Te Aka Matua o te Ture
Law Commission

E31 (142)

February 2019
Wellington, New Zealand

Report | Pūrongo 142

The Second Review of the Evidence Act 2006

Te Arotake Tuarua i te Evidence Act 2006

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

The Commissioners are:

The Hon Sir Douglas White - President
Donna Buckingham
Belinda Clark QSO
Helen McQueen

The office of the Law Commission is at:
Level 9, Solnet House, 70 The Terrace, Wellington 6011

Postal address: PO Box 2590, Wellington 6140, New Zealand

Document Exchange Number: SP 23534

Telephone: 04 473 3453
Email: com@lawcom.govt.nz
Internet: www.lawcom.govt.nz

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

ISBN 978-1-877569-91-3 (Print)

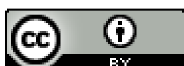
ISBN 978-1-877569-90-6 (Online)

ISSN 0113-2334 (Print)

ISSN 1177-6196 (Online)

This title may be cited as NZLC R142. This title is available on the internet at the Law Commission's website www.lawcom.govt.nz

Copyright © 2019 New Zealand Law Commission.



This work is licensed under the Creative Commons Attribution 4.0 International licence. In essence, you are free to copy, distribute and adapt the work, as long as you attribute the work to the Law Commission and abide by other licence terms. To view a copy of this licence, visit https://creativecommons.org/licenses/by/4.0/

Hon Andrew Little
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

President
The Hon Sir Douglas White

Commissioners
Donna Buckingham
Belinda Clark QSO
Helen McQueen

PO Box 2590
Wellington 6140
New Zealand
Phone 04 473 3453

lawcom.govt.nz

28 February 2019

Dear Minister

NZLC R142 – The Second Review of the Evidence Act 2006 - Te Arotake Tuarua i te Evidence Act 2006

I am pleased to submit to you the above report under section 16 of the Law Commission Act 1985.

Yours sincerely,

Douglas White.

Douglas White
President

Foreword

This is the Law Commission's third report relating to the law of evidence. The Commission's first report in 1999 led to the Evidence Act 2006, and the Commission's 2013 report on its first operational review of the Act led to the Evidence Amendment Act 2016.

The principal purpose of the operational reviews is to check how the Act is working in practice and whether any amendments are necessary or desirable. The Commission is not expected in these reviews to revisit the principles and policies on which the Act is based, unless warranted by a particular problem that has arisen in practice.

In the first review the Commission concluded the Act was working in a generally satisfactory manner and only a relatively few operational issues justifying amendment were identified.

We have reached a similar conclusion in this second review. After examining the operation of the Act since it came into force in 2007, considering the relevant court decisions interpreting and applying its provisions, publishing a comprehensive Issues Paper in March 2018, receiving invaluable submissions and consulting broadly, we are satisfied the Act is still generally working well and only a relatively few but important further amendments are warranted.

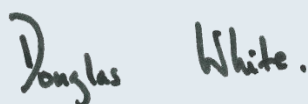
This time, we have had the benefit of assistance from Parliamentary Counsel so are able to include a draft Evidence Amendment Bill, which contains our proposed amendments to the Act.

In accordance with the Legislation Design and Advisory Committee *Legislation Guidelines 2018*, we have identified a number of areas where reform might occur without the need for further legislative intervention. In addition to continuing to rely on the courts to develop the law in the context of particular cases, we consider more effective and cost-efficient use might be made of existing provisions, practice notes and judicial guidance in bench books.

We have also identified some broader policy issues, not appropriate for resolution in this operational review, that might justify further examination in the future. These issues include the right to silence, the section 30 test for exclusion of improperly obtained evidence and the admissibility of statements made by defendants to fellow prisoners. These issues are mentioned in the appropriate chapter in this report and also in the context of considering whether the statutory requirement for ongoing operational reviews should be retained.

Our recommendations are intended to assist with the improvement of the justice system as a whole. For example, we recommend reforms to improve the court process for victims of sexual and family violence and to promote greater recognition of tikanga Māori in court procedure. The recommendations also aim to ensure that defendants' rights to a fair trial are preserved.

The draft Bill reflects our recommendations that require legislative amendment. We invite the Government to consider expeditious enactment of the Bill.



Douglas White

President

Acknowledgements

The Law Commission is grateful to all those who have assisted during the course of this project. In particular, we acknowledge the generous contributions of time and expertise from our judicial advisory committee and expert advisory group.

Members of the judicial advisory committee were:

- The Hon Justice Christine French
- The Hon Justice Simon France
- Judge Stephen Harrop

Members of the expert advisory group were:

- Brendan Horsley, Crown Law Office
- Professor Elisabeth McDonald MNZM, University of Canterbury
- Simon Mount QC, barrister
- Associate Professor Scott Optican, The University of Auckland
- Tania Singh, Public Defence Service
- Kingi Snelgar, barrister
- Chelly Walton, Ministry of Justice

The Commissioners responsible for this reference are Douglas White and Donna Buckingham. The legal and policy advisers for this report are Catherine Helm, Jenny Ryan, Clair Trainor, Chrystal Tocher and Nick Gillard.

We also acknowledge the valuable contributions made to this reference by former legal and policy advisers Jo Dinsdale, Yasmin Moinfar-Yong, Dena Valente and Simon Lamain and by Cathy Rodgers who spent three months with us on secondment from the Parliamentary Counsel Office.

The clerks who worked on this project were Kate Wilson and Tasneem Haradasa.

Contents

Foreword ... iv

Acknowledgements ... v

Contents ... 1

Executive summary ... 5

Recommendations ... 16

Chapter 1 - Introduction ... 22

The importance of the law of evidence ... 22
The nature and scope of our review ... 24
The process we have followed ... 29
Matters addressed in this report ... 30
Recommendation for the repeal of section 202 ... 30

Chapter 2 - Te ao Māori and the Evidence Act ... 34

Introduction ... 34
Background ... 34
Recognition of tikanga Māori in court procedure ... 36
Referring to te ao Māori or the Treaty of Waitangi in the Act's purpose provision ... 40
Judicial directions on cross-cultural identifications and demeanour assessments ... 41

Chapter 3 - Evidence of sexual experience ... 48

Introduction ... 48
Background ... 49
Sexual disposition evidence ... 50
Complainant's sexual experience with the defendant ... 54
False or allegedly false previous complaints ... 59
Extension of section 44 to civil proceedings ... 62
Notice requirement in section 44A ... 65

Chapter 4 - Conviction evidence ... 68

Introduction ... 68
Background ... 69
A presumptive proof rule ... 71
A bifurcated provision ... 80
Relationship between sections 8 and 49 ... 82
Notice of intention to offer rebuttal evidence ... 86
Conviction evidence in civil proceedings ... 87

Chapter 5 - Right to silence ... 90

Introduction ... 90
Drawing inferences from a defendant's silence ... 91
Drawing adverse inferences as to credibility from pre-trial silence ... 100
Judicial comment on silence at trial ... 101
Inferences of guilt from pre-trial silence in judge-alone trials ... 103
The police caution to suspects ... 104
The relationship between section 32 and the veracity provisions ... 108

Chapter 6 - Unreliable statements ... 110

Introduction ... 110
The relevance of truth in assessing reliability ... 111
Cross-examination on the truth of the statement ... 115
Evidence obtained during undercover operations ... 117

Chapter 7 - Improperly obtained evidence ... 124

Introduction ... 124
Background ... 125
Applying the factors in section 30(3) ... 126
Relevance of previously excluded evidence in a subsequent proceeding ... 134
Exclusion of improperly obtained evidence in civil proceedings ... 136

Chapter 8 - Identification evidence ... 141

Introduction ... 141
Background ... 142
Visual identifications expressed with uncertainty ... 142
Evidence that falls outside the definition of "visual identification evidence" ... 145
Relationship between identification evidence and hearsay provisions ... 148

Chapter 9 - Giving evidence in sexual and family violence cases ... 151

Introduction ... 151
Background ... 152
Evidence-in-chief of family violence complainants ... 155
Cross-examination of family violence complainants ... 158
Consulting family violence complainants on the mode of evidence ... 162
Pre-recording evidence of other witnesses ... 164
Recording evidence at trial for use at re-trial ... 167
Access to evidential video interviews in sexual and violent cases ... 170

Chapter 10 - Unacceptable questioning ... 177

Introduction ... 177
Intimidating or overbearing questioning ... 178
Complexity in structure and content of questions ... 179
Duty to intervene if questioning is unacceptable ... 180
Establishing "ground rules" at a case review hearing ... 184

Chapter 11 - Conduct of experts 186

Introduction 186
The need for a code of conduct in criminal proceedings 187
Development of a separate code of conduct 188
Contents of a new code of conduct 190
Failure to comply with code of conduct for expert witnesses 193

Chapter 12 - Myths and misconceptions in sexual and family violence cases 196

Introduction 196
Agreed statements in family violence cases 197
The need for judicial directions in sexual and family violence cases 200
Myths and misconceptions in sexual and family violence cases 205
Development, review and accessibility of judicial directions 218

Chapter 13 - Judicial directions on the impact of significant delay 221

Introduction 221
The scope of section 122 222
Judicial directions about potential forensic disadvantage 227

Chapter 14 - Veracity evidence 230

Introduction 230
Background 231
Redundant provisions 232
Section 38(2)(a) trigger 234
Interpretation of section 38(2)(a) 236
The term "veracity" and its definition 237
Applying the definition of veracity outside the veracity rules 239

Chapter 15 - Co-defendants' statements 240

Introduction 240
Admissibility of a co-conspirator's statement 240
Extending section 22A to non-hearsay statements 242
Admissibility of a defendant's statement against a co-defendant 245

Chapter 16 - Privilege 246

Introduction 246
Application of legal advice privilege to third party communications 246
Termination of litigation privilege 250
Termination of settlement negotiation privilege 253

Chapter 17 - Regulations 255

Introduction 255
Developments in recording and storage technology 256
Security and use of evidence recorded in a hearing prior to trial 260
Security and use of transcripts 265
Defence counsel access to evidential video interviews 268
Application of the Regulations to military proceedings 269
Other issues with the Regulations 271

Chapter 18 - Other issues with the Evidence Act 274

Introduction 274
Anonymous evidence given by undercover police officers 274
Defendant's statement to a fellow prisoner 279
The 'unusualness' of propensity evidence 281
Communication assistance 283

Appendix 1 - Draft Evidence Amendment Bill 286

Appendix 2 - Lists of Submitters and Consultees 295

Appendix 3 - Terms of reference 299

Executive summary

CHAPTER 1: INTRODUCTION

1. In this chapter we explain our approach to this second operational review of the Evidence Act 2006. We discuss the importance of the law of evidence, the nature and scope of our review and the process we have followed.

2. We also recommend the repeal of section 202, which is the provision requiring the Law Commission to periodically review the operation of the Evidence Act. Clause 22 of the draft Evidence Amendment Bill reflects our recommendation.

CHAPTER 2: TE AO MĀORI AND THE EVIDENCE ACT

3. There has been growing recognition of the need to acknowledge tikanga Māori within or alongside New Zealand law. A number of New Zealand statutes now expressly provide for consideration of tikanga, or the Treaty of Waitangi or its principles, in recognition of the strong Māori interest in the subject matter of the legislation. Māori have a strong interest in the operation of the Evidence Act because they are disproportionately represented in the criminal justice system, as victims and offenders.

4. We propose an amendment to the Act to make it clear that courts can regulate procedures for giving evidence in a manner that recognises tikanga. While some judges already take steps to recognise tikanga where appropriate (for example, by facilitating the giving of karakia in the courtroom), an express provision of this nature could encourage more consistent consideration of Māori interests.

5. Our proposed provision would only apply to procedures relating to the giving of evidence. It would not affect the substantive rules about the admissibility of evidence, privilege and confidentiality. The court could only accommodate tikanga to the extent it is possible to do so consistently with the Act and any other relevant enactments.

6. We consider this approach is preferable to a reference to te ao Māori in the Act's purpose provision. A general reference to te ao Māori or the Treaty of Waitangi in the purpose provision could create uncertainty about how and to what extent Māori interests should be taken into account in interpreting and applying the Act. Recent legislation has moved away from general references to the Treaty or its principles in favour of more specific provisions setting out how Māori interests should be taken into account.

7. We considered whether the Act should be amended to enable or require judicial directions on cross-racial identifications and/or assessments of witness demeanour. On balance, we consider this is unnecessary. The case law provides guidance for judges as to when a direction on cross-racial identification evidence or demeanour may be appropriate and what it should contain.

8. Clause 4 and clause 5 of the draft Bill reflect our recommendation.

CHAPTER 3: EVIDENCE OF SEXUAL EXPERIENCE

9. Case law highlights several concerns with the operation of section 44, which controls the extent to which complainants may be questioned about their sexual history.

10. We recommend amending the Act so that section 44 governs the admissibility of *all* evidence of the complainant's propensity in sexual matters, including:

    - evidence of the complainant's sexual disposition; and
    - evidence of the complainant's previous sexual experience with the defendant.

11. We recommend such evidence should only be admissible with the judge's permission if it is of such direct relevance that it would be contrary to the interests of justice to exclude it. This would be consistent with the policy of the provision, which is to protect complainants from unnecessarily intrusive and embarrassing questioning about their sexual history and prevent jurors from making erroneous assumptions about the complainant's behaviour based on their sexual history. It would require the judge and counsel to consciously enquire into the relevance of the proposed evidence. These recommended amendments are set out in clause 14 of the draft Bill.

12. Currently, section 44 only applies in criminal proceedings. We recommend an amendment to extend its application to civil proceedings. We see no reason in principle why it should not be extended, given the same policy considerations apply in both contexts. Clause 4 of the draft Bill reflects our recommendation.

13. We also recommend amending section 44A to require applications under section 44 (to offer evidence or ask questions about the complainant's sexual experience) to state why the evidence is of "such direct relevance … that it would be contrary to the interests of justice to exclude it" (section 44(3)). This would correct an apparent legislative oversight. This recommendation is reflected in clause 15 of the draft Bill.

14. We concluded the Act does not need to clarify the admissibility of a complainant's previous false or allegedly false complaint of sexual offending. Practitioners indicated the Supreme Court's recent guidance in *Best v R* is helpful and it is not difficult to apply.[1]

CHAPTER 4: CONVICTION EVIDENCE

15. Section 49 provides that conviction evidence is admissible in criminal proceedings as "conclusive proof" the convicted person committed the offence, unless there are "exceptional circumstances". Section 47 governs the use of conviction evidence in civil proceedings and largely mirrors section 49.

16. In relation to section 49, submitters were concerned that the conclusive proof rule can have unfair effects and potentially unfair outcomes for some defendants. In an ordinary party liability case or a re-trial following a mixed verdict, it can close off a defence that would generally be available to the defendant. The conclusive proof rule insulates key elements of the Crown case from challenge by the defence. No comparable jurisdiction has a conclusive proof rule.

---

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

17. Submitters also said section 49 is difficult to apply. Although the Supreme Court has tried to clarify the operation of the provision and interpret it in a way that avoids unfair consequences for defendants, submitters told us this has created more confusion.

18. We recommend replacing the conclusive proof rule in section 49 with a presumptive proof rule, as the Commission proposed in its 1999 report. This option was supported by submitters from prosecution and defence perspectives. A presumptive proof rule would allow a party to seek to rebut the presumption of guilt by proving on the balance of probabilities the person convicted did not commit the offence. We recommend that anyone intending to challenge the presumption must first inform the judge. This avoids the Crown having to prepare every case on the assumption the conviction evidence will be challenged.

19. We considered whether the difficulties with section 49 could be addressed by retaining the conclusive proof rule, but clarifying the scope of the "exceptional circumstances" test and the effect of convictions when that test is met. We concluded this would not address the concerns about potential unfairness flowing from the conclusive proof rule.

20. We recommend the new provision should clarify the relationship between sections 49 and 8 (the general exclusion provision), which has been a matter of uncertainty in the cases. The admissibility of conviction evidence should be subject to exclusion by any other provision of the Act, including section 8; however, a challenge to admissibility should not be possible on the basis that the presumptive effect of the conviction gives rise to unfair prejudice.

21. Although we did not discuss section 47 in our Issues Paper, we nevertheless recommend that section 47 be replaced with a presumptive proof rule. We consider it desirable for section 47 to align with our recommendations in relation to section 49, given the similar purpose and effect of these provisions.

22. Our proposed provisions are set out in clause 16 and clause 17 of the draft Bill.

CHAPTER 5: RIGHT TO SILENCE

23. We recommend amending section 32 to clarify that a judge may not draw an inference of guilt from a defendant's pre-trial silence. Section 32 prevents anyone from inviting the fact-finder to draw an inference of guilt from a defendant's pre-trial silence. In proceedings before a jury, it requires the judge to direct the jury that it may not draw that inference. It does not, however, expressly prevent a judge (in a judge-alone trial) from drawing an inference of guilt. In our view, there is no logical basis for permitting judges to draw inferences of guilt from pre-trial silence yet preventing juries from doing so. Submitters agreed with this view. Clause 11 of the draft Bill reflects this proposal.

24. Sections 32 and 33 prohibit drawing inferences that a defendant is guilty from their pre-trial silence or silence at trial. However, they do not preclude drawing adverse inferences as to credibility based on the defendant's pre-trial silence or drawing inferences from a defendant's silence at trial when assessing the strength of the prosecution's case. We asked submitters whether the Act should be amended to prohibit all adverse inferences being drawn from a defendant's silence or alternatively to permit any appropriate inferences to be drawn from a defendant's silence (including inferences of guilt). Submitters held divided views. While the distinction between permissible and impermissible use of a defendant's silence is a fine one and may be difficult for jurors to

understand, we have concluded it appears to be a workable compromise between the two alternatives we considered.

25. We considered whether the Act should be amended to clarify when an adverse inference as to credibility may be drawn from a defendant's pre-trial silence or when a judge may comment on a defendant's silence at trial. Submitters indicated the courts have provided sufficient guidance, and we concluded legislative amendment is unnecessary.

26. We considered whether the police caution given to suspects should refer to the possibility of an adverse inference as to credibility being drawn from pre-trial silence. We concluded this would be undesirable because of the risk suspects may feel pressured to speak, the concerns that have arisen with cautions in other jurisdictions and the difficulty of capturing the status quo in a standard caution.

27. We also considered whether the relationship between section 32 and the Act's veracity rules is problematic, but the submissions did not indicate problems in practice.

CHAPTER 6: UNRELIABLE STATEMENTS

28. We do not propose any amendment to section 28 (exclusion of unreliable statements).

29. We do not consider an amendment is required to clarify whether the truth of a statement is relevant in assessing its reliability. The current law under *R v Wichman* is sufficiently clear and consistent with the policy underlying section 28.[2] While the focus should be on the circumstances in which the statement was made, judges should be able to consider any obvious indications that a statement is true or false.

30. We also do not consider it is desirable to expressly prohibit cross-examination of a defendant about the truth or falsity of their statement at a pre-trial hearing. Such a prohibition might unduly constrain the ability of judges to take a pragmatic approach when determining which questions are permissible. The guidance provided in *Wichman* should be sufficient to avoid a pre-trial hearing becoming a 'mini-trial'.

31. In relation to Police undercover operations, we suggest consideration could be given to developing a separate practice note on police questioning for undercover operations. We also suggest judges should consider warning juries about the need for caution in relying on incriminating statements made during undercover operations.

CHAPTER 7: IMPROPERLY OBTAINED EVIDENCE

32. We do not recommend any amendments to section 30, which sets out a balancing test for determining whether improperly obtained evidence is admissible in criminal proceedings.

33. We considered whether section 30 should be more prescriptive about how the balancing process is to be applied, either generally and/or in relation to particular factors. We concluded the section 30 balancing process is necessarily fact-specific. Flexibility needs to be maintained to ensure appropriate outcomes in individual cases. We suggest, however, that there may be merit in conducting a broader review of the policy underlying

---

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

section 30, in response to concerns expressed by submitters that the section is skewed too heavily in favour of admitting improperly obtained evidence.

34. We also considered whether the fact that evidence has been excluded in an earlier proceeding should be characterised as a "vindication of rights" that weighs in favour of admission in a subsequent proceeding. The courts have taken varying approaches to this issue. While we caution against placing significant weight on the fact that improperly obtained evidence has been excluded in earlier proceedings, this should continue to be assessed by the courts on a case by case basis.

35. We do not consider it necessary to amend the Act to expressly address the status of improperly obtained evidence in civil proceedings. We consider the current position that improperly obtained evidence can be excluded in quasi-criminal proceedings (applying a balancing process similar to section 30) is correct in principle. The courts should be left to develop guidance on the factors to be taken into account in the balancing process and the approach to be taken in other types of civil proceedings.

CHAPTER 8: IDENTIFICATION EVIDENCE

36. We do not make any recommendations in relation to section 45 (admissibility of visual identification evidence).

37. We considered amending the definition of "visual identification evidence" to clarify whether visual identifications expressed with uncertainty are included, but concluded this is unnecessary. The uncertainty has been resolved by the Court of Appeal's decision in *F v R*, which was delivered after our Issues Paper was published.[3] It is now clear that tentatively expressed visual identifications are included within the definition.

38. We have also concluded the Act's provisions support an interpretation that evidence falling outside the scope of the "visual identification evidence" definition remains admissible, subject to sections 7 and 8. We do not consider it is necessary to amend the Act to make this clear.

39. Lastly, we have concluded it is unnecessary to amend the Act to clarify the relationship between the identification and hearsay evidence provisions. Our preferred approach is that hearsay visual identification evidence should satisfy both the admissibility requirements for identification evidence and the hearsay rules in order to be admissible. This approach is available as a matter of statutory interpretation, and we think the appellate courts should be left to provide further guidance in this area.

CHAPTER 9: GIVING EVIDENCE IN SEXUAL AND FAMILY VIOLENCE CASES

40. Our terms of reference required us to consider the rules of evidence relating to sexual and family violence cases. In 2015, the Commission made recommendations aimed at assisting sexual violence complainants to give their best evidence in court. In this report, we make similar recommendations in relation to family violence complainants. Our recommendations are not reflected in the draft Bill, given the Government is still considering the Law Commission's 2015 recommendations relating to the evidence of

3 *F v R* [2018] NZCA 246 at [34]–[35].

sexual violence complainants and given that our overall approach is to align the way evidence is given in sexual and family violence cases.

41. We recommend family violence complainants should be entitled to give their evidence-in-chief by way of a video record made before the hearing, regardless of when the video was recorded. This would be subject to a judge making an order to the contrary. A video record may include a mobile video record or a formal evidential video interview (EVI). Most submitters and all the judges we consulted supported this proposal.

42. We recommend family violence complainants should be entitled to have their cross-examination pre-recorded in a hearing prior to trial, unless a judge makes an order to the contrary. This would facilitate the complainant's best evidence, promote the complainant's recovery and enable both sides to make better pre-trial decisions based on the strength of the complainant's evidence. Some submitters were concerned that, if there is additional disclosure after the pre-trial hearing is recorded or the theory of the case subsequently changes, the defendant may lose the opportunity to question the complainant on relevant aspects of the prosecution's case, or the complainant may need to be recalled to give evidence again. We think these concerns can be addressed by allowing the judge to make an order to the contrary if there are good countervailing reasons why cross-examination should be conducted in the ordinary way (or in another alternative way), for example, if the judge is not satisfied that criminal disclosure requirements have been met. Overseas experience indicates complainants rarely need to be recalled. Even if they are recalled, it is still beneficial for complainants to pre-record the majority of their evidence as early as possible.

43. We recommend prosecutors in family violence cases should be required to make reasonable efforts to ensure complainants are informed about the various ways of giving evidence and ascertain their views on their preferred mode of evidence.

44. We considered whether the Act should entitle other witnesses to have their evidence pre-recorded, in particular, witnesses who give propensity evidence about an allegation of sexual or family violence they have previously made, family members of a sexual or family violence complainant who are witnesses in the trial and any other vulnerable witnesses. There was not strong support for this proposal. Submitters indicated the entitlement should be directed at the highest need witnesses: complainants in sexual and family violence cases. The Act already allows other witness to apply to give pre-recorded evidence and, on balance, we think this is sufficient.

45. We also considered whether the Act should be amended to expressly permit evidence recorded pre-trial and/or evidence recorded at trial to be used in a re-trial. Some submitters thought this would make re-trials less traumatic for complainants and increase the number of re-trials that proceed. We have concluded this would not spare complainants the trauma of giving evidence at a re-trial. Trial fairness would require that a complainant's cross-examination should only be tendered at a re-trial with the agreement of the defence. We consider it is unlikely the prosecution and defence would agree to the complainant's cross-examination being replayed at a re-trial. We therefore do not recommend legislative amendment.

46. Submitters confirmed that restrictions on defence counsel access to video interviews of complainants in sexual and violent cases have made it difficult for the defence to properly prepare its case, and have given rise to concerns about the fair trial rights of defendants. We recommend replacing section 106(4)–(4C) with a provision requiring the video record

to be given to the defendant's lawyer before it is offered in evidence (unless the judge directs otherwise). The video record should be dealt with in accordance with any requirements in the Evidence Regulations 2007, including requirements relating to security and use. Clause 19 of the draft Bill reflects our recommendation.

CHAPTER 10: UNACCEPTABLE QUESTIONING

47. Section 85 permits a judge to disallow a question, or direct a witness not to answer a question if the question or manner of questioning is unacceptable. The provision contains a list of factors the judge may consider when making this decision.

48. To strengthen the provision and encourage a more consistent approach to intervention, we recommend amending section 85 to require judges to intervene when they consider the manner, structure or content of questioning is unacceptable. Clause 18(1) of the draft Bill reflects our recommendation.

49. We also recommend the "vulnerability of the witness" should be included in the list of factors a judge may consider when deciding whether a question is unacceptable. Although the list of factors is non-exhaustive, a specific reference to vulnerability may prompt judges to consider the particular circumstances of a witness in cases where a witness is vulnerable for reasons other than those identified. Clause 18(2) of the draft Bill sets out our proposed provision.

50. We concluded it is unnecessary to amend section 85 to permit a judge to disallow a question if it is asked in a manner the judge considers to be unduly intimidating or overbearing. We consider this is already possible under section 85.

51. It is also unnecessary to amend the Act to allow a judge to exclude particular types of questions, such as tag questions. There was little support for this from submitters, and we have concluded that the appropriateness of particular types of questions is best considered on a case by case basis.

52. We considered whether the nature and scope of questioning of vulnerable witnesses should be addressed pre-trial at a case review hearing where "ground rules" for questioning are established. We support the use of "ground rules" hearings in appropriate cases but do not think legislative amendment is necessary to achieve this.

CHAPTER 11: CONDUCT OF EXPERTS

53. The Act allows expert witnesses to offer expert opinion evidence in civil and criminal proceedings; however, section 26 only requires expert witnesses in civil proceedings to comply with a Code of Conduct (in Schedule 4 of the High Court Rules 2016).

54. We recommend section 26 be amended so that expert witnesses in both civil and criminal proceedings are required to comply with any applicable rules of court relating to the conduct of experts. The case law establishes expert witnesses have ethical obligations when giving evidence, and we see no justification for having a code of conduct in civil proceedings and not in criminal proceedings. We recommend the Rules Committee should be asked to consider amending the Criminal Procedure Rules 2012 to include rules that mirror the rules relating to expert witnesses in the High Court Rules, including the obligation to confer with another expert witness if directed to do so by the judge. Clause 8 of the draft Bill reflects our recommendation.

55. Section 26(2) provides that evidence of an expert witness who has not complied with the Code of Conduct may only be given with permission of the judge. We considered amending the Act to include guidance on how the discretion should be exercised but concluded this is unnecessary. The courts are taking a consistent approach and tend to admit the evidence if it meets the "substantial helpfulness" test in section 25.

CHAPTER 12: MYTHS AND MISCONCEPTIONS IN SEXUAL AND FAMILY VIOLENCE CASES

56. Research shows that jurors may believe myths or have misconceptions about sexual and family violence, which can affect how they consider the evidence before them. We make three recommendations for addressing potential misconceptions during the trial process to reduce the risk jurors will engage in improper reasoning.

57. First, we recommend that, in family violence cases, counsel should consider whether a written statement for the jury addressing myths and misconceptions about family violence can be jointly agreed between the parties. In appropriate cases, a joint statement should be admitted by consent under section 9.

58. Second, we recommend that the Act should be amended to provide an express power to give a judicial direction to address any misconceptions jurors may have about sexual or family violence. Clause 21 of the draft Bill sets out our proposed provision.

59. Third, we recommend that sample judicial directions should be developed to counter misconceptions that jurors may about sexual and family violence. As a starting point, directions should be developed to address the following assumptions:

- A complainant who dresses 'provocatively' or acts 'flirtatiously' is at least partially responsible for the offending.
- A complainant who drinks alcohol or takes drugs is at least partially responsible for the offending.
- "Real rape" is committed by strangers and/or sexual violence by a partner or acquaintance is less serious.
- It is not rape unless the offender uses force or the complainant suffers physical injuries.
- A family violence victim can avoid future violence by leaving the relationship.

60. We recommend that these directions should be contained in a publicly accessible jury trials bench book rather than in the Act itself. Sufficient funding should be provided to the Institute of Judicial Studies to enable the directions to be developed and maintained. If this recommendation is not accepted, the directions could be included in the Evidence Regulations 2007.

CHAPTER 13: JUDICIAL DIRECTIONS ON THE IMPACT OF SIGNIFICANT DELAY

61. Section 122 governs judicial directions about evidence that may be unreliable in a criminal proceeding tried before a jury. Section 122(2)(e) requires a judge to consider giving a reliability warning about the evidence of a defendant's conduct alleged to have occurred more than 10 years ago (for example, in historical sexual abuse cases).

62. In the Supreme Court decision of *CT v R*, the majority held that a defendant's inability to check and challenge the allegations could be material to a judge's assessment of whether evidence may be unreliable for the purposes of section 122(2)(e).[4]

63. In our view, the suggestion that evidence can be considered unreliable solely because of delay related prejudice (even where there is nothing about the particular circumstances indicating the evidence is unreliable) could be seen as suggesting that it is dangerous to convict without corroborating evidence.

64. We recommend section 122 should be amended to clarify that its scope is confined to concerns about the actual reliability of the evidence and does not encompass fair trial concerns arising from a defendant's inability to check and challenge the allegations. Clause 20 of the draft Bill reflects this recommendation.

65. We considered whether the Act or non-legislative guidance should also specifically provide for judicial directions on the forensic disadvantage to a defendant in cases of delay, but concluded this is unnecessary. It is already possible for the judge to draw any particular and significant disadvantage to the jury's attention as part of the judge's duty to ensure a fair trial. A judicial direction in the Act might over-emphasise the disadvantage caused by the passage of time and the significance of this in the trial.

CHAPTER 14: VERACITY EVIDENCE

66. We make two recommendations in relation to the veracity provisions.

67. In 2016, the definition of "veracity" in section 37(5) of the Act was amended to clarify that the scope of the veracity provisions is limited to evidence that is extraneous to the subject matter of the proceedings. This amendment has rendered section 37(3)(c) redundant. Section 37(3) sets out matters the judge may consider when deciding whether the evidence proposed to be offered about a person's veracity is "substantially helpful", including "any previous inconsistent statements made by the person". As a witness's previous inconsistent statement will almost always have some relevance to the facts in issue, virtually all admissible previous inconsistent statements will fall outside the scope of the veracity rules. We therefore recommend section 37(3)(c) should be repealed. Clause 12 of the draft Bill reflects this recommendation.

68. We also recommend an amendment to section 38(2)(a). It is currently unclear whether the phrase "given oral evidence about" qualifies the phrase "challenged the veracity of a prosecution witness". We recommend amending section 38(2)(a) to clarify that a challenge to the veracity of a prosecution witness needs to be given in oral evidence. Clause 13 of the draft Bill reflects this recommendation.

69. We considered whether the term "veracity" and its definition are difficult to understand and should be amended. Consultees did not generally support legislative amendment, and we have concluded that legislative reform is not necessary or desirable.

70. During our consultation, two submitters suggested the amended definition of "veracity" in section 37(5) might be problematic when applied to other parts of the Act, particularly the previous consistent statements rule in section 35. If "veracity" always means

---

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

evidence that is extraneous to the proceedings, a party will no longer be able to adduce a previous consistent statement to rebut a challenge to the truthfulness of a witness in the proceedings. It was suggested the Act should be amended to restrict the definition of veracity to the veracity rules. We have concluded it is unnecessary to amend the Act in this way. Section 4 states "unless the context otherwise requires", veracity has the meaning given in section 37(5). We are confident the courts will apply a definition of veracity that is appropriate in the context of section 35 and gives effect to the purpose of the provision.

CHAPTER 15: CO-DEFENDANTS' STATEMENTS

71. Evidence of a statement made by a defendant may only be admitted against a co-defendant under section 22A of the Act. Section 22A provides for the admission of a hearsay statement against a defendant where it is made in furtherance of a conspiracy or joint enterprise.

72. We recommend amending the Act so that the admissibility rule in section 22A applies to any statement by a defendant, whether or not it is hearsay. We have concluded there is no principled basis for limiting section 22A to hearsay statements. Clause 9 and clause 10 of the draft Bill reflect our recommendation.

73. We considered whether all defendants' statements should be admissible against co-defendants for purposes other than proving the truth of their contents (regardless of whether the section 22A test applies). This issue was raised by a submitter. We concluded there is insufficient justification for recommending a change at this time.

CHAPTER 16: PRIVILEGE

74. We do not make any recommendations in relation to the Act's privilege provisions.

75. We considered whether section 54 should be amended to extend legal advice privilege to third party communications and documents provided to a client or legal adviser where the dominant purpose of the communication or document is to enable legal advice to be provided to the client. We have concluded that legislative amendment is unnecessary, as the courts' current approach already enables legal advice privilege to apply to third party communications in certain situations.

76. We considered amending the Act to clarify whether litigation privilege (section 56) and settlement negotiation privilege (section 57) should terminate and, if so, when. We concluded legislative amendment is unnecessary. In our view determining whether and when litigation privilege should terminate is a fact-specific exercise best left to the courts. We also consider it would be unhelpful to clarify whether and when settlement negotiation privilege terminates, as this issue is not causing problems in practice.

CHAPTER 17: REGULATIONS

77. Our terms of reference required us to consider whether the Evidence Regulations 2007 are comprehensible and fit for purpose or whether they should be the subject of a separate review.

78. We have identified a number of issues with the regulations that we consider would justify a separate review:

- The regulations are not expressed in technology-neutral language and do not accommodate modern methods of recording, storing and sharing information.
- The regulations contain different sets of rules for the use of mobile video records (Part 4) and other video records (Part 1). It may be preferable for the same regime to apply to all video evidence, regardless of the nature of the case or the recording device used.
- The regulations do not cover the process of pre-recording a complainant's evidence-in-chief or cross-examination or the subsequent use of the pre-recorded evidence.
- Unlike video records, there are very few rules governing the custody and use of transcripts of video evidence. A review of the regulations could consider how transcripts might be better regulated to preserve the privacy of the people to whom they relate.
- The regulations apply to military proceedings with very few modifications. It might be preferable to have separate regulations for military proceedings, as the language of the regulations does not easily fit the context of military proceedings.
- The regulations are lengthy and repetitive. A review of the regulations could consider how to make them more concise to enhance access to the law.

CHAPTER 18: OTHER ISSUES WITH THE EVIDENCE ACT

79. During our consultation, some submitters identified potential issues that were not addressed in our Issues Paper. In this final chapter we discuss four substantive matters that were raised by submitters:

- whether sections 108 and 109 of the Act should be amended to make it easier for undercover police officers to give evidence anonymously;
- whether the Act should be amended to control the admissibility of a defendant's statement to a fellow prisoner (that is an admission of guilt by one cell-mate to another cell-mate);
- how the 'usualness' factor in section 43(3)(f) should be assessed when considering the probative value of propensity evidence offered by the prosecution; and
- whether communication assistants, which are generally only used at trial, should be used earlier in the criminal justice process.

80. We have not made any recommendations in relation to these matters.

Recommendations

CHAPTER 1: INTRODUCTION

RECOMMENDATION

R1 Section 202, which provides for periodic reviews of the operation of the Evidence Act 2006, should be repealed.

CHAPTER 2: TE AO MĀORI AND THE EVIDENCE ACT

RECOMMENDATION

R2 A new provision should be inserted into the Act to clarify that the court may regulate its procedures for giving evidence in a manner that recognises tikanga Māori, provided this is not inconsistent with the provisions of the Act or another enactment.

CHAPTER 3: EVIDENCE OF SEXUAL EXPERIENCE

RECOMMENDATIONS

R3 Section 44 should be amended to clarify that:

- sexual disposition evidence is only admissible with the judge's permission if it is of such direct relevance that it would be contrary to the interests of justice to exclude it; and
- evidence of a complainant's reputation for having a particular sexual disposition is inadmissible.

R4 Section 44 should be amended so that evidence of a complainant's sexual experience with the defendant is only admissible with the judge's permission if it is of such direct relevance that it would be contrary to the interests of justice to exclude it. There should be an exception for evidence of *the fact* the complainant was in a sexual relationship with the defendant: this evidence should continue to be admissible subject to sections 7 and 8.

R5

Section 44 should be amended so that it applies in civil (as well as criminal) proceedings.

R6

Section 44A should be amended to require an application under section 44(1) (to offer evidence or ask any question about the sexual experience of the complainant) to include the reasons why the proposed evidence is of such direct relevance that it would be contrary to the interests of justice to exclude it.

CHAPTER 4: CONVICTION EVIDENCE

RECOMMENDATIONS

R7

Section 49 should be amended so that conviction evidence is admissible in a criminal proceeding as presumptive proof the person convicted committed that offence. A party should be able to seek to rebut the presumption by proving on the balance of probabilities that the person convicted did not commit the offence.

R8

Section 49 should be amended to clarify that the admissibility of conviction evidence or rebuttal evidence is subject to its exclusion under any other provision of the Act, including section 8. The amendment should also clarify that a challenge to the admissibility of conviction evidence cannot be made on the basis the presumptive effect of the conviction gives rise to unfair prejudice.

R9

Section 49 should be amended to require a party to a criminal proceeding who wishes to offer rebuttal evidence to inform the judge before doing so and indicate the nature of the evidence they propose to offer.

R10

Section 47, which governs the use of conviction evidence in civil proceedings, should be amended to align with our recommendations in relation to section 49.

CHAPTER 5: RIGHT TO SILENCE

RECOMMENDATION

R11 Section 32 should be amended to clarify that a judge may not draw an inference that a defendant is guilty from their pre-trial silence.

.

CHAPTER 9: GIVING EVIDENCE IN SEXUAL AND FAMILY VIOLENCE CASES

RECOMMENDATIONS

R12 The Act should be amended to entitle a complainant in a family violence case to give their evidence-in-chief by way of a video record made before the hearing, regardless of when the video was recorded, unless a judge makes an order to the contrary.

R13 The Act should be amended to entitle a complainant in a family violence case to have their cross-examination pre-recorded, unless a judge makes an order to the contrary.

R14 In all family violence cases, the prosecutor should be required to make reasonable efforts to:

- ensure the complainant is informed about the alternative ways of giving evidence (section 105) and the ordinary way of giving evidence (section 83); and
- ascertain the complainant's views on their preferred mode of evidence.

R15 Section 106(4)–(4C) should be amended so that any video record that is to be offered as an alternative way of giving evidence must be given to the defendant's lawyer before it is offered in evidence, unless the judge directs otherwise.

CHAPTER 10: UNACCEPTABLE QUESTIONING

RECOMMENDATIONS

R16 Section 85(1) should be amended to require the judge to intervene when they consider questioning of a witness is unacceptable.

R17 Section 85(2) should be amended to include the vulnerability of the witness as a factor the judge may consider when deciding whether the questioning of the witness is unacceptable.

CHAPTER 11: CONDUCT OF EXPERTS

RECOMMENDATIONS

R18 Section 26 should be amended so that experts in both civil and criminal proceedings are required to comply with the applicable rules of court relating to the conduct of experts.

R19 The Rules Committee should be asked to consider amending the Criminal Procedure Rules 2012 to include rules that mirror the rules relating to expert witnesses in the High Court Rules 2016.

CHAPTER 12: MYTHS AND MISCONCEPTIONS IN SEXUAL AND FAMILY VIOLENCE CASES

RECOMMENDATIONS

R20 In family violence cases, counsel should consider whether a written statement for the jury addressing myths and misconceptions about family violence can be jointly agreed between the parties. In appropriate cases, a joint statement should be admitted by consent under section 9.

R21 The Act should be amended to expressly provide that a judge may give a direction to address any juror misconceptions about sexual or family violence.

R22 Sample judicial directions should be developed to address myths and misconceptions that jurors may hold in sexual and family violence cases. As a starting point, directions should be developed to address the following myths and misconceptions:

- A complainant who dresses 'provocatively' or acts 'flirtatiously' is at least partially responsible for the offending.
- A complainant who drinks alcohol or takes drugs is at least partially responsible for the offending.
- "Real rape" is committed by strangers and/or sexual violence by a partner or acquaintance is less serious.
- It is not rape unless the offender uses force and/or the complainant suffers physical injuries.
- A victim of family violence can avoid future violence by leaving the relationship.

The sample directions should be contained in a publicly accessible jury trials bench book. Sufficient funding should be provided to the Institute of Judicial Studies to enable the directions to be developed and maintained.

CHAPTER 13: JUDICIAL DIRECTIONS ON THE IMPACT OF SIGNIFICANT DELAY

RECOMMENDATION

R23 Section 122 should be amended to clarify that its scope is confined to concerns about the reliability of the evidence and does not encompass fair trial concerns arising from a defendant's inability to check and challenge the allegations.

CHAPTER 14: VERACITY EVIDENCE

RECOMMENDATIONS

R24 Section 37(3)(c) should be repealed.

R25 Section 38(2)(a) should be amended to clarify that the phrase "given oral evidence about" qualifies the phrase "challenged the veracity of a prosecution witness".

CHAPTER 15: CO-DEFENDANTS' STATEMENTS

RECOMMENDATION

R26

The Act should be amended so that the admissibility rule in section 22A applies to any statement made by a defendant, whether or not it is a hearsay statement.

CHAPTER 17: REGULATIONS

RECOMMENDATION

R27

The Evidence Regulations 2007 should be reviewed and updated. Separate evidence rules or regulations should be developed for military proceedings.

CHAPTER 1

Introduction

1.1 The Law Commission is required by section 202 of the Evidence Act 2006 to undertake a review of the operation of the Act every five years. This is the second review of the Act.

1.2 In this chapter, we explain our approach to this second review. We discuss:

- the importance of the law of evidence;
- the nature and scope of our review;
- the process we have followed; and
- our recommendation for the repeal of section 202 (the provision requiring further operational reviews).

THE IMPORTANCE OF THE LAW OF EVIDENCE

1.3 The facts on which court and many tribunal proceedings are determined are proved by evidence: oral and written statements and physical exhibits. The rules relating to the admissibility and manner of giving evidence are therefore of vital importance.

1.4 In New Zealand, most of the rules of evidence are contained in the Evidence Act. Their importance is reflected in the purpose of the Act, which is "to help secure the just determination of proceedings".[1]

1.5 The Act's purpose applies to criminal and civil proceedings, but is particularly important in the context of criminal proceedings to ensure fair trials and to avoid wrongful convictions. As the Chief Justice put it in 2015 in *R v Wichman*:[2]

> Rules of proof and evidence … protect foundational principles of the criminal justice system such as the presumption of innocence and the privilege against self-incrimination, affirmed as fundamental by the New Zealand Bill of Rights Act.

1.6 To implement the Act's purpose, the rules prescribe what evidence is admissible and what evidence must be excluded. The fundamental principle is that all relevant evidence is admissible and evidence that is not relevant is inadmissible.[3] To be relevant, evidence must have "a tendency to prove or disprove anything that is of consequence to the determination of the proceeding".[4]

---

1 Evidence Act 2006, s 6. See also Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at ch 1 and below at [1.16].

2 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [190].

3 Evidence Act, s 7(1) and (2).

4 Section 7(3).

1.7 A judge must also exclude evidence if its probative value is outweighed by the risk the evidence will:[5]

- have an unfairly prejudicial effect on the proceeding; or
- needlessly prolong the proceeding.

In making this determination, the judge must take into account "the right of the defendant to offer an effective defence".[6]

1.8 These general provisions, which govern the interpretation of the Act,[7] are supplemented and qualified by a range of provisions providing for the admissibility or exclusion of particular types of evidence in specific situations.[8] There are specific provisions in Part 2 of the Act relating to hearsay evidence;[9] statements of opinion and expert evidence;[10] defendants' statements; improperly obtained evidence; silence of parties in proceedings and admissions in civil proceedings;[11] previous consistent statements made by witnesses;[12] veracity and propensity evidence;[13] identification evidence;[14] evidence of convictions and civil judgments;[15] and privilege and confidentiality.[16]

1.9 Again, as the Chief Justice pointed out in *R v Wichman*:[17]

> The principal way in which observance of fundamental principles of criminal justice and fairness in criminal process is protected is through the exclusionary rules of evidence developed to protect against unreliability and unfairness or to prevent impropriety in the use of public powers of investigation of crime and prosecution of offenders. These rules of evidence are addressed in New Zealand under the framework of the Evidence Act.

1.10 Reflecting the importance of the trial process, Part 3 of the Act contains a series of specific provisions relating to the eligibility and compellability of witnesses;[18] oaths and affirmations;[19] support, communication assistance and views;[20] questioning of witnesses;[21] alternative ways of giving evidence;[22] corroboration, judicial directions and judicial

---

5 Section 8(1).

6 Section 8(2).

7 Section 10.

8 See Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 465. See also *R v Frost* [2008] NZCA 406 at [14].

9 Subpart 1.

10 Subpart 2.

11 Subpart 3.

12 Subpart 4.

13 Subpart 5.

14 Subpart 6.

15 Subpart 7.

16 Subpart 8.

17 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [192].

18 Subpart 1.

19 Subpart 2.

20 Subpart 3.

21 Subpart 4.

22 Subpart 5.

warnings;[23] notice of uncontroverted facts and reference to reliable public documents;[24] and documentary evidence and evidence produced by machine, device or technical process.[25] Part 4 of the Act contains a series of provisions relating to evidence from overseas or to be used overseas.

1.11 This summary of the scheme of the Act demonstrates that the law of evidence has been largely codified (as the Commission originally recommended).[26] The scale of the task explains why Parliament decided the Commission should be required to review the operation of the Act every five years. [27]

1.12 The substantial codification of the law of evidence has been a success. This was confirmed by the Commission in its first review.[28] We are satisfied this remains the position at the conclusion of this second review.

THE NATURE AND SCOPE OF OUR REVIEW

1.13 Like the first review, this second review under section 202 of the Act is largely operational, although it includes one term of reference raising broader policy questions in respect of the rules of evidence relating to sexual and family violence.[29]

1.14 We explained the nature and scope of our review in Chapter 1 of our Issues Paper.[30] We noted it involved two steps, which were:

- consideration of how the Act's provisions were working in practice, in light of any real problems or difficulties with the interpretation and application of the provisions identified in the terms of reference; and
- if any problems or difficulties were identified, whether any amendments to the Act were necessary or desirable to correct them.

1.15 We considered that the six limbs of section 6, the purpose provision, provided a principled basis for considering any proposed amendment. We are following that approach in this report.

1.16 This means that, when we consider whether a potential amendment to the Act is necessary or desirable, we have taken into account whether the amendment also helps to secure the just determination of proceedings by:[31]

---

23 Subpart 6.

24 Subpart 7.

25 Subpart 8.

26 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C1]; Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [35]–[38]; and Evidence Act, ss 10 and 12. See also Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at ch 2; Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at 84–86; and Mathew Downs (ed) *Cross on Evidence* (online ed, LexisNexis) at [EVA10.2].

27 Evidence Act, s 202.

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

29 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [1.10].

30 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [1.18]–[1.40].

31 Section 6.

- providing for facts to be established by the application of logical rules;
- providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990;
- promoting fairness to parties and witnesses;
- protecting rights of confidentiality and other important public interests;
- avoiding unjustifiable expense and delay; and
- enhancing access to the law of evidence.

1.17 We explain our approach to te ao Māori in Chapter 2.[32] Rather than simply responding to operational problems with the Act, we have sought to promote actively recognition of Māori interests. This approach takes into account the Crown's duty under the Treaty of Waitangi.

1.18 In considering whether an amendment is necessary or desirable, we recognise that law reform may be achieved in a variety of ways and that legislation is not an exclusive solution.[33] We have therefore also taken into account:

- whether the courts should be left to develop and determine the law on the issue;
- whether the issue might be resolved through greater use of existing provisions in the Act;
- whether, instead of legislative amendments, the issue could be addressed through practice rules or judicial guidance in bench books; and
- whether the issue is a broader policy one that might benefit from separate examination.

1.19 We explain each of these factors in more detail below.

The role of the courts

1.20 The constitutional role of interpreting the provisions of the Act and applying the provisions to the particular facts of the case rests with the courts.[34] In doing so, they are able to resolve issues of interpretation and develop the law in a way that promotes the Act's purpose and principles and ensures the Act works as Parliament intended.[35]

1.21 As is apparent from our Issues Paper and this report, the courts have fulfilled these responsibilities in respect of many important provisions in the Act and will no doubt continue to do so. Recent examples include:

---

32 Section 5(2)(a) of the Law Commission Act 1985 provides that in making its recommendations, the Law Commission "shall take into account te ao Maori (the Maori dimension) and shall also give consideration to the multicultural character of New Zealand society".

33 See Lord Toulson "Democracy, Law Reform and the Rule of Law" in Matthew Dyson, James Lee and Shona Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, Oxford, 2016) at 127; David Ormerod "Reflections on the Courts and the Commission" in Matthew Dyson, James Lee and Shona Wilson Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, Oxford, 2016) at 326; and Ellen France, Judge of the Supreme Court of New Zealand "Something of a Potpourri: A Judge's Perspective on Law Reform" (Address to the Law Commission's 30th Anniversary Symposium, 3 November 2016).

34 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [2.4.3] and [21.2.2]–[21.2.3].

35 Section 10(1)(a); *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 537–538; and *Parbhu v Want* [2018] NZHC 2079 at [22].

- *R v Wichman*, where the Supreme Court decided truth is relevant to determining the reliability of a defendant's statement under section 28;[36]
- *Underwood v R*, where the Court of Appeal clarified how the seriousness of an offence is to be measured and taken into account when deciding whether to admit improperly obtained evidence under section 30;[37]
- *Best v R*, where the Supreme Court provided guidance on the interaction between sections 37 (veracity), 40 (propensity) and 44 (sexual experience) where a complainant had previously made a false or allegedly false complaint of sexual offending;[38]
- *F v R*, where the Court of Appeal, with reference to our Issues Paper, clarified the definition of visual identification evidence under section 45;[39] and
- *R v Aitchison*, where the High Court demonstrated how "communication assistance" under section 80 can be provided in a criminal trial.[40]

1.22 When the courts have already resolved particular issues, or it is reasonable to leave them to do so in the future, a statutory amendment may not be necessary or desirable.

Use of existing provisions

1.23 We have sometimes concluded that legislative reform is unnecessary where the issue can be addressed by making greater use of existing provisions in the Act. When considering the operation of the Act in relation to vulnerable people and those with communication difficulties, for example, we have noted the following existing provisions:

- section 79 (support persons);
- section 80 (communication assistance);[41]
- section 85 (unacceptable questions); and
- sections 103–107B (alternative ways of giving evidence).[42]

1.24 We discuss several of these provisions in more detail in this report.[43] We recognise that increased use of support people and communication assistance involves a cost to the

---

36 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [83]–[84] per William Young, Arnold and O'Regan JJ, and [432]–[433] per Glazebrook J (dissenting on the result but reaching the same conclusion on this point). The Chief Justice took a different view: at [280]–[285]. This aspect of *Wichman* is discussed at [6.9]–[6.12] below.

37 *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433, discussed at [7.25]–[7.28] below.

38 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186, discussed at [3.54]–[3.59] below.

39 *F v R* [2018] NZCA 246 at [34]–[35], discussed at [8.16]–[8.17] below.

40 *R v Aitchison* [2017] NZHC 3222, mentioned at [18.40] below.

41 See also Evidence Act, s 4 definition of "communication assistance"; s 81 (communication assistance need not be provided in certain circumstances); and Andrea Ewing "Communication Assistance: Update" (paper presented to the New Zealand Law Society Criminal Law Symposium Intensive Conference, October 2018) 103 at 105.

42 Natalie Walker "Modes of evidence in a digital world" (paper presented to the New Zealand Law Society Criminal Law Symposium Intensive Conference, October 2018) 117 at 119.

43 "Communication assistance" at [18.34]–[18.43]; "unacceptable questions" in Chapter 10; and "alternative ways of giving evidence" in Chapter 9.

justice system, but in our view, the cost is likely to be justified especially when the greater cost of a miscarriage of justice is taken into account.[44]

1.25 We also note there are other provisions such as section 9 (admission by agreement) that can be a valuable means for expediting trials. For example, agreed section 9 statements addressing undisputed counter-intuitive evidence have been admitted in cases involving child sexual offending.[45]

Practice notes and judicial guidance

1.26 The issue of practice notes and other judicial guidance, such as the criminal jury trials bench book, is another means by which aspects of evidence law and practice may be developed and kept up to date.

1.27 The Act currently contains one provision authorising the issue of practice notes. Under section 30(6), the Chief Justice is authorised to issue practice notes with guidance that judges are required to take into account when deciding whether a statement obtained by a member of the New Zealand Police has been obtained unfairly for the purposes of section 30(5)(c).[46]

1.28 The Chief Justice issued a Practice Note under section 30(6) on 16 July 2007.[47] The Practice Note restated the former Judges' Rules and in several significant respects increased the protections for people being questioned by police.[48] In Chapter 6, we suggest consideration could be given to issuing a separate Practice Note for Police Questioning during undercover operations.[49]

1.29 Judicial guidance may also be provided to jury trial judges to assist with the various directions they may be required or empowered to give, including under:

- section 32(2) (must direct jury not to draw inference of guilt from defendant's silence before trial);
- section 122 (may warn the jury about the need for caution about unreliable evidence);
- section 123 (must direct the jury not to draw any adverse inference against the defendant when a witness gives evidence in an alternative way);
- section 124 (must warn the jury about the defendant's lies if of the opinion the jury might place undue weight on that evidence);

---

44 See *R v Rao* [2018] NZDC 12581 and *R v Rao* [2018] NZDC 14278. *Rao* involved a complainant who had a significant intellectual disability. A communication assistant was used at trial, and during defence cross-examination, the complainant recanted many of her allegations. The Crown ultimately applied to dismiss the charges under s 147 of the Criminal Procedure Act 2011. The Court noted that the complainant had clearly had trouble understanding the questions put to her and suggested that if a communication assistant had been used at an earlier stage it is likely the matter would not have unnecessarily gone to trial. Discussed in Chapter 18 at [18.38].

45 See *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [113]. This is discussed in Chapter 12. See also *H (CA376/2017) v R* [2018] NZCA 376 at [37] (which refers to agreed statements on memory).

46 See *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26; *R v Reynolds* [2017] NZCA 611; and *Grainger v R* [2017] NZCA 621.

47 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

48 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at 210–211.

49 Chapter 6 at [6.43]–[6.46].

- section 125 (must comply with the requirements relating to warnings and directions to the jury about children's evidence);
- section 126 (must warn the jury about identification evidence); and
- section 127 (may tell the jury about good reasons for delayed complaints or for failure to complain in sexual cases).

1.30 The provision of judicial guidance in a bench book, rather than statutory or regulatory provisions, enables the guidance to be kept up to date with significant input from experienced members of the judiciary.[50] This is particularly important in areas where empirical research is ongoing.[51] Responsibility for providing guidelines and ensuring they reflect best practice and are up to date, should be with the New Zealand Institute of Judicial Studies.[52] Accordingly, the Institute needs to be adequately resourced to fulfil this important responsibility.

1.31 We note that some overseas jurisdictions now publish their resources for the judiciary online.[53] We consider allowing free public access to judicial resources such as bench books encourages greater transparency in the court system and improves access to justice. We discuss the jury trials bench book further in Chapter 12.[54]

Broader policy issues

1.32 With the exception of our term of reference relating to aspects of the law of evidence in the context of sexual and family violence cases, this review is an operational one. We have, however, identified several broader policy issues that might justify separate examination in the future. These include the right to silence, the section 30 test for exclusion of improperly obtained evidence and the admissibility of statements made by defendants to fellow prisoners.[55]

Unintended consequences

1.33 Finally, we recognise it is always important when making law reform proposals to ensure, as far as practicable, that they do not have unintended consequences. Particularly where we have not identified significant practical issues with the current law, the potential for introducing unintended consequences may weigh against proposing reform.

---

50 The New Zealand Institute of Judicial Studies maintains a range of bench books for judges.

51 Chapter 12 relates to myths and misconceptions that may arise in sexual and family violence cases,

52 The New Zealand Institute of Judicial Studies was established in 1998. It is the professional development arm of the New Zealand judiciary and provides education programmes and resources that support judges in the ongoing development of their judicial careers, promote judicial excellence and foster an awareness of developments in the law, its social context and judicial administration. The Institute is governed by a Board. The majority of the members of the Board are judges who are assisted by representatives from the legal profession, the community and academia. The Institute has a small permanent staff of five and is funded by the Ministry of Justice.

53 See for instance Judicial College (England and Wales) *The Crown Court Compendium* (December 2018) and the Judicial College of Victoria *Victorian Criminal Charge Book* (October 2017).

54 Chapter 12 at [12.104]–[12.108].

55 See below: the right to silence in Chapter 5; the section 30 test for exclusion of improperly obtained evidence in Chapter 7; and the admissibility of statements made by defendants to fellow prisoners in Chapter 18.

THE PROCESS WE HAVE FOLLOWED

1.34 At an early stage of the process, we established an expert advisory group consisting of Brendan Horsley (Crown Law), Professor Elisabeth McDonald (University of Canterbury), Simon Mount QC (barrister), Associate Professor Scott Optican (The University of Auckland), Tania Singh (Public Defence Service), Kingi Snelgar (barrister) and Chelly Walton (Ministry of Justice). The Chief Justice established a judicial advisory committee comprising Justices French and Simon France and Judge Stephen Harrop. We met with both groups in the preparation of our Issues Paper.

1.35 Our Issues Paper, which was published on 28 March 2018, identified 59 questions and invited submissions.[56] We sent our Issues Paper to a wide range of interested parties, published it on our website and publicised it through interviews and articles.[57] We gave an advance copy to the authors of *Mahoney on Evidence: Act and Analysis* so they were able to include references to the Issues Paper and the questions we asked in their fourth edition.[58]

1.36 We received 32 written submissions on one or more of the questions we identified. All submitters are listed in Appendix 2 to this report. They ranged from organisations that addressed most of the questions to individuals who provided very detailed comment on particular provisions or topics within their area of expertise or experience. Many of the individual submissions came from practitioners and academics.

1.37 The organisations that made comprehensive or relatively comprehensive submissions include the Aotearoa New Zealand Centre for Indigenous Peoples and the Law at the University of Auckland, the Auckland District Law Society, the Criminal Bar Association, the Crown Law Office, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service. We met with representatives of most of these organisations to discuss particular aspects of their submissions.

1.38 We also met with some members of our expert advisory group (either as individuals or as representatives of organisations) and other members of the group made submissions. We therefore decided it was not necessary to convene the expert advisory group again after the publication of the Issues Paper. We did convene another meeting with our judicial advisory committee to discuss many, but not all, of the questions in our Issues Paper.

1.39 In addition, we met with a range of other interested parties including:

- the District Court Kaupapa Māori Advisory Group;
- representatives of the Governing Board of the District Court Sexual Violence Pilot;
- Louise Nicholas and other representatives of Skylight Trust;
- barristers in Mānuka Chambers, Manukau;
- Professor Yvette Tinsley and Dr Warren Young, to discuss their jury research; and

---

56 We describe the process we followed before publication in: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [1.9]–[1.17].

57 For instance, Catherine Helm "Extending the 'rape shield' to evidence of sexual experience with the defendant" [2018] NZLJ 156 and Yasmin Moinfar-Yong "Can true statements be 'unreliable'?" (2018) 918 LawTalk 24.

58 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018).

- Justice Winkelmann and Janine McIntosh (the Chair and Executive Director of the Institute of Judicial Studies).

1.40 We have reviewed all the submissions we received and the comments made at our meetings. This informed our policy decisions, which in turn provided the basis for drafting instructions to Parliamentary Counsel, who have assisted us by drafting the Evidence Amendment Bill, which is included in this report.

MATTERS ADDRESSED IN THIS REPORT

1.41 This report addresses the 59 questions raised in our Issues Paper. Each chapter identifies the recommendations we have made, including any proposed amendments to the Act, and discusses our reasons for the recommendations. As we noted in our Issues Paper, there are a few provisions listed in our terms of reference that we have reviewed but have not included in this report, because they were not causing problems in practice.

1.42 We have identified a number of areas where reform might occur without the need for further legislative intervention.[59] This accords with the approach of the Legislation Design Advisory Committee's *Legislation Guidelines*.[60]

1.43 We have also considered suggestions made by submitters for other amendments to the Act that were not addressed in our Issues Paper.[61]

RECOMMENDATION FOR THE REPEAL OF SECTION 202

RECOMMENDATION

R1 Section 202, which provides for periodic reviews of the operation of the Evidence Act 2006, should be repealed.

1.44 As already noted, section 202 provides for the Commission to carry out a review of "the operation of the provisions of the Act" every five years.

1.45 This requirement was not recommended by the Commission in its original report in 1999 or included in the code proposed by the Commission. Instead it was added during the select committee stage to meet concerns raised about the relatively radical and unique nature of the substantial codification of the law of evidence that was involved.[62]

---

59 See our discussion at [1.18] above, noting that legislation is not an exclusive solution.

60 Legislation Design Advisory Committee *Legislation Guidelines* (Wellington, 2018) at [2.3] (noting that legislation involves significant costs so should only be created when it is necessary and the most appropriate means of achieving the policy objective). The Legislation Design and Advisory Committee considers legislative proposals and provides advice to government agencies that are developing policy and legislation. The Committee's *Legislation Guidelines* are endorsed by Cabinet.

61 See, for example, Chapter 7 (improperly obtained evidence) at [7.41]–[7.42] and [7.49]–[7.52]; Chapter 14 (veracity) at [14.42]–[14.44]; Chapter 17 (regulations) at [17.77]–[17.84]; and Chapter 18 (other matters).

62 Evidence Bill 2005 (256-2) (select committee report) at 14; and Evidence Bill 2005 (256-2), cl 194A.

1.46 Hon Rick Barker, the then Minister for Courts, on behalf of the Minister of Justice (moving the second reading of the Bill) said:[63]

> The committee was also unanimous in recommending that the bill include a provision that would require a regular review of the workings of the Act to see whether it is working effectively, or whether certain provisions require amendment. It was considered that such a review should take place every 5 years and that the body charged with reviewing the Act should be the Law Commission. I agree with this recommendation.

1.47 Speaking during the Committee of the Whole House, the then Opposition MP Christopher Finlayson suggested the regular review provision would ensure: "…this very important area of the law [would] be kept up to date, not in a piecemeal or an episodic fashion but in a principled way".[64]

1.48 Reflecting the operational nature of the review required by section 202 itself and the Minister's comments, the Commission in its 2013 Review of the Act referred to the need to check how the new legislative scheme would 'bed in'.[65]

1.49 Against this background, we asked in our Issues Paper whether section 202 should be retained and, if so, what form the reviews should take.

1.50 We received nine submissions that addressed the future of section 202.[66] All of them, including Crown Law, the New Zealand Bar Association, the New Zealand Law Society and Police supported the retention of section 202. Most suggested it was inevitable problems with the Act would continue to arise and periodic reviews were appropriate. Most also supported a lengthening of the review period from five years to ten years. Four suggested the Commission should continue to be responsible for future reviews. Members of the judicial advisory committee expressed a range of views. Submissions from two victim advocacy organisations generally supported looking at first principles rather than simply operational matters.

1.51 We recognise there are a number of reasons why section 202 might be retained:

- As submitters pointed out, practical problems with the interpretation and application of the Act are bound to continue to arise. Advances in technology and scientific research also make it likely the Act will require further updates.
- A statutory requirement for regular reviews may be considered necessary to ensure resources are committed to identifying and addressing problems in the Act.
- The law of evidence may be considered sufficiently important to warrant regular reviews. It is important because the Act's provisions play a critical function in criminal proceedings, where personal liberty is at stake through the risk of conviction and

---

63 (14 November 2006) 635 NZPD 6483.

64 (21 November 2006) 635 NZPD 6638. See the Hon Christopher Finlayson's comments during the second reading: (14 November 2006) 635 NZPD 6483. See also the Hon Christopher Finlayson, Hon Russell Fairbrother and Hon Nandor Tanczos's comments during the third reading: (23 November 2006) 635 NZPD 6802.

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

66 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Crown Law Office, the New Zealand Bar Association, the New Zealand Law Society, Police, Paulette Benton-Greig, Professor Elisabeth McDonald, the Public Defence Service and TOAH-NNEST Tauiwi Caucus.

imprisonment. Its importance is reflected in the significant number of appeals to the Court of Appeal involving consideration of the Act.[67]

- The Commission remains the appropriate body to conduct the reviews because of its independence, status, historical involvement with the codification of evidence law and consultative process.
- Future reviews might be at ten-yearly rather than five-yearly intervals to give the amendments made after the first two reviews time to 'bed in' and lessen the burden on the Commission's resources.

1.52 On the other hand, there are a number of countervailing factors supporting repeal of section 202:

- While the law of evidence is important, it has now been under review by the Commission since 1987 with over ten years spent on the original project and three years on the two reviews.[68] No other area of the law is subject to regular statutory review by the Commission in this way.[69] The law of evidence is not sufficiently special to warrant the time and cost of ongoing mandatory reviews.
- The Commission has a general statutory responsibility to keep the law of New Zealand under review in a systematic way.[70] Under its current funding regime, the Commission fulfils this responsibility principally through the law reform projects it receives from its Minister in its annual programme.[71] There is no statutory obligation imposed on the Commission to keep all areas of the law that it has previously reviewed for its Minister under ongoing review. Whether a particular area of law or an aspect of a particular area requires further review is a matter for the Minister at the relevant time.
- Further operational reviews of the nature required by section 202 are no longer needed. The substantial codification of the law of evidence has been successful, and

---

[67] We received information from the Court of Appeal that, in the two year period from 2015–2016, a total of 1,299 Court of Appeal decisions were issued. According to legal databases, during that two year period, there were around 300 (301, according to Westlaw, and 329, according to LexisNexis) Court of Appeal decisions that involved consideration of the Evidence Act. In other words, the Act featured in almost a quarter of all cases considered by the Court over that two year period.

[68] See Law Commission *Annual Report 1985-1987* (NZLC R2, 1987) at 13. The Law Commission's first evidence-related paper was Law Commission *Hearsay Evidence* (NZLC PP10, 1989). The Commission's work on evidence law throughout the 1990s culminated in the publication of the Evidence Code in 1999: Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999).

[69] Some statutes have 'one-off' review provisions. For example, see Search and Surveillance Act 2012, s 357; Local Government Act 2002, s 32; Veterans' Support Act 2014, s 282; and Prostitution Reform Act 2003, s 42. (The only other one referring to the Law Commission was the Search and Surveillance Act.) Other statutes have recurring review provisions (but do not involve the Law Commission): see Privacy Act 1993, s 26; Oranga Tamariki Act 1989, s 448B; and Intelligence and Security Act 2017, s 235. Examples of periodic review provisions can also be found overseas. They are notably present in terrorism legislation: see, for example, Terrorism Act 2006 (UK), s 36; Terrorism Prevention and Investigation Measures Act 2011 (UK), s 20; Counter-Terrorism and Security Act 2015 (UK), s 44; and Terrorism Insurance Act 2003 (Cth), s 41. However, review provisions are present in a number of different areas, see for instance Charities (Protection and Social Investment) Act 2016 (UK), s 16; Aboriginal Land Rights Act 1983 (NSW), s 252A; Employment Equity Act SC 1995 c 44, s 44; Northwest Territories Heritage Fund Act SNWT 2011 c 27, s 10; Child and Family Services Act SY 2008 c 1, s 183; Mortgage Brokerages, Lenders and Administrators Act SO 2006 c 29, s 57; and Credit Unions and Caisses Populaires Act SO 1994 c 11, s 334.

[70] Law Commission Act 1985, s 5(1)(a).

[71] Law Commission Act, s 7.

the Act is now largely 'bedded in'.[72] The two operational reviews have identified a relatively small number of practical issues requiring amendment. Any further practical issues that arise in the future may be monitored by the Ministry of Justice and lead to any further specific amendments that may be required without the necessity for a full-scale review by the Commission.[73]

- An operational review is not the place for a first principles or policy review. If a review of that nature is warranted, it would be preferable for it to be included as a separate project in the Commission's annual programme.[74]
- There is a significant opportunity cost involved in the Commission being required to continue to review the Act every five or ten years. The cost of a third operational review by the Commission would be difficult to justify as the benefits would be marginal now that most of the practical difficulties with the Act have been identified and addressed.

1.53 The Commission has decided these countervailing factors outweigh the reasons for retaining section 202 and therefore recommends its repeal. Clause 22 of the draft Bill reflects this recommendation.

72 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [1.6]; "Evidence Act a success" (2018) 920 LawTalk 36; and Stephen Kós in Foreword to Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018).

73 A recent example of this is the Family Violence (Amendments) Act 2018, which contains a number of amendments to the Evidence Act.

74 As noted at [1.32] above, in this report, we identify a number of broader policy issues that might justify separate examination in future.

CHAPTER 2

Te ao Māori and the Evidence Act

INTRODUCTION

2.1 In our Issues Paper, we sought submitters' views on whether any of the provisions of the Evidence Act 2006 have created difficulties for Māori and, if so, how the Act could be amended to better recognise Māori interests.

2.2 The submissions we received suggested that, while the existing provisions of the Act are not causing particular practical difficulties, there is scope to promote greater recognition of tikanga Māori[1] in courtroom procedures in appropriate cases.

2.3 In this chapter, we propose an amendment to the Act to make it clear that courts can regulate procedures for giving evidence in a manner that recognises tikanga. While some judges already take steps to recognise tikanga where appropriate (for example, by facilitating the giving of karakia in the courtroom), an express provision of this nature could encourage more consistent consideration of Māori interests.

2.4 We also explain why we do not consider any amendments to the Act are necessary to:

- expressly refer to te ao Māori[2] in the Act's purpose provision; or
- enable or require judicial directions on cross-racial identifications and/or assessments of witness demeanour.

BACKGROUND

2.5 In Chapter 2 of our Issues Paper, we explained that the Treaty of Waitangi is of vital constitutional importance and a key consideration in developing policy and legislation. We noted there has been growing recognition of the need to acknowledge tikanga within

---

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

2 In this chapter, we use the term 'te ao Māori' to incorporate Māori language, customs, beliefs, sites of importance and the importance of community, whanau, hapū and iwi: see Legislation Design and Advisory Committee *Legislation Guidelines* (Wellington, 2014) at [3.4].

or alongside New Zealand law.[3] A number of New Zealand statutes now expressly provide for consideration of tikanga, or the Treaty or its principles, in recognition of the strong Māori interest in the subject matter of the legislation.[4]

2.6 We also recognised that Māori have a strong interest in the operation of the Act because they are disproportionately represented in the criminal justice system, both as victims and offenders.

2.7 We observed that, in the decade since the Act came into force, there had been little case law relating to te ao Māori and the Act. We sought submissions on how the provisions of the Act were operating in practice. By way of example, we asked whether:

- the general opinion and hearsay provisions in the Act are facilitating the admission of oral evidence relating to Māori custom in court proceedings (as envisaged by the Law Commission when developing its Evidence Code); and
- the general discretion in section 69 of the Act to protect confidential communications is adequate to protect communications with kaumātua[5] and rongoā[6] practitioners.

2.8 We also requested feedback on whether the Act's purpose provision should be amended to expressly recognise te ao Māori. This suggestion had been raised at a September 2017 conference, "Reforming the Law of Evidence".[7]

2.9 Following the publication of our Issues Paper, we received nine submissions that addressed the questions raised in Chapter 2.[8] We also consulted the District Court Kaupapa Māori Advisory Group on our Issues Paper and attended a hui with legal practitioners in the Manukau area.

---

3 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [2.1], citing Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [117]. See also *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [164] per Blanchard, Tipping and McGrath JJ ("the common law of New Zealand requires reference to … tikanga, along with other important cultural, spiritual and religious values") and at [94] ("Maori custom according to tikanga is … part of the values of the New Zealand common law"); and [101] per Elias CJ.

4 We noted that, based on our research, there were 44 statutes referring to tikanga and 41 referring to the Treaty of Waitangi or its principles: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [2.3].

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

6 "Traditional Māori medicine – a system of healing that was passed on orally": Rhys Jones "Rongoā – medicinal use of plants" (24 September 2007) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>; "a holistic system of healing that has developed out of Māori cultural traditions": Institute of Environmental Science and Research Ltd and Te Whare Wānanga o Awanuiārangi, in partnership with Ngā Ringa Whakahaere o te Iwi Māori *The Future of Rongoā Māori: Wellbeing and Sustainability: A Report for Te Kete Hauora*, *Ministry of Health September 2008* (March 2009) at 5; and "physical remedies derived from trees, leaves, berries, fruits, bark, and moss and used to treat particular ailments": Mason Durie *Whaiora: Māori Health Development* (Oxford University Press, Auckland, 1994) at 20.

7 This conference was organised by Professor Elisabeth McDonald and was supported by the Law Foundation and the University of Canterbury.

8 The Aotearoa New Zealand Centre for Indigenous Peoples and the Law, Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, the Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig, Professor Elisabeth McDonald, the Public Defence Service and TOAH-NNEST Tauiwi Caucus.

2.10 Submitters did not point to specific practical issues for Māori arising from the provisions of the Act. It was not suggested there are barriers to admitting oral evidence of Māori custom or protecting communications with kaumātua and rongoā practitioners.[9]

2.11 Submitters and members of the District Court Kaupapa Māori Advisory Group did, however, emphasise the importance of recognising Māori interests when applying and interpreting the provisions of the Act. That is the main focus of this chapter.

