend the privilege to psychotherapists. It concluded that disclosures to psychotherapists were adequately protected by the general overriding discretion as to confidential information under section 69, noting that there was no evidence to suggest that this arrangement had failed to protect information shared in this way from disclosure.⁴¹ The Commission restated the view that the nature of the absolute privilege favoured certainty and clarity as to scope.

How have the courts approached section 59(5)?

- 12.37 The courts have taken a narrow interpretation of "acting on behalf of". Under the equivalent section of the 1980 Act, this was held to include nurses acting at the direction of a medical practitioner or clinical psychologist employed at a hospital⁴² but not a counsellor working in a programme for sexual offenders to whom the defendant had been referred by a psychologist.⁴³
- 12.38 Under the 2006 Act, it has been held that medical privilege can only be claimed by someone acting on behalf of a medical practitioner or clinical psychologist if the practitioner or psychologist had already initiated an examination, treatment or care

³⁷ Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I "Report on Medical Privilege" at 14–17.

³⁸ Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I "Report on Medical Privilege" at 15.

³⁹ Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [308].

⁴⁰ Te Aka Matua o te Ture | Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [308]; Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 157.

⁴¹ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.125].

⁴² *R v Rapana* [1995] 2 NZLR 381 (HC) at 383. In this case, the communications made by Mr Rapana were not privileged as they had been made to a nurse who has "offered to make a preliminary assessment as to whether a formal psychiatric examination of Mr Rapana was required".

⁴³ *R v Gulliver* 9 June 2005 CA51/05 at [42]. This was on the basis that the section only contemplated "vertical delegation or instruction where the delegate or person instructed is involved in carrying out the course of treatment, or part of it, being undertaken by the clinical psychologist" and not "horizontal" delegation where services are provided independently of the referrer.

regime.⁴⁴ This introduced a requirement for a pre-existing relationship between a patient and a medical practitioner or clinical psychologist before someone can be said to be acting on their behalf.⁴⁵

- 12.39 In *D v R*, D argued that the call-taker was acting in a professional capacity “on behalf of” a medical practitioner or clinical psychologist by filtering and referring calls to the local Crisis Assessment Team (CAT) for that team’s intervention.⁴⁶ Te Kōti Pira | Court of Appeal did not find it necessary to provide a definitive answer to that question.⁴⁷ On an application for leave to appeal, the Supreme Court accepted that the interpretation of section 59 potentially gave rise to a point of public importance, but declined leave to appeal as it was not an appropriate case to consider the issue.⁴⁸

Relationship with section 69

- 12.40 Section 69 confers a general discretion on the court to require that any confidential information not be disclosed in a proceeding. It provides a fallback for anything not captured by section 59. Even if someone is held to not have been acting “on behalf of” a medical practitioner or clinical psychologist, disclosure of confidential information can still be prevented if the judge considers that the public interest in the disclosure is outweighed by the public interest in preventing harm to the person by whom or about whom the confidential information was obtained, or to the particular relationship in the course of which it was obtained. In making this assessment, the judge must have regard to a number of factors set out under section 69(3).
- 12.41 The courts have tended to agree that information shared with healthcare professionals is confidential information for the purposes of section 69. There is greater disagreement as to where the balance between the public interest in disclosure and the prevention of harm to individuals is to be struck. Typically, the courts have ruled in favour of disclosure under section 69⁴⁹ – indeed, in *R v X*, the majority held that “the weight of appellate authority in this country and elsewhere favours the appropriateness of the disclosure of criminality”.⁵⁰ This is largely on the basis of the significance of the communication to the issue at hand

⁴⁴ *R v Hodgson* HC Timaru CRI-2008-076-001397, 30 March 2009.

⁴⁵ *R v Hodgson* HC Timaru CRI-2008-076-001397, 30 March 2009 at [46]. This point was not challenged on appeal to the Court of Appeal: *R v X* (CA553/2009) [2009] NZCA 531, [2010] 2 NZLR 181.

⁴⁶ *D (SC 26/2019) v R* [2019] NZSC 72 at [7].

⁴⁷ *D (CA54/2018) v R* [2019] NZCA 1. The Court concluded that privilege does not attach as D was not seeking treatment for “drug dependency or any other condition or behaviour that might manifest itself in criminal conduct” under s 59(1)(a). His suicidal ideation was a result of the allegations laid against him and the subsequent police investigation rather than because of his sexual attraction to young children.

⁴⁸ *D (SC 26/2019) v R* [2019] NZSC 72 at [7].

⁴⁹ We have identified one case where criminality disclosed in the context of being examined or treated was withheld under s 69: *R v Rapana* [1995] 2 NZLR 381 (HC). The court held that “the public interest in preserving the confidences of persons in the position of Mr Rapana, and encouraging free communication between such persons, outweighs the public interest in having the evidence disclosed in Court” (at 382).

⁵⁰ *R v X* (CA553/09) [2009] NZCA 531, [2010] NZLR 181 at [79]. See also Scott Optican and Peter Sankoff “Hearsay” (paper presented to New Zealand Law Society Evidence Act 2006 Revisited for Criminal Lawyers Seminar, February 2010) at 143: “[A]dmission is likely to be favoured in most instances ... The court will effectively be tasked with deciding whether its own need in obtaining a correct result is more important than that of preserving confidence in a relationship that is often external to the criminal justice system. In light of the balancing test it is hardly surprising that most cases of this type end with a judicial decision under s 69 that confidence – while important – is less critical than the court’s need for the evidence in the proceeding at hand”.

(the disclosures often being key to the prosecution case)⁵¹ and the lack of empirical evidence as to harm caused by disclosure,⁵² but it is far from settled. In a dissenting judgment in *R v X*, Ronald Young J held that the balance “clearly” lay in protecting the confidential communication between the nurses and X:⁵³

If the confidentiality of these discussions is not protected then counsel acting for such persons are highly likely to advise their client not to talk to a forensic nurse ... Compromising the capacity of forensic nurses to undertake their task will in turn potentially compromise the immediate safety of defendants and others involved in the criminal courts. This illustrates the powerful public interest in protecting free communication between the nurses and an accused.

Is legislative reform necessary or desirable?

- 12.42 There is plainly some uncertainty as to the scope of section 59(5) and the status of disclosures made to healthcare professionals who are not medical practitioners or clinical psychologists. The courts have taken a narrow approach as to who can be said to be acting “on behalf of” a medical practitioner or clinical psychologist, some of which appear inconsistent with the original intention of the Torts and General Law Reform Committee.⁵⁴ Neither the Court of Appeal nor the Supreme Court has decided the issue.
- 12.43 There is also a question as to whether the approach taken by the courts – particularly in relation to the sequencing of treatment and referral of patients – is consistent with modern multi-disciplinary teams (MDTs) working in healthcare or with patients’ understandings of their interactions with the various professionals who make up these teams. Patients are often reviewed and screened by other members of the team before being seen by a medical practitioner, with care and treatment being provided autonomously by individual members of the team (that is, not on behalf of a medical practitioner or clinical psychologist).⁵⁵ Many patients might make disclosures to these individuals on the basis that the information they share is necessary to initiate or direct their care and treatment and might reasonably expect that information to remain confidential. This is of note given the subjective element of section 59(2) – that it applies to communications “the person *believes is necessary* to enable the medical practitioner to examine, treat or care for” them.

⁵¹ See, for example, *R v Gulliver* 9 June 2005 CA51/05 (defendant’s disclosure of past offending to his counsellor was the only real evidence of the offending and the identity of the offender); *R v X* (CA553/09) [2009] NZCA 531 (disclosure regarding intent was “highly relevant” to the charge of attempted murder). The majority in *R v X* (CA553/09) held that “it seems wrong to us that the Crown should potentially be inhibited from pursuing the case at what the face of it appears to be the appropriate level of culpability” (at [87]).

⁵² See *R v X* (CA553/09) [2009] NZCA 531 at [82], citing *R v Lory* (*Ruling*) [1997] 1 NZLR 44 (HC).

⁵³ *R v X* (CA553/2009) [2009] NZCA 531, [2010] 2 NZLR 181 at [97]–[98].

⁵⁴ See, for example, *R v Hodgson* HC Timaru CRI-2008-076-001397 30 March 2009, which required treatment to have already been initiated by a doctor or clinical psychologist in order for someone to then be subsequently acting on their behalf, which is at odds with the Torts and General Law Reform Committee’s intention that the section cover “preliminary acts”.

⁵⁵ *Mahoney on Evidence* draws particular attention to the status of drug and alcohol addiction practitioners in light of s 59’s stated application to drug dependency, noting that “questions will arise whether, in any given clinical situation involving a multi-disciplinary health team, drug and alcohol practitioners registered with DAPAANZ fall within the scope of s 69(5)”: Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at EV59.04

- 12.44 This issue may be of more pressing concern in light of the recent proliferation of telehealth and digital technologies in healthcare,⁵⁶ much of which has been accelerated by the COVID-19 pandemic. This is particularly true in the area of mental health, where a number of non-medical professionals or digital tools could be recipients of information analogous to the situation to the helpline call-taker in *D v R*.⁵⁷ It is also clear that the healthcare system is under increasing pressure. McQueen J observed in a recent civil case regarding the interpretation of the CPMIP Act that “a shortage of psychiatrists and psychologists in New Zealand and world-wide has developed ... exacerbated by the COVID-19 pandemic”.⁵⁸ This means that more individuals, at least in the initial stages of seeking medical attention, may find themselves under the assessment or care and treatment of a professional other than a medical practitioner or clinical psychologist.
- 12.45 The existence of section 69 was critical in the conclusions of an earlier Commission review not to broaden the scope of section 59. At that time, it was not aware of “any situations where the discretion available under section 69 in relation to confidential information has failed to adequately protect information disclosed in the course of consultation with a health professional that did not attract medical privilege”.⁵⁹ If the courts tend to favour disclosure under section 69, however, there is a very tangible impact for confidential information if it is not found to attract privilege under section 59.
- 12.46 Our preliminary view is that reform may be desirable to address the ongoing uncertainties in relation to the status of disclosures to professionals other than medical practitioners and clinical psychologists and to reflect the reality of modern healthcare provision and systems. We seek views on whether this is the case and, if so, how section 59 should be amended.

Options for reform

- 12.47 We have identified two options for reform:
- (a) **Option 1:** Amend section 59(5) to clarify the meaning of “on behalf of”; or
 - (b) **Option 2:** Expand the section 59 privilege to apply to a broader range of healthcare workers beyond just medical practitioners and clinical psychologists.
- 12.48 Option 1 could be achieved by inserting new wording into section 59(5) to clarify the meaning of “on behalf of”. This could clarify that it applies to any person with whom the patient communicates for the purpose of arranging or facilitating examination or treatment by, or at the request of, the medical practitioner or clinical psychologist. This would retain the original policy behind the section by keeping the privilege strictly limited to medical practitioners and clinical psychologists. It would also clearly capture situations where non-clinical staff are the recipients of relevant information, for example, medical

⁵⁶ The Te Pae Tata Interim New Zealand Health Plan 2022 includes the “greater use of digital services to provide more care in homes and communities” as one of its six priority actions: Te Whatu Ora | Health New Zealand and Te Aka Whai Ora | Māori Health Authority *Te Pae Tata: Interim New Zealand Health Plan 2022* (Te Whatu Ora, October 2022) at 10.

⁵⁷ Digital Mental Health Lab, Te Kura Tātai Hauora | School of Health, Te Herenga Waka | Victoria University of Wellington *Aotearoa New Zealand Digital Tools for Mental Health and Wellbeing* (Te Herenga Waka | Victoria University of Wellington, March 2021); Nuffield Council on Bioethics *Briefing note: the role of technology in mental healthcare* (Nuffield Council on Bioethics, London, April 2022).

⁵⁸ *Maaka-Wanahi v Attorney-General* [2023] NZHC 187 at [6].