2.12 Some members of the Group, as well as two submitters, also suggested the Act could provide for specific judicial directions on the risks of assessing witness demeanour and/or relying on visual identification evidence where people of different cultural backgrounds are involved.

RECOGNITION OF TIKANGA MĀORI IN COURT PROCEDURE

RECOMMENDATION

R2 A new provision should be inserted into the Act to clarify that the court may regulate its procedures for giving evidence in a manner that recognises tikanga Māori, provided this is not inconsistent with the provisions of the Act or another enactment.

Use of tikanga in court procedure

2.13 This issue was not discussed in our Issues Paper. Our recommendation stems from a suggestion made by Judge Heemi Taumaunu, the chair of the District Court Kaupapa Māori Advisory Group, that the Act should be amended to ensure tikanga is respected during the giving of evidence. The Group told us that many judges (including non-Māori) already take tikanga into account when controlling court processes, for example, by enabling karakia[10] to be observed in the courtroom.[11] However, the inclusion of an express provision in the Act should improve consistency in practice by encouraging parties to raise tikanga issues and prompting judges to consider how evidence may be handled in a culturally appropriate way.

2.14 Judge Taumaunu described a range of situations in which tikanga considerations may be relevant. He gave the example of a case he had presided over that involved an assault at the tangihanga[12] of a rangatira.[13] Because of the sensitive nature of the evidence being

---

9 The District Court Kaupapa Māori Advisory Group noted that cases involving oral evidence of Māori custom come before the courts infrequently.

10 "Incantation, ritual chant, chant, intoned incantation, charm, spell – a set form of words to state or make effective a ritual activity" or "prayer, grace, blessing, service, church service – an extension of the traditional term for introduced religions, especially Christianity": John C Moorfield "Karakia" Te Aka Online Māori Dictionary <www.maoridictionary.co.nz>.

11 Practitioners at the hui we attended in Manukau also said that quite a few judges in Manukau observe karakia at the beginning and/or end of trials.

12 "Weeping, crying, funeral, rites for the dead, obsequies - one of the most important institutions in Māori society, with strong cultural imperatives and protocols": John C Moorfield "Tangihanga" Te Aka Online Māori Dictionary <www.maoridictionary.co.nz>.

given, Judge Taumaunu suggested a kaumātua (who gave evidence in the proceeding) give a karakia. The Judge also referred to other situations where the giving of evidence might engage tikanga considerations, such as where photos of a deceased person will be shown in the courtroom or in cases involving mākutu.[14]

2.15 We note that the Environment Court is required by statute to "recognise tikanga Maori where appropriate" in conducting its proceedings.[15] At our request, Principal Environment Court Judge Newhook and Environment Court Judge Smith provided us with some reflections on how that provision has operated in practice. The judges noted that tikanga had been incorporated into Environment Court proceedings in an organic fashion, tailored to the locations in which the court sits and the parties present. They gave some examples of how tikanga has been recognised in the procedure of the Court, including:

- commencing and concluding hearings with karakia;
- inviting parties to offer a mihi and support it by waiata or haka;
- conducting some hearings on marae; and
- on rare occasions, receiving requests for private hearings where matters of significant tikanga are involved.

2.16 In general, the registrar or the court arranges karakia and/or mihi with the parties in advance. In some cases, a party makes a request in writing, while in others, the registrar proactively enquires about the parties' wishes.

2.17 Overall, the judges considered the Environment Court's processes have been effective and noted they have generally been encouraged and accepted by counsel and parties. While they acknowledged the role of the Environment Court is different to that of other courts,[16] they suggested there may be cases in other courts where tikanga could be effectively recognised.

Reasons for reform

2.18 In this operational review, we have generally only recommended legislative reform where there is evidence to suggest that the current law is causing problems in practice.[17] We are not aware of specific situations in which the courts have failed to appropriately recognise tikanga when evidence is being given. However, we consider that a different approach is justified in this instance. The Act should seek to actively promote recognition of Māori interests rather than simply responding to practical difficulties. This is because:

---

13 "Chief (male or female), chieftain, chieftainess, master, mistress, boss, supervisor, employer, landlord, owner, proprietor": John C Moorfield "Rangatira" Te Aka Online Māori Dictionary <www.maoridictionary.co.nz>.

14 "To inflict physical and psychological harm and even death through spiritual powers, bewitch, cast spells": John C Moorfield "Mākutu" Te Aka Online Māori Dictionary <www.maoridictionary.co.nz>.

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

16 For example, the Resource Management Act, which the Court operates under, has a very broad purpose of promoting the sustainable management of natural and physical resources: s 5. The Environment Court is authorised to receive any evidence it considers appropriate, including evidence written or spoken in Māori, and is not bound by the usual laws of evidence that apply in judicial proceedings: s 276.

17 This is with the exception of our recommendations about family and sexual violence, as paragraph 3 of our terms of reference required us to consider some of the underlying policy issues in that area. Our terms of reference are set out in Appendix 3.

- the Crown has a duty under the Treaty to actively protect Māori interests,[18] including Māori customary and cultural values;[19] and
- Māori have a strong interest in the operation of the rules of evidence and criminal procedure generally, since they are disproportionately represented in the criminal justice system, both as victims[20] and offenders.[21]

2.19 We agree the Act could usefully be amended to encourage parties and judges to consider tikanga issues that might arise when evidence is being given in court. While there does appear to be growing recognition of tikanga in the courts already,[22] this is likely to depend largely on the inclination of individual judges.[23] A specific provision would provide a clear basis for parties to request consideration of tikanga in appropriate cases, as well as serving as a reminder to judges. This could help to ensure that tikanga is acknowledged in a more consistent way.

Our proposed amendment

2.20 We recommend inserting a new provision in the Act to make it clear the court may regulate its procedures in relation to the giving of evidence in a way that recognises tikanga. We emphasise the courts can already do this using their inherent and implied powers. The provision would not change the legal position; rather, it would remind parties and judges to consider how tikanga might be accommodated in appropriate cases.

2.21 The draft Bill includes the following clause to reflect our recommendation:

> 11A Recognition of tikanga Māori
>
> (1) The court may regulate its procedures in relation to the giving of evidence in a way that recognises tikanga Māori.
>
> (2) The court's power under subsection (1) must not be exercised in a way that is inconsistent with the provisions of this Act or any other enactment.
>
> (3) For the purposes of this Act, **tikanga Māori** means Māori customary values and practices.

---

18 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 702; and Waitangi Tribunal Report of the Waitangi Tribunal on the Manukau Claim (Wai 8, 1985) at 70.

19 Waitangi Tribunal *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wai 17, 1988) at 60:

> It was inherent in the Treaty's terms that Maori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for and, where necessary, reconciled.

See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [298], [326]–[328] and [339].

20 Ministry of Justice *2014 New Zealand Crime and Safety Survey Te Rangahau o Aotearoa Mō Te Taihara Me Te Haumarutanga 2014 Main Findings* (2015) at 71–73 (Māori were victimised at a rate of 151 offences per 100 Māori adults, compared to 62 offences per 100 European adults).

21 In 2017–2018, 41.4 per cent of people convicted of offences were Māori: Ministry of Justice "Data tables: People charged and convicted" (2018) <www.justice.govt.nz> at Table 8. By contrast, based on population estimates as at 30 June 2018, Māori account for 15 per cent of the total population: Stats NZ "National population estimates: At 30 June 2018" (2018) www.stats.govt.nz; and Stats NZ "Māori population estimates: At 30 June 2018" (2018) <www.stats.govt.nz>.

22 See, for example, *Friends and Community of Ngawha v Minister of Corrections* [2002] NZRMA 401 (HC) (where a karakia was offered on the two mornings of the hearing); Annis Somerville "Tikanga in the Family Court – the gorilla in the room" (2016) 8 NZFLJ 157; and Law Commission *Reforming the Law of Contempt of Court: A Modern Statute – Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017) at [3.4]–[3.5].

23 Charlotte Williams *The Too-Hard Basket: Maori and Criminal Justice Since 1980* (Institute of Policy Studies Victoria University of Wellington, Wellington, 2001) at 123.

2.22 The definition of tikanga Māori in subclause (3) is consistent with other legislative definitions.[24] The ability to recognise tikanga would apply to both civil and criminal proceedings, as tikanga may be relevant in either context. For example, in some cases, it might be appropriate to allow a karakia to be given before or after a witness is questioned.[25] Tikanga considerations might also influence a judge's decision about whether to allow a witness to have any support person(s) with them when giving evidence[26] or to disallow a question put to a witness as unacceptable.[27]

2.23 The provision would only apply to procedural matters. It would not affect the substantive rules regarding the admissibility of evidence, privilege and confidentiality. Nor would it allow tikanga considerations to override specific statutory rules.[28] The court could only accommodate tikanga to the extent it is possible to do so consistently with the Act and any other relevant enactments such as the Criminal Procedure Act 2011 and the High Court Rules 2016.[29] The provision would not allow Māori to access a parallel criminal justice system based on tikanga.[30]

2.24 The provision would only apply to procedures relating to the giving of evidence. In this respect, the provision would be more limited than the tikanga provision in the Resource Management Act 1991, which applies to the Environment Court's procedures more generally.[31] Broader questions about recognition of tikanga in court procedure are outside the scope of this review.

2.25 Unlike the provision applying to the Environment Court, we do not suggest the Evidence Act should *require* the court to recognise tikanga. As the Environment Court judges recognised, that Court operates in a different context to other courts.[32] When regulating their procedures in relation to giving evidence, the courts should generally retain complete discretion to determine when and to what extent it is appropriate to recognise tikanga. In doing so, they would have regard to other relevant considerations including the need to ensure a fair trial, promote fairness to parties and witnesses and avoid unnecessary expense and delay.[33]

---

24 For example, Te Ture Whenua Maori Act 1993, s 4; Resource Management Act 1991, s 2(1); Public Records Act 2005, s 4; and Fisheries Act 1996, s 2(1).

25 See above at [2.14].

26 Evidence Act 2006, s 79.

27 Evidence Act, s 85.

28 As observed by Heath J in *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 at [39], n 31:

> The procedure to be followed by the Court in a criminal trial is prescribed by statute, and recognises an adversarial contest where witnesses are challenged through cross-examination by a lawyer representing the opposing party. That procedure is inherently inconsistent with the nature of tikanga Maori.

See also *Police v Taurua* [2002] DCR 306 at [38]–[40].

29 The High Court Rules 2016 are deemed to be part of the Senior Courts Act 2016 under section 147(1) of that Act.

30 Arguments to the effect that Māori are not subject to the general criminal jurisdiction of the courts have been repeatedly rejected. See *Mason v R* [2013] NZCA 310 at [41]. See also *Te Tangata Whenua v Chief Executive of the Department of Corrections* [2017] NZSC 189 at [3]; *Warren v R* [2016] NZSC 156 at [4]; *R v Toia* [2007] NZCA 331 at [8]–[10]; *Watene v Police* [2017] NZHC 3252 at [8]; and *R v Pairama* (1995) 13 CRNZ 496 (HC) at 498–501.

31 Section 269(3).

32 See above at [2.17], n 16.

33 As reflected in the purpose provision in the Evidence Act, s 6, and in the New Zealand Bill of Rights Act 1990, ss 25 and 27.

2.26 In general, we would expect the court to seek parties' agreement in advance to the procedures to be followed. There may, however, be situations where the need to recognise tikanga does not become apparent until a proceeding is already under way. This should not prevent tikanga from being accommodated where appropriate.

REFERRING TO TE AO MĀORI OR THE TREATY OF WAITANGI IN THE ACT'S PURPOSE PROVISION

2.27 In our Issues Paper, we referred to a suggestion made at a September 2017 conference, "Reforming the Law of Evidence", that the Act's purpose provision[34] should be amended to expressly recognise te ao Māori. We invited submitters' views on this suggestion.

2.28 Five submitters commented on this issue.[35] Four of those submitters, including the Aotearoa New Zealand Centre for Indigenous Peoples and the Law and the New Zealand Bar Association supported referring to te ao Māori and/or te Tiriti o Waitangi/the Treaty of Waitangi in the Act. They considered this would:

- prompt counsel and judges to consider te ao Māori issues;
- recognise the strong interest Māori have in the operation of the Act; and
- emphasise the Crown's obligations to uphold the Treaty.

2.29 The Criminal Bar Association doubted whether adding a specific reference to te ao Māori in the Act's purpose provision would provide any assistance in practice; rather, it considered such an amendment would be likely to cause confusion.

2.30 Some members of the District Court Kaupapa Māori Advisory Group expressed a preference for legislation generally to include references to the Treaty in the purpose provision in addition to specific operative provisions. They considered that, in the absence of a reference to the Treaty in the purpose provision, operative provisions have potential to give rise to a multicultural approach that may or may not be capable of taking into account te ao Māori and giving effect to the Treaty.

2.31 We have concluded that a more specific provision encouraging recognition of tikanga in the procedures for giving evidence (as set out in recommendation 2) is preferable to a general reference to te ao Māori or the Treaty in the Act's purpose provision.

2.32 We note that the Act must be interpreted in a way that promotes its purpose and principles.[36] A general reference to te ao Māori or the Treaty in the Act's purpose provision could create uncertainty about how and to what extent Māori interests should be taken into account in interpreting and applying the Act. For example, we would not wish to suggest that otherwise relevant evidence could be excluded on the basis that its presentation in court might be inconsistent with Māori custom (although tikanga might appropriately influence how any such evidence is presented).[37]

---

[34] Section 6.

[35] The Aotearoa New Zealand Centre for Indigenous Peoples and the Law, the Criminal Bar Association, Elisabeth McDonald, the New Zealand Bar Association and Paulette Benton-Greig.

[36] Section 10(1).

[37] It is possible such an argument might be made where, for instance, a party to the proceeding seeks to cross-examine a rangatira or kaumātua or produce evidence challenging their veracity. See *Te Runanga o Ngai Tahu v Waitangi Tribunal* [2001] 3 NZLR 87 (HC) at [101], referring to the Waitangi Tribunal's statement that:

2.33 Parliament has moved away from enacting legislation that makes general references to the Treaty or its principles in favour of more specific provisions setting out how and in what circumstances Māori interests should be taken into account.[38] This development reflects the difficulty that can arise in determining the practical effect of general Treaty clauses.[39]

2.34 No specific problems with the application of the Act's provisions have been drawn to our attention that might be remedied through a reference to the Treaty in the purpose provision. In addition, the courts already take Treaty principles into account when interpreting legislation (where appropriate), irrespective of whether the legislation includes a Treaty provision.[40] The absence of an express reference to te ao Māori or the Treaty in the Act's purpose provision would not, therefore, prevent te ao Māori from being considered in appropriate cases.

JUDICIAL DIRECTIONS ON CROSS-CULTURAL IDENTIFICATIONS AND DEMEANOUR ASSESSMENTS

2.35 In our Issues Paper, we explained that the Commission considered the dangers inherent in cross-cultural eyewitness identifications and juror assessments of demeanour when developing its Evidence Code.[41] The Commission referred to research suggesting that "own-race" identifications may be more accurate than other-race identifications.[42] It also noted that jury assessments of a witness's credibility based on their demeanour are particularly dangerous when the witness is from a different culture.[43]

2.36 The Commission considered whether the Evidence Code should require judges to give specific warnings to juries where these issues arose but ultimately decided against that approach. In relation to identification evidence, it included in the Evidence Code a requirement for judges to give a more general warning to juries about the need for caution before convicting a defendant in reliance on the correctness of an identification.[44] That requirement now appears in section 126 of the Act and applies in cases where identification is the critical issue at trial. The Commission suggested that, where appropriate, the judge could mention the fact that identifications may be less reliable where the witness and defendant are of a different ethnicity.[45]

> … the cross-examination of kaumatua giving traditional oral evidence does not sit easily with Maori custom. Kaumatua evidence is not usually challenged, nor kaumatua exposed to possible ridicule before members of their iwi.

38 Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 531–533.

39 As discussed in New Zealand Productivity Commission *Regulatory Institutions and Practices* (30 June 2014) at [7.6] and Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 531–533.

40 See, for example, *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [248], citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 and 223 and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 183–184.

41 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [2.19]–[2.22].

42 Law Commission *Evidence: Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999) at [40].

43 Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [117].

44 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999), s 112.

45 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C398].

2.37 In relation to demeanour assessments, the Commission doubted a statutory provision requiring a judicial warning would serve any useful purpose.[46] It considered "the question of a warning can be addressed only according to the circumstances of each case".[47]

2.38 Members of the District Court Kaupapa Māori Advisory Group suggested it may now be desirable to provide for specific judicial directions on cross-cultural identifications and demeanour assessments. They suggested a legislative requirement to consider giving a direction could remove any doubts judges might have that jurors may be influenced by unconscious bias. Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre[48] and TOAH-NNEST Tauiwi Caucus[49] also supported a judicial direction regarding cultural stereotyping of demeanour.

2.39 We note that, although the issues of cross-cultural identifications and demeanour assessments were discussed in the te ao Māori chapter in our Issues Paper, they may be relevant to people of any cultural or ethnic background.

2.40 We have concluded the Act does not require amendment to provide for judicial directions on cross-cultural identifications and/or demeanour assessments. As we explain below, the appellate courts have already set out guidance on when such directions are appropriate and what they should contain. Case law emphasises that the need for a direction must be assessed on a case by case basis. A legislative provision would limit judicial discretion in a way we do not think would be desirable.

Cross-racial bias in identification evidence

2.41 There is substantial scientific literature on the phenomenon of "own-race bias". Studies suggest that attempts to identify a person of a different racial appearance are generally less accurate than attempts to identify a person of the same racial appearance.[50]

2.42 Case law in several United States jurisdictions specifically requires or authorises judges to give directions to the jury about the risk of cross-racial bias in identification evidence.[51]

---

[46] Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [119]. The issue was not discussed in the commentary on the Evidence Code.

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

[48] A group of non-kaupapa Māori organisations that provide support services to survivors of sexual violence in the Auckland region.

[49] Te Ohaakii a Hine – National Network Ending Sexual Violence Together, Tauiwi Caucus, a national network that includes 51 non-profit organisations that provide specialist sexual violence support services to those impacted by sexual harm and 24 individuals who work in this sector.

[50] See, for example, Brian Cutler and Steven Penrod *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge University Press, New York, 1995) at 104; Christian Meissner and John Brigham "Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review" (2001) 7(1) Psychol Public Policy Law 3; Luke Jackiw and others "Examining the Cross-Race Effect in Lineup Identification using Caucasian and First Nations Samples" (2008) 40(1) Can J Behav Sci 52; and United States National Research Council *Identifying the Culprit: Assessing Eyewitness Identification* (The National Academies Press, 2014) at 96–97.

[51] This is the case in New Jersey, Utah, California, Massachusetts and New York. See *State v Cromedy* 727 A 2d 457 (NJ 1999); *State v Henderson* 27 A 3d 872 (NJ 2011); *State v Long* 721 P 2d 483 (Utah 1986); *People v Palmer* 154 Cal App 3d 79 (1984); *Commonwealth v Bastaldo* 32 NE 3d 873 (Mass 2015); and *People v Boone* 77 NE 3d 896 (NY Ct App 2017). A model direction addressing the risks associated with identification evidence (including cross-racial bias) was also developed for the federal jurisdiction in *United States v Telfaire* 469 F 2d 552 (DC Cir 1972). Most circuits have approved the recommended model identification instruction but not the specific instruction on cross-racial identification. See also Judicial Council of California *Criminal Jury Instructions* (2018) at Instruction 315.

2.43 In New Zealand, the Court of Appeal indicated in 2009 in *R v Turaki* that judges should consider giving a warning on cross-racial identification bias in appropriate cases:[52]

> [90] A s 126 warning must be tailored to the circumstances of the case. This means that a trial judge should include, as appropriate, directions beyond those prescribed by s 126(2). In this regard, a trial judge should consider whether any of the additional warnings suggested by the Law Commission in New Zealand Law Commission Evidence Code and Commentary (NZLC R55-Vol 2 1999) at C398, are appropriate for the particular circumstances of the case. These included warnings about:
>
> …
>
> (c) The fact that, if the witness and defendant are of a different race/ethnicity, the identification may be less reliable;
>
> …

2.44 Subsequent appellate authority has reinforced the need for trial judges to identify the factual features that support or diminish the probative value of the identification in the particular case.[53]

The effectiveness of jury warnings on cross-racial bias is unclear

2.45 A number of studies have examined the impact of judicial directions on juror assessments of identification evidence, both in relation to cross-racial identification[54] and eyewitness identifications more generally.[55] While the studies have had mixed results, in general, they have not found judicial directions to have a significant impact on juror assessments of identification evidence.[56] The Court of Appeal considered the research in this area in *R v Turaki* and observed:[57]

> … the evidence is equivocal as to the effectiveness of judicial directions [in relation to eyewitness identifications]. Research has suggested that directions by judges and traditional safeguards such as cross-examination of eyewitnesses have only a limited ability to help a jury discriminate between accurate and inaccurate eyewitness identifications. Instead, they have a tendency to foster a generalised disbelief of all eyewitnesses among jurors.

---

52 *R v Turaki* [2009] NZCA 310. In that case, Mr Turaki appealed against conviction arguing that the judge failed to give a proper direction on identification evidence under s 126. The Court found that no s 126 warning was required because the evidence was "resemblance evidence", forming circumstantial evidence of identification rather than direct visual identification evidence: at [58].

53 *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1 at [35]; and *Robin v R* [2013] NZCA 330 at [34].

54 Molly O'Connor "Effects of Judicial Warnings About Cross-Race Eyewitness Testimony on Jurors' Judgments" (Thesis, Trinity College, Connecticut, 2013).

55 See, for example, the discussion in Andrew Taslitz "'Curing' Own Race Bias: What Cognitive Science and the *Henderson* case teach about Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error" (2013) 16 NYU J Legis & Pub Pol'y 1049 at 1074–1076; and Kristy A Martire and Richard I Kemp "The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony" (2009) 33(3) Law Hum Behav 225 at 225–226.

56 Richard A Wise and others "An examination of the causes and solutions to eyewitness error" (2014) 5 Front Psychiatry at 4; and Kristy A Martire and Richard I Kemp "The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony" (2009) 33(3) Law Hum Behav 225 at 225–226.

57 *R v Turaki* [2009] NZCA 310 at [47].

2.46 Similarly, in 2013, the Supreme Court of Washington declined to adopt a general rule requiring a judicial warning on cross-racial identification evidence,[58] noting that none of the studies referred to by the appellant:[59]

> .... support the conclusion that the giving of a cautionary cross-racial identification instruction solves the purported unreliability of cross-racial eyewitness identification, any more than would cross-examination, expert evidence, or arguments to the jury.

2.47 The Court also considered a specific cross-racial direction would have been unhelpful and even misleading in the case at hand, where the identification was based largely on the suspect's clothing and sunglasses rather than facial appearance.[60]

No amendment to the Act is required

2.48 On balance, we consider it unnecessary to amend the Act to require judges to warn juries about cross-racial identification evidence. We do not suggest that such directions should be avoided. A warning may well be appropriate in some circumstances, such as where the prosecution case relies substantially on cross-racial identification evidence that is primarily based on facial features. However, judges should have discretion to decide in each case whether a direction is appropriate and, if so, what form it should take.

2.49 We therefore endorse the current position as established by the case law on section 126:

- A jury warning must be given about the general risks associated with identification evidence if identification is the critical issue at trial.[61]
- The warning does not need to be in any particular words but must explain to the jury that mistaken identifications can be given by convincing witnesses and can result in serious miscarriages of justice.[62]
- The warning must be tailored to the circumstances of the case.[63] Where appropriate, the judge should consider telling the jury that identifications may be less reliable where the witness and defendant are of a different ethnicity.[64]

Juror assessments of witness credibility based on demeanour

2.50 A witness's cultural background can influence their demeanour and potentially lead jurors to draw incorrect conclusions about their credibility. For example, in some cultures, direct eye contact is considered impolite, while in others, avoiding a person's gaze is seen as an

---

58 *State v Allen* 294 P 3d 679 (Wash 2013). The appellant sought to overturn his conviction for harassment on the basis that the trial court erred by not instructing the jury on the potential fallibility of cross-racial eyewitness identification. The appellant referred to evidence that cross-racial identifications are less accurate.

59 At [18].

60 At [22].

61 Section 126(1).

62 Section 126(2).

63 *R v Turaki* [2009] NZCA 310 at [90]; *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1 at [35]; and *Robin v R* [2013] NZCA 330 at [34].

64 *R v Turaki* [2009] NZCA 310 at [90] and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C398].

indication of untruthfulness.[65] The impact of cultural factors on demeanour is now well-recognised by the courts and commentators, both in New Zealand and overseas.[66]

2.51 A possible response to this concern is to require or encourage trial judges to warn juries against relying too heavily on demeanour when assessing the credibility of witnesses from different cultural backgrounds. The Australian Law Reform Commission recommended in 1992 that courts should be made aware of the "desirability of warning the jury to make proper allowance for the cultural background of the witness in drawing conclusions from demeanour".[67]

2.52 Cultural factors are not the only reason for discouraging jurors from relying too heavily on demeanour assessments. Research suggests that demeanour is generally not a reliable indicator of truthfulness.[68] Behavioural cues often associated with lying, such as averting the gaze or fidgeting, are not necessarily a sign of dishonesty.[69] Giving evidence at a trial is also an unfamiliar and stressful situation for most people, which can alter their behaviour.[70] Other factors, such as the way in which evidence is given (for example, by video)[71] and the general character of the witness (such as their level of confidence),[72] may also affect demeanour.

2.53 Since the Act was enacted, the New Zealand courts have considered whether juries should invariably be warned of the risks of relying on demeanour to assess credibility. Both the Court of Appeal and the Supreme Court have declined to set out a general rule, emphasising the need to assess whether a demeanour warning is appropriate in the context of the particular case.

---

65 *E (CA799/2012) v R* [2013] NZCA 678 at [29]. See also Danielle Andrewartha "Lie Detection in Litigation: Science or Prejudice?" (2008) 15(1) PPL 88 at 91; Robert J Currie "The Contextualised Court: Litigating Culture in Canada" (2005) 9(2) E&P 73 at 91–92; and Australian Law Reform Commission *Multiculturalism and the Law* (ALRC R57, 1992) at [10.43].

66 See, for example, *E (CA799/2012) v R* [2013] NZCA 678 at [29]; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* [1999] HCA 3, (1999) 160 ALR 588 at [88(4)] per Kirby P; *Goodrich Aerospace Pty Limited v Arsic* [2006] NSWCA 187, (2006) 66 NSWLR 186 at [21]–[22]; and *R v Rhayel* 2015 ONCA 377, (2015) 324 CCC (3d) 362 at [85]. See also Danielle Andrewartha "Lie Detection in Litigation: Science or Prejudice?" (2008) 15(1) PPL 88 at 91; Robert J Currie "The Contextualised Court: Litigating Culture in Canada" (2005) 9(2) E&P 73 at 91–92; and *Australian Law Reform Commission Multiculturalism and the Law* (ALRC R57, 1992) at [10.43].

67 Australian Law Reform Commission *Multiculturalism and the Law* (ALRC R57, 1992) at [10.62]. The Commission recognised that "this is a difficult issue, not least because to require a judge to warn a jury about the dangers of drawing conclusions from demeanour would risk placing further emphasis on it".

68 See the discussion in Robert Fisher "The Demeanour Fallacy" [2014] NZ L Rev 575 at 577–582; Michael Green "Credibility Contests: The Elephant in the Room" (2014) 18(1) E&P 28 at 30–34; and Danielle Andrewartha "Lie Detection in Litigation: Science or Prejudice?" (2008) 15(1) PPL 88 at 91.

69 Robert Fisher "The Demeanour Fallacy" [2014] NZ L Rev 575 at 578; and Michael Green "Credibility Contests: The Elephant in the Room" (2014) 18(1) E&P 28 at 35.

70 Danielle Andrewartha "Lie Detection in Litigation: Science or Prejudice?" (2008) 15(1) PPL 88 at 92–93; *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [79].

71 Kathryn Leader "Closed-Circuit Television Testimony: Liveness and Truth-telling" (2010) 14(1) Law Text Culture 312 at 323–325.

72 Robert Fisher "The Demeanour Fallacy" [2014] NZ L Rev 575 at 579; and *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [80].

The Court of Appeal's decision in E (CA799/2012) v R

2.54 In *E (CA799/2012) v R* the Court of Appeal heard an appeal against conviction on the ground (among others) that the trial judge should have warned the jury about the risks of relying on demeanour when assessing the complainant's credibility.[73]

2.55 The Court found that such a warning is not invariably required, observing:[74]

> To adopt this approach would tend to deprive juries of the accepted benefits of seeing and hearing the witnesses; it would risk juries interpreting the Judge's direction as an invitation to disbelieve the witness or to place little weight on his or her evidence; and it would restrict the ability of the trial judge to tailor a direction appropriate to the circumstances of the case.

2.56 The Court did, however, suggest the jury should generally be informed that:[75]

- the assessment of the credibility and reliability of a witness should be broadly based, taking into account the evidence as a whole and factors such as internal consistency and plausibility; and
- demeanour may properly be taken into account, but it should be considered as one factor in the broader assessment rather than in isolation.

2.57 The Court stressed the need to tailor judicial directions to the circumstances of the case, noting that a more specific warning about reliance on demeanour might sometimes be appropriate.[76] This will depend on a range of factors, including the points made by counsel in their closing addresses and the relative importance of demeanour in the particular case. In the case before the Court, the witness's credibility was not a significant issue so a demeanour direction was not required.[77]

The Supreme Court's decision in Taniwha v R

2.58 The Supreme Court subsequently considered the question of demeanour warnings in *Taniwha v R*.[78] Like *E (CA799/2012) v R*, the case involved an appeal against conviction on the basis that the judge should have given a tailored demeanour direction to the jury.

2.59 The Court confirmed that a demeanour warning is not invariably required where credibility is at issue.[79] The need for a warning will depend on "whether there is a real risk that witness demeanour will feature illegitimately in the jury's assessment of witness veracity or reliability", taking into account the nature of the case and how the evidence has unfolded.[80]

2.60 The Court went on to suggest that, where a warning is considered appropriate, a direction along the following lines could be given:[81]

---

73 *E (CA799/2012) v R* [2013] NZCA 678.

74 At [41].

75 At [43]–[44].

76 At [46]–[50].

77 At [76]–[83].

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

79 At [43].

80 At [43].

81 At [46].

> I must warn you, though, that simply observing witnesses and watching their demeanour as they give evidence is not a good way to assess the truth or falsity of their evidence. For example, a witness may not appear confident or may hesitate, fidget or look away when giving evidence. That doesn't necessarily mean that their evidence is untruthful. The witness may be understandably nervous giving evidence in an unfamiliar environment in front of unknown people. *Or there may be cultural reasons for the way a witness presents.* On the other hand, a witness may appear confident, open and persuasive but nevertheless be untruthful. And remember that even an honest witness can be mistaken.
>
> Things like gestures or tone of voice may sometimes help you to understand what the witness actually means. But you should be cautious about thinking that they will help you much in determining whether or not the witness is telling the truth.
>
> [Emphasis added.]

2.61 In the case before it, the Court considered that a demeanour warning was not required.[82] The complainant's demeanour had not been over-emphasised by counsel.[83] In addition, the Court considered there was a substantial risk that the jury would have interpreted a demeanour warning as an invitation to disbelieve or place little weight on the complainant's evidence.[84]

No amendment to the Act is required

2.62 While the decisions in *E (CA799/2012) v R* and *Taniwha v R* concerned demeanour assessments generally, the reasoning of the courts is equally relevant where juries are assessing evidence given by witnesses from a different cultural background. We consider that requiring a demeanour direction as a matter of course could be problematic.[85] For example, in some cases, a direction might risk placing undue emphasis on the demeanour of a witness. The trial judge will need to assess in each case whether the witness's demeanour is likely to feature significantly in the jury's deliberations and whether a demeanour direction would be helpful or harmful in the circumstances.

2.63 We consider the judgments in *E (CA799/2012) v R* and *Taniwha v R* provide clear and helpful guidance to trial judges about when a demeanour direction may be appropriate and what it should contain. We note the model direction set out by the Supreme Court in *Taniwha v R* refers to the potential influence of cultural factors on a witness's demeanour. A statutory provision would add little to this. Guidance in case law also has the benefit of being able to evolve as further research emerges.

---

82 At [53] and [55].

83 At [56].

84 At [52]. This was because an issue had been squarely raised at trial as to whether the complainant's reaction of distress when she was shown a photograph while giving evidence was genuine or fabricated.

85 Contrast discussion in Scott Optican "Evidence" [2018] NZ L Rev 429 at 484.

CHAPTER 3

Evidence of sexual experience

INTRODUCTION

3.1 Propensity evidence about a complainant's sexual experience may only be offered in accordance with section 44 of the Act.[1] Section 44 is the equivalent of what is referred to as the "rape shield" in some jurisdictions.[2] It applies in sexual cases to control the extent to which complainants may be questioned about their previous sexual experience.[3]

3.2 Under section 44(1), evidence of a complainant's sexual experience with any person other than the defendant is inadmissible, except with permission of the judge. The judge must not grant permission unless the proposed evidence satisfies the heightened relevance threshold in section 44(3): the evidence must be of such direct relevance that it would be contrary to the interests of justice to exclude it. Section 44(2) imposes a complete ban on admitting evidence relating to the complainant's reputation in sexual matters.

3.3 In our Issues Paper, we identified five issues with the operation of section 44:

- There is uncertainty about the admissibility of sexual disposition evidence.
- Section 44 does not control the admissibility of evidence about the complainant's sexual experience with the defendant.
- The Supreme Court's guidance in *Best v R* regarding the admissibility of previous false or allegedly false complaints of sexual offending is arguably too complicated.[4]
- Section 44 does not apply in civil proceedings.
- Section 44A does not require an application under section 44(1) (to offer evidence or ask a question about the complainant's sexual experience) to specify the grounds relied on for admission of the evidence.

---

1 Evidence Act 2006, s 40(3)(b).

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

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

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

3.4 In this chapter, we recommend:

- sexual disposition evidence should be admissible under section 44(1) with the judge's permission, subject to satisfying the heightened relevance test;
- evidence of the complainant's sexual experience with the defendant should only be admissible under section 44(1) with the judge's permission, subject to satisfying the heightened relevance test;
- section 44 should be amended to extend its application to civil proceedings; and
- an application to offer evidence or ask a question about the complainant's sexual experience or sexual disposition should specify the grounds relied on for admission.

3.5 We do not consider the Act needs to clarify the admissibility of previous false or allegedly false complaints of sexual offending. In consultation, legal practitioners indicated the Supreme Court's guidance in *Best v R* is helpful and is not difficult to apply.

BACKGROUND

3.6 The purpose of the rape shield provision is to protect complainants from unnecessarily intrusive and embarrassing questioning about their sexual history.[5] Research indicates that such questioning can make complainants feel they are on trial rather than the defendant.[6] The rape shield provision recognises that it is evidence relating to the particular incident that should inform the outcome of the proceedings rather than evidence of earlier events in the complainant's life.[7] As the Supreme Court has recognised, trials for sexual violence offences should not be "derailed by collateral inquiries of little or no actual relevance into the complainant's sexual experiences".[8]

3.7 A related aim of the provision is to prevent sexual history evidence being used to support two erroneous assumptions.[9] The assumptions are that, because a complainant has a particular reputation, disposition or experience in sexual matters, either:

- they are the kind of person who is more likely to have consented to sexual activity on this occasion; or
- they are less worthy of belief than a complainant who does not have those characteristics.

3.8 Against these objectives, the provision must balance "the defendant's right to a fair trial and the right to present an effective defence".[10] These rights are affirmed by section 25 of the New Zealand Bill of Rights Act 1990 and recognised in section 6(b) of the Evidence Act.

---

5 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53]; and Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [320].

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

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

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

9 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53] per McGrath, Glazebrook and Arnold JJ, citing *Bull v R* [2000] HCA 24, (2000) 201 CLR 443 at [53].

10 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53] per McGrath, Glazebrook and Arnold JJ. See also Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [355]–[356].

SEXUAL DISPOSITION EVIDENCE

RECOMMENDATION

R3

Section 44 should be amended to clarify that:

- sexual disposition evidence is only admissible with the judge's permission if it is of such direct relevance that it would be contrary to the interests of justice to exclude it; and
- evidence of a complainant's reputation for having a particular sexual disposition is inadmissible.

3.9 Section 44 does not refer to evidence of a complainant's general disposition in sexual matters (unlike its predecessor, section 23A of the Evidence Act 1908).[11] An example of sexual disposition evidence is a recording of sexual fantasies in a personal diary.[12] Another example could be evidence of sex toys in the complainant's bedside cabinet, which the complainant uses privately but not with the defendant or others. This is clearly evidence of the complainant's propensity in sexual matters yet does not appear to be captured by the terms "sexual experience … with any person" in section 44(1) or "reputation" in section 44(2), as it might not involve other persons or lead to a relevant reputation.[13]

Issues Paper

3.10 In our Issues Paper, we noted there is some uncertainty in the case law as to how sexual disposition evidence should be dealt with under the Act. We discussed the 2013 Supreme Court decision in *B (SC12/2013) v R* as an illustration of this.[14] In that case, the Court unanimously held the proposed evidence was inadmissible, but three separate judgments were delivered. Each judgment expressed a different view on how the Act should treat evidence that reveals a complainant's disposition in sexual matters but does not involve other persons.

3.11 The majority (McGrath, Glazebrook and Arnold JJ) suggested that evidence of sexual disposition may fall within the term "sexual experience" in section 40(3)(b) but not within

[11] Section 23A of the Evidence Act 1908 provided that no evidence could be given relating to the sexual experience or reputation of the complainant in sexual matters, except by leave of the judge. The judge could not grant leave unless satisfied the evidence was of direct relevance to the facts in issue or the issue of sentence and to exclude it would be contrary to the interests of justice. The provision was subject to the proviso that evidence must not be regarded as being of direct relevance by reason only of "any inference it may raise as to the general disposition or propensity of the complainant in sexual matters": s 23A(3).

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

[13] *See B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [55]–[56].

[14] See Law Commission *The Second Review of the Evidence Act 2006* (NZLC IP42, 2018) at [3.14]–[3.25]. In *B (SC12/2013 v R* [2013] NZSC 151, [2014] 1 NZLR 261, the defence proposed to call evidence that some months before the alleged sexual offending, the complainant asked another man to dispose of a mouse, and when the man arrived, he found the complainant in her nightwear in the middle of the day and smelling of alcohol – although nothing sexual occurred.

the narrower phrase "sexual experience … with any person" in section 44(1).[15] In effect, because sexual disposition is not specifically referred to in section 44, it is arguable that evidence of sexual disposition cannot be led at all.[16] This suggestion was criticised by Elias CJ and by William Young J.[17] The majority concluded section 44 "needs further legislative clarification".[18]

3.12 In our Issues Paper, we expressed the preliminary view that section 44 should be amended to capture all evidence of the complainant's propensity in sexual matters, including sexual disposition evidence. We asked what admissibility rule should apply to evidence of sexual disposition: should it be inadmissible, or should it be admissible with the permission of the judge subject to the heightened relevance test in section 44(3)?

Consultation

3.13 We received 14 submissions on this issue, which came from both prosecution and defence perspectives. Thirteen submitters (including the Crown Law Office, New Zealand Police and the Public Defence Service) said sexual disposition evidence should be admissible under section 44, subject to satisfying the heightened relevance test in section 44(3).[19] The remaining submitter (the Criminal Bar Association) said it would not be concerned about an amendment to clarify the admissibility of sexual disposition evidence but did not specify the admissibility threshold that should apply.

3.14 Most submitters thought sexual disposition evidence may sometimes be relevant and should not automatically be excluded.[20] Three submitters gave the example of a complainant who wants to give evidence of their sexual orientation.[21] They said complainants should be entitled to give evidence that they are known to be a lesbian, and the Crown should be entitled to suggest the defendant knew the complainant is a lesbian and would therefore be unlikely to want to have sex with him.

3.15 Four submitters suggested that sexual disposition evidence is more like evidence of sexual experience than evidence of sexual reputation (the way in which a complainant is

---

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

16 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [56]. They then stated: "Such an outcome seems consistent with the policy underlying s 44 and other rape shield provisions."

17 Elias CJ said her interpretation of s 44(2) – encompassing sexual disposition – was consistent with the "sense of the legislation" that "any evidence of sexual propensity … is covered by the two aspects of s 44": at [16]. If evidence of a complainant's sexual disposition was not covered by s 44, there would be an "unaccountable gap" in the protection afforded to complainants by the rape shield provision: at [16]. William Young J also criticised the solution proposed by the majority. He argued there is no distinction between "sexual experience" in s 40(3)(b) and "sexual experience … with any person" in section 44(1); the former is simply "short-hand" for the latter: at [119]. He disagreed with the "reading up" of "sexual experience" in s 40(3)(b) to encompass non-experiences (such as fantasies recorded in a diary): at [119]. William Young J held that although "the policy behind s 44 was engaged" (at [122]), the proposed evidence was neither sexual experience evidence nor reputation and so s 44 did not apply: at [111] and [120]. He assessed the admissibility of the proposed evidence under s 7 and held it was not relevant and therefore inadmissible: at [121]–[128].

18 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [57] per McGrath, Glazebrook and Arnold JJ.

19 The Auckland District Law Society, Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA The Practice, Crown Law, the New Zealand Bar Association, the New Zealand Law Society, New Zealand Police, the Public Defence Service, TOAH-NNEST Tauiwi Caucus and four individual submitters.

20 The Auckland District Law Society, Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, Crown Law, the New Zealand Bar Association, the New Zealand Law Society, the Public Defence Service, TOAH-NNEST Tauiwi Caucus and two individual submitters.

21 BVA, Crown Law and Paulette Benton-Greig.

regarded by others).[22] They said it should therefore be admissible subject to the heightened relevance test, rather than completely barred like evidence of reputation.

3.16 We also consulted our judicial advisory committee and two judges from the Sexual Violence Court Pilot. The judges all thought sexual disposition evidence should be admissible under section 44, subject to satisfying the heightened relevance test.

Our view

Section 44 should govern the admissibility of sexual disposition evidence

3.17 We maintain our preliminary view that section 44 should govern the admissibility of all evidence of a complainant's propensity in sexual matters, including sexual disposition evidence. This is consistent with section 40(3)(b) of the Act, which states that propensity evidence about a complainant's sexual experience may only be offered in accordance with section 44. It is also consistent with the policies of section 44 to protect complainants from unnecessarily intrusive and embarrassing questions and prevent the use of erroneous assumptions based on the complainant's sexual history.

3.18 There is uncertainty in the case law about whether all sexual disposition evidence is captured by section 44. In some cases - for example, where evidence of sexual disposition is also evidence of sexual experience - it is clear that section 44 applies.[23] However, the cases suggest that uncertainty arises where the evidence reveals the complainant's disposition in sexual matters but does not involve other persons.

3.19 In *B (SC12/2013) v R*, the members of the Supreme Court suggested three different ways of dealing with sexual disposition evidence. The Chief Justice thought such evidence should be captured by section 44 (as evidence of reputation).[24] The majority suggested it potentially falls within a gap in the Act and will arguably always be inadmissible.[25] William Young J said that, even if the policy of section 44 is engaged, the admissibility of the evidence may not necessarily be governed by the provision.[26]

3.20 In subsequent Court of Appeal decisions, for example, *R v Singh* in 2015 and *Jones v R* in 2018, it appears the Court has overlooked the majority's suggestion in *B (SC12/2013) v R* and has instead suggested that sexual disposition evidence may be captured by section 44 (as evidence of sexual experience).[27] The uncertainty is also illustrated by the 2017 District Court decision in *R v Reynolds*, where the Judge said evidence of a complainant's sexual orientation did not engage section 44 as it could not be categorised as evidence

[22] BVA, Crown Law and two individual submitters. BVA noted that, whereas evidence of reputation will only ever be relevant to a defendant's reasonable belief in consent, evidence of sexual disposition may be relevant to a defence of either consent or reasonable belief in consent.

[23] In *Pegler v R* [2015] NZCA 260, the defendant wanted to offer video evidence of the male complainant having sex with another male to counter the complainant's claim that he would not be interested in sex with another man – although the evidence related to the complainant's sexual disposition, it was also plainly evidence of sexual experience falling within section 44(1).

[24] *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [15]–[16].

[25] At [56].

[26] At [111]–[120].

[27] In *R v Singh* [2015] NZCA 435, the Court of Appeal said the Supreme Court in *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 was suggesting that evidence of sexual disposition could properly be dealt with as evidence of "sexual experience" under s 44: at [25]. In *Jones v R* [2018] NZCA 288, the Court of Appeal also seemed to suggest that sexual disposition evidence could be treated as evidence of "sexual experience" under s 44: at [32]–[34].

of sexual experience or reputation.[28] Similar to William Young J's suggested approach in *B (SC12/2013) v R*, the Judge held that the proposed evidence was admissible under the general relevance test in section 7 of the Act.

3.21 In our view, the Act should be amended to make it clear that sexual disposition evidence is captured by section 44. We consider the risk of illogical reasoning about the complainant's behaviour based on evidence of their sexual disposition justifies some controls and restrictions on the admissibility of such evidence beyond the Act's general relevance test in section 7 and the general exclusion provision in section 8.

Sexual disposition evidence should be admissible subject to the heightened relevance test

3.22 We consider sexual disposition evidence should be admissible under section 44, subject to satisfying the heightened relevance test in section 44(3). Those we consulted overwhelmingly preferred this option over the option of completely barring sexual disposition evidence. Like them, we consider there could be situations where sexual disposition evidence is of direct relevance to the proceedings. For example, the prosecution may wish to offer evidence of the complainant's sexual orientation to support the complainant's credibility. Alternatively, the defence may want to offer evidence of a complainant's sexual fantasies recorded in a diary or online (for example, on a dating app) to support a defence of consent or reasonable belief in consent. It follows that evidence of sexual disposition should not be completely barred.

3.23 We note there may be situations where the proposed evidence is both evidence of sexual disposition and reputation, for example, if the proposed sexual disposition evidence is not based on facts but only on the complainant's reputation. This issue has not arisen in the case law, but the majority of the Supreme Court in *B (SC12/2013) v R* noted that "although analytically distinct, the concepts of experience, reputation and disposition may overlap in practice, which may result in problems of application".[29]

3.24 For the avoidance of doubt, we recommend that section 44 should be amended to make it clear that evidence *of the fact* of someone's sexual disposition should be admissible if it satisfies the heightened relevance test. However, evidence of the complainant's *reputation* for having a particular sexual disposition should be barred.

3.25 Clause 14 of the draft Bill reflects this recommendation.

---

[28] *R v Reynolds* [2017] NZDC 21845 at [8]–[10] and [13]. The Court referred to *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 but noted that, although the Supreme Court had referred to difficulties regarding how to categorise disposition evidence, it did not appear to have made a final determination: at [7].

[29] *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [57].

COMPLAINANT'S SEXUAL EXPERIENCE WITH THE DEFENDANT

RECOMMENDATION

R4

Section 44 should be amended so that evidence of a complainant's sexual experience with the defendant is only admissible with the judge's permission if it is of such direct relevance that it would be contrary to the interests of justice to exclude it. There should be an exception for evidence of *the fact* the complainant was in a sexual relationship with the defendant: this evidence should continue to be admissible subject to sections 7 and 8.

3.26 New Zealand is one of the few jurisdictions where the rape shield provision does not control the admissibility of evidence of the complainant's sexual experience *with the defendant*.[30] Under the Act, this evidence is admissible subject only to the general admissibility requirements in section 7 and section 8.

Issues Paper

3.27 In our Issues Paper, we explained that the extension of the rape shield to evidence of the complainant's sexual experience with the defendant has been a contentious issue in New Zealand and overseas. The debate centres on the perceived relevance of the evidence. Those in favour of extending the rape shield argue evidence of previous sexual experience between the complainant and defendant is irrelevant to whether or not the complainant consented on the occasion in question. Those opposed to extending the rape shield argue the evidence of an existing or previous sexual relationship between the complainant and the defendant will often be, or inevitably is, relevant to a defence of consent and especially to a defence of reasonable belief in consent.

3.28 We asked whether the rape shield should now be extended. We questioned whether the risk of illogical reasoning about the complainant's behaviour based on their previous sexual relationship or experience with the defendant justifies some controls on the admissibility of this evidence and, if so, to what extent this evidence should be restricted. For example, we asked should a heightened relevance test govern the admissibility of evidence about *the fact* the complainant was previously in a relationship with the defendant, or should it only apply to evidence about *the nature* of the past experience?

Consultation

3.29 We received 15 submissions on this issue. Nine submitters thought the Act should be amended to more tightly control the admissibility of evidence of the complainant's sexual experience with the defendant. This included Crown Law, Police and a number of academics and organisations that work to improve the court experience for sexual

---

30 See, for example, Youth Justice and Criminal Evidence Act 1999, s 41 (UK); Criminal Code RSC 1985 C-46, s 276 (Canada); Criminal Procedure Act 2009, s 342 (Vic); Evidence Act 1906, s 36BC (WA); and Evidence Act 2001, s 194M (Tas). See also: Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [7.14], citing the Ministry of Justice Improvements to Sexual Violence Legislation in New Zealand: Public Discussion Document (August 2008) at 22–25.

violence complainants.[31] Six submitters supported the status quo,[32] including the Public Defence Service and the New Zealand Law Society.

3.30 We consulted with Skylight Trust, which includes a team of advocates for sexual violence survivors. Skylight supported an amendment to control the admissibility of such evidence.

3.31 We also consulted with our judicial advisory committee and two judges from the Sexual Violence Court Pilot. None of the judges thought the rape shield should be extended.

Reasons given for extending the rape shield

3.32 Those who supported greater controls on the admissibility of evidence of the complainant's sexual experience with the defendant considered the general admissibility requirements in sections 7 and 8 do not adequately protect complainants. Three submitters commented that no comparable jurisdiction considers bare "relevance" to be an effective control on the admissibility of this evidence, and New Zealand is behind international best practice in this regard.[33]

3.33 Five submitters said the law should support the fact that consent needs to be established afresh in each sexual interaction.[34] Three submitters said particularised consent is recognised in section 128 of the Crimes Act 1961, which makes rape within marriage illegal.[35] Another individual submitter pointed to provisions that restrict evidence of a complainant's sexual history with the defendant in civil sexual harassment proceedings.[36]

3.34 Two individual submitters said section 44 prioritises the protection of complainants in stranger rape cases over complainants who are raped by a partner or acquaintance. They said this does not accord with the reality that, in the majority of rape cases, the offender will be known to the complainant.[37]

3.35 Three submitters said the limited application of the rape shield provision can have an undesirable impact on complainants and the way jurors perceive complainants in some situations:[38]

- Where the sexual experience between the complainant and the defendant involved 'non-normative' sex, the admissibility of such evidence may tar the complainant in the eyes of jurors who have different sexual norms. Jurors may reason "if she was prepared to consensually do that, what kind of sexual boundaries does she have?"

---

[31] Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Crown Law, Paulette Benton-Greig, Police, Professor Elisabeth McDonald, TOAH-NNEST Tauiwi Caucus, and three individual submitters.

[32] The Auckland District Law Society, BVA The Practice, the Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

[33] Crown Law, Paulette Benton-Greig and one individual submitter.

[34] Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Paulette Benton-Grieg, TOAH-NNEST Tauiwi Caucus and two individual submitters.

[35] Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, TOAH-NNEST Tauiwi Caucus and one individual submitter.

[36] Section 116 of the Employment Relations Act 2000 and s 62(4) of the Human Rights Act 1993 provide that no account may be taken of any evidence of the complainant's previous sexual experience or reputation, including previous sexual experiences with the defendant.

[37] See Chapter 12 at [12.73], n 67 for statistics supporting this fact.

[38] Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Paulette Benton-Greig and TOAH-NNEST Tauiwi Caucus.

- Where the sexual experience occurred in the context of partner violence, the admissibility of evidence of the complainant's previous consent to sexual activity ignores the fact of coercion (on the defendant's part) and fear (on the complainant's part). It allows the defendant to claim the repeated effect of his violence is an acceptable basis to assume consent.

3.36 Several submitters considered the heightened relevance test should control the admissibility of evidence of sexual experience between the complainant and the defendant.[39] Crown Law said this would require the defence to properly articulate the relevance of the proposed evidence beyond the unhelpfully vague argument that "it is relevant to consent".

3.37 Some submitters, including Crown Law, said the heightened relevance test should only apply to the nature and details of a previous sexual relationship, not *the fact* of a previous sexual relationship between the complainant and the defendant. Crown Law said it would be undesirable to require the judge's permission to adduce evidence of this background or narrative nature. One individual submitter explained that it may be necessary to acknowledge the fact of the relationship - for example, to explain why the parties were living or travelling together at the time of the alleged offending.

Reasons given for retaining the status quo

3.38 Those who did not support extending the rape shield to evidence of sexual experience between the complainant and the defendant considered there are no problems with the current approach to the admissibility of this evidence. They said sections 7 and 8 adequately govern its admissibility,[40] and one submitter noted that section 85 also allows the court to control inappropriate questioning.[41] BVA The Practice[42] said trial judges are comfortable ruling what, if any, relevance the complainant's previous sexual experience with the defendant has to an asserted belief in consent.

3.39 Four submitters said the complainant's previous sexual experience will usually be relevant to the issue of consent or reasonable belief in consent.[43] Two submitters said it would be artificial not to be able to question the complainant on their sexual experience with the defendant, and juries would struggle to understand why such evidence was not raised.[44]

3.40 The Criminal Bar Association and the New Zealand Bar Association were concerned that extending the rape shield would add to the length and cost of trials by requiring defendants to seek leave to give the evidence of previous sexual experience. The Criminal Bar Association suggested it would create another potential ground of appeal, in cases where counsel did not apply to offer the evidence.

3.41 The Public Defence Service said extending the rape shield would erode the principle that the defendant is not required to disclose their defence before trial. The Auckland District

---

39 Crown Law, Paulette Benton-Greig, Police and one individual submitter.

40 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

41 The Public Defence Service.

42 This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

43 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

44 BVA and the Criminal Bar Association.

Law Society was concerned that restricting the admissibility of the evidence would erode the defendant's right to present an effective defence.

3.42 None of the judges from our judicial advisory committee and neither of the two judges from the Sexual Violence Court Pilot supported extending the rape shield. Our judicial advisory committee was concerned that this might make it difficult for defendants and complainants to tell their story. They were less concerned about a heightened relevance test controlling evidence of the complainant's sexual experience with the defendant if there is an exception for evidence of *the fact* of a previous sexual relationship, as distinct from evidence of the nature and details of that relationship.

Section 44 should govern the admissibility of evidence of the complainant's sexual experience with the defendant

3.43 We consider section 44 should be amended so that evidence of a complainant's sexual experience with the defendant will only be admissible with the judge's permission if it satisfies the heightened relevance test.

3.44 This would be consistent with the policy of the provision. Section 44 aims to protect complainants from unnecessarily intrusive and embarrassing questioning about their previous sexual experience and to prevent the use of erroneous assumptions based on their sexual history. The assumption that consent on a previous occasion makes consent more likely on a future occasion devalues the importance of consent in relationships.[45] Consent is given to a particular person on a particular occasion – it is not given to a person for all time.[46] In our view, the risk of illogical reasoning about the complainant's behaviour based on their previous sexual experience with the defendant justifies greater legislative control over the admissibility of this evidence.

3.45 We were told the gap in the rape shield can be particularly harmful for complainants where the previous sexual experience between the complainant and the defendant involved 'non-normative' sex. In such cases, the sexual experience evidence may lead jurors to erroneously assume the complainant has 'loose' sexual morals and is more likely to have consented to the sexual activity on this occasion or is less worthy of belief.

3.46 The gap in section 44 may also impact on complainants in situations where their sexual experience with the defendant occurred in a context of violence. The admissibility of this evidence may lead jurors to assume the complainant was likely to have 'consented' on this occasion too. Susan Chapman (now Justice Chapman of the Ontario Court of Justice) has explained the importance of carefully scrutinising the relevance of sexual experience evidence in the context of partner violence, as the admissibility of such evidence may disproportionately affect the most vulnerable women:[47]

> The unfairness of improper admission of sexual activity evidence has a disproportionate impact on the rights of certain women, including Aboriginal women and women with

---

45 See Christine Boyle and Marilyn McCrimmon "The Constitutionality of Bill C-49: Analyzing Sexual Assault as if Equality Really Mattered" (1998) 41(2) Crim LQ 198 at 222–223.

46 See Andrea Ewing "Case Note: Consent and 'Relationship Expectations' – *Christian v R* [2017] NZSC 145" [2017] NZCLR 357 at 362. See also, for example, *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53]; and *Morton v R* [2013] NZCA 667 at [109].

47 Susan M Chapman "Section 276 of the *Criminal Code* and the Admissibility of 'Sexual Activity' Evidence" (1999) 25 (1) Queen's LJ 121 at 130. The article discusses the equivalent rape shield provision in Canada: Canadian Criminal Code, s 276.

> physical or psychological disabilities. It has been estimated, for example, that eight of ten Aboriginal women will be beaten or sexually assaulted in their lifetimes. When prior victimization is used to test the credibility of a complainant, the result is that those women most frequently assaulted will actually receive less protection from the criminal law for reasons entirely unrelated to their truthfulness. The reality of these and other women and children forces the courts to carefully scrutinize claims of relevance made in the name of full answer and defence.

3.47 A heightened relevance threshold would require the judge and counsel to consciously enquire into the direct relevance of the evidence. In our view, this is important because, if consent is given to a particular person on a particular occasion, it cannot be assumed evidence of a complainant's propensity to consent will be of any direct relevance. A heightened relevance test would require the court to balance the competing interests of defendants (to present an effective defence) and complainants (not to be affected by jurors' erroneous assumptions about the relevance of the evidence). In our view, this would promote fairness to the parties and witnesses, in line with the Act's purpose.[48]

3.48 Further, extending the rape shield would provide for facts to be established by the application of logical rules.[49] There are currently different pathways to admit sexual experience evidence under the Act, depending on whether the sexual experience was with the defendant or someone else. The threshold for admissibility is considerably lower if the sexual experience occurred with the defendant. This may be problematic in some cases, as illustrated by the Court of Appeal decision in *Jones v R.*[50]

3.49 In *Jones*, the Court of Appeal was asked to consider the admissibility of evidence of the complainant's alleged interest in having a threesome with the defendant and the defendant's partner.[51] The Court said the section 44 "rape shield" did not apply to the evidence because it was not evidence of sexual experience with any person *other than the defendant*.[52] This meant the lower threshold for admissibility in section 7 applied, despite the risk the jury would use the evidence of the complainant's interest in 'non-normative' sex to assume she had 'loose morals' and was likely to have consented to sexual activity on this occasion.[53]

3.50 We consider it would be more logical for section 44 to govern the admissibility of *all* sexual experience evidence, regardless of who the sexual experience was with. The focus should be on the direct relevance of the evidence, not the relationship of the parties involved.

---

48 Section 6(c).

49 Section 6(a).

50 *Jones v R* [2018] NZCA 288.

51 *Jones v R* [2018] NZCA 288.

52 *Jones v R* [2018] NZCA 288 at [39], [43] and [47]–[48].

53 The evidence admissible under s 7(3) included evidence that: the complainant had referred to herself as the third member of the defendant's relationship with his girlfriend and when out socialising referred to being on a "date" and being their "girlfriend"; the defendant and his partner told the complainant they were considering inviting another woman into their relationship and exploring the swing lifestyle, and the complainant was interested in this and started being flirtatious in their company; and the complainant allegedly said "I would have a threesome with you guys because we are all beautiful humans".

3.51 Requiring the judge's permission to admit evidence of the complainant's sexual experience with the defendant would also more closely align with the approach that comparable jurisdictions take to the admissibility of this evidence.[54]

There should be an exception for the fact of a previous sexual relationship

3.52 We consider the heightened relevance test should only control evidence about the nature and details of the sexual experience between the complainant and the defendant – not the *fact of* a previous sexual relationship between the complainant and defendant. We think it would be undesirable to require pre-trial applications for leave to adduce evidence of this background or factual nature.

3.53 Clause 14 of the draft Bill reflects our recommendation in relation to evidence of the complainant's sexual experience with the defendant.

FALSE OR ALLEGEDLY FALSE PREVIOUS COMPLAINTS

Issues Paper

3.54 In *Best v R*,[55] the Supreme Court provided guidance on the interaction between section 37 (veracity), section 40 (propensity) and section 44 (sexual experience) in cases where a complainant has previously made a false or allegedly false complaint of sexual offending.

3.55 In our Issues Paper, we explained that, prior to *Best*, the admissibility of evidence of a complainant's previous allegation of sexual offending was assessed under section 37 in cases where it was manifestly clear the complaint was false.[56] In such cases, the sexual context was seen as "tangential" to the issue of veracity.[57] Where the truth or falsity of the past complaint was disputed, the admissibility of the evidence fell to be determined under section 44.

3.56 We noted the Supreme Court in *Best* set out a new approach:[58]

(a) There must be some evidential foundation for asserting that a previous complaint was false before it can even be raised by the judge.

(b) The complainant should then be asked in the absence of the jury to confirm whether or not the previous complaint was false.

(c) The judge should then consider whether the evidence is "substantially helpful" under section 37.[59]

---

54 See above at [3.26], n 30.

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

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

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

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

59 The more evidence that needs to be called on the previous complaint (to establish whether or not it was false), the less likely it is the evidence will be substantially helpful in assessing veracity. Such a trial within a trial is not in accordance with the policy of s 44, which at least in part was to encourage the reporting of sexual offences by making it less of an ordeal for complainants to give evidence at trials for sexual offences: at [74] per Glazebrook J.

(d) If the substantial helpfulness test is met, the judge should consider under section 44 whether it would be "contrary to the interests of justice" to exclude the evidence.

(e) Even if the judge considers it would be contrary to the interests of justice to exclude the evidence, section 44 may limit the way the evidence is led so the concentration is on the falsehood of the complaint and not on the previous sexual experience.

3.57 We noted there has been some criticism of the approach in *Best*, in particular that it is more complex to apply than the previous approach and arguably blurs the distinction between propensity and veracity evidence.[60]

3.58 We expressed the preliminary view that, although the *Best* approach may be more complex, it is the right approach.[61] From a policy point of view, we suggested it is logical to treat the admissibility of evidence of a false complaint in the same way as evidence of an allegedly false complaint – that is, as evidence primarily directed at the complainant's veracity. We said this aligns with the Law Commission's original intention. The *Best* approach also adds an extra layer of protection for complainants – even if the evidence is "substantially helpful" under section 37, section 44 may limit the way it can be led.

3.59 We asked whether submitters agreed with the approach in *Best* and, if so, whether it should be simplified or clarified in the Act. We asked whether the admissibility of evidence of a previous false complaint of sexual offending should be treated differently from evidence of an *allegedly* false complaint, and whether false and/or allegedly false complaints should be treated as evidence of veracity, sexual experience or both.

Consultation

3.60 Twelve submitters addressed these questions.[62] Six supported the approach in *Best*. They considered it logical to treat the admissibility of a false complaint in the same way as an allegedly false complaint and said that, depending on the circumstances, both section 37 (veracity) and section 44 (sexual experience) may be engaged.[63]

3.61 BVA, the Criminal Bar Association and Crown Law told us the guidance in *Best* is working well and has not been difficult to apply. The Public Defence Service said *Best* sets out a pragmatic approach to admissibility of false and allegedly false previous complaints of sexual offending. BVA, the Criminal Bar Association and the Public Defence Service suggested there is no better alternative.

---

60 See Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [3.61]–[3.63]. See also, more recently: Scott Optican "Evidence" [2018] NZ L Rev 429 at 467.

61 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [3.64].

62 The Auckland District Law Society, Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, the Criminal Bar Association, Crown Law, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig, Police, the Public Defence Service and TOAH-NNEST Tauiwi Caucus.

63 The Auckland District Law Society, BVA, the Criminal Bar Association, Crown Law, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

3.62 Six submitters said it is difficult to see how the Act could simplify or clarify the approach in *Best*.[64] The Auckland District Law Society and the New Zealand Bar Association suggested that *Best* should be given time to 'bed in' and be refined by the courts.

3.63 Four submitters did not support the approach in *Best*. Police and Professor Elisabeth McDonald thought section 37 should govern the admissibility of false and allegedly false complaints of previous sexual offending, because this evidence is primarily relevant to a person's veracity. Paulette Benton-Greig[65] thought section 44 should govern the admissibility of this evidence. She commented that very few complaints are false in the sense that they are entirely fabricated with malicious intent,[66] and therefore a very high threshold should apply. The Auckland District Law Society suggested *Best* should be reviewed and clarified by way of further appeals to the Supreme Court rather than legislative amendment.

3.64 Two submitters expressed concern about the admissibility of *any* evidence of false or allegedly false complaints of previous sexual offending (unless the complaint is very clearly untrue).[67] They said there are many reasons why someone may not follow through with their initial complaint or why their complaint may not result in a conviction, and usually this is not because their complaint was false. Therefore, evidence of a previous false or allegedly false complaint may have no bearing on the complainant's truthfulness or otherwise. These submitters did not specify which provision(s) should govern the admissibility of this evidence but they clearly considered a high threshold should apply.

3.65 We also consulted our judicial advisory committee and two judges from the Sexual Violence Court Pilot. Our judicial advisory committee said the *Best* approach is overly complicated and they prefer the pre-*Best* approach.[68] The Sexual Violence Court Pilot judges said the approach in *Best* has been welcomed by judges and counsel, and they are now familiar with it. They said it is helpful to have a clear, logical structure to follow in cases where the admissibility of false or allegedly false complaints of previous sexual offending is an issue.

Our view

No amendment to the Act is required

3.66 We have concluded that no amendment to the Act is necessary or desirable. Although not everyone we consulted supported the approach set out in *Best*, our overall impression from practitioners was that the guidance is sufficiently clear and easy to apply. The courts have also applied the guidance in *Best* without any apparent difficulty.[69]

---

64 The Auckland District Law Society, BVA, the Criminal Bar Association, Crown Law, the New Zealand Bar Association and the Public Defence Service. The Public Defence Service said that it is difficult to see how the *Best* approach could be simplified, but the evidential standard for asserting that a prior complaint was false may benefit from some clarification. The New Zealand Law Society said this is an area that could be simplified or clarified by amending the Act but did not indicate how the Act could do this.

65 A member of the law faculty at the University of Waikato with expertise in the justice response to sexual violence.

66 For example, the most vulnerable witnesses are the least able to sustain a rape complaint in the face of pressure from others or internal stress. She said the idea that "false complaints" can provide an evidential basis for concluding that a complainant is a serial false complainer rests on the rape myth that women are vindictive and lie about sex.

67 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus.

68 The pre-*Best* approach is discussed above at [3.55].

69 *Arona v R* [2018] NZCA 427 and *Hohua v R* [2017] NZCA 89.

3.67 We maintain our preliminary view that the approach in *Best* is more logical than the approach prior to *Best*. We consider the admissibility of evidence of false and allegedly false complaints should be treated in the same way – that is, as evidence primarily directed at the complainant's veracity. This aligns with the Commission's original intention.

3.68 Some submitters said a very high threshold for admissibility should apply to evidence of false and allegedly false previous complaints of sexual offending. We note the approach in *Best* adds an extra layer of protection for complainants – even if the evidence is "substantially helpful" under section 37, section 44 may limit the way it can be used.

3.69 There was limited support for amending the Act. We are satisfied the Supreme Court's relatively recent guidance in *Best* is sufficiently clear and that the finer points of its approach can be refined by the courts over time.

EXTENSION OF SECTION 44 TO CIVIL PROCEEDINGS

RECOMMENDATION

R5 Section 44 should be amended so that it applies in civil (as well as criminal) proceedings.

3.70 Section 44 only applies in criminal proceedings. In civil proceedings there is no general mechanism for controlling the admissibility of sexual experience evidence, although the Employment Relations Act 2000 and the Human Rights Act 1993 contain specific provisions controlling this evidence in sexual harassment proceedings.[70]

Issues Paper

3.71 In our Issues Paper, we suggested there may be occasions outside these employment or human rights contexts where it would be appropriate to have a mechanism governing the admissibility of evidence of sexual experience or reputation. We gave the example of professional disciplinary proceedings such as those taken in the Health Practitioners Disciplinary Tribunal following allegations of sexual misconduct.

3.72 We asked whether the Act's general admissibility provisions in sections 7 and 8 sufficiently control sexual experience evidence in civil proceedings or whether section 44 or an equivalent rape shield provision should apply in all civil proceedings.

Consultation

3.73 The eight submitters who responded to this question thought section 44 (or an equivalent provision) should apply in civil proceedings.[71]

3.74 Several submitters said the same policy considerations apply in civil and criminal contexts, as complainants[72] have the same needs in both settings.[73] The New Zealand Bar

---

70 Section 116 of the Employment Relations Act 2000 and s 62(4) of the Human Rights Act 1993. See Law Commission *The Second Review of the Evidence Act 2006* (NZLC IP42, 2018) at [3.67]–[3.69].

71 Auckland Sexual Abuse HELP Foundation/Family Action/Family Counselling Services, Crown Law, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig and one individual submitter.

Association suggested there is an even stronger justification for a rape shield provision in civil proceedings, as the liberty of the defendant is not at stake. Similarly, Paulette Benton-Greig said a rape shield is justified because there are arguably fewer protections and supports for complainants in the civil context.

3.75 One individual submitter, who has recently written on this issue,[74] observed there are legislative controls on sexual experience evidence in some civil proceedings (where there is an allegation of sexual harassment) but not all civil proceedings. She said this means there is a gap in protection for complainants in professional disciplinary proceedings, defamation proceedings and tortious claims arising from assault and battery. She suggested it is illogical to afford protection to complainants in sexual harassment proceedings but not in other civil contexts.

3.76 Elisabeth McDonald said section 44 should be extended to ensure judges feel comfortable applying the protective aspects of the Act. One individual submitter supported extending section 44 to civil proceedings but noted the Act only applies to proceedings conducted by a court not by a tribunal (such as the Human Rights Review Tribunal). She nevertheless suggested that extending section 44 would draw attention to the risk sexual experience evidence may be inappropriately used in civil as well as criminal proceedings, and noted tribunals are strongly guided by the provisions of the Act.

Our view

Section 44 should apply in civil proceedings

3.77 We consider section 44 should be amended to extend its application to civil proceedings. We see no reason in principle why a rape shield provision should not govern the admissibility of evidence of a complainant's sexual history in all civil proceedings. The same policy considerations apply in both criminal and civil contexts: to protect complainants from unnecessarily intrusive and embarrassing questioning about their sexual history and to prevent the use of erroneous assumptions based on the complainant's sexual history.[75] The need to protect alleged victims of sexual violence does not disappear because the context has shifted from criminal to civil proceedings.[76]

3.78 There are currently no controls on the admissibility of sexual experience evidence in civil proceedings, except where sexual harassment is alleged.[77] There may nevertheless be

---

72 For ease of reading and for consistency in this chapter, we refer to all complainants and plaintiffs in cases involving sexual violence as "complainants".

73 Auckland Sexual Abuse HELP Foundation/Family Action/Family Counselling Services Centre, Paulette Benton-Greig and TOAH-NNEST Tauiwi Caucus and one individual submitter.

74 Christina Laing "Sexual Experience and Reputation Evidence in Civil Proceedings: A Case for Reform" (2018) 24 Auckland U L Rev 175 at 197–198.

75 See discussion above at [3.6]–[3.7].

76 See Advisory Committee on Rules "Rule 412. Sex-Offense Cases: The Victim – Notes of Advisory Committee on Rules - 1994 Amendment" Legal Information Institute <www.law.cornell.edu>. Rule 412 of the Federal Rules of Evidence sets out the United States rape shield provision, which applies in both civil and criminal proceedings. The notes of the Advisory Committee on the Federal Rules of Evidence explain that the reason for extending Rule 412 to civil cases is "obvious" because:

> The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwanted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief.

77 See s 116 of the Employment Relations Act 2000 and s 62(4) of the Human Rights Act 1993.

risks associated with the admissibility of sexual experience evidence in other civil contexts, for example, in defamation proceedings involving allegations of sexual misconduct. If the defence is that the allegations are true, the fact-finder may have to decide similar issues to those in criminal proceedings involving allegations of sexual offending (to find out whether the allegations are true).

3.79 Similarly, there may be risks associated with admitting sexual experience evidence in tortious proceedings, where an assault or battery is alleged to have arisen from sexual misconduct.[78] This could be problematic where, for example, a victim of historical sexual abuse seeks exemplary damages.[79] As liability will likely turn on whether the sexual assault actually occurred, there is a risk the victim may be subjected to intrusive and embarrassing questioning about their sexual history and that erroneous assumptions might be drawn from evidence of their previous sexual experience.

3.80 In professional disciplinary proceedings involving allegations of sexual misconduct, such as proceedings in the Lawyers and Conveyancers Disciplinary Tribunal or the Health Practitioners Disciplinary Tribunal, the need for a rape shield provision may also arise.

3.81 We note the Act only applies to proceedings "conducted by a court", not proceedings conducted by a tribunal.[80] This means amending section 44 would not extend its application to professional disciplinary proceedings or other civil proceedings heard by a tribunal.[81] We nevertheless consider extending the application of section 44 to civil proceedings would draw attention to the risks of admitting sexual experience evidence in civil proceedings and help to ensure the relevance of sexual experience evidence is carefully scrutinised. Although tribunals are not bound by the Act, most are guided by it.[82]

3.82 We also note section 116 of the Employment Relations Act and section 62(4) of the Human Rights Act, which control the admissibility of evidence of sexual experience or reputation in sexual harassment proceedings, appear to be stricter than section 44. They provide that "no account" may be taken of evidence of the complainant's sexual experience or reputation. This contrasts with section 44 of the Evidence Act, which allows sexual experience evidence to be admitted with permission of the judge. In practice, however, section 62(4) of the Human Rights Act has been interpreted as meaning evidence of sexual experience (including sexual experience between the complainant and the defendant) is admissible if it is of such direct relevance to the subject of the claim, the facts in issue or the issue of appropriate compensation that it would be contrary to the

---

78 Christina Laing "Sexual Experience and Reputation Evidence in Civil Proceedings: A Case for Reform" (2018) 24 Auckland U L Rev 175 at 188.