⁵⁹ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.125].

receptionists, who the Torts and General Law Reform Committee envisaged as falling within the scope of acting “on behalf of”.⁶⁰

- 12.49 The drawback of Option 1 is that it may not totally resolve the uncertainty with this section, and courts may still have to engage in finer distinction as to who falls within this category and in which circumstances. For example, it is debateable whether call-takers or helpline advisers would fall within this category, as it would have to be determined whether their role is simply directing calls or the individual to further advice or support, as opposed to arranging or facilitating care or treatment by an identifiable individual. It would also not capture situations where healthcare professionals provide examination or treatment autonomously (for example, nurse practitioners) or where an individual may not, or only infrequently, see a medical practitioner or clinical psychologist in the course of their treatment.
- 12.50 Under Option 2, section 59 could be amended to include a broader list of healthcare professions. A profession could qualify for inclusion on this list if it is involved in the treatment of drug dependency or any other condition or behaviour that may manifest itself in criminal conduct. Alternatively, the reference to “medical practitioners and clinical psychologists” could be replaced with a reference to “health practitioner (as defined by the Health Practitioners Competence Assurance Act 2003)”.
- 12.51 This option would eliminate the need to clarify when someone is said to be acting “on behalf of” a medical practitioner or clinical psychologist but would require revisiting the original policy intention behind the narrow drafting of the section 59 privilege: to ensure clarity and certainty as to the application of an absolute privilege. Expanding the privilege to cover a far greater number of healthcare professionals could make the section so broad so as to lose the clarity and certainty desired by the original drafters and diminish the significance of the existence of an absolute medical privilege. It should be noted, however, that there are already various restrictions built in to section 59 that necessarily limit its application. For example, the privilege applies only in the context of examination or treatment for drug dependency or behaviour that may manifest itself in criminal conduct (under section 59(1)(a)) and only to communications the patient believes is “necessary” to enable examination or treatment (under section 59(2)).
- 12.52 Additionally, expanding the privilege to cover a wider range of healthcare professionals could be seen to be giving true effect to the underlying policy justifications for the privilege – the public interest in encouraging individuals to seek medical attention and to communicate openly in the expectation that information will be kept private applies equally to communications made to a broader range of healthcare professionals. Patients may not see a distinction, and reasonably expect the information they share with a nurse or another healthcare professional, to be treated in the same way as information they were to share with a medical practitioner or clinical psychologist.
- 12.53 Expanding the privilege to cover a wider range of healthcare workers might also be more closely aligned with modern approaches to healthcare provision (particularly whether other healthcare professionals are in fact acting on behalf of a doctor or in their own right) and patients’ perceptions of and relationships with a range of different healthcare professionals. Additionally, the scope of medical privilege has never been completely static, as demonstrated by the inclusion of clinical psychologists in 1989. There may be

⁶⁰ Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I “Report on Medical Privilege” at 15.

other healthcare professions that can be said to be closely analogous to clinical psychologists in terms of the role they undertake in relation to drug dependency and other conditions that might manifest in criminal behaviour and in being similarly statutorily registered and regulated.

- 12.54 There are limitations to each approach under Option 2. An approach guided by the Health Practitioners Competence Assurance Act would be simpler, but it could exclude health professions not regulated by the Act (notably, in this context, drug and alcohol addiction practitioners) or broader support staff who may be the recipients of confidential information (such as receptionists, who as noted above were envisaged as acting on behalf of the medical practitioner by the Torts and General Law Reform Committee), should their inclusion be considered desirable. Such an approach could also include some professions who are regulated under the Health Practitioners Competence Assurance Act but who are unlikely to be offering relevant treatment.
- 12.55 The alternative approach of seeking to provide a definitive list of professionals covered by the privilege, however, could introduce unnecessary rigidity or unintentional gaps by seeking to provide a definitive list. This is particularly true in the context of an ever-changing and expanding healthcare system and models of MDT working. One possibility to address this would be to include a provision allowing for any additional professions to be included in scope in future through regulations made under the Act.

QUESTION

Q54

Should section 59 be amended to clarify when communications to, or information obtained by, healthcare professionals other than a medical practitioner or clinical psychologist are privileged? If so, should it be amended to:

- a. clarify when someone is acting “on behalf of” a medical practitioner or clinical psychologist under section 59(5); or
 - b. extend the privilege to attach to a wider range of healthcare professionals?
-

CHAPTER 13

Other privilege issues

INTRODUCTION

In this chapter, we consider the operation of the privilege provisions in the Act (other than medical privilege, which is discussed in Chapter 12) and seek feedback on issues relating to:

- the application of legal advice privilege (section 54) to documents prepared but not communicated between clients and legal advisers;
- termination of litigation privilege (section 57);
- litigation privilege and confidentiality;
- settlement privilege and the interests of justice exception; and
- successive interests in privileged material (section 66(2)–(4)).

LEGAL ADVICE PRIVILEGE AND DOCUMENTS PREPARED BUT NOT COMMUNICATED BETWEEN CLIENTS AND LEGAL ADVISERS

13.1 Section 54 of the Evidence Act 2006 is known as “legal advice privilege”. It enshrines what was solicitor-client privilege under the common law. Under section 54, communications with legal advisers are privileged provided the communication was intended to be confidential and was made in the course of and for the purpose of obtaining (or providing) professional legal services.

What is the issue?

13.2 Section 54 only refers to “communications” with legal advisers. Under the common law, however, solicitor-client privilege extended to material brought into existence for the purpose of obtaining or providing legal services even if the material was not in fact communicated. This included drafts and working papers prepared by lawyers or notes prepared by a client for the purpose of better communicating with a lawyer.¹

¹ See, for example, *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209 (HC) at 213; *Saunders v Commissioner, Australian Federal Police* (1998) 160 ALR 469 (FCA) at 472; Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EC20.09(5)].

- 13.3 It is unclear whether section 54 extends to documents prepared for the purpose of obtaining or providing legal services but not communicated. On a strict reading, the use of the word “communication” in section 54 does not accommodate such material. This does not appear to have been Te Aka Matua o te Ture | Law Commission’s intention when developing the Evidence Code upon which section 54 is based. The Commission explained that its proposed Code provision “essentially re-enacts the current law on privilege for communications with legal advisers”.²
- 13.4 There is some te Kōti Matua | High Court authority for the proposition that legal advice privilege extends to documents not communicated.³ These decisions, however, did not analyse how such an approach is available on the wording of section 54.⁴ As some commentators have observed, such an interpretation is difficult to reconcile with the plain words of section 54.⁵ To date there has been no te Kōti Pīra | Court of Appeal or te Kōti Mana Nui | Supreme Court consideration of this issue.

Is legislative reform necessary or desirable?

- 13.5 We seek submissions on whether section 54 should be amended to clarify that legal advice privilege applies to documents prepared but not communicated for the purpose of obtaining or providing legal advice, consistent with the common law and the decisions in *Huang* and *Bain*. It does not appear that there was any intention to depart from the previous common law approach when the Act was passed. Further, as the authors of *Mahoney on Evidence* have observed, excluding documents prepared for the purpose of obtaining legal advice but not actually communicated to a lawyer “is arguably inconsistent with the policy rationale for the privilege, namely to encourage full and frank communication with lawyers”.⁶
- 13.6 Should reform be considered necessary or desirable, one option would be to amend section 54(1) to clarify that the privilege applies to communications *and related documents*. The word “document” is broadly defined in the Act to mean “any material, ... and information electronically recorded or stored”.⁷ The requirements in subsections 54(1)(a) and (b) would however still apply, which means that the related document would need to have been intended to be confidential and made in the course of and for the

² Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [254]. See also Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C244], which states that the relevant provision “spells out what is essentially the present law on privilege for legal advice”.

³ *R v Huang* HC Auckland CRI-2005-004-21953, 19 September 2007 at [54]–[56], finding that s 54 applied to notes made by the defendant of relevant events for the purposes of instructing a lawyer but not communicated; and *Bain v Minister of Justice* [2013] NZHC 2123 at [143], finding that s 54 applied not only to advice given to the Minister of Justice by Ministry legal officers and the Solicitor-General but also to any “reasonably related documents held within the Ministry” and within the Crown Law Office (at [154]).

⁴ The decision in *R v Huang* HC Auckland CRI-2005-004-21953, 19 September 2007 was criticised by counsel in a subsequent High Court case, who argued that the wording of s 54 is not wide enough to cover an “intention to communicate”, but the Court in that case did not have to determine whether the approach in *Huang* should be followed: *Pernod Ricard New Zealand Ltd v Lion – Beer, Spirits and Wine (NZ) Ltd* [2012] NZHC 2801 at [27]–[29].

⁵ As observed in Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) [EVA54.12(d)] and Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV54.02(2)].

⁶ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV54.02(2)].

⁷ Evidence Act 2006, s 4 (definition of “document”).

purposes of obtaining or providing legal services. This would avoid the need to further define the concept of “related document” as it would only capture documents connected to the request for or provision of legal advice. Documents that are merely sent to a lawyer, but not prepared for the purpose of seeking legal advice, would not attract the privilege.⁸ This option is similar to approaches adopted in Australia.⁹

QUESTION

Q55

Should section 54 be amended to clarify that the privilege applies to related documents that meet the conditions described in subsections 54(1)(a) and (b) but are not communicated between the person requesting or obtaining professional legal services and the legal adviser?

TERMINATION OF LITIGATION PRIVILEGE

13.7 Section 56 establishes a privilege in relation to preparatory materials for proceedings known as “litigation privilege”. The purpose of litigation privilege is to protect the adversarial process.¹⁰ The Act does not address whether (and, if so, when) litigation privilege terminates.

What is the issue?

13.8 The termination of litigation privilege is a long-standing issue that was considered in both previous Commission reviews of the Act.¹¹ Case law since the Second Review of the Act demonstrates that the law remains unsettled on this point, a fact that continues to attract attention from commentators.¹²

13.9 The same issue does not appear to arise in relation to legal advice privilege (section 54) or privilege for settlement negotiations, mediation or plea discussions (settlement privilege) (section 57). While the Act does not address whether these privileges terminate either, the established position in respect of legal advice privilege is that “once privileged, always privileged”.¹³ That is, privileged documents remain privileged in all circumstances, unless that privilege is waived.

⁸ See, for example, *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [165] and [169].

⁹ In Australia, legal advice privilege extends to confidential documents “whether delivered or not” prepared by the client, lawyer or another person for the dominant purpose of the lawyer or one or more of the lawyers providing legal advice to the client: Evidence Act 1995 (Cth), s 118(c); Evidence Act 1995 (NSW), s 118(c); Evidence Act 2008 (Vic), s 118(c); Evidence Act 2011 (ACT), s 118(c); Evidence (National Uniform Legislation) Act 2011 (NT), s 118(c).

¹⁰ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.62].

¹¹ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.58]–[10.65] and Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [16.19]–[16.30].

¹² See, for example, Allison Ferguson and Guy Tompkins “Update on Evidence Act for Civil Litigators” (paper presented to New Zealand Law Society Evidence Act Update for Civil Litigators webinar, 14 June 2022) at 36–41 and Sean McAnally “Litigation privilege: permanent or temporary?” [2022] NZLJ 8.

¹³ See, for example, *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293 at [22], citing *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [44].

13.10 In respect of settlement privilege, the High Court has previously suggested that the privilege does not terminate,¹⁴ and the Court of Appeal recently confirmed this in relation to plea discussions.¹⁵ The Court of Appeal explained that the rationale for the privilege is to encourage frank discussions between prosecution authorities and defendants with the aim of enhancing the prospect of agreement being reached.¹⁶ The Court acknowledged that the rationale for the privilege may be “substantially reduced” once a defendant pleads guilty and is sentenced, but saw merit in the submission that the general purpose for the privilege being extended to plea negotiations served a broader purpose relating to encouraging other defendants to engage with prosecutors in frank negotiations to achieve appropriate plea agreements.¹⁷ While the Court’s decision was focused on the application of section 57 in the criminal context, we think its reasons are equally applicable in the civil context. As the Commission explained in its 2013 Review:¹⁸

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. ...

Should litigation privilege terminate?

13.11 There are different views on whether litigation privilege should terminate. One view is that litigation privilege should terminate once the litigation that created the privilege (and any related litigation) comes to an end. This was the approach favoured by the Supreme Court of Canada in *Blank v Minister of Justice*.¹⁹ The basis for this approach lies in the policy underlying the privilege. In the words of *Blank*, its purpose is to create a “zone of privacy” in relation to pending or apprehended litigation.²⁰ Once that need has been exhausted and litigation has concluded, it is argued that there is no need for the privilege to endure.²¹ The decision in *Blank* has been cited with approval in several New Zealand cases.²²

¹⁴ *Jung v Templeton* HC Auckland CIV-2007-404-5383, 30 September 2009 at [64].

¹⁵ *T v R* [2020] NZCA 15. See also *Re Harder* [2023] NZHC 620 at [15].

¹⁶ *T v R* [2020] NZCA 15 at [28].

¹⁷ *T v R* [2020] NZCA 15 at [29].

¹⁸ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.64].

¹⁹ *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319.

²⁰ *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319 at [34].

²¹ *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319 at [34]; Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.62].

²² *Snorkel Elevating Work Platforms Ltd v Thompson* [2007] NZAR 504 (HC) at [13] (a case decided before the Evidence Act 2006 came into force); *Houghton v Saunders* [2013] NZHC 1824 at [21]; *Nisha v LSG Sky Chefs New Zealand Ltd (No 16)* [2015] NZEmpC 127 at [37]–[39]. See also *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293 at [21]–[22], where the Court noted *Blank* and observed that, because the rationale for different forms of privilege are different, “the persistent character of solicitor/client privilege does not necessarily justify the same rule [of “once privileged, always privileged”] applying to litigation privilege” (at [22]).

However, it “does not have a firm hold”,²³ with neither the Court of Appeal nor Supreme Court having considered the matter.²⁴

- 13.12 Another view is that litigation privilege should not terminate. This appears to be the preferred approach in England and Wales.²⁵ This approach treats litigation privilege the same as legal advice privilege and settlement privilege, thereby promoting a more coherent scheme. It might, for example, be considered odd that privilege endures in relation to any concessions made during without prejudice discussions to settle a proceeding but not in relation to any concessions recorded in confidential material that was prepared by one party for that same proceeding. This approach would also avoid the practical difficulties that would inevitably arise in trying to determine when litigation, including any “related litigation”, is at an end.²⁶

Previous Commission consideration

- 13.13 In its 2013 Review, the Commission did not express a view on whether litigation privilege should terminate but instead recommended that any problems be considered at the next periodic review. It noted, however, that it was not aware of this issue causing problems in practice and observed that it may be difficult to neatly encapsulate the idea of “termination” in legislation given this would likely be driven by the facts in any given case.²⁷
- 13.14 In the Second Review, the Commission noted that several cases had considered whether litigation privilege should terminate without reaching a definitive conclusion.²⁸ Few submitters addressed the issue and the views of those who did were mixed on whether the Act should be amended and, if so, whether litigation privilege should terminate.²⁹
- 13.15 The Commission expressed a view that litigation privilege *should* terminate once the litigation with which it is connected ends, but that there be an exception for ongoing related litigation.³⁰ The Commission did not, however, recommend amending the Act on the basis that determining when related litigation is pending or anticipated is likely to be a fact-specific exercise and a matter best left to the courts to determine on a case-by-case basis.

²³ Sean McAnally “Litigation privilege: permanent or temporary?” [2022] NZLJ 8.

²⁴ In *A v Attorney-General* [2009] NZCA 490, the Court of Appeal noted that whether the Court should adopt the approach in *Blank* was an “interesting question” but one that did not need to be considered in that case (at [27]). 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.

²⁵ See discussion in *NZH Ltd v Ramspecs Ltd* [2015] NZHC 2396 at [31].

²⁶ Difficulties in assessing when the privilege should end were recognised in *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319 and by the Commission in *Te Aka Matua o te Ture | Law Commission The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.62]–[10.63].

²⁷ *Te Aka Matua o te Ture | Law Commission The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.65] and R21.

²⁸ *Houghton v Saunders* [2013] NZHC 1824; *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293; *Nisha v LSG Sky Chefs New Zealand Ltd (No 16)* [2015] NZEmpC 127; and *NZH Ltd v Ramspecs Ltd* [2015] NZHC 2396.

²⁹ *Te Aka Matua o te Ture | Law Commission The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [16.21]–[16.23].

³⁰ *Te Aka Matua o te Ture | Law Commission The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [16.28].

Developments since the Second Review

13.16 In *Minister of Education v James Hardie New Zealand*, the High Court did not have to decide whether litigation privilege had terminated but made some observations.³¹ The Court expressed “some sympathy” for the view that the conclusion reached in *Blank* is not available under the Act,³² observing:³³

In my view, the proper interpretation and application of s 53 to this issue is likely to be key. That section does not appear to contemplate litigation privilege ceasing at the conclusion of the proceedings in relation to which the relevant documents had been prepared. Rather, s 53(1) expressly provides that a person who has a privilege conferred by any of ss 54 to 59 “has the right to refuse” to disclose the document or communication “in a proceeding ...” (emphasis added). Accordingly, s 53(1) does not distinguish between any of the different forms of privilege for the purposes of the duration of that privilege. Nor is the type of proceeding in which a privilege-holder has the “right” to refuse to disclose a privileged document limited, at least in the case of litigation privilege, to the related proceedings contemplated in *Blank*.

13.17 The Court also expressed concern as to how the *Blank* approach might operate in practice, querying whether subsequent related proceedings would “re-attach” privilege to the documents concerned and what this would mean if the documents had lost their confidentiality in the intervening period.³⁴

13.18 The matter also attracted comment from the High Court in *Metlifecare Retirement Villages Ltd v James Hardie New Zealand Ltd*.³⁵ The Court noted that counsel “properly accepted that the principle once privileged, always privileged, applied even if the privilege was in relation to a different legal dispute”.³⁶

Is legislative reform necessary or desirable?

13.19 We seek submissions on whether the Act should be amended to clarify whether (and, if so, when) litigation privilege terminates. In previous reviews, the Commission concluded that it was appropriate to leave this matter to be determined by the courts. It may be that this remains the most appropriate approach. On the other hand, the absence of certainty may be causing problems in practice. In any event, the fact the law remains unsettled 16 years after the Act came into force may suggest reform is desirable to promote clarity and certainty.

13.20 If reform is considered necessary or desirable, a policy decision needs to be made on what approach is to be preferred. There does not appear to be consensus on this issue. The position favoured by the Commission in its Second Review, that litigation privilege should terminate, has not been favoured in subsequent case law. The authors of *Mahoney on Evidence* have similarly suggested that “the better approach is for the rule of “once privileged always privileged” to be of universal application under the Act”.³⁷ Allison

³¹ *Minister of Education v James Hardie New Zealand* [2019] NZHC 3487 at [100].

³² *Minister of Education v James Hardie New Zealand* [2019] NZHC 3487 at [105].

³³ *Minister of Education v James Hardie New Zealand* [2019] NZHC 3487 at [106].

³⁴ *Minister of Education v James Hardie New Zealand* [2019] NZHC 3487 at [107].

³⁵ *Metlifecare Retirement Villages Limited v James Hardie New Zealand Limited* [2022] NZHC 511.

³⁶ *Metlifecare Retirement Villages Limited v James Hardie New Zealand Limited* [2022] NZHC 511 at [87].

³⁷ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV67.07].

Ferguson and Guy Tompkins also note that “arguably, if parliament had intended for any particular type of privilege to only subsist for a defined period of time, it would have been expressly provided for in the relevant position”.³⁸ On the other hand, a different interpretation is favoured by Sean McAnally, who argues that sections 53 and 56 “are more consistent with the *Blank* approach than not”.³⁹

- 13.21 Finally, we note that, if the preferred view is that litigation privilege should not terminate, it may be desirable to amend the Act by including a new provision that *also* confirms the position with respect to legal advice privilege and settlement privilege. While the position in respect of these privileges is more settled, it would be inconsistent to amend the Act to address the termination status of one but not the other legal privileges.

QUESTION

Q56

Is the uncertainty as to whether and/or when litigation privilege terminates causing any problems in practice? If so, should the Act be amended to clarify:

- a. that litigation privilege terminates at the conclusion of the relevant proceeding and any connected litigation; or
- b. that litigation privilege, along with legal advice privilege and settlement privilege, does not terminate except as provided for in the Act?

LITIGATION PRIVILEGE AND CONFIDENTIALITY

- 13.22 Unlike sections 54 and 57, section 56 does not include any reference to confidentiality. This appears to be a drafting error and there is clear Supreme Court authority that confirms that, for litigation privilege to attach to a communication or information, it must have been intended to be confidential.⁴⁰

- 13.23 While the law is settled on this point, we seek submissions on whether the absence of a reference to confidentiality in section 56 is creating confusion or otherwise causing problems in practice. If so, it may be desirable to correct the drafting issue by amending section 56(1) so that it provides as follows (additions underlined):

(1) Subsection (2) applies to a communication or information only if the communication or information is:

(a) intended to be confidential; and

(b) made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the proceeding).

³⁸ Allison Ferguson and Guy Tompkins “Update on Evidence Act for Civil Litigators” (paper presented to the New Zealand Law Society conference, Evidence Act Update for Civil Litigators, 14 June 2022).

³⁹ Sean McAnally “Litigation privilege: permanent or temporary?” [2022] NZLJ 8. See also James Anson-Holland “The Limits of Settlement Privilege in New Zealand: Distilling the Guiding Principles” [2022] 30 NZULR 79 at 99–103. Anson-Holland argues that, following the logic of *Blank*, settlement privilege should terminate once the parties to the dispute have reached a concluded settlement agreement except in circumstances involving the same legal combat.

⁴⁰ *Beckham v R* [2015] NZSC 98 at [93]–[94].

QUESTION

Q57

Is the lack of reference to a requirement for confidentiality in section 56 creating confusion or otherwise causing problems in practice? If so, should section 56(1) be amended to clarify that litigation privilege only applies to a communication or information that is intended to be confidential?

SETTLEMENT PRIVILEGE AND THE INTERESTS OF JUSTICE EXCEPTION

- 13.24 Section 57 codified the common law “without prejudice” rule. It protects from disclosure communications between parties in civil proceedings that are intended to be confidential and are made in connection with an attempt to settle or mediate the dispute (settlement privilege).⁴¹
- 13.25 The rationale for settlement privilege is founded both on public policy (that parties should be encouraged to settle disputes out-of-court, secure in the knowledge that whatever is said for that purpose will remain confidential and will not be used against them in later proceedings), and on the principle that the law should respect the parties’ agreement to communicate on a without prejudice basis.⁴²
- 13.26 At common law, there were many exceptions to the without prejudice rule,⁴³ but not all these exceptions were codified in the Act.⁴⁴ This resulted in conflicting case law as to whether the common law exceptions not codified continued to apply after the Act was passed.⁴⁵
- 13.27 In response to this concern, the Commission in its 2013 Review recommended amending section 57 to accommodate the remaining common law exceptions.⁴⁶ It identified two options for doing so. It could either “attempt to spell out each of the exceptions” in the Act or it could make provision along the lines that a court may order disclosure if it considers that, “in the interests of justice, the need for the communication to be disclosed in the proceeding outweighs the need for the privilege”.⁴⁷ The Commission recommended the latter option, although it recognised that this might invite litigation in areas outside

⁴¹ Evidence Act 2006, s 57(1). Privilege in respect of plea discussions in criminal proceedings is addressed in s 57(2A)–(2B).

⁴² See, for example, *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713 at [11]; and *Sheppard Industries Ltd v Specialised Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [23]–[32].

⁴³ James Anson-Holland discusses 11 common law exceptions in “The Limits of Settlement Privilege in New Zealand: Distilling the Guiding Principles” [2022] 30 NZULR 79 at 84–87.

⁴⁴ The three exceptions that were originally codified in s 57(3) are described as exceptions that promote the public policy principle of encouraging settlement, while those exceptions that subordinate that principle to other seemingly more important principles of public policy were not originally codified: James Anson-Holland “The Limits of Settlement Privilege in New Zealand: Distilling the Guiding Principles” [2022] 30 NZULR 79 at 84–85.

⁴⁵ See discussion in Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.49]–[10.52].

⁴⁶ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.54].

⁴⁷ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.56].

the pre-existing recognised exceptions to the privilege.⁴⁸ Its view was that there was a greater risk in seeking to spell out the exceptions and that it would be better that the Act “acknowledge the courts’ role in setting the boundaries of the privilege”.⁴⁹

- 13.28 In accordance with the Commission’s recommendation, the Evidence Amendment Act 2016 inserted section 57(3)(d) into the Act, which provides the privilege does not apply to:

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.