79 Cases where a victim of historical sexual abuse has been awarded exemplary damages include: *Jay v Jay* [2014] NZCA 445; *A v M (No 2)* [1991] 3 NZLR 228 (HC); and *H v R* [1996] 1 NZLR 299 (HC). See discussion in Christina Laing "Sexual Experience and Reputation Evidence in Civil Proceedings: A Case for Reform" (2018) 24 Auckland U L Rev 175 at 188-190.

80 See s 5(3) and the definition of "proceeding" in s 4. We have not considered whether legislation applying to tribunals should be amended to include an equivalent provision to s 44, as that is outside the scope of this review.

81 We note this could also be achieved by amending the Acts that govern the various professional disciplinary tribunals. For example, the New Zealand Law Society Working Group recently recommended that the Lawyers and Conveyancers Act 2006 should be amended to include a provision equivalent to s 44 or that the Act should provide that s 44 of the Evidence Act applies as if a proceeding before the Lawyers and Conveyancers Disciplinary Tribunal were a criminal proceeding: *Report of the New Zealand Law Society Working Group* (2018) at 94.

82 See, for example, Lawyers and Conveyancers Act 2006, s 151(4); Human Rights Act 1993, s 106(4); Real Estate Agents Act 2008, s 88(4); and Health Practitioners Competence Assurance Act 2003, Schedule 1, cl 6(5) (we note that this Act refers to the Evidence Act 1908 rather than the Evidence Act 2006).

interests of justice to exclude it.[83] This interpretation is consistent with our recommendation above: that evidence of the complainant's sexual experience with the defendant should be admissible with the judge's permission, subject to satisfying the heightened relevance test. We therefore do not consider it is necessary to amend the Employment Relations Act or the Human Rights Act.

3.83 We recommend section 44 should be amended to extend its application to civil as well as criminal proceedings. Clause 4 of the draft Bill reflects this recommendation.

NOTICE REQUIREMENT IN SECTION 44A

RECOMMENDATION

R6 Section 44A should be amended to require an application under section 44(1) (to offer evidence or ask any question about the sexual experience of the complainant) to include the reasons why the proposed evidence is of such direct relevance that it would be contrary to the interests of justice to exclude it.

3.84 Section 44A sets out the requirements for an application under section 44(1) to offer evidence or ask any question about the sexual experience of the complainant.

3.85 The section was inserted into the Act following a recommendation the Law Commission made in its 2013 Review of the Act. The Commission recommended amending section 44 to require an applicant to give notice when applying for leave to lead evidence of a complainant's sexual experience in a sexual case.[84] The rationale for the notice requirement was to enable the court to make pre-trial decisions about the admissibility of the proposed evidence.[85] The Commission recommended the notice requirement be modelled on the notice requirements in relation to hearsay evidence in section 22 of the Act, which include the need to specify the grounds relied on for admission of the evidence.[86] The Government accepted the recommendation, and section 44A was inserted into the Act by the Evidence Amendment Act 2016.[87]

Issues Paper

3.86 In our Issues Paper, we noted section 44A does not entirely reflect the Commission's recommendation in its 2013 Review of the Act. There is no requirement for the notice to specify the grounds relied on for admission of the evidence under section 44(3). In other words, the application is not currently required to specify how the proposed evidence "is

83 *Director of Human Rights Proceedings v Smith* (2004) 7 NZELC 97425 (HRRT). The case concerned s 62(4) of the Human Rights Act 1993, which mirrors s 116 of the Employment Relations Act 2000.

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

85 At [7.32]. It would also ensure that all parties are provided with a fair opportunity to respond to the evidence or question: Evidence Amendment Bill 2015 (27-2) (select committee report) at 2.

86 See Evidence Act, ss 22(2)(d)–(i). The Commission also referred to legislation in the state of Victoria, where a notice requirement has been in place since 2009: Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [7.31]. Section 346 of the Criminal Procedure Act 2009 (Vic) requires the notice to set out: the initial questions sought to be asked, the scope of the questioning and how the evidence sought to be elicited has "substantial relevance" to the facts in issue or why it is a proper matter for cross-examination as to credit.

87 Section 44A was inserted by s 15 of the Evidence Amendment Act 2016, which came into force on 8 January 2017.

of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it".

3.87 We expressed the preliminary view that this omission may have been an oversight (given the Government accepted the rationale for the Commission's recommendation). We asked whether section 44A should be amended to require a written application to include the grounds relied on for admission under section 44(3).

Consultation

3.88 Ten submitters answered this question.[88] Nine of them agreed that section 44A should be amended to require the grounds relied on to be included in the written application.[89] The reasons given in support of this amendment included:

- to correct a legislative oversight;
- to reflect current practice;
- to reflect the purpose of section 44A to provide parties with a "fair opportunity to respond to the evidence or question";[90]
- to enable better resolution of section 44 applications and better preparation of complainants for trial; and
- to ensure consistency with other provisions in the Act, including the approach to hearsay notices (section 22), and admissibility objections generally.

3.89 On the other hand, the New Zealand Law Society said that, although the omission was probably an oversight, it is unnecessary to amend section 44A. It said rule 2.13(c) of the Criminal Procedure Rules 2012 already requires written applications to state the grounds for making an application.

Our view

Section 44A should require a written application to include reasons

3.90 We consider it is necessary and desirable to amend section 44A to require a written application under section 44(1) to include the reasons why the proposed evidence is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interests of justice to exclude it. This would correct an apparent legislative oversight and give effect to the purpose of the provision (to enable admissibility decisions to be made pre-trial). If a party applies to offer evidence or ask a question about the sexual experience of the complainant, the other party needs to know the reasons for the application to be able to respond to it. We consider it is preferable to amend section 44A rather than rely on the Criminal Procedure Rules, because setting out the requirements for an application under section 44(1) in one place will enhance access to the law of evidence.[91]

---

88 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, the Criminal Bar Association, Crown Law, the New Zealand Bar Association, Police, the Public Defence Service, TOAH-NNEST Tauiwi Caucus and two individual submitters.

89 The New Zealand Law Society did not think s 44A needs to be amended.

90 Section 44A(5)(a).

91 Section 6(f).

3.91 We recommend section 44A be amended to require an application under section 44(1) to include the reasons why the proposed evidence is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interests of justice to exclude it. Our proposed provision is set out in clause 15 of the draft Bill.

CHAPTER 4

Conviction evidence

INTRODUCTION

4.1 Section 49 provides that evidence of the fact a person has been convicted of an offence (conviction evidence) is admissible in a criminal proceeding as conclusive proof the person committed the offence (the conclusive proof rule). In "exceptional circumstances", however, the judge may allow a party to offer evidence tending to prove the person convicted did not commit the offence.[1] The admissibility of a conviction under section 49 is also subject to its exclusion under any other provision of the Act.[2] This includes the general exclusion provision in section 8, which requires the judge to exclude evidence if its probative value is outweighed by the risk the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding.

4.2 In the Law Commission's 2013 Review of the Act, it discussed the operation of section 49 in cases involving co-defendants. The Commission did not recommend legislative amendment but said the effect of section 49 on co-defendants should be kept under review, with any problems identified to be considered in the second review of the Act.

4.3 In our Issues Paper, we reviewed the case law since 2013 and concluded that section 49 continues to cause concern, particularly in cases involving co-defendants. We identified three difficulties with section 49:

- The scope of the "exceptional circumstances" test is unclear. The conclusive proof rule intentionally closes off argument on issues that have already been resolved to the criminal standard of proof, but it is unclear at what point that will give rise to fair trial concerns for defendants.
- Section 49(2) does not clearly state what the evidential effect of a conviction is once the "exceptional circumstances" test is satisfied.
- The relationship between sections 8 and 49 is uncertain. It is unclear whether the conclusive effect of a conviction can give rise to unfair prejudice under section 8 when conclusiveness is the precise effect intended by section 49(1).

4.4 We asked whether the Act should be amended to address some or all of these difficulties and, if so, how. We also asked how section 49 operates in straightforward cases, to better understand the scale of the problems we had identified.

---

1 Evidence Act 2006, s 49(2).

2 Evidence Act, s 49(1).

4.5 We discussed the option of replacing the conclusive proof rule with a presumptive proof rule, as the Commission originally recommended in its 1999 report.[3] There was strong support for this from submitters. Submitters were concerned that the conclusive proof rule can have unfair effects and potentially unfair outcomes for defendants in some cases.

4.6 In this chapter, we recommend the following:

- Conviction evidence should be admissible as presumptive proof that the person convicted of an offence committed that offence. The presumption should be rebuttable on the balance of probabilities.
- A party who wishes to offer evidence to rebut the presumption should be required to inform the judge before doing so.
- The admissibility of conviction evidence should be subject to exclusion under any other provision of the Act, including section 8. However, a challenge to admissibility should not be possible on the basis the presumptive effect of the conviction evidence gives rise to unfair prejudice.

4.7 Section 47 (conviction as evidence in civil proceedings) mirrors section 49 (conviction as evidence in criminal proceedings). In our Issues Paper, we did not discuss section 47, because, to our knowledge, it was not causing problems in practice. In this chapter, we nevertheless recommend that section 47 should be amended to align with section 49 if our recommendations in relation to section 49 are accepted.

BACKGROUND

The 2013 Review of the Evidence Act 2006

4.8 In its 2013 Review of the Act, the Commission described two situations where section 49 can potentially deprive a co-defendant of running a defence that would otherwise be available to them and relieve the Crown of the burden of proving essential elements of the charge:[4]

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

(b) Second, where a co-defendant is tried as a party to an offence after the principal defendant is convicted (either in an earlier trial or following a guilty plea). As secondary liability is contingent on a principal offence being committed, a co-defendant cannot be convicted as a party to the offence if the principal offence is not proved. A co-defendant can, however, potentially be deprived of the opportunity to advance a legitimate defence (that there was no principal offence to

---

[3] Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 140. Under a presumptive proof rule, the conviction evidence would operate as presumptive proof that the person convicted committed the offence, but the defendant would be able to offer evidence to rebut the presumption.

[4] Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [9.6]–[9.11].

which their liability as a party could attach) if evidence of the principal defendant's conviction is offered as conclusive proof that the principal offence occurred.

4.9 The Commission did not recommend legislative reform to address these situations. It considered the Act already contains two avenues for a co-defendant to challenge the use of conviction evidence if that would impact on their right to a fair trial: the "exceptional circumstances" test in section 49 and section 8.[5] At the time, the case law indicated the courts were conscious of a defendant's right to offer an effective defence when making decisions about the admissibility of conviction evidence. The Commission nevertheless recommended the effect of section 49 on co-defendants be kept under review, with any problems identified to be considered in the second review of the Act.

Review of subsequent cases

4.10 In our Issues Paper, we reviewed the cases since 2013 and said there appeared to be continuing concerns about the effect of section 49 in situations involving co-defendants. We discussed the 2016 Supreme Court decision in *Morton v R* where the defendant was tried as a party to rape after his co-defendants had been convicted as principals (the situation described above at [4.8](b)).[6] We noted that the joint judgment of William Young and O'Regan JJ directly invited the Commission to reconsider section 49:[7]

> Section 49 has the potential to produce effects which we think were not envisaged by those responsible for its drafting. … The exceptional circumstances test may prove not to be well-adapted to address the range of problems which will arise, if reliance on s 49 becomes routine. For these reasons we are of the view that s 49 warrants reconsideration by the Law Commission.

4.11 We noted section 49 may also have unfair effects in some re-trial situations. We discussed the 2017 Supreme Court case *V v R*, which involved a re-trial following a mixed verdict where there had been convictions on some counts but an acquittal on a charge of rape.[8] If the defendant's convictions at trial were offered as conclusive proof of that offending in the re-trial for rape, his ability to present a defence would have been severely curtailed, because the convictions related to a closely connected series of events. The Court held the "exceptional circumstances" test was satisfied.

---

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

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

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

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

A PRESUMPTIVE PROOF RULE

RECOMMENDATION

R7

Section 49 should be amended so that conviction evidence is admissible in a criminal proceeding as presumptive proof the person convicted committed that offence. A party should be able to seek to rebut the presumption by proving on the balance of probabilities that the person convicted did not commit the offence.

Summary of our recommendations

4.12 In our Issues Paper, we reviewed the operation of the two avenues for avoiding the effects of the conclusive proof rule in section 49(1), namely section 8 and the "exceptional circumstances" test. We identified three difficulties with the operation of these avenues (set out above at [4.3]). We sought feedback on the scale of these problems and asked whether legislative reform is necessary.

4.13 We suggested that one option for reform would be to replace the conclusive proof rule in section 49(1) with a presumptive proof rule. Under a presumptive proof rule, an admissible conviction would be presumptive proof that the person convicted of an offence committed that offence, unless the contrary is proved.

4.14 We suggested a presumptive proof rule could solve two of the three problems we identified with section 49. It would:[9]

- remove the need for the problematic "exceptional circumstances" provision; and
- clarify the evidential effect of convictions.

4.15 We noted the Commission recommended a presumptive proof rule in its 1999 report.[10] The Commission recommended convictions should be *admissible* in criminal proceedings (as this had been a matter of uncertainty in the common law).[11] The Commission's report sets out three policy reasons for this recommendation:[12]

- Time and expense would be saved, since making convictions admissible would avoid forcing a party to litigate a matter that has already been resolved.
- It would make available evidence that is not only relevant, but also highly probative, since guilt will have been established to the criminal standard of beyond reasonable doubt.
- Not to admit such evidence would run contrary to the policy of the criminal justice system that a criminal conviction is sufficient basis to impose grave penalties.

4.16 Given the higher standard of proof in criminal proceedings, the Commission recommended conviction evidence should operate to establish a presumption of guilt

---

9 It would not, by itself, clarify the relationship between sections 8 and 49. This issue is discussed below at [4.75]–[4.84].

10 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999), cl 51 at 140–141.

11 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [232].

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

that was rebuttable on the balance of probabilities (rather than simply being admissible evidence).[13] Even in civil proceedings, the Commission considered that giving convictions conclusive weight would be "inconsistent with the serious consequences that flow from convictions".[14] It preferred a presumptive proof rule, which would not prevent third parties arguing against liability at a different time.[15]

4.17 In our Issues Paper, we noted the Government did not fully adopt the Commission's recommendation in the Evidence Bill.[16] The Bill provided that convictions should be admissible but should be conclusive, rather than presumptive, proof of guilt. The explanatory note to the Bill did not give reasons for the change.[17] As a result, the courts have frequently drawn on the Commission's policy reasons for the *admissibility* of convictions as policy reasons for the *conclusive proof rule*.[18] In our Issues Paper, we recognised that replacing the conclusive proof rule with a presumptive proof rule would therefore be a significant policy change.

4.18 We asked about the operation of section 49 in straightforward cases to help us understand the scale of the problems with the conclusive proof rule and determine whether such a significant policy change is warranted.

4.19 The submissions confirmed there are significant concerns with the conclusive proof rule, particularly in situations involving co-defendants and re-trials following a mixed verdict where there have been convictions on some counts but a hung jury on other counts.[19] We were told the conclusive proof rule can have unfair effects and potentially unfair outcomes for defendants in these situations. In addition, the provision appears to be difficult to understand and apply. Submitters said attempts by the Supreme Court to clarify the operation of section 49 have only added to the confusion.

4.20 There was strong support for replacing the conclusive proof rule with a presumptive proof rule from both prosecution and defence perspectives.[20] Several submitters, including the Crown Law Office, the New Zealand Bar Association and the Public Defence Service, said tinkering with section 49 would not address the concerns about potential unfairness to defendants; rather, a full reform of section 49 is required.

4.21 Our judicial advisory committee did not support replacing section 49 with a presumptive proof rule but nevertheless expressed concern about the operation of the provision in relation to co-defendants.

---

13 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [233]–[236].

14 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [224].

15 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [224].

16 Evidence Bill 2005 (256-1), cl 45.

17 Evidence Bill 2005 (256-1) (explanatory note) at 12.

18 For example, *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [91] per Elias CJ; *Pratchett v R* [2017] NZCA 612 at [27]; *R v Sansom* [2018] NZHC 1988 at [17]; *R v Tanginoa* [2012] NZHC 3121 at [43]; *R v Bouavong (No 7)* [2012] NZHC 524 at [32] and [59]; and *R v Cunnard* HC Nelson CRI-2010-442-026, 2 May 2011 at [11]. See also: *V v R* [2017] NZSC 142 at [18], n 18.

19 The situations of concern are described in more detail above at [4.8].

20 Seven of the nine submissions we received favoured a presumptive proof rule: Auckland District Law Society, BVA The Practice, the Criminal Bar Association, Crown Law, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service. Crown Law suggested that a bifurcated conclusive/presumptive proof provision could be considered: see the discussion below at [4.57]–[4.63]. Reform was not supported by New Zealand Police. One individual submitter was unsure.

4.22 We have concluded that section 49 should be repealed and replaced with a presumption that the person convicted of an offence committed that offence unless the contrary is proved on the balance of probabilities. This is consistent with the approach suggested by the Commission in its 1999 report.[21] It is also consistent with the approach to conviction evidence that is taken in England and Wales.[22]

4.23 As we explain below, a presumptive proof rule would:

- remove the need for the problematic "exceptional circumstances" provision;
- clarify the evidential effect of convictions;
- promote the purpose of the Act by:
  - recognising the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA);[23]
  - promoting fairness to parties and witnesses;[24]
  - enhancing access to the law of evidence;[25] and
- more closely align with the approaches to conviction evidence taken overseas.

4.24 Clause 17 of the draft Bill reflects this recommendation. We discuss our reasons in more detail below.

A presumptive proof rule would remove the need for an "exceptional circumstances" test

4.25 A presumptive proof rule would remove the need for the problematic "exceptional circumstances" test, as the defendant would be able to seek to challenge the conviction evidence as of right. This would address one of the issues we discussed in our Issues Paper, namely that the scope of the "exceptional circumstances" test is uncertain.

Issues Paper

4.26 In our Issues Paper, we explained that our review of the cases since 2013 indicated the courts have had difficulty defining the scope of "exceptional circumstances".[26] Section 49(2) provides that, in "exceptional circumstances", the judge may allow a party to offer evidence tending to prove that the person convicted did not commit the offence. This exception allows the conclusive effect of the conviction to be avoided: it does not alter its admissibility.

4.27 We noted that, prior to the Supreme Court's decision in *Morton*, the courts had taken a narrow view, essentially restricting "exceptional circumstances" to when new evidence put the safety of the conviction in doubt.

---

21 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [236]. We note the Public Defence Service thought the burden of proof should be no greater than raising an evidential burden or an arguable case.

22 See Police and Criminal Evidence Act 1984 (England and Wales), s 74 and the discussion of the Court of Appeal of England and Wales in *R v Clift* [2012] EWCA Crim 2750, [2013] 2 All ER 776 at [30]–[33].

23 Section 6(b).

24 Section 6(c).

25 Section 6(f).

26 See Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [4.18]–[4.23].

4.28 In *Morton*, William Young and O'Regan JJ[27] took a wider view. They held the test was satisfied because the conviction evidence would have the practical effect of depriving the defendant of a defence. Their reasoning was motivated by fair trial concerns and, in particular, the defendant's right to present an effective defence.

4.29 The Chief Justice also considered the "exceptional circumstances" test was satisfied, but on the basis the evidence related to an issue that had not been determined by the conviction of the other defendants.[28] Glazebrook and Arnold JJ did not consider the test had been met – they considered the test was "a high one", justified by a number of policy considerations.[29]

4.30 Subsequently, the Supreme Court in *V v R* took a wide view of "exceptional circumstances" in a case where the defendant's own convictions were said to curtail his practical ability to advance his defence.[30] The Supreme Court held that the policy of section 49(1) is to provide a convenient way of proving offences that have already been established to the criminal standard of proof and to prevent "the criminal justice system being vexed by collateral challenges to concluded determinations of criminal responsibility, with potentially inconsistent outcomes".[31] It said this policy was not engaged where the evidence of the conviction is directed at an element of the offence, but the particular issue has not been determined in the previous trial.[32] If the policy behind section 49 is not engaged, there will be "exceptional circumstances" in a case where the defendant's right to present a defence would be curtailed if the conviction is treated as conclusive proof of the offending.[33]

4.31 We asked for feedback on the extent to which the "exceptional circumstances" test is causing problems in practice. We asked whether section 49(2) should be amended to clarify the scope of the test and, if so, how.

4.32 We described two options for reform. First, section 49(2) could be amended to include examples of "exceptional circumstances". One example of an exceptional circumstance given in *Morton* is where A and B are charged with conspiring with each other to commit a crime and A pleads guilty.[34] Another example is where there is reason to think the

---

27 William Young and O'Regan JJ were in the majority with Elias CJ but delivered a separate, joint judgment.

28 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [112].

29 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [125].

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

31 *V v R* [2017] NZSC 142 at [18], citing *Morton v R* [2016] NZSC 51 at [91] per Elias CJ.

32 *V v R* [2017] NZSC 142 at [22].

33 At [23].

34 In this situation, B would have no defence unless the judge concludes there are exceptional circumstances: *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [51]–[52], discussed in *B v R* [2017] NZCA 575. See: Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [4.23], n 318.

conviction may have been wrongly entered.[35] Alternatively, we suggested the conclusive proof rule could be replaced with a presumptive proof rule.

Consultation

4.33 Nine submitters addressed these questions.[36] All submitters considered the scope of the "exceptional circumstances" test needs to be clarified but they were divided as to how this should be achieved.

4.34 Some submitters commented on the uncertain scope of the "exceptional circumstances" test. BVA The Practice[37] noted different judges have taken different approaches to the effect of convictions in cases involving co-defendants and said the Act should be clearer on such a fundamental issue. Crown Law said there is still much uncertainty about the interpretation of section 49, notwithstanding the Supreme Court decisions in *Morton* and *V v R*. It suggested uncertainty is a result of the Supreme Court taking unorthodox interpretative approaches to avoid the unfair effects of the conclusive proof rule.

4.35 Several submitters expressed concern about the potentially unfair effects of the conclusive proof rule and the inability of the "exceptional circumstances" exception to mitigate these effects.

4.36 Some submitters said the "exceptional circumstances" test does not mitigate unfairness arising from the operation of the conclusive proof rule in cases where the conviction relates to the same set of facts as the current offending. Crown Law and the New Zealand Bar Association said problems with the conclusive proof rule regularly arise in circumstances where the conviction relates to the same set of facts as the current offending, for example, where there is a purported reliance on co-defendants' convictions in a party liability case or in a re-trial of a single defendant following a mixed verdict where there have been convictions on some counts but a hung jury on other counts. Crown Law said the conclusive proof rule can have a "potentially Draconian effect" in some cases.

4.37 Crown Law explained that, in an ordinary party liability case, conviction evidence may close off a defence that is generally available to a defendant. It gave the example of a two-person conspiracy, where the conviction of one co-defendant necessarily implies the guilt of the other defendant.[38] It noted that, in the United Kingdom, this effect would usually result in the conviction evidence being excluded. In New Zealand, however, the courts appear to have taken the opposite approach. In *V v R*, the Supreme Court said "exceptional circumstances" will exist "where evidence is directed at an element of the offence but the particular issue has not been determined in the previous trial".[39] Crown Law said this implies that, where the particular issue has been determined in the previous trial, "exceptional circumstances" will not be found.

---

35 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [60], considered in *P v R* [2017] NZCA 612 at [35]–[36]. See Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [4.23], n 319.

36 The Auckland District Law Society, BVA The Practice, the Criminal Bar Association, Crown Law, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, New Zealand Police and the Public Defence Service.

37 This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

38 This is because the conviction will conclusively prove that a conspiracy existed between the two defendants and what it related to.

39 *V v R* [2017] NZSC 142 at [22].

4.38 The New Zealand Law Society commented that, in ordinary party liability cases, defendants will routinely question the convictions to which they were allegedly parties - there is nothing "exceptional" about this. Yet the effect of the conclusive proof rule is to insulate key elements of the Crown case from challenge. Crown Law and the New Zealand Bar Association also commented on this disconnect between the statutory "exceptional circumstances" test and the circumstances in which unfairness can arise, which they said are not in any sense "exceptional": namely situations involving co-defendants and re-trials following a mixed verdict.

4.39 Submitters also suggested the "exceptional circumstances" test does not mitigate unfairness arising from the admissibility of guilty pleas as conclusive proof of the offending. The New Zealand Law Society and the Criminal Bar Association commented that the fact a conviction was entered following a guilty plea does not amount to "exceptional circumstances" under section 49(2). They suggested unfairness can arise if all convictions carry the same probative weight without any consideration of the circumstances in which they were entered. They noted defendants plead guilty for various reasons and it cannot always be assumed that a defendant who pleads guilty actually committed the offence charged by the Crown. For example, a defendant may judge their chances of an acquittal to be low and so accept the Crown's offer of a discount in sentence for a guilty plea and the defendant's co-operation.

4.40 The New Zealand Law Society said that, if one co-defendant pleads guilty and their conviction is admissible as conclusive evidence in the trial of the other defendant, this effectively means the burden is on the second defendant to prove their innocence. It cited a former Justice of the Supreme Court of the United Kingdom, who said:[40]

> … evidence that a now absent co-accused has pleaded guilty may carry in the minds of the jury enormous weight, but it is nevertheless evidence which cannot properly be tested in the trial of the remaining Defendant. That is particularly so where the issue is such that the absent co-defendant who has pleaded guilty could not, or scarcely could, be guilty of the offence unless the present Defendant were also. In both those situations the court needs to consider with considerable care whether the evidence of the conviction would have a disproportionate and unfair effect upon the trial.

Our view

4.41 In our view, replacing the conclusive proof rule with a presumptive proof rule would address the uncertainty and unfairness associated with the operation of the "exceptional circumstances" test. Although two submitters suggested these problems could be cured by defining "exceptional circumstances" in the Act,[41] we think it would be difficult to anticipate and capture all the situations in which unfairness might arise. As some other submitters commented, whether "exceptional circumstances" exist is an evaluation driven by the facts of each case.[42] Further, we are not convinced that defining "exceptional circumstances" in the Act would, by itself, adequately address the concerns about potential injustice flowing from the conclusive proof rule.[43]

---

40 Lord Justice Hughes (as he then was) in *R v Smith* [2007] EWCA Crim 2105 at [16].

41 Police and Professor Elisabeth McDonald. Crown Law's submission noted that the Auckland Crown Solicitor supported this approach.

42 The Auckland District Law Society and the Public Defence Service.

43 Crown Law made this point in its submission.

A presumptive proof rule would clarify the evidential effect of convictions

4.42 A presumptive proof rule would clarify the evidential effect of conviction evidence in all cases: the conviction would be proof that the person convicted committed the offence unless the contrary is proved on the balance of probabilities. This would address one of the issues we discussed in our Issues Paper regarding section 49(2).

Issues Paper

4.43 In our Issues Paper, we noted that section 49(2) does not clearly state what the evidential effect of a conviction is once the "exceptional circumstances" test is satisfied and that the courts have interpreted the provision in various ways. Section 49(2) provides that, in "exceptional circumstances", the judge may:

- permit a party to offer evidence tending to prove that the person convicted did not commit the offence; and
- if satisfied that it is appropriate to do so, direct that the issue whether the person committed the offence be determined without reference to that subsection.

4.44 In *Morton*, the Chief Justice considered a conviction remains conclusive once permission is given under section 49(2)(a) but is no longer treated as conclusive once a direction under section 49(2)(b) is given.[44] William Young and O'Regan JJ expressed concern that jurors would "struggle to make sense" of a conviction remaining conclusive once leave is granted under section 49(2)(a), as it could be difficult to explain that a conviction is conclusive while permitting evidence tending to suggest the contrary.[45] Glazebrook and Arnold JJ (the minority) commented that, even if a direction is given under section 49(2)(b), there may still be difficulties for a jury. The jury will have heard evidence indicating the convictions were wrongly entered and will have been directed by the judge that the convictions are not conclusive proof of the offending, but at the same time they will have certificates of conviction indicating the offenders committed the offence. They concluded:[46]

> It is not at all obvious how the jury can be expected to make sense of all this, in particular, the fact that another jury has been satisfied beyond reasonable doubt that the offenders committed [the offence].

4.45 The Supreme Court in *V v R* applied the Chief Justice's interpretation of section 49(2) in *Morton*, distinguishing between the continuing conclusive effect of convictions under section 49(2)(a) and the displacement of conclusive effect under section 49(2)(b).[47]

---

44 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [96]–[97].

45 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [38]. William Young and O'Regan JJ would have preferred a direction under s 49(2)(b) to be given in *Morton*, but because their general approach was closer to that of Elias CJ (who considered a direction should not be given) than Glazebrook and Arnold JJ, they adopted her approach to form a majority view: at [80]. The Court of Appeal in *V v R* [2017] NZCA 141 echoed this concern, saying: "there may well be difficulties in explaining to a jury that a conviction is conclusive proof that the person committed the offence while permitting evidence tending to suggest the contrary": at [20(g)].

46 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [136].

47 *V v R* [2017] NZSC 142 at [29]. The Chief Justice's view was also applied by the Court of Appeal in *X v Attorney-General* [2016] NZCA 476, (2016) PRNZ 750. The Court of Appeal disagreed with the trial judge's procedural ruling. It was necessary to give a direction under s 47(2)(b) in this case "because the Attorney-General's *only* purpose in adducing the evidence proposed under s 47(2)(a) is to prove W did not commit the offences of which he was convicted": at [29] (emphasis added). At [27] the Court accepted that:

However, the Court held that a section 49(2)(b) direction should accompany permission under section 49(2)(a) because:[48]

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

4.46 We expressed the preliminary view that the drafting of section 49(2) could be improved by clearly stating the intended evidential effect of a conviction if "exceptional circumstances" are established. We noted one option would be to amend section 49 so that a direction under section 49(2)(b) automatically accompanies a finding that there are exceptional circumstances. The other option would be to replace the conclusive proof rule with a presumptive proof rule.

Consultation

4.47 Almost all of the submissions we received said the Act should be amended to clarify the evidential effect of convictions when the "exceptional circumstances" test is met.[49] Most submitters who supported amendment thought sections 49(2)(a) and (b) should be consolidated so that a direction automatically accompanies a finding that there are exceptional circumstances. Several submitters said jurors would find it easier to understand the evidential effect of a conviction if a direction automatically accompanied a finding of exceptional circumstances. They indicated it is difficult for jurors to make sense of conviction evidence if they also hear evidence tending to suggest the offending did not occur.[50]

4.48 Crown Law was concerned about the "all or nothing" effect of a conviction if "exceptional circumstances" exist and the judge gives a direction under section 49(2)(b). In such cases, the conviction carries no more weight than any other piece of evidence, which effectively requires the Crown to re-litigate everything. Crown Law said the fact the policy of conclusive proof needs to give way to other justice interests in a given case does not imply that the policy ceases to be relevant.

Our view

4.49 Replacing the conclusive proof rule with a presumptive proof rule would remove the need for the "exceptional circumstances" test and therefore remove the need to clarify the evidential effect of conviction evidence once that test is met. We consider a presumptive proof rule would simplify the use of conviction evidence by clarifying that conviction

---

> Where the evidence sought to be admitted under para (a) is relevant for some purpose other than to prove the person convicted did not actually commit the offence … it may be appropriate and practicable for permission to be given under para (a) without a para (b) direction being given.

48 *V v R* [2017] NZSC 142 at [29]. More recently, the Court of Appeal in *B v R* [2017] NZCA 575 accepted exceptional circumstances would likely be made out for the purposes of s 49(2)(a) but declined to make a direction under s 49(2)(b). The Court did not consider a direction would be justified, but left this matter for the trial judge to decide: at [40].

49 Six of the seven submissions we received thought the Act should clarify the evidential effect of convictions once the "exceptional circumstances" test is satisfied, namely the Auckland District Law Society, the Criminal Bar Association, Crown Law, the New Zealand Law Society, Police and the Public Defence Service.

50 The Auckland District Law Society, the Criminal Bar Association, the New Zealand Law Society and the Public Defence Service.

evidence is always proof of the offending it relates to, unless the contrary is proved (on the balance of probabilities).

A presumptive proof rule would promote the purpose of the Act

4.50 In our view, a presumptive proof rule would better promote the purpose of the Act.[51] One aspect of the Act's purpose is to help secure the just determination of proceedings by providing rules of evidence that recognise the importance of the rights affirmed by NZBORA.[52] Section 25 of NZBORA sets out minimum standards of criminal procedure, including the right to present an effective defence. We consider a presumptive proof rule would better recognise this right than the conclusive proof rule. It would allow the defendant to seek to give evidence challenging the conviction evidence and to displace the presumption of guilt by satisfying the court to the contrary on the balance of probabilities.

4.51 For the same reason, a presumptive proof rule would give better effect to another aspect of the Act's purpose – to promote fairness to parties and witnesses.[53] The potentially unfair effects of the conclusive proof rule have caused the courts to strain to interpret section 49 in a way that avoids this unfairness.[54] A presumptive proof rule would be fairer to defendants.

4.52 A presumptive proof rule would also promote other aspects of the Act's purpose, namely providing for facts to be established by the application of logical rules[55] and enhancing access to the law of evidence.[56] The submissions indicated section 49 is difficult for users of the Act to understand and apply. These difficulties appear to stem partly from its drafting and partly from the absence of any explanatory legislative material for the conclusive proof rule. A presumptive proof rule would have a clear and principled basis. Unlike the conclusive proof rule, it would allow a party, including the defendant, to seek to offer relevant and admissible evidence in an appropriate case rebutting the presumption.[57] At the same time, however, it would continue to give effect to the policy reasons the Commission identified as supporting the admissibility of convictions (set out above at [4.15]).

---

51 Section 6.

52 Section 6(b).

53 Section 6(c).

54 The New Zealand Bar Association also told us of a case where *counsel* took unorthodox steps to avoid the conclusive effects of a defendant's guilty plea (to earlier minor charges) in proceedings for more serious offending arising out of the same incident. In that case, counsel for the Crown and the defendant admitted a s 9 agreed statement of fact to the effect that the defendant had pleaded guilty to the lesser charges.

55 Section 6(a).

56 Section 6(f).

57 As noted below at [4.77], the paradigm example of an appropriate case is the conspiracy situation, where the admissibility of the guilty plea of one co-conspirator necessarily implies the guilt of the other defendant(s). In such a case, admission of conviction evidence would effectively deprive the other defendant(s) of any defence. Meritless applications to challenge the conviction evidence would however be barred by the operation of s 8 and/or by abuse of process principles.

No comparable jurisdiction has a conclusive proof rule

4.53 Several submitters commented on the desirability of more closely aligning New Zealand's approach to conviction evidence with the approaches taken in comparable jurisdictions.[58]

4.54 In England and Wales, section 74 of the Police and Criminal Evidence Act 1984 provides that a conviction is admissible to prove the person convicted committed the offence and will have that effect unless the contrary is proved. The presumption operates in tandem with section 78(1), which permits a court to exclude evidence if it would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

4.55 In Canada, section 657.2 of the Criminal Code 1985 provides that, in the absence of evidence to the contrary, previous convictions are admissible as proof a person has committed an offence only in two specified circumstances.[59] In other circumstances, a prior conviction is not conclusive proof, and evidence of the conviction of a principal, for example, "does not foreclose a full exploration of the principal's guilt on the trial of the accessory".[60]

4.56 In Australia, the admissibility of previous convictions in criminal proceedings is governed by the common law.[61] The rule in *Hollington v F Hewthorn & Co*,[62] that the conviction of a third party is not admissible against an accused person at trial, has not been statutorily abolished in Australia and still applies in criminal proceedings.[63] The one recognised exception is that evidence of the conviction of a principal offender is admissible in the trial of an accessory after the fact.[64] It is, however, still open to the accused to rebut this evidence. Further, the trial judge retains a residual discretion to exclude the evidence if satisfied that its admission would be unfair to the accused.

A BIFURCATED PROVISION

4.57 Crown Law suggested that, instead of completely replacing section 49 with a presumptive proof rule, consideration could be given to a bifurcated provision. It said a conclusive proof rule could be retained for conviction evidence where the conclusive proof rule does not give rise to problems, and a presumptive proof rule could apply to conviction evidence in all other situations.

4.58 It suggested the conclusive proof rule could be retained in relation to:

- convictions offered for a propensity purpose;

---

58 The Auckland District Law Society, Crown Law, the New Zealand Bar Association and the New Zealand Law Society.

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

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

61 The Queensland Court of Appeal summarised the law in *R v Kirkby* [1998] QCA 445, [2000] 2 Qd R 57 at [14]–[38].

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

63 The decision has been overruled in several Australian jurisdictions in relation to civil proceedings. See: Evidence Act 1977 (Qld), s 79; Evidence Act 1929 (SA), s 34A; Evidence Act 2001 (Tas), s 92(2); and Evidence Act 2008 (Vic), s 92(2).

64 *R v Kirkby* [1998] QCA 445, [2000] 2 Qd R 57 at [44] per McMurdo P. The exception does not allow admission of the principal offender's conviction at the trial of a person charged as a secondary party under ss 7(1)(a), (b), (c) or (d) of the Criminal Code 1899 (Qld) (which is similar to s 66(1) of the Crimes Act 1961).

- convictions said to be relevant to a person's veracity;
- convictions giving rise to accessorial liability;[65]
- convictions for theft (or other imprisonable offences) giving rise to liability for receiving;[66] and
- convictions for assault or similar where the victim subsequently dies and the defendant is charged with murder/manslaughter.[67]

4.59 It suggested the conclusive proof rule could be subject to exceptions where the judge is satisfied there is reasonable evidence the conviction was wrongly entered or that exceptional circumstances give rise to "manifest injustice". It said the presumptive proof rule could be subject to the same exceptions.

4.60 In the event an exception applies, Crown Law suggested the judge could have discretion to direct that the conviction has presumptive weight, and in the absence of such a direction, the conviction would have ordinary weight (admissible only).

Our view

4.61 We considered this suggestion and other possible variations of a bifurcated provision.[68] We discussed the possibility of a bifurcated provision with the Public Defence Service, the New Zealand Bar Association, our judicial advisory committee and some members of our expert advisory group. These consultees all acknowledged the conclusive proof rule may not be problematic in relation to some conviction evidence. The members of the judicial advisory committee thought a bifurcated approach may be a way of striking a balance between the fair trial rights of co-defendants (to present an effective defence) and the desirability of not re-litigating matters that have already been proven to the criminal standard of proof. However, the Public Defence Service and one member of our expert advisory group commented that it would be very difficult to draw the line between convictions that should be governed by a conclusive proof rule and those that should be governed by a presumptive proof rule. We noticed this in our consultation on the issue: for example, Crown Law suggested convictions offered for a propensity purpose are unproblematic, whereas the Public Defence Service said propensity convictions can be problematic and a conclusive proof rule should not apply to them.

4.62 We consider it would be difficult to draw the line between all potentially problematic and unproblematic conviction evidence. A bifurcated approach would mean different evidential effects are prescribed for different convictions, which may introduce unnecessary complexity and have the potential to result in unfairness for defendants in

---

65 Crimes Act 1961, s 71.

66 Crimes Act, s 246.

67 The situation in *R v Hogan* [1974] QB 398.

68 For example, retaining a conclusive proof rule for convictions that are offered for a veracity or propensity purpose and adopting a presumptive proof rule for convictions that relate to the same set of facts as the current offending. This would address the co-defendants' situations discussed in this report, but it would also mean that convictions giving rise to liability as an accessory after the fact, convictions for theft giving rise to liability for receiving, and convictions for assault or similar where the victim subsequently dies and the defendant is charged with murder/manslaughter would operate as presumptive proof of guilt. In practice, the conclusiveness of these convictions does not appear to be problematic.

situations that had not been anticipated. In our view, the simplest and fairest approach is to replace section 49 with a presumptive proof rule.

4.63 If this recommendation is not accepted, however, one possible option might be to adopt a presumptive proof rule in relation to conviction evidence of co-defendants but retain the conclusive proof rule (and the exceptional circumstances test) for all other conviction evidence. This would address the potentially unfair effects of section 49 on co-defendants but would not (on its own) clarify the evidential effect of convictions in cases where the exceptional circumstances test applies and is met.[69]

RELATIONSHIP BETWEEN SECTIONS 8 AND 49

RECOMMENDATION

R8 Section 49 should be amended to clarify that the admissibility of conviction evidence or rebuttal evidence is subject to its exclusion under any other provision of the Act, including section 8. The amendment should also clarify that a challenge to the admissibility of conviction evidence cannot be made on the basis the presumptive effect of the conviction gives rise to unfair prejudice.

4.64 The admissibility of conviction evidence under section 49 is subject to its exclusion under any other provision of the Act.[70] This includes section 8, which requires the judge to exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding. In making this assessment, the judge must take into account the defendant's right to offer an effective defence.[71]

Issues Paper

4.65 In our Issues Paper, we observed that there is some uncertainty in the case law about whether the conclusive effect of a conviction can give rise to unfair prejudice under section 8, given conclusiveness is the precise effect prescribed by section 49(1).

4.66 In *Morton v R*, William Young and O'Regan JJ[72] said there is "scope for the view that an effect which is mandated by s 49(1) should not be regarded as unfairly prejudicial if the circumstances are not exceptional".[73] They suggested section 8 might operate in cases where there is "no practical necessity" for evidence of the prior conviction to be given.[74]

---

69 This issue is discussed above at [4.42]–[4.49].

70 Evidence Act, s 49(1).

71 Evidence Act, s 8(2).

72 William Young and O'Regan JJ were in the majority with Elias CJ but delivered a separate, joint judgment.

73 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [14]. The High Court in *R v O'Carroll* [2015] NZHC 2152 had also previously stated at [17]:

> [Section] 49(1) provides that evidence of a conviction is conclusive proof of commission of the offence. It cannot be unfairly prejudicial to allow evidence to be adduced simply because the Act provides that it is conclusive.

74 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [14].

4.67 In *V v R*, the Supreme Court acknowledged the uncertain relationship between the conclusive proof rule and section 8 but did not need to resolve the issue.[75]

4.68 More recently, in 2017, the Court of Appeal in *B v R* remarked on the ambiguous relationship between sections 8 and 49, saying: "[t]he interface between exclusion for unfair prejudice under s 8 and the orders available under s 49(2) to overcome potential prejudice has never been fully explored by this Court".[76]

4.69 In our Issues Paper, we noted that, in recent cases involving co-defendants, the courts have said the fact a co-defendant's conviction closes off some live issue that might otherwise have been relied on by the defence does not necessarily result in unfair prejudice.[77] We said this differs from the earlier case law considered by the Commission in its 2013 Review of the Act, where the courts more readily accepted that evidence of a co-defendant's conviction was unfairly prejudicial and inadmissible under section 8.[78]

4.70 We asked whether the relationship between sections 8 and 49 should be clarified in the Act or whether this ambiguity is a matter best resolved by the courts. We did not suggest that a presumptive proof rule would resolve this matter.

Consultation

4.71 Six of the seven submitters who addressed this question thought the relationship between sections 8 and 49 should be clarified in the Act, but they had differing views about the appropriate approach.[79]

4.72 The Auckland District Law Society, the New Zealand Law Society and the Public Defence Service emphasised the general application of section 8 to all of the Act's admissibility provisions. They said the Act should clarify that the admissibility of conviction evidence should be considered under other provisions of the Act, including section 8, before turning to section 49. They were concerned by the suggestion in *Morton* that section 8 may not be an available avenue to exclude evidence of a conviction if the suggested unfairness arises from the conclusive effect of the conviction.[80] They emphasised that section 49 does not allow the court to exclude evidence of a conviction, so section 8 is an important safeguard on a defendant's right to present an effective defence.

4.73 The New Zealand Law Society further noted that, in all but exceptional cases, the admission of a conviction entails its conclusive effect and this has "severe and

---

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

[76] See *B v R* [2017] NZCA 575 at [17].

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

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

[78] See Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [4.13]–[4.14]. In *R v Bouavong (No 7)* [2012] NZHC 524 and *R v Tanginoa* [2012] NZHC 3121, the High Court held that offering the previous conviction in the manner proposed would deprive the defendants of the ability to offer an effective defence of their choosing and would essentially deprive the defendants of their opportunity to test evidence offered against them on essential elements of the charge. The Court in both cases held that the conviction evidence was inadmissible and emphasised the priority of s 8 over s 49.

[79] The Auckland District Law Society, BVA, Crown Law, the New Zealand Law Society, Police and the Public Defence Service. The remaining submitter, Elisabeth McDonald, did not think the relationship should be clarified in the Act, as she considered this may create problems for the application of s 8 in other contexts.

[80] The Auckland District Law Society, the New Zealand Law Society and the Public Defence Service.

undesirable" consequences in some cases, such as ordinary party liability cases. The Auckland District Law Society said that, if Parliament's intention had been to restrict this important right, it would have done so more explicitly.

4.74 On the other hand, Crown Law and Police said the Act should be amended to clarify that the effect of the conviction evidence mandated by section 49 does not by itself give rise to unfair prejudice under section 8. Crown Law said issues of unfair prejudice arising from the conclusive effect of the conviction fall to be considered under the "exceptional circumstances" exception. It considered the policy of section 49 would be undermined if evidence properly admissible within its terms could be excluded as a result of unfair prejudice.

Our view

The Act should clarify the relationship between section 49 and section 8

4.75 We consider the Act should be amended to clarify that section 8 is an available route to exclude conviction evidence. Although convictions relevant to veracity or propensity may be inadmissible under the veracity or propensity rules, section 8 is the only safeguard against unfairness arising from the *admissibility* of conviction evidence that relates to a fact in issue in the proceedings.

4.76 Although we recommend section 49 should be replaced with a presumptive proof rule and consider this will promote fairness to the parties, there will still be situations where the unfairly prejudicial effect of conviction evidence can only be remedied by excluding it from the proceedings. For instance, where admitting evidence of the conviction would effectively deprive the defendant of *any* defence.

4.77 The paradigm example of this is the conspiracy situation, where the admissibility of the guilty plea of one co-conspirator necessarily implies the guilt of the other defendant(s). This is because the conviction evidence would prove that a conspiracy existed between the defendants and what the conspiracy related to. William Young and O'Regan JJ commented on this in *Morton*.[81] They noted that, if A and B are charged with conspiring with each other to commit a crime and A pleads guilty, under a presumptive proof rule, the admission of the conviction of A would reverse the onus of proof with the result that the jury should convict B unless satisfied of innocence on the balance of probabilities. They cited Sir John Smith (a former Professor of Law at Nottingham University and author of *Smith & Hogan's Criminal Law*) who described this as "a result which was surely never intended and is contrary to all principle".[82]

4.78 We note that, in England and Wales, conviction evidence is admissible as presumptive proof of the offending[83] unless its admissibility "would have such an adverse effect on the

---

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

82 JC Smith "Conspiracy – admissibility of plea of guilty by co-conspirator" [1988] Crim LR 456 at 456. Cited in *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [51].

83 Section 74 of the Police and Criminal Evidence Act 1984 (England and Wales) provides that, where a person other than the accused has been convicted of an offence, they shall be presumed to have committed that offence unless the contrary is proved.

fairness of the proceedings that the court ought not to admit it".[84] The conviction of a co-conspirator following a guilty plea is a prime example of when the courts in England and Wales will consider excluding, and very often will exclude, conviction evidence.[85] We would expect the same approach to be taken in New Zealand.

4.79 We note that, if the conclusive proof rule is replaced with a presumptive proof rule, this change will not by itself clarify whether the presumptive effect of a conviction can of itself give rise to unfair prejudice in terms of section 8. The defence could potentially argue the conviction's presumptive effect is unfair because it places a burden on the defence to discharge the presumption, as compared with a conviction that is admissible but does not operate to establish a presumption of guilt. On the other hand, the courts might respond in a similar manner to William Young and O'Regan JJ in *Morton*, saying the evidential effect of the conviction (that is, its presumptive effect) should not be regarded as unfairly prejudicial given this is the precise effect that is intended. We therefore think the relationship between sections 8 and 49 should be clarified in the Act.

4.80 The Commission clearly intended the admissibility of conviction evidence would be subject to exclusion under section 8 (or any other provision of the Act). In its 1999 report, the Commission said section 8 "is in addition to – and overrides – specific rules on the admissibility of evidence".[86] It explained that section 8(1) may exclude relevant evidence that otherwise meets the specific admissibility requirements in the Act. Similarly, it said conviction evidence "is only admissible if it is not excluded by any other provision".[87]

4.81 In its report *Disclosure to Court of Defendants' Previous Convictions*, *Similar Offending*, *and Bad Character* (2008), the Commission commented that "[t]here is no reason to believe the legislature, which adopted the thrust of the Commission's proposed provision, intended otherwise".[88] It said sections 7 and 8 are general provisions that apply to the whole Act and noted the mandatory language of section 8 ("must exclude"). The Commission concluded "section 8 will prevail over section 49".[89]

4.82 We recommend a new subsection should be included in section 49 to clarify the admissibility of conviction evidence is subject to its exclusion under any other provision of the Act, including section 8. The subsection should clarify that a challenge to admissibility cannot be made on the basis the presumptive effect of the conviction gives rise to unfair prejudice. We consider the policy of section 49 would be undermined if the presumptive effect of a conviction could, of itself, give rise to unfair prejudice under section 8.

---

84 Section 78(1) of the Police and Criminal Evidence Act 1984 (England and Wales) provides that the court may refuse to allow the prosecution to offer evidence in any proceeding if the admission of the evidence "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

85 See Michael Zander *Zander on PACE: The Police and Criminal Evidence Act 1984* (8th ed, Sweet & Maxwell, London, 2018) at [8-04]–[8-05]; David Ormerod and David Perry (eds) *Blackstone's Criminal Practice 2018* (28th ed, Oxford University Press, Oxford, 2017) at [F12.13]–[F12.17]; *R v O'Connor* (1987) 85 Cr App R 298; and *R v Curry* [1988] Crim LR 527. Contrast: *R v Chapman* [1991] Crim LR 44; and *R v Denham* [2016] EWCA Crim 1048.

86 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, Vol 1, 1999) at [C56].

87 At [C234].

88 Law Commission *Disclosure to Court of Defendants' Previous Convictions*, *Similar Offending*, *and Bad Character* (NZLC R103, 2008) at [3.7].

89 At [3.7].

4.83 We also recommend that section 49 should clarify that evidence offered by a party to rebut the presumption (rebuttal evidence) is subject to any other exclusionary provision in the Act, including section 8.

4.84 Clause 17 of the draft Bill reflects our recommendation.

NOTICE OF INTENTION TO OFFER REBUTTAL EVIDENCE

RECOMMENDATION

R9 Section 49 should be amended to require a party to a criminal proceeding who wishes to offer rebuttal evidence to inform the judge before doing so and indicate the nature of the evidence they propose to offer.

4.85 Section 49(3) requires a party to a criminal proceeding who wishes to offer evidence of the fact that a person has been convicted of an offence to first inform the judge of the purpose for which the evidence is to be offered. This enables the judge to consider whether the conviction evidence is excluded by the operation of any other provision in the Act. For example, if the conviction evidence is offered for the purpose of attacking the convicted person's veracity, the evidence must be "substantially helpful" in assessing that person's veracity before it will be admissible.[90] Similarly, if the conviction evidence is offered as evidence of propensity, the relevant propensity rule will apply.[91] We consider the notice requirement in section 49(3) should be retained.

4.86 Crown Law made the point that, if a presumptive proof rule is adopted, section 49 should also require a person who intends to offer evidence to rebut the presumption to notify the court. Without a prior notice requirement, Crown Law said the prosecution would need to brief every case on the assumption the conviction evidence will be challenged. This would defeat one of the objectives of convictions being admissible in criminal proceedings: that time and expense will be saved because a party will not need to litigate a matter that has already been resolved.[92] This matter was not discussed in our Issues Paper, and no other consultees raised it as an issue.

4.87 Crown Law referred to *R v C*, a decision of the Court of Appeal of England and Wales, where the Lord Chief Justice set out case management principles that should be followed when the defendant challenges the correctness of a conviction.[93] These principles suggest the defendant should provide a detailed defence statement in which they "should identify all the ingredients of the case which he will advance for the purposes of discharging the evidential burden of proving that he did not commit the earlier … offences".[94] This information enables the Crown to prepare its case.

---

90 See section 37. We discuss the veracity provisions in Chapter 14.

91 See sections 40–43.

92 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [233]. See discussion above at [4.15].

93 *R v C* [2010] EWCA Crim 2971.

94 *R v C* [2010] EWCA Crim 2971 at [14].

Our view

4.88 If a presumptive proof rule is adopted, we recommend that a party who wishes to offer evidence to rebut the presumption should be required to inform the judge (and thereby the prosecution) before doing so and should be required to indicate the nature of the evidence they propose to offer. This will enable the Crown to more efficiently and cost-effectively prepare its case. Clause 17 of the draft Bill reflects this recommendation.

CONVICTION EVIDENCE IN CIVIL PROCEEDINGS

RECOMMENDATION

R10 Section 47, which governs the use of conviction evidence in civil proceedings, should be amended to align with our recommendations in relation to section 49.

4.89 Section 47 (conviction as evidence in civil proceedings) largely mirrors section 49 (conviction as evidence in criminal proceedings).

4.90 In our Issues Paper, we did not discuss section 47 because, to our knowledge, it was not causing any problems. We therefore have not consulted widely on whether section 47 should be amended. The absence of any particular concerns probably reflects the fact it is of less significance in practice than section 49.

Our view

Section 47 should align with our recommendations in relation to section 49

4.91 We nevertheless consider it would be desirable to align section 47 with section 49 if our recommendations in this chapter are accepted. As the authors of *Mahoney on Evidence: Act and Analysis* note, sections 47 and 49 have "apparently very similar, if not identical, effect".[95] They suggest that "whatever the Law Commission eventually recommends in relation to s 49 can be expected to apply to some extent also to s 47, given the similar purposes and effects of the provisions".[96]

4.92 The desirability of aligning sections 47 and 49 can also be seen in the legislative history of these provisions. In the Commission's 1999 report, it recommended sections 47 and 49 should both operate as presumptive proof that the convicted person committed the offence,[97] and the Bill introduced by the Government provided that both sections should operate as conclusive proof of the offending.[98] The Commission and the select committee considered the same effect (albeit a different rule) should apply in both civil and criminal contexts.

4.93 The Commission's 1999 report explains that the Commission originally thought prior convictions should be *conclusive* of guilt in civil proceedings, because giving prior

95 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at 401.

96 At 405.

97 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999), cl 49 and cl 51.

98 Evidence Bill 2005 (256-1), cl 43 and cl 45.

convictions only presumptive weight would enable convicted persons to recover damages or avoid liability by proving on the balance of probabilities that they did not do what has already been proved beyond reasonable doubt.[99] However, the Commission was persuaded by the views of some commentators that people may plead guilty, to careless driving, for example, to resolve the criminal case speedily but may wish to contest a large civil claim arising out of the same incident.[100] The Commission said this example has validity and therefore recommended that convictions should create a presumption but should not be conclusive of guilt.[101] The Evidence Bill did not adopt the Commission's recommendation for a presumptive proof rule,[102] and the explanatory note to the Bill did not explain why the Government favoured a conclusive proof rule.[103]

4.94 We consider a presumptive proof rule would more closely align with the approach to conviction evidence in civil proceedings that is taken in comparable jurisdictions. In England and Wales, for example, conviction evidence has presumptive weight in both civil and criminal proceedings.[104] The presumption is rebuttable by contrary proof on the balance of probabilities.[105]

4.95 In Australia, conviction evidence is admissible in civil proceedings.[106] The Evidence Act 1995 (Cth) does not specify the weight to be given to the conviction evidence or set up a presumption that the conviction is presumed to be correct. The Australian Law Reform Commission, which proposed the provision, explained:[107]

> A conviction has substantial evidentiary weight itself in any event and needs no presumption that it was justified. It is enough that the convicted person will have an evidentiary onus in the civil proceedings, if he disputes the facts sought to be proved by the conviction.

4.96 In Canada, conviction evidence is admissible in subsequent civil proceedings as prima facie evidence of the material facts on which the convictions were made, but individuals may rebut the presumption. It appears the courts consider the nature and circumstances of each case and are flexible regarding the weight they afford to previous convictions.[108]

4.97 We consider problems may arise if a different approach is taken to the use of conviction evidence in civil and criminal proceedings in New Zealand. On the other hand, we find it difficult to see how aligning the approaches to conviction evidence in sections 47 and 49 would give rise to any problems in civil court proceedings. We suggest that aligning the two provisions would support the Act's purpose of providing for facts to be established

---

99 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [223].

100 At [223].

101 At [223].

102 Evidence Bill 2005 (256-1), cl 43.

103 Evidence Bill 2005 (256-1) (explanatory note) at 12.

104 Civil Evidence Act 1968 (UK); and s 11 and Police and Criminal Evidence Act 1984 (England and Wales), s 74.

105 *Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50, [1970] All ER 230 (CA).

106 Section 91(1) of the Evidence Act 1995 (Cth) sets out the general rule that "[e]vidence of the decision, or finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in the proceeding". Section 92(2) creates an exception in civil proceedings in respect of the conviction of an offence.

107 Australian Law Reform Commission *Evidence (Interim)* (ALRC R26 Vol 1, 1985) at [778], cited in Stephen Odgers *Uniform Evidence Law* (12th ed, Thomson Reuters, Sydney, 2016) at [EA.92.60].

108 Wendy Moore "The Admissibility of Criminal Convictions in Civil Trials" in TL Archibald and RS Echlin (eds) *Annual Review of Civil Litigation 2010* (online ed, Carswell Thomson Reuters, Canada, 2010).

by the application of logical rules.[109] For completeness, we note we are not recommending any change to section 48, which contains a conclusive proof rule for defamation proceedings.[110]

4.98 We recommend that section 47 be amended to replace the conclusive proof rule with a presumptive proof rule. We recommend that the new provision should align with our recommendations in relation to section 49. Clause 16 of the draft Bill reflects this recommendation.

---

109 Section 6(a).

110 In its 1999 report, the Commission supported a conclusive proof rule applying to conviction evidence in defamation proceedings. The Commission explained that a defendant in a defamation proceeding should be entitled to a complete defence when the publication sued on is based on the fact of a criminal conviction established to the highest standard of proof: Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [225]–[227].

CHAPTER 5

Right to silence

INTRODUCTION

5.1 The right to silence has been described as not a single right but rather a "disparate group of immunities, which differ in nature, origin, incidence and importance".[1] In New Zealand, specific aspects of the right to silence are given special legislative protection.[2]

5.2 Section 32 of the Evidence Act aims to prevent a fact-finder from drawing an inference that a defendant is guilty from their pre-trial silence. However, it does not preclude a fact-finder from drawing adverse inferences about a defendant's credibility from their pre-trial silence. Section 33 of the Act allows a judge, but not the prosecution, to comment on the defendant's failure to give evidence at trial. Case law has established that, while fact-finders may not draw inferences of guilt from a defendant's silence at trial, they may draw inferences from a defendant's silence at trial when assessing the strength of the prosecution's case.[3] The distinction between the permissible and impermissible uses of a defendant's silence can cause difficulty, and the courts have acknowledged this can be a "fine line" to walk in practice.[4]

5.3 In our Issues Paper, we asked whether sections 32 and 33 should be amended to remove the need to decide whether the line between permissible and impermissible comment on a defendant's silence has been crossed in any given case. We provided three options:

- Amending sections 32 and 33 to prohibit all adverse inferences being drawn from a defendant's silence.

---

1 *R v Director of Serious Fraud Office*, *ex parte Smith* [1993] AC 1 (HL) at 30. At 30–31, Lord Mustill identified the following immunities: (1) a general immunity from being compelled on pain of punishment to answer questions posed by other persons or bodies; (2) a general immunity from being compelled on pain of punishment to answer questions that may incriminate; (3) a specific immunity enjoyed by suspects being interviewed by police (or others in authority) from being compelled on pain of punishment to answer questions; (4) a specific immunity enjoyed by accused persons undergoing trial from being compelled to give evidence and answer questions; (5) a specific immunity enjoyed by those charged with a criminal offence from having to answer questions put to them by police (or others in authority); and (6) a specific immunity enjoyed by accused persons undergoing trial from having adverse comment made on any failure to answer questions pre-trial or to give evidence at trial.

2 For example, s 23(4) of the New Zealand Bill of Rights Act 1990 (NZBORA) guarantees the right to silence when a person has been arrested or detained; s 25(d) of NZBORA guarantees the right not to be compelled to be a witness or confess guilt at trial; and s 60 of the Evidence Act 2006 preserves the common law immunity against being compelled to answer any questions that may incriminate oneself.

3 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [5.15]–[5.16].

4 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [5.26]–[5.27]. See also *Hewitt v R* [2018] NZCA 374 at [23].

- Amending sections 32 and 33 to permit any appropriate inferences being drawn from a defendant's silence.
- Retaining the status quo.

5.4 We have concluded that the status quo should be retained because it represents a workable compromise that allows fact-finders to draw some inferences from a defendant's silence, while prohibiting inferences of guilt from being drawn.

5.5 In this chapter, we also consider whether section 32 should expressly prohibit a judge in a judge-alone trial from relying on a defendant's pre-trial silence as the basis for an inference of guilt. We have concluded that section 32 should be amended to provide that in a judge-alone trial, a judge may not draw an inference that a defendant is guilty from their pre-trial silence.

5.6 In this chapter, we also discuss the following issues relating to sections 32 and 33:

- Whether section 32 should set out the circumstances in which an adverse inference about a defendant's credibility can be drawn from their pre-trial silence.
- Whether section 33 should be amended to provide guidance on the circumstances in which it is appropriate for a judge to comment on the exercise of a defendant's right to silence at trial.
- Whether drawing adverse inferences about a defendant's credibility from their pre-trial silence should be conditional upon the defendant having been cautioned about that possibility.
- Whether the relationship between section 32 and the Act's veracity rules are creating any difficulties in practice.

5.7 We do not recommend any amendments to sections 32 or 33 in relation to these matters.

DRAWING INFERENCES FROM A DEFENDANT'S SILENCE

5.8 Section 32 of the Act relates to a defendant's pre-trial silence. It provides:

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

Issues Paper

5.9 As we explained in our Issues Paper, it appears well settled in the case law that section 32 only prevents inviting or drawing inferences that a defendant is guilty from their pre-trial silence. It does not preclude challenge to or comment on the defendant's credibility based on the belated proffering of an explanation.[5] The courts have described this distinction as a "fine line" for prosecutors and trial judges to walk in practice.[6] The difficulty arises because a challenge to credibility based on pre-trial silence effectively invites the fact-finder to assign some evidential significance to a defendant's pre-trial silence, which can come perilously close to an invitation to infer guilt.

5.10 In *Hewitt v R* in 2018, the Court of Appeal observed that, while the cases gave little guidance on where "the fine and uncertain line" marking the divide could be found, it was apparent that courts had been vigilant to ensure that a defendant was not prejudiced through exercising their right to silence.[7] This point was illustrated with reference to several Court of Appeal decisions where a prosecutor was found to have crossed the line in commenting on a defendant's pre-trial silence.[8]

5.11 Section 33 of the Act controls comment on the defendant's silence at trial. It provides:

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

5.12 Fact-finders are permitted to draw inferences from a defendant's silence at trial when assessing the strength of the prosecution's case; however, they should not draw an inference of guilt from a defendant's silence at trial.[9] The distinction between permissible and impermissible uses of a defendant's silence at trial has been referred to as a "fine one at best".[10]

5.13 In our Issues Paper, we suggested that the rules may not be logical and may require clarification. We noted it has been two decades since the Law Commission consulted the public on this matter and suggested it may be timely to revisit the issue.[11]

---

5 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [5.24]–[5.25].

6 See the authorities referred to at [5.26], n 389 and [5.29] of the Issues Paper: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018). See also *Hewitt v R* [2018] NZCA 374 at [23]; and *W v R* [2018] NZCA 81 at [14].

7 *Hewitt v R* [2018] NZCA 374 at [24].

8 At [25]–[28] citing: *Smith v R* [2013] NZCA 362, [2014] 2 NZLR 421; *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467; *Reuben v R* [2017] NZCA 138; and *Hamdi v R* [2017] NZCA 242, (2017) 28 CRNZ 319. The Court in *Hewitt* also refers to *Hastings v R* [2015] NZCA 180, where the Court of Appeal found that the prosecutor had come close to, but not crossed, the line: at [29].

9 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [5.15]–[5.19].

10 Mathew Downs (ed) *Cross on Evidence* (online ed, LexisNexis) at [EVA33.4].

11 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [5.28]–[5.30].

5.14 We set out three options:

- Option (a) – amend sections 32 and 33 to prohibit any adverse inferences from being drawn from a defendant's pre-trial silence or silence at trial.[12]
- Option (b) – amend sections 32 and 33 to permit the drawing of appropriate adverse inferences from a defendant's pre-trial silence or silence at trial and remove the current prohibition on inviting inferences of guilt.[13]
- Option (c) – retain the status quo.

5.15 We did not express a preliminary view on these options and asked submitters to explain which option they preferred and why.

Consultation

5.16 We received 13 submissions. Five submitters supported option (a),[14] two supported option (b)[15] and five submitters supported retaining the status quo.[16] The remaining submission was from the New Zealand Law Society, which expressed a split view between option (a) and option (b) with respect to pre-trial silence.[17]

5.17 Many of the submitters who supported either option (a) or option (b) said the current law is confusing for jurors to understand.[18] For example, it was suggested there is a risk that jurors will draw adverse inferences of guilt even from a properly worded judicial direction.[19] Submitters suggested that the first two options would offer simplicity, clarity and consistency in approach.

5.18 We discuss the submissions we received in support of each option below.

Option (a) – prohibiting all adverse inferences from a defendant's silence

5.19 The option of amending sections 32 and 33 to prohibit any adverse inferences from being drawn from either a defendant's pre-trial silence or silence at trial was supported by the

---

12 We noted that (in relation to pre-trial silence), a section along the lines of s 89 of the Evidence Act 1995 (Cth) could be adopted (which prohibits any inferences "unfavourable to a party" from being drawn from pre-trial silence); and that (in relation to silence at trial) a section similar in terms to s 4(6) of the Canada Evidence Act 1985 RSC 1985 c C-5 could be adopted (which prohibits the judge and prosecution from commenting on the failure of an accused to testify).

13 We noted, by way of example, that ss 34–39 of the Criminal Justice and Public Order Act 1994 (UK) provide for the drawing of adverse inferences from silence in a number of situations.

14 The Auckland District Law Society (it also suggested that retention of the status quo was preferable to adopting option (b)), the Criminal Bar Association, the New Zealand Bar Association, the Public Defence Service and a barrister who specialises in criminal defence work (with respect to s 32).

15 BVA The Practice (it said it preferred option (b), or in the alternative, retaining the status quo) and one individual submitter (the latter was in relation to s 32 only). The Crown Law Office's submission noted that option (b) was supported by the Crown Solicitor in Christchurch.

16 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Crown Law, New Zealand Police, Professor Elisabeth McDonald and TOAH-NNEST Tauiwi Caucus.

17 While not expressly stated, the New Zealand Law Society appeared to support option (b) with respect to silence at trial. The submission said that it did not support retaining the status quo and that option (a) was not supported by any contributor with respect to silence at trial.

18 A notable exception was the submission from BVA. It submitted that, although the distinction between adverse challenges to credibility and inferences of guilt was "philosophically" difficult to grapple with, it was a distinction that worked well in practice and on which judges directed well.

19 The New Zealand Law Society.

Auckland District Law Society,[20] the Criminal Bar Association, the New Zealand Bar Association and the Public Defence Service. One individual submitter (a barrister who specialises in criminal defence work) supported this option with respect to pre-trial silence.[21] Some of the contributors to the New Zealand Law Society submission supported option (a) in relation to pre-trial silence.

5.20 The New Zealand Bar Association thought it is unfair to draw adverse inferences from defendants' silence given there could be many reasons why a defendant might choose to remain silent. The individual submitter considered that, unless a defendant is given a warning upon arrest that silence or failure to mention a defence could be used against them to infer guilt, even circumstantially, the Act should prohibit any adverse inference from being drawn from a defendant's pre-trial silence.

5.21 The Public Defence Service thought permitting any appropriate inferences to be drawn from a defendant's silence (option (b)) would erode the right to refrain from making a statement and the right not be compelled to be a witness or confess guilt.[22] It thought option (b) might require an amendment to the New Zealand Bill of Rights Act 1990 (NZBORA). It submitted that option (b) would potentially lead to inroads into other closely connected rights, such as the privilege against self-incrimination and the well-established principle that the prosecution bears the burden of proving its case against the defendant. In addition, the Public Defence Service thought that allowing adverse inferences to be drawn from the defendant's silence would potentially undermine legal privilege. It said juror speculation about why the defendant remained silent could place pressure on the defendant to reveal why their lawyer advised them to remain silent.

5.22 The contributors to the New Zealand Law Society submission who preferred prohibiting all adverse inferences in relation to pre-trial silence supported a statutory provision similar to the Australian provision in section 89 of the Evidence Act 1995 (Cth). Option (a) was not supported by any contributors to the New Zealand Law Society submission with respect to silence at trial. The submission said there was consensus that the right to silence is especially important when the defendant is first confronted by investigators. The New Zealand Law Society said it was generally accepted that there are some situations where it is proper to make adverse comments in relation to silence at trial.

Option (b) – permitting any appropriate adverse inferences from a defendant's silence

5.23 The option of permitting any appropriate adverse inferences (including inferences of guilt) to be drawn from a defendant's pre-trial silence or silence at trial was supported by the Crown Solicitor in Christchurch.[23] One individual submitter supported option (b) in relation to pre-trial silence and said that comment should be allowed on "ambush defences" that police have not had the opportunity to check.[24]

---

[20] It also suggested that retention of the status quo was preferable to adopting option (b).

[21] The submitter did not express a view with respect to silence at trial.

[22] Section 23(4) of NZBORA provides that everyone who is arrested or detained for any offence or suspected offence has the right to refrain from making any statement and to be informed of that right. Section 25(d) of the NZBORA provides that everyone who is charged with an offence has the right not to be compelled to be a witness or to confess guilt.

[23] This was noted in Crown Law's submission.

[24] The submission did not indicate which option was preferred in relation to silence at trial.

5.24 BVA The Practice[25] thought that adverse inferences should be able to be drawn from a defendant's silence so supported option (b) or (c). It said an absolute prohibition on adverse inferences would preclude the Crown from asking the fact-finder to engage in logical, permissible and appropriate reasoning. However, it did not support removing the prohibition on inferring guilt from silence altogether.

5.25 The New Zealand Law Society contributors who supported option (b) in relation to pre-trial silence favoured an approach based on the Criminal Justice and Public Order Act 1994 (UK),[26] although they did not support the adoption of a police caution along the lines of the one that is given there.[27] We inferred that the New Zealand Law Society submission supported option (b) in relation to silence at trial.[28]

Option (c) – retaining the status quo

5.26 The option of retaining the status quo was supported by Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre,[29] the Crown Law Office, New Zealand Police, Professor Elisabeth McDonald (who supported codifying the status quo) and TOAH-NNEST Tauiwi Caucus.[30]

5.27 Crown Law said the current distinction between permissible use of silence for credibility purposes and impermissible use to demonstrate guilt is difficult to apply in practice and creates confusion but represents a tolerable compromise between absolute prohibition (option (a)) and permission (option (b)).[31]

5.28 The submissions from Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus considered a defendant's silence has "forensic" significance. They said it seems inherently unfair that victims of sexual assault can be subjected to attacks on their credibility at trial while the defendant may not be subject to cross-examination.

5.29 Police appeared to support the status quo over the other options proposed but ultimately thought more work in this area would be beneficial. Police said sections 32 and 33 are problematic and submitted that the Act should provide further clarity around the inferences that may be drawn from a defendant's silence before and during trial. Police told us it may be beneficial to conduct a separate review of the right to silence in the

---

25 This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

26 Section 34 of the Criminal Justice and Public Order Act 1994 (UK) permits the court or jury, when determining whether the accused is guilty of the offence charged, to draw "such inferences…as appear proper" from the accused's failure to mention a fact relied on in their defence when questioned or charged.

27 The caution that must be given in England and Wales is set out in Code C (Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers):

> You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.

28 This was not expressly stated; however, the submission said that the New Zealand Law Society did not support retaining the status quo and that option (a) was not supported by any contributor with respect to silence at trial.

29 A group of non-kaupapa Māori organisations that provide support services to survivors of sexual violence in the Auckland region.

30 Te Ohaakii a Hine – National Network Ending Sexual Violence Together, Tauiwi Caucus, a national network that includes 51 non-profit organisations that provide specialist sexual violence support services to those impacted by sexual harm and 24 individuals who work in this sector.

31 Crown Law did not favour option (b) – it noted it was likely to be highly controversial and thought it was likely to generate its own set of problems.

future but did not consider this to be urgent. It said further consideration should be given to the models adopted in the United Kingdom and New South Wales. Police also suggested that a distinction could be drawn between a defendant who is silent pre-trial and at trial and a defendant who does make a pre-trial statement but does not mention key facts that are relied upon at trial. Police said in this latter case, adverse inferences should be permitted.

Further consultation

5.30 In a meeting with Crown Law, we were told that only very experienced prosecutors are able to walk the 'fine line' when referring to a defendant's pre-trial silence. In our conversation with the Public Defence Service, we were told that prosecutors tend to be reasonably cautious about commenting on a defendant's pre-trial silence and that judges are cautious about commenting on a defendant's silence at trial under section 33.

5.31 We had a detailed discussion with our judicial advisory committee on this issue. Members discussed issues that may arise with the current distinction, including the complexities of explaining the fine distinction to a jury. There was discussion as to whether inferences should be drawn from pre-trial silence alone (and not from silence at trial) and whether a distinction should be made between total silence and giving a partial account pre-trial. At the end of the discussion, the committee appeared to favour retaining the status quo.

5.32 Simon Mount QC (a member of our expert advisory group) told us he favoured retaining the status quo.

Our view

The status quo should be retained

5.33 We accept the current distinction between permissible and impermissible use of a defendant's silence is a fine one and may be difficult for jurors to understand. We note the feedback that prosecutors must walk a fine line to avoid straying into impermissible comment about a defendant's pre-trial silence, and we understand that only very experienced prosecutors are able to achieve this. We consider it unsatisfactory that the fact that some adverse inferences may be drawn from a defendant's silence is not immediately apparent on the face of sections 32 and 33.

5.34 Although we consider there are some issues with the status quo, we are reluctant to support either option (a) or option (b) at this time. We presented two antithetical alternatives to the status quo in our Issues Paper, and there was no general consensus on the preferred approach to reforming the law. Although submitters indicated some dissatisfaction with the status quo, we have concluded the status quo is a tolerable compromise between the two alternatives we identified in our Issues Paper.