How is section 57(3)(d) operating in practice?

- 13.29 Several High Court decisions have now considered the scope of section 57(3)(d).⁵⁰ The cases largely confirm that the common law exceptions inform the court’s exercise of discretion under the new statutory “interests of justice” exception.⁵¹ Of particular focus in the case law has been the ongoing relevance of the common law exception for “unambiguous impropriety”. This may be due to it being regarded as an exception of general application that allows a court to prevent abuse of settlement privilege.⁵²
- 13.30 However, commentators have pointed to some cases that appear to suggest the scope of section 57(3)(d) may be wider than the common law exceptions.⁵³ In *Smith v Shaw*, the Court had rejected an application to order disclosure of privileged material under the interests of justice exception, finding that the case fell far short of the high threshold of “unambiguous impropriety”.⁵⁴ The Court observed that “given the very clear policy

⁴⁸ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.57].

⁴⁹ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.57].

⁵⁰ The separate interests of justice exception, which applies only in relation to plea discussions (s 57(2B)(c) of the Evidence Act 2006), was recently considered in *Re Harder* [2023] NZHC 620. The case concerned a request for legal advice given by the then Solicitor-General to WorkSafe about a voluntary reparation payment offered in connection with the prosecution of the Chief Executive of Pike River Coal Ltd at the time of the Pike River Mine tragedy. The Court held that the exception applied in that case, concluding that transparency through open justice outweighed the factors that pointed against disclosure of the documents over which privilege was claimed (at [20]).

⁵¹ Nina Khouri “Mediation” [2021] NZ L Rev 169 at 195. See, for example, *Smith v Shaw* [2020] NZHC 238, [2020] 3 NZLR 661, where counsel agreed that authorities on the common law exceptions will be of guidance in the approach to the new section (at [34]), and the Court applied case law on the common law “unambiguous impropriety” exception (at [45]). See also *Body Corporate 212050 v Covekinloch Auckland Ltd (in liq)* [2017] NZHC 2642 at [94], where one of the reasons the Court declined to order disclosure of privileged communications was that the claim did not fall within any of the common law exceptions, and *TPT Forests Ltd v Penfold* [2022] NZEmpC 236, a Kōti Take Mahi | Employment Court decision where the Judge observed that s 57(3)(d) “intended to pick up the common law exceptions to without prejudice privilege” (at [31]).

⁵² See discussion in James Anson-Holland “The Limits of Settlement Privilege in New Zealand: Distilling the Guiding Principles” [2022] 30 NZULR 79 at 87; and *Minister of Education v Reidy McKenzie Ltd* [2016] NZCA 326, (2016) 23 PRNZ 439 at [26].

⁵³ See James Anson-Holland “The Limits of Settlement Privilege in New Zealand: Distilling the Guiding Principles” [2022] 30 NZULR 79 at 98; and Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA57.12].

⁵⁴ *Smith v Shaw* [2020] NZHC 238, [2020] 3 NZLR 661 at [45]–[46].

reasons for and benefits of settlement privilege, it is right that any exceptions to it are narrow”.⁵⁵

- 13.31 Several months later, another application in the same proceedings was made to set aside settlement privilege under the interests of justice exception.⁵⁶ That application was decided by a different High Court Judge who described the exception in 57(3)(d) as follows:⁵⁷

This relatively new subsection broadened the common law exceptions to settlement privilege. The test is whether it is in the interests of justice to set aside the privilege. This involves an assessment of whether the specific facts before the Court justify an exception to the more general policy reasons for preserving the privilege.

- 13.32 In that interlocutory application it was not argued that the privileged material fell within the common law exception for “unambiguous impropriety”, but rather the Court would otherwise be misled or deceived if the material was excluded, which would not be in the interests of justice.⁵⁸ The Court was not satisfied that permitting the evidence to be produced would be in the interests of justice and noted that the threshold for what justifies excluding protection in the “interests of justice” is necessarily high.⁵⁹ It has, however, been suggested that this case leaves open the possibility that a broader interests of justice exception is available.⁶⁰

- 13.33 The High Court again considered section 57(3)(d) in *Gibbs v Windmeyer*.⁶¹ In that case, it was argued that the common law exception to settlement privilege for “unambiguous impropriety” remained as a separate ground, but the Court preferred the view that all common law exceptions were subsumed by the statutory interests of justice exception.⁶² The Court adopted the approach in *Smith v Shaw* to “unambiguous impropriety” and concluded that the threshold had not been met.⁶³ It went on to consider whether there were “any other “interests of justice” considerations”.⁶⁴ While the Court concluded there were no grounds for setting aside settlement privilege under section 57(3)(d), it appeared to accept that other reasons, not previously giving rise to an exception under the common law could potentially be addressed under section 57(3)(d).

- 13.34 Finally, in *Smith v Claims Resolution Service Ltd*, settlement privilege did not protect parts of the plaintiff’s email exchanges that attempted to settle the proceedings on the basis that the need for disclosure outweighed the need for the privilege to apply.⁶⁵ The need for disclosure arose because the defendant had applied for a freezing order to prevent

⁵⁵ *Smith v Shaw* [2020] NZHC 238, [2020] 3 NZLR 661 at [46].

⁵⁶ *Smith v Shaw* [2020] NZHC 1229.

⁵⁷ *Smith v Shaw* [2020] NZHC 1229 at [17].

⁵⁸ *Smith v Shaw* [2020] NZHC 1229 at [20].

⁵⁹ *Smith v Shaw* [2020] NZHC 1229 at [25].

⁶⁰ James Anson-Holland “The Limits of Settlement Privilege in New Zealand: Distilling the Guiding Principles” [2022] 30 NZULR 79 at 98.

⁶¹ *Gibbs v Windmeyer* [2021] NZHC 2582.

⁶² *Gibbs v Windmeyer* [2021] NZHC 2582 at [75]–[76], citing *Smith v Shaw* [2020] NZHC 238, [2020] 3 NZLR 661.

⁶³ *Gibbs v Windmeyer* [2021] NZHC 2582 at [80]–[83].

⁶⁴ *Gibbs v Windmeyer* [2021] NZHC 2582 at [86].

⁶⁵ *Smith v Claims Resolution Service Ltd* [2021] NZHC 3424 at [39].

the sale of the plaintiff’s property and the email extracts concerned the plaintiff’s financial situation and future plans for the property. The Court considered that, if the plaintiff was putting those factual matters forward as a basis for negotiating the outcome she preferred, it was in the interests of justice that both parties be able to preserve their positions by reference to what was said.⁶⁶ While analysis of section 57(3)(d) in this case was limited, the decision does suggest a “wider view” of the ambit of the interests of justice exception than the above cases.⁶⁷

Is legislative reform necessary or desirable?

- 13.35 The cases discussed above demonstrate that section 57(3)(d) is being used in practice and that the boundaries of settlement privilege are being tested as a result.⁶⁸ Some divergence in the case law at this stage is, perhaps, to be expected, particularly given neither the Court of Appeal nor the Supreme Court have yet considered the scope of the provision. We expect that clarity will develop over time and on a case-by-case basis.
- 13.36 We note, however, that concerns have been expressed about any interpretation of the interests of justice exception that would see it applying to a broader range of situations than at common law. It has been argued that any significant expansion to the common law exceptions to settlement privilege would inappropriately erode the protections of the privilege.⁶⁹ We also note the recent rejection in England and Wales of any broad “interests of justice” exception on the basis that this would be antithetical to the otherwise narrow and principled existing common law exceptions.⁷⁰
- 13.37 In light of this, we seek submissions on how section 57(3)(d) is operating in practice and whether legislative reform is desirable. We are particularly interested in understanding whether the present uncertainty is creating problems.

QUESTION

Q58

Is section 53(3)(d) causing problems in practice? If so, should the Act be amended to clarify the scope of the exception?

SUCCESSIVE INTERESTS IN PRIVILEGED MATERIAL

- 13.38 Subsections 66(2)–(4) of the Act govern successive interests in material that attracts privilege under sections 54–57 of the Act. They provide:

66. Joint and successive interests in privileged material

⁶⁶ *Smith v Claims Resolution Service Ltd* [2021] NZHC 3424 at [39].

⁶⁷ Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA57.12]. See also discussion in Allison Ferguson and Guy Tompkins “Update on Evidence Act for Civil Litigators” (paper presented to New Zealand Law Society Evidence Act Update for Civil Litigators webinar, 14 June 2022) at 35–36.

⁶⁸ Nina Khouri “Mediation” [2021] NZ L Rev 169 at 198.

⁶⁹ James Anson-Holland “The Limits of Settlement Privilege in New Zealand: Distilling the Guiding Principles” [2022] 30 NZULR 79 at 98. We note that Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) already describes s 57(3)(d) as a “substantial weakening” of settlement privilege (at [EA57.06]).

⁷⁰ *Briggs & Ors v Clay & Ors* [2019] EWHC 102 (Ch) at [118]–[119].

...

- (2) On or after the death of a person who has a privilege conferred by any of sections 54 to 57 in respect of a communication, information, opinion, or document, the personal representative of the deceased person or other successor in title to property of the deceased person—
 - (a) is entitled to assert the privilege against third parties; and
 - (b) is not restricted by any of sections 54 to 57 from having access or seeking access to the privileged matter.
- (3) However, subsection (2) applies only to the extent that a Judge is satisfied that the personal representative or other successor in title to property has a justifiable interest in maintaining the privilege in respect of the communication, information, opinion, or document.
- (4) A personal representative of a deceased person who has a privilege conferred by any of sections 54 to 57 in respect of a communication, information, opinion, or document and any other successor in title to property of a person who has such a privilege, may, on the application of a person who has a legitimate interest in maintaining the privilege (including another holder of the privilege), be ordered by a Judge not to disclose the privileged matter in a proceeding.

What is the issue?

- 13.39 A potential drafting issue has been identified with section 66(2). This arises from changes made to that section by the Evidence Amendment Act 2016, in response to a recommendation made by the Commission in the 2013 Review.
- 13.40 Sections 66(2)–(4) are based on the Commission’s proposed Evidence Code provisions. Those provisions identified two distinct categories of successive privilege holders:⁷¹
- (a) a personal representative of a deceased person who has a privilege conferred under what became sections 55 to 57; and
 - (b) a successor in title to property of a person who has such a privilege.
- 13.41 In relation to successors in title, it is clear from the Commission’s commentary that this category was intended to include situations where the privilege holder is living but is no longer the owner of the relevant property, for example, where the Official Assignee is successor in title to a bankrupt’s property.⁷² This was consistent with the existing common law position.⁷³
- 13.42 The Act largely adopted the Commission’s proposed Code provisions, but section 66(2) as enacted referred to “the personal representative of the person or other successor in title to property of a person”, while section 66(4) referred to “a personal representative *of a deceased person* ... and any other successor in title to property of a person” (emphasis added).
- 13.43 The Commission noted the anomaly in the 2013 Review and concluded that the omission in section 66(2) of the words “of a deceased person” in relation to personal

⁷¹ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at cl 70(2)–(3).

⁷² Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C288].

⁷³ Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA66.4].

representatives was a drafting error.⁷⁴ It recommended that “deceased” be added after “personal representative of the” in section 66(2).⁷⁵

- 13.44 The Evidence Amendment Act made this change but it also inserted the term “deceased” in the phrase “other successor in title to property of a *deceased* person”. The authors of *Cross on Evidence* note that the effect of this change is that a successor in title can no longer claim privilege while the prior owner of the property survives and that:⁷⁶

This effects a very significant change to the rights of access to documents recording legal advice that were previously available to liquidators and the Official Assignee, and others who acquired property about which legal advice has been given. There is no indication that this significant change was intended. There appears to be no rational basis on which this form of purely title-based succession to privilege should take effect only on the death of the prior privilege holder.