5.35 Option (a) would represent a significant change to New Zealand law when compared to both the pre-Act common law and sections 32 and 33. It was not generally supported by prosecutors. Nine of the 14 submissions we received supported the ability for fact-finders to make some inferences (either under the status quo or option (b)). Some submitters said that option (a) would unfairly restrict the prosecution and prevent it from asking the fact-finder to engage in logical and appropriate reasoning.

5.36 Paul Rishworth points out in *The New Zealand Bill of Rights* that some evidence will call for an explanation from the defendant:[32]

> The simple fact is that some prosecution evidence, when adduced, will demand an explanation from the accused because he or she can be expected to be in a position to give it. If no explanation is forthcoming in circumstances where one could be expected, an inference of guilt may well be confirmed in the mind of judge or jury. So long as the evidence adduced crosses the threshold of a prima facie case that is properly before the judge or jury, the use of silence in this way is regarded as consistent with the right not to give evidence at trial. As courts have pointed out, the right to silence cannot immunise a person from the inferences that ordinary people will reasonably draw from other evidence in the trial. In this way, accused persons will often face 'tactical' pressure to testify, but it is not a pressure imposed by law.

5.37 Option (b) is likely to be seen by some practitioners and members of the public as "abolishing" or curtailing the right to silence.[33] In this regard, we note the Commission's observation in its 1992 preliminary paper *Criminal Evidence: Police Questioning*:[34]

> The right of silence is at best a qualified right; there are undoubted adverse consequences which may flow from a defendant remaining silent before or during trial. The central question is whether those detrimental consequences should be added to or lessened. To discuss the right of silence in absolute terms of preservation or abolition is artificial.

5.38 The Public Defence Service considered that option (b) could erode the right to refrain from making a statement and the right not to be compelled to be a witness or confess guilt.[35] In *The New Zealand Bill of Rights Act: A Commentary*, the authors note that, overseas, different conclusions have been reached on the human rights consistency of provisions allowing an accused to face adverse inferences and/or comment for exercising the right to silence.[36] The authors consider it is not inherently inconsistent with

---

32 Paul Rishworth "The Right to Silence and the Right Against Self-incrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 654.

33 For example, the provisions of the Criminal Justice and Public Order Act 1994 (UK) that provide for the drawing of adverse inferences from silence were considered by many, when they were enacted, to have abolished the right to silence. See Michael Zander *Zander on PACE: The Police and Criminal Evidence Act 1984* (8th ed, Sweet & Maxwell, London, 2018) at [13-01]:

> [The right to silence] was said to have been 'abolished' by the Criminal Justice and Public Order Act 1994 … In fact the new law did not abolish the right to silence. It is not an offence for a suspect to decline to answer questions put by a police officer nor for a defendant to refuse to go into the witness box. The right to silence remains.

Contrast Andrew Choo *Evidence* (5th ed, Oxford University Press, Oxford, 2018) at 135–136 (quoting a comment in S Nash, "Silence as Evidence: A Commonsense Development or a Violation of a Basic Right?" (1997) 21 Crim LJ 145 at 151):

> While, on one view, the right to remain silent in England and Wales remains technically unaffected by sections 34, 36 and 37 of the 1994 Act, it is clear that the right has been substantially attenuated. Allowing adverse inferences to be drawn is—to quote a comment made in a different context—'tantamount to imposing a penalty for relying upon a procedural right'. Unsurprisingly perhaps, the 'new' provisions may well have had the effect of reducing the extent to which the right to silence is exercised during police interviews.

34 Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at [4].

35 New Zealand Bill of Rights Act 1990, ss 23(4) and 25(d).

36 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [23.17.3]–[23.17.6]. The authors cite *Averill v United Kingdom* (2000) 33 EHRR 264 (ECHR), where the European Court of Human Rights affirmed that whether drawing adverse inferences from an accused's silence infringed the right to a fair trial was:

> … a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.

section 23(4) of NZBORA for a trial court to be made aware of the fact of a defendant's silence in the face of police questioning. However, they say special caution needs to be exercised when relying on a defendant's pre-trial silence as a means of evaluating the credibility of a defendant's explanations (or failure to give explanations) and that (absent exceptional circumstances) silence on legal advice should be regarded as of no weight in proving guilt.[37] In relation to silence at trial, the authors comment:[38]

> The right to silence is not offended by a trier of fact drawing reasonable inferences from an accused's decision not to testify in circumstances where an explanation could be expected. True, the accused is under a tactical pressure to consider testifying. But criminal trials are not unfair just because at various points an accused has to make a tactical choice.

5.39 As well as raising possible NZBORA issues, submissions indicated that option (b) could create unfairness for defendants. For example, the Public Defence Service suggested it could pressure defendants to reveal legal advice[39] and could, in effect, lead to a shifting of the burden of proof. The New Zealand Bar Association submitted that, if this option were adopted, the Crown was likely to stress at every opportunity that there was an inexplicable failure to provide a defence, which was unfair because there could be many possible explanations for any silence.

5.40 Section 34 of the Criminal Justice and Public Justice and Order Act 1994 (UK) illustrates some of the potential difficulties of a statutory provision allowing any appropriate inferences to be drawn from silence.[40] Some commentators have argued that the law on section 34 has become so complex that the costs of the provision outweigh any evidential benefits it may provide.[41]

They also cite *R v Noble* [1997] 1 SCR 874 (SCC), where a majority of the Supreme Court of Canada held that an accused's silence could only be relied upon where the Crown had already proven its case beyond reasonable doubt and silence was only referred to in order to dismiss any need to discuss possible exculpatory issues. The authors also note at [20.11.22] that the Human Rights Committee has expressed concern in relation to statutory provisions that permit a court or jury to draw an adverse inference from an accused's pre-trial silence.

37 At [20.11.20].

38 At [23.17.6]. See also Paul Rishworth "The Right to Silence and the Right Against Self-incrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 654:

> Courts in New Zealand and elsewhere have held that a person's silence at trial may, in certain circumstances, have a legitimate bearing on determination of their guilt. This places a tactical pressure on the accused to testify, and so the rules that ascribe some significance to silence at trial can be understood as limiting the right in s. 25(d). But, properly understood, these rules do not ascribe probative value to the accused's silence as such, and as a result there is no inconsistency with s. 25(d) calling for justification.

39 We note that in *Condron v United Kingdom* (2001) 31 EHRR 1 (ECHR), the European Court of Human Rights found that the fact the applicants were subjected to cross-examination on the content of their lawyer's advice was not a breach of their fair trial rights under Article 6 of the European Convention on Human Rights. The Court stated at [60]:

> They were under no compulsion to disclose the advice given, other than the indirect compulsion to avoid the reason for their silence remaining at the level of a bare explanation. The applicants chose to make the content of their solicitor's advice a live issue as part of their defence. For that reason they cannot complain that the scheme of section 34 of the 1994 Act is such as to override the confidentiality of their discussions with their solicitor.

But see the comment on this finding in Hannah Quirk "Twenty years on, the right of silence and legal advice: the spiralling costs of an unfair exchange" (2013) 64 NILQ at 480:

> In practice this amounts to little more than Hobson's choice, as suspects either have an unexplained silence from which inferences may be drawn, or they seek to explain this and have to waive privilege.

40 Section 34 permits the fact-finder to draw "such inferences … as appear proper" from the accused's pre-trial silence.

41 Diane Birch "Suffering in silence: a cost-benefit analysis of section 34 of the Criminal Justice and Public Order Act 1994" [1999] Crim LR 769 at 772–773 (the author argues that section 34 has become "too expensive" because it consumes too much judicial time at trial and on appeal; it is a "headache for the conscientious jury, and a tool with which the slapdash, incompetent jury may wreak injustice"; and the evidential gains are slight). See also Andrew Choo *Evidence* (5th ed, Oxford University Press, Oxford, 2018) at 136:

5.41 In England and Wales, when determining whether it is appropriate to draw an adverse inference from a defendant's pre-trial silence, courts assess whether it was reasonable for the defendant to rely on their lawyer's advice to exercise the right to silence.[42] This may involve the lawyer being called to give evidence,[43] "creating an acute conflict of interest and preventing him or her from continuing to represent the defendant".[44] One academic says lawyers now face a quandary of having to choose between "the risks of allowing suspects to answer questions and potentially inculpate themselves; or of facing adverse inferences, should prosecutions follow" and argues this has devalued the protective benefit of legal advice.[45]

5.42 While the status quo was seen to be problematic by most submitters, both option (a) and option (b) attracted criticism and were seen to involve a significant policy shift. We note that we only received 14 submissions on this issue. In these circumstances, we have reached the view that the status quo should be retained at this time. It appears to be a workable compromise between prohibiting all adverse inferences and permitting any adverse inferences to be drawn from a defendant's silence, even though it involves a fine distinction that may be difficult for juries to understand. Both prosecutors and judges appear to be adopting a cautious approach to commenting on a defendant's silence. Courts have ensured that defendants' fair trial rights are paramount and have been vigilant to ensure that defendants are not prejudiced through exercising the right to silence.[46] Where the line between permissible and impermissible comment on a defendant's silence is crossed, this may result in a miscarriage of justice and a re-trial being ordered.[47]

5.43 If this issue is revisited again in the future, we suggest that consideration could be given to some more nuanced options for reform. These might include permitting adverse inferences to be drawn only from pre-trial silence[48] or only from silence at trial[49] or distinguishing between a defendant who says nothing before or at trial and a defendant who does make a pre-trial statement but is 'silent' about particular facts and then raises them at trial.[50]

It may be argued that the considerable difficulties involved in administering the provisions that restrict the right to silence are wholly disproportionate to any benefits to the prosecution that the provisions may bring.

42 See Michael Zander *Zander on PACE: The Police and Criminal Evidence Act 1984* (8th ed, Sweet & Maxwell, London, 2018) at [13.24]; and Hannah Quirk "Twenty years on, the right of silence and legal advice: the spiralling costs of an unfair exchange" (2013) 64 NILQ 465 at 472.

43 See Michael Zander *Zander on PACE: The Police and Criminal Evidence Act 1984* (8th ed, Sweet & Maxwell, London, 2018) at 594.

44 David Dixon and Nicholas Cowdery "Silence Rights" (2013) 17(1) AILR 23 at 28.

45 Hannah Quirk "Twenty years on, the right of silence and legal advice: the spiralling costs of an unfair exchange" (2013) 64 NILQ 465 at 483. See also Hannah Quirk *The Rise and Fall of the Right of Silence* (Routledge, Oxon, 2017) at 110.

46 See *Hewitt v R* [2018] NZCA 374 at [24].

47 See, for example, *Smith v R* [2013] NZCA 362, [2014] 2 NZLR 421.

48 This suggestion arose in discussion with our judicial advisory committee.

49 The New Zealand Law Society submission said there was a consensus that the right to silence was particularly important when a defendant was first confronted by investigators and that it was generally accepted that there are some situations where it is proper to comment on silence at trial.

50 This was suggested by Police. At our meeting with the judicial advisory committee, it was suggested that total silence could be distinguished from partially telling a story pre-trial.

5.44 We considered whether sections 32 and 33 should be amended to capture the current distinction in the law between permissible and impermissible uses of a defendant's silence (in other words, codifying the status quo).[51] We do not think it is entirely satisfactory that the possibility of adverse inferences being drawn from a defendant's silence is not apparent on the face of sections 32 and 33. Amending sections 32 and 33 to reflect the status quo would make the law more accessible.[52] However, this would not solve the primary problem of the difficult distinction that exists in the law. We have not recommended codifying the status quo, as we consider a more comprehensive review of the options for reform may be desirable.

DRAWING ADVERSE INFERENCES AS TO CREDIBILITY FROM PRE-TRIAL SILENCE

5.45 Section 32 does not refer to the fact that adverse inferences as to credibility may be drawn from a defendant's pre-trial silence. Therefore the section does not list the circumstances in which an adverse inference may be drawn.

Issues Paper

5.46 In our Issues Paper, we noted the case law indicated that a challenge to a defendant's credibility on the basis of their pre-trial silence is permissible in the following situations:

- Where a defendant said nothing at all prior to trial and then advances a defence in evidence at trial.
- Where a defendant said something prior to trial but did not disclose a defence that is later advanced at trial.
- Where a defendant said something prior to trial, and there is a material inconsistency between that account and what the defendant advances in evidence at trial.

5.47 We sought feedback on whether section 32 should set out the circumstances in which an adverse inference may be drawn about a defendant's credibility from pre-trial silence. We did not express a preliminary view.

Consultation

5.48 Seven submissions commented on this issue.[53] Four submitters supported clarifying the circumstances in which adverse inferences may be drawn.[54] The Auckland District Law Society thought there would be merit in restricting the ability to draw adverse inferences about a defendant's credibility to the situations outlined at [5.46] above. The New Zealand Bar Association said that, if a special caution was adopted in New Zealand, it would be important to know *when* a failure to mention something would be capable of harming a defence. It also said that any attempt to prescribe the circumstances in which adverse inferences might be permitted would "pose an unenviable challenge". Elisabeth

---

51 Elisabeth McDonald suggested the status quo should be codified.

52 One aspect of the Act's purpose is "enhancing access to the law of evidence": s 6(f).

53 The Auckland District Law Society, BVA, Crown Law, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society and one individual submitter.

54 The Auckland District Law Society, Crown Law, Elisabeth McDonald and the New Zealand Bar Association.

McDonald expressed a concern about the effectiveness of judicial directions at explaining the difference between guilt and credibility.

5.49 Two submissions did not express a clear view.[55] BVA was not sure whether there should be a defined or exclusive list of situations in which an adverse inference could be drawn but thought codification could have some benefits (such as educating defence counsel on when their clients risk adverse attack by giving evidence). It considered the situations identified in our Issues Paper, were the most common examples of when such inferences could be drawn but thought there should also be a "catch-all" provision. An individual submitter said the current case law on when reference can be made to pre-trial silence seems adequate but could be "systematised and enacted".

5.50 The remaining submission, from the New Zealand Law Society, expressed a split view: some contributors to the submission thought the Act should be amended to provide legislative clarification on this matter while others did not.

5.51 Feedback from our judicial advisory committee was that it would be difficult for legislation to capture the circumstances in which an adverse inference about credibility can be drawn.

Our view

5.52 We have concluded that section 32 should not be amended to set out the circumstances in which an adverse inference about credibility can be drawn from a defendant's pre-trial silence. We think it would be preferable to allow courts the flexibility to determine the circumstances in which it may be appropriate to draw such an inference rather than have them prescribed in the Act.

5.53 We also note it would be difficult for section 32 to refer to the circumstances in which an adverse inference as to credibility can be made without expressly referring to the ability to draw such an inference (in other words, codifying the status quo). As we discuss above, we have concluded that the Act should not be amended in this way.

JUDICIAL COMMENT ON SILENCE AT TRIAL

Issues Paper

5.54 Section 33 is silent on the exact circumstances in which it is appropriate for a judge to comment on the fact that a defendant did not give evidence at trial. In our Issues Paper, we referred to the 1993 case of *R v McRae*, in which the Court of Appeal summarised the situations when comment would be appropriate as follows:[56]

- Where the defendant has been given leave to cross-examine a complainant as to credibility in circumstances where the defendant could be expected to give evidence.
- When the defendant relies on an exculpatory statement but gives no evidence to support the statement.

---

55 BVA and one individual submitter.

56 *R v McRae* (1993) 10 CRNZ 61 (CA) at 64. This case, and its subsequent application, is referred to in the Issues Paper: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [5.56]–[5.57].

- When the defendant through counsel has made a suggestion that someone else is responsible for the crime but gives no evidence in support of that proposition.
- When an attempt is made by the defendant to get their version of events before the jury by putting factual allegations to Crown witnesses and those allegations are not accepted by the witnesses.

5.55 Our Issues Paper noted that, in their 2011 book *From "Real Rape" to Real Justice*, Elisabeth McDonald and Yvette Tinsley supported amending section 33 to provide statutory guidance on when it is appropriate for a judge to make a comment on a defendant's silence at trial. They suggested this would achieve greater consistency between cases and certainty for both the defendant and any complainant. It might also act as a reminder to judges that drawing an inference is permissible in some cases. The authors said it could help address concerns expressed by complainants in sexual cases that it is unfair for a defendant to be able to cross-examine them when defendants are not required to give evidence.[57]

5.56 We sought feedback on whether section 33 should set out the circumstances in which a judge may comment on a defendant's silence at trial. We did not express a preliminary view.

Consultation

5.57 We received nine submissions on this issue.[58] Four submitters supported legislative guidance on the circumstances in which comment is appropriate.[59] Crown Law noted there is a general reluctance on the part of judges to comment under section 33 and thought (non-exhaustive) legislative guidance might serve as a useful reminder. A similar comment was made by BVA, which also noted codification would have the advantage of making the law easily accessible to counsel and the court during a trial, reducing dependence on knowledge of the relevant case law. BVA thought it might be appropriate to have a non-exclusive list of circumstances in which comment may be appropriate with a "catch-all" provision.

5.58 Two submitters thought it was unnecessary to amend section 33 to provide guidance on the circumstances in which comment is appropriate.[60] The Auckland District Law Society said it did not foresee any practical difficulty with continued reliance on the guidance set out in *R v McRae* and said the concerns raised in the Issues Paper did not justify legislative intervention.

5.59 The three remaining submissions did not express a clear preference.[61] The Public Defence Service submitted that, while the circumstances in which comment is appropriate are already relatively clear from the case law, including legislative guidance would be consistent with one aspect of the Act's purpose by enhancing access to the law of

---

57 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 360–363.

58 The Auckland District Law Society, BVA, Crown Law, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Police, the Public Defence Service and one individual submitter.

59 BVA, Crown Law, Elisabeth McDonald and Police.

60 The Auckland District Law Society and the New Zealand Bar Association.

61 The New Zealand Law Society, the Public Defence Service and one individual submitter.

evidence.[62] However, it doubted whether including the circumstances set out in case law in section 33 would change the current unwillingness of judges to comment. The Public Defence Service said it is to be expected that judges take a cautious approach to commenting on defendants' silence, given such comments can impact on important rights and the danger of juries placing too much weight on them.

5.60 The New Zealand Law Society said contributors to its submission held differing views on whether section 33 should be amended to provide legislative guidance. Those who supported further clarification noted that courts often struggle with applying the section, so statutory (but non-exhaustive) guidance would be of assistance. Those who did not support it considered an individualised assessment is required on the facts of the case, and as guidance would not be exhaustive, it would not provide certainty about whether an inference is appropriate.

5.61 Our judicial advisory committee considered it is unnecessary to amend section 33 to set out the circumstances in which a judge may comment on a defendant's silence at trial. It was noted that such comment was rare.

Our view

5.62 We have concluded it is not necessary or desirable to amend section 33 to clarify the circumstances in which a judge may comment on a defendant's silence at trial. The feedback we received indicates the courts have provided sufficient guidance on this issue and there is no need for legislative amendment. In the absence of evidence suggesting problems have arisen in the way the courts have addressed these issues, we do not think that greater legislative prescription is necessary.

INFERENCES OF GUILT FROM PRE-TRIAL SILENCE IN JUDGE-ALONE TRIALS

RECOMMENDATION

R11 Section 32 should be amended to clarify that a judge may not draw an inference that a defendant is guilty from their pre-trial silence.

5.63 Section 32 does not expressly prevent a judge in a judge-alone trial from relying on a defendant's pre-trial silence as the basis for an inference of guilt. Although section 32(2)(a) prevents anyone from *inviting* the judge to draw such an inference, the section does not specifically prevent the judge from drawing the inference. By contrast, in jury trials, section 32(2)(b) requires the judge to direct the jury that it may not draw an inference of guilt from pre-trial silence.

Issues Paper

5.64 In our Issues Paper, we expressed the preliminary view that judges sitting alone should be permitted to draw only the same inferences that are available to a jury in relation to a defendant's pre-trial silence. We said there seemed to be no logical basis for permitting

62 Section 6(f).

judges to draw inferences of guilt from pre-trial silence yet preventing juries from doing so. We sought feedback on whether the Act should clarify the position.

Consultation

5.65 We received eight submissions in response to this question.[63] All of them supported amending section 32 to clarify whether a judge sitting alone is permitted to draw an adverse inference of guilt from a defendant's pre-trial silence. Submitters thought the same rule should apply to both judges sitting alone and juries.[64] We were told there is no principled basis for the situation to be different depending on whether or not there is a jury.[65]

5.66 The Auckland District Law Society commented that the absence of examples of judges applying a different standard for themselves than they would apply to a jury meant that, in practice, the absence of a direct rule had not given rise to difficulty.

5.67 The Public Defence Service said that if a different approach were to apply to judges sitting alone, counsel would have to consider this when advising a defendant on whether to elect trial by jury or by judge-alone. This could result in an increase in the number of jury trials.

5.68 The feedback from our judicial advisory committee was that there should be no distinction between a judge's and jury's ability to draw inferences from pre-trial silence.

Our view

5.69 We remain of the view that there is no logical basis for permitting judges to draw inferences of guilt from pre-trial silence yet preventing juries from doing so. This view was supported by all submitters. We recommend that section 32 be amended to provide that, in a judge-alone trial, a judge may not draw an inference that a defendant is guilty from the defendant's pre-trial silence. Clause 11 of the draft Bill reflects this recommendation.

THE POLICE CAUTION TO SUSPECTS

5.70 The caution police officers currently give to suspects does not mention the possibility that an adverse inference as to credibility might be drawn from their pre-trial silence.[66]

---

63 The Auckland District Law Society, BVA, Crown Law, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Police, and the Public Defence Service.

64 The Auckland District Law Society, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

65 The Auckland District Law Society and the New Zealand Bar Association.

66 The caution currently given to suspects is set out in *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297 at (2):

> Whenever a member of the police has sufficient evidence to charge a person with an offence, or whenever a member of the police seeks to question a person in custody, the person must be cautioned before being invited to make a statement or answer questions. The caution to be given is:
>
> (a) that the person has the right to refrain from making any statement and to remain silent;
>
> (b) that the person has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions and that such right may be exercised without charge under the Police Detention Legal Assistance Scheme;
>
> (c) that anything said by the person will be recorded and may be given in evidence.

Issues Paper

5.71 In our Issues Paper, we asked whether section 32 should be amended to make the drawing of adverse inferences about a defendant's credibility from their pre-trial silence conditional on the defendant having been cautioned about that possibility. We noted that a "special caution" of this nature would have the clear advantage of alerting the person to the potential use that could be made of their silence. However, we also observed that a special caution could place pressure on the accused to speak. Critics have argued that a special caution could lead to suspects giving false defences because they feel they need to provide a defence immediately or could lead to them falsely confessing and making up statements in an attempt to end questioning rather than honestly stating that they do not recall certain facts.[67]

5.72 Our Issues Paper noted that, in New South Wales, adverse inferences can only be drawn from pre-trial silence if a special caution was given to the defendant.[68] The caution must warn the person that they do not have to say or do anything but that "it may harm the person's defence if the person does not mention when questioned something the person later relies on in court".[69] In New South Wales, an unfavourable inference may not be drawn from pre-trial silence unless the special caution was given in the presence of a lawyer and the defendant was given a reasonable opportunity to consult with the lawyer about the general nature and effects of special cautions.[70]

5.73 In England and Wales, a suspect must be cautioned before questioning if the suspect's answers or silence may be given in evidence.[71] A person must also be questioned on arrest (or further arrest).[72] The caution should be in the following terms:[73]

> You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.

Consultation

5.74 We received eight submissions in response to this question. Three submitters supported the introduction of a special caution[74] while three did not.[75] The remaining two submitters did not express a clear view.[76]

---

67 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [5.43]–[5.46].

68 Note that the provision allowing adverse inferences to be drawn from pre-trial silence only applies in criminal proceedings for serious indictable offences: s 89A(1) of the Evidence Act 1995 (NSW).

69 s 89A(9) of the Evidence Act 1995 (NSW).

70 s 89A(2) of the Evidence Act 1995 (NSW).

71 Police and Criminal Evidence Act 1984 Code C (Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers), July 2018 at 10.1.

72 Police and Criminal Evidence Act 1984 Code C (Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers), July 2018 at 10.4. It is not necessary to give a caution if it is impracticable to do so by reason of the person's condition or behaviour at the time or the person was cautioned immediately prior to arrest.

73 Police and Criminal Evidence Act 1984 Code C (Revised Code of Practice for the detention, treatment and questioning of persons by Police Officers), July 2018 at 10.5. There are some specified situations where there is a restriction on drawing adverse inferences from silence, such as where the person is detained and has not had the opportunity to access legal advice. In such situations, the caution to be given is: "You do not have to say anything, but anything you do say may be given in evidence.": at Annex C (2). See also Michael Zander *Zander on PACE: The Police and Criminal Evidence Act 1984* (8th ed, Sweet & Maxwell, London, 2018) at [6-40].

5.75 The Auckland District Law Society thought it was important for defendants to be given a special caution so they can make a fully informed decision about whether to remain silent or to give a statement, given the potential for serious negative consequences at their trial. It noted that, in recent years, most defendants undergo a police investigation without the assistance of counsel. An individual submitter thought the current caution given to suspects could lead them to feel they had been trapped. The submitter said the Act should contain a special caution of the kind used in England and Wales or Australia.

5.76 The New Zealand Law Society said that many suspects are under a great deal of stress when questioned by a police officer. It noted the power imbalance between suspects and police officers and that many suspects have limited educational levels and difficulty dealing with information under pressure. Against that background, the New Zealand Law Society was concerned that a special caution warning suspects of the "risks" of staying silent could unfairly add to the existing pressure on suspects. It thought the existing caution should continue to be given and said that lawyers are best placed to advise their clients on the consequences of providing a statement or staying silent.

5.77 BVA was also concerned about the risk of a special caution placing pressure on the suspect to provide an explanation, thereby undermining both the right to silence and the privilege against self-incrimination.

5.78 Similarly, the Public Defence Service submitted that, while a caution was proposed as a protection for the defendant, in reality, it would give the false impression that a suspect is "better off" by giving a statement. The Public Defence Service thought there is a real risk this could seriously erode the right to refrain from making a statement (in section 23(4) of NZBORA). It did not think the current caution used by Police is misleading suspects. Both the Public Defence Service and the New Zealand Law Society said it is almost always in the suspect's best interests to stay silent initially (at least until they have received some preliminary advice from their lawyer).[77]

5.79 The Public Defence Service said the special caution used in New South Wales, which requires a legal representative to be present when it is given, appears to be causing significant problems. It noted that funding has not been provided for on-duty lawyers to be available at police stations for the purposes of the special caution. It also referred to reports of some New South Wales lawyers effectively preventing police officers from giving special cautions by refusing to attend the police station on behalf of their client (on the basis this would prejudice their client's position as the special caution would be able to be given).[78]

5.80 The Criminal Bar Association said that, if adverse inferences are permitted to be drawn from pre-trial silence, there is some appeal in requiring suspects to be cautioned about that possibility. However, it expressed concern that a special caution could become overly complicated.

---

74 The Auckland District Law Society, Elisabeth McDonald and one individual submitter.

75 BVA, the New Zealand Law Society and the Public Defence Service.

76 The Criminal Bar Association and the New Zealand Bar Association.

77 The Public Defence Service said there was generally no benefit to a defendant providing a wholly exculpatory statement because s 21 of the Evidence Act prevents the defendant from relying on it as evidence if they do not give evidence, and s 35 prevents reliance on it if they *do* give evidence.

78 It referred to an article from the *Sydney Morning Herald*: Emma Partridge "Right to silence drives lawyers to not show up for clients at police stations" *Sydney Morning Herald* (Online ed, Sydney, 21 July 2015).

5.81 The New Zealand Bar Association said the prevailing view in England and Wales was that the special caution used there was cumbersome to administer and complicated. It said as a result of the caution given there, counsel who are present at the police interview often do not continue to represent the defendant at trial (so that if criticism is made of the interview process and the advice given by counsel to their client, they will not be conflicted). The New Zealand Bar Association said if this were to happen in New Zealand, there would be serious difficulties in finding enough senior counsel willing to take the time to give advice at the police station in circumstances where their future involvement in the case is likely to be ruled out.

5.82 The New Zealand Bar Association said if the Act were amended to permit the drawing of adverse inferences about a defendant's pre-trial silence (which it did not support), an appropriately tailored caution would be essential.

5.83 The feedback from our judicial advisory committee was that it would be difficult to have a sufficient caution as it would be too complex.

Our view

No amendment to the Act is required

5.84 We do not consider section 32 should be amended to make the drawing of adverse credibility inferences from a defendant's pre-trial silence conditional on the defendant having received a special caution about that possibility.

5.85 We note the caution given in England and Wales has been subject to criticism on the basis that it is overly complex and confusing for suspects to understand.[79] Concerns have been raised in relation to suspect understanding of the (almost identically worded) special caution in New South Wales.[80] As we noted above, the distinction between the permissible and impermissible inferences that can be drawn from a defendant's silence is a fine one and we consider it would be difficult to capture this distinction in a standard caution.

5.86 Although a special caution is intended to assist defendants by ensuring they are fully informed about the possible implications of exercising the right to silence, the emphasis on the risks of silence may have the unintended effect of pressuring defendants to speak. In light of this, we are concerned that what at first appears to be a rights-protective measure might actually have the potential to erode rights by giving suspects the impression that answering questions places them in a better position.

---

79 See, for example, Hannah Quirk *The Rise and Fall of the Right of Silence* (Routledge, Oxon, 2017) at 63–64. The author notes that the caution had been described as "gobbledegook" and cites research stating that one-third of surveyed police officers were unable to provide an adequate explanation of the sentence "it may harm your defence if you do not mention when questioned something which you later rely on in Court". She also notes that, due to the complex nature of the caution, police have been observed 'translating' the caution for suspects and adding comments such as "now is the time to speak": at 63–64. See also Susanne Fenner, Gisli H. Gudjonsson and Isabel C H Clare "Understanding of the Current Police Caution (England and Wales) Among Suspects in Police Detention" (2002) 12 J Community Appl Soc Psychol 83. This study found that, when the caution was presented in its entirety, no participant provided a correct explanation for all three sentences, yet 96 per cent of participants stated that they had understood it.

80 David Dixon and Nicholas Cowdery "Silence Rights" (2013) 17(1) AILR 23 at 30–31. The authors say that indigenous people may face particular problems with the special caution (based on research on experience with the "comparatively simple standard caution").

5.87 Further, as demonstrated overseas, difficulties might arise where a lawyer is required to advise an accused in relation to a special caution. For instance, defence counsel might have to give evidence at trial about the advice given in response to the special caution, which would prevent them from acting for the defendant at trial.

5.88 We have therefore concluded that drawing adverse inferences about a defendant's credibility from pre-trial silence should not be conditional on the defendant having been cautioned about that possibility. We consider this would be undesirable because of the risk a special caution may cause suspects to feel pressure to speak, the concerns that have arisen with special cautions in other jurisdictions and the difficulty of capturing the status quo in a caution.

THE RELATIONSHIP BETWEEN SECTION 32 AND THE VERACITY PROVISIONS

Issues Paper

5.89 Our Issues Paper explained that Elisabeth McDonald, writing in 2012 and 2013, had noted a possible tension between section 32 and the Act's veracity rules.[81] She suggested that, if section 32 is seen as permitting unfavourable inferences about a defendant's credibility to be drawn from pre-trial silence, including inferences about a defendant's veracity, the evidence would be subject to the veracity rules and would therefore need to be "substantially helpful" in order to be admitted.[82] She suggested that, in most circumstances, it would be hard to argue that the fact of pre-trial silence would be substantially helpful in assessing the veracity of the defendant.

5.90 Elisabeth McDonald noted it is also arguable that section 32 only permits unfavourable inferences about a defendant's credibility to be drawn from pre-trial silence in the sense of *probative* credibility rather than *moral* credibility.[83] She says use of the defendant's pre-trial silence in this way would fall outside the veracity rules.

5.91 In our Issues Paper, we noted we were unable to identify any case where comment on a defendant's pre-trial silence was permitted in order to suggest the defendant lacked veracity or any case where it was suggested that both section 32 and the veracity rules were engaged. For that reason, we did not think the relationship between section 32 and the veracity provisions was causing any issues in practice. We sought feedback from submitters on whether they were aware of any difficulties.

Consultation

5.92 We received eight submissions on this issue. The submission from Elisabeth McDonald said that, based on her reading of the cases, she suspects there is still some ambiguity in terms of what is treated as veracity evidence and what goes to credibility.

---

81 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [5.50]–[5.52], citing Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 262–263; and Elisabeth McDonald "Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006" (2013) 44 VUWLR 573 at 583.

82 Elisabeth McDonald noted that if offered by the prosecution, the evidence would be subject to s 38 of the Act. This requires the prosecution to obtain permission from the judge to offer evidence about a defendant's veracity and requires the defendant to have first given evidence about their veracity or to have challenged the veracity of a prosecution witness.

83 She uses the term "probative credibility" to refer to reliability and the term "moral credibility" to refer to veracity.

5.93 The other submitters said the relationship between section 32 and the veracity provisions is not causing any problems in practice.[84] BVA said that, while the veracity overlay has the potential to be confusing, it has not been an issue in practice because pre-trial silence is not used to attack general veracity. Police said usually where section 32 applies, the prosecutor is attempting to challenge the defendant's credibility in relation to facts at issue in the present trial, which does not trigger the veracity rules in section 37.

Our view

5.94 We have concluded that, in the absence of further evidence that the relationship between section 32 and the Act's veracity rules is causing difficulties in practice, legislative amendment is not necessary or desirable.

84 The Auckland District Law Society, BVA, the Criminal Bar Association, Crown Law, the New Zealand Bar Association, the New Zealand Law Society and Police.

CHAPTER 6

Unreliable statements

INTRODUCTION

6.1 Evidence of a statement made by a defendant is generally admissible in a criminal proceeding unless it is excluded under section 28 (exclusion of unreliable statements), section 29 (exclusion of statements influenced by oppression) or section 30 (improperly obtained evidence).[1]

6.2 This chapter focuses on section 28. The section is concerned with "threshold reliability", that is, whether a defendant's statement is sufficiently reliable to be considered by the fact-finder at trial.[2] Section 28 applies where the prosecution seeks to offer evidence of a statement made by the defendant and the defendant, a co-defendant or the judge raises the issue of the reliability of the statement.[3] 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.[4]

6.3 In this chapter, we consider the following:

- Whether the truth or falsity of a statement should be relevant in assessing its reliability. After the Act came into force, there were conflicting decisions on this issue.[5] In 2015, the majority of the Supreme Court in *R v Wichman* found that truth is relevant under section 28.[6] In our Issues Paper, we asked whether that is the correct approach in light of the earlier uncertainty.
- Whether defendants should be able to be cross-examined about the truth or falsity of their statement at a pre-trial hearing or voir dire[7] to determine its admissibility under section 28.

---

1 Evidence Act 2006, s 27.

2 If the threshold for reliability is crossed, it is ultimately for the fact-finder to decide the weight to be given to the evidence, having assessed the credibility of the witnesses and all the surrounding circumstances going to reliability.

3 Section 28(1).

4 Section 28(2). This requirement does not apply if the statement is offered only as evidence of the physical, mental, or psychological condition of the defendant at the time the statement was made or as evidence of whether the statement was made: s 28(3).

5 For a discussion of the earlier case law, see Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.80]–[3.84].

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

7 Where an issue of admissibility arises at trial, the judge may declare a "voir dire". A voir dire is where evidence from the defendant is heard (usually without the presence of the jury). At the voir dire, the defendant is able to testify without committing himself or herself to testifying at the trial proper. See Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [ED4.07].

- Whether the Act adequately addresses concerns about the reliability of evidence obtained through undercover operations and/or its potential to unfairly prejudice the defendant.[8]

6.4 We conclude that no amendment is required to section 28 to clarify whether the truth of a statement is relevant in assessing its reliability. The current law under *Wichman* is sufficiently clear and consistent with the policy underlying section 28. While the focus under section 28 should be on the circumstances in which the statement was made, judges should be able to consider any obvious indications that a statement is true or false.

6.5 We also do not consider it desirable to expressly prohibit cross-examination of a defendant about the truth or falsity of their statement at a pre-trial hearing or voir dire. Such a prohibition may unduly constrain the ability of judges to take a pragmatic approach when determining what questions are permissible. The guidance provided in *Wichman* should be sufficient to avoid a pre-trial hearing becoming a 'mini-trial'.

6.6 Lastly, in relation to undercover operations, we suggest:

- consideration could be given to developing a separate Practice Note on Police Questioning for undercover operations; and
- judges should consider warning juries about the need for caution in relying on incriminating statements made during undercover operations.

THE RELEVANCE OF TRUTH IN ASSESSING RELIABILITY

6.7 The relevance of truth in assessing reliability was considered by the Law Commission during the 1990s and remained a contentious issue during the development and passage of the Evidence Bill.[9] As enacted, section 28 does not specifically state whether truth is relevant or not.[10]

6.8 After the Act came into force, there was conflicting case law about the relevance of truth to the reliability assessment.[11] In 2013, the Commission recommended section 28 should be amended to provide that the truth of a statement is irrelevant.[12] This was intended to ensure that judges considering threshold reliability did not usurp the function of the jury. The recommendation was not accepted by the Government due to concerns that a blanket rule would be too restrictive.

---

8 We note this issue was discussed in Chapter 7 of our Issues Paper (Improperly obtained evidence): Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

9 The history of section 28 is discussed in our Issues Paper at [6.5]–[6.17]: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

10 Section 28(2) provides that, once the reliability of a statement has been raised as an issue, "[t]he 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".

11 For a discussion of the earlier case law, see Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.80]–[3.84].

12 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.85]–[3.87]. The relevance of truth was also considered by the Commission prior to the enactment of the Evidence Act and by the select committee that considered the Evidence Bill.

The Supreme Court's decision in *Wichman*

6.9 The relevance of truth under section 28 was considered by the Supreme Court in 2015 in *R v Wichman*.[13] The statement at issue in *Wichman* was a confession made by the defendant in the context of a 'Mr Big' operation. This is a type of undercover operation that ultimately leads to an interview between the suspect and an undercover police officer (purportedly the head of a criminal organisation) designed to elicit a confession.[14] Four of the judges concluded that truth is relevant in determining reliability under section 28.[15] The Chief Justice disagreed.[16]

6.10 The majority accepted section 28 does not permit a "mini trial" before the judge to determine the truthfulness of the statement for the purposes of assessing its reliability.[17] At the same time, however, they considered it would be "incongruous … if an obviously true confession were to be excluded on the basis of a theoretical likelihood that the circumstances in which it was made may have affected its reliability".[18] They therefore concluded that the congruence between the statement and the objective facts, as well as the general plausibility of the statement, is relevant under section 28.[19]

6.11 Glazebrook J reached a similar view in her separate judgment, concurring with the majority on this issue. She observed:[20]

> As the main justification in policy terms for excluding a statement is because of concerns about reliability, then it would not be a sensible policy choice to exclude a statement which subsequent evidence shows to have been actually true. To exclude a confession that is true merely because, absent the subsequently discovered evidence, it risked being unreliable would be contrary to the policy of s 28 and would not be conducive to public confidence in the criminal justice system.

6.12 The Chief Justice, in her dissenting judgment, considered that the wording and history of section 28 suggest it is concerned with the circumstances in which the statement was made, not its actual reliability.[21] She saw this interpretation as consistent with the broader policy of the Act in that it would avoid prolonging proceedings, raising matters of fact not easily resolved in pre-trial determinations of admissibility and intruding on the task of the jury.[22]

---

13 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753. The factual background and the different judgments on the issue of reliability in *Wichman* are summarised in our Issues Paper at [6.20]–[6.33]: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* 2006 (NZLC IP42, 2018).

14 A "Mr Big" operation involves undercover officers recruiting a suspect into a bogus criminal organisation. The officers gain the suspect's trust by having them perform a series of supposedly criminal acts in exchange for payment. The operation culminates in an interview with the supposed head of the organisation, for the ostensible purpose of the suspect gaining full admission to the organisation. He tells the suspect they must be completely honest about their past and promises to ensure they will not be prosecuted for any offending admitted.

15 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [83]–[84] per William Young J (giving the judgment of William Young, Arnold and O'Regan JJ) and [432]–[433] per Glazebrook J.

16 At [280]–[285].

17 At [83]–[84].

18 At [83] per William Young J (giving the judgment of William Young, Arnold and O'Regan JJ).

19 At [84].

20 At [433].

21 At [280]–[281].

22 At [283].

Issues Paper

6.13 In our Issues Paper, we explained that *Wichman* had prompted us to reconsider whether truth should be relevant to determining admissibility under section 28. We noted that, prior to the Act coming into force, judges were not permitted to inquire into the truth of a statement obtained through inducements by a person in authority. The rationale for this rule was to avoid encouraging improper police conduct.

6.14 Under the Act, however, section 28 is principally concerned with whether the statement is sufficiently reliable to be considered by the fact-finder at trial. It does not focus on whether police acted improperly.[23] The potential unreliability does not need to stem from the conduct of a person in authority (such as a police officer). It may arise from factors internal to the defendant, such as their mental condition at the time, whether or not this was outwardly apparent.[24]

6.15 We expressed the view that it may be undesirable to require courts to ignore actual indications as to the truth or falsity of a statement, particularly where the potential unreliability stems from factors internal to the defendant. We suggested that disregarding the truth of a statement is arguably inconsistent with the policy underlying section 28.

Consultation

6.16 Seven submitters considered truth should be relevant in determining admissibility under section 28.[25] They considered the administration of justice would be brought into disrepute if unquestionably true statements were excluded under section 28. They considered judges and counsel could make sensible decisions about what sort of material ought to be considered so as to avoid conducting a 'mini-trial' at a pre-trial hearing or usurping the role of the fact-finder.

6.17 The Criminal Bar Association, the New Zealand Law Society and the Public Defence Service disagreed with the view that truth should be relevant.[26] They considered it would be inappropriate to determine whether a statement is true at the admissibility stage and attempting to do so would risk turning pre-trial hearings into a 'mini-trial'. They also noted there are likely to be few cases in which a confession being considered under section 28 is clearly true. Finally, they thought that allowing truth to be considered in cases where the potential unreliability stems from police conduct would risk incentivising poor behaviour.

6.18 The Crown Law Office advised us that the position set out by the majority and Glazebrook J in *Wichman* is now accepted and has been applied in subsequent cases. Our judicial advisory committee considered truth should be relevant when determining admissibility under section 28. They did not see any need to amend the section, as the position is sufficiently clear after *Wichman*. They also noted the factors listed in section 28(4) that a judge must take into account in determining admissibility are not exhaustive.

---

23 Police impropriety is instead addressed by ss 29 (exclusion of statement influenced by oppression) and 30 (improperly obtained evidence).

24 Section 28(4)(a) and (b).

25 BVA The Practice, Crown Law, New Zealand Police and four individual submitters. The members of the New Zealand Bar Association involved in the submission were divided: some considered truth should be relevant but others did not.

26 However, the Criminal Bar Association noted, that, if the truth of the statement could be established through the production of evidence, there might be a case for it to be considered.

Several submitters also supported clarifying that truth is relevant when determining admissibility under section 28.[27]

Our view

No amendment to the Act is required

6.19 We consider the approach of the majority and Glazebrook J in *Wichman* is correct. While the focus of section 28 is on the circumstances surrounding the making of the statement, that should not prevent judges from considering any obvious indications that the statement is true or false. The policy underlying section 28 is to prevent a fact-finder from relying on a defendant's statement where it would be unsafe to do so. Where there are obvious indications that a statement is true or false, that will be relevant to the actual reliability of the statement. Preventing judges from having regard to those indications would be artificial and contrary to the policy of the section.

6.20 We considered whether a different approach is required where the potential unreliability of a statement stems from factors external to the defendant, such as the conduct of police officers. In such cases, there is a stronger argument for disregarding indications of truth, as excluding the statement could be considered necessary to discourage improper police practices.

6.21 Ultimately, however, we have decided that judges should not be prohibited from considering the actual truth of a statement in such cases. There are other sections in the Act specifically designed to address police impropriety. Section 30 provides for the exclusion of improperly obtained evidence, including statements that are obtained unfairly (such as through a breach of the Practice Note on Police Questioning). Section 29 deals with statements that are influenced by oppression. Applying different rules where the unreliability stems from internal versus external factors is likely to create confusion, particularly where there is a mixture of both kinds of factors.

6.22 We emphasise that a reliability hearing should not become a 'mini-trial' to determine the truth of a statement. The primary focus should be on the circumstances in which the statement was made. We endorse the following principles identified in the judgments of the majority and Glazebrook J in *Wichman*:

- The circumstances in which the statement was made should be assessed before considering actual reliability.[28]
- The stronger the circumstances pointing to a risk that the confession is unreliable, the stronger the indicators of actual reliability should be.[29]
- The degree of congruence between what is asserted in the statement and the objective facts is relevant in assessing reliability, as is the general plausibility of the statement.[30] For example, the statement may refer to aspects of the crime that only

---

27 BVA, the New Zealand Bar Association, the New Zealand Law Society, the Public Defence Service and one individual submitter.

28 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [434] per Glazebrook J.

29 At [435] per Glazebrook J.

30 At [84] per William Young J (giving the judgment of William Young, Arnold and O'Regan JJ).

the offender would know, or evidence may have been discovered as a consequence of the statement that corroborates its contents.[31]

- That said, care must be taken in assessing a confession's consistency with other evidence. Knowledge of that other evidence might not come from being a perpetrator but from other sources (such as from police, whether advertently or inadvertently).[32] Apparent indicators of reliability within the statement (such as emotion, general plausibility and sensory details) should also be regarded with caution as they have been present in confessions proven to be false.[33]
- Any finding on actual reliability should normally be made only where there is other clear and independent evidence of reliability.[34] Relying solely on a confession will almost certainly be too dangerous in cases where the circumstances raise a significant risk of a false confession.[35]
- A judge may decide that a statement is reliable enough to go to the jury even if there are inconsistencies with other evidence.[36]
- The reliability hearing is not a 'mini-trial'.[37] The judge is not engaged in an exercise of assessing the truth or otherwise of the admission but merely taking into account the contents of the statement and any "obvious indications of reliability or unreliability with regard to other aspects of the case".[38]

6.23 In our view, the guidance given in *Wichman* is sufficiently clear. The *Wichman* decision has been applied in subsequent cases without apparent difficulty.[39] We therefore do not consider any amendment to section 28 is required.

CROSS-EXAMINATION ON THE TRUTH OF THE STATEMENT

Issues Paper

6.24 In our Issues Paper, we also considered whether a defendant should be able to be cross-examined about the truth of the statement at a pre-trial hearing or voir dire to determine admissibility under section 28 ('the admissibility hearing'). We queried whether this would be appropriate, given that section 28 deals with the threshold question of whether the evidence is sufficiently reliable to be considered by the fact-finder. Permitting cross-examination at the admissibility hearing would arguably usurp the function of the jury.

6.25 We also noted the possibility that difficulty could arise in cases where the defendant combines arguments of unreliability under section 28 and oppression under section 29.

---

31 At [81] per William Young J (giving the judgment of William Young, Arnold and O'Regan JJ) and [422] and [433] per Glazebrook J.

32 At [436] per Glazebrook J.

33 At [436] and [394] per Glazebrook J.

34 At [438] per Glazebrook J.

35 At [438] per Glazebrook J.

36 At [438], n 490 per Glazebrook J.

37 At [84] per William Young J (giving the judgment of William Young, Arnold and O'Regan JJ).

38 At [431] per Glazebrook J.

39 See, for example, *Lyttle v R* [2017] NZCA 245 at [46]; *Mark v R* [2017] NZCA 223 at [22]; and *Walker v R* [2017] NZCA 188 at [58] and [66]. See also *R v RK* [2016] NZYC 323, [2017] DCR 180 at [29]–[32] and [35].

Section 29(3) prohibits consideration of the truth of a statement when determining whether it should be excluded on the basis of oppression.

6.26 The majority in *Wichman* did not address whether the defendant may be cross-examined on the truth of a statement at an admissibility hearing where section 28 is at issue. Glazebrook J considered that, where the defendant gives evidence at the admissibility hearing, the Crown should:[40]

- put to the accused for comment the matters that will be relied on to indicate that the statement is reliable; but
- not extensively challenge any assertion made by the defendant that the statement was false.

Consultation

6.27 Six submitters addressed this issue.[41] Four of those did not think cross-examination of the defendant on the truth or falsity of the statement should be permitted.[42]

- The New Zealand Bar Association, the New Zealand Law Society and New Zealand Police considered this was unnecessary for determining threshold reliability and would prolong the proceeding.
- Police and the Public Defence Service considered it would usurp the function of the jury.
- The New Zealand Bar Association submitted that it would require the defendant to reveal too much of their defence in advance of the trial proper.
- The New Zealand Law Society expressed concern that it could have a "chilling effect" on the defendant's ability to challenge the admissibility of the statement, as their answers to cross-examination at the admissibility hearing could be used against them in the trial proper.[43]

6.28 Two submitters, BVA The Practice[44] and Crown Law, did not think it was appropriate to prohibit cross-examination. Crown Law thought the issue was context-specific and it would be difficult to draw a bright line in the Act between permissible and impermissible questions. It considered *Wichman* had made it sufficiently clear that the assessment of reliability does not involve a 'mini-trial' to determine the truth of the statement. BVA considered that, as a matter of fairness, it should be open to the prosecution to cross-examine the defendant if the reliability of their statement is challenged.

6.29 We also discussed this issue with our judicial advisory committee. The committee noted it is the defendant's choice whether to give evidence at the admissibility hearing, and the onus is on the prosecution to establish threshold reliability. Therefore, it was suggested

---

40 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [439].

41 BVA, Crown Law, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

42 The New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

43 Under s 15 of the Evidence Act, evidence given to prove the facts necessary to determine admissibility of other evidence is admissible in the proceeding if the witness gives evidence in the proceeding that is inconsistent with it.

44 This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

there is no reason to prohibit cross-examination of the defendant on the truth of the statement.

Our view

Cross-examination should not be prohibited

6.30 We consider it would be undesirable to introduce a general prohibition on cross-examining the defendant on the truth of the statement at the admissibility hearing. We emphasise the defendant is under no obligation to give evidence at the admissibility hearing. If they choose to do so, the judge should have the flexibility to determine the appropriate scope of questioning in the context of the particular case.

6.31 We consider the concerns raised by submitters can be addressed without introducing a general prohibition. As Glazebrook J suggested in *Wichman*, judges should ensure questioning is limited to what is required to determine threshold reliability.[45] It should not involve substantial attempts by the Crown to challenge the defendant's assertion that the statement is untrue. This approach will ensure the admissibility hearing does not become a 'mini-trial' at risk of needlessly prolonging the proceedings and/or usurping the function of the jury.

6.32 Where admissibility is also being challenged under section 29 (and section 29(3) prohibits consideration of the truth of the statement), we consider the judge will be best-placed to determine the appropriate approach. We do not think this would necessarily require two separate admissibility hearings, although that approach may be considered appropriate in some cases. The focus of section 29 is on whether oppressive conduct has occurred, not on the reliability of the evidence itself. The judge may well be able to set aside any evidence about the truth of the statement when making that assessment. We note that judges sitting on judge-alone trials are routinely required to disregard evidence that has been excluded (for example, because it is unreliable or was improperly obtained).

EVIDENCE OBTAINED DURING UNDERCOVER OPERATIONS

6.33 In our Issues Paper, we sought submitters' views on two questions relating to undercover police operations:

- Whether the Chief Justice's Practice Note on Police Questioning (the Practice Note) should apply to undercover operations.[46]
- Whether sections 28 and 8[47] adequately address concerns about reliability and unfair prejudice that may arise in relation to undercover operations that are designed to secure incriminating statements and/or involve recruiting the target into a fictitious criminal organisation.

---

45 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [439].

46 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

47 Section 8(1)(a) requires a judge to exclude evidence if its probative value is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding.

Practice Note on Police Questioning

6.34 The Practice Note requires Police to provide advice to people in custody, or in relation to people where there is sufficient evidence to lay a charge, about the right to silence and the right to consult and instruct a lawyer without delay.[48] It also prevents questioning of people in a manner that amounts to cross-examination.[49] The Act requires a judge to take the Practice Note into account when determining whether evidence was obtained "unfairly" (and therefore improperly) for the purposes of section 30.[50] Section 30 sets out a balancing process for determining whether improperly obtained evidence is admissible in a criminal proceeding.

6.35 The Supreme Court considered whether the Practice Note applied to undercover operations in *R v Wichman*.[51] As noted above, that case concerned the admissibility of confession evidence arising out of a Mr Big undercover police operation.[52]

6.36 The majority of the Court in *Wichman* found the Practice Note did not directly apply to undercover police officers as it was "intended to govern the conduct of police officers acting as such and thus with the ability to deploy the coercive power of the state".[53] However, they accepted there could be circumstances in which an undercover operation amounted to an improper circumvention of the constraints on police interrogation because of how it was carried out.[54]

6.37 Both Elias CJ and Glazebrook J dissented on this issue. They considered the Practice Note did apply to undercover officers and that this was necessary to uphold the fundamental values of the criminal justice system.[55] They emphasised the issue would only arise where the operation culminated in an interrogation.[56]

Issues Paper

6.38 We expressed the preliminary view in our Issues Paper that it was difficult to see how the procedures contemplated by the Practice Note could apply to undercover operations without exposing the operation and potentially endangering undercover officers.

6.39 We also noted that concerns around how undercover operations are conducted had already been considered by the Commission and the Ministry of Justice in their report *Review of the Search and Surveillance Act 2012*.[57] The report, which is still under consideration by the Government, recommended including a "covert operations" regime

---

48 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297, r 2.

49 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297, r 3.

50 Section 30(6).

51 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753. *Wichman* is discussed at [6.20] and [7.73]–[7.78] of our Issues Paper: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

52 See above at [6.9].

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

54 At [108]–[115].

55 At [333] per Elias CJ and [473]–[476] per Glazebrook J.

56 At [348] per Elias CJ and [488] per Glazebrook J.

57 Law Commission and Ministry of Justice *Review of the Search and Surveillance Act 2012 – Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2017), ch 15.

in the Search and Surveillance Act 2012. The regime would place prospective constraints on the circumstances and manner in which undercover operations can be conducted.

Consultation

6.40 Four submitters thought the Practice Note should apply to undercover police officers.[58] They considered police should not be able to circumvent the protections in the Practice Note where an undercover operation involves an interrogation or where inducements are offered to confess.

6.41 Five submitters disagreed.[59] They considered the Practice Note could not be applied to undercover operations without undermining their efficacy and/or compromising the safety of undercover police officers. However, BVA thought there may be merit in developing a separate practice note for undercover officers. The Criminal Bar Association also noted that it may be desirable for there to be some limits on the questioning of suspects in the context of undercover operations.

6.42 We also discussed this issue with the members of our judicial advisory committee. They did not see how the Practice Note could realistically apply to undercover officers.

Our view

A new practice note could be considered

6.43 If the Practice Note were to apply to undercover operations, it would likely prevent certain types of undercover operations (such as Mr Big or other scenario operations) from being carried out. An operational review of the Evidence Act is not the appropriate place to determine whether that is desirable, nor should the applicability of the Practice Note be considered in isolation from broader questions about the validity of undercover operations. These questions would be better addressed by Government in the context of considering the recommendations made by the Commission and the Ministry of Justice in their review of the Search and Surveillance Act.[60]

6.44 Depending on the view ultimately reached on those recommendations, it may be appropriate to develop a separate practice note or guidelines relating to the questioning of suspects during undercover operations. We consider a separate practice note would be preferable to applying the existing Practice Note. Different considerations arise in undercover operations. For example, as the majority observed in *Wichman*:[61]

> … if the Practice Note had been intended to address the conduct of undercover officers it would have addressed in some detail the circumstances in which a caution is required (perhaps when the interaction is in the nature of a discussion about past offending, as in *Meyers*) and those where it is not, for instance in an orthodox infiltration of a criminal organisation intended to ascertain information in relation to current offending. There would also have been a need to distinguish between the questions which an undercover officer can legitimately ask about past offending (perhaps along the lines of that seen as acceptable in *Christou*) and those which are unacceptable.

---

58 The New Zealand Bar Association, the New Zealand Law Society and two individual submitters.

59 BVA, the Criminal Bar Association, Crown Law, the Public Defence Service and one individual submitter.

60 The recommendations are discussed above at [6.39].

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

6.45 If a separate practice note is considered desirable, it would appear to be possible for the Chief Justice to issue one without any amendment to the Act. Section 30(6) requires judges to "take into account guidelines set out in practice notes … issued by the Chief Justice" when deciding whether a statement was obtained unfairly. This wording is broad enough to cover additional practice notes.

6.46 We emphasise that the current law under *Wichman* does not treat the Practice Note as irrelevant to undercover operations. If undercover police officers were to conduct what is effectively an interrogation, any confession made may well be found to be unfairly obtained on the basis that the constraints on police questioning have been improperly circumvented. The confession may then be excluded from the proceeding, depending on the outcome of the section 30 balancing process.[62]

Concerns about reliability and unfair prejudice

6.47 In our Issues Paper, we explained that undercover operations aimed at securing incriminating statements may give rise to concerns about reliability and unfair prejudice:

- Reliability: For example, in a Mr Big operation the suspect may be pressured to confess or disclose information in a context where they are "led to believe that such a confession will bring about the benefits associated with membership of [a criminal] organisation without resulting in adverse consequences".[63] Inducements of this kind can create a real possibility of a false confession.[64]
- Unfair prejudice: Where the undercover operation involves recruiting the suspect into a fictitious criminal organisation and/or having them perform supposedly criminal acts, this may taint the jury's perception of them.[65]

6.48 There are some general provisions in the Act that may help to address these concerns. As discussed above, section 28 provides for the exclusion of unreliable statements. In addition, section 8(1)(a) requires a judge to exclude evidence if its probative value is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding.

6.49 In our Issues Paper, we noted that the Supreme Court of Canada, in response to concerns about reliability and unfair prejudice, adopted a rule that confessions made in the context of Mr Big operations are presumptively inadmissible.[66] They may only be relied on if the Crown establishes on the balance of probabilities that the probative value of the confession outweighs its prejudicial effect.

6.50 We also referred to two other possible ways of addressing concerns about reliability and/or unfair prejudice if the existing provisions in the Act are considered to be insufficient. First, the Act could be amended to include a specific reliability rule for

62 See Chapter 7 for a more detailed discussion of section 30.

63 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [74].

64 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [74]. The majority observed at [20] that the risk of a false or overstated confession had crystallised in some Canadian cases (referring to *R v Unger* (1993) 85 Man R (2d) 284 (MBCA); *R v Unger* 2005 MBQB 238, (2005) 196 Man R (2d) 280; and *R v Bates* 2009 ABQB 379, (2009) 468 AR 158).

65 See *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [21]; and *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [73].

66 *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [85] and [152].

confessions made in the context of Mr Big (or similar) undercover operations.[67] Second, juries could be warned not to misuse evidence of fake criminal offending and to consider carefully whether confession evidence is reliable.[68]

Consultation

6.51 Eight submitters addressed this issue.[69] Two submitters (Crown Law and Police) considered that sections 28 and 8 of the Act adequately address concerns about reliability and unfair prejudice that can arise in relation to Mr Big operations. Police said these concerns are at the forefront of officers' minds when undercover operations are planned and undertaken.

6.52 Six submitters did not think concerns around reliability and unfair prejudice were adequately addressed by the current provisions in the Act.[70] Five of these submitters (including the Public Defence Service) supported a presumption that confessions obtained through Mr Big operations are inadmissible, as has been adopted in Canada.[71] The New Zealand Bar Association and one individual submitter also suggested a heightened reliability threshold for incriminating statements made during Mr Big operations, requiring the Crown to prove beyond reasonable doubt that the statement is reliable. Three submitters suggested amending the Act to expressly provide for jury warnings about the danger of unreliable confessions being made in the course of a Mr Big operation.[72]

6.53 Our judicial advisory committee considered the existing mechanisms in the Act for challenging evidence gathered during the course of a Mr Big operation were sufficient.

Our view

A statutory "presumptive inadmissibility" approach is unnecessary

6.54 We consider section 28 of the Act is already likely to achieve a similar result to the "presumptive inadmissibility" approach adopted in Canada. Under section 28, the defendant need only raise the issue of reliability on the basis of an evidential foundation.[73] It is also open to the judge to raise the issue of reliability.[74] Once the issue is raised, the statement is presumptively excluded unless the judge determines otherwise.[75] Raising an

---

67 We suggested the rule could require consideration of factors such as the length and scale of the operation, any inducements offered to the suspect or pressures to confess and whether the personal characteristics of the suspect made them particularly vulnerable: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [7.90].

68 As suggested by Glazebrook J in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [533].

69 BVA, Crown Law, the New Zealand Bar Association, the New Zealand Law Society, Police, the Public Defence Service and two individual submitters.

70 BVA, the New Zealand Bar Association, the New Zealand Law Society, the Public Defence Service and two individual submitters.

71 The New Zealand Bar Association, the New Zealand Law Society, the Public Defence Service and two individual submitters.

72 The New Zealand Bar Association, the Public Defence Service and one individual submitter.

73 Section 28(1)(a).

74 Section 28(1)(b).

75 Section 28(2).

evidential foundation is unlikely to be difficult in a case involving a Mr Big operation. As the majority of the Supreme Court observed in *Wichman*:[76]

> [77] A defendant who has made a confession in a Mr Big interview will always be able to point to the inducing effect of the promises and, because such promises and representations are always conditional on the suspect "passing" the Mr Big interview, to implicit threats (for instance as to continued association with the organisation) which are the other side of the coin to such promises.
>
> [78] Leaving aside cases in which it might be thought that no practical issue of reliability arises — for instance because, as in *Mack* and *Cowan*, the previously undiscovered remains of a murder victim have been located — such a defendant will have no difficulty in invoking s 28. ...

6.55 We are therefore not persuaded that amending section 28 to adopt a "presumptive inadmissibility" approach is necessary or desirable. While some submitters supported such an amendment, they did not point to any situations in which the need to raise an evidential foundation has proved problematic.

6.56 We also note that section 28 does not limit the matters a judge can take into account in assessing whether to admit a statement.[77] There is room to take into account factors more specific to undercover operations. For example, it may be appropriate to consider the length and scale of the operation and any particular inducements offered to the defendant or pressures to confess. Section 28(4)(b) already refers to the defendant's personal characteristics, which could include any characteristics that made them particularly vulnerable to pressure or influence.

Judges should consider warning juries about the risk of unreliability

6.57 In cases where confession evidence obtained through a Mr Big operation (or a similar scenario operation) is admitted, we would expect judges to consider warning the jury about the risk of unreliability and the need to avoid making improper use of the evidence about fictitious criminal activity. The suggested directions included as an appendix to Glazebrook J's judgment in *Wichman* may provide a useful starting point in relation to reliability.[78]

6.58 We do not, however, think it is necessary or desirable to amend the Act to expressly permit or require judges to consider giving such a warning. Any such provision would need to specify the types of undercover operations it would apply to. While Mr Big operations are an obvious example, there are likely to be other kinds of operations that give rise to concerns about reliability or unfair prejudice. It would be difficult to accurately anticipate and describe all of the scenarios in which a warning may be appropriate.

6.59 Additionally, where the section 28 test has been satisfied and the evidence is admitted, the residual risk of unreliability may be low in some instances. Where that is the case, a judicial warning may risk over-emphasising the issue.

6.60 For these reasons, we consider it is preferable for judges to assess on a case by case basis whether a reliability or unfair prejudice warning is appropriate.

---

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

77 Section 28(4).

78 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753, appendix to Glazebrook J's judgment.

Specific rules of evidence for undercover operations

6.61 Finally, we note that, while we do not recommend creating specific rules of evidence for undercover operations at this stage, we would not rule it out as an option. Depending on the outcome of the Government's consideration of the recommendations made in the Law Commission and Ministry of Justice's *Review of the Search and Surveillance Act 2012*, specific evidence rules may be considered appropriate in the future.

CHAPTER 7

Improperly obtained evidence

INTRODUCTION

7.1 Under the Evidence Act, evidence is deemed to be "improperly obtained" if it is obtained through a breach of the law (for example, an unreasonable search or seizure),[1] or as a consequence of a statement made by a defendant that would be inadmissible if offered in evidence by the prosecution or unfairly.[2]

7.2 Section 30 of the Act sets out a balancing process for determining whether improperly obtained evidence is admissible in criminal proceedings and specifies factors that may be taken into account as part of that balancing process. The Act does not expressly address the status of improperly obtained evidence in civil proceedings.

7.3 In our Issues Paper, we discussed the following issues relating to the admissibility of improperly obtained evidence that had been raised in case law:

- **Applying the section 30 balancing process:** We noted there had been some uncertainty around the application of section 30, particularly the interpretation and relative weight of the factors the court may take into account. We asked whether section 30 should be more prescriptive about how the balancing process is to be applied, either generally and/or in relation to particular factors.
- **Relevance of exclusion in earlier proceedings to the balancing process:** We asked whether the fact that evidence has been excluded in a previous proceeding should be a factor in the section 30 balancing process favouring admission in the later proceeding.
- **Exclusion of improperly obtained evidence in civil proceedings:** We explained that, while section 30 only applies in criminal proceedings, the Supreme Court has held that improperly obtained evidence can also be excluded in civil proceedings (at least those under the Criminal (Proceedings) Recovery Act 2009).[3] We asked whether the Act should be amended to expressly address the status of improperly obtained evidence in civil proceedings.

---

1 That is, in breach of s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA). See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

2 Evidence Act 2006, s 30(5). For a breach of the law to qualify, it must be by a person to whom s 3 of NZBORA applies (such as a police officer).

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

7.4 The chapter on improperly obtained evidence in our Issues Paper also discussed matters relating to evidence obtained during undercover operations. We have addressed these matters in Chapter 6.

7.5 In this chapter, we do not recommend any amendments to the Act. We conclude the following:

- The section 30 balancing process is necessarily fact-specific. Flexibility needs to be maintained to ensure appropriate outcomes in individual cases. We suggest, however, that 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.
- While we caution against placing significant weight on the fact that improperly obtained evidence has been excluded in earlier proceedings, this should continue to be assessed by the courts on a case by case basis.
- The current position that improperly obtained evidence can be excluded in quasi-criminal proceedings (applying a balancing process similar to section 30) is correct in principle. The courts should be left to develop guidance on the factors to be taken into account in the balancing process and the approach to be taken in other types of civil proceedings.

BACKGROUND

7.6 In a criminal proceeding, the defendant, a co-defendant or the judge may raise an issue as to whether evidence was improperly obtained.[4] Where this occurs, the judge must determine whether the evidence was improperly obtained and, if it was, whether the exclusion of the evidence would be proportionate to the impropriety.[5] This is done through 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".[6]

7.7 Section 30(3) provides a non-exhaustive list of factors that a court may consider in conducting this balancing process:

> For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
>
> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
>
> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
>
> (c) the nature and quality of the improperly obtained evidence:
>
> (d) the seriousness of the offence with which the defendant is charged:
>
> (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
>
> (f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:

4 Evidence Act, s 30(1).

5 Evidence Act, s 30(2).

6 Evidence Act, s 30(2)(b).

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

7.8 Section 30 essentially codified the balancing test outlined by the Court of Appeal in *R v Shaheed.*[7] The main difference is that the test in *Shaheed* only applied to evidence obtained in breach of the New Zealand Bill of Rights Act 1990 (NZBORA), whereas section 30 applies to all improperly obtained evidence.

7.9 Prior to *Shaheed*, evidence obtained in breach of NZBORA would be excluded unless there was good reason to admit it.[8] This prima facie exclusionary rule reflected a view that, where evidence was obtained in breach of NZBORA rights, its exclusion would generally be necessary to vindicate the breach.[9]

7.10 The *Shaheed* balancing test moved away from a 'vindication of rights' approach. It reflected concerns that routine exclusion of crucial, reliable evidence of serious crime would bring the administration of justice into disrepute.[10] It was intended to recognise the importance of the values reflected in NZBORA while also maintaining sufficient flexibility to "ensure that the overall interests of justice are served".[11]

APPLYING THE FACTORS IN SECTION 30(3)

7.11 In our Issues Paper, we sought feedback from submitters on how the factors listed in section 30(3) should be interpreted and whether a more prescriptive approach to the balancing process was required. We also specifically asked the following:

- Whether the centrality of the evidence to the prosecution's case should be considered.
- How the "seriousness" of an offence (section 30(3)(d)) should be measured and whether this factor should favour exclusion or inclusion.
- Whether the availability of alternative techniques (section 30(3)(e)) should favour exclusion or inclusion.

7.12 These questions arose from case law decided since the Act came into force, which we described in some detail in our Issues Paper.[12]

7.13 We also discuss below two other issues that were not addressed in our Issues Paper but were raised by submitters:

- New Zealand Police suggested section 30(3) should be amended to include the "practicalities of policing" as a relevant factor.

---

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

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

[9] See, for example, *R v Te Kira* [1993] 3 NZLR 257 (CA) at 276 per Hardie Boys J; *R v Goodwin* [1993] 2 NZLR 153 (CA) at 194 per Richardson J and at 202 per Hardie Boys J; and *R v Tawhiti* [1993] 3 NZLR 594 (HC) at 597.

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

[11] *R v Shaheed* [2002] 2 NZLR 377 (CA) at [172] per Gault J (concurring with the majority on this point). See also at [192] per McGrath J.

[12] Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [7.14]–[7.44].

- The Public Defence Service and the New Zealand Bar Association suggested section 30 is being applied in a way that is skewed too heavily in favour of admitting improperly obtained evidence.

Centrality of the evidence to the prosecution case

7.14 The centrality of the evidence to the prosecution case was treated as a relevant factor in the *Shaheed* balancing test[13] and was included in the first version of the Evidence Bill in 2005.[14] The Bill treated the centrality of the evidence as part of what is now section 30(3)(c) ("the nature and quality of the improperly obtained evidence") rather than a separate factor. The reference to centrality was removed on the recommendation of the select committee, as the committee could not envisage when it would be relevant given that the seriousness of the offence was covered in the following paragraph.[15]

7.15 In 2011, some members of the Supreme Court in *Hamed v R* considered whether the centrality of the evidence to the prosecution case nonetheless remained a relevant factor under section 30.[16] There was no majority decision on the issue.[17] The Court of Appeal has, however, consistently treated the centrality of the evidence as a relevant factor.[18] There remains some uncertainty about whether the centrality of the evidence should be considered under section 30(3)(c) ("the nature and quality of the improperly obtained evidence") or as an independent factor (as section 30(3) is non-exhaustive).[19]

Issues Paper

7.16 In our Issues Paper, we expressed the preliminary view that the centrality of the evidence to the prosecution case should be a relevant factor favouring admission of the evidence. We considered there is a degree of artificiality in conducting the balancing process without taking this into account. The more important the evidence is, the more likely it is that excluding the evidence will prevent a conviction, which may undermine the credibility

---

13 *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152] per Blanchard J.

14 Evidence Bill 2005 (256–1), cl 26(3)(c).

15 Evidence Bill 2005 (256–2) (select committee report) at 4. As we noted in our Issues Paper, this reasoning has been criticised. Chris Gallavin and Justin Wall have argued that the centrality of the evidence to the prosecution case has a different focus to the seriousness of the offence and it is unrealistic not to take it into account: Chris Gallavin and Justin Wall "*Hamed*: section 30" [2012] NZLJ 116 at 117.

16 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [201] per Blanchard J, at [236]–[237] per Tipping J and at [260] per McGrath J. The other two judges (Elias CJ and Gault J) did not expressly address this issue.

17 Blanchard and McGrath JJ thought the centrality of the evidence to the prosecution case could be considered under section 30: at [201] and [260]. Tipping J disagreed, saying that to treat the centrality of the evidence as a relevant factor would be contrary to clear Parliamentary intent: at [237].

18 *McGarrett v R* [2017] NZCA 204 at [39]; *N v R* [2017] NZCA 140 at [34]; *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [31]; *Murray v R* [2016] NZCA 221 at [180]; *T (CA438/2015) v R* [2016] NZCA 148 at [68]; *Holdem v R* [2014] NZCA 546 at [28(d)]; *Lin v R* [2014] NZCA 47 at [18(f)]; *Hoete v R* [2013] NZCA 432, (2013) 26 CRNZ 429 at [44]; *Tye v R* [2012] NZCA 382 at [36]; *Shirtliff v R* [2012] NZCA 336 at [17]–[19]; and *Te Moananui v R* [2010] NZCA 515 at [47(c)].

19 Some cases have treated the centrality of the evidence to the prosecution case as part of the s 30(3)(c) assessment (*R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [523], n 667 per Glazebrook J; *Holdem v R* [2014] NZCA 546 at [28(d)]; and *Te Moananui v R* [2010] NZCA 515 at [47(c)]) while others have treated it as an independent factor (*McGarrett v R* [2017] NZCA 204 at [39]; *N v R* [2017] NZCA 140 at [34]; *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [31]; *T (CA438/2015) v R* [2016] NZCA 148 at [50]; *Lin v R* [2014] NZCA 47 at [18(f)]; *Hoete v R* [2013] NZCA 432, (2013) 26 CRNZ 429 at [44]; *Tye v R* [2012] NZCA 382 at [36]; and *Shirtliff v R* [2012] NZCA 336 at [18]–[19]). In *Murray v R* [2016] NZCA 221, the Court treated it as a factor "to be weighed along with the seriousness of the offending" in s 30(3)(d): at [180].

and effectiveness of the justice system. We asked submitters whether section 30(3) should be amended to expressly recognise this factor (either as part of section 30(3)(c) or as an independent factor).

Consultation

7.17 We received seven submissions on this issue. Six submitters agreed the centrality of the evidence to the prosecution case should be a relevant consideration.[20]

7.18 Only the New Zealand Bar Association expressly supported amending section 30(3)(c) to include centrality as an additional factor.[21] The New Zealand Law Society considered amendment is unnecessary as the courts already take centrality into account and the absence of an express reference to centrality in section 30(3) is not causing any problems in practice. The New Zealand Law Society was concerned that the inclusion of centrality as an express factor could be seen as legislative endorsement of an "end justifies the means" approach.

7.19 The Public Defence Service did not think the centrality of evidence should be a relevant consideration under section 30. It argued there is no logical basis for the centrality of evidence to favour admission over exclusion. It considered that the more central the evidence is, the more cautious police should be and the more defendants' rights should be protected. The Public Defence Service was concerned that, if centrality is treated as a relevant factor under section 30(3), there is a risk it will become an overwhelming factor in the balancing test.