- 13.45 It does not appear that such a change was intended. The explanatory note to the Evidence Amendment Bill explained that the changes to section 66 were to ensure “that the privilege can be asserted only by the personal representative of the deceased person, as recommended by the Law Commission”.⁷⁷ It does not mention the separate category of successors in title, and neither does the Ministry of Justice’s initial briefing on the Bill, which similarly explained that the Bill “ensures clarity and avoids future problems that could arise from the section being read to cover personal representatives generally”.⁷⁸ There is nothing in the legislative history to suggest that the amendment intended to change the law on successors in title in such a way.
- 13.46 The authors of *Cross on Evidence* note that, in practice, the Courts continue to deal with the issue of succession to privilege in the context of company liquidation and receivership “as if s 66 had not been amended”.⁷⁹

Is legislative reform necessary or desirable?

- 13.47 Our preliminary view is that the insertion of “deceased” in respect of successors in title in section 66(2) was a drafting error. The amendments were intended to give effect to the Commission’s recommendation in the 2013 Review. That recommendation and the Commission’s discussion of the issue were focused solely on personal representatives. The Commission did not comment on successors in title, which is a separate category of successive privilege holders. Further, the Commission’s Evidence Code made it clear that the intention was always that this category, unlike personal representatives, would not be limited to situations where the original privilege holder has died. As noted above, this was consistent with the common law position.

⁷⁴ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.189].

⁷⁵ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at R28.

⁷⁶ Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA66.4].

⁷⁷ Evidence Amendment Bill 2015 (27–1) (explanatory note) at 8.

⁷⁸ Ministry of Justice *Evidence Amendment Bill – Initial Briefing* (8 September 2015) at 8.

⁷⁹ Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA66.4], citing the recent cases of *Whitley (as liquidator of Property Ventures Ltd (in liq)) v Connell (sued as a firm)* [2022] NZHC 2994 at [62]–[64]; *Katoria Trustee Ltd (ato CA Quinn Trust) v Toon* [2022] NZHC 3037 at [35]–[37]. Neither case refer to ss 66(2)–(4) when determining who “owned” the privilege in the relevant material. We have not identified any other decisions that address the impact of the amendment to s 66(2).

13.48 We therefore seek submissions on whether section 66(2) should be amended to remove the word “deceased” from the phrase “successor in title to property of the deceased person”.

QUESTION

Q59

Should section 66(2) be amended to remove the word “deceased” from the phrase “successor in title to property of the deceased person”?

CHAPTER 14

Trial process

INTRODUCTION

In this chapter, we consider three provisions in the Act that deal with aspects of the trial process and seek feedback on issues relating to:

- restriction on disclosure of complainant’s occupation in sexual cases (section 88);
- cross-examination duties (section 92); and
- cross-examination on behalf of a defendant or party who is precluded from personally cross-examining a witness (section 95(5)).

RESTRICTION ON DISCLOSURE OF COMPLAINANT’S OCCUPATION IN SEXUAL CASES

14.1 Section 88 of the Evidence Act 2006 prevents questioning about or comment on the complainant’s occupation in a sexual case except with the permission of the judge.¹ The judge must only grant permission if the evidence “is of sufficient direct relevance to the facts in issue that to exclude it would be contrary to the interests of justice”.² Section 88 re-enacted an existing rule of evidence,³ which was first enacted in 1985 in response to complainants’ requests for further protection of their identity and privacy in sexual cases.⁴

What are the issues?

14.2 Research published by Adjunct Professor Elisabeth McDonald in 2020 identified two issues in relation to section 88:

¹ Evidence Act 2006, s 88(1).

² Evidence Act 2006, s 88(2).

³ Evidence Act 1908, s 23AA.

⁴ Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 96.

- (a) Compliance with the section was low.⁵ Complainants were routinely asked or gave evidence about their occupation or whether they were employed or studying without the judge considering section 88.
- (b) The scope of the section may be too narrow in that it only refers to “occupation”.⁶ It does not apply, for example, to evidence about the complainant’s status as a student, mother or beneficiary, or evidence about their education or qualifications.⁷ It also does not differentiate between the complainant’s occupation at the time of the offending and at the time of the trial.⁸ This may result in the complainant being asked about both when only one is relevant.

14.3 McDonald made a submission to the select committee considering the Sexual Violence Legislation Bill in 2020 suggesting changes to section 88 to broaden its scope.⁹ No changes were made to the Bill. The Departmental Report noted the proposed amendments to section 88 may be better analysed following more thorough consideration of the research and case law.¹⁰

Is legislative reform necessary or desirable?

Low compliance with section 88

14.4 It is clear from the research conducted by McDonald that complainants are routinely asked and/or give evidence about their occupation without the judge considering admissibility under section 88. This is concerning, particularly given a provision to this effect has been in force since 1986.¹¹

14.5 A question about a complainant’s occupation is often asked as an introductory question by the prosecution as a way of “settling” the complainant at the start of proceedings.¹² Preliminary feedback we have received has noted that judges may find it difficult to intervene. They may be reluctant to interrupt a complainant, particularly at an early stage of their evidence, or to appear to be critical of a lawyer in front of a jury. If the question is general in nature (rather than asking for specifics such as where the complainant works), it may not be considered to raise serious privacy concerns.

⁵ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 200–203 and 243. See also Elisabeth McDonald *In the absence of a jury: Examining judge-alone rape trials* (Canterbury University Press, Christchurch, 2022) at 117–118.

⁶ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 201 and 243.

⁷ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 243. See, for example, *R v Morgan (No 1)* [2016] NZHC 1427 at [9] (finding that “occupation” in s 88 does not include beneficiary status).

⁸ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 200–201.

⁹ Elisabeth McDonald “Submission to the Justice Committee on Sexual Violence Legislation Bill 2019” at [27].

¹⁰ Ministry of Justice *Departmental Report for the Justice Committee: Sexual Violence Legislation Bill* (March 2020) at [387].

¹¹ Section 23AA of the Evidence Act 1908, inserted by s 2 Evidence Amendment Act (No 2) 1985.

¹² Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 203.

- 14.6 Given the requirement for judicial approval is already clear on the face of section 88 and some of the low compliance stems from procedural tendencies at trial, our preliminary view is that statutory amendment is unlikely to improve compliance with the provision. However, we seek feedback on other measures that may help to increase awareness and proper consideration of the requirements of the section. This could include, for example, guidance or education for judges and/or prosecutors.

Scope of section 88

- 14.7 Section 88 is based on section 23AA of the Evidence Act 1908. That provision was introduced in 1985 with the aim of preventing further indignity to, or traumatising or intimidating of, victims of sexual violence.¹³
- 14.8 Information about the complainant’s occupation, or lack thereof, can be irrelevant and may cause unnecessary embarrassment, shame or fear of harassment.¹⁴ The same may be true of other types of personal information about the complainant. For instance, McDonald’s research referred to cases in which the complainant appeared to be in some distress after having to disclose they were not working or were an 18-year-old “stay at home mum” on a benefit.¹⁵ However, the one case we identified that directly addresses this issue found that “occupation” in section 88 does not include beneficiary status. This suggests section 88 is likely to be interpreted in a relatively narrow way.
- 14.9 Requiring the judge’s permission to offer evidence about a wider range of the complainant’s personal information may be seen as consistent with the policy basis for the section. If so, there may be a case for amending section 88.
- 14.10 We invite submissions on whether section 88 should be amended to broaden its scope and, if so, what types of information should be included. For example, McDonald’s report recommended it should specifically cover:¹⁶
- (a) the occupation the complainant had at the time of the alleged offence and/or at the time of the trial;
 - (b) whether the complainant has (or had) no occupation or is (or was) unemployed or is (or was) a student and in what course of study;
 - (c) whether the complainant is (or was) fully occupied caring for children or family members;
 - (d) the complainant’s school or tertiary qualifications.

¹³ (5 December 1985) 468 NZPD 8849.

¹⁴ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 203; Gerald Orchard “Sexual Violation: The Rape Law Reform Legislation” (1986) 12 NZULR 97 at 109.

¹⁵ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 203.

¹⁶ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 500 (recommendation 48).

QUESTIONS

- Q60** Is there an issue with low compliance with section 88? If so, how should this be addressed?
- Q61** Should section 88 be amended to protect a wider range of information? If so, what should it include?

CROSS-EXAMINATION DUTIES

14.11 Section 92 establishes a duty to cross-examine witnesses. Section 92(1) states:

In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.

What is the issue?

14.12 Our review of case law and commentary identified some uncertainty as to the purpose of section 92 and what it requires of cross-examining counsel. There is concern that this may be resulting in mechanical and overcautious cross-examination in civil proceedings and improper or repetitive cross-examination in some criminal proceedings.

Is the purpose and scope of section 92 uncertain?

14.13 Section 92 codified the long-standing common law rule first put forward by the House of Lords in *Browne v Dunn*.¹⁷ The rule is concerned with fairness to the witness so that they have an opportunity to reply to any criticism of their evidence based on competing evidence that is to be called later.¹⁸ It is there to protect the interests of the party that called the witness, *not* the interests of the party who is cross-examining the witness.¹⁹ Additionally, the rationale of accuracy in fact-finding is also said to underpin section 92.²⁰ The fact-finder should not be denied the opportunity to assess from all perspectives conflicting recollections of events.²¹

14.14 The duty to cross-examine is not absolute. The courts have confirmed that section 92 “need not be slavishly followed where the witness is perfectly well aware that his or her

¹⁷ *Browne v Dunn* (1893) 6 R 67 (HL). The rule was affirmed by the New Zealand Court of Appeal in *Gutierrez v R* [1997] 1 NZLR 192 (CA) at 199.

¹⁸ See, for example, *C v R* [2019] NZCA 653 at [76]; *Martin v R* [2015] NZCA 606 at [44]; *Alesco New Zealand Ltd v Commissioner of Inland Revenue* [2013] NZCA 40 at [44]; and *Pitceathly v R* [2010] NZCA 95 at [22].

¹⁹ See, for example, *Minister of Education v Carter Holt Harvey* [2020] NZHC 1539 at [50]; *R v Stojanovich* [2009] NZCA 210 at [22].

²⁰ See, for example, *Wallace v Attorney-General* [2022] NZCA 375 at [155]. This is consistent with the common law case *R v S* (2002) 19 CRNZ 442 (CA) (at [19]).

²¹ *Wallace v Attorney-General* [2022] NZCA 375 at [155], citing *R v Dewar* [2008] NZCA 344 and *R v S* (CA369/01) (2002) 19 CRNZ 442 (CA).

evidence is not accepted on a particular point”.²² The courts instead take a flexible and purposive approach when asked to determine whether a breach of section 92 has occurred. There are many examples of cases where one party’s failure to cross-examine a witness on a material issue is deemed *not* to breach the section 92 duty. This is on the basis that the witness was aware their evidence was not accepted on a particular point and, therefore, had the opportunity to respond to the criticism (whether or not that opportunity was taken).²³

14.15 The problem, however, is that neither the purpose of section 92 nor the courts’ general approach are apparent on the face of the section. As the authors of *Mahoney on Evidence* observe, a literal interpretation of section 92 would require cross-examination of witnesses on every item of evidence in a party’s case that meets the requirements in section 92(1).²⁴ They suggest that such a mechanical approach could blunt the impact of cross-examination and undermine a party’s control of adversarial questioning at trial.²⁵ The authors of both *Adams on Criminal Law* and *Mahoney on Evidence* also suggest that a literal interpretation of section 92 could conflict with the focus in section 6(e) of the Act on avoiding unjustifiable expense and delay.²⁶

14.16 The wording of section 92 may be generating some uncertainty as to what is required to discharge the cross-examination duty, leading lawyers to “err in the direction of excess”.²⁷ As James Farmer KC has observed:²⁸

It is a common misconception that all evidence of a witness with which there is some disagreement must be challenged by way of cross-examination. If that were so, trials would be needlessly protracted.

14.17 This matter was considered by Te Aka Matua o te Ture | Law Commission when it recommended codifying the rule in *Browne v Dunn* in the Evidence Code. The Commission acknowledged concern that codification could unnecessarily lengthen cross-examinations as counsel seek to comply with the duty.²⁹ The Commission sought to allay these concerns by recommending that the statutory duty be expressly limited to

²² *R v Dewar* [2008] NZCA 344 at [44] and *R v S* [2009] NZCA 227 at [27]. Affirmed in *Kent Sing Trading Company Ltd v JNJ Holdings Ltd* [2019] NZCA 388 at [92] and *Manukau v R* [2013] NZCA 217 at [24].

²³ See, for example, *Taylor v Asteron Life Ltd* [2020] NZCA 354, 2 NZLR 561 at [127]–[129]; *Minister of Education v Carter Holt Harvey* [2020] NZHC 1539 at [148]; *Solomon v R* [2019] NZCA 616 at [38] and [40]; *Farmer v R* [2019] NZCA 430 at [16]–[18]; *Manukau v R* [2013] NZCA 217 at [26]; *Pitceathly v R* [2010] NZCA 95 at [22]; *R v K* (CA531/2007) [2009] NZCA 97 at [15]; *R v S* [2009] NZCA 227 at [29].

²⁴ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV92.03].

²⁵ Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV92.03].

²⁶ Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA92.02]; Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV92.03].

²⁷ Richard Mahoney “Putting the Case Against the Duty to Put the Case” [2004] NZ L Rev 313 at 337.

²⁸ James Farmer “Witnesses in Civil Cases – the Consequences of Not Calling and of Not Cross-Examining” (paper presented to the Pacific Islands Lawyers Association, Auckland, November 2019) at [17].

²⁹ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [403].

situations where “the witness or the party who called the witness may be unaware that they are a part of the cross-examining party’s case”,³⁰ explaining that:³¹

The Law Commission expects that s 92 will result in *fewer* instances of the sort of unnecessary, overcautious cross-examinations that occur at present to ensure compliance with a common law rule that is of uncertain scope and varying application.

- 14.18 The Commission’s proposed wording, however, did not appear in the Evidence Bill introduced into Parliament in 2005.³²

Impact of section 92 in civil proceedings

- 14.19 If the objectives of section 92 are fairness and accuracy in fact-finding, arguably it has little utility in civil proceedings. The parties’ positions in civil proceedings are usually clear well in advance of trial because of procedural requirements such as exchange of pleadings and briefs of evidence.³³

- 14.20 The issue, however, is that uncertainty as to what section 92 requires may be resulting in the very behaviour the Commission sought to avoid with its Evidence Code – that is, unnecessary and overcautious questioning in cross-examination to avoid any breach of section 92.³⁴ As Andrew Barker KC explained in a submission to the Rules Committee on its Improving Access to Civil Justice project:³⁵

I find this often to be a largely pro forma and meaningless obligation, given the filing of substantive briefs of evidence and reply evidence (whether in writing or as led by counsel). Some counsel take a very broad approach to this obligation. Others are very careful and particular and devote a significant amount of time in putting each aspect of their case to every witness. The same variability in approach to the obligation applies to the judiciary.

Impact of section 92 on witnesses

- 14.21 Another concern is that section 92 is resulting in improper or unnecessarily repetitive questioning of witnesses in some cases.

- 14.22 McDonald’s examination of New Zealand trial processes in adult acquaintance rape cases identified a “very apparent” tension between the need to fairly “put the case” in cross-

³⁰ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 216; Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [403].

³¹ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [404]. See also Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C334].

³² It is unclear why this was the case. The Cabinet paper that sought agreement on the proposal to codify the cross-examination duty in the Evidence Bill reflected the Commission’s proposed wording: “I propose to codify the duty of a cross-examiner to “put the case” to the witness. A party must cross-examine a witness on substantial matters of the party’s case that contradict the evidence of the witness if the witness might be in a position to give admissible evidence on the matters *and may be unaware that these matters are part of the cross-examining party’s case*” (emphasis added): Cabinet Paper “Evidence Bill: Paper 4: The Trial Process” (4 December 2002) at [21].

³³ Mathew Downs (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [EA92.01(3)]. See also Richard Mahoney “Putting the Case Against the Duty to Put the Case” [2004] NZ L Rev 313 at n 13.

³⁴ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [404].

³⁵ Andrew Barker KC *Submission to Rules Committee on Consultation Paper on Improving Access to Civil Justice* (July 2021) at [28]. The Rules Committee also expressed concern with the operation of s 92 in civil proceedings. However, its concern was that, outside of expert witnesses, cross-examination should be limited to situations of factual dispute and not involve putting arguments to witnesses or inviting arguments in answers: Te Komiti mō ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022) at [191].

examination and the judicial control of improper or needlessly repetitive questioning.³⁶ McDonald found that some complainants were subjected to long periods of questioning in reliance on the duty to put the defendant's case,³⁷ sometimes even when the defendant's version of events had already been put to the complainant during their examination-in-chief.³⁸ McDonald concluded that better use could be made of the rules of evidence and procedure that already exist:³⁹

We consider that in the particular context of adult rape cases when the issue is consent, what is in contention will be usually be very clear pre-trial, and there could be tighter controls placed on the challenges to the complainant's version of events (such as reducing the need to put all of the details of the defendant's competing claims).

14.23 Further research published by McDonald in 2022 found that repetitive questioning on the basis of the section 92 duty occurred in both jury and judge-alone rape trials.⁴⁰

14.24 In relation to the observed lack of judicial intervention in cross-examination, McDonald suggested that:⁴¹

... this may be because it is difficult for a judge, in adversarial proceedings, to intervene about matters of content when the defendant has a duty to put their case to the complainant (see section 92 of the Evidence Act 2006). However, the extent of the questioning required in order to meet this duty is contestable – and in both studies there were cases in which the judge queried the need for the questions and the response given that relied on section 92.

14.25 Also relevant is Dr Isabel Randell's research on cross-examination of child and adolescent sexual violence complainants, published in 2021.⁴² Randell identified similar concerns with questioning that was intended to meet the section 92 duty:⁴³

In the trials analysed, the defence case was, for the most part, that the complainant's allegations were false. However, allegations of lying may increase distress, impede concentration, interfere with participation in questioning, and risk a young complainant becoming erroneously compliant and suggestible. Although counsel may have a duty to address lying with the complainant, if indeed that is the defence case, the extent to which accusations of lying are made by defence counsel has been suggested to be unnecessary.

³⁶ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 326.

³⁷ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 354–358.

³⁸ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 355.

³⁹ Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 383.

⁴⁰ Elisabeth McDonald *In the absence of a jury: Examining judge-alone rape trials* (Canterbury University Press, Christchurch, 2022) at 204–205.

⁴¹ Elisabeth McDonald *In the absence of a jury: Examining judge-alone rape trials* (Canterbury University Press, Christchurch, 2022) at 190.

⁴² Isabel Randell *That's a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants* (Chief Victims Advisor to Government, August 2021).

⁴³ Isabel Randell *That's a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants* (Chief Victims Advisor to Government, August 2021) at 30, citing Kim McGregor *Child witnesses in the NZ criminal courts: Issues, responses, opportunities* (Chief Victims Advisor to Government, 2017) at 14. See also Emily Henderson, Jonathan Temm and Phillip Hamlin *Pre-trial Case Management Guideline* (Benchmark, December 2018) at 23–24.

- 14.26 Randell questioned whether “sustained or aggressive attacks on the witness’ honesty” is necessary to meet the section 92 duty.⁴⁴ Randell also suggested a fear of appeal on the ground that the judge unfairly restricted the defence counsel’s ability to put questions to the witness may be acting as a barrier to judicial intervention.⁴⁵
- 14.27 The Benchmark initiative has published a best-practice guideline that addresses the section 92 duty in the context of vulnerable witnesses.⁴⁶ That guidance notes the law does not require lawyers to put questions to vulnerable witnesses in certain circumstances and pre-trial directions can be sought on the extent to which counsel must put the case in order to reduce unnecessary and overly distressing questioning. The findings of the McDonald and Randell studies, however, suggest that varying understandings and practices in relation to section 92 remain. While this research concerned adult and child complainants in cases involving sexual violence, that does not necessarily mean that the issue is confined to these cases.

Is legislative reform necessary or desirable?

- 14.28 The issues identified above suggest that section 92 has the potential to cause problems in practice in both civil and criminal proceedings. It may be resulting in unnecessarily lengthy cross-examination, which fails to promote the Act’s objective of avoiding unjustifiable expense and delay.⁴⁷ The wording of section 92 may also be failing to provide trial judges with sufficient guidance on when they can intervene in repetitive questioning when it is said to be part of trial counsel’s duty to put the case. If so, this also fails to promote the Act’s objective of promoting fairness to witnesses.⁴⁸
- 14.29 We are, therefore, interested in views on whether section 92 should be amended to clarify the scope of the cross-examination duty.

Preferred option for reform

- 14.30 Should reform be considered necessary or desirable, our preferred option is to amend section 92 to clarify that the duty to cross-examine is only engaged when a party or witness has not otherwise been put on notice of the cross-examining party’s case. This would be consistent with the policy objectives of the duty (discussed above) and would reflect the language originally proposed by the Commission in the Evidence Code.
- 14.31 This change would more clearly signal to cross-examining counsel what is required of them under this duty. It would clarify that they are under no duty to cross-examine witnesses when their party’s case is clear and there is no evidence to be led subsequently

⁴⁴ Isabel Randell *That’s a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants* (Chief Victims Advisor to Government, August 2021) at 37 (citations omitted).

⁴⁵ Isabel Randell *That’s a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants* (Chief Victims Advisor to Government, August 2021) at 38 (citations omitted).

⁴⁶ Emily Henderson, Jonathan Temm and Phillip Hamlin *Pre-trial Case Management Guideline* (Benchmark, December 2018) at [10].

⁴⁷ Evidence Act 2006, s 6(e). See also s 8(1)(b), which provides for the exclusion of evidence if its probative value is outweighed by the risk that the evidence will needlessly prolong the proceeding.

⁴⁸ Evidence Act 2006, s 6(c).

of which the witness may be unaware. This would give counsel greater freedom to treat cross-examination as a matter of trial strategy. In criminal proceedings, the trial judge would have clearer guidance as to when they should intervene in cross-examination under section 85 to disallow unacceptable questioning.

- 14.32 In civil proceedings, clarifying section 92 in this way could reduce the extent of mechanical and overcautious cross-examination (as was intended by the Commission in proposing the Evidence Code).

QUESTION

Q62

Should section 92 be amended to clarify the extent of a party’s cross-examination duties? If so, should section 92 be amended to state that the obligation to cross-examine only arises if the witness or the party who called the witness may be unaware of the basis on which their evidence is challenged?

CROSS-EXAMINATION ON BEHALF OF ANOTHER

- 14.33 Defendants in criminal proceedings and parties in civil proceedings are usually represented by counsel. If a person is self-represented, there are some limitations on their ability to personally cross-examine witnesses. Section 95 of the Act provides that, in cases involving sexual offending, family violence or harassment, the defendant is not entitled to personally cross-examine the complainant and certain witnesses.⁴⁹ The judge may also order that a party must not personally cross-examine a witness in any civil or criminal proceeding.⁵⁰ When a party is precluded from personally cross-examining a witness, they may have their questions put to the witness by a person appointed by the judge.⁵¹

What is the issue?

- 14.34 A question has arisen in the case law as to the role of the person appointed to put questions to the witness.
- 14.35 In 2020, the Principal Family Court Judge issued guidance to te Kōti Whānau | Family Court judges noting that there were differing views on the role of counsel appointed to put a party’s questions to a witness.⁵² The guidance indicated that counsel appointed under section 95 should conduct the cross-examination *on behalf of* the defendant or other party. This involved more than simply voicing the party’s questions – it also required counsel to comply with the section 92 duty to put the case.
- 14.36 The courts have subsequently taken differing views on whether a person appointed under section 95 is simply a “mouthpiece” for the defendant or other party, or whether they have broader duties. A broad interpretation in line with the Principal Family Court

⁴⁹ Evidence Act 2006, s 95(1).

⁵⁰ Evidence Act 2006, s 95(2).

⁵¹ Evidence Act 2006, s 95(5)(b).

⁵² See discussion in *Irving v Irving* [2021] NZHC 2269 at [9]–[10].