7.20 Three submitters addressed the question of whether centrality should be an independent factor or part of the "nature and quality" assessment in section 30(3)(c).[22] They all considered centrality was different from the "nature and quality" of the evidence and should be a separate consideration. BVA The Practice[23] said the "nature and quality" factor relates to the type of evidence. For example, mobile phone data may be of low to moderate quality but could be central to a case because of the inferences that can be drawn from it in combination with other evidence.

Our view

7.21 We remain of the view that the centrality of the evidence to the prosecution case may be a relevant factor favouring admission of the evidence. The balancing process in section 30(2)(b) requires a judge to "[give] appropriate weight to the impropriety and [take] proper account of the need for an effective and credible system of justice". If a conviction (particularly for a serious crime) is unlikely to be secured without the evidence, its exclusion is more likely to undermine the credibility of the justice system.[24]

7.22 The balancing process must also, however, give appropriate weight to the impropriety. The centrality of the evidence should not be used to justify the admission of improperly

---

20 The Auckland District Law Society, BVA The Practice, the New Zealand Bar Association, the New Zealand Law Society, Police and one individual submitter.

21 One other submitter suggested that including centrality as an express factor might be desirable if s 30(3) were to be amended to specify which factors favour admission and which favour exclusion, but not otherwise.

22 BVA, the New Zealand Bar Association and one individual submitter.

23 This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

24 See the discussion in *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152].

obtained evidence as a matter of course; it is simply one factor that may be weighed in the balancing process.

7.23 Bearing this in mind, we have concluded section 30(3) should not be amended to expressly refer to the centrality of the evidence as a relevant consideration. Section 30(3) already allows "other matters" to be taken into account. There is clear appellate authority holding that the centrality of the evidence can be considered as part of the balancing process. Making it an express factor would risk over-emphasising its importance.

7.24 While it is unlikely to have a significant effect on the practical application of the balancing process, we consider the centrality of the evidence is best understood as a separate factor. The "nature and quality" assessment in section 30(3)(c) is aimed primarily at the reliability of the evidence.[25] For example (as observed in *Shaheed*), where confessional evidence is obtained in breach of a right, there may be concerns about its reliability, whereas real evidence (such as drugs or a weapon) is likely to be highly probative even if obtained in breach of a right.[26]

Seriousness of the offence

Issues Paper

7.25 In our Issues Paper, we noted that, until recently, there had been some confusion about how "seriousness" was to be measured and whether it favours admission or exclusion of the evidence. In 2016, the Court of Appeal provided guidance on these questions in *Underwood v R.*[27] In summary, the Court said the following:

- Seriousness (like the other section 30(3) criteria) should be treated as an evaluative consideration.[28] The penalty for the offence is not always a reliable guide, although it may be useful in some cases.[29] Where the penalty is considered a suitable measure, the starting point will usually be a better guide than the maximum penalty, as it reflects the aggravating and mitigating factors of the particular offending.[30]
- Taken alone, seriousness favours admission of the evidence because there is an enhanced public interest in convicting those who have committed serious crimes.[31] However, other factors favouring exclusion of the evidence – such as the impugned right and the nature of the breach – may assume greater importance if the offence is serious.[32]

7.26 We noted the *Underwood* guidance did not appear to have attracted criticism or generated significant difficulties in practice. We asked whether submitters agreed with the approach the Court took in that case.

---

25 *R v Shaheed* [2002] 2 NZLR 377 (CA) at [151].

26 *R v Shaheed* [2002] 2 NZLR 377 (CA) at [151].

27 *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 753.

28 At [49].

29 At [43], [45] and [48]–[49].

30 At [46].

31 At [32] and [41]. The absence of seriousness does not favour exclusion; rather, it has no role to play in the balancing process: at [41].

32 At [40].

Consultation

7.27 We received seven submissions on this point.[33] They all supported the approach of the Court of Appeal in *Underwood*. There was little support for amending the Evidence Act to reflect *Underwood*. Submitters generally felt the Court's guidance was sufficiently clear. The New Zealand Bar Association and Police considered further legislative prescription may unduly constrain judicial discretion. Our judicial advisory committee also did not consider amendment was necessary.

Our view

7.28 We have concluded that no amendment to the Act is necessary or desirable. The main users of the Act (judges, prosecutors and the defence bar) appear to support the Court's approach in *Underwood*. We are not aware of it causing any practical difficulties that need to be resolved through legislative amendment.

Availability of alternative investigatory techniques

Issues Paper

7.29 In our Issues Paper, we noted there has been some uncertainty in case law about how the availability of alternative investigatory techniques is relevant to the section 30 balancing process. While it was originally identified in *Shaheed* as a factor favouring exclusion of the evidence, some subsequent cases have treated it as favouring admission or as a neutral factor.[34] The *absence* of alternative techniques has similarly been treated as a factor favouring admission, exclusion or as a neutral factor.[35]

7.30 We expressed our preliminary view as follows:

- Where an alternative investigatory technique was known to be available, this should usually favour exclusion of the evidence. It suggests police made an intentional decision to use improper means to obtain the evidence.
- Where no alternative techniques were known to be available, this should be a neutral factor.

7.31 We sought submitters' views on whether the availability of alternative techniques should favour admission or exclusion of the evidence (or either, depending on the context) and whether section 30 should be amended to clarify the position. We also asked whether the absence of alternative techniques should have any bearing on the balancing process.

---

33 The Auckland District Law Society, BVA, the New Zealand Bar Association, the New Zealand Law Society, Police, the Public Defence Service and one individual submitter.

34 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [7.39]–[7.41].

35 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [7.39]–[7.41].

Consultation

7.32 Seven submitters commented on this issue. Of those, six submitters agreed with our preliminary views that the availability of alternative techniques should favour exclusion of the evidence, while their absence should be a neutral factor.[36]

7.33 The Auckland District Law Society and the Public Defence Service submitted that, where there are no lawful means available to obtain the evidence, police should not be encouraged or permitted to use unlawful means. The Auckland District Law Society considered this would undermine the credibility of the justice system. The Public Defence Service reasoned that police should not be excused for breaking the law in situations where they could have acted lawfully but chose not to.[37]

7.34 The remaining submitter, Police, did not think the availability of alternative techniques should *always* favour exclusion. Police considered that, where evidence was obtained without a warrant in circumstances of urgency, the availability of alternative techniques (such as the ability to apply for a search warrant) should not be considered a factor favouring exclusion in the absence of bad faith or recklessness.

7.35 No submitters commented on the desirability of amending section 30 to clarify whether the availability of alternative techniques favours admission or exclusion. Only two submitters discussed whether an amendment is required to clarify the status of an *absence* of alternative techniques. The New Zealand Bar Association thought there may be merit in doing so, while the Public Defence Service did not think there was a need to explicitly refer to the absence of alternative techniques.

Our view

7.36 We remain of the view that the availability of alternative investigatory techniques will ordinarily operate as a factor favouring exclusion of the evidence. 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 and give insufficient weight to the breach of rights.

7.37 We recognise, however, that in some situations the presence of other factors will make the availability of alternative techniques a neutral factor.[38] This may be the case, for example, if police obtain evidence without seeking a warrant (in circumstances where no warrantless power applies) because the situation is urgent. The “urgency” factor in section 30(3)(h) is then engaged and may effectively cancel out the availability of alternative techniques. This will depend on the nature of the urgency and how realistic it was to use the alternative techniques (such as seeking a warrant).

7.38 Where no alternative investigatory techniques are available, this should generally be regarded as a neutral factor. No submitters suggested otherwise. On the one hand, it would be inappropriate to justify improper police conduct on the basis that there was no legitimate way to obtain the evidence. Such an approach would tend to undermine the

---

[36] The Auckland District Law Society, BVA, the New Zealand Bar Association, the New Zealand Law Society, the Public Defence Service and one individual submitter.

[37] The Public Defence Service considered the presence of alternative techniques should favour exclusion even if Police did not know about them but that knowledge should be an aggravating factor.

[38] As the Court of Appeal recognised in *Kalekale v R* [2016] NZCA 259 at [42]–[45].

rule of law. If there are concerns that police powers are inadequate, that should be addressed through legislative amendment.[39]

7.39 On the other hand, we consider it unnecessary to treat the absence of alternative investigatory techniques as a separate factor favouring exclusion of the evidence. This approach was suggested by the Chief Justice in *Hamed v R*, who considered the lack of alternative techniques emphasised the deliberate unlawfulness of police conduct.[40] While that may be the case, section 30(3)(b) already provides for consideration of the "nature of the impropriety, including whether it was deliberate, reckless or done in bad faith".

7.40 We do not recommend amending section 30 to clarify how the availability or absence of alternative techniques should be taken into account. As we have noted, the availability of alternative techniques will usually favour exclusion of the evidence, but that is not invariably the case. Some flexibility should be retained so the courts can take a fact-specific approach. To the extent that the absence of alternative techniques may be relevant as showing deliberate impropriety, that is already adequately provided for in section 30(3)(b).

The practicalities of policing

7.41 Police suggested including an additional factor in section 30(3): the practicalities of policing. It suggested this would permit consideration of matters such as resource constraints, timeframes, the level of experience of the officers involved and the prioritisation of police activities.

Our view

7.42 We do not consider the practicalities of policing should be recognised as an independent factor. These kinds of considerations can be (and already are) taken into account in assessing the nature of the impropriety (section 30(3)(b)) and whether there was urgency in obtaining the evidence (section 30(3)(h)). Including an additional factor would risk giving excessive weight to the practicalities of policing.

Is a more prescriptive approach to the balancing process in section 30 required?

7.43 In addition to the specific issues discussed above, we sought submitters' views on whether section 30 should generally be more prescriptive about how the balancing process is to be applied. For example, should section 30 specify which factors favour admission or exclusion or how the factors are to be weighed relative to each other?

Consultation

7.44 Five submitters expressly opposed amending section 30 to be more prescriptive.[41] The Auckland District Law Society, BVA and the New Zealand Law Society emphasised that

---

39 In *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305, Blanchard, Tipping and McGrath JJ considered the absence of alternative techniques pointed to admission of the evidence: at [196], [246] and [274]–[275]. McGrath J said this was because:

> If the public concluded that, in future, when a similar situation arose, the police could not effectively investigate it as a crime and be able to gather admissible evidence, strong doubts would reasonably arise over the effectiveness in particular of the justice system.

40 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [73].

41 The Auckland District Law Society, BVA, the Criminal Bar Association, the New Zealand Law Society and Police.

the balancing process is an evaluative one and flexibility is needed to enable an appropriate response in individual cases. The Criminal Bar Association cautioned against tinkering with section 30 and thought the best approach was to leave the balancing process to the good sense of judges.

7.45 Only two submitters clearly supported making section 30 more prescriptive. The Public Defence Service considered the section 30(3) factors are inconsistently and sometimes arbitrarily applied. It suggested greater prescription in section 30 could make the outcome of the balancing process more predictable, consistent and transparent. In a subsequent meeting, the Public Defence Service suggested the nature of the impropriety and the seriousness of the offence could be identified as the two most important factors, with the other factors carrying less weight.

7.46 We also spoke to our judicial advisory committee about this issue. They advised against a more prescriptive approach. They considered a degree of uncertainty is unavoidable when undertaking the balancing process and greater prescription is likely to generate problems rather than solve them.

Our view

7.47 We have concluded that it would be inappropriate to amend section 30 to be more prescriptive about the application of the balancing process.[42] We agree that some uncertainty is implicit in the nature of the balancing process. This is evident from the fact that section 30(3) is non-exhaustive: additional factors may be taken into account in appropriate cases. We would not wish to unduly limit the ability of the courts to take a fact-specific approach.

7.48 We also are not convinced that amending section 30 would make its application clearer. It may simply shift uncertainty to other aspects of the balancing process. For example, if section 30(3) were to specify which factors favour admission or exclusion and their relative weight, this may lead to more argument about whether a factor is engaged in a particular case.

A broader review of section 30?

7.49 The Public Defence Service suggested to us that the current application of section 30 is heavily skewed towards admitting improperly obtained evidence. It said certain factors favouring admission, such as the seriousness of the offence and the centrality of the evidence to the prosecution case, have a tendency to become overwhelming factors. The result is that improperly obtained evidence is rarely excluded.

7.50 A similar point was made by Jonathan Eaton QC when he met with us to discuss the New Zealand Bar Association's submission. He said defence lawyers have expressed dissatisfaction with the current application of section 30, which is seen as being balanced in favour of admitting evidence. This means there are no meaningful consequences for police impropriety.

7.51 Some members of our judicial advisory committee also observed that the tendency under section 30 is to admit the evidence (although they did not comment on the desirability or otherwise of this outcome).

---

[42] Contrast Scott Optican "Evidence" [2018] NZ L Rev 429 at 491.

7.52 We have not considered fundamentally changing the approach under section 30. This is a significant issue that would require revisiting the underlying policy basis for section 30. Based on the feedback we received, there may be merit in a broader review of the policy approach under section 30 and whether it gives sufficient weight to the impropriety.[43]

RELEVANCE OF PREVIOUSLY EXCLUDED EVIDENCE IN A SUBSEQUENT PROCEEDING

7.53 As we explained in our Issues Paper, case law has established there is no general prohibition on admitting evidence in a subsequent proceeding that has been ruled inadmissible under section 30 in an earlier proceeding.[44] The section 30 balancing process must be undertaken afresh in each proceeding.[45]

7.54 We noted, however, that differing approaches have been taken to whether the earlier exclusion should be characterised as a 'vindication of rights' favouring admission of the evidence. In 2011, the Court of Appeal in *JF v R* considered the proceeding-specific nature of the balancing process meant the earlier exclusion was irrelevant.[46] The Court of Appeal subsequently disagreed with that approach in 2013 in *Clark v R*, finding that the earlier exclusion could be taken into account as an "alternative remedy" under section 30(3)(f).[47]

7.55 The Supreme Court considered this issue in 2016 in *Marwood v Commissioner of Police*.[48] The majority found that the earlier exclusion represented a vindication of rights that should be taken into account as a factor favouring admission of the evidence in subsequent proceedings.[49] The Chief Justice, on the other hand, considered the outcome in the earlier proceeding was of little significance.[50] She cautioned against minimising the public interest in the observance of human rights by viewing the earlier exclusion as simply a remedy for the person affected.[51]

Issues Paper

7.56 In our Issues Paper, we questioned whether treating an earlier exclusion as a 'vindication of rights' placed undue weight on individual rights in light of the policy underpinning section 30. As explained above, the *Shaheed* decision on which section 30 is based

---

43 We note there is also commentary indicating that s 30 tends to favour admission. For example, it has been suggested that if the judge concludes that the probabilities are in equilibrium, the party who bore the burden of proof will lose because that party has not tipped the balance of probabilities in their favour. See: Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA30.2(e)]; Simon France (ed) Adams on Criminal Law – *Evidence* (Online looseleaf ed, Thomson Reuters) at [EA30.06(1)]; and Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV30.06].

44 *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [91]; and *JF v R* [2011] NZCA 645 at [17]–[28].

45 *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [91]; *JF v R* [2011] NZCA 645 at [20]; and *Clark v R* [2013] NZCA 143, (2013) 26 CRNZ at [22].

46 *JF v R* [2011] NZCA 645 at [41].

47 *Clark v R* [2013] NZCA 143, (2013) 26 CRNZ at [26].

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

49 At [51]–[52]. The majority's approach in *Marwood* has since been applied by the Court of Appeal: *R v G* [2017] NZCA 317 at [31]; and *R v R* [2017] NZCA 149 at [22].

50 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [68].

51 At [67].

moved away from the 'vindication of rights' rationale that underlay the earlier prima facie exclusionary rule. Instead, it focused on the overall interests of justice.[52]

Consultation

7.57 We received five submissions on this issue. Four submitters disagreed with the Supreme Court's characterisation of an earlier exclusion as a "vindication of rights" that favours admission in a subsequent proceeding.[53] The New Zealand Bar Association and the New Zealand Law Society considered the Chief Justice's approach in *Marwood* best reflected the "overall interests of justice" policy underlying section 30. They, along with the Criminal Bar Association, thought the admissibility of evidence needs to be assessed on a case by case basis, without preconceptions derived from the outcome of any earlier proceedings.

7.58 Similarly, the Public Defence Service emphasised that a rights-centred approach is not the focus of section 30. It considered it would be unfair to take a rights-centred approach when it works in favour of the prosecution but not to take a rights-centred approach where it would favour the defendant.

7.59 The New Zealand Bar Association thought it was wrong to characterise an earlier exclusion as an "alternative remedy" in terms of section 30(3)(f) (as the Court of Appeal did in *Clark v R*). It submitted that the alternative remedy logically needs to relate to the proceeding where the prosecution proposes to offer the evidence.

7.60 The remaining submitter, Andrew Butler (co-author of *The New Zealand Bill of Rights Act: A Commentary*[54]), thought the majority in *Marwood* was correct to characterise the earlier exclusion as a vindication of rights. However, he did not think this favoured admission of the evidence in subsequent proceedings. He considered effective vindication requires that the right continue to be protected: the rights and freedoms protected by NZBORA do not cease to have effect just because they have been vindicated in one setting.

Our view

No amendment to the Act is required

7.61 We would caution against placing significant weight on the fact that evidence has been excluded in earlier proceedings. As the Chief Justice observed in *Marwood*, placing too much weight on a remedy provided to the individual ignores the public interest in ensuring human rights are respected.[55] This public interest needs to be considered in the balancing process. The credibility of the justice system will be compromised if the public feel that police impropriety is condoned by the courts.[56] It may well be necessary to

---

52 See above at [7.9]–[7.10].

53 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

54 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

55 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [67].

56 Section 30(2)(b) requires the judge to give "appropriate weight to the impropriety and [take] proper account of the need for an effective and credible system of justice".

exclude improperly obtained evidence again in any subsequent proceedings to properly recognise the impropriety and preserve the integrity of the justice system.[57]

7.62 We would not, however, go so far as to say that an earlier exclusion of the evidence cannot be considered at all. Although the focus of section 30 is on the overall interests of justice, the need to vindicate breaches of individuals' rights remains a relevant part of that assessment.[58] For example, one of the factors listed in section 30(3) is whether there are alternative remedies available that would provide adequate redress to the defendant.[59] This implies that, if some form of redress has already been provided (or could be provided) by means other than exclusion of the evidence in the proceedings at hand, that will be relevant in determining where the overall interests of justice lie.

7.63 We therefore do not consider any amendment to the Act is required. The courts should continue to assess the appropriate weight to be given to any earlier exclusion of evidence on a case by case basis. We note that the majority of the Supreme Court in *Marwood*, in finding that the earlier exclusion of evidence is a relevant factor, emphasised that this factor would not always mean the evidence is admissible in a subsequent proceeding.[60] For example, where police have acted in bad faith, further vindication by excluding the evidence may be required.[61]

7.64 We would expect it to be rare for this factor to be determinative. While the Court in *Marwood* did decide to admit the evidence, this was primarily due to other factors. The impropriety was not considered to be a serious one,[62] and the nature of the proceeding (a civil claim) meant the appellant was not at risk of conviction and imprisonment.[63] The Chief Justice, although differing on the relevance of the earlier exclusion, reached the same conclusion.[64]

EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE IN CIVIL PROCEEDINGS

7.65 Section 30 only applies to criminal proceedings.[65] The Act does not specify whether (or in what circumstances) courts can exclude improperly obtained evidence in civil proceedings.

7.66 This issue was considered by the Supreme Court in *Marwood*, as we discussed in some detail in our Issues Paper.[66] That case involved a civil proceeding commenced by the

---

57 We note the Chief Justice said in *Marwood* that "[i]t cannot be principled to treat exclusion of evidence in one proceeding as sufficient observance of fundamental rights": *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [66].

58 See *R v Shaheed* [2002] 2 NZLR 377 (CA) at [144]: "… the proper approach is to conduct a balancing exercise in which the fact that there has been a breach of the accused's guaranteed right is a very important but not necessarily determinative factor"; and at [147]: "where the breach of rights is readily excusable (for example, a breach of s 23(1)(a) or (b) in circumstances of urgency or danger) it will require rather less in the way of vindication".

59 Section 30(3)(f). Section 30(3)(a) also refers to the importance of the right breached and the seriousness of the intrusion on it.

60 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [51].

61 At [51].

62 At [50] and [70].

63 At [49] per William Young J and [73] per Elias CJ.

64 At [70]–[74].

65 Section 30(1).

Commissioner of Police under the Criminal Proceeds (Recovery) Act 2009. The Commissioner sought to rely on evidence that had been excluded under section 30 in an earlier criminal proceeding.

7.67 The Supreme Court held there was jurisdiction to exclude improperly obtained evidence in a civil proceeding of the kind in issue – that is, a proceeding "by way of law enforcement and with a public officer as a plaintiff".[67] The Court reasoned as follows:

- Section 7(1) of the Act provides that all relevant evidence is admissible unless it is inadmissible or excluded *under* the Act *or any other Act*. Prior to the Act's enactment, it would have been open to a judge to exclude evidence as a remedy for a breach of NZBORA.[68] This would amount to exclusion "under" NZBORA, for the purposes of section 7(1).[69]
- This jurisdiction to exclude evidence was not expressly or impliedly removed by section 30.[70] Its continued recognition is consistent with section 11, which provides that the inherent and implied powers of the court are not affected by the Act, except to the extent that the Act provides otherwise.[71]

7.68 In making these findings, the Court disagreed with the Court of Appeal, which had considered evidence could not be excluded "under" NZBORA in terms of section 7(1), since NZBORA contains no express or implied power to exclude evidence.[72]

Issues Paper

7.69 In our Issues Paper, we queried whether the exclusion of evidence obtained in breach of NZBORA was a remedy "under" NZBORA itself. We expressed the tentative view that it was better characterised as a common law development and that a discretion to exclude such evidence in civil proceedings arguably did not survive the enactment of the Act. We referred to the Law Commission's 1999 report on what is now section 30, which stated "improperly obtained evidence is admissible in civil proceedings, subject to relevance and the general exclusion in s 8".[73]

7.70 We acknowledged, however, that it may be desirable for courts to be able to exclude evidence that has been obtained due to police impropriety, even where personal liberty is not at stake (through the risk of conviction and imprisonment). If they could not, this would arguably give insufficient recognition to the rights protected by NZBORA. We asked submitters whether the Act should be amended to recognise a power to exclude improperly obtained evidence, either in all civil proceedings or only civil proceedings of a quasi-criminal nature (such as proceedings under the Criminal Proceeds (Recovery) Act).

---

66 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [7.60]–[7.64].

67 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [35] and [38] per William Young J and [58]–[61] per Elias CJ. Although on the facts of the case the evidence was admitted.

68 At [35] per William Young J and [61] per Elias CJ.

69 At [35] per William Young J and [61] per Elias CJ.

70 At [58]–[60] per Elias CJ.

71 At [37] per William Young J and [60]–[61] per Elias CJ.

72 *Commissioner of Police v Marwood* [2015] NZCA 608, [2016] 2 NZLR 733 at [32]–[35].

73 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C152]. This commentary was not referred to by the Supreme Court in *Marwood*.

Consultation

7.71 This question attracted relatively little comment from submitters. Only the New Zealand Bar Association expressed a clear view on whether the Act should be amended. It supported the inclusion of an express power in the Act to exclude improperly obtained evidence in civil proceedings, pursuant to a balancing exercise similar to that under section 30. It considered most of the factors in section 30 would be relevant, except the seriousness of the offence.[74] The balancing test would need to recognise that, in the context of a civil proceeding, relying on improperly obtained evidence is less likely to compromise the integrity of the justice system.

7.72 The New Zealand Law Society and Andrew Butler also submitted that there should be an ability to exclude improperly obtained evidence in civil proceedings through a balancing exercise similar to the one in section 30. They did not expressly address whether an amendment was desirable to clarify the position. Andrew Butler considered an ability to exclude improperly obtained evidence in civil proceedings is necessary to effectively vindicate the rights protected by NZBORA and deter future breaches.

7.73 Police thought improperly obtained evidence should generally be admissible in civil proceedings. It accepted there should be a power to exclude the evidence (through a balancing process similar to section 30) but suggested exclusion should only occur in exceptional cases.

7.74 Feedback from our judicial advisory committee was that the courts should be left to develop case law around the treatment of improperly obtained evidence in civil cases and that there is currently insufficient material on which to base a legislative provision.

Our view

No amendment to the Act is required

7.75 We consider the courts should have power to exclude improperly obtained evidence in civil proceedings of a quasi-criminal nature in which the Crown is a party. Such a power is necessary to enable the courts to give proper weight to the rights protected by NZBORA.

7.76 The general approach under section 30(2) of assessing whether exclusion is proportionate to the impropriety appears to us to be equally relevant in such cases. The considerations relevant to the balancing process will, however, differ in some ways. For example, the seriousness of the offence factor (section 30(3)(d)) will not apply in civil cases. The courts may also have regard to the fact that civil proceedings will not result in a conviction or loss of liberty.

7.77 This is essentially the approach taken by the Supreme Court in *Marwood*. The Court applied a balancing exercise akin to the section 30 analysis in deciding whether to

---

74 We note the Criminal Bar Association, by contrast, submitted that the factors relevant to any balancing exercise in a civil context were likely to be quite different. It did not comment further.

exclude the evidence.[75] It also placed considerable weight on the fact that the appellant was not at risk of conviction or imprisonment.[76]

7.78 Other kinds of civil proceedings may require a different approach. The Court in *Marwood* was concerned with proceedings under the Criminal Proceeds (Recovery) Act. It did not consider the status of improperly obtained evidence in civil proceedings more generally.

7.79 While disputes about the admissibility of improperly obtained evidence in civil proceedings are most likely to arise in quasi-criminal cases, they could plausibly occur in other contexts. For example, a party applying for a parenting order in the Family Court could seek to refer to improperly obtained evidence to show the other party is not fit to provide day-to-day care of a child. This would raise significantly different considerations to a criminal proceeds forfeiture proceeding.

7.80 Although we have not formed a view on the matter, we think it is at least arguable that there should be no jurisdiction to exclude improperly obtained evidence in civil proceedings involving only private parties.[77] The need to give appropriate weight to the impropriety and/or to maintain the credibility of the justice system by excluding the evidence – and thereby not condoning the improper conduct – may be less relevant where the Crown is not a party to the proceeding.[78] Alternatively, if there is jurisdiction to exclude, the test may need to be different. We emphasise, however, that this situation is unlikely to arise often. Indeed, to date, it has not been considered in case law.

7.81 The Supreme Court's reasoning in *Marwood*, in particular its finding that improperly obtained evidence could be excluded "under" NZBORA, has been the subject of considerable criticism.[79] Like commentators, we have some difficulty with the idea that evidence can be excluded "under" NZBORA, given the absence of any explicit power in NZBORA itself.

7.82 On balance, however, we have decided against recommending an amendment to the Act. We have reached that decision for the following reasons:

- The current position in light of *Marwood* is that improperly obtained evidence can be excluded in quasi-criminal proceedings, applying a balancing process similar to section 30 with any necessary modifications. That is, we think, the correct result.
- The precise factors that will be relevant to the balancing process in a quasi-criminal proceeding would benefit from further judicial consideration. The court in *Marwood*

---

75 *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [50] per William Young J and [64] per Elias CJ.

76 At [49] per William Young J and [73] per Elias CJ.

77 Subject to the general relevance requirement in s 7 and the general exclusionary rule in s 8.

78 As noted in *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148], one of the key reasons for excluding evidence where Police has acted improperly is that: "A system of justice which readily condones such conduct on the part of law enforcement officers will not command the respect of the community." Where the Crown is not a party to the proceeding, admitting the evidence is less likely to be seen as condoning the improper conduct.

79 Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA7.5]; Scott Optican "Case Note: Every Silver Lining has a Cloud – the Exclusion of Improperly Obtained Evidence in Civil Proceedings: *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260" [2017] NZCLR 228 at 240; and Pheroze Jagose "Capital Letter: Supreme Court finds Bill of Rights Act breaches reach into civil cases" *The National Business Review* (online ed, New Zealand, 2 November 2016). See also Alexandra Franks "Admissibility of excluded evidence in later proceedings" [2016] NZLJ 386 at 389 (published before the Supreme Court's decision), stating that the Court of Appeal's decision was "legally correct" and it was therefore likely the Supreme Court would take the same view.

did not address this question in any significant detail and nor did those we consulted with.

- The courts are yet to consider the status of improperly obtained evidence in other types of civil proceedings. Submitters also did not discuss this issue in any depth. As noted above, different policy considerations may well apply outside quasi-criminal proceedings. Any attempt to frame a test for exclusion of improperly obtained evidence in civil proceedings without the benefit of judicial decisions or extensive engagement from submitters is likely to create more problems than it would solve.

7.83 We consider the best approach at this stage is to leave the courts to develop guidance on the principles that ought to apply when a party seeks to rely on improperly obtained evidence in a civil proceeding. Developments in this area could be monitored by the Ministry of Justice. An express statutory power to exclude such evidence in civil proceedings, similar to section 30, could be considered at a later date, if the need arises.

CHAPTER 8

Identification evidence

INTRODUCTION

8.1 Section 45 controls the admissibility of "visual identification evidence" in criminal proceedings and is intended to ensure that only reliable identification evidence is admitted.

8.2 In our Issues Paper, we asked:[1]

- whether the definition of "visual identification evidence" should be amended to clarify whether it includes identifications that are expressed with uncertainty;
- whether evidence falling outside the scope of the definition of "visual identification evidence" should remain admissible, subject to sections 7 and 8 (and whether the Act needs to be amended to clarify this); and
- whether the relationship between the identification and hearsay evidence provisions requires clarification.

8.3 We do not recommend any amendments to the Act. We conclude the following:

- It is not necessary to amend the definition of "visual identification evidence". The existing definition in section 4, read in the context of the case law, is sufficiently broad to encompass identifications that are expressed tentatively.
- The Act's provisions support an interpretation that evidence falling outside the scope of the "visual identification evidence" definition is not necessarily inadmissible. Such evidence may still be admissible under sections 7 and 8 and any other admissibility rules that may apply.
- Our preferred approach to the relationship between the hearsay and visual identification rules is that hearsay visual identification evidence needs to satisfy both the admissibility requirements for identification evidence and the hearsay rules in order to be admitted. This approach is available as a matter of statutory interpretation, and we consider the appellate courts should be left to provide further guidance in this area.

---

[1] Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [8.10]–[8.11], [8.26]–[8.29] and [8.30]–[8.33]. We did not address the admissibility of voice identification (governed by s 46 and defined in s 4 of the Evidence Act) in our Issues Paper as we were unaware of any operational difficulties with those provisions.

BACKGROUND

8.4 The term "visual identification evidence" is defined in section 4:

> **visual identification evidence** means evidence that is—
>
> (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
>
> (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a).

8.5 Under section 45, visual identification evidence obtained by way of a formal procedure followed by officers of an enforcement agency will be admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that it is unreliable.[2] The requirements for a formal procedure are set out in section 45(3).[3]

8.6 If no formal procedure is followed the visual identification evidence will be inadmissible unless there was a good reason for not following a formal procedure or the prosecution can prove beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.[4] Section 45(4) sets out a number of circumstances that constitute "good reasons" for not following a formal procedure.

VISUAL IDENTIFICATIONS EXPRESSED WITH UNCERTAINTY

Issues Paper

8.7 In our Issues Paper, we explained that a witness may make a visual identification tentatively. We gave the following examples:

- A witness might identify a person from a photomontage as the person they saw at the time of the relevant events but qualify that identification by nominating another person/other people from the photomontage (for example, "the person in photo X and the person in photo Y look like the suspect, but X is the most likely").
- A witness might nominate a single person from a photomontage but express uncertainty as to the accuracy of the identification (for example, "the person in photo X looks like the suspect, but I am not sure").

8.8 We summarised the relevant case law on the admissibility of identification evidence where the identification has been expressed with uncertainty.[5] We concluded that the cases demonstrate a degree of confusion as to whether tentative identifications amount

---

2 See Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [201] ("the scientific evidence suggests that a formalised procedure with specified standard features is more likely to produce a reliable identification"); and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C217]. An enquiry into reliability under s 45(1) extends to both the circumstances in which the witness identified the alleged offender *and* the circumstances of the formal procedure: *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [20].

3 The most frequently used formal procedure in New Zealand involves assembling a photomontage, which includes a photograph of the suspect.

4 Evidence Act 2006, s 45(2). See Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA45.7] for examples of circumstances that may be relevant to assessing reliability.

5 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [8.14]–[8.24].

to "an assertion … to the effect that a defendant was present at or near" the scene of the offending in terms of the definition of "visual identification evidence". If tentative identifications are included in the definition, they would be subject to the admissibility requirements of section 45.

8.9 We asked submitters whether the definition of "visual identification evidence" in section 4 should be amended to clarify whether identifications that are expressed with uncertainty are included and, if so, how.

8.10 Our preliminary view was that it might be more consistent with the policy underlying the visual identification evidence provisions to classify tentative identifications as evidence falling within the scope of "visual identification evidence" and therefore subject to section 45. The relevance of the evidence is that it tends to identify the defendant as the offender; and the purpose of the provisions is to reduce miscarriages of justice through mistaken identifications.[6]

Consultation

8.11 We received six submissions addressing these matters.[7] The Crown Law Office, the New Zealand Bar Association, the New Zealand Law Society and New Zealand Police considered tentative identifications should be included within the definition of "visual identification evidence". They considered this aligns with the policy underpinning sections 45 and 126:[8] that witness identifications are fallible and often unreliable and should therefore attract heightened scrutiny. Some submitters commented that tentative identifications are already impliedly included in the definition of "visual identification evidence". Crown Law and Police, for instance, said that amendment is unnecessary because the phrase "to the effect that a defendant was present" in the definition of visual identification evidence could comfortably be read to include tentative identifications.[9]

8.12 The New Zealand Bar Association considered it would be illogical if confident identifications needed to satisfy the rigorous admissibility test in section 45, while identifications expressed with uncertainty could be more readily admitted under sections 7 and 8. On this basis, the New Zealand Bar Association thought the Act should be amended to clarify that identifications expressed with uncertainty are included in the definition of "visual identification evidence".

8.13 The Criminal Bar Association took the view that, if a witness could not *positively* identify a defendant, the evidence should not be characterised as "visual identification evidence". The Public Defence Service considered some identifications may be so uncertain they do

---

6 *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [22], discussed in *Law Commission Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [8.28].

7 The Criminal Bar Association, the Crown Law Office, the New Zealand Bar Association, the New Zealand Law Society, New Zealand Police and the Public Defence Service. In our Issues Paper, we also asked whether tentative identifications should be characterised as "resemblance evidence" or some other type of circumstantial evidence. Only one submitter, the New Zealand Law Society, responded. It said that identifying an individual from a montage, even with some uncertainty, is different in nature to resemblance evidence and is likely to be given more weight by a jury. It therefore considered the evidence should be subject to the statutory balances and warnings set out in the visual identification regime.

8 Section 126 requires judges to warn juries about the special need for caution before convicting a defendant in reliance on the correctness of an identification in cases where "… the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person …".

9 Evidence Act, s 4(1)(a).

not amount to "visual identification evidence" at all. It acknowledged, however, that most identifications are expressed with a degree of uncertainty and that it would not necessarily be appropriate to exclude these from the definition. Although the Public Defence Service made some suggestions for amendments to exclude tentative identifications from the definition, it ultimately concluded it was preferable to allow case law to further develop in this area.[10]

8.14 Our judicial advisory committee noted there have been a large number of cases on these matters recently and commented that these decisions should assist with clarifying the law.

Our view

No amendment to the Act is required

8.15 We consider that identifications expressed with uncertainty should be subject to the admissibility requirements of section 45.[11] This is consistent with the purpose of section 45, which is to mitigate the risk of miscarriages of justice associated with mistaken identifications.[12] It is self-evident that the purpose of offering identification evidence (including tentative identification evidence) is to identify the defendant as the offender. This raises the risk of a miscarriage of justice if the case against the defendant relies wholly or substantially on tentative identification evidence in order for the jury to convict the defendant. For this reason, section 126 of the Act requires the judge to direct the jury on the "special need for caution before finding the defendant guilty in reliance on the correctness of any such identification".[13]

8.16 Our view is supported by the 2018 decision of the Court of Appeal in *F v R*, delivered after our Issues Paper had been published.[14] The Court stated:[15]

> The definition [of "visual identification evidence"] provides that the assertion is "to the effect" that the defendant was present. The learned authors of *The Evidence Act 2006: Act and Analysis* say this may have been intended to include cases where the person

---

10 The Public Defence Service suggested that tentative identifications could be excluded from the definition of "visual identification evidence" by defining "assertion" as "more than tentative" (however, it acknowledged this could create uncertainty as to what is meant by "more than tentative"). It also suggested s 45 could be amended to state that evidence nominating more than one person in a photomontage could not be admitted.

11 Sections 7 and 8, on the other hand, are general provisions, only requiring the evidence to be relevant and more probative than "unfairly prejudicial".

12 Under s 45, the evidence will be admissible if a "formal procedure" (i.e. a procedure complying with the requirements set out in s 45(3)) was followed (or there was a good reason for not following a formal procedure) unless the defendant proves on the balance of probabilities that it is unreliable. On the other hand, the evidence will not be admissible if a formal procedure was not followed (or there was no good reason for not following one) unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.

13 Section 126(1).

14 *F v R* [2018] NZCA 246. In this case, Mr F was charged with unlawful possession of a firearm and discharging a firearm with reckless disregard (at an outdoor market). The witness was to give evidence that her regular customer (not the defendant) brought a man with him to her food stall on the day of the shooting. That man was not someone she had previously seen accompanying her regular customer. The witness was unable to identify the appellant from a photo montage.

15 *F v R* [2018] NZCA 246 at [34].

> making the assertion admits to some uncertainty.[16] This comment is noted and implicitly accepted by the Law Commission in its second review of the Act when considering whether the definition of visual identification evidence should be amended.

The Court went on to state that it agreed with this interpretation.[17]

8.17 On this basis, we consider the position under the current law is that visual identifications expressed with uncertainty are included within the definition of "visual identification evidence" and are therefore subject to admissibility criteria in section 45. No amendment is required to clarify the position, any uncertainty having been resolved by the Court of Appeal's recent decision in *F v R*.

EVIDENCE THAT FALLS OUTSIDE THE DEFINITION OF "VISUAL IDENTIFICATION EVIDENCE"

Issues Paper

8.18 In our Issues Paper, we asked submitters whether there is a need to clarify the admissibility of evidence falling outside the scope of the definition of "visual identification evidence" in light of the Court of Appeal's 2016 decision in *Meaker v R*.[18]

8.19 In *Meaker*, the identification witness had eliminated five of eight photographs in a photomontage and felt unable to identify any of the remaining three (one of which was of the appellant) as one of the two offenders. The issue was whether her evidence fell within the Act's definition of "visual identification evidence" and therefore triggered the section 45 reliability requirements. Ultimately, the Court concluded the evidence did not amount to visual identification evidence as it was "not an assertion … that *a* defendant [the appellant] was present" at or near the place where the offence occurred.[19] It was therefore inadmissible under section 45.[20]

8.20 The question then arose as to whether the witness's response to the photomontage could be admitted as circumstantial evidence, subject to sections 7 and 8. The Court considered sections 7 and 8 did not provide a "parallel" pathway for admitting identification evidence, as to do so would make section 45 "superfluous".[21] In reaching

---

16 Citing Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers Ltd, Wellington, 2014) at [EV4.44.01]. (We note for completeness that the same point is made in Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV4.44.01]).

17 *F v R* [2018] NZCA 246 at [35].

18 *Meaker v R* [2016] NZCA 236.

19 At [15].

20 At [15].

21 At [18] and [22]. We note that in *R v Kingi* [2017] NZCA 449 at [25], the Court of Appeal clarified that *Meaker* does not stand as authority for the proposition that s 45 is the only route through which visual identification evidence can be ruled inadmissible, such that s 8 is not a relevant consideration:

> The finding in *Meaker* was that there are not parallel and alternative pathways to the admissibility of visual identification evidence under the Act … even if the evidence meets the threshold reliability test under s 45, it may nevertheless be excluded under s 8.

See also *K v Police* [2017] NZCA 430 at [24]:

> Section 45 is not a mini-code in the sense that it excludes the application of other requirements for the admissibility of evidence set out in ss 7, 8 and 23–25 of the Act.

this view, the Court appeared to suggest the evidence fell into a class analogous to visual identification evidence (albeit not visual identification evidence):[22]

> We reject the submission that if the evidence failed to meet the specific requirements of ss 4 and 45 of the Act, which were designed to mitigate the grave risk of injustice with this *type of evidence*, it should nevertheless be admitted under the general provisions of ss 7 and 8.

8.21 In our Issues Paper, we noted that some doubt has been expressed about the finding in *Meaker* that evidence inadmissible under section 45 cannot be considered under the alternative route of sections 7 and 8.[23]

8.22 We asked submitters whether evidence falling outside the scope of the definition of "visual identification evidence" should remain admissible, subject to sections 7 and 8 of the Act. If so, we asked whether the Act should be amended to clarify the position.

Consultation

8.23 We received six submissions on this issue.[24] Five submitted that the admissibility of evidence falling outside the scope of the definition should be considered under sections 7 and 8.[25] Crown Law described this as a straightforward matter of statutory interpretation, which had unfortunately been confused by the decision in *Meaker*. The New Zealand Bar Association submitted that, while some confusion appears to have been caused by *Meaker*, on balance, the 2017 Court of Appeal decisions of *R v Kingi*[26] and *K v Police*[27] have settled the matter – both reaffirmed that section 45 does not exclude the operation of section 8.[28]

8.24 The New Zealand Law Society submitted that evidence not purporting to identify a defendant need not be subject to the same safeguards. It said the key issue is to ensure the definition of "visual identification evidence" has properly captured evidence that engages the policy matters with which section 45 is concerned.

8.25 The Public Defence Service considered identification evidence falling outside the definition would be so tentative or uncertain that its probative value would be unlikely to ever outweigh the risk that it would have an unfairly prejudicial effect. The Public Defence Service emphasised the risk of miscarriages of justice based on mistaken identifications and considered it would defeat the purpose of the special procedure in section 45 to allow this type of evidence to be admitted, subject to sections 7 and 8.

8.26 On the question of whether an amendment is necessary to clarify the position, two submitters (the New Zealand Bar Association and Police) did not think an amendment

---

22 At [22] (emphasis added).

23 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [8.20], n 839.

24 The Criminal Bar Association, Crown Law, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

25 The role of s 24 (general admissibility of opinions) was also mentioned.

26 *R v Kingi* [2017] NZCA 449 at [25].

27 *K v Police* [2017] NZCA 430 at [24].

28 For discussion of these cases, see: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [8.20], n 839. See also above at [8.20], n 21.

was strictly necessary. Crown Law noted there might be merit in addressing the ambiguity *Meaker* had caused in this area.

Our view

No amendment to the Act is required

8.27 As noted above,[29] the Court of Appeal decision in *F v R* was delivered after our Issues Paper was published.[30] The Court in that case was asked to consider the admissibility of the evidence of a Crown witness as visual identification evidence under section 45. Having noted the relevance test under section 7(3) of the Act,[31] it went on to say:[32]

> How the evidence is characterised determines whether the evidential gateway of s 45 of the Act, in addition to ss 7 and 8, ought to be applied in the assessment of admissibility.

8.28 The Court pointed out the witness was unable to identify the appellant. It found the evidence was "circumstantial evidence" rather than "visual identification evidence" and was therefore not subject to section 45.[33] It went on to apply the relevance and exclusion rules in sections 7 and 8 and determined the evidence was admissible.[34] Accordingly, *F v R* is clear authority for the proposition that evidence falling outside the scope of the definition of "visual identification evidence" may remain admissible, subject to sections 7 and 8.

8.29 Although we accept there was some confusion following the Court of Appeal's decision in *Meake*r, we consider the position was subsequently clarified by the Court in *K v Police* and *R v Kingi* as well as in the decision in *F v R*. Further, the Court's recent approach accords with the view expressed in *Mahoney on Evidence: Act and Analysis* that section 45 does not exclude the application of other relevant provisions.[35]

8.30 We consider the Act supports an interpretation that evidence falling outside the scope of "visual identification evidence" is not necessarily inadmissible. Such evidence may still be admitted so long as it satisfies the relevance and general provisions of sections 7 and 8 along with any other admissibility rules that apply on the facts. Accordingly, we do not consider an amendment to the Act is necessary or desirable.

---

29 At [8.16].

30 *F v R* [2018] NZCA 246.

31 Section 7(3) states: "[e]vidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding".

32 *F v R* [2018] NZCA 246 at [28].

33 At [43].

34 At [77].

35 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV 45.02].

RELATIONSHIP BETWEEN IDENTIFICATION EVIDENCE AND HEARSAY PROVISIONS

Issues Paper

8.31 Visual identification evidence is not necessarily given directly by an eyewitness. The definition incorporates an account of an identification by someone other than the identifier (such as a police officer who conducted the formal procedure under section 45).[36] If the identifier is not a "witness" in the proceeding (for example, because the identifier becomes unwell and is unable to give evidence), the visual identification evidence arguably constitutes a "hearsay statement".[37]

8.32 In our Issues Paper, we noted a potential conflict arises between section 45(1) and the hearsay provisions in sections 17 and 18.[38] On one hand, section 45(1) makes the evidence admissible if a formal procedure is correctly followed, unless the defendant proves the evidence is unreliable. On the other hand, sections 17 and 18 make the evidence admissible only if the prosecution can show there is a reasonable assurance of reliability.[39]

8.33 It is unclear whether hearsay identification evidence needs to satisfy *both* the admissibility requirements for identification evidence *and* the hearsay rules or whether it is sufficient for the evidence to comply with the admissibility requirements of section 45 alone.

8.34 In our Issues Paper, we discussed the Court of Appeal's 2017 decision in *R v R*, which considered the relationship between evidence of visual identification and hearsay.[40] In that case, a witness (O) gave police a written statement that described the offender. O later picked the defendant out of a photomontage as the offender but became unavailable as a witness (due to illness) prior to trial. The Court applied the section 18 test in determining the admissibility of O's pre-trial statements. The Court accepted that her police statement and photo identification had to be considered together – and that both amounted to hearsay evidence, to be given by a police officer.[41] The Court held the circumstances relating to O's police statement provided reasonable assurance of reliability in terms of the section 18 test for the admissibility of hearsay evidence.[42]

8.35 At the same time, however, the Court noted the application of section 18 to O's photo identification was problematic because of the operation of the visual identification admissibility requirements in section 45.[43] As the Court explained:

---

36 Evidence Act, s 4(1).

37 Section 4 of the Evidence Act defines "hearsay statement" as "a statement that (a) was made by a person other than a witness; and (b) is offered in evidence at the proceeding to prove the truth of its contents".

38 Section 17 sets out the general rule excluding hearsay evidence. Section 18 is the main exception to this general rule.

39 This point was initially made in a 2008 article: Richard Mahoney "Evidence" [2008] NZ L Rev 195 at 209.

40 *R v R* [2017] NZCA 61, discussed in Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua I te Evidence Act 2006* (NZLC IP42, 2018) at [8.32].

41 At [9].

42 At [10]–[12]. Section 18(1) provides that a hearsay statement is admissible if the prosecution can show there is a "reasonable assurance that the statement is reliable".

43 *R v R* [2017] NZCA 61 at [14].

Section 45 provides that if a formal procedure is followed, then the identification is presumed reliable and the evidence admissible unless the defence proves to the contrary on the balance of probabilities. In contrast, under s 18 it is a condition of admissibility that the prosecution show the circumstances relating to the statement provide reasonable assurance the statement is reliable. Those circumstances arguably involve wider considerations than the factors taken into account in a s 45 reliability assessment.

8.36 In our Issues Paper, we asked whether the Act should be amended to clarify the relationship between these provisions and, if so, how it should be amended.

Consultation

8.37 Four submitters addressed these issues.[44] The New Zealand Bar Association and Police submitted that it would be preferable to amend the Act to clarify the relationship between the hearsay and visual identification evidence provisions. The New Zealand Bar Association considered that hearsay identification evidence ought to satisfy both the hearsay and identification evidence provisions in order to be admitted.[45]

8.38 The New Zealand Law Society and the Public Defence Service also took the view that any hearsay identification evidence needs to meet the criteria in both the hearsay and the visual identification provisions. However, neither considered the Act requires amendment, as they were unaware of particular problems in practice.

Our view

No amendment to the Act is required

8.39 The hearsay rules are intended to mitigate risks associated with hearsay evidence, particularly the inability of the defence to test the evidence through cross-examination.

8.40 These risks also arise where hearsay identification evidence is concerned. This is particularly the case if evidence is admitted under section 45 where a formal procedure was not followed but for a "good reason" (and the defendant has not been able to prove on the balance of probabilities that the evidence is unreliable). In this situation, there is a risk the reliability of the evidence has not been sufficiently tested in order for the evidence to be admitted as hearsay. On this basis, we consider it appropriate to require the prosecution to show there is a reasonable assurance of reliability in accordance with section 18(1)(a) before such evidence is admitted. In other words, hearsay identification evidence that meets the criteria for admissibility under section 45 should also satisfy the test in section 18. This approach presumes that satisfaction of the section 45 admissibility requirements for identification evidence does not necessarily provide sufficient reassurance of reliability in accordance with section 18(1)(a).

8.41 The authors of *Mahoney on Evidence: Act and Analysis* consider the Act can be interpreted to support the view that hearsay identification evidence needs to satisfy both the admissibility requirements for identification evidence and the hearsay rules in order to

---

[44] The New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

[45] Police did not specify how the relationship between the provisions should be clarified.

be admitted.[46] They reach this conclusion by examining the operation of paragraphs (a) and (b) in section 17 of the Act:[47]

> **17 Hearsay rule**
>
> A hearsay statement is not admissible except—
>
> (a) as provided by *this subpart* or by the provisions of any other Act; or
>
> (b) in cases where—
>
> (i) this Act provides that this subpart does not apply; and
>
> (ii) the hearsay statement is relevant and not otherwise inadmissible under this Act.

8.42 The authors say:[48]

> The combination of paragraphs (a) and (b) means that hearsay made admissible by other provisions in the Act must nevertheless also comply with the hearsay rules, unless the operation of the hearsay rule is expressly excluded.

8.43 We agree with this approach. We are not persuaded that an amendment to the Act is necessary or desirable. There are three reasons for this. First, we are not aware of this issue causing problems in practice. Second, our preferred approach is available as a matter of statutory interpretation.[49] Third, we consider it would be preferable to leave the appellate courts to provide further guidance in this area (the issue having only been briefly discussed in the Court of Appeal to date).[50] For these reasons we do not recommend an amendment to the Act.

---

[46] Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV17.01].

[47] Emphasis added.

[48] Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV17.01]. We note this analysis does not have universal support. The authors of *Cross on Evidence* consider the more specific rule in s 45(1) should take precedence in matters where both sets of rules are engaged: Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA45.9].

[49] Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV17.01].

[50] At the time this report was finalised, *R v R* [2017] NZCA 61 was the most recent case.

CHAPTER 9

Giving evidence in sexual and family violence cases

INTRODUCTION

9.1 In 2015, the Law Commission made a number of recommendations to facilitate the use of pre-recorded evidence (including evidence-in-chief and cross-examination) for sexual violence complainants.[1] The Government is currently considering these recommendations.

9.2 In this second review of the Evidence Act, we build on those recommendations and consider whether the Act could better facilitate the use of pre-recorded evidence in relation to family violence complainants, other witnesses in sexual and family violence cases and/or vulnerable witnesses generally.[2]

9.3 We have concluded that greater use of pre-recorded evidence could have benefits for many of these witnesses but that any legislative reforms should be directed at the highest need witnesses, namely complainants in sexual and family violence cases. Any legislative reforms must also recognise the fair trial rights of defendants.

9.4 In relation to greater use of pre-recorded evidence, we recommend:

- family violence complainants should be entitled to give their evidence-in-chief by a video record made before the hearing (regardless of when the video was recorded), unless a judge makes an order to the contrary;
- family violence complainants should be entitled to have their cross-examination pre-recorded in a hearing prior to trial, unless a judge makes an order to the contrary; and
- prosecutors in family violence cases should be required to make reasonable efforts to ensure the complainant is informed about the various ways of giving evidence and to ascertain the complainant's views on their preferred mode of evidence.

9.5 The draft Bill does not include any provisions implementing these recommendations. It would be premature to do so, given the Government is still considering the Commission's 2015 recommendations relating to pre-recording the evidence of sexual violence complainants and given that our preferred approach is to align the way that evidence is given in sexual and family violence cases.

---

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

[2] Pre-recorded evidence includes evidence-in-chief and cross-examination that is pre-recorded in a hearing prior to trial as well as evidential video interviews and mobile video records that are given as evidence-in-chief.

9.6 We have also considered whether evidence recorded pre-trial and/or evidence recorded at trial could assist sexual and family violence complainants in cases that require a re-trial but have concluded that legislative reform is not necessary or desirable.

9.7 In this chapter, we recommend replacing section 106(4)–(4C) with a provision requiring a video record of the complainant's evidence in sexual and family violence cases to be given to the defendant's lawyer before it is offered in evidence (unless the judge directs otherwise). Consultation confirmed that the Act's restrictions on defence counsel access to such videos have made it difficult for the defence to properly prepare its case and have given rise to concerns about the fair trial rights of defendants.

BACKGROUND

9.8 Section 103 of the Act permits a judge in any proceeding to direct that a witness is to give evidence "in the ordinary way" (set out in section 83) or "in an alternative way" (set out in section 105). The ordinary way is orally in a courtroom before a judge, a jury (if there is one), the defendant, counsel and potentially members of the public. Alternative ways of giving evidence include a witness giving evidence from behind a screen or from a place outside the courtroom, for example, using closed circuit television. Another alternative way, which is the focus of this chapter, is to give evidence by way of a video record made before the proceedings ("pre-recorded evidence").

9.9 A witness may give evidence in the ordinary way without an application to a judge. They may only give evidence in an alternative way if the judge so directs (either on the application of a party or on the judge's own initiative). A direction may be made on a number of grounds relating to the witness's personal characteristics and the nature of the proceedings.[3] The judge must have regard to fair trial considerations, the views of the witness and the need to minimise stress and promote the recovery of the witness.[4] Since January 2017, child witnesses in criminal proceedings have been entitled to give all parts of their evidence in alternative ways.[5]

9.10 Evidence-in-chief can be given by way of a pre-recorded video of the witness's original police interview (the evidential video interview or EVI). In sexual violence cases, it is relatively common for complainants to give their evidence-in-chief in this way.[6] The Act also permits a judge to direct that a witness's cross-examination and re-examination be pre-recorded (at a separate pre-trial hearing), but this option has rarely been used since the Court of Appeal's 2011 decision in *M v R*.[7]

9.11 In *M v R,* the Court was asked to determine whether the language of sections 103 and 105 permitted a judge to direct that the cross-examination of a complainant should be pre-

---

3 The grounds are set out in s 103(3) and include: the age or maturity of the witness, any physical or mental impairment, the witness's fear of intimidation, the linguistic or cultural or religious background of the witness, the nature of the proceeding and the relationship of the witness to any party to the proceeding.

4 Section 103(4).

5 Section 107 (inserted by s 31 of the Evidence Amendment Act 2016, which came into force on 8 January 2017). In this chapter, we therefore do not discuss further the pre-recording of children's evidence.

6 In 2015, the Law Commission noted, however, that there are significant variations throughout the country in the use of the EVI as the complainant's evidence-in-chief: Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.39] and [4.58].

7 *M v R* [2011] NZCA 303, [2012] 2 NZLR 485.

recorded in a case involving sexual violence. The Court held that such a direction was possible but considered it would need to be a "compelling case"[8] and that a judge should be "very slow to order pre-trial cross-examination in the absence of clear evidence" that full disclosure had occurred.[9] The Court emphasised the general rule of criminal law that a defendant is not required to show their hand before trial (by disclosing what or how they propose to argue in defence).[10] If pre-recording of cross-examination takes place before full disclosure has occurred, the defence could lose the opportunity to question a witness on relevant aspects of the prosecution's case that are only subsequently disclosed to the defence. The Court also noted the resource implications of pre-recording cross-examination and the risk that a complainant may need to be recalled to give evidence if new matters come to light shortly before trial.[11]

9.12 While cross-examination is rarely pre-recorded in New Zealand,[12] in Australia and the United Kingdom there has been a trend towards enabling certain complainants and other witnesses to give pre-recorded evidence at trial (including evidence-in-chief, cross-examination and re-examination).[13] The overseas experience has been largely positive.[14]

9.13 In its 2015 report *The Justice Response to Victims of Sexual Violence*, the Commission concluded that sexual violence complainants would benefit from greater use of pre-recorded evidence.[15] This would:

- ameliorate some of the anxiety complainants experience when waiting for trial;[16]
- protect the complainant's evidence from deterioration by the passage of time;[17]
- potentially reduce the risk of a mistrial by allowing the judge to control questioning more robustly in the knowledge that interventions can be edited out;[18] and

---

8 At [41].

9 At [35].

10 At [34]. The Criminal Disclosure Act 2008 does impose some limited disclosure obligations on the defence relating to evidence relied on where the defence intends to run an alibi defence and when the defence proposes to call an expert witness: ss 22 and 23. By contrast, the prosecution is required to disclose all relevant information to the defence as soon as reasonably practicable after a defendant has pleaded not guilty unless there is good reason not to: Criminal Disclosure Act, ss 12–19.

11 At [40].

12 See Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.58].

13 See Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.10]–[9.17].

14 See Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006*) at [9.15]–[9.16]. See also Emily Henderson, Kirsten Hanna and Emma Davies "Pre-recording children's evidence: the Western Australian experience" [2012] Crim L R 3 at 13–14.

15 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.33]–[4.34] and [4.77]. The Commission also looked at the issue in the 2013 Review of the Act. It said that pre-recording complainant evidence (including cross-examination) in certain cases had merit and that this issue required further investigation. However, noting the discussion in *M v R*, the Commission concluded that pre-recording raised significant policy issues and that its operational review of the Act was not the appropriate place for that enquiry: Law Commission *The 2013 Review of the Evidence Act 2013* (NZLC R127, 2013) at [11.80]. In this second review of the Act, our terms of reference require us to consider some policy matters in respect of the rules of evidence relating to sexual and family violence.

16 At [4.34] and [4.77].

17 At [4.34] and [4.77].

18 At [4.70].

- enable complainants to take breaks more easily when giving evidence.[19]

9.14 In relation to the pre-recording of cross-examination, the Commission noted that, between 2010 and 2011 (prior to *M v R*), in a number of cases in Auckland the cross-examination of children had been successfully pre-recorded.[20] Empirical research and a considerable volume of international commentary also strongly supported the practice.[21] The Commission noted that it will sometimes be necessary to recall the complainant if new matters come to light or if there is additional disclosure after the pre-recorded hearing has taken place. With refined processes, however, this could be managed and minimised as much as possible.[22]

9.15 The Commission concluded the Evidence Act should provide greater support for the use of pre-recorded evidence-in-chief and encourage a more consistent approach to its use.[23] It recognised that not all complainants will want or need to give their evidence in an alternative way but considered the mode of evidence should be their choice.[24]

9.16 The Commission recommended amending the Act to:

- entitle adult complainants in sexual cases to give their evidence-in-chief in an alternative way or in the ordinary way;[25]
- require prosecutors to consult with complainants in sexual cases on their preferred mode of giving evidence;[26] and
- entitle sexual violence complainants to have their cross-examination pre-recorded, unless a judge made an order to the contrary[27] – relevant reasons for a judge to make an order to the contrary would include those that pertain to the fair trial rights of defendants and circumstances where it would be impractical or excessively costly to pre-record the cross-examination.[28]

9.17 The Commission also made the following recommendation:

- The Ministry of Justice should be responsible for issuing up-to-date memoranda outlining operational processes to be followed where cross-examination is to be pre-recorded in a hearing before trial.[29]

9.18 The Government is currently considering the Commission's 2015 recommendations. We continue to endorse those recommendations.

---

19 At [4.70].

20 At [4.60].

21 At [4.76].

22 At [4.78].

23 At [4.46].

24 At [4.54]. Currently, the judge may direct that evidence is to be given in an alternative way, either on the judge's own initiative or on the application of a party: s 103(1).

25 At 72, R3.

26 At 72, R4.

27 At 76, R5.

28 At 76, R6.

29 At 76, R7.

EVIDENCE-IN-CHIEF OF FAMILY VIOLENCE COMPLAINANTS

RECOMMENDATION

R12 The Act should be amended to entitle a complainant in a family violence case to give their evidence-in-chief by way of a video record made before the hearing, regardless of when the video was recorded, unless a judge makes an order to the contrary.

9.19 Since December 2018, section 106A has entitled adult complainants in family violence cases to give their evidence-in-chief by way of a video record made before the hearing.[30] The video must have been recorded by a police employee no later than two weeks after the incident in which the family violence allegedly occurred.[31] In practice, this enables complainants to give a video recorded by a police officer at the scene of the alleged incident, or soon after the alleged incident, as their evidence-in-chief (a mobile video record).[32] Notwithstanding section 106A, section 106B allows a defendant to apply to a judge for a direction that a family violence complainant may give their evidence or any part of their evidence in the ordinary way under section 83 or in another alternative way under section 105.[33]

Issues Paper

9.20 In our Issues Paper, we recognised the benefits of good quality on-scene mobile video records[34] but noted that mobile video records may not be appropriate in some cases. Where there has been a pattern of sustained violence over many years, for example, it may not be appropriate or possible to take a video statement of a complainant at the scene of the alleged incident (or soon afterwards), and it will be necessary for police to conduct a formal evidential video interview (EVI). An EVI is not usually recorded within two weeks of the alleged incident. In practice, this means that section 106A does not entitle complainants to give an EVI as their evidence-in-chief.

9.21 We explained that, by contrast, legislation in a number of Australian states entitles family violence complainants to give their evidence-in-chief by way of a video record (unless a

---

30 Section 106A (inserted by s 60 of the Family Violence (Amendments) Act 2018, which came into force on 3 December 2018).

31 Section 106A(3).

32 In this report, we have used the term "mobile video record" – the term used in the Evidence Regulations 2007. However, during our consultation with Police, it referred to these records as "victim video statements".

33 When considering whether to give a direction under s 106B, the judge must have regard to whether the interests of justice require a departure from the usual procedure under s 106A in the particular case and the matters in s 103(3) and (4): s 106B(4).

34 Benefits include reduced stress for complainants, richer evidence for the courts, earlier guilty pleas, improved productivity of police officers (by reducing the time they spend on written statements) and reduced court time: see Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.29]. See also Natalie Walker "Modes of evidence in a digital world" (paper presented to the New Zealand Law Society Criminal Law Symposium Intensive Conference, October 2018) 117 at 121.

judge directs otherwise) without time constraints on when the video must be made.[35] We suggested the Evidence Act could go further than section 106A to support family violence complainants. We asked whether the Act should be amended to automatically entitle a family violence complainant to give a video record as their evidence-in-chief, regardless of when the video was recorded, unless a judge makes an order to the contrary.[36]

Consultation

9.22 Most submitters[37] and all the judges[38] we consulted supported an entitlement for all family violence complainants to give pre-recorded evidence-in-chief, regardless of when the video was recorded. The Public Defence Service commented that the two week limitation is not logical and may frustrate the intention of the provision if police is not able to comply. New Zealand Police explained that the two week time limit was included in section 106A to ensure police officers do not use a mobile video record as a substitute for an EVI where an EVI is appropriate. Before the provision came into force in December 2018, Police trialled the use of mobile video records as evidence-in-chief in a pilot in Counties Manukau. Police said there were no problems during the pilot with officers recording a victim's statement on their mobile phone in situations where an EVI would have been appropriate. Police no longer consider the two week time limit in section 106A to be necessary.

9.23 The Criminal Bar Association said extending the entitlement to give a video record as evidence-in-chief (by removing the two week limitation) would also benefit the defence, as viewing the complainant's evidence well in advance of the trial enables the defence to more effectively prepare its case.[39]

9.24 The New Zealand Bar Association and Paulette Benton-Greig[40] said that, if sexual violence complainants are entitled to give pre-recorded evidence-in-chief in future, there are no policy reasons why family violence complainants should be treated differently.

9.25 Two submitters did not think the Act requires amendment. The New Zealand Law Society said the entitlement in section 106A is sufficient. The Public Defence Service said sections 103 and 105 of the Act already allow a case by case decision about whether a complainant may give a pre-recorded video record as their evidence-in-chief.

---

35 At [9.32].

36 At [9.31]–[9.32] and [9.53].

37 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Criminal Bar Association, New Zealand Police, Paulette Benton-Greig, Professor Elisabeth McDonald and TOAH-NNEST Tauiwi Caucus. BVA The Practice supported a wider entitlement for family violence complainants to give their evidence in alternative ways, including by way of pre-recorded evidence. The New Zealand Bar Association noted the benefits of specifying some time frame, whether 2 weeks or otherwise, to achieve the benefits of promptly recording evidence; however, it also noted the benefits of aligning the rules applying to family violence complainants with those that might apply to sexual violence complainants as well as child witnesses. Two submitters did not consider amendment was necessary: the New Zealand Law Society and the Public Defence Service.

38 We consulted our judicial advisory committee and two judges from the Sexual Violence Court Pilot.

39 The Criminal Bar Association gave this explanation when answering a question in the Issues Paper about whether vulnerable witnesses in general should be entitled to have their evidence-in-chief pre-recorded. However, the point is consistent with the Criminal Bar Association's response to the question whether sexual violence complainants should be entitled to give a pre-recorded video as their evidence-in-chief. The Criminal Bar Association said it had no particular concern with this, although it is important for the video record to comply with any applicable rules of court.

40 A member of the law faculty at the University of Waikato with expertise in the justice response to sexual violence.

Our view

Family violence complainants should be entitled to pre-record their evidence-in-chief

9.26 In our view, any legislative reforms allowing sexual violence complainants to have their evidence-in-chief pre-recorded should also be extended to family violence complainants. Family violence complainants experience similar issues to sexual violence complainants when giving evidence in court, including the burden of waiting to give evidence and the stress of giving evidence in front of the defendant (who may be their spouse or partner).

9.27 While the Act already entitles family violence complainants to give their evidence-in-chief by way of a video record if the video was recorded within two weeks of the alleged incident of family violence, we consider there are good reasons for entitling family violence complainants to give a pre-recorded video record as their evidence-in-chief, regardless of when the record was made. The type of video record that is available or appropriate (including a mobile video record, an EVI or evidence-in-chief recorded in a pre-trial hearing) will likely depend on the complexity of the case and whether or not the video record is taken at (or shortly after) the incident. We see no policy reasons for effectively confining the entitlement to one type of video record (mobile video records). If an EVI is available, for example, then regardless of when it was recorded, it seems logical that it should be used wherever possible to minimise the stress on the complainant and to help ensure that good quality evidence is put before the court. The defence may also benefit from being able to see the complainant's evidence-in-chief earlier in the process and prepare accordingly.

9.28 We recommend the Act should be amended to entitle family violence complainants to give their evidence-in-chief by way of a video record, regardless of when that video was recorded. This should be subject to an order made by a judge to the contrary to enable any countervailing considerations relating to the fair trial rights of defendants to be taken into account. One way to achieve this could be to repeal section 106A(3)(b).[41]

9.29 There may be benefit in a wider entitlement for family violence complainants to give evidence in any of the alternative ways (set out in section 105) or in the ordinary way (set out in section 83). Complainants may not want to have their evidence pre-recorded in a hearing prior to trial or give an available video record as their evidence-in-chief. They may, for example, prefer to give evidence in person from behind a screen. We do not see any reason in principle why they should not be entitled to do so.

---

[41] A family violence complainant would then be entitled to give an EVI as evidence-in-chief, subject to a judge's direction to the contrary under section 106B. As noted above at [9.5], the draft Bill does not include any provisions reflecting these recommendations.

CROSS-EXAMINATION OF FAMILY VIOLENCE COMPLAINANTS

RECOMMENDATION

R13 The Act should be amended to entitle a complainant in a family violence case to have their cross-examination pre-recorded, unless a judge makes an order to the contrary.

Issues Paper

9.30 In our Issues Paper, we noted that the Commission's 2015 report *The Justice Response to Victims of Sexual Violence* recommended sexual violence complainants should be able to have their cross-examination pre-recorded in a hearing prior to trial (unless the judge makes an order to the contrary).[42]

9.31 We asked whether a similar provision should apply in relation to family violence complainants, given sexual and family violence complainants face a number of similar challenges when giving evidence in court.[43] We explained that, in both sexual and family violence cases:

- the defendant is often known to the complainant;
- there is a power imbalance between the defendant and the complainant;
- the violence usually occurs in private and is difficult to corroborate;
- complainants are at risk of being re-traumatised by the criminal justice process;
- complainants are likely to require enhanced services and support during the criminal justice process; and
- complainants may be persuaded or pressured to recant their statement to police.

9.32 Noting the Court of Appeal's concerns with pre-recording cross-examination in *M v R*,[44] we asked submitters how the Act could mitigate the possibility that additional disclosure may occur after the pre-recording hearing takes place.

Consultation

9.33 We received 10 submissions on whether family violence complainants should be able to have their cross-examination pre-recorded (unless a judge directs otherwise). Submitters

---

42 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.24], citing Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 76, R5.

43 These similarities are set out at [9.38]–[9.52] of our Issues Paper: *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

44 See above at [9.11]. See also Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.18]–[9.19] and [9.54]–[9.56].

held divided views on this issue.[45] We received six submissions on how the Act could mitigate the possibility of additional disclosure.[46]

9.34 Those who supported greater use of pre-recorded cross-examination generally thought this would assist complainants and the court by facilitating the complainant's best evidence.[47] Paulette Benton-Greig said there are no good policy reasons to treat family violence complainants differently from sexual violence complainants, given that similar issues arise for complainants in both contexts (for example, fear, delay and questioning practices). BVA The Practice considered that greater use of pre-recorded evidence may promote overall efficiencies in the justice system: after the parties see the strength of the case, there may be amendments to the charges and changes in pleas, leading to pre-trial resolutions.[48] Some consultees also suggested the benefits of pre-trial resolutions (including time and cost savings) would outweigh the costs of pre-recording cross-examination.[49]

9.35 Those opposed to greater use of pre-recorded cross-examination generally reiterated the concerns outlined by the Court of Appeal in *M v R*.[50] Police and the Public Defence Service were concerned that a pre-recording hearing would add at least one more court event to the proceedings for all parties and contribute to delays. They said this would add to the victim's stress and frustration[51] and result in defendants having to wait longer for a resolution.[52] The Public Defence Service also commented that there may be additional disclosure after the pre-trial hearing is recorded or the theory of the case may change if there is a subsequent change in counsel. In such cases, the defendant would either lose the opportunity to question a complainant on relevant aspects of the prosecution's case or the complainant may need to be recalled to give evidence again. It said recalling a complainant would defeat the purposes of pre-recording their evidence.

9.36 We also consulted with our judicial advisory committee and two judges from the Sexual Violence Court Pilot. These judges all supported greater use of pre-recorded evidence. Some judges commented that the law has not kept up with developments in technology and developments in the use of pre-recorded evidence overseas.

---

[45] Four submitters supported the greater use of pre-recorded cross-examination, and five were opposed to any amendment. One submitter, BVA, favoured an entitlement for family violence complainants to give their evidence in any of the alternative ways set out in the Act.

[46] Two submitters said the Act could not mitigate the possibility that additional disclosure may occur after the pre-recording hearing. Three submitters said the Act could mitigate this possibility but did not suggest how. BVA commented that complainants would need to be recalled to give evidence at trial if necessary in the interests of justice. They also suggested that prior to conducting a pre-recording hearing, the judge should be satisfied that defence counsel has adequate disclosure and adequate instructions.

[47] Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, Elisabeth McDonald, Paulette Benton-Greig and TOAH-NNEST Tauiwi Caucus.

[48] This firm has a Crown Warrant for Palmerston North and the wider Manawatu region. For more information about the point raised in this submission, see: John Baverstock *Process evaluation of pre-recorded cross-examination pilot (Section 28)* (Ministry of Justice (UK), 2016) at 33.

[49] Two judges from the Sexual Violence Court Pilot.

[50] The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

[51] Police.

[52] The Public Defence Service.

9.37 The Sexual Violence Court Pilot judges nevertheless recommended an incremental approach to legislative reform, starting with an entitlement for sexual violence complainants to have their cross-examination pre-recorded. They suggested that, if an entitlement is successfully implemented, it could then be incrementally extended to other vulnerable witnesses, such as family violence complainants in jury trials. The judges noted there are a significant number of judge-alone trials for family violence offending,[53] and if family violence complainants in all of these cases were entitled to have their cross-examination pre-recorded, it may overburden the courts' resources (for example, the technology needed to record, store, edit and replay the evidence).[54]

9.38 BVA similarly suggested an entitlement for family violence complainants to have their entire evidence pre-recorded should be confined to serious cases of family violence:

> The sheer number of cases and the shorter duration of lower level domestic violence cases mean that pre-recording will not achieve the same reduction in waiting time for those complainants. In fact, having two separate hearings, one to pre-record the complainant's evidence, and one to conduct the trial will in many cases increase the overall amount of hearing time required. In time, [in] the more serious cases of long term domestic violence allegations, pre-recording by contrast will achieve the same benefits as for sexual complainants.

Our view

Family violence complainants should be entitled to pre-record their cross-examination

9.39 We have concluded there are good policy reasons why family violence complainants should be entitled to have their cross-examination pre-recorded in a hearing prior to trial, unless a judge makes an order to the contrary.

9.40 The Commission has previously recommended sexual violence complainants should be entitled to have their cross-examination pre-recorded, unless the judge orders otherwise.[55] As we explained in our Issues Paper, sexual and family violence complainants experience a number of similar challenges when giving evidence in court.[56] They may, for example, be re-traumatised by the criminal justice process and require enhanced services and support during the court process.

9.41 We therefore anticipate that an entitlement to have their cross-examination pre-recorded would have similar benefits for family violence complainants as it would for sexual violence complainants. As we have previously discussed,[57] these benefits include minimising the stress complainants experience by participating in the criminal justice process, promoting their recovery and facilitating their best evidence.

---

53 On this point see also: Natalie Akoorie "Sobering accounts of domestic violence by Judge Phil Connell and victim Mereana Love" *The New Zealand Herald* (online ed, Hamilton, 23 July 2018).

54 We note that the majority of trials for serious offending are conducted before a judge and jury rather than a judge alone; however, the mode of trial is not necessarily indicative of the seriousness of the charges: see *S (CA377/2017) v R* [2018] NZCA 101.

55 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 76, R5.

56 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.38]–[9.52]. See also above at [9.31].

57 See above at [9.13].

9.42 We also expect that an entitlement for family violence complainants to have their cross-examination pre-recorded would have benefits for the administration of justice. Some overseas experience suggests that, by seeing the strength of the evidence in advance of the trial, both sides are able to make better pre-trial decisions.[58] There may be amendments to the charges and changes in pleas, leading to pre-trial resolutions. Any withdrawal of charges or guilty plea represents a cost-saving for the criminal justice system.[59]

9.43 We recognise that pre-recording cross-examination may have greater benefits for family violence complainants in proceedings that take a long time to resolve, for example, in cases where the violence is more serious and/or there is an extensive history of family violence. In such cases, pre-recording evidence alleviates the negative impact that delays can have on the quality of the evidence and on the victims' ability to move on from the offending.

9.44 The benefits of pre-recording cross-examination may be less pronounced or absent in cases that are more expeditiously resolved. In judge-alone trials involving less serious offending, for example, an additional hearing to pre-record the complainant's cross-examination may not appreciably reduce the time for complainants waiting to give their evidence and may even prolong resolution.

9.45 We consider this can be addressed by qualifying the entitlement to give pre-recorded cross-examination so that a judge may make an order to the contrary if there are good countervailing reasons why cross-examination should be conducted in the ordinary way (or in another alternative way). Countervailing reasons could include avoiding unnecessary or unjustifiable expense or delay.[60] As we discuss below, we think prosecutors should be required to make reasonable efforts to ensure complainants are informed about the various modes of evidence, including the advantages and disadvantages of each mode of evidence. We anticipate that a prosecutor would inform the complainant if pre-recording their cross-examination may not have any appreciable benefits in the complainant's particular circumstances.

Additional disclosure after cross-examination is pre-recorded

9.46 We consider there are two ways the Act can address the possibility of additional disclosure or other developments in the case occurring after the pre-trial hearing to record the complainant's cross-examination.

9.47 First, we recommend the entitlement to give pre-recorded cross-examination should be subject to a judge making an order to the contrary. A judge could make an order to the contrary if there are good countervailing reasons why cross-examination should be conducted in the ordinary way (or in another alternative mode). Countervailing reasons in

---

[58] John Baverstock *Process evaluation of pre-recorded cross-examination pilot (Section 28)* (Ministry of Justice (UK), 2016) at 33–34 and 59–60; and Emily Henderson, Kirsten Hanna and Emma Davies "Pre-recording children's evidence: the Western Australian experience" [2012] Crim L R 3 at 10.

[59] Emily Henderson, Kirsten Hanna and Emma Davies "Pre-recording children's evidence: the Western Australian experience" [2012] Crim L R 3 at 10.

[60] Section 6(e).

this context might include promoting fairness to the parties and witnesses,[61] for example, where the judge is not satisfied that criminal disclosure requirements have been met.

9.48 Second, the Act already provides that a judge may recall a witness who has given evidence if the judge considers it is in the interests of justice to do so.[62] The interests of justice may require a complainant to be recalled where there has been additional disclosure after the pre-trial hearing to record their cross-examination.

9.49 In *M v R*, and some of the submissions we received, the possibility that a complainant may need to be recalled to give evidence was mentioned as a reason for not pre-recording a complainant's cross-examination.[63] In our view, the fact some complainants may need to be recalled to give evidence at trial should not prevent all complainants from being entitled to have their cross-examination pre-recorded. Experience indicates that complainants rarely need to be recalled to give evidence.[64] If they are, they may only need to give evidence in relation to a particular issue. It is still beneficial for complainants to have the majority of their evidence pre-recorded as early as possible to relieve them of the stress of waiting to give this evidence and to facilitate their best evidence.

CONSULTING FAMILY VIOLENCE COMPLAINANTS ON THE MODE OF EVIDENCE

RECOMMENDATION

R14

In all family violence cases, the prosecutor should be required to make reasonable efforts to:

- ensure the complainant is informed about the alternative ways of giving evidence (section 105) and the ordinary way of giving evidence (section 83); and
- ascertain the complainant's views on their preferred mode of evidence.

Issues Paper

9.50 In our Issues Paper, we noted that the Commission's 2015 report recommended prosecutors should be required to consult with sexual violence complainants on their preferred mode of evidence.[65] The Commission reasoned that an entitlement to give evidence in various ways is worth little if the complainant does not know it exists.

---

[61] Section 6(c).

[62] Section 99.

[63] *M v R* [2011] NZCA 303, [2012] 2 NZLR 485 at [40]. This point was also made in the submissions of Police and the Public Defence Service.

[64] Emily Henderson, Kirsten Hanna and Emma Davies "Pre-recording children's evidence: the Western Australian experience" [2012] Crim L R 3 at 11; and Emma Davies and Kirsten Hanna "Pre-recording testimony in New Zealand: Lawyers' and victim advisors' experiences in nine cases" (2013) 46(2) Aust NZ J Criminol 289 at 300.

[65] This accompanied a recommendation that sexual violence complainants should be entitled to give evidence-in-chief in an alternative way or in the ordinary way: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.21]–[9.22]; and Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 72, R4.

9.51 We asked whether prosecutors should also be required to consult complainants in family violence cases about their preferred mode of evidence. We expressed the preliminary view that there would be merit in such a requirement.

Consultation

9.52 Eight of the 10 submissions we received considered family violence complainants should be consulted about their preferred mode of evidence.[66] However, two of the eight submitters suggested prosecutors could be required to consult with the complainant *or* ascertain the complainant has reached an informed view about their preferred mode of evidence.[67]

9.53 Submitters who supported a requirement for consultation said it is important complainants know the options that are available for giving evidence. Two submitters suggested it is critical to complainants' healing that they are offered a choice following an experience in which choice has been taken away by the abuse of power.[68]

9.54 Two submitters, Police and BVA, did not think prosecutors should be required to consult with complainants. Police said the complainant's views on the mode of evidence should not be determinative given the possibility of the complainant recanting. BVA said it may be difficult for prosecutors to comply with an obligation to consult with the complainant if the complainant turns hostile or refuses to engage with police in the course of the proceeding.

Our view

Prosecutors should make reasonable efforts to ensure complainants are informed about the various ways of giving evidence, and ascertain their views

9.55 In our view, family violence complainants should be fully informed about the options available for giving evidence (whether by way of an entitlement or an application) and should have an opportunity to provide their views. To be fully informed, we consider complainants need to know what the options are, as well as the implications of giving evidence in each of those ways. For example, if the Act is amended to entitle complainants to have their cross-examination pre-recorded, we think they should be told they may still be recalled to give some evidence at trial. The process of consulting with complainants may help prosecutors understand how the complainant's best evidence can be obtained.

9.56 We recommend the Evidence Act or the Victims' Rights Act 2002 should be amended to require the prosecutor in a family violence case to make reasonable efforts to:

- ensure the complainant is informed about the ordinary and alternative ways of giving evidence; and

---

[66] Eight of the ten submissions supported a requirement for complainants to be consulted on their preferred mode of giving evidence: Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, the Criminal Bar Association, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig, the Public Defence Service and TOAH-NNEST Tauiwi Caucus.

[67] Elisabeth McDonald and Paulette Benton-Greig. Paulette Benton-Greig said ideally this consultation should be done by a specially trained support person who has an ongoing relationship with the complainant.

[68] Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus.

- ascertain the complainant's views on their preferred mode of evidence (including evidence-in-chief and cross-examination).

9.57 Requiring the prosecutor to make reasonable efforts to consult with complainants would not impose an unduly onerous obligation on prosecutors where a complainant becomes hostile or refuses to engage with police. In those situations, police might, for example, write to the complainant with information on the various ways of giving evidence and invite the complainant to discuss their views.

9.58 We consider an obligation on prosecutors to consult family violence complainants on their preferred mode of evidence should align with any reforms resulting from the Commission's 2015 recommendation that prosecutors should consult sexual violence complainants on their preferred mode of evidence.

PRE-RECORDING EVIDENCE OF OTHER WITNESSES

9.59 In our Issues Paper, we asked whether other witnesses might also benefit from an entitlement to have their evidence (including cross-examination) pre-recorded such as:

- witnesses who give propensity evidence about a previous allegation of sexual or family violence;
- family members of a sexual or family violence complainant who are witnesses in the trial; and
- any other vulnerable witnesses.

9.60 We recognised the Act already allows any witness in any proceeding to give their evidence in an alternative way, if the judge gives a direction to that effect (either on the application of a party or on the judge's own initiative).[69]

Propensity witnesses and family members of the complainant

Issues Paper

9.61 In our Issues Paper, we observed that witnesses who are to give propensity evidence about an allegation of sexual or family violence they have previously made may experience the same anxiety about testifying in court as complainants. We suggested it may be desirable to extend an entitlement to give pre-recorded evidence to those witnesses. We noted that, in the Australian Capital Territory, a "similar act witness" may give a video record as evidence-in-chief in a proceeding relating to a sexual or violent offence,[70] although the court may still refuse to admit all or any part of the video record.[71]

9.62 We also suggested it may be desirable to extend an entitlement to give pre-recorded evidence to family members of sexual or family violence complainants, who are witnesses

---

69 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.59].

70 Evidence (Miscellaneous Provisions) Act 1991 (ACT), s 37. A "similar act witness" means a witness in a sexual or violent offence proceeding who gives evidence relating to an act committed on or in the presence of the witness by the accused and is tendency or coincidence evidence under the Evidence Act 2011 (ACT), s 40D(2). See Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.57].

71 Evidence (Miscellaneous Provisions) Act 1991 (ACT), s 40F(2). See Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.57].

in the trial. One of the goals of pre-recording evidence is to aid the complainant's long-term psychological recovery. If a complainant is able to have their evidence pre-recorded but their family member cannot, the whole family (including the complainant) may be inhibited in their recovery.

9.63 We asked whether the Act should entitle (a) propensity witnesses and/or (b) family members of complainants to have their evidence pre-recorded (including cross-examination) unless a judge makes an order to the contrary.

Consultation

9.64 We received 10 submissions,[72] which showed limited support for entitling propensity witnesses and family members to have their evidence pre-recorded.[73] Submitters said:

- the limited funding and resources available for pre-recording evidence should, at least initially, be directed towards sexual and family violence complainants (who need it the most);[74]
- the Act already allows propensity witnesses and family members to apply to give evidence in an alternative way, and it is appropriate that a judge considers their applications on a case by case basis;[75] and
- pre-recording cross-examination is generally problematic, for the reasons set out in *M v R*.[76]

9.65 Two submitters thought the Act should be amended.[77] Two other submitters, BVA and Paulette Benton-Greig, did not support an entitlement for all propensity witnesses and family member witnesses to have their evidence pre-recorded but recognised that pre-recording could offer real benefits for some witnesses on a case by case basis.

9.66 BVA commented that pre-recording may minimise the risk of propensity witnesses being re-traumatised by giving evidence about the sexual or family violence they experienced, sometimes years later.[78] It would also allow them to give their evidence over a set time period rather than having to travel to the trial and wait until the appropriate moment to give evidence. If there are developments prior to the trial, such as pleas or adjournments, they would not be adversely affected. Further, if evidence to support the alleged propensity is not delivered as anticipated, the admissibility of the witness's evidence could be reconsidered without impacting on the trial.

---

72 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, the Criminal Bar Association, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig, Police, the Public Defence Service and TOAH-NNEST Tauiwi Caucus. Most submissions gave one response to both questions.

73 Eight submitters did not support legislative amendment.

74 BVA and Paulette Benton-Greig.

75 Elisabeth McDonald, the New Zealand Law Society and Police.

76 The New Zealand Bar Association, the New Zealand Law Society and Police expressed concerns along the same lines as those raised by the Court of Appeal in *M v R*. The Criminal Bar Association said it had no particular problem with a presumption for propensity witnesses and family members of the complainant to have their evidence-in-chief pre-recorded, as long as they are available for cross-examination. The Criminal Bar Association also said that propensity witnesses should essentially be treated the same as sexual violence complainants.

77 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus.

78 However, BVA thought entitlements to give pre-recorded evidence should focus on those who would benefit most from it (complainants in cases of sexual or extensive family violence).

9.67 BVA acknowledged it may sometimes be appropriate to record a family member's evidence at the same time as the complainant's evidence. This may help to avoid the risk of a family member's evidence being contaminated by their knowledge of how the complainant gave evidence or what the complainant was cross-examined on.[79]

9.68 BVA nevertheless concluded that, given the significant resourcing required to pre-record evidence, initial efforts should focus on those for whom pre-recording will make the most difference: complainants in sexual and family violence cases.[80]

9.69 We also consulted our judicial advisory committee and two judges from the Sexual Violence Court Pilot. There was general support among the judges for greater use of pre-recorded evidence but some uncertainty as to whether an entitlement for all propensity witnesses and family members of complainants is necessary.

Our view

9.70 Although we consider some propensity witnesses and family members of the complainant would benefit from pre-recording their evidence, submitters did not strongly support an entitlement for these witnesses to give pre-recorded evidence. Section 103 already allows propensity witnesses and family members of complainants to apply to give their evidence by way of a video record, and on balance, we consider this is currently sufficient.

9.71 We are conscious of the costs associated with recording and electronically storing evidence. As resources for pre-recording evidence will need to be prioritised, we suggest they should be directed at the highest need witnesses: children, complainants in sexual and family violence cases and other vulnerable witnesses (which may include propensity witnesses and family members) identified on a case by case basis.

Other vulnerable witnesses

Issues Paper

9.72 Although our Issues Paper focused on witnesses in sexual and family violence cases, we acknowledged there may be other vulnerable witnesses who would benefit from an entitlement to give pre-recorded evidence. This could include witnesses with linguistic difficulties and people with physical, psychological or psychiatric impairments.

9.73 We asked whether submitters supported moving towards greater use of pre-recorded evidence for all vulnerable witnesses in future and, if so, which vulnerable witnesses should be entitled to give pre-recorded evidence.

Consultation

9.74 Submitters did not think the Act should entitle vulnerable witnesses to have their evidence pre-recorded,[81] particularly their cross-examination.[82]

---

79 BVA nevertheless thought the ability to apply to the judge to pre-record the family member's evidence is sufficient in such cases.

80 As noted above at [9.38], BVA considered that not all family violence complainants will benefit from pre-recording their evidence, and it suggested an entitlement should be confined to more serious cases of alleged family violence.

9.75 A number of submitters said the most important issue is to identify the particular vulnerabilities of the witness and enable them to access the specific support they need to give their best evidence.[83] An *entitlement* for all vulnerable witnesses to have their evidence pre-recorded will not necessarily support all vulnerable witnesses to give their best evidence. Paulette Benton-Greig expressed concern about defining entitlements to give pre-recorded evidence around the characteristics of a witness (for example, age) or the nature of the proceedings (for example, sexual violence).[84] A range of less concrete factors may affect whether someone needs additional support to give evidence in court. These factors could include whether a witness is a member of a gang or the effects of repeat victimisation on the witness.

9.76 We also consulted our judicial advisory committee and two judges from the Sexual Violence Court Pilot. The judges all supported greater use of pre-recorded evidence; however, the Sexual Violence Court Pilot judges suggested an incremental approach to entitlements (starting with sexual violence complainants) is desirable to avoid overburdening the courts' resources.

Our view

9.77 We do not make any recommendations for reform on this issue. Whether it is appropriate to pre-record a witness's evidence is best determined on a case by case basis rather than defining entitlements to give pre-recorded evidence around notions of vulnerability. A wide range of factors and circumstances may influence whether a witness is vulnerable, and different forms of support may be needed to address these different vulnerabilities. We consider it is important, as a matter of practice, to identify the particular needs of the vulnerable witness and to offer them the particular support or mode of evidence they need to provide their best evidence.

RECORDING EVIDENCE AT TRIAL FOR USE AT RE-TRIAL

9.78 Giving evidence in court can be traumatic for complainants in sexual and family violence cases. If a trial results in a hung jury or the defendant successfully appeals a conviction, complainants may be unwilling to come back to court to give evidence at a re-trial.

9.79 In 2011, Elisabeth McDonald and Yvette Tinsley recommended there should be a provision in the Act allowing a sexual violence complainant's evidence to be recorded by video at trial and allowing the prosecution to apply for the recording made at trial or pre-trial to be

---

81 We received 10 submissions. Six submissions did not support an entitlement: Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig, Police and the Public Defence Service. Two submitters did not support a general entitlement for vulnerable witnesses to have their cross-examination pre-recorded (but did not necessarily object to pre-recording evidence-in-chief): BVA and the Criminal Bar Association. Two submissions were unclear.

82 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and Police reiterated the concerns expressed by the Court of Appeal in *M v R*.

83 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Elisabeth McDonald, Paulette Benton-Greig, and TOAH-NNEST Tauiwi Caucus.

84 She also recognised the need to prioritise resources so supported an entitlement for complainants to have their evidence pre-recorded and the ability to apply to give evidence in alternative ways for other witnesses.

used in any re-trial.[85] They said, in some cases, this would avoid the complainant having to give evidence in person at the re-trial, allowing the complainant to begin recovering from their ordeal more quickly.[86] It would also preserve the highest quality evidence for trial in cases that are heavily reliant on the complainant's memory.[87]

Issues Paper

9.80 In our Issues Paper, we commented that the Act does not appear to prevent evidence from being recorded at trial or prevent evidence recorded pre-trial from being used in a re-trial.[88] Nevertheless, we observed that most Australian states expressly permit prosecutors to tender a complainant's evidence recorded pre-trial or at trial in any re-trial.

9.81 We asked whether the Act should be amended to expressly permit the evidence of sexual and/or family violence complainants to be recorded at trial for use at any re-trial and allow the prosecution to tender any evidence recorded pre-trial in any re-trial. If there was support for this, we noted an amendment could clarify fair trial rights for defendants, for example, that they are not prevented from challenging the admissibility of any part of the evidence from the first trial or from giving evidence that did not form part of the first trial.

9.82 We did not express a preliminary view but acknowledged there would be costs associated with recording the evidence of all complainants at trial and with the digital storage of these records in case of a re-trial. We expressed uncertainty about how evidence recorded at trial or pre-trial would realistically be used in any re-trial, given the evidence at a re-trial may change or new issues may be introduced.

Consultation

9.83 We received nine submissions on this issue. Most were not opposed to the suggestion in principle, but some noted practical difficulties.[89] We also consulted with Skylight Trust, which includes a team of advocates for sexual violence survivors led by Louise Nicholas. Skylight considered the suggested amendments would make re-trials less traumatic for complainants.

9.84 Those who supported the suggested amendments thought this could make a significant difference to the number of re-trials that proceed. They suggested that very few re-trials proceed because complainants are unwilling to come back to court and give evidence again. In practice, this means that ordering a re-trial is often tantamount to an acquittal.

---

85 Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 308.

86 At 307.

87 At 307.

88 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.64]–[9.70].

89 Five submissions supported the suggestions: Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Elisabeth McDonald, Paulette Benton-Greig, Police and TOAH-NNEST Tauiwi Caucus. The Criminal Bar Association and the New Zealand Bar Association said they did not object to the suggestions in principle but noted a number of practical difficulties. The contributors to the New Zealand Law Society submission were divided on this issue and provided both perspectives. The Public Defence Service did not support the suggestion.

9.85 Those who identified practical difficulties with the suggestions emphasised that the dynamics of a re-trial are invariably different to the dynamics of the trial. At the re-trial, both sides will strategically rethink how to approach the case. Some of the evidence presented at the first trial may (in hindsight) be regarded as objectionable or able to be better phrased, and there may be new disclosure or a change in the charges. These changes mean it is likely the recorded evidence will require significant editing and that the complainant will need to come back to court for further questioning at the re-trial. It was also suggested that the cost of recording evidence in all cases would not be justified, given the limited number of re-trials that occur.

9.86 The Public Defence Service queried who would make the decision about whether to play the recorded evidence at the re-trial or whether to call the witness. They said it would be unfair if this decision were solely the domain of the Crown as it would allow the Crown to play the recorded evidence where it is happy with how the evidence was presented at the original trial but to call the witness where that evidence is not particularly strong or well presented.

9.87 Our judicial advisory committee commented that, if the first trial resulted in a conviction, the defence will likely want to take a different approach to cross-examination at the re-trial. Similarly, if the first trial resulted in a hung jury, the prosecution may not want to use the complainant's evidence again at the re-trial.

Our view

No amendment to the Act is required

9.88 We were concerned to hear how traumatic it is for complainants to give evidence at a re-trial and by the suggestion that many complainants are unwilling to proceed when a re-trial is ordered. Nevertheless, we do not think the suggested amendments will spare complainants the trauma of having to give evidence at a re-trial. The difficulty is that the prosecution is only responsible for a complainant's evidence-in-chief and re-examination at trial: the defence is responsible for the complainant's cross-examination. Trial fairness would therefore require that a complainant's cross-examination should only be tendered at a re-trial with the agreement of the defence: the prosecution should not be able to engineer a situation that could constrain the defendant's ability to present an effective defence.

9.89 We think it is unlikely the prosecution and the defence would agree to the complainant's cross-examination being replayed at a re-trial. If the trial had resulted in a conviction, the prosecution may want to offer the same evidence-in-chief at the re-trial. However, it is unlikely the defence would want the cross-examination to be used again at trial. The defence would likely want to take a different approach to cross-examination. If the trial resulted in a hung jury, the complainant's evidence may have been less compelling and the prosecution may not wish to repeat it at the re-trial.

9.90 We have therefore decided not to recommend a new provision expressly permitting a complainant's evidence to be recorded at trial or a new provision allowing the prosecution to tender any evidence recorded pre-trial or at trial in any re-trial.

ACCESS TO EVIDENTIAL VIDEO INTERVIEWS IN SEXUAL AND VIOLENT CASES

RECOMMENDATION

R15 Section 106(4)–(4C) should be amended so that any video record that is to be offered as an alternative way of giving evidence must be given to the defendant's lawyer before it is offered in evidence, unless the judge directs otherwise.

9.91 In 2016, the Act was amended to restrict defence access to video record evidence of child complainants and witnesses (including adult complainants) in sexual and violent cases. Instead of being automatically entitled to a copy of the complainant's EVI, section 106(4)–(4C) now requires defence counsel to apply to the judge for a copy of this video record.

9.92 At the same time, the Evidence Regulations 2007 were amended so that, unless the judge directs otherwise, the EVI may only be viewed by the defendant and/or their counsel at the premises of Police or a Crown lawyer or other premises with their agreement.[90]

9.93 The amendments were intended to address the possibility of these sensitive video records being lost or misused.[91]

Issues Paper

9.94 In our Issues Paper, we explained we had received feedback indicating the new restrictions are causing problems for the defence. We asked whether the restrictions on defence counsel access to video interviews in sexual or violent cases are causing difficulties in practice and, if so, how access could be improved while still mitigating the risk that the video record could be inappropriately used.

Consultation

9.95 Eleven submitters responded to one or both parts of this question.[92] We also consulted our judicial advisory committee and two judges from the Sexual Violence Court Pilot.

9.96 Almost everyone we heard from acknowledged the restrictions have caused practical problems for defence counsel, but some thought the restrictions are justified to protect complainants' privacy.[93] The themes emerging from submissions are summarised below.

---

90 Regulation 20B. This was inserted by reg 9 of the Evidence Amendment Regulations 2016, which came into force on 9 January 2017.

91 We set out the background to the amendments in our Issues Paper: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.71]–[9.74].

92 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, the Criminal Bar Association, the Crown Law Office, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig, Police, the Public Defence Service, TOAH-NNEST Tauiwi Caucus and one individual submitter (a defence lawyer).

93 Submitters who commented on the importance of protecting complainants' privacy were: Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Crown Law, Police, TOAH-NNEST Tauiwi Caucus and one individual submitter.

Justification for the restrictions

9.97 The feedback from the Crown Law Office captured the privacy concerns that led to the restrictions. It explained that, if a complainant's EVI falls into the wrong hands, it can be used to harass, intimidate, blackmail or otherwise re-victimise the complainant. If it is published on the internet, it can quickly spread to a wide audience and is difficult to erase. This may impact on the willingness of others to report offending. Crown Law referred us to *R v Henning*, a 2011 District Court decision that describes an incident (prior to the 2016 amendments) where an accused had filmed a replay of the video interview of the complainant while defence counsel was out of the room and another incident in which a defence lawyer lost a copy of the EVI of a 9-year-old sexual violence complainant.[94]

9.98 On the other hand, the Public Defence Service and one individual submitter argued there is no justifiable basis for the 2016 amendments. The Public Defence Service said the amendments were based on a speculative risk about the potential for EVIs to be misused and a conflation of that risk with defence counsel access to EVIs. It noted defence counsel are subject to the same rules and regulations as all lawyers, including prosecutors, and it is difficult to see why lawyers who work for the Crown are trusted to have copies of EVIs while lawyers who work as defence counsel are not.

9.99 One individual submitter referred to the genesis of the amendments in a recommendation in *From "Real Rape" to Real Justice.*[95] They noted the recommendation was not based on any suggestion of impropriety on the part of defence counsel but rather on the risk of EVIs being inadvertently mishandled or lost. The submitter argued such a risk is inherent in any human system and cannot be completely eliminated: the suggested misuse is just as likely to occur in the hands of police or prosecutors.

Impact of restrictions on the preparation of the defence

9.100 We were told that co-ordinating viewing times at the police station can be difficult. Preparation of the defence case takes place at all times of the day and night, weekends and holidays. One submitter described trying to co-ordinate the availability of the police officer in charge, the defendant, defence counsel and possibly an interpreter as "an exercise in frustration". The police officer in charge may be on leave or unavailable, the defendant may be in custody and defence counsel will be juggling other work engagements.

9.101 When a suitable time is arranged, we were told there has sometimes been inadequate space and resourcing at the police station to enable defence counsel to view the EVI, particularly when the defendant is present.

9.102 One individual submitter (a defence lawyer) said that proper analysis of an EVI may necessitate multiple viewings, which is difficult if an appointment is required on each occasion at a time convenient for police. Often EVIs are lengthy, or there may be more than one EVI to watch for a trial. Defence counsel may wish to pause the video for discussion with their client, to check the accuracy of the transcript or to work out inaudible or incoherent passages using visual cues.

---

94 *R v Henning* DC Wellington CRI-2010-078-1159, 5 July 2011 at [14].

95 Elisabeth McDonald and Yvette Tinsley *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 307, recommendation 8.4.

9.103 We were told it is difficult for defence counsel to properly analyse the EVI at the police station using police equipment and without access to the normal resources available in their offices.

9.104 We were advised that some defendants feel uncomfortable going to the police station to view the EVI. We were also told that sometimes a police officer will remain in the room while the EVI is being played, making it difficult for defence counsel to communicate freely with the defendant.

Impact of restrictions on defendants

9.105 One individual submitter (a defence lawyer) told us that, if the defendant is in custody, the police and prosecutor offer the EVI to defence counsel for viewing rather than offering it to the defendant (which would necessitate the prosecutor travelling to a prison). Some defendants do not want transcripts sent to them in prison where they have no privacy. The defence is therefore required to apply to the court for a copy of the EVI so they can show it to the defendant. If the judge refuses the application, the decision cannot be appealed.[96] This means it is possible a defendant may come to trial having never seen the evidence against them. This undermines the ability of the defence to examine the witnesses for the prosecution under the same conditions as the prosecution. It was submitted that both of these consequences adversely impact the defendant's fair trial rights.[97]

9.106 Some submitters commented that it is not sufficient to provide the defendant with a transcript because there is often an emotional and visual component to interviews that a transcript does not capture. On occasions, there have been guilty pleas entered or changes in position after a complainant's interview has been played to the jury when defendants see and hear for the first time the strength of the evidence against them.[98] On those occasions, the complainant will already be waiting at court, having prepared to give evidence.

Impact of restrictions on the resolution of the case

9.107 The restrictions mean that defence counsel must apply for a copy of the EVI (for example, to show the EVI to a defendant in custody).[99] It was submitted that an application requires a further court appearance, which causes delay and prevents early resolution of matters. Delays are detrimental to complainants and defendants (who may be on bail or in custody).

---

96 See *H (CA714/2017) v R* [2018] NZCA 34.

97 New Zealand Bill of Rights Act 1990, s 25(a) and (f).

98 This point was also made during consultation with our judicial advisory committee. It was suggested it is in the interests of both the defence and the prosecution for defendants to view the EVI, as this may lead to an early guilty plea.

99 Several consultees commented that, in some regions, applications for a copy of an EVI are almost always granted and that, in other regions, the converse is true.

Mitigating the risk of an EVI being inappropriately used

9.108 Six submitters said the Act should be amended to automatically entitle defence counsel to a copy of the EVI but that restrictions should prevent the defendant having possession of it and should require the defendant to view the EVI in the presence of their counsel.[100]

9.109 One submitter said there are already numerous safeguards in the Act and the Evidence Regulations to mitigate any risk or perceived risk of misuse and to punish any breach. They noted the Act creates offences punishable by a fine or imprisonment for inappropriate possession or use of video records of child complainants and of any witness (including adult complainants) in a sexual or violent case.[101] The Regulations also contain a number of safeguards relating to the handling of these video records.[102] The New Zealand Law Society commented that, if a lawyer knowingly or intentionally breached the law in relation to the security of video records, this would likely constitute serious misconduct and expose the lawyer to professional disciplinary sanctions.[103]

9.110 Two submitters considered the current restrictions should remain but there should be an obligation on the prosecution to facilitate access to the EVI for defence counsel.[104]

9.111 The Public Defence Service suggested defence counsel could be required to have a policy that covers how the EVI will be securely stored and how its movement will be tracked (for example, by maintaining a register of when the EVI is accessed and by whom). The Public Defence Service currently has a policy in place that covers these matters.

9.112 A number of consultees discussed the use of technology to mitigate the risk of EVIs falling into the wrong hands.[105] Police said they would prefer all video interviews to be recorded and stored electronically in a cloud-based system for secure access rather than being recorded or copied to DVD. Police told us that mobile video records of family violence complainants are stored on a cloud-based system, which requires defence counsel to register and sign in (so that the computer and IP address are linked for security purposes). Metadata is recorded when the footage is viewed. Police provide defence counsel with a link to the video soon after it is filmed, and access is removed once the trial is over. The video has a watermark so police can see when and by whom the link was accessed, enabling them to work out who is responsible for any misuse (for example, if a replay of the recording is filmed on another device and uploaded to the internet). Self-represented litigants are able to watch the mobile video record at the police station or at the prison, and they receive a transcript of the video.

---

100 BVA, the Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, the Public Defence Service and one individual submitter.

101 Section 119(1AA)–(1AC).

102 These are set out below at [9.118].

103 Lawyers and Conveyancers Act 2006; and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

104 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus.

105 The Public Defence Service suggested Police could be required to use technological safeguards to protect EVIs, for example, by providing versions of the EVI that cannot be copied and that are password protected. Our judicial advisory committee also thought technology should be used to mitigate the risk. Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus said that systems can be hacked and no risks should be taken with EVIs. We discussed the possible use of technology to mitigate risk with Police and Crown Law.

9.113 Police said it is interested in using this same technology to provide disclosure of EVIs in a more efficient and secure form in future.[106] It noted there may be financial implications associated with the use of this technology for EVIs. It said the restrictions in section 106 should remain at present, but the Act and Regulations should accommodate the future use of cloud-based storage and access systems.

Our view

Defence counsel should be entitled to a copy of any EVI that is to be offered by the prosecution

9.114 We recognise the importance of protecting complainants' privacy and the need to mitigate the risk of complainants' EVIs falling into the wrong hands. However, we consider the restrictions on defence counsel access to EVIs (relating to child complainants or witnesses in a sexual or violent case) are not a suitable way to mitigate the risk because of the impact these restrictions have on the fair trial rights of defendants.

9.115 Defendants have rights to minimum standards of criminal procedure. They include the rights to know the prosecution case,[107] to present an effective defence[108] and to examine witnesses for the prosecution under the same conditions as the prosecution.[109] It is essential defence counsel have proper access to the complainant's EVI to prepare and present an effective defence. The EVI contains important emotional and visual information, and carefully reviewing it (on one or more occasions) is an essential part of properly preparing the defence case. In our view, it is unreasonable to expect defence counsel to be able to prepare properly by viewing the EVI at a police station at a time convenient for police and without access to the resources that are normally available to counsel in their offices.

9.116 We are also concerned about the possible impact of the restrictions on the fair trial rights of defendants in custody. It is troubling that defendants may potentially come to court without ever having seen the evidence against them. Defendants cannot make informed decisions or properly instruct counsel unless they have seen the EVI and the strength of the evidence against them.

9.117 We recommend replacing section 106(4)–(4C) with a provision to the effect that:[110]

> A copy of pre-recorded evidence that is to be offered by the prosecution as an alternative way of giving evidence-
>
> (a) must be given to the defendant's lawyer unless the Judge directs otherwise; and
>
> (b) must be dealt with in accordance with any regulations made under section 201.

9.118 We consider the Regulations already adequately mitigate the risk of a complainant's EVI being misused. The Regulations include the following requirements and restrictions on the

---

106 Commenting on the Police response, Crown Law noted that uploading and storing EVIs on a cloud-based system and providing digital access to defence counsel would not address the risk that defendants may surreptitiously record a complainant's EVI on a mobile phone.

107 Criminal Disclosure Act 2008, s 13.

108 New Zealand Bill of Rights Act 1990, s 25(e).

109 New Zealand Bill of Rights Act 1990, s 25(f).

110 Our proposed provision is very similar to the provision in force prior to the 2016 amendments.

storage, showing, viewing, use, copying and supplying of a video record that is given to a lawyer under section 106 of the Act:[111]

- The defendant's lawyer must place the video record in safe custody.[112]
- The defendant's lawyer must return the video record to the police as soon as practicable after the criminal proceeding to which it relates is concluded.[113]
- The defendant's lawyer may only use the video record for the purposes of preparing the defence, obtaining advice from an expert in connection with the criminal proceedings and giving legal advice to the person they are representing.[114]
- The defendant's lawyer must not supply a copy of the video record to the defendant or any other person (other than an expert) without the permission of the judge.[115]
- The defendant may view the video record only in the presence of a lawyer.[116]
- No person may copy a lawyer's copy of the video record without the permission of a judge.[117]
- Police may only show the video record to specified people for limited purposes.[118]
- An expert may only view a video record for the purpose of providing advice and must not give or show it to anyone else. The expert must keep it in safe custody and must return it to police or the relevant lawyer as soon as practicable after the proceeding to which it relates is concluded.[119]

9.119 In addition, the Act already creates offences punishable by a fine or imprisonment for inappropriate possession or use of video records of child complainants and any witness (including adult complainants) in a sexual or violent case.[120] Unless permitted by an Act or any regulation, it is an offence to:

- possess a video record of this type;[121]
- possess a video record of this type with the intention of copying, supplying or showing it;[122] and

---

111 Regulation 29.

112 Regulation 31(1).

113 Regulation 31(2).

114 Regulation 32(1).

115 Regulation 32(2).

116 Regulation 32(5).

117 Regulation 33.

118 Regulation 20. Regulation 20 provides that Police may only show the video record for limited purposes, including: seeking advice to determine if and what charges should be filed, or any care or protection proceeding that ought to be instituted; allowing a suspect or defendant (or their lawyer) to know the case against them; allowing the witness to view it; making a transcript; allowing a Crown lawyer or expert to view it; enabling a judge to view it; training or reviewing the performance of an interviewer; complying with an order of a judge; enabling Police to discharge their duties under an enactment; and assisting Police to further investigations of suspected offences.

119 Regulation 20A.

120 Regulation 63 of the Evidence Regulations also provides that a person who fails to comply with the requirements or restrictions on the use of, supply of or access to video records (including mobile video records) specified under the Regulations commits an offence and is liable on conviction to a fine.

121 Section 119(1AA).

122 Section 119(1AB).

- copy, supply or show a video record of this type.[123]

9.120 As we discuss in Chapter 17, we consider the Regulations should be amended to be technology neutral to accommodate the use of new technology for storing and sharing access to video records.

9.121 We recognise there are costs associated with electronic storage of EVIs. However, the technology described to us by Police would relieve defence counsel of the responsibility of securely storing the EVI at their premises and returning the physical copy to police.[124] This would help to mitigate the danger of EVIs inadvertently falling into the wrong hands.

9.122 Bearing in mind the concerns that led to the 2016 restrictions,[125] we do not think it would be appropriate for self-represented defendants to be automatically entitled to a copy of the EVI (or be given access to a link to the EVI). We suggest self-represented defendants should be entitled to view the EVI in the presence of police or standby counsel.[126]

9.123 Our recommendations for reform are reflected in clause 19 of the draft Bill.

123 Section 119(1AC).

124 See discussion of the technology above at [9.112].

125 See above at [9.93] and [9.97]

126 *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392 has drawn a distinction between amicus curiae (counsel appointed by the court to assist the court itself) and standby counsel (counsel appointed by the court to assist a self-represented defendant if and to the extent the defendant is willing to accept it). See Kerry Cook "*Fahey v R: Some Information and Practical Considerations*" (paper presented to the New Zealand Law Society Criminal Law Symposium Intensive Conference, October 2018) 89 at 95.

CHAPTER 10

Unacceptable questioning

INTRODUCTION

10.1 Section 85(1) permits a judge to disallow a question or direct a witness not to answer a question if they consider a question to be "improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand". Section 85(2) provides a non-exhaustive list of factors the judge may consider when making a decision under section 85(1). The factors listed are:

(a) the age or maturity of the witness; and

(b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and

(c) the linguistic or cultural background or religious beliefs of the witness; and

(d) the nature of the proceeding.[1]

10.2 The Law Commission considered section 85 in its 2013 Review of the Act[2] and in its 2015 report *The Justice Response to Victims of Sexual Violence*.[3] In the 2013 Review, no recommendations for change were made, as the review was operational and the Commission wanted to avoid revisiting policy decisions made by Parliament.[4] In the 2015 report, no recommendations were made, as the Commission thought section 85 would be best considered in the context of the next review of the Act.[5]

10.3 In our Issues Paper, we asked:

- whether the Act should be amended to provide that the judge may disallow a question if it is asked in a manner the judge considers unduly intimidating or overbearing;
- whether the Act should be amended to allow a judge to exclude particular types of questions, for example, tag questions;[6]
- whether there should be a statutory duty on judges to intervene when the manner of questioning or the structure or content of questioning is unacceptable and, if so, in which kind of proceedings or in relation to whom should the duty apply; and

1 Section 85(2)(e) also addresses hypothetical questions. It provides: "in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding".

2 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.17]–[11.23].

3 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.101]–[4.105].

4 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.20].

5 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.105].

6 A tag question consists of a statement with a short question inviting confirmation.

- whether the scope and nature of questioning of vulnerable witnesses should be addressed at a pre-trial "ground rules" hearing and, if so, in which kind of proceedings or in relation to whom would such a hearing be appropriate.

10.4 In this chapter, we recommend section 85 be amended to place a statutory duty on judges to intervene when they consider questioning of a witness is unacceptable.

10.5 We also recommend that the vulnerability of the witness be added to the list of factors a judge may consider when deciding whether the questioning of the witness is unacceptable.

INTIMIDATING OR OVERBEARING QUESTIONING

10.6 In 2013 and 2015 the Commission considered whether section 85 should be amended to permit a judge to disallow a question asked in a manner that is "unduly intimidating or overbearing". Research suggested judges are cautious about interfering with the questioning of witnesses and may benefit from further guidance in this area.[7]

Issues Paper

10.7 In our Issues Paper, we expressed the preliminary view that unduly intimidating or overbearing questions would be "improper" or "unfair" and would therefore be implicitly covered by section 85. We asked if there would be merit in amending the Act to make this explicit.

Consultation

10.8 All seven submitters who addressed this question thought it was unnecessary to amend section 85 to explicitly refer to unduly intimidating or overbearing questions.[8]

10.9 The New Zealand Bar Association, the New Zealand Law Society, New Zealand Police and the Public Defence Service considered that intimidating and overbearing questions can already be disallowed under section 85 and therefore thought there is no need for greater legislative guidance. The Criminal Bar Association agreed that section 85 already enables judges to disallow intimidating and overbearing questions but was not opposed to section 85 being amended if clarification was needed.

10.10 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre[9] and TOAH-NNEST Tauiwi Caucus[10] said aggressive cross-examination of complainants and other vulnerable witnesses can re-traumatise them and reduce their ability to give a reliable account. However, they thought this should be addressed by placing a statutory duty on judges to intervene in unacceptable questioning.

---

7 See Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [9.83]–[9.87].

8 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, the Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, New Zealand Police, the Public Defence Service and TOAH-NNEST Tauiwi Caucus.

9 A group of non-kaupapa Māori organisations that provide support services to survivors of sexual violence in the Auckland region.

10 Te Ohaakii a Hine – National Network Ending Sexual Violence Together, Tauiwi Caucus, a national network that includes 51 non-profit organisations that provide specialist sexual violence support services to those impacted by sexual harm and 24 individuals who work in this sector.

10.11 The Crown Law Office did not make a written submission on this issue but later told us it supported education of counsel rather than a “legislative fix” to prevent a certain tone of questioning. The Public Defence Service and Jonathan Eaton QC shared this view.

10.12 In addition, we consulted with our judicial advisory committee. The committee considered that judges already have sufficient power to intervene in questioning.

Our view

No amendment to the Act is required

10.13 We do not think it is necessary to amend section 85 to permit a judge to disallow a question if it is asked in a manner the judge considers to be unduly intimidating or overbearing. As noted in our Issues Paper, we consider that a judge can already disallow such questions for being “unfair” or “improper”. Further, as we discuss below, we think that a statutory duty to intervene in unacceptable questioning will ensure judges address questioning that may be considered unduly overbearing or intimidating.

COMPLEXITY IN STRUCTURE AND CONTENT OF QUESTIONS

Issues Paper

10.14 In our Issues Paper, we noted that children and other vulnerable witnesses often find grammatically complicated questions difficult to understand. We gave the example of “tag questions”. These consist of a statement with a short question inviting confirmation (such as “he was kind to you, wasn’t he?”), and can be particularly difficult for a child or a witness with any learning impairment to answer. We asked whether the Act should be amended to allow judges to exclude particular types of questioning.

10.15 Our preliminary view was that, although section 85 already permits linguistically complex questions to be disallowed,[11] it is doubtful it can be applied proactively to prevent vulnerable witnesses from being asked certain types or categories of questions (such as tag questions).[12]

Consultation

10.16 Seven submitters addressed this issue.[13] Four submitters thought the Act should not be amended to exclude particular types of questioning, and three thought amendment was appropriate.

10.17 The New Zealand Bar Association and the New Zealand Law Society considered section 85 is sufficient and that an amendment is therefore unnecessary. The Criminal Bar Association thought judges should respond to individual questions rather than excluding

[11] Section 85(1) permits a judge to disallow a question, or to direct a witness not to answer a question, that is “expressed in language that is too complicated for the witness to understand”.

[12] In *Metu v R* [2016] NZCA 124 at [18], the Court of Appeal expressed reservations about the lawfulness of a blanket policy purporting to ban tagged questions. See [9.92]–[9.93] of the Issues Paper for a more detailed explanation of *Metu*: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

[13] Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA The Practice, the Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

particular types of questions. The New Zealand Law Society, the Public Defence Service and Police said judges already have a wide discretion to intervene and excluding particular types of questioning would restrict that discretion. The New Zealand Law Society noted that an unduly prescriptive approach risks both requiring judges having to intervene when it is unnecessary and judges missing questions that are unacceptable.

10.18 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre said tag questions should be disallowed as they are generally coercive. It noted there are many other ways to phrase questions. BVA The Practice[14] suggested section 85 should be amended to empower judges to intervene when questions are inappropriate for the age or circumstances of the witness or when the type or formulation of a question is inappropriate. It thought this was particularly important in sexual cases involving children, as children do not respond to the "underlying suggestion" implicit in the tag question.

Our view

No amendment to the Act is required

10.19 We do not consider section 85 should be amended to allow judges to exclude particular types of questioning. The appropriateness of particular types of questions (such as tag questions) is best considered on a case by case basis and will depend on the witness's particular characteristics and level of comprehension. Further, we recommend below that section 85 should be amended to impose a duty on judges to intervene when they consider the questioning is unacceptable. This should ensure that judges intervene when they consider questioning to be expressed in language that is too complicated for the witness to understand.

DUTY TO INTERVENE IF QUESTIONING IS UNACCEPTABLE

RECOMMENDATIONS

R16 Section 85(1) should be amended to require the judge to intervene when they consider questioning of a witness is unacceptable.

R17 Section 85(2) should be amended to include the vulnerability of the witness as a factor the judge may consider when deciding whether the questioning of the witness is unacceptable.

Issues Paper

10.20 In our Issues Paper, we discussed case law that has established that judges have a duty to intervene "where necessary to protect vulnerable witnesses from being intimidated or where they may not understand what is being put to them".[15] We noted that consultation

[14] This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

[15] *Metu v R* [2016] NZCA 124 at [18].

leading to the Commission's 2015 report *The Justice Response to Victims of Sexual Violence* identified significant differences of opinion over where the line between robust cross-examination and unacceptable questioning should be drawn.[16]

10.21 We explained that section 85 is permissive. It does not signal that intervention is *required* where witnesses are particularly vulnerable to intimidation or to misunderstanding and are therefore responding inaccurately to unacceptable questioning (because of their personal characteristics or the nature of the proceedings). We asked whether there should be a statutory duty on judges to intervene when they consider the manner of questioning or the structure or content of questioning is unacceptable. If so, we asked in what kind of proceedings or in relation to whom the duty should apply.

Consultation

10.22 Ten submitters addressed this issue.[17] Submitters were divided in their views. The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service did not think there should be a statutory duty to intervene in unacceptable questioning. They considered section 85 already provides judges with a wide discretion and offers sufficient protection for witnesses. The Criminal Bar Association and New Zealand Bar Association stated that judges already intervene when necessary. The New Zealand Law Society and the Public Defence Service were concerned that imposing a statutory duty could lead to an over-interventionist approach. The Criminal Bar Association expressed concern that a statutory duty would create another ground of appeal.

10.23 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, Professor Elisabeth McDonald, Paulette Benton-Greig,[18] Police and TOAH-NNEST Tauiwi Caucus thought there should be a statutory duty to intervene when questioning is unacceptable.

10.24 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus considered that section 85 is not adequately protecting victims of sexual violence. In particular, Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre expressed concern that, because judges are so focused on ensuring the defendant gets a fair trial, the judge may overlook the need to protect the witness from unacceptable questioning. Both submitters expressed concern that it is seen as necessary for the witness to come under some form of attack while being questioned.[19] They noted that two concerns arise if a witness feels attacked: first, the witness is re-traumatised; and second, the witness is less able to give a reliable account.

---

16 See [9.102]–[9.104] of our Issues Paper for specific views expressed by consultees: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

17 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, the Criminal Bar Association, Professor Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig, Police, the Public Defence Service and TOAH-NNEST Tauiwi Caucus.

18 A member of the law faculty at the University of Waikato with expertise in the justice response to sexual violence.

19 Referring to [9.102] of our Issues Paper, which cites a letter written to the Law Commission by the Criminal Bar Association in relation to the *The Justice Response to Victims of Sexual Violence Report*: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

10.25 Paulette Benton-Greig said there needs to be a change in cross-examination questioning practices. She noted that various tactics are used to undermine and discredit victims and she questioned whether such approaches actually lead to reliable evidence.

10.26 Elisabeth McDonald and Paulette Benton-Greig supported replacing section 85 with a provision modelled on an Australian provision, section 41 of the Evidence Act 2008 (Vic). The section, which has since been amended, provided that the judge must disallow improper questions or improper questioning of a vulnerable witness unless the court is satisfied that, in all the circumstances of the case, it is necessary for the question to be put. For all other witnesses, section 41 provided that the judge may disallow an improper question or improper questioning. The amended section 41 is discussed below.[20]

10.27 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Police and TOAH-NNEST Tauiwi Caucus thought a statutory duty to intervene in unacceptable questioning should apply to all cases but particularly in sexual and family violence cases and cases involving child witnesses. Police thought it would be especially important in cases involving intellectually impaired witnesses.

10.28 Members of our judicial advisory committee acknowledged there may be some judges who do not intervene enough, but they did not consider amending section 85 would resolve this. There was concern a statutory duty would create a further ground of appeal.

10.29 We also consulted Skylight Trust, which includes a team of advocates for sexual violence survivors. Skylight stated that some judges intervene when the witness is questioned in an unacceptable manner but not all do. Skylight noted that juries are sometimes shocked by the way defence counsel address witnesses, particularly children, and that it is important to ensure counsel are educated to address witnesses in an appropriate way.

Our view

Judges should intervene if questioning is unacceptable

10.30 We recommend section 85 be amended to place a statutory duty on judges to intervene if questioning is unacceptable. Clause 18(1) in the draft Bill reflects this recommendation. It is important that vulnerable witnesses are not re-traumatised and are able to give their best evidence. If a question is "improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand", this is likely to negatively impact on the witness's well-being and their ability to give their best evidence. In our view, it is insufficient for a judge to be *permitted* to intervene. If a judge decides, in accordance with section 85, that a question is unacceptable, they should be *required* to intervene.

10.31 Further, in the Commission's 2015 report *The Justice Response to Victims of Sexual Violence*, submitters were concerned that judges were reluctant to intervene in unacceptable questioning due to the risk of creating grounds on which a case might be appealed.[21] Similar concerns were raised during our consultation for this report. In our view, introducing a statutory duty to intervene in unacceptable questioning will provide a

---

[20] At [10.33].

[21] Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [4.97].

more secure basis for intervention and may also encourage a more consistent approach to intervention.

10.32 In response to concerns that a statutory duty will lead to more appeals, we note that there is already significant judicial discretion in section 85, as the judge must *consider* the question to be unacceptable, and is not limited in the matters they can take into account in making that assessment. The assessment is therefore likely to be very context-specific, and we anticipate the appellate courts would be unlikely to intervene, except in very clear cases.

10.33 We note that, in Australia, section 41 of the Evidence Act 2008 (Vic), which deals with improper questioning, was amended in 2018 to provide judges with a stronger basis for intervening in improper questioning. Originally, the section provided that a judge *may* disallow an improper question or improper questioning and that they *must* disallow improper questions or improper questioning of a *vulnerable witness* (unless the court was satisfied that, in all the circumstances of the case, it was necessary for the question to be put). However, the section now provides: "The court *must* disallow an improper question or improper questioning put to a witness in cross-examination, or inform the witness that it need not be answered".[22] This means the court must disallow all improper questions or improper questioning, regardless of whether the witness is vulnerable or the court thinks it is necessary for the question to be put.

Section 85 should include a reference to the vulnerability of the witness

10.34 We also recommend section 85 be amended to include the vulnerability of the witness as a factor a judge may consider when reaching a decision about whether the questioning of the witness is unacceptable. The factors currently in section 85 include personal characteristics of the witness such as age, disability and linguistic ability.[23] Although the list of factors is non-exhaustive, a specific reference to vulnerable witnesses may prompt judges to consider the particular circumstances of a witness in cases where a witness is vulnerable for reasons other than those currently identified in section 85(2). For example, a witness who is suffering from the effects of repeat victimisation could be seen as vulnerable.[24] Clause 18(2) in the draft Bill would give effect to this recommendation.

---

[22] The section was amended by s 57 of the Justice Legislation Miscellaneous Amendment Act 2018 (Vic) (emphasis added).

[23] Section 85(2) states:

> Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to—
>
> (a) the age and maturity of the witness; and
>
> (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and
>
> (c) the linguistic or cultural background or religious beliefs of the witness; and
>
> (d) the nature of the proceeding; and
>
> (e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

[24] We note that the term "vulnerable" or "vulnerability" is present in a number of other statutes. For example, s 78 of the Criminal Procedure Act 2011 enables the court to order a pre-trial admissibility hearing in a judge-alone trial, and one of the grounds is that "the complainant or witness is particularly vulnerable and resolving the admissibility issue is in the interests of justice": s 78(4)(b). Other Acts that refer to the term "vulnerable" include the Crimes Act 1961, ss 2, 151, 195 and 195A; Family Court Act 1980, ss 11B and 11D; Sentencing Act 2002, s 9(1)(fb); and Vulnerable Children Act 2014, s 5.

ESTABLISHING "GROUND RULES" AT A CASE REVIEW HEARING

Issues Paper

10.35 In our Issues Paper, we noted another approach to controlling unacceptable questioning is to provide for more direction pre-trial. We suggested this could occur at an enhanced case review hearing at which "ground rules" for questioning could be determined – similar to the process currently in use by the Sexual Violence Court Pilot. In the Pilot, case review hearings are attended by the judge, counsel, and all defendants, unless specifically excused. Prior to the review hearing, Crown and defence counsel must engage in case management discussions and jointly complete the case management memorandum. At the review hearing, the judge enquires into, and gives appropriate directions in respect of the need for communication assistance. If the need for interpreters or communication assistance has already been identified prior to the review hearing, the discussion focuses on the report about the assistance the witness needs. We understand that the judge also takes care at the review hearing to ensure that counsel understand what is expected by the court with regard to the style and type of questioning of vulnerable witnesses, particularly children. However, we also understand that judges do not restrict the questions that counsel can ask; rather, the focus is on the question being stated in a way that is fair and that the witness can understand.

10.36 We asked whether there was support for addressing the scope and nature of questioning of vulnerable witnesses at a pre-trial "ground rules" hearing. If so, we asked in what kind of proceedings or in relation to whom would such a hearing be appropriate.

Consultation

10.37 Ten submitters addressed this issue.[25] Six thought there is no need for a ground rules hearing prior to trial in all cases but supported ground rules hearings in certain types of cases, such as those involving:

- vulnerable witnesses;[26]
- child witnesses;[27]
- intellectually impaired witnesses;[28]
- sexual violence;[29]
- family violence;[30] and
- serious personal violence.[31]

---

25 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, the Criminal Bar Association, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig, Police, the Public Defence Service and TOAH-NNEST Tauiwi Caucus.

26 BVA and the Criminal Bar Association.

27 Elisabeth McDonald and Police.

28 Elisabeth McDonald and Police.

29 Elisabeth McDonald and the New Zealand Law Society.

30 Elisabeth McDonald.

31 Paulette Benton-Greig.

10.38 The New Zealand Law Society cautioned against more general use of ground rules hearings because of concerns that such an approach would risk requiring pre-trial disclosure of the defence case. The Public Defence Service also expressed concerns about disclosure, noting that protections need to be in place to ensure the defendant is not prematurely required to disclose their defence, which would impact on fair trial rights. It also thought any ground rules would need to be fluid enough to allow for late disclosure or a change in the defendant's instructions.

10.39 Some submitters elaborated on what should occur at a ground rules hearing. TOAH-NNEST Tauiwi Caucus thought it should be used to establish the scope and nature of the questioning. The Criminal Bar Association thought such a hearing should be used to discuss the witness's needs and how the process will work but that counsel should not be required to submit questions in advance.

10.40 The New Zealand Bar Association thought a ground rules hearing would only be appropriate in cases where communication assistance is a live issue. It thought section 85 provides a proper basis for control of questioning in all other cases.

10.41 Our judicial advisory committee expressed some concern that ground rules hearings could restrict the way defendants are able to present their case.

Our view

No amendment to the Act is required

10.42 We consider that ground rules hearings should be used in appropriate cases.[32] If certain kinds of questions are likely to be inappropriate for a particular witness, it is in the best interests of the parties to address this pre-trial in order to ensure the witness can give the best evidence possible. However, we do not think that legislative amendment is necessary to achieve this.

10.43 Rather, we maintain our preliminary view expressed in the Issues Paper that a ground rules hearing could occur as part of an enhanced case review hearing, similar to the case review hearings that occur as part of the Sexual Violence Court Pilot. If a party or judge is concerned about how a witness will cope with questioning, such a hearing could include discussions about the witness's needs and how these are best addressed. We consider a case by case approach is appropriate, as witnesses who initially appear to be in the same category may have a range of needs. For example, children of the same age may have different levels of comprehension.

---

32 An example of such a case is *R v Aitchison* [2017] NZHC 3222. In that case, the Court held four pre-trial conferences to determine how a witness who was intellectually disabled could best be questioned.

CHAPTER 11

Conduct of experts

INTRODUCTION

11.1 The Evidence Act allows expert opinion evidence to be given in both civil and criminal proceedings.[1] However, the requirement for expert witnesses to comply with the Code of Conduct for expert witnesses in Schedule 4 of the High Court Rules 2016 only applies in civil proceedings.[2]

11.2 In our Issues Paper, we asked whether expert witnesses in criminal proceedings should also be required to adhere to a code of conduct. If so, we asked:

- whether a separate code should be developed or whether the Code of Conduct in the High Court Rules should apply (either in whole or in part); and
- whether expert witnesses in criminal proceedings should be subject to an obligation to confer with another expert witness if directed to do so.

11.3 We also noted that section 26(2), which provides judges with a discretion to admit evidence of expert witnesses who fail to comply with the Code of Conduct, does not provide guidance on how to exercise the discretion. We asked whether section 26(2) should be amended to provide such guidance.

11.4 In this chapter, we recommend that:

- expert witnesses in criminal proceedings should be required to adhere to a code of conduct;
- a separate code of conduct should be created for expert witnesses in criminal proceedings and this should be located in the Criminal Procedure Rules 2012; and
- the Rules Committee should be asked to consider the amendment of the Criminal Procedure Rules to include rules that mirror the rules relating to expert witnesses contained in the High Court Rules, including the obligation to confer with another expert witness if directed to do so.

11.5 We have concluded it is unnecessary to amend section 26(2) to provide guidance on when the evidence of an expert witness who has failed to comply with the Code of Conduct can be given.

---

1 Section 25(1).

2 Section 26(1). The Code is recognised by r 9.43 of the High Court Rules 2016 and r 9.34 of the District Court Rules 2014.

THE NEED FOR A CODE OF CONDUCT IN CRIMINAL PROCEEDINGS

RECOMMENDATIONS

R18 Section 26 should be amended so that experts in both civil and criminal proceedings are required to comply with the applicable rules of court relating to the conduct of experts.

R19 The Rules Committee should be asked to consider amending the Criminal Procedure Rules 2012 to include rules that mirror the rules relating to expert witnesses in the High Court Rules 2016.

Issues Paper

11.6 Section 26 of the Act, which requires expert witnesses to comply with the "applicable rules of court relating to the conduct of experts",[3] only applies in civil proceedings. Expert witnesses in criminal proceedings are therefore not required to comply with the Code of Conduct for expert witnesses in the High Court Rules. The case law has, however, established that equivalent principles and ethical obligations to those found in the Code apply to expert witnesses in criminal proceedings.[4]

11.7 In our Issues Paper, we suggested it might be desirable to reflect this position in the Act. We asked whether expert witnesses in criminal proceedings should be required to adhere to a code of conduct.

Consultation

11.8 We received six submissions.[5] All submitters agreed that the conduct of expert witnesses in criminal proceedings is governed by principles akin to those in the existing Code of Conduct, as established in the case law. The New Zealand Law Society and New Zealand Police noted it is common practice for expert witnesses in criminal proceedings to refer to the existing Code of Conduct and comply with it.[6]

11.9 The New Zealand Law Society said there is no need to create a code of conduct for expert witnesses in criminal proceedings, as the principles governing their conduct are

---

3 The Code of Conduct for expert witnesses in Sch 4 of the High Court Rules 2016 currently contains the only applicable rules of court relating to the conduct of experts, but s 26 is drafted in wide terms that are not specifically tied to the Code. Any future rules of court governing the way experts are to conduct themselves in giving expert evidence would be incorporated into the Act through s 26. See Simon France (ed) *Adams on Criminal Law – Evidence* (Online looseleaf ed, Thomson Reuters) at [EA26.01].

4 See [10.6]–[10.7] of our Issues Paper for discussion of this case law: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

5 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, New Zealand Police, the Public Defence Service and one individual submitter (a barrister).

6 This is likely due to *Balfour v R* [2013] NZCA 429 where the court suggested that expert witnesses in criminal proceedings should "comply with the requirements of the Code of Conduct for Expert Witnesses contained in Sch 4 to the High Court Rules": at [50].

well established in case law. The remaining submitters considered there was merit in codifying these principles.

11.10 The New Zealand Bar Association and the Public Defence Service noted that codifying the principles would make them clear and accessible to expert witnesses and counsel. One individual submitter noted that the legislative materials do not explain why a code of conduct should apply in civil, but not criminal, proceedings. The submitter highlighted that, in the United Kingdom, Canada and some Australian states, expert witnesses in criminal proceedings must adhere to a code of conduct. The submitter suggested that requiring experts in criminal proceedings to adhere to a code of conduct could mitigate the risk of bias, 'junk science' and misleading evidence, ensuring a fair trial for the defendant.

11.11 Our judicial advisory committee indicated that the status quo is not causing any problems in practice.

Our view

Expert witnesses in criminal proceedings should adhere to a code of conduct

11.12 We recommend the Act be amended to require expert witnesses in criminal proceedings to adhere to a code of conduct. In our view, there is no justification for having a code of conduct for expert witnesses in civil proceedings and not in criminal proceedings. The case law establishes that expert witnesses have ethical obligations when giving evidence, and explicitly stating these obligations in a code would make them clear and accessible. This would promote the Act's purpose of enhancing access to the law of evidence.[7] Clause 8 has been included in the draft Bill to implement this recommendation.

DEVELOPMENT OF A SEPARATE CODE OF CONDUCT

Issues Paper

11.13 If submitters supported a code of conduct for expert witnesses in criminal proceedings, we asked whether a separate code should be developed, or if the existing Code of Conduct in the High Court Rules should apply (either in whole or in part).

Consultation

11.14 Five submitters responded to this question.[8] The Criminal Bar Association, the New Zealand Bar Association and the Public Defence Service supported the development of a separate code of conduct. The Criminal Bar Association considered a separate code is needed so that the obligation in the existing Code of Conduct to confer with another expert if directed to do so will not apply in criminal proceedings. The New Zealand Bar Association and the Public Defence Service supported the development of a separate code as it would allow for differences that might be necessary due to the different rules that apply in criminal and civil proceedings. The New Zealand Bar Association highlighted

---

[7] Section 6(f).

[8] The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

that there are important constitutional differences between civil and criminal law, including the burden of proof and disclosure obligations.

11.15 Police thought the existing Code of Conduct should apply to expert witnesses in criminal proceedings. The New Zealand Law Society did not think a code of conduct is necessary in criminal proceedings. However, if a code is considered necessary, it suggested the existing Code of Conduct should be adopted in part (without the obligation to confer). It was concerned that a separate code would lead to increased challenges to the admissibility of expert evidence, leading to more pre-trial or voir dire examinations.[9]

Our view

A separate code of conduct should be developed

11.16 We consider a separate code of conduct should be developed for expert witnesses in criminal proceedings. The existing Code of Conduct is located in the High Court Rules, which only regulate civil proceedings. Therefore, we consider it is necessary to develop a separate code of conduct for criminal proceedings, which could be included as a schedule to the Criminal Procedure Rules. We note that the Criminal Procedure Rules can only be amended with the concurrence of certain members of the Rules Committee.[10] Given their role in the amendment of the Criminal Procedure Rules, we have raised the issue of having a code of conduct for expert witnesses in criminal proceedings in a schedule to the Criminal Procedure Rules with the Rules Committee.[11] A separate code would also have the benefit of allowing different obligations to be developed for expert witnesses in criminal proceedings and civil proceedings if the Rules Committee considers this to be appropriate.

---

9 Where an issue of admissibility arises at trial, the judge may declare a "voir dire". A voir dire is where evidence from the defendant is heard (usually without the presence of the jury). At the voir dire, the defendant is able to testify without committing himself or herself to testifying at the trial proper. See Simon France (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Thomson Reuters) at [ED4.07].

10 The Rules Committee was established by s 51B of the Judicature Act 1908 and is continued by section 155 of the Senior Courts Act 2016: Courts of New Zealand "About the Rules Committee – Introduction" <www.courtsofnz.govt.nz>. Section 148 of the Senior Courts Act 2016 states that "The Governor-General may, by Order in Council, make rules of practice and procedure for each of the senior courts" and that "[r]ules may be made only with the concurrence of the Chief Justice and 2 or more members of the Rules Committee of whom at least 1 is a Judge of the High Court". This process applies to the Criminal Procedure Rules 2012, as s 386 of the Criminal Procedure Act 2011 states that:

> The power to make rules of court under section 148 of the Senior Courts Act 2016 and section 228(1) of the District Court Act 2016 includes the power to make rules regulating the practice and procedure of the courts in the exercise of jurisdiction conferred by this Act.

This is confirmed by the Criminal Procedure Rules 2012, which state:

> Pursuant to section 386 of the Criminal Procedure Act 2011, section 122(1) of the District Courts Act 1947, and section 51C of the Judicature Act 1908, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, and with the concurrence of the Right Honourable the Chief Justice, the Chief District Court Judge, and at least 2 other members of the Rules Committee established under section 51B of the Judicature Act 1908 (of whom at least 1 was a Judge of the High Court and at least 1 was a District Court Judge), makes the following rules.

11 We discuss a concern they raised below at [11.21]–[11.23].

CONTENTS OF A NEW CODE OF CONDUCT

New criminal code should mirror the existing civil code

11.17 Although we do not think the existing Code of Conduct itself should apply in criminal proceedings, we do think its contents can be mirrored. This is because the case law obligations for expert witnesses in criminal proceedings are similar to the requirements in the existing Code of Conduct.[12]

11.18 There are currently two exceptions to this. First, the courts have not required an expert witness in criminal proceedings to confer with another expert witness and to prepare a joint witness statement.[13] As explained below, however, we consider the obligation to confer if so directed should equally apply to expert witnesses in criminal proceedings.

11.19 Second, a new obligation was recently inserted into the existing Code of Conduct, which states: "If an expert witness is engaged under a conditional fee agreement, the expert witness must disclose that fact to the court and the basis on which he or she will be paid."[14] We do not see any reason why this obligation should not also apply to expert witnesses in criminal proceedings.

11.20 Given our conclusions with regard to these two exceptions, we do not have any concerns about the contents of the existing Code of Conduct being substantially mirrored in the code of conduct for expert witnesses in criminal proceedings.

11.21 Some members of the Rules Committee expressed concern that there would be difficulties requiring expert witnesses in criminal proceedings to be impartial (which is one of the obligations in the existing Code of Conduct), given that much of the expert evidence in criminal proceedings comes from non-independent experts, such as police officers, pathologists and ESR specialists. We note that such expert witnesses have already been held to have an obligation of impartiality. For example, in *Lisiate v R*,[15] the Court of Appeal held that a detective who was called as an expert in telecommunications analysis should have stated at the outset of his evidence that he understood and accepted the principles contained in *R v Hutton* (which includes the obligation to be impartial).[16]

---

12 Compare *R v Carter* (2005) 22 CRNZ 476 (CA) at [47] with sch 4 of the High Court Rules 2016 (code of conduct for expert witnesses).

13 Although expert witnesses in civil proceedings have these obligations (High Court Rules 2016, Sch 4, r 6(a)–(c)) in *R v Seu* CA81/05, 8 December 2005 at [81] the Court of Appeal rejected a submission that the Crown's expert witness was obliged to comply with the Code of Conduct in civil proceedings and to confer with the other expert witness. (*Seu* was decided prior to the enactment of the Evidence Act but has been referred to by post-Act cases such as *R v Hutton* [2008] NZCA 126.)

14 High Court Rules 2016, sch 4, r 2A. This section was inserted by r 28 of the High Court Rules 2016 Amendment Rules (No 2) 2017, which came into force on 1 September 2017.

15 *Lisiate v R* [2013] NZCA 129, (2013) CRNZ 292.

16 At [53].

11.22 Also, the issue of non-independent experts complying with an obligation to be impartial has already been considered in the civil context. In *Prattley Enterprises Limited v Vero Insurance New Zealand Limited*, the Court of Appeal noted:[17]

> It is necessary to distinguish impartiality – the primary objective of the Code – from independence. An expert witness need not be independent of the party by whom the expert is briefed. Any potential conflict of interest is ordinarily treated as a matter of weight. That is so because independence goes to the relationship between the expert and the party engaging the witness, while impartiality is a behavioural quality, signifying an attitude of neutrality as between the parties. An expert witness who lacks independence may nonetheless behave impartially.

11.23 In our view, this observation is equally applicable to criminal proceedings. Experts who are not independent (such as police) are still able to comply with the obligation to be impartial.

Obligation to confer

Issues Paper

11.24 As noted above, the courts have not appeared to accept that expert witnesses in criminal proceedings are subject to the obligation to confer.[18] In our Issues Paper, we asked whether they should be subject to an obligation to confer with another expert witness if directed to do so. We noted that expert witnesses in criminal proceedings tend not to confer, and suggested this is because there is a lack of guidance on whether this is permitted and, if it is, how it should occur. We set out the advantages and disadvantages of empowering a judge to direct expert witnesses in criminal proceedings to confer.[19]

Consultation

11.25 We received five submissions on this issue.[20] Submitters were divided in their views. The New Zealand Bar Association and Police considered it was appropriate for expert witnesses in criminal proceedings to be subject to an obligation to confer. The New Zealand Bar Association did, however, consider there would need to be safeguards. In particular, it suggested the judge should have a discretion not to order the conferral of experts, and, except for any joint statement, the contents of the discussion should not be referred to without the judge’s permission.

11.26 The Public Defence Service was not opposed to an obligation to confer applying in criminal cases but noted there would need to be protections around the disclosure of some aspects of the defence case or limitations on what was to be discussed.

---

17 *Prattley Enterprises Limited v Vero Insurance New Zealand Limited* [2016] NZCA 67, [2016] 2 NZLR 750 at [99]. See also *Mainzeal Property and Construction Ltd (in liq) v Yan* [2018] NZHC 2470 at [18] where the Court stated: “Complete independence is not required for an expert giving expert evidence. That is not a requirement set out in the Code of Conduct for expert witnesses…”.

18 *R v Seu* CA81/05, 8 December 2005 at [81]. This case was decided prior to the enactment of the Evidence Act 2006, but has been referred to by post-Act cases such as *R v Hutton* [2008] NZCA 126. See Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [10.10]–[10.12].

19 See Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [10.13]–[10.14].

20 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

11.27 The Criminal Bar Association and the New Zealand Law Society did not think expert witnesses in criminal proceedings should be subject to an obligation to confer. They were concerned that such an obligation would cause too much of the defence case to be disclosed. The Criminal Bar Association was concerned that conferral could lead to disclosure of privileged information or to an expert conceding too much if the other expert was a compelling advocate. The New Zealand Law Society noted that such an obligation could raise issues under the New Zealand Bill of Rights Act 1990, as it could erode a defendant's rights not to make a statement and not to be compelled to be a witness in their own defence. It was also concerned that an obligation to confer would require the defence to show their hand prior to trial. Both the Criminal Bar Association and the New Zealand Law Society thought the decision about whether expert witnesses should confer should be left to the parties.

Our view

The obligation to confer should apply to expert witnesses in criminal proceedings

11.28 We consider expert witnesses in criminal proceedings should be obliged to confer with another expert witness if directed to do so by the judge. As noted in our Issues Paper, the advantage of conferral is that it narrows the issues before the court, saving time and expense for the court and parties. In both the United Kingdom[21] and the Australian state of Victoria,[22] the courts can order expert witnesses in criminal proceedings to confer with another expert. This does not appear to have caused issues; rather, reports to date suggest it is working well in Victoria.[23]

11.29 We also consider that rules 9.43 (expert witness to comply with code of conduct), 9.44 (court may direct conference of expert witnesses) and 9.45 (status of joint witness statement by expert witnesses) of the High Court Rules, which govern the practicalities of imposing an obligation to confer on expert witnesses, should also be mirrored in the Criminal Procedure Rules.

11.30 With respect to the concern that an obligation to confer will result in too much of the defence case being disclosed, we note the following:

- The obligation is not automatically imposed; rather, the judge has a discretion to order conferral.
- The defence is already obliged to disclose any brief of evidence to be given by an expert witness at least 10 working days before trial.[24] If a judge directs the expert witnesses to confer once this has occurred, there is arguably little or no erosion of a defendant's right not to show their hand.
- Under rule 9.44(2), unless the parties agree otherwise, expert witnesses must confer in the presence of the parties' legal advisers and have the assistance of the legal advisers in preparing a joint statement. If legal advisers are present, they can ensure

---

21 The Criminal Procedure Rules 2015 (UK), r 19.6.

22 Supreme Court of Victoria Practice Note SC CR 3 Expert Evidence in Criminal Trials, r 12.

23 Chris Maxwell, President of the Victorian Court of Appeal "Preventing Miscarriages of Justice: Expert Forensic Evidence and Collaborative Law Reform" (Address to Conference of District and County Court Judges, Melbourne, 10 April 2015) at 3–4.

24 Criminal Disclosure Act 2008, s 23(1).

that the expert witness does not disclose too much of the defence case or any privileged material.

- Under rule 9.44(6), the matters discussed at the expert witness conference must not be referred to at the hearing unless the parties agree. Therefore, even if an expert witness accidentally discloses too much, the other party will not be able to rely on the information during the hearing.

11.31 During our consultation, a concern was expressed that 10 days would be insufficient time to arrange a conference of expert witnesses. One factor that may help to mitigate this concern is that the details of any expert witness to be called by either the prosecution or defence must be included in the case management memorandum (in a judge-alone trial) or a trial callover memorandum (in a jury trial).[25] The parties and judge will therefore be aware at an earlier stage that both parties intend to call expert witnesses and that they may need to consider whether it is appropriate for the expert witnesses to confer. In some cases (for example, where particular expert witnesses frequently give evidence on specific topics), the likelihood that expert witnesses will need to confer may be apparent from their identity.

11.32 We therefore recommend the Rules Committee be asked to consider the amendment of the Criminal Procedure Rules to include rules that mirror the rules relating to expert witnesses contained in the High Court Rules, including rules 9.43 (expert witness to comply with code of conduct), 9.44 (court may direct conference of expert witnesses), 9.45 (status of joint witness statement by expert witnesses) and Schedule 4 (code of conduct for expert witnesses). If this recommendation is accepted, the Ministry of Justice would need to discuss it with the Rules Committee.[26]

FAILURE TO COMPLY WITH CODE OF CONDUCT FOR EXPERT WITNESSES

Issues Paper

11.33 Section 26(2) of the Act states that if an expert witness does not comply with the rules of court (that is, the Code), the expert evidence can only be given with the judge's permission. However, the section does not provide guidance on how judges should exercise this discretion.