Judge’s guidance was adopted in the Family Court case *Finley v Wiggins*.⁵³ Te Kōti Pira | Court of Appeal also appeared to adopt this approach, without directly addressing the issue, in *Millar v R*.⁵⁴ One of the grounds of appeal was that counsel appointed under section 95 had made errors in their cross-examination and overlooked lines of enquiry. The Court of Appeal agreed, noting counsel was appointed to cross-examine the complainant and “was required to perform that task and any others he undertook competently”.⁵⁵

- 14.37 On the other hand, in *Irving v Irving*, te Kōti Matua | High Court found that the role of a person appointed under section 95 is limited to putting the questions of the unrepresented party.⁵⁶ They are not required to conduct their own cross-examination or comply with section 92 – it is the unrepresented party who is subject to section 92 cross-examination duties.⁵⁷ This conclusion was based on the plain wording of section 95,⁵⁸ the fact that lay persons may be appointed to the role⁵⁹ and the purpose of the provision (which is to protect vulnerable witnesses from being questioned by their alleged abuser directly rather than to ensure parties have legal representation).⁶⁰ This approach was subsequently applied by the High Court in *R v Family Court*⁶¹ and impliedly endorsed by the Court of Appeal.⁶² However, as noted above, the Court of Appeal decision in *Millar*, which was released shortly after *Irving*, took a different approach.
- 14.38 It may be that *Millar* can be distinguished from *Irving* on the basis that, in *Millar*, the person was appointed “pursuant to s 95 ... and [to] assist the Court” (emphasis added).⁶³ That interpretation has not, however, been confirmed in subsequent case law to date.

Is legislative reform necessary or desirable?

- 14.39 It appears that there is uncertainty about the correct interpretation of section 95, which has potentially significant implications for people appointed under section 95(5) and the unrepresented parties they are assisting. We seek feedback on whether reform is desirable to clarify the position or whether this issue should be left to be resolved through case law.
- 14.40 Our preliminary view is that the approach in *Irving* is correct. Section 95(5) provides that the unrepresented party may have *their questions* put to the witness by the appointed person. Section 95(6) sets out a process for judicial oversight of the questions put, which would seem unnecessary if counsel appointed under section 95(5) were subject to

⁵³ *Finley v Wiggins* [2020] NZFC 6481, [2020] NZFLR 958 at [11]–[13].

⁵⁴ *Millar v R* [2021] NZCA 548.

⁵⁵ *Millar v R* [2021] NZCA 548 at [74].

⁵⁶ *Irving v Irving* [2021] NZHC 2269 at [54].

⁵⁷ *Irving v Irving* [2021] NZHC 2269 at [55]–[56].

⁵⁸ *Irving v Irving* [2021] NZHC 2269 at [23]–[24].

⁵⁹ *Irving v Irving* [2021] NZHC 2269 at [25].

⁶⁰ *Irving v Irving* [2021] NZHC 2269 at [36].

⁶¹ *R v Family Court* [2021] NZHC 3204 at [84]–[85]. This decision was appealed, but the Court of Appeal did not need to determine whether the approach in *Irving* was correct: see *R v Family Court* [2023] NZCA 27 at [12].

⁶² *Elliot v Family Court at Auckland* [2022] NZCA 146 at [14].

⁶³ *Millar v R* [2021] NZCA 548 at [34].

broader cross-examination duties.⁶⁴ The fact that a lay person can be appointed under section 95(5) provides further support for the view that the role is limited to stating questions prepared by the unrepresented party.

- 14.41 The legislative history of section 95, which is set out in *Irving*, also supports a narrow interpretation.⁶⁵ The predecessor to section 95, section 23F of the Evidence Act 1908, allowed a defendant to put questions to the complainant “by stating the questions to a person, approved by the judge, who shall repeat the questions to the complainant”. Section 95 was intended to apply to a broader class of witnesses than section 23F, but in other respects, it was intended to retain the existing approach of allowing the unrepresented party to put their questions to a witness through another person.⁶⁶ The section was intended to protect witnesses, not to assist unrepresented parties to properly put their case.⁶⁷
- 14.42 If clarification is considered desirable, this could be achieved by inserting a new subsection into section 95 providing that:
- (a) the role of a person appointed under section 95(5)(b) is limited to putting the unrepresented party’s questions to the witness; and
 - (b) a lawyer appointed under section 95(5)(b) to put the defendant’s or party’s questions to the witness is not acting as counsel for the defendant or party.

QUESTION

Q63

Should section 95 be amended to clarify that:

- a. the role of a person appointed under section 95(5)(b) is limited to putting the unrepresented party’s questions to the witness; and/or
- b. a lawyer appointed under section 95(5)(b) to put the defendant’s or party’s questions to the witness is not acting as counsel for the defendant or party?

⁶⁴ Ordinarily, questions put by counsel during cross-examination are not subject to such a process, although the trial judge has a general power to disallow unacceptable questions under Evidence Act 2006, s 85.

⁶⁵ *Irving v Irving* [2021] NZHC 2269 at [12]–[16] and [27]–[29].

⁶⁶ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C341] and [C350].

⁶⁷ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [414].

CHAPTER 15

Other issues

INTRODUCTION

In this chapter, we consider and seek feedback on three stand-alone issues relating to:

- the role of the judge when determining whether to admit evidence by agreement under section 9;
- the test for admitting novel scientific evidence; and
- the scope of sections 108 and 109 (the giving of evidence by undercover police officers).

SECTION 9 (ADMISSION BY AGREEMENT) AND THE ROLE OF THE JUDGE

15.1 Section 9(1)(a) of the Evidence Act 2006 permits a judge, in civil and criminal proceedings, to admit evidence that is not otherwise admissible with the written or oral agreement of all parties.

Is the application of section 9 unclear?

15.2 We received preliminary feedback suggesting section 9 is inconsistently applied and that greater guidance is needed.

15.3 Section 9 is based on Te Aka Matua o te Ture | Law Commission's proposed Evidence Code provision.¹ The Commission explained the rationale for section 9 as follows:²

Section 9(1)(a) codifies the convenient practice in both civil and criminal proceedings which allows a judge, with the consent of all parties, to admit evidence that may otherwise not be admissible. For example, in the course of presenting their cases, parties sometimes introduce, without objection from the other side, evidence that is not strictly relevant to determining the proceeding. In the end, it saves time to allow this sort of harmless evidence, rather than disrupt its flow by constant rulings on admissibility.

¹ Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 36.

² Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C62].

- 15.4 The Commission also noted the section was “in line with the objective of avoiding unjustifiable expense and delay”.³
- 15.5 This suggests that section 9 was primarily intended to avoid unnecessarily lengthening proceedings by dispensing with the requirement for admissibility rulings on evidence that is relatively insignificant. However, the wording of section 9(1)(a) is significantly broader than the Commission’s discussion would suggest. It simply states that the judge may, “with the written or oral agreement of all parties, admit evidence that is not otherwise admissible”. It does not explain how the judge should determine whether to exercise that power or impose any limits on it.
- 15.6 Case law suggests there are differing views on the extent to which section 9 permits admission by agreement of evidence that is otherwise inadmissible or subject to exclusion.
- (a) In *Wilson v R*⁴ and *Douglas v R*,⁵ te Kōti Pīra | Court of Appeal found that evidence admitted by agreement at trial should not have been admitted as it did not meet the requirements of the previous consistent statements rule and the propensity provisions respectively. The Court in *Wilson* said the judge has a duty to ensure a conviction is not based on material evidence that is inadmissible.⁶
 - (b) In *R v Wellington*, te Kōti Matua | High Court referred to the decisions in *Wilson* and *Douglas* and observed it was not clear whether they were consistent with the wording of section 9(1)(a).⁷ The Court concluded otherwise inadmissible evidence could be admitted by agreement provided its admission would not result in an unfair trial and exclusion was not required by section 8 (general exclusion).⁸
 - (c) In *WM (CA714/18) v R*, the Court of Appeal found that, while the judge has a responsibility to ensure a fair trial, “it would be rare for a Judge to refuse to permit the defence to put otherwise inadmissible evidence before a jury, with the consent of the Crown, when the defence has decided that this would assist the defence”.⁹ In that case, evidence of prior convictions was admitted at trial by agreement despite the evidence having been ruled inadmissible propensity evidence. The Court declined to find the trial judge was wrong to admit the evidence under section 9.
- 15.7 Based on these cases, it appears unclear what approach the courts should take when the parties agree to admit otherwise inadmissible evidence. In particular, it is unclear whether evidence should be admitted under section 9 if it:

³ Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [31].

⁴ *Wilson v R* [2015] NZCA 531 at [26].

⁵ *Douglas v R* [2018] NZCA 26 at [14]–[15].

⁶ *Wilson v R* [2015] NZCA 531 at [18]. See also *Douglas v R* [2018] NZCA 26 at [14]–[15].

⁷ *R v Wellington (No 4)* [2018] NZHC 2080 at [44].

⁸ This approach is consistent with an earlier Court of Appeal case, *Hannigan v R* [2012] NZCA 133, where the Court said (at [13(c)]) that admission by agreement under s 9 “does not relieve the Judge from the task of ensuring that the trial is fair. In particular, it does not relieve the Judge from the task of ensuring that the general exclusion in s 8 is complied with”.

⁹ *WM (CA714/18) v R* [2020] NZCA 338 at [62].

- (a) is material evidence that is otherwise inadmissible because of the operation of a specific provision in the Act (for example, the rules relating to hearsay, opinion evidence or previous consistent statements); or
 - (b) would lead to an unfair trial or would otherwise be excluded under section 8 (general exclusion).
- 15.8 This could cause uncertainty for parties and result in continued argument over the propriety of admission under section 9. It may therefore be desirable to clarify the circumstances in which a judge may refuse to admit evidence by agreement under section 9.

Options for reform

- 15.9 If reform is considered desirable, we have identified two options for amending section 9 that could be implemented together or separately:
- (a) **Option 1:** Amend section 9 to provide that, in determining whether to admit evidence under section 9(1)(a), the judge must have regard to certain factors. These could include, for example:
 - (i) the need to ensure fairness to parties and witnesses; and
 - (ii) the desirability of avoiding unjustifiable expense and delay.
 - (b) **Option 2:** Amend section 9 to provide that evidence may not be admitted by agreement if exclusion is required by section 8(1)(a).
- 15.10 Option 1 would provide guidance to judges on the types of considerations that are relevant in exercising their discretion under section 9. It would not require exclusion in any particular situation so would continue to allow the court to have regard to all the circumstances of the case.
- 15.11 In terms of relevant factors, we suggest section 9 should be applied in a manner that avoids unnecessary expense and delay, consistent with the Act's purpose provision.¹⁰ It is clear from the Commission's Evidence Code that this was the intent of the section. Avoiding unnecessary admissibility rulings by admitting evidence by agreement may save time and cost. It is also possible, however, that admitting evidence under section 9 could unnecessarily lengthen the proceeding if the parties agree to admit significant amounts of evidence that is of marginal relevance or probative value.
- 15.12 Ensuring fairness to parties and witnesses could also be included as a relevant consideration. For example, the admission of hearsay evidence by agreement may be considered unfair if cross-examination of the witness is likely to be necessary for the defendant to offer an effective defence. The contrary argument is that "a defendant is entitled to run their defence as they choose, even if their choice seems unwise".¹¹ On this view, it would be inappropriate for the court to refuse to admit evidence under section 9 on fairness grounds if the parties have agreed to its admission.¹²

¹⁰ Evidence Act 2006, s 6(e).

¹¹ *WM (CA714/18) v R* [2020] NZCA 338 at [62].

¹² We also note defendants may have good reasons for agreeing to the admission of evidence that may not be readily apparent. For example, agreeing to the admission of hearsay evidence may be considered preferable to having the witness give evidence at trial because of the risk they will provide further detail that is harmful to the defence case.

- 15.13 Option 2 would mean that section 9 could not be used to admit evidence where section 8(1)(a) applies – that is, where the probative value of the evidence is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding (taking into account the right of the defendant to offer an effective defence).¹³ Section 8(1)(a) creates a general exclusionary rule that applies to all evidence.¹⁴ Allowing defendants to agree to the admission of unfairly prejudicial evidence may lead (as the cases discussed above demonstrate) to appeals on the basis of trial counsel error. It may also be considered contrary to the original intent of the section (which was aimed at efficiency) and the Act’s purpose of promoting fairness to parties.¹⁵ This option would, however, more significantly circumscribe the ability of the parties to run their case as they choose.
- 15.14 We do not suggest making section 9 subject to other specific provisions in the Act dealing with the admissibility or exclusion of evidence. The wording of section 9 suggests it is intended to permit admission by agreement of any evidence that would otherwise be inadmissible under another provision in the Act. This may promote expedience, for example, where the parties agree that hearsay evidence ought to be admitted as it is unnecessary for the witness to attend the trial and be cross-examined. It may also assist the defence. For example, a defendant may decide that the admission of a potentially unreliable statement is in fact helpful to the defence case.¹⁶ In this situation, it may be consistent with the principle of promoting fairness to parties and witnesses to admit the evidence. Section 8(1)(a) would not necessarily require exclusion of such evidence, depending on how its probative value and prejudicial effect are assessed.
- 15.15 We note neither of these options would expressly state that evidence may be admitted under section 9 despite the applicability of any other provision that would render it inadmissible. We consider that is already clear from the wording of section 9(1)(a), which refers to admitting “evidence that is not otherwise admissible”. By providing guidance on when evidence should not be admitted under section 9 and omitting reference in this context to specific admissibility rules, the options discussed above may help to reinforce that these rules do not constrain the application of section 9.