11.34 In our Issues Paper, we asked whether section 26(2) should be amended to include guidance on how the discretion should be exercised and, if so, what guidance should be provided. We noted that the courts tend to admit evidence under section 26(2) if it fulfils the section 25 test of "substantial helpfulness" and asked whether this should be reflected in the Act itself.[27] We noted that the lack of guidance had been criticised but

---

[25] Criminal Procedure Rules 2012, rr 4.8(2)(b) and 5.8(f). A case management memorandum must be filed by the defendant no later than 5 working days before the date of the case review hearing: r 4.6. A case review hearing must take place no later than 45 working days after the entry of a not guilty plea in all proceedings for category 4 offences and category 3 offences where the defendant has elected a jury trial and no later than 30 working days after the entry of a not guilty plea in all other proceedings: r 4.2. A trial callover memorandum must be filed no later than 15 working days before the trial callover date by the prosecutor and no later than 5 working days before the trial callover date by a defendant who is represented by a lawyer: r 5.6. A trial callover must take place no later than 40 working days after the proceedings are adjourned for a trial callover: r 4.3.

[26] See above at [11.16], n 10 for a detailed description of how the Criminal Procedure Rules 2012 are amended.

[27] Section 25(1) states:

questioned whether an amendment to the Act is necessary, given the courts are taking a consistent approach to the issue.

Consultation

11.35 We received four submissions addressing these issues.[28] The New Zealand Bar Association and New Zealand Law Society did not consider section 26(2) needed to be amended, as the case law does not suggest there have been problems in practice. They also noted that the decision whether to exercise the discretion will largely depend on the context and the particular facts of the case. They were therefore concerned that amending section 26(2) to include a statutory list of considerations could restrict the exercise of judicial discretion. The Public Defence Service agreed that the current common law approach was working but thought section 26(2) could be amended to reflect the common law so it would be more accessible. Police considered that when a judge was deciding whether to exercise the discretion, the focus should be on whether the evidence was "impartial" and "substantially helpful". At an additional consultation meeting, they noted that, although it could be helpful to have further guidance on how to apply the discretion in section 26(2), it was not necessary as the current common law approach was working well.

11.36 Our judicial advisory committee also thought there was no need to amend section 26(2) to provide guidance on how to exercise the discretion.

Our view

No amendment to the Act is required

11.37 We do not consider it is necessary to amend section 26(2), given the current law is working well in practice and is consistently applied. We expect that, if a code of conduct is adopted for expert witnesses in criminal proceedings, this approach will also apply in situations where an expert witness in a criminal proceeding fails to comply with the code of conduct. In our view, the application of the "substantial helpfulness" test is appropriate, as it reflects the fact that the existing Code of Conduct and section 25 are primarily aimed at addressing the same concerns:[29]

> Aside from the duty to confer with other expert witnesses if directed by the court, many of the issues within the Code of Conduct will be covered by the operation of s 25 and the substantial helpfulness test. For example, qualification as an expert is a prerequisite to admissibility; and a statement as to the facts upon which the opinion is based is required under s 25(3).

11.38 The exercise of the discretion is a fact-specific decision, which makes it difficult to provide specific guidance on when the discretion should be exercised. There is a danger that being too prescriptive would have the unintended consequence of limiting the

---

> An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

See [10.16]–[10.19] of our Issues Paper for discussion of this case law: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

28 The New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

29 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV26.01(2)].

judge's discretion. Although this would not be such an issue if section 26 were amended to include more widely framed guidance, we consider it is preferable not to impose a statutory constraint on judicial discretion in this context.

CHAPTER 12

Myths and misconceptions in sexual and family violence cases

INTRODUCTION

12.1 Research has shown that jurors may believe myths and misconceptions about sexual and family violence, which can affect how they consider the evidence in sexual and family violence cases. For example, a juror might reason that a complainant must have consented to a sexual act because she did not fight off the defendant or suffer physical injuries, or a juror might think that incidents of family violence could not have been serious because the complainant did not leave the relationship. Potential misconceptions about sexual and family violence need to be addressed during the trial process to reduce the risk that jurors will engage in improper reasoning.

12.2 There are several ways of providing jurors with information to correct any misconceptions they may have. First, an expert witness may be called to give "counter-intuitive evidence". Expert counter-intuitive evidence may be admitted under section 25 of the Evidence Act if the fact-finder is likely to obtain "substantial help" from it in understanding other evidence or ascertaining a fact in the proceeding.

12.3 Second, evidence to correct juror misconceptions may be admitted by way of an agreed statement under section 9 (which permits the admission of evidence with the agreement of all parties).

12.4 Third, a trial judge may give a direction aimed at addressing juror misconceptions. The Act currently provides for this type of direction in one situation: section 127 permits a judge to give a direction that there can be good reasons for the victim of a sexual offence to delay making, or fail to make, a complaint about alleged offending.[1]

12.5 The Supreme Court has confirmed the availability of expert evidence, section 9 statements and judicial directions to correct misconceptions held by jurors in criminal trials.[2]

---

1 The Evidence Regulations 2007 also contain a judicial direction that addresses juror misconceptions about the accuracy and reliability of the evidence of very young children: reg 49.

2 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [110].

12.6 In the Law Commission's 2015 report *The Justice Response to Victims of Sexual Violence*, it recommended parties in sexual violence cases should be encouraged to agree on expert evidence or a written statement dealing with myths and misconceptions around sexual violence and to admit the evidence by way of a joint statement under section 9, wherever possible.[3]

12.7 In this chapter, we recommend that counsel should also endeavour to admit a joint statement under section 9 in appropriate family violence cases. We also recommend that additional judicial directions should be developed to address misconceptions that jurors may hold in sexual and family violence cases. We recommend these directions be publicly accessible and kept up-to-date.

AGREED STATEMENTS IN FAMILY VIOLENCE CASES

RECOMMENDATION

R20

In family violence cases, counsel should consider whether a written statement for the jury addressing myths and misconceptions about family violence can be jointly agreed between the parties. In appropriate cases, a joint statement should be admitted by consent under section 9.

12.8 Section 9 permits a judge to admit evidence offered in any form or way agreed by all parties.[4] In some cases it may be appropriate for the parties to agree on a section 9 statement rather than calling expert witnesses to give counter-intuitive evidence.

12.9 In *DH v R*, a case involving sexual abuse of a child, the Court of Appeal suggested an expert's counter-intuitive evidence should have been summarised and presented as a joint statement to the jury.[5] On appeal, the Supreme Court commented:[6]

> We agree that such an approach ought to be considered in cases of this kind. That will depend on the content of the evidence to be given (in particular whether it is limited to a topic such as delay not affecting the likelihood of a truthful or false complaint, on which there is apparently general acceptance or whether it includes evidence on more controversial topics, where there is not), whether the defence counsel wishes to cross-examine, whether a defence expert on the same subject is to be called, whether counsel are in agreement as to the method of presentation and other factors.

12.10 In the Supreme Court's decision in *Kohai v R*, a case involving child sexual offending delivered contemporaneously with *DH v R*, the Court referred to "an agreed statement of the essential propositions" as a means of addressing the "possibility of erroneous reasoning by the jury".[7]

---

3 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 121, R29.

4 Section 9(1)(b).

5 *DH v R* [2013] NZCA 670 at [26].

6 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [113].

7 *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833 at [18(b)].

Issues Paper

12.11 In our Issues Paper, we discussed the benefits of addressing juror misconceptions by way of an agreed statement admitted under section 9. For example:

- the evidence can be dealt with in a clear and succinct way;
- there is no need for an expert to give evidence in court, which gets around the difficulty that there is a shortage of experts to give counter-intuitive evidence in New Zealand and can also shorten the proceeding and therefore reduce costs; and
- it can avoid a "battle of the experts".

12.12 Our Issues Paper also noted some limitations on this method of addressing juror misconceptions. First, it limits forensic testing of the evidence as there is no expert to cross-examine. Second, there may be situations where a section 9 statement is simply not appropriate, such as on controversial topics where there is disagreement.

12.13 We asked how common it is for parties in sexual or family violence trials to present an agreed section 9 statement to the jury. We also asked whether parties in family violence cases should be encouraged to agree on a section 9 statement dealing with myths and misconceptions.

Consultation

Use of agreed statements in practice

12.14 We received four submissions on the use of agreed statements in sexual and family violence trials.[8] The New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service were all aware of section 9 statements being admitted in trials. Both the Public Defence Service and the New Zealand Bar Association commented that such statements are uncommon in family violence cases. The New Zealand Bar Association said the use of section 9 statements depends on both availability of expert evidence and reaching agreement among experts. It observed that this area of the law could be contentious. The Public Defence Service said the suitability of a section 9 statement would depend on the nature and type of evidence and the factual circumstances of the case.

12.15 The New Zealand Bar Association said defence counsel may not agree to a section 9 statement, so they retain the right to question the Crown witness who proposes to give the counter-intuitive evidence. It noted there are very few experts available to give evidence on these issues in New Zealand, so defence counsel face major practical difficulties in challenging expert counter-intuitive evidence.

12.16 BVA The Practice[9] said that it seeks to reach agreement on a counter-intuitive brief of evidence with defence counsel.[10] Although the expert is listed as a witness, the agreed brief is read to the jury. BVA said having a written brief enables jurors to read and absorb

---

8 BVA The Practice, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

9 This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

10 BVA said that, since the Supreme Court's decisions in *DH* and *Kohai* providing guidance on the use of counter-intuitive evidence, the experts it engages have been inserting summary sections into the end of their briefs of evidence. These are more detailed than judicial directions would be but are not as academic or scientific as the full brief of evidence. It said these statements are of considerable assistance.

the information and to refer to it in the jury room if another juror raises a point that arises from a myth or misconception.

12.17 The feedback from our judicial advisory committee was that section 9 is rarely used to admit agreed statements on myths and misconceptions. We were told that section 9 statements are agreed to when the Crown wants to call an expert witness to give counter-intuitive evidence and the defence wants to reduce the effect of the evidence. In our meeting with two judges from the Sexual Violence Court Pilot, they said parties in pilot cases often present an agreed statement on myths and misconceptions to the jury. We were told the format of the section 9 statement can vary. It is usually a list of agreed facts but is sometimes a truncated brief of evidence.

Encouraging parties to offer an agreed statement in family violence cases

12.18 We received seven submissions on whether parties in family violence cases should be encouraged to agree upon s section 9 statement dealing with myths and misconceptions about family violence.[11] Four submitters were in favour of this.[12]

12.19 The New Zealand Bar Association said that, if the facts of a particular case give rise to a risk that myths and misconceptions around family violence might arise, the parties should be encouraged to agree upon expert evidence to deal with the issue. It noted there would need to be suitably qualified experts available to guide the parties and agreement among the experts.

12.20 The Public Defence Service said parties should be encouraged to agree on all facts and evidence that are relevant and uncontested. It said that, in principle, counter-intuitive evidence in respect of family violence makes sense and could be admitted as a section 9 statement. It said that, in order to have agreement on a section 9 statement, the evidence would need to be relevant, uncontested and based on broadly accepted social science literature. The Public Defence Service also said that, in cases where a defendant was a victim of family violence who hurt or killed their abuser, evidence could be helpful to address the misconception the defendant could or should have left the relationship.

12.21 The Criminal Bar Association said there should be more uniformity in the statements given. It suggested it would be helpful to have a standard set of statements that the prosecution intends to rely on made available to defence counsel.

12.22 The other three submissions we received on this question noted that section 9 statements have some limitations or may not be appropriate in all situations. The New Zealand Law Society noted that myths and misconceptions may not arise in all family violence cases. It emphasised that counsel's duty to the court is to ensure that only relevant evidence is called and that the evidence is given as expeditiously as possible. BVA said in family violence cases it suspects that, unless clear expert evidence is prepared and then disclosed, defence counsel will be reluctant to agree to counter-intuitive evidence that is specific to family violence. Paulette Benton-Greig said she was

---

11 BVA, the Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, Paulette Benton-Greig, New Zealand Police and the Public Defence Service.

12 The submissions in favour were from the Criminal Bar Association, the New Zealand Bar Association, New Zealand Police and the Public Defence Service.

not sure that section 9 was having much of an effect in sexual violence trials and suggested judicial directions may be more effective.[13]

Our view

Counsel should consider using agreed statements to address myths and misconceptions about family violence

12.23 Addressing possible juror misconceptions in family violence cases through an agreed statement has a number of benefits in comparison to expert witness evidence. It avoids the need to have experts give evidence in court, which may shorten the trial, reduce costs and mitigate the problem of a lack of available experts to give counter-intuitive evidence in New Zealand.[14] We also note that jurors may benefit from having a written statement to refer to during proceedings and deliberations.

12.24 Myths and misconceptions may not arise in all family violence cases. However, where a case does raise such issues, counsel should consider whether a statement could be agreed and admitted under section 9.

12.25 We accept that an agreed statement may not be the appropriate method of addressing juror assumptions in all family violence cases, such as those where the counter-intuitive evidence is controversial in nature. In such a case, it may be more appropriate to call an expert witness to give counter-intuitive evidence and have this tested by cross-examination. However, even where a witness is called, it may be worthwhile considering whether some aspects of their evidence could be agreed upon and admitted as a joint statement. This could shorten the proceedings and assist jurors to understand which aspects of the counter-intuitive evidence are undisputed.

12.26 Our recommendation is consistent with the recommendation the Commission made in 2015 in relation to sexual violence cases.

THE NEED FOR JUDICIAL DIRECTIONS IN SEXUAL AND FAMILY VIOLENCE CASES

RECOMMENDATIONS

R21 The Act should be amended to expressly provide that a judge may give a direction to address any juror misconceptions about sexual or family violence.

---

[13] Paulette Benton-Greig is a member of the law faculty at the University of Waikato with expertise in the justice response to sexual violence.

[14] We are unaware how many experts are available to give evidence on myths and misconceptions that arise in family violence cases. However, we note that a 2014 article identified there were only four expert witnesses providing counter-intuitive evidence in child sexual abuse cases in New Zealand: Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand" (2014) 21(4) PPL 511 at 512.

R22 Sample judicial directions should be developed to address myths and misconceptions that jurors may hold in sexual and family violence cases. As a starting point, directions should be developed to address the following myths and misconceptions:

- A complainant who dresses 'provocatively' or acts 'flirtatiously' is at least partially responsible for the offending.
- A complainant who drinks alcohol or takes drugs is at least partially responsible for the offending.
- "Real rape" is committed by strangers and/or sexual violence by a partner or acquaintance is less serious.
- It is not rape unless the offender uses force and/or the complainant suffers physical injuries.
- A victim of family violence can avoid future violence by leaving the relationship.

The sample directions should be contained in a publicly accessible jury trials bench book. Sufficient funding should be provided to the Institute of Judicial Studies to enable the directions to be developed and maintained.

Background

12.27 Judicial directions are another method of addressing incorrect assumptions and beliefs that jurors may hold about sexual and family violence. Where directions are given, this can avoid the need for an expert witness to be called to give counter-intuitive evidence or for the parties to reach agreement on a section 9 statement.

12.28 In *DH v R*, the Supreme Court indicated that judicial directions are one possible method of countering erroneous beliefs and assumptions in criminal trials.[15] The Court said:[16]

> Jury directions of the type used in England and Wales on topics where there is a general acceptance of the topic are a worthwhile alternative to expert evidence. If all the areas that would otherwise be covered by expert evidence are amenable to jury direction, this would obviate the need for the evidence and it would no longer be substantially helpful. If not, the jury directions could reduce the scope of the evidence to topics not covered in the directions.

12.29 We note that there are two existing provisions containing judicial directions that address potential juror misconceptions. Section 127 of the Act enables a judge to give a direction to the jury about delayed complaints and failure to complain in sexual cases, which may counter the misconception that a "real victim" of sexual violence would make a complaint immediately. Regulation 49 of the Evidence Regulations 2007 contains directions that are designed to address assumptions juries may hold about the reliability and accuracy of very young children's evidence.

---

15 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [110].

16 At [111].

12.30 We understand that trial judges do sometimes give directions in relation to other misconceptions jurors may hold, such as on the dynamics of family violence.

Issues Paper

12.31 In our Issues Paper, we noted that a number of overseas jurisdictions have judicial directions aimed at countering assumptions that may arise in sexual cases. In England and Wales, these directions are contained in *The Crown Court Compendium*, which is a guide for the judiciary on jury and trial management, summing up and sentencing.[17] Scotland and several Australian states and territories have judicial directions in legislation.[18]

12.32 Bearing in mind the overseas research, our Issues Paper asked whether there is a need for new judicial directions to address myths and misconceptions about sexual and family violence in New Zealand.

Consultation

12.33 We received nine submissions, with five of those submissions agreeing there is a need for new judicial directions.[19] The submissions from Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre[20] and TOAH-NNEST Tauiwi Caucus[21] said judicial directions were needed because rape myths are prevalent. One individual submitter said judicial directions are a means of ensuring myths and misconceptions can be addressed more consistently and reflect the current state of knowledge on the matters they address. BVA said judicial directions would avoid the need to rely on expert evidence, which was appropriate given the sheer volume of family violence prosecutions.

12.34 Four submitters considered that new judicial directions are either unnecessary or may not be appropriate.[22] The Criminal Bar Association said that specific directions were not needed due to the ability to admit counter-intuitive evidence through section 9 statements. However, it said it would not be a problem if additional judicial directions were created and said this could potentially help avoid the lack of uniformity that currently exists between section 9 statements. The New Zealand Bar Association said the current directions given in jury trials address most of the specific areas of counter-intuitive evidence noted in the Issues Paper.

12.35 The Public Defence Service said that judicial directions dealing with counter-intuitive evidence should not be introduced without solid, non-controversial evidence that such

17 Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018).

18 Criminal Procedure (Scotland) Act 1995, Jury Directions Act 2015 (Vic), Evidence (Miscellaneous Provisions) Act 1991 (ACT), Evidence Act 1929 (SA) and Criminal Code Act 1983 (NT).

19 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, Paulette Benton-Greig, Police and TOAH-NNEST Tauiwi Caucus.

20 A group of non-kaupapa Māori organisations that provide support services to survivors of sexual violence in the Auckland region.

21 Te Ohaakii a Hine – National Network Ending Sexual Violence Together, Tauiwi Caucus, a national network that includes 51 non-profit organisations that provide specialist sexual violence support services to those impacted by sexual harm and 24 individuals who work in this sector.

22 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

misconceptions still exist in the New Zealand context. It said that, if judicial directions are to be introduced, they should replace counter-intuitive evidence to avoid over-emphasis.

12.36 The New Zealand Law Society said new judicial directions were not needed. It said that trial courts are following the guidance of the Supreme Court in *DH v R* as to the type of direction that may be appropriate in jury trials. The New Zealand Law Society said that directions are dependent on the particular facts of the case and that a case may raise a number of myths and misconceptions or it may not raise any. It said whether a direction was appropriate in a particular case is a matter of judicial discretion and the categories of 'myths and misconceptions' are not necessarily closed or agreed.

12.37 We also consulted Skylight Trust, which includes a team of advocates for sexual violence survivors led by Louise Nicholas. Skylight said that judicial directions on myths and misconceptions surrounding sexual offending, given in simple language, could help educate the jury. However, it also noted the merit in evidence being given by experts who keep abreast of the literature and developments in this area. Skylight said that, if judges give directions in this area, they need to believe what they are saying and to keep well-informed about developments. It also said that judicial directions need to be given in simple language as jurors can become confused as to what the direction means and the evidence to which it relates.

12.38 Our judicial advisory committee said if directions are contained in legislation, they should be thoroughly researched, accurate and able to accommodate developments in research over time. The two judges we consulted from the Sexual Violence Court Pilot supported up-to-date judicial directions on counter-intuitive matters.

12.39 We also met with Professor Yvette Tinsley and Dr Warren Young to discuss their research on judicial directions.[23]

Effectiveness and timing of judicial directions

12.40 The authors of *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* have commented on the effectiveness of judicial directions to address misconceptions in sexual cases. They state:[24]

> There is some limited research to suggest that expert evidence is slightly more effective in challenging commonly held misconceptions than judicial instructions at the end of the trial. Instructions earlier in the trial have been found to have similar levels of effectiveness to expert evidence. We are of the view that there is insufficient evidence to suggest that a judicial instruction in sexual cases would be helpful or effective.

12.41 An article by English law professor Jennifer Temkin also discusses the effectiveness of judicial directions in addressing rape myths.[25] She notes several issues that can limit their

---

[23] This research focuses on what improves juror comprehension, rather than on particular evidential directions. Their research has been published in: Jonathan Clough and others "The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension" (2018) 42 Crim LJ 278.

[24] Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 372

[25] Jennifer Temkin "'And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse': Challenging Rape Myths in the Courtroom" (2010) 13 New Crim L Rev 710.

effectiveness, including jurors finding them difficult to understand,[26] the risk that referring to the false information will entrench rather than overcome the stereotype[27] and the lack of guarantee that judges will deliver them effectively or at all.[28] Temkin concludes that it is unlikely judicial directions on rape myths will have much impact on conviction rates. Nonetheless, she suggests that judicial directions, as one of a number of different strategies to dismantle untruths about rape, can have benefits such as providing public recognition from an authoritative source that certain beliefs about rape are false.[29]

12.42 Temkin suggests that, to be useful, judicial directions must follow several basic principles. First, they must be clear and simple. Second, different myths need to be challenged in different ways. For example, some beliefs about rape are always false, while other myths involve beliefs that may or may not be true given the circumstances. Third, judicial directions need to avoid the risk of drawing too much attention to the false belief. Fourth, in some cases, expert evidence that can provide greater explanation will also be appropriate (for example, on matters such as memory and consistency).[30]

12.43 The literature suggests that the timing of judicial directions can impact on their effectiveness. A judicial direction given before evidence is heard may have more impact than one given during summing up.[31]

12.44 At our meeting with Yvette Tinsley and Dr Warren Young, we were told there are risks associated with giving a standard judicial direction, as the jury may interpret the direction as something the judge is telling them about the particular case. In finely balanced cases, juries can look for any indication from the judge as to what they should do. They said when a standard direction is given, it is important for the judge to explain they are not telling the jury how to decide, but rather giving them information that they need to know. We were told that giving too many judicial directions can be counterproductive and that directions should not be mandatory as they may not be relevant to a particular case.

Our view

New judicial directions should be developed to counter myths and misconceptions in sexual and family violence cases

12.45 We have concluded that there is a need for new judicial directions to be developed to help counter misconceptions that jurors may have about sexual and family violence.

12.46 Judicial directions may avoid the need for expert counter-intuitive evidence to be called or reduce the number of topics to be covered by expert evidence. We were told by one

---

26 At 721–724. On this point see also Jonathan Clough and others "The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension" (2018) 42 Crim LJ 278 at 280, noting that "decades of research suggests that jurors struggle to comprehend and/or apply judicial directions on law".

27 Jennifer Temkin "'And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse': Challenging Rape Myths in the Courtroom" (2010) 13 New Crim L Rev 710 at 724–727.

28 At 729.

29 At 732.

30 At 733–734.

31 Emma Henderson and Kirsty Duncanson "A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional Consent Narratives in Rape Trials?" (2016) 39(2) UNSWLJ 750 at 778; Annie Cossins "Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England" (2013) 17 E&P 74 at 94; and Jane Goodman-Delahunty, Anne Cossins and Kate O'Brien "Enhancing the Credibility of Complainants in Child Sexual Assault Trials: The Effect of Expert Evidence and Judicial Directions" (2010) 28 Behav Sci & L 769 at 780.

submitter that there are a limited number of expert witnesses available to give counter-intuitive evidence in New Zealand.[32] Avoiding the need to have expert witnesses give counter-intuitive evidence in court may shorten the length of the trial, reduce the cost of the trial and mitigate the problem of the limited number of experts available.[33]

12.47 For the reasons discussed later in this chapter, we have concluded the Act should be amended to provide an express power for judges to give a judicial direction to address myths or misconceptions that may arise in arise in sexual and family violence cases. We have also concluded that sample directions should be developed to address prevalent myths and misconceptions, and that these should be contained in a publicly accessible jury trials bench book, rather than in the Act itself.

12.48 An express power for judges to give judicial directions would have the benefit of reminding counsel and judges of the possibility that jurors may have misconceptions about sexual and family violence. Sample directions in a publicly accessible jury trials bench book would encourage judges to consider whether a direction may be appropriate and how the direction can be given to counter the myth (and avoid reinforcing it). We consider this would have the benefits of increased transparency and consistency between cases.

12.49 We consider sample judicial directions would be appropriate where there is general agreement as to the prevalence of a particular myth or misconception and how it should be addressed. In the paragraphs below, we discuss topics that we consider could be addressed by judicial directions.

MYTHS AND MISCONCEPTIONS IN SEXUAL AND FAMILY VIOLENCE CASES

Issues Paper

12.50 In our Issues Paper, we noted that overseas research suggests jurors are often affected by the following misconceptions in cases of sexual offending:

- A genuine victim will put up a fight or scream or cry for help.
- A victim of sexual assault will suffer external and internal injuries.
- Inconsistencies or omissions in evidence represent evidence of fabrication since truthful people remember all the details.
- A complainant who drinks alcohol or takes drugs is at least partially responsible for the offending.
- A complainant who dresses 'provocatively' or acts 'flirtatiously' is at least partially responsible for the offending.
- Continued association with the defendant means the sexual assault did not occur.

12.51 The Issues Paper also referred to the following misconceptions about family violence, which were identified in the Commission's 2015 report *The Justice Response to Victims of Sexual Violence*:

- Family violence comprises a series of discrete incidents of physical violence.

---

[32] See above at [12.15].

[33] See above at [12.23].

- A victim's fear of future violence is irrational or unreasonable.
- A victim can avoid future violence by simply leaving the relationship.
- If a victim was violent as well, their fear was not real.

12.52 We asked submitters what misconceptions should be the subject of judicial directions.

Consultation

12.53 We received six submissions on this question.[34] The New Zealand Bar Association said that qualified experts should determine the areas that might properly be the subject of judicial directions and that it would support the consensus of expert opinion. Other submitters suggested topics, with some degree of overlap.

12.54 New Zealand Police supported directions on the following myths: victims put up a fight or cry for help; victims will suffer injuries; inconsistencies or omissions in evidence represent evidence of fabrication; and continued association with the defendant means the sexual assault or family violence did not occur.

12.55 The submissions from Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus supported the list of directions in *The Crown Court Compendium* (England and Wales)[35] as well as directions on retraction of complaints, false complaints and rates of re-victimisation. Paulette Benton-Greig supported directions on the following categories of myths: those that blame victims; expectations of victim behaviour during or after the event, trauma, memory and consistency; consent; false complaints; and who is a "real rapist".

12.56 BVA suggested directions could be used in family violence cases when the complainant has been hostile towards the prosecution. These could address matters such as the difficult position family violence complainants are in and the relationship dynamic that can result in violent relationships. BVA said judicial directions in adult sexual assault cases should be informed by expert research in the New Zealand context to provide a foundation for which myths need addressing. It said the topics that should be addressed include: people can react to sexual violence in different ways so it is not uncommon for victims to be quiet or not resist; delayed or incremental reporting of complaints; and why a defendant would offend where he could be caught.

---

[34] Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, the New Zealand Bar Association, Paulette Benton-Greig, Police and TOAH-NNEST Tauiwi Caucus.

[35] Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 20-3 to 20-4. It says that guidance may be needed on one or more of the following supposed indicators relating to the complainant's evidence: delay in making a complaint; complaint made for the first time when giving evidence; inconsistent accounts given by the complainant; lack of emotion/distress when giving evidence; consistent account given by the complainant; emotion/distress when giving evidence; clothing worn by the complainant said to be revealing or provocative; intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others; previous knowledge of, or friendship/sexual relationship between the complainant and the defendant; some consensual sexual activity on the occasion of the alleged offence; lack of any use or threat of force, physical struggle and/or signs of injury; a defendant who is in an established sexual relationship; and sexual orientation. (Note that the November 2017 version of the *Crown Court Compendium* that was quoted in the Issues Paper did not include "sexual orientation" in this list).

Our view

Judicial directions should be developed to address five myths

12.57 Since the publication of our Issues Paper, we have carried out a more extensive literature review to determine which myths and misconceptions are likely to arise in sexual and family violence cases. Our research has highlighted a number of misconceptions that jurors may have about sexual and family violence. We note a caveat that most of this literature is from overseas, and there may be differences between countries.[36]

12.58 We have grouped the myths about sexual violence that arise most commonly in the literature into the following categories of beliefs and assumptions:

- Women provoke or are responsible for sexual assault, for example by wearing revealing clothing, drinking alcohol, flirting with the defendant or inviting the defendant into their home.[37]
- Only certain people are victims of sexual violence. For example, only women can be sexually assaulted,[38] sex workers cannot be raped,[39] people with disabilities are rarely victims of sexual assault[40] and only young attractive people are victims.[41]
- Beliefs about who can be the perpetrator of sexual violence. For example, "real rape" is perpetuated by strangers[42] and women cannot be sexually assaulted by their partner or this is a less serious crime.[43]
- Beliefs about fabrication of allegations and believability of complainants. For example, false rape allegations are common,[44] there should be other witnesses of

---

36 For example, one review of published research indicated that rape myths have a greater effect on juror decision making in Europe than in the United States: Sokratis Dinos and others "A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision-making?" (2015) 43 IJLCJ 36. See also Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 35 (citing research that shows there is considerable variation between countries in levels of rape myth acceptance).

37 See Katie M Edwards and others "Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change" (2011) 65(11–12) Sex Roles 761 at 766; Hannah McGee and others "Rape and Child Sexual Abuse: What Beliefs Persist About Motives, Perpetrators, and Survivors?" (2011) 26(17) JIV 3580 at 3582 and 3587–3588; Natalie Taylor and Jacqueline Joudo *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Australian Institute of Criminology, Research and Public Policy Series No 68, 2005) at 59; and Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 E&P 299 at 311–313.

38 See Jessica A Turchik and Katie M Edwards "Myths About Male Rape: A Literature Review" (2012) 13(2) Psychology of Men & Masculinity 211.

39 See Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 109; Melanie Randall "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22 Can J Women & L 297 at 409; and Olivia Smith and Tina Skinner "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26(4) Social & Legal Studies 441 at 443.

40 See Australian Institute of Family Studies and Victoria Police *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017) at 15.

41 See Hannah McGee and others "Rape and Child Sexual Abuse: What Beliefs Persist About Motives, Perpetrators, and Survivors?" (2011) 26(17) JIV 3580 at 3587–3588.

42 Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 47.

43 See Katie M Edwards and others "Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change" (2011) 65(11–12) Sex Roles 761 at 763.

the incident or physical evidence[45] and the complainant's recollection should be clear, coherent, detailed, specific and should not contain any inconsistencies or omissions.[46]

- Beliefs that seek to minimise or excuse perpetrator behaviour. For example, rape results from men being unable to control their need for sex.[47]
- The necessity of physical force and/or physical resistance during a sexual assault. For example, an offender will typically use physical force or a weapon, a "real rape" victim will resist and fight off the offender, and a "real rape victim" will sustain physical injuries at the time of the offence.[48]
- How a "real rape" victim will respond to sexual assault. For example, a "real rape" victim would report the offending immediately, refuse to associate with the offender and react with visible distress and hysteria.[49]
- Beliefs about sexual behaviour and consent. For example, a complainant is less credible or more responsible if they have previously engaged in consensual sex with the defendant[50] and physiological responses during sexual activity must mean the person consented.[51]

---

44 See Katie M Edwards and others "Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change" (2011) 65(11–12) Sex Roles 761 at 767; and National Council of Women of New Zealand *Gender Attitudes Survey – Full Results 2017* (2018) at 22 (29 per cent of respondents agreed "false rape accusations are common").

45 See Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 101; and Tyler J Buller "Fighting Rape Culture with Noncorroboration Instructions" (2017) 53 Tulsa L Rev 1 at 2, 5, 15 and 18.

46 See Australian Institute of Family Studies and Victoria Police *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017) at 8.

47 See National Council of Women of New Zealand *Gender Attitudes Survey – Full Results 2017* (2018) at 23 (24 per cent of respondents agreed "Rape happens when a man's sex drive is out of control"); and Kim Webster and others *Australians' attitudes to violence against women: Full technical report*, *Findings from the 2013 National Community Attitudes towards Violence Against Women Survey (NCAS)* (Victorian Health Promotion Foundation, 2014) at 107–108 (43 per cent of respondents agreed "rape results from men not being able to control their need for sex").

48 See Jennifer Temkin "'And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse': Challenging Rape Myths in the Courtroom" (2010) 13 New Crim L Rev 710 at 715; Denise Lievore *Non-reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Commonwealth Office of the Status of Women, 2003) at 30; Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 E&P 299 at 314–317; Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 106; and Natalie Taylor and Jacqueline Joudo *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Australian Institute of Criminology, Research and Public Policy Series No. 68, 2005) at 59.

49 See Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 32; and Natalie Taylor and Jacqueline Joudo *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Australian Institute of Criminology, Research and Public Policy Series No. 68, 2005) at 59.

50 See Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 45.

51 See Jessica A Turchik and Katie M Edwards "Myths About Male Rape: A Literature Review" (2012) 13(2) Psychology of Men & Masculinity 211 at 212.

12.59 The beliefs and assumptions about family violence that arise in the literature include:

- Beliefs about what constitutes domestic or family violence, such as it is a series of individual episodes of violence,[52] it is a relationship issue,[53] and it is caused by factors such as financial pressure or alcohol use.[54]
- Beliefs about how a victim of family violence should behave, such as: a victim can and should leave the relationship and this will stop the violence.[55]
- Beliefs about characteristics of victims, such as: women who have experienced intimate partner violence are characteristically weak, vulnerable and passive.[56]

12.60 Many of these misconceptions could be appropriately countered by way of a judicial direction. As a starting point, we consider sample judicial directions should be developed to address the following misconceptions jurors in sexual or family violence cases may hold:

- A complainant who dresses ‘provocatively’ or acts ‘flirtatiously’ is at least partially responsible for the offending.
- A complainant who drinks alcohol or takes drugs is at least partially responsible for the offending.
- “Real rape” is committed by strangers and/or sexual violence by a partner or acquaintance is less serious.
- It is not rape unless the offender uses force and/or the complainant suffers physical injuries.
- A family violence victim can avoid future violence by leaving the relationship.

12.61 The literature consistently identified these as commonly held misconceptions. Further, these misconceptions are not specifically addressed by provisions in the Act or other relevant legislation.[57] We also note that some of these myths are the subject of judicial directions in other jurisdictions. We discuss each topic below.

---

[52] Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality & Safety Commission, 2016) at 34, 36 and 50; and Rebecca Bradfield “Understanding the Battered Woman Who Kills Her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia” (2002) 9 PPL 177 at 183.

[53] See Rebecca Bradfield “Understanding the Battered Woman Who Kills Her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia” (2002) 9 PPL 177 at 183.

[54] See Rebecca Bradfield “Understanding the Battered Woman Who Kills Her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia” (2002) 9 PPL L 177 at 183; and Alissa Pollitz Worden and Bonnie E Carlson “Attitudes and Beliefs About Domestic Violence: Results of a Public Opinion Survey: Beliefs About Causes” (2005) 20(10) JIV 1219 at 1227.

[55] See Fleur McLaren *Attitudes*, *Values and Beliefs about Violence within Families 2008 Survey Findings* (Centre for Social Research and Evaluation, 2010) at 14 (67 per cent of respondents agreed that “[a] woman who is beaten by her partner, just needs to leave the relationship to be safe”); Rebecca Bradfield “Understanding the Battered Woman Who Kills Her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia” (2002) 9 PPL 177 at 183 and 185–186; Niwako Yamawaki and others “Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim’s Relationship With Her Abuser, and the Decision to Return to Her Abuser” (2012) 27(16) JIV 3195; and Alissa Pollitz Worden and Bonnie E Carlson “Attitudes and Beliefs About Domestic Violence: Results of a Public Opinion Survey: Beliefs About Causes” (2005) 20(10) JIV 1219 at 1238.

[56] See Rebecca Bradfield “Understanding the Battered Woman Who Kills Her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia” (2002) 9 PPL 177 at 186; and Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality & Safety Commission, 2016) at 37–38 and 50.

[57] For example, section 128A of the Crimes Act 1961, which sets out particular circumstances in which a person does not consent to sexual activity.

The complainant's dress or behaviour

12.62 Our research highlighted a number of beliefs and assumptions that hold the complainant responsible for the sexual assault if they dressed or behaved in a particular way prior to the incident. Some jurors may believe:

- women who wear revealing clothing provoke sexual violence or are responsible for it;[58]
- the defendant is less culpable (or the complainant is responsible) if the complainant "led them on", for example by flirting, dancing, kissing them or inviting them in.[59]

12.63 If jurors believe statements like this, it may cause them to focus on whether they think the complainant is 'to blame' rather than focusing on the question of consent. Jurors may also reason that a complainant who dressed or acted in a certain way must have wanted sexual activity.

12.64 In England and Wales, *The Crown Court Compendium* provides that, in a sexual case, judicial guidance may be necessary on the issue of "[c]lothing worn by the complainant said to be revealing or provocative". The Compendium provides the following sample direction:[60]

> You have been reminded of/you will remember that when W went out on the evening of {date} W was dressed in {specify}. The defence suggested to W that this was because W was "out on the pull" and looking for sex. You will also remember W's response that {insert}. You must not assume that W was looking to have sex or willing to have sex if the opportunity presented itself because of the way W was dressed. Just because someone dresses in revealing clothing it does not mean that they are inviting or willing to have sex. It also does not mean that someone else who sees that person and interacts with them could reasonably believe that that person would consent to sex simply because of the way they are dressed.

12.65 The submissions we received from Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Paulette Benton-Greig and TOAH-NNEST Tauiwi Caucus supported the development of a judicial direction to address this misconception.

12.66 We consider a judicial direction should be developed to prevent jurors from relying on erroneous assumptions based on a complainant's clothing or supposedly flirtatious behaviour.

---

58 See Katie M Edwards and others "Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change" (2011) 65(11-12) Sex Roles 761 at 766; Hannah McGee and others "Rape and Child Sexual Abuse: What Beliefs Persist About Motives, Perpetrators, and Survivors?" (2011) 26(17) JIV 3580 at 3582 and 3587–3588; and Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 46.

59 See Natalie Taylor and Jacqueline Joudo *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Australian Institute of Criminology, Research and Public Policy Series No. 68, 2005) at 59; Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 E&P 299 at 311–313; and National Council of Women of New Zealand *Gender Attitudes Survey– Full Results 2017* (2018) at 23 (7 per cent of respondents agreed with the statement "[i]f someone is willing to 'make out', then it's no big deal if the other person pushes them a little further and has sex", 13 per cent were neutral and 77 per cent disagreed).

60 Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 20-7 to 20-8.

The use of alcohol or drugs

12.67 Research shows jurors may be affected by the belief that a complainant who has consumed alcohol or drugs is partially responsible for the offending or provoked it.[61]

12.68 In research commissioned by the Ministry of Women's Affairs, police officers and prosecutors indicated that juries seem reluctant to convict an offender for sexual offending when the victim was intoxicated.[62] In the recent New Zealand Gender Attitudes Survey, 15 per cent of respondents agreed that "[i]f someone is raped when they're drunk, they're at least partly responsible for what happens".[63]

12.69 The submissions we received from Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, Paulette Benton-Greig and TOAH-NNEST Tauiwi Caucus supported a judicial direction on this topic. In our consultation meeting with Skylight, it said that jurors find it difficult to decide whether the complainant consented in cases where alcohol is involved.

12.70 In England and Wales, *The Crown Court Compendium* lists assumptions on "intoxication (drink and/or drugs) on the part of the complainant whilst in the company of others" as a topic that may require judicial guidance in a sexual violence case. It contains the following sample direction:[64]

> W has accepted that he/she was very drunk on the night of {insert}. But it is important you do not assume that because W was drunk he/she was either looking for, or willing to have, sex. When it was suggested to W in cross-examination that he/she was out that night to get drunk and then to have sex, W said {insert}. You must not assume that because W was drunk he/she must have wanted sex. People do go out at night and get drunk, sometimes for no reason at all. It would be wrong to leap to the conclusion that just because a person is drunk they must be out looking for, or willing to have, sex. It would also be wrong to leap to the conclusion that someone else who sees and interacts with that person could reasonably believe that person would consent to sex.

12.71 We note that evidence of the complainant's alcohol or drug use may be relevant to the question of whether the complainant was able to consent.[65] Section 128(A)(4) of the Crimes Act 1961 provides:

---

61 See Destin N Stewart and Kristine M Jacquin "Juror Perceptions in a Rape Trial: Examining the Complainant's Ingestion of Chemical Substances Prior to Sexual Assault" (2010) 19(8) Journal of Aggression, Maltreatment & Trauma 853 at 870–871; Emily Finch and Vanessa E Munro "The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants" (2007) 16(4) S & LS 591 at 592–593, 598–600, 605 and 607; Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 46; and Melanie Randall "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22 Can J Women & L 297 at 414.

62 Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 103 and 108.

63 National Council of Women of New Zealand *Gender Attitudes Survey – Full Results 2017* (2018) at 23. The results showed that 73 per cent disagreed with the statement, 10 per cent were neutral and 2 per cent did not know.

64 Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 20-8.

65 We note that the Crown Court Compendium has an sample direction on consent in the context of the victim's intoxication, in addition to the direction on assumptions relating to the victim's intoxication: Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 20-23.

> A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

12.72 We are not proposing any changes to this provision or to the law that has developed around it; rather, we suggest that a judicial direction could be developed to counter impermissible reasoning about the victim's use of alcohol or drugs. For example, a juror reasoning that a victim must have wanted sex because she had a drink with the defendant, or reasoning that the defendant should not be held responsible in a sexual case because the complainant 'got herself into the situation' by choosing to drink alcohol.

Rape by a partner or acquaintance

12.73 Another myth the literature identifies as prevalent is that "real rape" is perpetrated by strangers and/or that sexual assault by a partner or acquaintance is less serious.[66] However, research shows that sexual violence is more likely to be perpetrated by someone known to the victim than by a stranger.[67]

12.74 Jurors who believe that "real rape" is perpetrated by strangers may be less willing to convict in cases where the defendant is known to the complainant. In our consultation meeting with Skylight, it told us of a juror who, after a trial, explained that it had taken a long time to reach a guilty verdict because one other juror refused to believe it was possible for a father to rape his daughter.

12.75 Even where jurors accept that rape by a partner or acquaintance is common and serious, the literature suggests they may expect a victim to respond differently.[68] For example, in one study, mock jurors were prepared to accept that a victim of a stranger rape would 'freeze' and be unable to engage in physical or verbal resistance but expected a victim in an acquaintance case to fight back.[69]

---

66 See Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 105; Christine Ferro, Jill Cermele and Ann Saltzman "Current Perceptions of Marital Rape: Some Good and Not-So-Good News" (2008) 23(6) JIV 764; Katie M Edwards and others "Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change" (2011) 65(11–12) Sex Roles 761 at 763–765; and Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 47.

67 See Australian Institute of Family Studies and Victoria Police *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017) at 5. See also Ministry of Justice *2014 New Zealand Crime and Safety Survey Te Rangahau o Aotearoa Mō Te Taihara Me Te Haumarutanga 2014 Main Findings* (2015) at 47. This shows that in 2013, 0.9 per cent of all adults were the victim of a sexual offence by a stranger, while 1.1 per cent of adults were the victim of a sexual offence committed by a current or former intimate partner; 0.2 per cent of adults were the victim of a sexual offence by another family member; and 1.3 per cent of adults were the victim of a sexual offence by a non-family member who is known to them (such as a colleague, flatmate or friend).

68 Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 E&P 299. (Mock jurors were receptive to the idea that a woman could be raped by someone she had previously had a sexual relationship with and there was no clear indication that jurors considered rape by an acquaintance to be any less serious than rape by a stranger per se. However, a number of mock jurors commented that rape involving someone known to the victim was "more delicate", "a lot harder" and "more of a 'grey area'" than rape involving a violent stranger: at 309–310. In post-deliberation questionnaires, 71 per cent of mock jurors indicated that the parties' previous relationship was either "an important or highly important factor in influencing their verdicts": at 322).

69 Louise Ellison and Vanessa E Munro "A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13 New Crim L Rev 781 at 790.

12.76 While not specifically referring to the offender/victim relationship, one of the directions in *The Crown Court Compendium* in England and Wales includes the following passage:[70]

> From experience we know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people.

12.77 The *Crown Court Bench Book*, which preceded *The Crown Court Compendium*, contained a sample judicial direction on avoiding assumptions when the complainant and defendant are known to each other. It read:[71]

> A woman (a man) who has been subjected to a sexual assault obviously undergoes a traumatic experience, whether or not the victim and her (his) attacker are known to one another, and whether or not they have previously enjoyed a consensual sexual relationship. At first thought, you might assume that stranger rape would be far more traumatic, violent and frightening. It can be, but experience tells the courts that this is not necessarily the case. The experience of a victim of rape by someone she (he) knows or trusts may be just as traumatic whether or not physical violence or the threat of physical violence was involved.

12.78 We consider it would be desirable to develop a direction which refers to the fact that sexual offending can, and often does, take place between people who know each other. The direction might also caution jurors about making generalisations about the incident based on whether the defendant was a stranger to the complainant (such as reasoning that they would have been able to escape if the defendant was known to them).

The defendant's use of force and the complainant's resulting injuries

12.79 The literature shows there are a number of myths about the use of force during sexual offending and about the victim's resulting injuries, such as:

- an offender will typically use physical force against their victim and/or use a weapon;[72]
- a victim of "real rape" will resist and fight off the offender;[73] and
- a rape victim will usually sustain physical injuries at the time of the offence.[74]

---

70 Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 20-4.

71 Judicial Studies Board *Crown Court Bench Book: Directing the Jury* (March 2010) at 357.

72 See Jennifer Temkin "'And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse': Challenging Rape Myths in the Courtroom" (2010) 13 New Crim L Rev 710 at 715; and Denise Lievore *Non-reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Commonwealth Office of the Status of Women, 2003) at 30.

73 National Council of Women of New Zealand *Gender Attitudes Survey – Full Results 2017* (2018) at 22 (7 per cent of respondents agreed with the statement that "[y]ou can't really call it rape if someone doesn't physically fight back". See also Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 105–106; and Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 E&P 299 at 314–315.

74 Elaine Mossman and others *Responding to sexual violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, September 2009) at 105–106; Natalie Taylor and Jacqueline Joudo *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Australian Institute of Criminology, Research and Public Policy Series No. 68, 2005) at 59; and Louise Ellison and Vanessa E Munro "Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations" (2013) 17 E&P 299 at 317–318.

12.80 The literature suggests that, in many cases, sexual offenders do not use physical force during an offence and that victims may be more likely to freeze rather than fight off the offender.[75] A New Zealand study that reviewed around 2,000 police files of sexual offences reported that force was used against the victim in 28–52 per cent of cases and that a weapon was used in about 5–7 per cent of cases. Victims sustained physical injuries in 27–30 per cent of the cases reviewed. Where the extent of the physical injury was recorded, this was relatively minor in 61 per cent of cases (such as superficial cuts, grazes and bruises).[76]

12.81 A number of overseas jurisdictions have developed judicial directions that address misconceptions about use of force, physical resistance and injuries.

12.82 In England and Wales, *The Crown Court Compendium* states that judicial guidance on the lack of any use or threat of force, physical struggle and/or signs of injury may be necessary.[77] The sample direction states (in part):[78]

> … it is important for you to recognise that just because D did not use or [threaten] to use any force on W, and W did nothing to prevent D from having sexual intercourse with him/her and was not injured, this does not mean that W consented to what took place or that what W said happened cannot be true. Experience has shown that different people may respond to unwanted sexual activity in different ways. Some may protest and physically resist throughout the event. But others may be unable to protest or physically resist, through fear or personality.

12.83 In Scotland, the Criminal Procedure Act 1995 contains judicial directions relating to the absence of physical resistance or physical force in a sexual case.[79] These directions are:

- there can be good reasons why a person against whom a sexual offence is committed might not physically resist the sexual activity and an absence of physical resistance does not, therefore, necessarily indicate that an allegation is false.[80]
- there can be good reasons why a person may, in committing a sexual offence, not need to use physical force to overcome the will of the person against whom the offence is committed and an absence of physical force does not, therefore, necessarily indicate that an allegation is false.[81]

12.84 Several Australian states and territories have judicial directions on this topic. In Victoria, section 46 of the Jury Directions Act 2015 (Vic) enables the prosecution or defence counsel to request the trial judge to give a particular judicial direction on consent. These

---

75 Australian Institute of Family Studies and Victoria Police *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017) at 6.

76 Sue Triggs and others *Responding to sexual violence: Attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, September 2009) at 27–28. Note that the report states that interpretation of the data is complicated by the lack of relevant information in many file notes of offences. At 27, it states that:

> … [i]f cases involving injury were assumed to involve a degree of force by the offender (and this may not always be so) then the estimate of cases involving force would increase to 41 percent to 64 percent of cases.

77 Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 20-4.

78 Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 20-9.

79 Criminal Procedure (Scotland) Act 1995, s 288DB.

80 Criminal Procedure (Scotland) Act 1995, s 288DB(2).

81 Criminal Procedure (Scotland) Act 1995, s 288DB(5).

include directions relating to lack of physical injury or violence and lack of resistance.[82] In the Australian Capital Territory, South Australia and the Northern Territory, a judge must, in a relevant case, direct the jury that a person is not to be regarded as having consented to a sexual act just because the person did not protest or physically resist or did not sustain a physical injury.[83]

12.85 Police supported the use of judicial directions to address the misconception that victims will put up a fight or cry for help and that they will suffer injuries. Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus supported the list of directions in *The Crown Court Compendium* (which includes lack of force, physical struggle or sign of injury). Paulette Benton-Greig said there should be judicial directions on the myths that victims will physically fight back at all costs and have injuries.

12.86 We consider a sample direction (or directions) should be developed to address the assumption that, in a sexual case, an offender will typically use force and the victim will sustain physical injuries.

12.87 New Zealand legislation already contains a provision relating to lack of physical resistance during a sexual assault. Section 128A(1) of the Crimes Act 1961 provides:

> A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

12.88 We note there may be some overlap between the directions we propose and the existing directions that are given in relation to consent under the Crimes Act.[84] *The Crown Court Compendium* notes that it will be necessary to consider what directions are to be given on consent when deciding what needs to be said to the jury about assumptions in sexual cases.[85]

---

82 Jury Directions Act 2015 (Vic), s 46(3) provides (in part) that the prosecution or defence counsel may request that the trial judge:

> (c) inform the jury that experience shows that—
>
> (i) there are many different circumstances in which people do not consent to a sexual act; and
>
> (ii) people who do not consent to a sexual act may not be physically injured or subjected to violence, or threatened with physical injury or violence; or
>
> (d) inform the jury that experience shows that—
>
> (i) people may react differently to a sexual act to which they did not consent and that there is no typical, proper or normal response; and
>
> (ii) people who do not consent to a sexual act may not protest or physically resist the act;
>
> ...

83 Evidence (Miscellaneous Provisions) Act 1991 (ACT), s 80C(b) and (c); Evidence Act 1929 (SA), s 34N(b) and (c); Criminal Code Act 1983 (NT), s 192A(a) and (b).

84 Paulette Benton-Greig said that the situations addressed in s 128A of the Crimes Act are very common in rape trials but the section and its potential remedies are rarely referred to at trial.

85 Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 20-15 to 20-17.

Avoiding future violence simply by leaving the relationship

12.89 The literature shows there may be a societal perception that a victim of family violence could have, and should have, avoided the violence by leaving the relationship.[86] For example, 67 per cent of respondents in a New Zealand study agreed that "a woman who is beaten by her partner just needs to leave the relationship to be safe".[87]

12.90 A report by the New Zealand Family Violence Death Review Committee challenges this assumption:[88]

> It is commonly (mis)understood that victims are at liberty to separate from abusive partners. In reality separation is very difficult because abusive partners' behaviours are intended to undermine victims' abilities to escape and be self-determining. Victims resist their partner's violence but this does not stop the violence.
>
> Data on female primary victims shows that separation alone does not secure their safety and, therefore, cannot be seen as the solution to stopping their partner's violence. Sixty-seven percent of the female primary victims were killed, or their [new/ex] male partners were killed, by male predominant aggressors in the time leading up to or following separation.

12.91 Police said a direction would be helpful to counter the assumption that a complainant's continued association with the defendant in a family violence case means that violence did not occur.

12.92 BVA noted that a number of myths and misconceptions arise in the context of intimate partner violence. Jurors may question why the complainant remained in the violent relationship, or did not tell anyone about the violence or left their children alone with the offender. BVA suggested there should be a direction on the complex nature and power dynamics of violent relationships.

12.93 The Public Defence Service, while not in favour of judicial directions in this area, said counter-intuitive evidence could be particularly helpful in explaining why defendants remain in abusive relationships until they 'snap' and wound or kill their abuser. This could address the misconception that the defendant could and should have left the relationship prior to the event.

12.94 In Victoria, the Jury Directions Act 2015 enables a direction on family violence to be given in a criminal proceeding in which self-defence or duress in the context of family violence is in issue.[89] The matters that may be addressed in this direction include:[90]

> if relevant, that experience shows that—
>
> (i) people may react differently to family violence and there is no typical, proper or normal response to family violence;

---

86 See Rebecca Bradfield "Understanding the Battered Woman Who Kills Her Violent Partner – The Admissibility of Expert Evidence of Domestic Violence in Australia" (2002) 9 PPL L 177 at 183 and 185–186; Niwako Yamawaki and others "Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship With Her Abuser, and the Decision to Return to Her Abuser" (2012) 27(16) JIV 3195; and Alissa Pollitz Worden and Bonnie E Carlson "Attitudes and Beliefs About Domestic Violence: Results of a Public Opinion Survey" (2005) 20(10) JIV 1219 at 1238.

87 Fleur McLaren *Attitudes*, *Values and Beliefs about Violence within Families 2008 Survey Findings* (Centre for Social Research and Evaluation, 2010) at 14.

88 Family Violence Death Review Committee *Fifth Report Data: January 2009 to December 2015* (Health Quality and Safety Commission, 2017) at 10.

89 Jury Directions Act 2015 (Vic), ss 55, 58–60.

90 Jury Directions Act 2015 (Vic), s 60(b).

(ii) it is not uncommon for a person who has been subjected to family violence—

(A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;

(B) not to report family violence to police or seek assistance to stop family violence;

…

12.95 We consider a sample direction should be developed to address the myth that a family violence complainant could have stopped the violence by leaving the relationship and should have done so. We understand that trial judges are already giving a direction of this nature in some cases.

Other misconceptions

12.96 We have recommended that, as a starting point, five judicial directions should be developed for use in sexual and family violence cases to challenge the misconceptions jurors may hold in a particular case. We note that there are many other misconceptions that could be addressed through judicial directions.[91]

12.97 When deciding which misconceptions to recommend directions on, we considered whether there were existing provisions that could address these assumptions (in whole or in part). For example:

- we consider the changes we have proposed to section 44 to restrict evidence of the complainant's prior sexual experience with the defendant being admitted will limit the effect of misconceptions such as "people who consent to sex in the past are assumed to have consented again in the future";
- the misconception that victims of "real rape" would report the offending immediately can be addressed by a direction under section 127 of the Act; and
- the meanings of "family violence", "abuse" and "psychological abuse" in the recently enacted Family Violence Act 2018 may address some misconceptions about what family violence is (for example, that it must involve physical violence).[92]

12.98 The focus of our Issues Paper and the submissions we received was on adult complainants in sexual and family violence cases. Accordingly, we have not recommended that judicial directions be developed in relation to child sexual abuse.[93] However, for the sake of completeness, we note the literature shows jurors may also hold a number of misconceptions in such cases. These misconceptions include: children are easily manipulated into giving false reports of sexual abuse, children often lie about being sexually abused, child sexual assault can be detected by a medical examination, real child victims would report sexual abuse immediately to an adult and if a child

---

91 See those discussed at [12.58]–[12.59] above.

92 Family Violence Act 2018, ss 9–11. "Violence" is defined as meaning all or any of: physical abuse, sexual abuse, psychological abuse: s 9(2). Violence against a person can include a pattern of behaviour made up of a number of acts that may be coercive or controlling and/or cause the person cumulative harm: s 9(3). "Abuse" can include a single act or a number of acts that form a pattern of behaviour (even if any or all of those acts viewed in isolation may appear to be minor or trivial: ss 10(1) and (2).

93 BVA commented that judicial directions might be best suited to sexual violence cases where the complainant is an adult as the propositions involved are simpler than the complex dynamics of child sexual abuse.

continues to associate with the defendant, the offending didn't happen.[94] We note that regulation 49 of the Evidence Regulations already contains directions about some aspects of young children's evidence. Further, courts regularly admit counter-intuitive expert psychological evidence in cases involving child sexual abuse.[95]

DEVELOPMENT, REVIEW AND ACCESSIBILITY OF JUDICIAL DIRECTIONS

Issues Paper

12.99 In our Issues Paper, we asked whether any new judicial directions on misconceptions arising in sexual and family cases should be contained in the Act or in non-legislative guidance (such as the jury trials bench book).

Consultation

12.100 We received eight submissions on this issue.[96] Four submitters considered that directions should be in non-legislative guidance.[97] The main reason given was non-legislative guidance can more easily be amended to reflect current research. The Public Defence Service said that, if new judicial directions were introduced, they should be in the Act or in a publicly accessible form to ensure transparency and consistency.

12.101 BVA suggested a provision in the Act that requires a judge to consider whether to give a direction listed in the current "sexual violence judicial guidelines", which are made by Order in Council. It suggested a practice note by the judiciary as an alternative.

12.102 The submissions we received from Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus said they did not have sufficient information to form an opinion on this question. However, they wanted the following factors to be taken into account: judges should be accountable for using the directions when appropriate; consistent and correct information should be given; the directions should be able to be updated when necessary; there should be a consultation process for any updates; and any changes and updates should be made by appropriate decision-makers.

---

94 See, for example, Annie Cossins and Jane Goodman-Delahunty "Misconceptions or expert evidence in child sexual assault trials: Enhancing justice and jurors' 'common sense'" (2013) 22 JJA 171; Anne Cossins "Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us" (2008) 15(1) PPL 153 at 156–157; and Australian Institute of Family Studies and Victoria Police *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017) at 17–19.

95 Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand" (2014) 21(4) PPL 511.

96 Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre, BVA, the Criminal Bar Association, the New Zealand Bar Association, Paulette Benton-Greig, Police, the Public Defence Service and TOAH-NNEST Tauiwi Caucus.

97 The Criminal Bar Association, the New Zealand Bar Association, Paulette Benton-Greig and Police.

Our view

The Act should expressly allow judges to give judicial directions to address myths and misconceptions in sexual and family violence cases

12.103 We consider the Act should be amended to refer to a judge's ability to make a direction addressing myths and misconceptions that may arise in a sexual or family violence case. This would make it clear that delay or failure to make a complaint (section 127) is not the only aspect of behaviour on which a direction may be appropriate. Clause 21 of the draft Bill reflects this recommendation. Our proposed clause does not specify the timing of such a direction so that judges have a discretion to give the direction when most appropriate in a particular trial.[98]

Sample directions should be developed and contained in a publicly available bench book

12.104 We do not consider the Act should contain a list of particular directions or topics for directions. The feedback we received shows this would not be appropriate because the research in this area is continually developing and the Act cannot be readily amended to reflect these developments. Rather, we consider sample judicial directions addressing juror assumptions in sexual and family violence cases should be contained in a jury trials bench book. This could include a list of topics on which judicial directions may be appropriate, as well as sample directions, such as provided in *The Crown Court Compendium*. The language of the sample judicial directions needs to be carefully considered to increase their effectiveness.[99] The language used should be simple and focus on the correct position rather than the myth to avoid reinforcing the erroneous beliefs. However, the sample directions would only provide guidance for judges - a judge would have discretion to frame the direction as appropriate in the particular case. It may also assist jurors to be able to refer to written copies of the directions.[100]

12.105 Having directions in a jury trials bench book would allow them to be easily amended and would allow new directions to be added. We have suggested five directions as a starting point but we envisage other directions could be added to this list over time and the language of directions may need updating. We consider it is important for the directions to be regularly updated as the research into juror understanding of sexual and family violence develops. As public understanding of sexual and family violence develops, some directions may eventually no longer be required.

---

98 As we discuss at [12.43], the literature suggests that the timing of judicial directions can impact on their effectiveness. In England and Wales, the Crown Court Compendium advises that judges should give thought as to the most appropriate time for the directions, such as at the outset of the trial or in the course of summing up: Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 20-4.

99 We note with interest that, in 2018, a Marsden Fund grant was made to a project entitled: "Disorder in the Courtroom: How do Judicial Instructions and Question Trails Influence Juror Decision-Making?" The research, led by University of Otago Vice-Chancellor Professor Hayne, has the goal of "[developing] better processes to help juries fulfil their role of evaluating the evidence before them, and of using that evidence to reach a just verdict": Division of Humanities "University of Otago celebrates Marsden Fund success" (8 November 2018) University of Otago <www.otago.ac.nz>. This research may provide some helpful guidance on how judicial directions can best correct juror misconceptions.

100 See Jonathan Clough and others "The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension" (2018) 42 Crim LJ 278 at 297, concluding that comprehension and application of legal directions can be improved through plain-language directions, written copies of directions and decision-making aids such as checklists and question trails (although observing that these modifications "are not a panacea").

12.106 We think it is essential that judicial directions in this area are publicly accessible to enhance access to the law of evidence. Counsel need to know in advance which matters are likely to be addressed by a judicial direction and which may still require counter-intuitive evidence to be adduced. Knowledge of likely judicial directions may also impact on the way a case is presented. For example, the defence may decide not to ask questions that suggest the complainant is responsible for what occurred in the knowledge that this is likely to lead to certain judicial directions being given.

12.107 Consequently, we only support placing the directions in a jury trials bench book if this is made publicly available and sufficient funding is provided to the Institute of Judicial Studies to develop and maintain them. We note the recent comments by the Court of Appeal in the 2018 decision *Deys and Treweek v R* on this point:[101]

> We recognise that bench books are published in other jurisdictions. There is merit in such a resource being available to the profession, provided it is kept current. Unfortunately the judiciary does not have the resources needed to keep the Jury Trials Bench Book current. It serves as a primer for judges, who are expected to rely on their own knowledge of the law and the assistance of counsel to ensure that directions are correct.

12.108 We suggest that the reference to judicial directions in the Act should not come into effect until the sample directions have been developed in a jury trials bench book.

12.109 If our recommendation to have judicial directions on myths and misconceptions in a jury trials bench book is not adopted, we consider the directions should be contained in the Evidence Regulations and note that regulation 49 provides a model. This would require an amendment to section 201 of the Act to empower appropriate regulations to be made.

---

101 *Deys v R* [2018] NZCA 466 at [7].

CHAPTER 13

Judicial directions on the impact of significant delay

INTRODUCTION

13.1 Section 122 governs judicial directions about evidence that may be unreliable in criminal proceedings tried with a jury. The purpose of such directions is to inform juries about the limitations and risks that certain forms of evidence may pose. Section 122(2)(e) requires a judge to consider giving a reliability warning about evidence of a defendant's conduct that is alleged to have occurred more than 10 years ago, for example in trials involving historical sexual abuse.

13.2 In the Supreme Court decision in *CT v R*,[1] the majority held that a defendant's inability to check and challenge allegations in historical cases could be material to a judge's assessment of whether evidence may be unreliable for the purposes of section 122(2)(e).

13.3 In our Issues Paper, we expressed concern about this interpretation of section 122(2)(e). In particular, we suggested it might have introduced a near-mandatory requirement to give a reliability warning in cases of significant delay, even where there is nothing about the particular circumstances that indicates the evidence is unreliable. We asked:

- whether section 122(2)(e) should be amended to expressly confine its scope to the effect of delay on the reliability of the evidence; and
- whether there is a need for separate judicial directions addressing disadvantage arising from delay and, if so, where these directions should be located.

13.4 In this chapter, we recommend amending section 122 to confine its scope to concerns about the actual reliability of the evidence. We consider there are other ways a judge can address fair trial concerns arising from a defendant's limited ability to test the allegations, including by granting a stay of proceedings. In this chapter, we refer to the delay-related disadvantage arising from a defendant's inability to check and challenge the allegations as "forensic disadvantage".[2]

---

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

2 The term forensic disadvantage is used in Australia: Evidence Act 1995 (Cth), s 165B (largely similar provisions have been adopted in the Australian Capital Territory, New South Wales and the Northern Territory: Evidence Act 2011 (ACT); Evidence Act 1995 (NSW); and Evidence (National Uniform Legislation) Act 2011 (NT)). The term forensic disadvantage is also used in England and Wales: Judicial College (England and Wales) *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (December 2018) at 10-4.

13.5 We conclude it is not necessary to amend the Act to expressly permit judges to give a direction on forensic disadvantage, as it is already possible for judges to do this as part of their duty to ensure a fair trial.

THE SCOPE OF SECTION 122

RECOMMENDATION

R23 Section 122 should be amended to clarify that its scope is confined to concerns about the reliability of the evidence and does not encompass fair trial concerns arising from a defendant's inability to check and challenge the allegations.

Background

13.6 Before the Supreme Court's decision in *CT*, courts and commentators considered section 122(2)(e) was directed at the unreliability of the evidence in the particular case, especially reliability concerns arising from the effect of time on the memory of the witness.[3] In *CT*, however, the majority (comprising Elias CJ, McGrath and William Young JJ) took a wider view of the scope of section 122(2)(e).[4] They suggested evidence may be unreliable "for reasons other than the effect of delay on the memory of the complainant".[5] In particular, the defendant's inability to "check and challenge" the allegations could be a relevant concern.[6] They said reliability is not a narrow term and that a restrictive approach to directions under section 122 may not be wise or warranted.[7] They noted a section 122 direction is not limited to cases where the evidence itself may be unreliable due to the passage of time and a lengthy delay may raise issues bearing on the fairness of the trial as well.[8] The majority also noted that "there will almost always be some risk of prejudice in cases in which decades pass between alleged offending and trial".[9]

13.7 The minority (Glazebrook and Arnold JJ) disagreed with this interpretation. They considered the majority's approach suggested "evidence could be considered possibly unreliable under section 122(2)(e) solely because of delay-related prejudice and even where there is nothing about the particular circumstances that would suggest that the evidence may be unreliable".[10] In their view this amounted to a suggestion that it is

---

3 For this reason, the Court of Appeal had said that a s 122(2)(e) warning was not necessary where the defence alleged the complainant was lying, as lapse of time was irrelevant to fabrication. See *S (CA514/08) v R* [2009] NZCA 622 at [63]–[65]; *N (CA298/2012) v R* [2013] NZCA 17 at [24]–[26].

4 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465. The issue on appeal was whether the proceedings should have been stayed because of the risk of unfairness caused by delay and, if not, whether the summing up given by the trial judge in relation to the delay was adequate to overcome any risk of unfairness arising from the effect of delay on the reliability of the evidence.

5 At [49].

6 At [49].

7 At [45].

8 At [43].

9 At [57].

10 At [70].

dangerous to convict without corroboration in cases where the offending occurred more than 10 years ago.[11]

Issues Paper

13.8 In our Issues Paper, we noted our concerns with the majority's interpretation of section 122(2)(e) in *CT*.[12] We expressed the preliminary view that reliability and forensic disadvantage are distinct concepts and the purpose of section 122(2)(e) is to address concerns about the effect of delay on the reliability of the evidence.

13.9 We suggested it is unnecessary to treat forensic disadvantage as a relevant factor under section 122 because prejudice arising from the passage of time between the offending and the trial may be addressed by an application to stay the proceeding. Further, in cases that do proceed to trial, judges are responsible for conducting proceedings in a way that ensures a fair trial.

13.10 We also queried the suggestion that, because the defendant has lost the ability to call witnesses or locate evidence, the evidence of the complainant is somehow less reliable. We did not consider there was a logical connection between forensic disadvantage and the actual reliability of the complainant's evidence. We expressed support for the minority's observation in *CT* that:[13]

> Evidence is either reliable or it is not. The ability to test the evidence may enable a fact finder to decide whether or not the evidence is reliable. It does not, however, change the underlying reliability or otherwise of the evidence.

13.11 We noted that the minority's view in *CT* is consistent with the approach that England and Wales and Australia have taken to judicial directions in cases involving significant delay.[14]

13.12 We expressed concern that the majority's interpretation of section 122(2)(e) in *CT* could be interpreted as requiring a section 122 direction on forensic disadvantage in nearly all cases involving a delay of more than 10 years, without having to identify any particular prejudice to the accused. We agreed with the minority's concern that this might undermine a complainant's evidence and could be perceived as implying it is dangerous to convict in the absence of corroborating evidence. Such an approach would undermine complainants' evidence in cases involving historical sexual abuse. It would be inconsistent

---

[11] At [71]. Section 121(2) provides that it is not necessary for the judge to warn the jury that is dangerous to act on uncorroborated evidence or to give a warning to the same or similar effect or give a direction relating to the absence of corroboration. However, the majority noted at [43]:

> … s 122 is not inconsistent with s 121… Section 122 is not concerned with the policies which formerly led to requirements of corroboration or scepticism about delayed complaint in sexual cases … Section 122 addresses, rather, the different concern, equally relevant to sexual cases as it is in relation to other allegations of criminal offending, that a lengthy lapse of time between the conduct in issue and the evidence at trial may raise issues of reliability that bear on the fairness of the trial.

[12] Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [12.41]–[12.47].

[13] *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [63].

[14] The approaches taken in England and Wales and Australia are set out in our Issues Paper: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [12.32]–[12.40] and [12.44].

with legislative reforms designed to improve aspects of the criminal justice process that adversely or unfairly impact on victims of sexual offending.[15]

13.13 We asked submitters whether the Act should be amended to expressly confine the scope of section 122(2)(e) to the effect of delay on the reliability of the evidence.

Consultation

13.14 We received nine submissions. Six submitters supported our preliminary view that section 122(2)(e) should be confined to concerns about the reliability of evidence in cases involving a significant delay between the offending and the trial.[16] Two submitters disagreed with our preliminary view.[17] One submitter made an alternative proposal.[18]

13.15 The New Zealand Law Society and the Crown Law Office agreed that reliability and forensic disadvantage are separate concepts. The Criminal Bar Association thought it was logical to confine the scope of section 122(2)(e) to reliability.

13.16 Crown Law submitted that the majority's approach in *CT* is problematic as it has effectively introduced Australia's *Longman* direction,[19] which has been repeatedly rejected by New Zealand courts.[20] It suggested a judicial direction linking forensic disadvantage to the complainant's reliability is unfair to complainants. Crown Law also considered that the frequency with which the Court of Appeal has tried to distinguish *CT* suggests a level of discomfort with its implications.[21]

---

15 Elisabeth McDonald "From 'Real Rape' to Real Justice? Reflections on the Efficacy of More than 35 Years of Feminism, Activism and Law Reform" (2014) 45 VUWLR 487 at 488. For instance, s 121 states it is not necessary to warn a jury about accepting uncorroborated evidence, and s 127 permits a judge to explain there can be good reasons for a complainant to delay making or fail to make a complaint in certain circumstances. We also discuss juror myths and misconceptions in sexual and family violence cases in Chapter 12.

16 The Criminal Bar Association, the Crown Law Office, the New Zealand Law Society, New Zealand Police, Paulette Benton-Greig and Professor Elisabeth McDonald.

17 The New Zealand Bar Association and the Public Defence Service.

18 BVA The Practice. BVA said they supported our preliminary view and agreed that *CT* is problematic. However, BVA suggested extending the scope of s 122(2)(e) to include "and the Judge considers that delay has caused significant disadvantage" (in other words, expanding s 122(2)(e) to expressly encompass forensic disadvantage).

19 *Longman v R* (1989) 168 CLR 79. *Longman* involved a complaint of sexual abuse that was made more than 20 years after the alleged offending. The High Court held the jury should have been warned that it would be "dangerous to convict" on the complainant's evidence alone unless the jury, scrutinising the evidence with great care, was satisfied of its truth and accuracy ("the *Longman* direction"): at 91. The rationale behind the direction was that a considerable delay puts the defendant at a disadvantage because he or she has lost the "means of testing the complainant's allegations which would have been open to him [or her] had there been no delay": at 91. It may no longer be possible to explore the alleged circumstances in detail or adduce evidence casting doubt on the complainant's story: at 87.

20 See Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [12.16].

21 Crown Law noted that, in *L v R* [2015] NZSC 42, [2015] 1 NZLR 658 and *T v R* [2014] NZCA 602, appeals were allowed (see our discussion of these cases in Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [12.25]–[12.28]). However, Crown Law also highlighted that the vast majority of Court of Appeal decisions on this point have found no miscarriage of justice arising from the absence of a reliability warning. See *D (CA95/2014)v R* [2015] NZCA 171, leave denied *D (SC60/2015) v R* [2015] NZSC 119; *Ohquist v R* [2015] NZCA 310; *K (CA665/2014) v R* [2015] NZCA 566, leave denied *K (SC133/2015) v R* [2016] NZSC 26; *T (117/2015) v R* [2015] NZCA 572; *F (CA600/2014) v R* [2015] NZCA 616; *Prasad v R* [2016] NZCA 163; *T (CA561/2014) v R* [2016] NZCA 235; and *C (CA66/2015)v R* [2016] NZCA 342. Crown Law also questioned the *CT* majority for distinguishing *R v Harmer* (CA32/02, 26 June 2003) on the basis that it did not involve historical sexual offending (*CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [28]). Crown Law noted that *Harmer* is an authoritative permanent Court of Appeal decision, and while it is true *Harmer* did not concern historical sexual offending, it is not apparent why this should make a difference and the majority in *CT v R* offered no rationale.

13.17 Crown Law suggested section 122(2)(e) should be repealed so that concerns about the effect of delay on the reliability of the evidence are addressed on a discretionary basis under section 122(1). It said a delay of 10 years is an arbitrary threshold for when a judge must consider giving a direction. Whether a warning is required should be a contextual assessment depending on factors such as the length of the delay, whether complaints were made at the time, the strength of the Crown case and the nature of the defence (for example, unreliable memory or fabrication).[22] If section 122(2)(e) is retained, Crown Law said it should be confined to the effect of delay on the reliability of the evidence.