¹³ We do not suggest making s 9(1)(a) subject to s 8 as a whole. Evidence Act 2006, s 8(1)(b) requires exclusion if the probative value of the evidence is outweighed by the risk that it will needlessly prolong the proceeding. As noted above, s 9 was intended to enable admission by agreement of potentially irrelevant evidence to avoid the need for constant admissibility rulings. While this is intended to shorten proceedings overall, the evidence itself may be longer (and hence admission may be seen as “needlessly prolonging the proceedings”). Requiring the judge to apply s 8(1)(b) could create confusion about whether the judge is entitled to admit such evidence. We suggest it would be preferable to reflect the purpose of s 9 by requiring the judge to have regard to the desirability of avoiding unjustifiable expense and delay (as proposed in Option 1), which would encourage a more holistic view of the proceeding.

¹⁴ *Hudson v R* [2010] NZCA 417 at [43].

¹⁵ Evidence Act 2006, s 6(c).

¹⁶ We note a defence objection is not required to engage s 28. The judge may raise the issue under s 28(1)(b) and may then be required to exclude the evidence under s 28(2).

QUESTION

Q64

Should section 9 be amended to clarify when the court should admit evidence by agreement? If so, should section 9 be amended to:

- a. require the judge to have regard to certain factors when deciding whether to admit evidence under section 9(1)(a) (such as the desirability of ensuring fairness to parties and witnesses and/or avoiding unjustifiable expense and delay); and/or
- b. provide that evidence may not be admitted by agreement if exclusion is required by section 8(1)(a)?

NOVEL SCIENTIFIC EVIDENCE

- 15.16 Through preliminary feedback, a question was raised with us about the need for additional guidance in the Act on the admissibility in civil and criminal proceedings of scientific evidence based on methodologies that are novel or that are argued to lack scientific validity (novel scientific evidence).
- 15.17 Expert opinion evidence is admissible under section 25 if it is likely to be of substantial help to the fact-finder. In applying the substantial helpfulness test to novel scientific evidence, the courts consider several non-statutory factors identified by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc.*¹⁷ These factors include the extent to which the evidence has been tested, peer reviewed and generally accepted by the scientific community.¹⁸
- 15.18 In a 2018 article, Jack Oliver-Hood argued that, despite the *Daubert* factors having been endorsed by the Privy Council, the courts were still allowing unreliable scientific evidence to go before juries, which were ill-equipped to determine the scientific validity of evidence.¹⁹
- 15.19 Subsequently, in *Lundy v R*, the Court of Appeal reaffirmed the relevance of the *Daubert* factors²⁰ and considered expert evidence must meet a reliability threshold before it will be of assistance to the fact-finder.²¹ Further, the validity of a methodology must be established at the admissibility stage through a track record of acceptance in a body of scientific opinion.²² Judges and juries cannot be expected to resolve complex scientific debates of this kind.²³

¹⁷ *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993). Endorsed in New Zealand in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [138]–[139].

¹⁸ *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [138].

¹⁹ Jack Oliver-Hood “Challenging the Admissibility of Scientifically Invalid Evidence” [2018] NZ L Rev 399.

²⁰ *Lundy v R* [2018] NZCA 410 at [237]–[248].

²¹ *Lundy v R* [2018] NZCA 410 at [239].

²² *Lundy v R* [2018] NZCA 410 at [241]–[242].

²³ *Lundy v R* [2018] NZCA 410 at [241] and [243].

- 15.20 The implication of *Lundy* appears to be that any questions about the reliability of scientific evidence should be addressed when determining its admissibility, having regard to the *Daubert* factors. If the methodology used is not shown to be generally accepted within the scientific community, it is unlikely to be substantially helpful for the purposes of section 25. Oliver-Hood has discussed the approach in *Lundy* positively, stating:²⁴

Lundy has expanded out what would have been considered inadmissible scientific evidence from the obvious “junk science”, to include scientific evidence which has not been shown *pre-trial* to have demonstrable scientific validity. That question is now one of admissibility for the judge pre-trial, [and] not [for] the jury.

Is legislative reform necessary or desirable?

- 15.21 While *Lundy* has been cited with apparent approval in subsequent cases,²⁵ it is not yet clear what impact it will have – in particular, whether it will lead to more frequent pre-trial consideration of the admissibility of scientific evidence and/or a stricter approach to assessing reliability in the context of section 25.²⁶ At this stage, we have not identified evidence of a problem with the application of *Lundy* that may require amendments to the Act. It may be preferable to observe how case law develops.
- 15.22 Given this, our preliminary view is that reform would be premature at this stage. However, we invite feedback on whether problems have been observed in practice since *Lundy* that may indicate reform is needed.
- 15.23 There are potential issues with attempting to codify the approach in *Lundy* (including the *Daubert* factors). For example, in the absence of more extensive judicial consideration, it may be difficult to define what class of evidence the test should apply to. It is not clear the *Daubert* factors are equally applicable to all classes of scientific evidence.²⁷
- 15.24 It was suggested to us that section 25 could be amended to clarify that the admissibility of novel scientific evidence should be determined pre-trial (without necessarily changing the statutory test). We are interested in views on whether there is a problem in practice with admissibility not being determined pre-trial. We note that the Act does not generally specify when admissibility decisions must be made. Additionally, this approach would still necessitate defining when evidence must be dealt with in this way (as section 25 applies to all expert opinion evidence).

²⁴ Jack Oliver-Hood “Section 25 Case Study: Scientific Expert Evidence” in Scott Optican and Jack Oliver-Hood (Presenters) “Evidence Law Update for Civil and Criminal Lawyers” (CPD seminar presented for ADLS, Auckland, February 2018) at 57–58, cited in Scott Optican “Evidence” [2019] 4 NZ L Rev 565 at 594.

²⁵ *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 at [492]–[495]; *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [230].

²⁶ We note *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 suggests the courts may now be more willing to exclude expert evidence on the basis that the relevant methodology has not received general acceptance within the scientific community (see at [497]–[498]).

²⁷ We note, for example, that two recent Court of Appeal decisions (which are subject to publication restrictions until final disposition of trial) did not refer to *Lundy* when considering the admissibility of evidence about psychological conditions.

QUESTION

Q65

Are there problems in practice determining the admissibility of novel scientific evidence since the decision in *Lundy v R*? If so, what amendments to the Act, if any, are appropriate to address this?

UNDERCOVER POLICE OFFICER EVIDENCE

- 15.25 Sections 108–109 of the Act permit undercover police officers to give evidence without disclosing their identity in criminal proceedings involving any offence punishable by at least seven years' imprisonment or certain other offences.²⁸
- 15.26 Protection of the identity of the undercover police officer is available once the Commissioner of Police files a certificate in the court in which the proceeding is to be heard. The certificate must confirm that the witness was a member of the Police and acted as an undercover officer during the period in question and they have not been convicted of any offence nor found to have been in breach of the Police Code of Conduct. The certificate must also confirm whether, to the knowledge of the Police Commissioner, the witness has been the subject of “adverse comment by the judge” in giving evidence in any other proceedings.²⁹
- 15.27 Once this certificate is filed, the Act prohibits evidence being given or questions being asked that could reveal the identity of the undercover police officer except by leave of the judge.³⁰

Are sections 108–109 causing problems in practice?

- 15.28 The Minister of Justice's letter referring this review to the Commission suggested we may wish to consider whether the provisions governing anonymous evidence of undercover police officers require amendment.³¹
- 15.29 The Commission did not consider the operation of sections 108–109 in its Issues Paper for the Second Review of the Act.³² During the consultation period, however, Police submitted that various aspects of those provisions should be amended. In its final report, the Commission concluded that all of the suggested amendments were unnecessary.³³ These issues were raised by Police during the Second Review:

²⁸ Including offences under the Misuse of Drugs Act 1975 for a term of at least five years, participation in an organised criminal group under s 98A of the Crimes Act 1961, and breaches of s 41A or 42B of the Arms Act 1983.

²⁹ Sections 108(2)-(3).

³⁰ Evidence Act 2006, s 109(1). Leave may be granted under s 109(1)(d) if the test prescribed in s 109(2) is fulfilled.

³¹ Letter from Hon Kris Faafoi (Minister of Justice) to Amokura Kawharu (President of Te Aka Matua o te Ture | Law Commission) regarding the third statutory review of the Evidence Act 2006 (23 February 2022).

³² Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

³³ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.2]–[18.21].

- (a) Whether section 108 should be amended to provide anonymity for undercover police officers in a wider range of offences. The Commission considered that section 108 should not be amended in this way. The threshold in section 108(1)(a) provides a way to balance the public interest in allowing the effective use of undercover policing with the defendant’s right to know the identity of their accuser. Parliament very clearly intended to limit the scope of application to the most serious offences.³⁴
 - (b) Whether sections 108 and 109 should be extended to apply to civil proceedings. The Commission took the view that there was already (pre-Act) precedent permitting undercover police officers to give evidence anonymously in civil proceedings, and that the types of cases where this would be relevant would be rare.³⁵
 - (c) Whether the requirement for the section 108(2) certificate to disclose any breach of the Police Code of Conduct should be limited to serious misconduct. The Commission considered that this would be unduly narrow.³⁶ It would have the effect of excluding minor matters that might be relevant to an assessment of the officer’s integrity and restricting the ability of the defendant to challenge a section 108 order.
 - (d) Whether the definition of “undercover Police officer” (as defined in section 108(5)) should be amended, particularly to take account of overseas law enforcement when undercover operations are undertaken in partnership with other jurisdictions. The Commission did not recommend amending the definition as there was no evidence to suggest that it was causing problems in practice.³⁷
- 15.30 Issue (a) above had been considered by the Commission in its 2013 Review of the Act. The Commission did not recommend reform, noting the absence of evidence demonstrating that cases were regularly falling over or that the Crown was not proceeding with cases because of undercover officers declining to give evidence.³⁸
- 15.31 Since the Second Review, section 108 has been amended as part of reforms to the Arms Act 1983 to include anonymity protections for specific Arms Act offences punishable by less than seven years’ imprisonment.³⁹
- 15.32 Our review of case law and commentary did not identify any issues with sections 108–109 that may justify reform. We acknowledge, however, that the nature of the protections for undercover officers may make any issues with the procedures in the Act difficult to identify through such a review. The fact that these provisions have been raised with us again suggests there may be ongoing concern with their operation. We therefore seek submissions on whether sections 108–109 are causing problems in practice and, if so, what amendments may be appropriate. We emphasise that we would require specific

³⁴ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.7]–[18.11].

³⁵ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.13]–[18.15].

³⁶ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.16]–[18.19].

³⁷ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.20]–[18.21].

³⁸ Te Aka Matua o te Ture | Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.88]–[11.89] and [11.94]–[11.95].

³⁹ Evidence Act 2006, s 108(1)(ca), inserted by s 14 of the Firearms Prohibition Orders Legislation Act 2022.

examples of problems caused by the current approach in the Act to conclude that reform is necessary or desirable.

QUESTION

Q66

Are sections 108–109 causing problems in practice? If so, how should they be amended?



Te Aka Matua o te Ture | Law Commission is located at:

Level 9, Solnet House, 70 The Terrace, Wellington 6011

Postal address: PO Box 2590, Wellington 6140, Aotearoa New Zealand

Document Exchange Number: SP 23534

Telephone: 04 473 3453

Email: com@lawcom.govt.nz