13.18 The Public Defence Service and the New Zealand Bar Association did not consider section 122(2)(e) should be amended to expressly confine it to the effect of delay on the reliability of the evidence. They said the Supreme Court's interpretation of section 122(2)(e) (as including forensic disadvantage) is correct. The Public Defence Service noted that, while forensic disadvantage can affect both the prosecution and the defence, the presence of forensic disadvantage alone is unlikely to result in a stay of proceedings. The New Zealand Bar Association said the possibility of a stay of proceedings may not remedy the forensic disadvantage. It noted that there is high threshold to be met before a court will intervene to stay a prosecution: a fair trial must no longer be possible.[23] Therefore, even if a stay is not granted, there may still be issues for the defence caused by forensic disadvantage.

13.19 The New Zealand Bar Association also disagreed with our comment that the majority's approach in *CT* has created a near mandatory requirement to direct on potentially unreliable evidence (including forensic disadvantage) or amounts to a suggestion that it is dangerous to convict without corroboration. The Public Defence Service submitted that judicial directions can address any suggestion that it is dangerous to convict without corroboration.[24] The Public Defence Service said it is not unusual to see an increase in appeals following a change in the common law so the number of appeals may not be a good indication of a problem at this stage. The New Zealand Bar Association suggested appellate jurisprudence on section 122(2)(e) indicates trial judges are exercising the discretion appropriately and only giving reliability directions where there is some evidential foundation for forensic disadvantage.

13.20 Our judicial advisory committee considered that section 122 is concerned with the effect of delay on memory rather than forensic disadvantage.

---

22 In 1999, the Law Commission decided against including evidence of historical allegations as a type of evidence requiring the judge to consider giving a reliability warning. They reasoned that such evidence is not inherently unreliable because of delay, and any particular concern could be dealt with by the general ability to give a warning about evidence the judge considers may be unreliable. See the discussion in Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [12.17]–[12.18].

23 The Supreme Court in *Williams v R* [2009] NZSC 41, [2009] 2 NZLR 750 at [18] noted that a stay is not even a mandatory or usual remedy. The Supreme Court noted that, in *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA), the Court of Appeal divided on the question of whether a stay is an automatic remedy for a breach of s 25(b) of the New Zealand Bill of Rights Act 1990.

24 See Evidence Act, s 121.

Our view

Forensic disadvantage should be irrelevant to whether or not a judge gives a reliability warning

13.21 We maintain our preliminary view that the scope of section 122(2)(e) should be confined to concerns about the actual reliability of the evidence and should not encompass fair trial considerations arising from forensic disadvantage. Most submitters supported this view.

13.22 We consider the majority's approach in *CT* might unfairly undermine complainants' evidence by suggesting it is dangerous to convict without corroboration in cases where the offending occurred more than 10 years ago. We prefer the minority's view that section 122(2)(e) is directed at the reliability of the evidence itself, not with any difficulties in testing that evidence.[25] While we agree it may sometimes be appropriate to draw the jury's attention to those difficulties, we do not consider that section 122(2)(e) is the appropriate mechanism for doing so.[26]

13.23 We have concluded it is necessary to amend section 122. We recommend a new subsection be added to section 122 to clarify that forensic disadvantage is irrelevant to the judge's assessment of whether evidence may be unreliable. We consider the new subsection should apply to the whole of section 122, not only section 122(2)(e). Clause 20 of the draft Bill reflects this recommendation.

13.24 We considered Crown Law's suggestion to repeal section 122(2)(e). Although this would be consistent with the Law Commission's original intention,[27] it is primarily a solution to another problem that Crown Law sees with section 122(2)(e): that 10 years is an arbitrary threshold. We do not consider repealing section 122(2)(e) is necessary to respond to the issues we have identified and are not aware of the 10 year threshold causing problems in practice. We also note that a judge may give a reliability warning about evidence relating to offending alleged to have occurred less than 10 years ago under section 122(1).

---

25 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [61] (per Glazebrook and Arnold JJ). In *Ross v R* [2018] NZSC 38 at [7], the Supreme Court declined leave noting it had already dealt with s 122 warnings.

26 In *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [72], the minority observed:

> … the warning given under s 122 is a very strong warning and, if given in relation to a complainant's evidence, is likely to be interpreted by the jury effectively as a judicial instruction to reject the evidence or to give it little weight. This would be unfair to the complainant where the judge, based on an examination of the particular evidence considered in light of the case as a whole, does not consider that the evidence may be unreliable but merely has concerns about delay-related prejudice to the accused.

27 The Commission was of the view that evidence of historical offending is not inherently unreliable and therefore did not require mandatory consideration of its reliability by the judge: Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C385].

JUDICIAL DIRECTIONS ABOUT POTENTIAL FORENSIC DISADVANTAGE

Issues Paper

13.25 In our Issues Paper, we suggested that if section 122(2) is confined to reliability, it may be necessary to amend the Act to expressly provide for judicial directions about forensic disadvantage, as in Australia.[28] An alternative would be a non-legislative response, such as the inclusion of a sample judicial direction about possible forensic disadvantage in a jury trials bench book. This is the approach taken in England and Wales.[29]

13.26 On the other hand, we noted some criticisms of "pro-defendant interventions" in cases of delay. Missing evidence can be a problem for the prosecution as well as the defence, and possibly a greater problem for the prosecution in view of the presumption of innocence which stacks the odds against the complainant.[30]

13.27 We asked submitters whether there is a need for judicial directions about forensic disadvantage and if so, whether these directions should be contained in the Act or in non-legislative guidelines.[31]

Consultation

13.28 We received eight submissions on these questions.[32] Six submitters thought there was a need for a judicial direction addressing forensic disadvantage,[33] and two did not.[34]

13.29 The New Zealand Law Society, the New Zealand Bar Association and the Public Defence Service submitted that a stay of proceedings alone is insufficient to respond to forensic disadvantage. This is because there are cases where the disadvantage is not great enough to justify a stay but the disadvantage needs to be explained to the jury. The New Zealand Law Society also thought there should be an express direction aimed at addressing the fair trial issues that could arise in cases involving significant delay between

---

28 Evidence Act 1995 (Cth), s 165B. Largely similar provisions have been adopted in the Australian Capital Territory, New South Wales and the Northern Territory: Evidence Act 2011 (ACT), Evidence Act 1995 (NSW), Evidence (National Uniform Legislation) Act 2011 (NT). See the discussion of the Australian position in Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [12.32]–[12.35].

29 Judicial College (England and Wales) *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (December 2018) at 10-16 to 10-17. See the discussion of the position in England and Wales in Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [12.36]–[12.40].

30 See David Hamer "Delayed Complaint, Lost Evidence and Fair Trial: Epistemic and Non-epistemic Concerns" in Paul Roberts and Jill Hunter (eds) *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, Oregon, 2012); and our discussion in Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [12.49]–[12.51].

31 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at 207, Q45.

32 BVA, the Criminal Bar Association, Crown Law, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

33 BVA, the Criminal Bar Association, Elisabeth McDonald, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

34 Crown Law and Police.

the alleged offending and the trial. BVA The Practice suggested amending section 122(2)(e) so it would specifically include the possibility of forensic disadvantage.[35]

13.30 New Zealand Police and Crown Law submitted that forensic disadvantage may affect both the prosecution and the defence. Crown Law noted the content of the missing evidence is unknown, so claims about forensic disadvantage are merely speculative. Police submitted that concerns about forensic disadvantage can already addressed by a stay of proceedings.

13.31 The New Zealand Law Society submitted that an express judicial direction addressing forensic disadvantage should be added to the Act so it can be recognised as separate to unreliability.[36] The Criminal Bar Association commented that, if section 122(2)(e) is amended to confine its scope to reliability, a separate forensic disadvantage direction should be added.

13.32 Two submitters favoured the status quo.[37] The New Zealand Bar Association and the Public Defence Service submitted the interpretation of section 122(2)(e) adopted by the majority in *CT* (which incorporates forensic disadvantage) means a direction expressly dealing with forensic disadvantage is unnecessary.[38] However, both noted that, if section 122(2)(e) is confined to reliability, there should be a judicial direction addressing forensic disadvantage.[39]

13.33 Professor Elisabeth McDonald suggested including a direction on forensic disadvantage in the Evidence Regulations 2007.

13.34 Our judicial advisory committee considered it may not be necessary to amend the Act, as judges already give directions on forensic disadvantage where appropriate.

Our view

No amendment to the Act is required

13.35 For the following reasons, we do not think it is necessary or desirable to amend the Act to expressly permit judicial directions addressing forensic disadvantage in cases of delay:

- It is already possible for the judge to draw any particular and significant disadvantage to the jury's attention as part of the judge's duty to ensure a fair trial.[40]

---

35 This firm has a Crown Warrant for Palmerston North and the wider Manawatu region. BVA suggested adding "and the Judge considers that delay has caused significant disadvantage" to s 122(2)(e). However BVA also supported our preliminary view that s 122 should be confined to reliability and that a forensic disadvantage direction is not necessary.

36 They supported the Australian approach we discussed in our Issues Paper: see Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [12.32]–[12.35].

37 BVA, the New Zealand Bar Association and the Public Defence Service. This is consistent with their submissions, discussed above, opposing confining section 122(2)(e) to reliability.

38 The Public Defence Service submitted that this interpretation arguably achieves the same purpose as limiting the scope of section 122(2)(e) to reliability and amending the Act to include a separate warning about forensic disadvantage.

39 The New Zealand Bar Association also supported the Australian approach. It favoured a provision that would allow principles to be developed in the case law and incorporated into the bench book. It noted that, given the wide variety of circumstances in which delay can impact a case, it is important to avoid being overly prescriptive.

40 We note the Legislation Design Advisory Committee suggests that new legislation should only be drafted when it is necessary and particular care should be taken when obligations already in the common law or other statutes are proposed to be included in new legislation for an educative purpose: Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 14–15.

- The purpose of including a judicial direction on forensic disadvantage in the Act would be to alert the jury to the possibility that evidence might have been lost or witnesses might not be available due to the significant delay. The jury will likely be alerted to these possibilities by defence submissions.
- There is a risk that expressly including a judicial direction in the Act will over-emphasise the disadvantage caused by the passage of time and the significance of this matter in the trial.
- The Act does not include all possible judicial directions. Many directions, including directions on the burden and standard of proof, are not contained in the Act.
- The New Zealand context can be distinguished from the Australian context, where the statutory provision for directions on forensic disadvantage was a direct response to *Longman*.[41] In England and Wales, there is no statutory direction on forensic disadvantage; rather, there is guidance on the content of a forensic disadvantage direction in *The Crown Court Compendium*.[42]

13.36 Although we are not recommending a specific direction be placed in the Act, greater judicial guidance could be valuable where, as part of the duty to ensure a fair trial, a judge considers a direction is appropriate.[43] We note that it would be possible for the Institute of Judicial Studies to develop a direction on forensic disadvantage for the jury trials bench book.[44]

---

41 *Longman v R* (1989) 168 CLR 79. For discussion of this case, see above at [13.16], n 19.

42 Judicial College (England and Wales) *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (December 2018) at 10-16 to 10-17.

43 We note that standardised directions can be misunderstood by jurors as a direction specific to the case. See Jonathon Clough and others "The Judge as Cartographer and Guide: The Role of Fact-based Directions in Improving Juror Comprehension" (2018) 42 Crim LJ 278. There might be merit in making any model directions sufficiently flexible for judges to tailor them to the circumstances of an individual case, as in the England and Wales *Crown Court Compendium*: Judicial College (England and Wales) *The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up* (December 2018) at 10-16 to 10-17.

44 We discuss the role of the Institute of Judicial Studies and the bench book in Chapter 1. We also discuss judicial directions in the context of myths and misconceptions in sexual and family violence cases in Chapter 12.

CHAPTER 14

Veracity evidence

INTRODUCTION

14.1 Veracity evidence is concerned with whether a person is honestly recounting their version of events (in other words, is not being deliberately untruthful). The focus is on the person's inclination to tell the truth rather than the factual correctness of their testimony.

14.2 The admissibility of veracity evidence is governed by sections 36–39 of the Act (the veracity rules).[1] The term "veracity" is also used in other parts of the Act, including section 35 (previous consistent statements).[2]

14.3 In this chapter, we consider:

- whether any of the veracity provisions in the Act are redundant;
- whether the 2016 amendment to section 38(2)(a) reflects a logical and fair approach to determining whether the defendant has put their veracity in issue;
- whether section 38(2)(a) requires the challenge to the veracity of a prosecution witness to be given in oral evidence;
- whether the term "veracity" and/or its accompanying definition is difficult to understand and should be amended; and
- whether the definition of veracity in section 37(5) is problematic when applied to provisions outside the veracity rules and, if so, whether the Act should be amended to confine the use of the definition to the veracity rules.

14.4 We recommend two amendments to the Act:

- Section 37(3)(c) should be repealed. The provision has been rendered redundant by the Supreme Court's 2013 decision in *Hannigan v R*[3] and a 2016 amendment to the definition of "veracity" in section 37(5).
- Section 38(2)(a) should be amended to clarify that any challenge to the veracity of a prosecution witness needs to be given in oral evidence.

---

1 Evidence Act 2006, Subpart 5—Veracity and propensity.

2 The term veracity is also used in: s 4(1), definition of "veracity"; s 16(1), definition of "circumstances" in relation to a person who is not a witness; s 40, the propensity rule; and s 204, the notice that may be given concerning a defendant's intention to offer evidence concerning the veracity of co-defendants.

3 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [119].

BACKGROUND

14.5 In our Issues Paper, we set out the background to the term "veracity" and its definition in section 37(5).[4] We explained that, although the Law Commission used the term "truthfulness" in its 1999 code, the select committee replaced the term with "veracity" to put the emphasis on the witness's intention to tell the truth rather than the factual accuracy of the evidence. Section 37(5) of the Act originally provided: "[f]or the purposes of this Act, veracity means the disposition of a person to refrain from lying whether generally or in the proceeding".

14.6 In its 2013 Review of the Act, the Commission recommended amending this provision by deleting the phrase "whether generally or in the proceeding".[5] The intention was to make it clear that there is "no rule that prevents a party from offering evidence contradicting or challenging a witness's answers given in response to cross-examination directed *solely* to truthfulness".[6]

14.7 Shortly after the Commission completed its 2013 Review, the Supreme Court discussed the veracity rules in *Hannigan v R*.[7] In line with the views of the Commission in its 2013 Review,[8] the majority of the Court in *Hannigan* concluded that the operation of the veracity rules in the Act was confined to evidence that was not admissible independently of those rules.[9] The majority went on to say that "[t]he veracity rules contemplate evidence being adduced as to the veracity of a witness in relation to matters which have no other relevance to the case at hand".[10] The majority's approach has been followed in subsequent decisions.[11]

14.8 As the Commission recommended, the Evidence Amendment Act 2016 removed the phrase "whether generally or in the proceeding" from section 37(5). Therefore, since 8 January 2017, when the Amendment Act came into force, section 37(5) has provided: "For the purposes of this Act, veracity means the disposition of a person to refrain from lying."

---

4 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [13.6]–[13.9].

5 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 112, R11.

6 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.68], referring to Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [161] (emphasis added).

7 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [113]–[138]; the majority judgment of McGrath, William Young, Chambers and Glazebrook JJ, delivered by William Young J, Elias CJ dissented. For discussion of that case, see Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [13.12]–[13.17].

8 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [137].

9 At [119].

10 At [120].

11 See for instance: *Pou v R* [2014] NZCA 294 at [42]; *McAllister v R* [2016] NZCA 61 at [14]; and *Pakai v R* [2017] NZSC 27 at [9].

REDUNDANT PROVISIONS

RECOMMENDATION

R24 Section 37(3)(c) should be repealed.

Issues Paper

14.9 In our Issues Paper, we suggested that certain provisions of the Act might have been rendered redundant by *Hannigan* and the subsequent amendment to the definition of veracity in 2016:

- Section 36(1), which provides that the veracity provisions do not apply to evidence about a person's veracity if veracity is an ingredient of the claim in a civil proceeding or one of the elements of the offence for which a person is being tried in a criminal proceeding. If evidence that bears on the issues in dispute will never fall within the veracity rules, section 36(1) is arguably unnecessary.
- A phrase in section 38(2), which provides that the prosecution in a criminal case may offer evidence about a defendant's veracity if:[12]

  (a) the defendant has, in court, given oral evidence about his or her veracity or challenged the veracity of a prosecution witness *by reference to matters other than the facts in issue*; and

  (b) the Judge permits the prosecution to do so.

  The inclusion of the italicised words is arguably unnecessary, given the veracity rules only apply to evidence unrelated to the facts in issue.
- Section 37(3)(c), which includes any previous inconsistent statements made by a person in a list of factors the judge may consider in deciding if the proposed evidence is likely to be "substantially helpful" in assessing veracity. As a witness's previous inconsistent statement will almost always have some relevance to the facts in issue, virtually all admissible previous consistent statements will fall outside the scope of the veracity rules.

14.10 We asked whether the inclusion of these provisions in the Act is causing confusion or difficulties in practice and, if so, whether any or all of these provisions should be repealed or amended.

Consultation

14.11 Five submitters addressed these questions.[13] None was aware that these provisions had caused confusion in practice. With the exception of New Zealand Police and the Public Defence Service, submitters did not express a firm view on whether the provisions are redundant and whether they should be repealed or retained.

[12] Emphasis added.

[13] The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, New Zealand Police and the Public Defence Service.

14.12 Police did not consider it necessary to repeal or amend any of the provisions that we had identified as being potentially redundant. It did not consider the inclusion of sections 36(1), 37(3)(c) and 38(3) in the Act was problematic.

14.13 The Public Defence Service supported repealing section 37(3)(c). It submitted that the provision is inconsistent with the majority's reasoning in *Hannigan*.[14] It noted *Hannigan* makes it clear that previous inconsistent statements are irrelevant to assessing a person's veracity, as such statements will almost always be relevant to a fact or facts in issue in the proceedings. Therefore, it considered section 37(3)(c) should be repealed.

14.14 The Public Defence Service noted that section 36(1) and the reference in section 38(2)(a) to "matters other than the facts in issue" are consistent with the position taken by the majority in *Hannigan*, which referred to the inclusion of these two provisions as being driven by the legislature's "abundance of caution".[15] The Public Defence Service argued that, because the provisions codify the common law, they should be retained. This would be consistent with one aspect of the Act's purpose, which is enhancing access to the law of evidence.[16]

Our view

Section 37(3)(c) should be repealed

14.15 We recommend that section 37(3)(c) should be repealed. We note that the majority of the Supreme Court in *Hannigan* did not expressly consider how section 37(3)(c) was affected by its discussion of the veracity rules.[17] However, the authors of *Mahoney on Evidence: Act and Analysis* note that *Hannigan* renders section 37(3)(c) largely irrelevant because a witness's previous inconsistent statement will almost always have some relevance to the facts in issue, and consequently virtually all admissible previous inconsistent statements will fall outside the scope of the veracity rules.[18] In other words:[19]

> The only evidence about which such a statement could be inconsistent would be evidence that has nothing to do with the issues in the case – being thereby irrelevant and inadmissible.

14.16 We agree that section 37(3)(c) is redundant and potentially inconsistent with the majority judgment in *Hannigan*.[20] Removing section 37(3)(c) will enhance access to the law of

---

14 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612.

15 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [127].

16 Section 6(f).

17 But see the discussion of section 37(3)(c) in the dissenting judgment of Elias CJ in *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [52].

18 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV37.08]. The authors' argument is as follows. In order for a statement to be admissible, it must be relevant to an issue in the proceeding (s 7(2)). The relevance of the witness's previous statement is to highlight an inconsistency with the evidence given by the witness at the hearing (in order to suggest the witness lacks veracity). For a witness's previous statement to amount to a previous inconsistent statement, it must be relevant to the same issue in the case (despite saying something different about that issue). Being about the same issue as the witness's evidence, *Hannigan's* conclusion is triggered and the evidence of the previous inconsistent statement is not governed by the veracity rules.

19 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV37.08].

20 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612.

evidence in accordance with the purpose of the Act[21] and the principles of good legislation.[22] Clause 12 of the draft Bill reflects our recommendation to repeal section 37(3)(c).

Sections 36(1) and 38(2)(a) should be retained

14.17 We do not recommend that section 36(1) or section 38(2)(a) be amended or repealed. We accept the majority's comments in *Hannigan* that section 36(1) and the phrase "by reference to matters other than the facts in issue" in section 38(2)(a) were likely included out of an abundance of caution (and are arguably unnecessary).[23] However, submitters did not express any concerns about these provisions. We are also persuaded that these provisions serve a useful purpose in codifying the common law (particularly for those unfamiliar with *Hannigan*). This enhances access to the law of evidence, in line with one aspect of the Act's purpose.[24]

SECTION 38(2)(a) TRIGGER

14.18 Section 38 sets out when evidence of a defendant's veracity may be admitted in a criminal proceeding. In its 2013 Review of the Act, the Commission recommended amending section 38(2)(a) to clarify that the defendant only 'opens the door' to the prosecution introducing evidence about their veracity when they give evidence in court that puts their veracity at issue.[25] This recommendation was accepted and the amended section 38(2)(a) came into force on 8 January 2017. The provision now reads:[26]

> The prosecution in a criminal proceeding may offer evidence about a defendant's veracity only if—
>
> (a) the defendant has, *in court, given oral evidence* about his or her veracity or challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; and
>
> (b) the Judge permits the prosecution to do so.

14.19 The amendment was intended to resolve an uncertainty about whether a defendant's pre-trial statement to police can be treated as putting their veracity at issue.[27] The Commission had considered this issue in its 2008 report, *Disclosure to Court of Defendants' Previous Convictions*, *Similar Offending*, *and Bad Character*.[28] It explained that a complication arises in circumstances where the defendant has made a statement

---

21 Section 6(f).

22 See the Legislation Design and Advisory Committee *Legislation Guidelines* (Wellington, 2018) at 8 (stating that legislation needs to be "easy to navigate and understand" as well as "provide certainty as to rights and obligations …").

23 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [127].

24 Section s 6(f).

25 Prior to the amendment, subsection (2)(a) said:

> (2) The prosecution in a criminal proceeding may offer evidence about a defendant's veracity only if—
>
> (a) the defendant has offered evidence about his or her veracity or has challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; …

26 Emphasis added.

27 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.108].

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

to police, and the prosecution (as it usually does) leads evidence of that statement as part of the prosecution case. While that statement is not sworn evidence by the defendant, it becomes evidence in the case, and on one view, the veracity of the defendant in that statement therefore comes into issue.[29] If evidence regarding the defendant's veracity is relevant, arguably it should be admissible.

14.20 On the other hand, the Commission recognised:[30]

> … it might be thought a bizarre situation if the prosecution can engineer a right to lead evidence as to a defendant's previous convictions going to veracity through the prosecution offering evidence itself, quite possibly against the defendant's wishes, and especially when the defendant's evidence in issue is un-sworn and open to discounting accordingly.

14.21 The Commission recommended the uncertainty be clarified[31] and indicated a strict approach may be appropriate "[i]n the light of an apparent Parliamentary inclination to be conservative and to protect a defendant's rights in this area".[32] The Commission's 2008 report provided the basis for its 2013 recommendation to amend section 38(2)(a), which was subsequently reflected in the Evidence Amendment Act 2016.

Issues Paper

14.22 In our Issues Paper, we noted some dissatisfaction with the policy underlying the 2016 amendment to section 38(2)(a). Some members of our expert advisory group as well as our judicial advisory committee commented that the policy underlying the provision is weighted against the prosecution and should be reviewed. They suggested it is unfair that the jury may be shown a defendant's police video statement but that the prosecution may only offer evidence about a defendant's veracity if the defendant then chooses to testify in court. With these comments in mind, we asked submitters whether the recent amendment to section 38(2)(a) reflected "a logical and fair approach in determining whether the defendant has put their veracity in issue".[33]

Consultation

14.23 Five submitters responded to this issue.[34] The Criminal Bar Association said the veracity rules are adequate. The New Zealand Bar Association was supportive of the 2016 amendment. The New Zealand Law Society described the amendment as striking a "reasonable and pragmatic balance".[35] The Public Defence Service noted it was not aware of the amendment causing any difficulties in practice and suggested it is too soon to evaluate the provision.

---

29 At [3.38].

30 At [3.38].

31 At [9.15].

32 At [3.38].

33 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [13.27]–[13.31].

34 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

35 We have assumed this refers to the balance between the rights of the defendant and the duties of the prosecution.

14.24 Police took a different view. It said section 38(2) "allows defendants to get a 'free hit' by challenging a complainant's veracity in pre-trial statements without fear of triggering a challenge to their own veracity".

Our view

No amendment to the Act is required

14.25 We have concluded that the 2016 amendment to section 38(2)(a) should be retained. Consultees had divided views as to whether the policy underlying the 2016 amendment to section 38(2)(a) reflects a fair and logical approach to determining whether the defendant has put their veracity in issue.

14.26 We note the Commission has consistently taken the view that defendants' rights in this area should be protected. This is reflected in its 2008 report *Disclosure to Court of Defendants' Previous Convictions*, *Similar Offending*, *and Bad Character*[36] and in its 2013 Review of the Act.[37]

14.27 As the 2016 amendment to clarify the uncertainty in section 38(2)(a) is still relatively recent, we consider it should be given time to 'bed in'. We therefore do not consider it necessary or desirable to amend section 38(2)(a) at this time.

INTERPRETATION OF SECTION 38(2)(A)

RECOMMENDATION

R25 Section 38(2)(a) should be amended to clarify that the phrase "given oral evidence about" qualifies the phrase "challenged the veracity of a prosecution witness".

14.28 During our review of the Act, Professors Elisabeth McDonald and Jeremy Gans raised an issue with the interpretation of section 38(2)(a).[38] They said it is unclear whether the phrase "given oral evidence about" qualifies the phrase "challenged the veracity of a prosecution witness". In other words, it is unclear whether the challenge to the veracity of a prosecution witness needs to be given in oral evidence.

Our view

14.29 We did not include the issue in our Issues Paper, because we asked a broader question about the policy underlying section 38(2)(a).[39] Given we have not recommended any change to the policy underlying section 38(2)(a), we consider it would be desirable to amend this aspect of section 38(2)(a) to clarify that the challenge to the veracity of a

---

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

37 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.104]–[6.108].

38 The issue was raised at the "Reforming the Law of Evidence Conference" in Wellington in September 2017.

39 See the discussion above at [14.18]–[14.27].

prosecution witness needs to be given in oral evidence. We are not aware of the matter having caused any problems in practice; however, it is a simple amendment with the potential to pre-empt an interpretation issue.

14.30 We recommend replacing the word "challenged" with the phrase "given oral evidence challenging". Clause 13 of the draft Bill sets out our proposed amendment.

THE TERM "VERACITY" AND ITS DEFINITION

Issues Paper

14.31 In our Issues Paper, we asked whether the term "veracity" was causing difficulties in practice and, if so, how the Act could be amended to address this. We noted we had received some feedback that the Act's use of this term was confusing and that a simpler term such as "honesty" or "truthfulness" should be adopted.

14.32 We also asked submitters whether the definition of veracity in section 37(5) was causing any difficulties, particularly given that "veracity" is defined in the negative as "the disposition of a person to *refrain* from lying". We noted the majority's comment in *Hannigan*:[40]

> We treat a disposition to tell lies as being substantially the opposite of a disposition to refrain from lying (in terms of the definition of veracity in s 37(5)), and evidence indicative of a disposition to tell lies as necessarily bearing on the disposition of the person in question to refrain from lying.

Consultation

14.33 We received seven submissions on the term "veracity" and its definition.[41]

The term "veracity"

14.34 There was not strong support for amending the term "veracity". BVA The Practice[42] did not believe the term was a cause of confusion in practice when applied in accordance with *Hannigan*. The New Zealand Law Society noted the term "veracity" was not commonly used and could be challenging for parties in the context of jury trials. However, it considered the term should be retained given that relevant case law has developed. The New Zealand Law Society did not support replacing veracity with "truthfulness" because of the risk it would be conflated with factual correctness in the context of the particular case.

14.35 On the other hand, the Criminal Bar Association said the term was confusing and suggested it be replaced with "honesty" or "truthfulness". Our judicial advisory committee also suggested it might be preferable to replace the term "veracity" with a more commonly used word.

---

40 *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [112], n 46.

41 The Auckland District Law Society, BVA The Practice, the Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society, Professor Elisabeth McDonald and the Public Defence Service.

42 This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

The definition of veracity

14.36 The New Zealand Law Society favoured amending the definition of veracity, to reflect its dual aspects (being the disposition to lie as well as the disposition to refrain from lying). Both our judicial advisory committee and our expert advisory group also supported an amendment of this nature.

14.37 The New Zealand Bar Association and the Public Defence Service acknowledged the definition of veracity is cumbersome but did not support legislative amendment. The New Zealand Bar Association commented that the definition is readily amenable to clarification and no judge would leave a jury without that clarification. The Public Defence Service expressed concern that amending the definition would result in a period of uncertainty and confusion while case law developed around the new definition. BVA did not support amending the definition as it has not experienced any difficulties with the current definition.

14.38 The New Zealand Law Society also suggested that the term "disposition" in the definition could be replaced with another more commonly used word, such as "tendency", which it submitted would be easier for a jury to understand.

Our view

The term "veracity" should be retained

14.39 Although "veracity" is not a commonly used term and may be confusing for some people reading the Act, practitioners are now familiar with the term and a body of case law has developed around it. Consultees – while not entirely satisfied with the term veracity – did not identify any real problems in practice. Few consultees supported replacing veracity with another term. On this basis, we consider the Act should retain the term veracity.

The definition of "veracity" should not be amended

14.40 We considered whether the definition of veracity should be amended to provide "the disposition of a person to *lie or* refrain from lying". Although some consultees supported amending the definition of veracity to reflect both its positive and negative aspects, we have concluded that an amendment is not necessary or desirable. We note the courts have recognised the dual aspects of the term, and we recognise an amendment might make the definition easier to read; however, we consider an amendment might also make it difficult to interpret some other provisions in the Act. For example, section 37(3) sets out a list of factors a judge may take into account when deciding whether proposed evidence about a person's veracity is "substantially helpful". One of those factors is "that the person has been convicted of 1 or more offences that indicate a propensity for a lack of veracity". When the proposed new definition is substituted, the provision would require the judge to consider whether the person had been convicted for offences indicating "a propensity for a lack of [the disposition to lie or refrain from lying]". [43]

---

[43] Another example is the definition of "hostile" in s 4. If the definition of veracity were amended to "the disposition to lie or refrain from lying", then "hostile", in relation to a witness, would mean that the witness:

> …exhibits, or appears to exhibit, a lack of [the disposition to lie or refrain from lying] 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…

14.41 We have also concluded that it is not necessary or desirable to amend the term "disposition" in the definition of veracity. We are not aware of this term causing confusion in practice.

APPLYING THE DEFINITION OF VERACITY OUTSIDE THE VERACITY RULES

14.42 During our consultation, two submitters, the Auckland District Law Society and Elisabeth McDonald, raised an issue that we had not discussed in our Issues Paper. They suggested that the removal of the phrase "whether generally or in the proceeding" from the definition of "veracity" in section 37(5) might cause problems when applied in other parts of the Act (outside the veracity rules). In particular, the amendment might have unintentionally restricted the operation of the previous consistent statements rule in section 35.

14.43 The Auckland District Law Society explained that, if "veracity" in section 37(5) means evidence that is extraneous to the proceedings, a party would no longer be able to adduce a previous consistent statement to rebut a challenge to the truthfulness of a witness in the proceedings. The Auckland District Law Society and Elisabeth McDonald suggested that Parliament's amendment to the veracity rules cannot have been intended to have this effect. It was suggested that the definition of veracity in section 37(5) be amended to confine it to the subpart in which it appears.[44]

Our view

No amendment to the Act is required

14.44 We have concluded it is not necessary or desirable to amend the Act to restrict the definition of veracity to the veracity rules. Section 4 of the Act states that "unless the context otherwise requires … veracity has the meaning given in section 37". As a matter of statutory interpretation, the meaning of veracity in section 37(5) does not prevent section 35(2)(a) being interpreted to mean veracity *in the proceeding*, rather than extraneous to the proceeding. We are confident the courts will apply a definition of veracity that is appropriate in the context of section 35 and that gives effect to the purpose of the provision. We are not aware of cases where the amended definition of veracity has caused problems when applied to section 35 or other provisions of the Act.

---

[44] Subpart 5—Veracity and propensity.

CHAPTER 15

Co-defendants' statements

INTRODUCTION

15.1 Evidence of a statement made by a defendant may only be admitted against a co-defendant under section 22A of the Act.[1] Section 22A provides for the admission of a hearsay statement against a defendant where it was made in furtherance of a conspiracy or joint enterprise. This raises a question whether a defendant's statement that is not hearsay can ever be admitted against a co-defendant.

15.2 In our Issues Paper, we expressed the preliminary view that there is no principled basis for distinguishing between hearsay and non-hearsay statements when determining whether a defendant's statement is admissible against a co-defendant under section 22A. All the submissions we received agreed with that view.

15.3 In this chapter, we recommend amending the Act so that the admissibility rule in section 22A applies to any statement by a defendant, whether or not it is hearsay.

15.4 We also briefly consider whether all defendants' statements should be admissible against co-defendants for purposes other than proving the truth of their contents (regardless of whether the section 22A test applies). This issue was raised by a submitter. We conclude there is insufficient justification for recommending such a change at this time.

ADMISSIBILITY OF A CO-CONSPIRATOR'S STATEMENT

15.5 Section 27 of the Act sets out when the prosecution can offer evidence in a criminal proceeding of a statement made by a defendant. Under section 27(1), the general rule is that a defendant's statement is inadmissible against a co-defendant. There is, however, one exception to this general rule. Section 27(1) provides that a defendant's statement "is admissible against a co-defendant … only if it is admitted under section 22A".

15.6 Section 22A appears in the hearsay evidence subpart[2] of the Act and provides for the admission against a defendant of a hearsay statement made in furtherance of a conspiracy or joint enterprise. It states:

> 22A Admissibility of hearsay statement against defendant
>
> In a criminal proceeding, a hearsay statement is admissible against a defendant if—
>
> (a) there is reasonable evidence of a conspiracy or joint enterprise; and
>
> (b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and

1 Evidence Act 2006, s 27(1).

2 Part 2, subpart 1 of the Act.

(c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.

15.7 The apparent combined effect of sections 27(1) and 22A is to prevent the prosecution from using a defendant's statement against a co-defendant unless the statement is a hearsay statement (and meets the threshold criteria in section 22A).

15.8 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*.[3] This means a defendant's statement is inadmissible against a co-defendant, even if the criteria in section 22A are satisfied, if:

- the defendant elects to give evidence at trial (and does not adopt the statement in their testimony);[4] or
- the prosecution intends to rely on the statement for a purpose other than proving the truth of its contents (for example, to establish that the statement was made[5] or to provide context).[6]

15.9 The general rule in section 27(1) that defendants' statements are inadmissible against a co-defendant was intended to reflect the position at common law.[7] At common law, out-of-court statements by defendants were considered to be hearsay evidence, which was inadmissible.[8] The Court of Appeal in *R v Pearce* said the common law rule:[9]

> … reflects that notwithstanding that a confession is against the interest of the maker of the statement and is thereby likely to be true, in a co-accused situation the maker of the statement may have other motives, such as endeavouring to transfer blame to the other co-accused, that are capable of undermining the reliability of the statement. The rule also reflects that the out of Court admission has not been made on oath and that the co-accused will not have had an opportunity to cross-examine the maker of the statement.

15.10 Section 22A was inserted by the Evidence Amendment Act 2016 with the intention of codifying the common law co-conspirators' rule, which operated as an exception to the general prohibition on admitting hearsay evidence.[10] However, at common law, hearsay evidence was defined differently than it is under the Evidence Act. All out-of-court witness statements were classified as hearsay, regardless of whether the witness gave evidence at trial.[11] Because of this, the common law co-conspirators' rule would have allowed the prosecution to admit a defendant's statement even if the defendant elected

---

3 Section 4(1), definition of "hearsay statement". A "witness" is a person who gives evidence and is able to be cross-examined in a proceeding: s 4(1).

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

5 As in *James v R* [2011] NZCA 219, [2012] 1 NZLR 353 and *Charlton v R* [2016] NZCA 212.

6 As in *Lal v R* [2012] NZCA 20.

7 *R v Pearce* [2007] NZCA 40 at [34]; and Evidence Bill 2005 (256–2) (select committee report) at 4.

8 *R v Fenton* CA223/00, 14 September 2000 at [31].

9 *R v Pearce* [2007] NZCA 40 at [26].

10 See the discussion in our Issues Paper at [14.3]–[14.9]: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018); and Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.91] and [3.108]–[3.112]. Section 27(1) was amended at the same time to provide that a defendant's statement "is admissible against a co-defendant in the proceeding only if it is admitted under section 22A" (formerly, it had provided that such a statement was not admissible against a co-defendant).

11 Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [58]; and Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [3]–[4].

to give evidence at trial.[12] 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.[13]

15.11 Sections 27(1) and 22A have therefore imposed greater restrictions on the admissibility of defendants' statements than the common law did.

EXTENDING SECTION 22A TO NON-HEARSAY STATEMENTS

RECOMMENDATION

R26 The Act should be amended so that the admissibility rule in section 22A applies to any statement made by a defendant, whether or not it is a hearsay statement.

Issues Paper

15.12 In our Issues Paper, we expressed the preliminary view that it was more logical to regard the common law co-conspirators' rule as an independent means of admitting a defendant's statement against a co-defendant than an exception to the hearsay rule.

Consultation

15.13 We received eight submissions, which included both defence and prosecution perspectives.[14] All of the eight submissions that addressed this issue agreed with this preliminary view. Submitters saw no good reason for limiting section 22A to hearsay statements and suggested amending the section to apply to any statement by a defendant.

15.14 BVA The Practice submitted that, if the Act is not amended, practical issues could emerge in multi-party drug conspiracy cases.[15] Text messages and intercepted communications may be put before the jury, but if a particular defendant then elects to give evidence (and denies the communications), the statutory basis for admitting them will no longer be available.

---

[12] In contrast, as noted above, under the Act a statement is only hearsay if it is made by a person other than a witness: s 4(1), definition of "hearsay statement".

[13] In such a case the evidence was not considered hearsay, as the hearsay rule only applied to statements offered as truth of what was said: Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, 1991) at [58]; and Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [3]–[4]. There was no general rule against admitting defendants' statements that were not hearsay against a co-defendant.

[14] The submitters that addressed this issue were the Auckland Crown Solicitor, BVA The Practice, the Criminal Bar Association, the Crown Law Office, the New Zealand Bar Association, the New Zealand Law Society, New Zealand Police and the Public Defence Service.

[15] This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

Our view

Section 22A should not be limited to hearsay statements

15.15 After our Issues Paper was published, the admissibility of non-hearsay statements in a co-conspirator context was considered by the High Court in *R v Wellington*.[16] In that case, intercepted communications were admitted by agreement (under section 9) at the trial of two siblings on drug-related charges. However, the Judge, Palmer J, also considered whether the evidence might have been admissible under section 22A, "in the hope it might assist further reform of the law."[17]

15.16 The Judge would have been prepared to interpret section 27 as allowing a statement to be admitted if the section 22A test is satisfied, even if it is not a hearsay statement.[18] The Judge reached this conclusion based on a purposive reading of section 27, although the Judge acknowledged such a reading "faces a stiff interpretive challenge in the wording of s 22A"[19] and that "legislative amendment would be far preferable" to clarify the position.[20]

15.17 The Judge referred to the suggestion in our Issues Paper that it would be more logical to regard the co-conspirators' rule as an independent means of admitting a defendant's statement against a co-defendant, rather than as an exception to the hearsay rule. The Judge then stated:

> [66] … it is clear that is the purpose of the current provision. As the Court of Appeal said in *Pearce*, the purpose of the rule against admissibility of co-defendants' statements is the unreliability of a statement blaming another co-defendant, which was not made on oath and which is unable to be tested under cross-examination. The purpose of the 2016 amendments was to qualify that inadmissibility in circumstances where specified indicia of unreliability are not present: the test in s 22A of whether there is reasonable evidence the defendant was a member of a joint enterprise in furtherance of which the statement was made. In those circumstances, there should be no reason for the concern about unreliability that motivates s 27.
>
> [67] Fulfilling that legislative purpose does not depend on whether the statement is hearsay or not, as the Commission points out. …The intention of s 27, read in light of its legislative history and purpose, was to invoke the three-part test of reliability in s 22A as the only possible route to admitting co-defendants' statements. If the s 22A test is satisfied, then the statement is admissible as an exception to the inadmissibility of co-defendants' statements irrespective of whether the statement is hearsay or not. Otherwise only hearsay statements of co-defendants would be admissible. Statements which, for example, were not relied on for the truth of their contents, would not be admissible, even if they were not the subject of the concern that motivates s 27. I cannot see any sense in that.

15.18 We remain of the view that there is no principled basis for limiting section 22A to hearsay statements. The main rationale for the rule against admitting defendants' statements against co-defendants is that the co-defendant will not have the opportunity to test the

---

16 *R v Wellington* [2018] NZHC 2080.

17 At [69].

18 At [69]. This was on the basis that s 27 refers to "evidence of a statement made by a defendant" and does not qualify that by referring to hearsay statements only.

19 At [68].

20 At [69].

reliability of the statement by cross-examining its maker.[21] The same rationale underlies the general rule against admitting hearsay evidence.[22]

15.19 Bearing this in mind, it is difficult to see why hearsay statements should be admissible under section 22A but non-hearsay statements should not be admissible. If anything, hearsay statements should be (and usually are) subject to stricter admissibility rules than other evidence due to the inability to test their reliability through cross-examination.[23] We suggested in our Issues Paper that these concerns might be why the threshold criteria were included in section 22A: in effect, they operate as a reliability test in place of the general hearsay provisions in the Act.[24]

15.20 The concerns associated with hearsay statements are unlikely to apply to the same degree to defendants' statements that are not hearsay:

- If a defendant's statement is not hearsay because the defendant elects to give evidence at trial, the co-defendant will be able to test the reliability of the statement by cross-examining the defendant.[25]
- If the 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 (and, in any case, would be at least partially addressed if the section 22A criteria are satisfied).

15.21 We have therefore reached the view that the admissibility rule in section 22A should provide an independent basis for admitting a defendant's statement against a co-defendant, regardless of whether the statement is hearsay. We consider this approach will promote one aspect of the Act's purpose by "providing for facts to be established by the application of logical rules".[26]

15.22 To give effect to this recommendation, clauses 7 and 9 of the draft Bill would replace section 22A with a new section 27AA, containing the same threshold criteria but applying to any statement made by a defendant. The draft Bill also includes minor consequential amendments.[27]

---

21 At [66]. See also Evidence Bill 2005 (256–2) (select committee report) at 4.

22 Under ss 17–18 of the Act, a hearsay statement is generally inadmissible unless the circumstances relating to the statement provide reasonable assurance that the statement is reliable (subject to specific exceptions). In Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [50], the Commission expressed the view "that the lack of opportunity to test a witness's evidence in cross-examination is the most compelling reason for limiting the admissibility of hearsay evidence".

23 Evidence Act, ss 17–18.

24 Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [14.18]–[14.21]. We questioned the common law justification of 'implied agency', which was used to support the admission of hearsay evidence in co-conspirator cases. We noted that being a party to a conspiracy does not of itself mean the statement is reliable; rather, we suggested the true justification for the co-conspirators' rule was necessity, because conspiracy is difficult to prove. This means hearsay evidence made in a co-conspirator context remains subject to all of the dangers of hearsay, hence the inclusion of the threshold criteria in section 22A.

25 Any witness who gives evidence at trial may be cross-examined by all parties who wish to do so: Evidence Act, s 84(1)(b). This includes co-defendants.

26 Section 6(a).

27 The Bill would amend references to s 22A in s 27 and repeal s 22(2)(i) (which relates to notice requirements for hearsay evidence).

ADMISSIBILITY OF A DEFENDANT'S STATEMENT AGAINST A CO-DEFENDANT

15.23 The Crown Solicitor in Auckland proposed a broader amendment than we have recommended above. It was suggested all out-of-court statements by defendants should be admissible against a co-defendant (regardless of whether they are made in furtherance of a conspiracy or joint enterprise) unless they are relied on to prove the truth of their contents.

15.24 The Crown Solicitor noted that argument over the admissibility of defendants' statements often adds to the length and complexity of joint trials. It was proposed that defendants' statements against co-defendants should only be excluded if they are relied on to prove the truth of their contents, as in that situation, the lack of opportunity to cross-examine the maker of the statement may significantly impact on trial fairness.

Our view

No amendment to the Act is required

15.25 We note this suggestion is somewhat similar to the recommendation made by the Law Commission in its 1999 report. The Commission proposed that defendants' statements would be prima facie admissible against co-defendants, subject to exclusion under the reliability rule (now section 28), the oppression rule (now section 29) and/or the improperly obtained evidence rule (now section 30).[28] The hearsay rule would not apply. That approach was not ultimately adopted in the Act. The select committee that considered the Evidence Bill was concerned it would "unfairly deny the co-defendant the opportunity to test the reliability of the statement by cross-examining its maker and add to the length and complexity of many joint trials".[29]

15.26 The amendment proposed by the Crown Solicitor in Auckland would involve a significant change in policy. In our Issues Paper, we noted we did not intend to consider such a change without evidence that the current law was causing problems in practice. We did not receive any other submissions on this point. Based on the information available to us, we see insufficient justification for recommending such a significant change to the law at this time.

---

28 Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at s 26, [C119] and [C124]. Three reasons were given for this recommendation. First, under the (then) existing law, juries would hear evidence of a defendant's statement that implicated a co-defendant anyway, but the judge would direct them to ignore the statement to the extent it implicated the co-defendant. The Commission did not think it was realistic for juries to put this information out of their minds. Second, the Commission considered it "offen[ded] common sense to exclude from the jury's consideration the evidence of accomplices, who are often the only witnesses to the crime". Finally, the Commission considered there was "no compelling reason not to rely on evidence that the prosecution ha[d] obtained fairly, in establishing the case against all of the defendants": Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [117].

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

CHAPTER 16

Privilege

INTRODUCTION

16.1 Privilege is the basis on which a person can refuse to disclose relevant evidence.[1] The Evidence Act's privilege provisions (sections 53–67) protect certain classes of relationships by limiting the disclosure of information that was shared in the context of the relationship.[2]

16.2 In our Issues Paper, we considered issues that have arisen in relation to legal advice privilege (section 54), litigation privilege (section 56) and settlement negotiation privilege (section 57). We asked:

- whether legal advice privilege should be extended to third party communications and documents provided to a client or legal adviser, where the dominant purpose of the communication or document is to enable legal advice to be provided to the client ("third party communications"); and
- whether litigation privilege and settlement negotiation privilege should terminate and, if so, when.

16.3 These issues arose out of the Law Commission's 2013 Review of the Act, which suggested they be kept under review.[3]

16.4 In this chapter, we conclude it is unnecessary to amend section 54 to extend the scope of legal advice privilege, as the courts' current approach already enables legal advice privilege to apply to third party communications in certain situations.

16.5 We also conclude that it is unnecessary to amend sections 56 and 57 to clarify whether and when the privileges terminate. Determining whether and when litigation privilege should terminate is a fact-specific exercise best left to the courts. We also consider it would be premature to clarify in the Act whether and when settlement negotiation privilege terminates as this issue is not causing problems in practice

APPLICATION OF LEGAL ADVICE PRIVILEGE TO THIRD PARTY COMMUNICATIONS

16.6 Legal advice privilege protects communications between a person and their legal adviser[4] as well as communications made or received by a person's authorised representative on

---

1 Matthew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVAPart2Subpart8.1Introduction].

2 Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [248].

3 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.29] and [10.65].

4 Evidence Act 2006, s 54(1). Section 51(1) states that "legal adviser" means a lawyer, a registered patent attorney or an overseas practitioner.

their behalf.[5] Courts have therefore held that legal advice privilege can apply to communications with a third party if they "acted as an agent in communicating with the client's solicitor".[6] Third parties who have been held to have acted as agents include: engineers, loss assessors and fire origin and cause investigators;[7] a surveying firm;[8] and a financial advising firm.[9]

Issues Paper

16.7 In our Issues Paper, we asked whether the current scope of legal advice privilege was creating any problems in practice and whether section 54 should be amended to apply to all third party communications, not just communications by an agent.[10] We set out the arguments for and against extending section 54 to third party communications.[11]

Consultation

16.8 We received five submissions addressing these issues.[12] Submitters were divided in their views. The Criminal Bar Association and the New Zealand Bar Association said the status quo is not causing any problems in practice and there is no need for section 54 to be amended. The New Zealand Law Society and two individual submitters commented on the uncertainty (among legal practitioners and consultants providing specialist advice to lawyers) as to when communications with third parties will be protected.[13] Submitters suggested various ways of amending section 54 to resolve this.[14]

16.9 Our judicial advisory committee did not consider legal advice privilege should be extended to all third parties.

---

5 Evidence Act, s 51(4).

6 *Brandlines Ltd v Central Forklift Group Ltd* HC Wellington CIV 2008-485-2803, 11 February 2011 at [33]. See also *Robert v Foxton Equities* [2014] NZHC 726, [2015] NZAR 1351 at [34]; *Aquaheat New Zealand Ltd v Hi Seat Ltd (in liq and rec)* [2014] NZHC 1173, [2014] NZCCLR 21 at [39]; and *Lyttelton Port Co Ltd v Aon New Zealand Ltd* [2017] NZHC 2215 at [32].

7 *Brandlines Ltd v Central Forklift Group Ltd* HC Wellington CIV 2008-485-2803, 11 February 2011 at [4] and [45]. However, legal advice privilege did not apply, as the second requirement referred to below at [16.12] was not fulfilled.

8 *Robert v Foxton Equities* [2014] NZHC 726, [2015] NZAR 1351 at [33] and [43].

9 *Aquaheat New Zealand Ltd v Hi Seat Ltd (in liq and rec)* [2014] NZHC 1173, [2014] NZCCLR 21 at [62]–[64]. However, the firm was only held to be an agent in relation a specific piece of advice, not all financial advice.

10 This issue was considered by the Commission in its 2013 Review of the Act, due to suggestions that limiting legal advice privilege to third parties acting as a client's agent did not reflect the realities of modern-day practice where third parties are used as more than mere agents. The Commission did not make any recommendations but suggested the issue be reconsidered in circumstances that would allow for widespread consultation and consideration of potential consequences: Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.10] and [10.29].

11 See Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [15.8]–[15.9].

12 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and two individual submitters (a lawyer specialising in safety and environment issues and a barrister).

13 The New Zealand Law Society noted that, to some extent, the issue is an apparent lack of knowledge among practitioners as to when communications with third parties will be protected.

14 The New Zealand Law Society suggested s 54 should extend legal advice privilege to third party documents prepared for, and third party communications having, the dominant purpose of obtaining legal advice. One individual submitter suggested s 54 should extend legal advice privilege to third parties where their expertise is required to enable the client to be provided with comprehensive legal advice on complex matters. Another individual suggested s 54 should extend legal advice privilege to third party communications and documents (potentially only communications and documents that are expert opinion evidence) created for the purpose of lawyers providing legal advice to a client.

16.10 Two contrasting themes emerged from our consultation. Those who did not support legislative amendment were concerned that extending legal advice privilege could impact on the principle of open justice and result in the court being unable to access relevant communications and documents. On the other hand, those who thought legislative amendment was necessary were concerned that limiting legal advice privilege to third parties who are agents prevents clients from obtaining accurate and reliable legal advice. They noted that clients and legal advisers may be hesitant to engage the assistance of specialist advisers if their advice is likely to be disclosed.[15]

Our view

No amendment to the Act is required

16.11 As the Commission noted in the 2013 Review of the Act, the fact that clients might not always be able to obtain legal advice without the assistance of specialist advisers is the strongest argument for extending the scope of legal advice privilege to third party communications. Since the underlying rationale of legal advice privilege is to "facilitate access to effective legal advice",[16] it is desirable that the privilege applies to communications with third parties that are necessary to enable a client to obtain legal advice.

16.12 Our analysis of the case law indicates that parties can already structure their advice to ensure that legal advice privilege applies to communications with specialist advisers and documents created by specialist advisors. In *Brandlines v Central Forklift Group*, it was held that two requirements need to be fulfilled for legal advice privilege to apply to communications with a third party:[17]

- First, the third party must act as an agent in communicating with the client's legal adviser.[18] A third party acts as an agent if they assume, and have been authorised to assume, "the role of the client in communicating the information to the solicitor".[19] They must act as "'the man on the spot', as the client's "alter ego" and on [the client's] behalf".[20] It is not necessary, however, for the third party to have "the capacity to instruct and/or receive legal advice from the solicito[r]… on the client['s] behalf".[21]

---

15 Examples of advisers lawyers might need to consult before being able to give comprehensive legal advice included land contamination consultants, accountants and health and safety experts.

16 *Pratt Holdings v Commissioner of Taxation* [2004] FCAFC 122, (2004) 136 FCR 357 at [43]. This includes ensuring a person is "able to consult [their] lawyer in confidence, since otherwise [they] might hold back half the truth": *R v Derby Magistrates Court* [1996] AC 487 (HL) at 507; ensuring that lawyers are able to use their legal skills to assist people with their affairs without being subject to scrutiny to from others: *Three Rivers District Council v Bank of England (Disclosure) (No 4)* [2004] UKHL 48, [2005] 1 AC 610 at [34]; and "enabl[ing] the free exchange of information between solicitor and client for the purposes of obtaining and providing legal advice": *Brandlines Ltd v Central Forklift Group Ltd* HC Wellington CIV 2008-485-803, 11 February 2011 at [13].

17 *Brandlines v Central Forklift Group* HC Wellington CIV 2008-485-803, 11 February 2011.

18 At [33].

19 At [34].

20 At [34].

21 At [35].

- Second, the communication or document created by the agent must be for the purpose of obtaining or providing legal advice.[22]

16.13 A slightly different approach was taken in *Robert v Foxton Equities* where it was held that it was necessary for the third party to "be given authority to communicate with the solicitor to obtain legal advice, and actually do so".[23] Subsequently, however, in *Aquaheat New Zealand Ltd v Hi Seat Ltd (in liq and rec)* the Court adopted the approach taken in *Brandlines*[24] and held it was to be preferred to the narrower approach in *Foxton Equities*.[25] *Aquaheat* also highlighted the fact that the communication or document created by the agent must be for the "principal" or "dominant" purpose of obtaining or providing legal advice; as in *Brandlines*, the communications and documents were not privileged because their principal purpose was to allow the plaintiff to determine the cause of the fire.[26] This requirement also ensures that privilege cannot be claimed in relation to documents that were already independently in existence.

16.14 The approach outlined in *Brandlines* and *Aquaheat* allows parties to structure advice to ensure that legal advice privilege applies to communications with specialist advisers or documents created by them. For example, the parties could create an agency agreement[27] stating that the third party is to communicate directly with the legal adviser to provide information that will enable the legal adviser to provide the client with legal advice. The agent would then communicate the information directly to the legal adviser (although the client could be present if they wished). This would allow parties to engage specialist advisers without being concerned the advice will be disclosed.

16.15 The New Zealand Law Society acknowledged that advice can be structured to increase the chance of legal advice privilege applying to communications with third parties. They expressed some concern, however, that structuring advice to maintain privilege is an artificial approach, which results from the artificial distinction between who is and is not an agent.

16.16 Given the rationale underlying legal advice privilege is to facilitate access to effective legal advice, we consider the test should focus on whether the specialist adviser is 'stepping into the client's shoes' as an agent. The specialist adviser's role is essentially to communicate facts to the legal adviser that the client cannot so the client can receive reliable and accurate legal advice. If the client could communicate the facts to the legal adviser, there would not be any need for a third party to be involved. Any communications with third parties who are not agents should therefore not be covered by legal advice privilege, as the rationale of facilitating access to effective legal advice no longer applies.

16.17 Since the approach in *Brandlines* and *Aquaheat* allows legal advisers to receive advice from and provide information to third parties, and enables them to provide their client with accurate and reliable advice (consistent with the rationale for legal advice privilege),

---

22 At [32]–[33].

23 *Robert v Foxton Equities Ltd* [2014] NZHC 726, [2015] NZAR 1351 at [40].

24 *Aquaheat New Zealand Ltd v Hi Seat Ltd (in liq and rec)* [2014] NZHC 1173, [2014] NZCCLR 21 at [39]–[42].

25 At [44]–[45].

26 At [40]–[41].

27 *Aquaheat* suggests agency would be "beyond argument" if there was an express agreement: *Aquaheat New Zealand Ltd v Hi Seat Ltd (in liq and rec)* [2014] NZHC 1173, [2014] NZCCLR 21 at [62].

we have concluded that it is not necessary or desirable to amend section 54 to extend the scope of legal advice privilege.

16.18 Further, we consider that amending section 54 could lead to significant unintended consequences.[28] For example, extending legal advice privilege to third party communications could blur the distinction between legal advice privilege and litigation privilege[29] and deprive the court of access to relevant and important communications.[30]

TERMINATION OF LITIGATION PRIVILEGE

Issues Paper

16.19 Section 56 of the Act protects the privilege for preparatory materials (also known as litigation privilege). This privilege covers any information or communication that is made for the dominant purpose of preparing for a proceeding.[31] An issue we identified is that section 56 does not state whether, and, if so, when, litigation privilege terminates.[32]

16.20 In our Issues Paper, we noted that a number of recent cases have considered whether litigation privilege should terminate without reaching a definitive conclusion.[33] We asked whether the Act should be amended to clarify whether litigation privilege terminates. If submitters felt clarification was necessary, we asked whether the Act should be amended to provide that:

- litigation privilege does not terminate; or
- litigation privilege ends when the litigation it is associated with ends (with an exception for ongoing related litigation).

Consultation

16.21 Four submissions addressed whether litigation privilege should terminate.[34] The New Zealand Bar Association and the New Zealand Law Society did not consider the Act should be amended to clarify whether (and, if so, when) litigation privilege terminates. They thought this is a matter that should be determined by the courts on a case by case basis. The New Zealand Bar Association noted that, because decisions about whether the

---

28 The United Kingdom Supreme Court has also observed that any extension to legal advice privilege would have significant implications, that "would be very difficult to identify, let alone to assess": *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185 at [62].

29 Australian Law Reform Commission and others *Uniform Evidence Law* (ALRC R102, NSWLRC FR112, VLRC Final Report, December 2005) at [14.102]–[14.103].

30 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.23].

31 Section 56(1).

32 This issue was considered by the Commission in its 2013 Review of the Act. The Commission noted it was unclear on the face of s 56 whether the privilege terminates. The Commission did not make any recommendation as it was not aware of the issue causing problems in practice and thought it was an issue that could be determined by the courts. The Commission suggested that the issue could be reconsidered in the next statutory review of the Act if the interpretation of the provision proved to be problematic: Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.58] and [10.65].

33 See [15.18]–[15.21] of the Issues Paper for a more detailed explanation of these cases: Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018).

34 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

privilege terminates involve fine judgement, particularly where there is related litigation, decisions are best made in the context of a concrete fact situation.

16.22 In contrast, the Criminal Bar Association and the Public Defence Service considered the Act should be amended to clarify when litigation privilege terminates, in the interests of certainty.[35] The Public Defence Service suggested the Act should be amended to state that the privilege does not terminate, as it was concerned clients might not provide free and frank information to third parties for assessments and discussions if they know it could be disclosed later.[36]

16.23 Our judicial advisory committee considered that whether litigation privilege terminates is a matter that should be determined by the courts.

Our view

No amendment to the Act is required

16.24 It is important to consider the underlying rationale for litigation privilege when determining whether or not it should terminate. In *Blank v Minister of Justice*, the Canadian Supreme Court held that litigation privilege exists "to create a 'zone of privacy' in relation to pending or apprehended litigation".[37] The Court therefore concluded that, once litigation ends, the privilege loses its purpose and justification and that litigation privilege therefore terminates when the litigation it arose from ends.[38] The Court also noted that there needs to be an exception for when related litigation is ongoing.[39]

16.25 In *Houghton v Saunders*, the High Court was persuaded by the analysis in *Blank*, noting "[c]onceptually, a privilege recognised because of the need for a 'zone of privacy' while proceedings are on-going comes to an end when the proceedings do".[40] The Court also concluded that there must be an exception "where there is a relevant connection between one set of proceedings and another, whilst the other litigation continues".[41]

16.26 In *Nisha v LSG Sky Chefs New Zealand Ltd (No 16)*[42] and *Osborne v Worksafe New Zealand*,[43] the courts focused on the differing rationales underlying litigation privilege and legal advice privilege when considering whether litigation privilege should terminate.[44] In *Nisha*, the Employment Court highlighted that the foundation of *Blank* is the differing

---

35 The Criminal Bar Association did not express a view on whether the privilege should terminate or not.

36 The authors of *Mahoney on Evidence: Act and Analysis* express similar concerns that the privilege terminating would have a "chilling effect on parties preparing for litigation" if they do not know how long the privilege will apply for: Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at 524.

37 *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319 at [34].

38 At [34]–[35].

39 At [34]–[35].

40 *Houghton v Saunders* [2013] NZHC 1824 at [20]–[21].

41 At [21].

42 *Nisha v LSG Sky Chefs New Zealand Ltd (No 16)* [2015] NZEmpC 127.

43 *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293.

44 Contrast *NZH Ltd v Ramspecs Ltd* [2015] NZHC 2396 at [32] where an obiter comment was made suggesting litigation privilege might not terminate.

rationales underlying legal advice privilege and litigation privilege.[45] Legal advice privilege allows clients to communicate with absolute candour with their legal advisers, whereas litigation privilege is concerned with allowing parties to prepare for litigation.[46] In *Osborne*, the High Court noted that since legal advice privilege and litigation privilege have different underlying rationales, there may not be a justification for litigation privilege having the "persistent character" of legal advice privilege.[47]

16.27 In other jurisdictions, courts have focused on the differences between legal advice privilege and litigation privilege when determining their scope. For example, in *Re L (A Minor)*, the House of Lords was quick to reject the contention that the absolute nature of legal advice privilege extended equally to litigation privilege, noting that there is "a clear distinction" between the two privileges.[48] This led the House of Lords to hold that, although legal advice privilege applied in non-adversarial proceedings, litigation privilege would not.[49] This approach has also been followed in Australia.[50]

16.28 We agree, given the underlying rationale of litigation privilege, it should terminate once the litigation it is connected to ends. We also agree that, if litigation privilege terminates, it is important to ensure there is an exception for ongoing related litigation. As noted by the Court in *Houghton*, if the subject matter of two proceedings is sufficiently related, "[i]t would frustrate the purpose of litigation privilege if it was brought to an end when either of the proceedings terminated".[51]

16.29 In our view, the approach taken in *Blank* and *Houghton* (that litigation privilege terminates, with an exception for when related litigation is ongoing) is an appropriate approach as it provides a clear rule but is also sufficiently flexible to ensure that the privilege does not terminate in circumstances where its rationale suggests it should continue. Such an approach also partially addresses concerns that litigation privilege terminating may have a chilling effect on parties involved in litigation (preventing them from providing free and frank information to third parties) as they can be sure that the privilege will not terminate in relation to subsequent connected litigation.

16.30 Given that determining whether related litigation is pending or anticipated is likely to be a fact-specific exercise, we consider that determining when litigation privilege terminates is a matter that is best left to the courts to determine on a case by case basis. We therefore do not consider it is desirable to amend section 56.

---

45 The Employment Court is not required to apply the provisions of the Evidence Act. However, the Court in *Nisha* decided to follow the guidance provided by s 56: *Nisha v LSG Sky Chefs New Zealand Ltd (No 16)* [2015] NZEmpC 127 at [16] and [19].

46 *Nisha v LSG Sky Chefs New Zealand Ltd (No 16)* [2015] NZEmpC 127 at [28].

47 *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293 at [22]. The Court did not need to decide the issue, as it held that litigation privilege did not apply to the case.

48 *Re L (A Minor)* [1996] 2 All ER 78 (HL) at 83.

49 At [86].

50 *AWB Ltd v Cole* [2006] FCA 571, (2006) 152 FCR 382 at [163]; and *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530, (2006) 67 NSWLR 91 at [55].

51 *Houghton v Saunders* [2013] NZHC 1824 at [21].

TERMINATION OF SETTLEMENT NEGOTIATION PRIVILEGE

Issues Paper

16.31 Section 57 of the Act protects communications between parties that are intended to be confidential and are part of an attempt to settle a dispute (including settlement negotiations, mediation and plea discussions).[52]

16.32 In our Issues Paper, we explained that section 57 does not state whether and, if so, when settlement negotiation privilege terminates.[53] We noted that the question of whether settlement negotiation privilege should terminate has only been considered briefly by the High Court in *Jung v Templeton*, where the court made an obiter comment that settlement negotiation privilege does not terminate.[54] We asked whether the issue of settlement negotiation privilege terminating was causing any problems in practice and, if it was, whether the Act should be amended to clarify the position.

Consultation

16.33 We received four submissions addressing whether settlement negotiation should terminate.[55] The New Zealand Bar Association and the New Zealand Law Society suggested the question of whether settlement negotiation privilege terminates is not causing problems in practice. The New Zealand Bar Association highlighted that, if problems were to arise, they could be addressed by section 57(3)(d) of the Act, which allows judges to disclose material covered by settlement negotiation privilege if the need for disclosure outweighs the need for the privilege.

16.34 The Public Defence Service stated that settlement negotiation privilege should not terminate in criminal matters. It said it would not be practical to use confidentiality agreements as a substitute for the privilege in a criminal context, given the volume of cases that pass through the courts. Conversely the Criminal Bar Association expressed concern that if settlement negotiation privilege did not terminate in the criminal context, counsel would not be able to refer to plea discussions in sentencing.[56] We also consulted with our judicial advisory committee. The committee considered the courts should determine whether settlement negotiation privilege terminates.

---

52 Section 57(1).

53 This issue was considered by the Commission in its 2013 Review of the Act. The Commission noted it was unclear on the face of s 57 whether the privilege terminates. The Commission did not make any recommendation as it was not aware of the issue causing problems in practice and thought it was an issue that could be determined by the courts. The Commission suggested that the issue could be reconsidered in the next statutory review of the Act if the interpretation of the provision proved to be problematic: Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.58] and [10.65].

54 *Jung v Templeton* HC Auckland CIV-2007-404-5383, 30 September 2009 at [64].

55 The Criminal Bar Association, the New Zealand Bar Association, the New Zealand Law Society and the Public Defence Service.

56 See *Mains v R* [2016] NZCA 290 for an example of when this was necessary.

Our view

No amendment to the Act is required

16.35 As noted in the 2013 Review of the Act[57] and reiterated in our Issues Paper, the purpose of settlement negotiation privilege is to encourage parties to settle disputes. Parties might be more reluctant to make certain offers or concessions if there is a risk they will be made public. Also, section 57(3)(d) provides for disclosure in cases where it is in the interests of justice, without the need for the privilege to terminate. Further section 57(2B)(c) similarly provides that the court may order disclosure of a communication or document covered by the privilege for plea discussions if:

> … after due consideration of the importance of the privilege and the rights of a defendant in a criminal proceeding, it would be contrary to justice not to disclose the communication or document or part of it.

16.36 This addresses the concern expressed by the Criminal Bar Association that counsel should be able to refer to plea discussions in sentencing if it is necessary.[58]

16.37 We therefore do not consider settlement negotiation privilege should terminate.[59] As the only authority on this point, *Jung*, has also taken this position and no further litigation has arisen since 2009, the status quo does not appear to be causing issues in practice. Accordingly, we have concluded it is unnecessary to amend section 57.

---

57 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.64].

58 See, for example, *Mains v R* [2016] NZCA 290.

59 The authors of *Mahoney on Evidence: Act and Analysis* also express the view that settlement negotiation privilege should not terminate, especially given the exceptions to the privilege in ss 57(2B)(c) and (3)(d): Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at 460.

CHAPTER 17

Regulations

RECOMMENDATION

R27 The Evidence Regulations 2007 should be reviewed. Separate evidence rules or regulations should be developed for military proceedings.

INTRODUCTION

17.1 Our terms of reference require us to consider whether the Evidence Regulations 2007 are comprehensible and fit for purpose, or whether they should be the subject of a separate review.

17.2 The Regulations are made under the Evidence Act and the Summary Proceedings Act 1957.[1] They deal primarily with procedural and technical matters associated with video recorded evidence. The Regulations are divided into five parts:

- Part 1: video record evidence in criminal proceedings (and certain military proceedings).
- Part 2: judicial directions in relation to the evidence of a child under the age of six.
- Part 3: transitional provisions.
- Part 4: mobile video record evidence in criminal proceedings concerning domestic violence.[2]
- Part 5: offences.

17.3 In our Issues Paper, we identified a number of possible issues with the Regulations, particularly in relation to Parts 1 and 4.[3] Our main concern was whether the Regulations currently accommodate, and will continue to accommodate, developments in recording technology. We expressed the preliminary view that this issue alone is significant enough to warrant a review of the Regulations. We also noted the Regulations may require

---

[1] The empowering provisions are s 201 of the Evidence Act 2006 and s 212 of the Summary Proceedings Act 1957. There are also specific statutory provisions that authorise, contemplate or supplement the provisions of the Evidence Regulations 2007, namely ss 105, 106, 119A and 125 of the Evidence Act. See also s 70 of the Court Martial Act 2007.

[2] Part 4 of the Regulations refers to "domestic violence" rather than "family violence" so this chapter uses the phrase "domestic violence" where necessary. We note that the Domestic Violence Act 1995 is to be repealed, as from 1 July 2019 (by s 258 of the Family Violence Act 2018).

[3] Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [16.4].

amendment to provide safeguards around the storage, security and use of evidence recorded at pre-trial hearings.

17.4 We suggested that, if a review of the Regulations is considered necessary in light of the above issues, the review might also usefully consider:

- whether the restrictions around the security and use of transcripts of video records sufficiently protect witness's privacy;
- whether the Regulations should be amended to better facilitate the viewing of certain video records by defence counsel; and
- whether the Regulations should continue to apply to military proceedings.

17.5 We asked submitters whether there were any other issues associated with the application of the Regulations. Submitters confirmed there are a number of problems with the Regulations, and there was general support for a review of the Regulations.[4]

17.6 In this chapter we discuss the following aspects of the Regulations:

- developments in recording and storage technology;
- security and use of evidence recorded in a hearing prior to trial;
- security and use of transcripts of video records;
- defence counsel access to evidential video interviews;
- application to military proceedings; and
- other matters not addressed in our Issues Paper.

17.7 We conclude that the Regulations should be the subject of a separate review. We also suggest the development of separate regulations for evidence in military proceedings.

DEVELOPMENTS IN RECORDING AND STORAGE TECHNOLOGY

17.8 Part 1 of the Regulations contains rules about video records of witness evidence that may be offered in criminal proceedings (and certain military proceedings). Some of the language used in Part 1 does not seem to accommodate the use of modern methods of recording and storing information. A number of the regulations seem to contemplate a witness interview being recorded and/or stored on a physical storage device (such as a videotape, CD or DVD). For example, regulation 13(1)(a) states that, if the recording equipment fails, "the video record must be removed from the video recording equipment". Regulation 17(1) requires the master copy of a video record to be "sealed with a certificate" and "placed in safe custody with the Police". This language does not readily accommodate an interview being recorded on a device such as a smartphone and digitally transferred to a storage facility or system (such as a cloud-based evidence management platform).

[4] We also note that the submissions from Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre and TOAH-NNEST Tauiwi Caucus said the organisations would like to be consulted when a review of the Regulations occurs.

17.9 Section 106(8) of the Act provides some flexibility around compliance with the technical requirements of the Regulations.[5] However, this cannot always provide a means of admitting evidence stored in a manner not contemplated by the Regulations. For example, in *Police v Winiata*, the District Court held that an interview with a complainant that was recorded on a smartphone at the scene of a family violence incident and then stored in a cloud-based evidence management platform, Evidence.com,[6] could not be admitted at trial because there had not been substantial compliance with the Regulations.[7] A digital master copy of the interview had been created by Evidence.com, and police had used this to create a DVD master copy and working copy. The Court considered that, for the purposes of the Regulations, the master copy of the interview was the digital master created by Evidence.com (and not the "DVD master").[8] Therefore, the master copy was not in the safe custody of the police (as regulation 17 requires) but in the custody of a foreign corporation based outside New Zealand (the servers being owned by an American company and held in Australia).[9] The Court considered the process used was a "step too far" to be able to say there had been substantial compliance with the Regulations.[10]

17.10 Part 4 was subsequently inserted into the Regulations to facilitate police use of mobile video records as evidence in criminal proceedings. The provisions in Part 4 contemplate that video files will be digitally transferred to a storage system and that access to the video record can be provided (such as by a secure website link) instead of a physical copy of the video.[11] However, Part 4 has not provided a complete solution to the problem of the Regulations contemplating physical records as it is limited to mobile video records of evidence of adult complainants concerning domestic violence allegations.[12] Also, Part 4 does not deal comprehensively with mobile video record evidence. Instead, certain provisions in Part 1 refer to Part 4.[13] As we noted in our Issues Paper, this kind of cross-referencing can cause uncertainty and confusion.[14]

---

5 This provides:

> The Judge may admit a video record that is recorded and offered as evidence substantially in accordance with the terms of any direction under this subpart and the terms of regulations referred to in subsection (2), despite a failure to observe strictly all of those terms.

6 Affidavits provided by Police described Evidence.com as "a cloud-based secure storage system specifically designed for the secure storage of evidential documents including video records of police interviews".

7 *Police v Winiata* [2016] NZDC 7509, [2017] DCR 282 at [57]–[58].

8 At [54].

9 At [57].

10 At [58].

11 Regulations 55–62.

12 Regulation 52(1) provides that Part 4 applies to mobile video records. Regulation 53 defines a "mobile video record" as:

> a video record—
>
> (a) that a Police employee has made on a mobile device with the intention that it be offered later as evidence in criminal proceedings; and
>
> (b) that records the evidence of a complainant who is not a child; and
>
> (c) that concerns allegations of domestic violence.

13 Regulation 54(1) provides that a mobile video record must comply with regs 5 to 12. Regulation 56 provides that regs 20, 20A, 20B, 20C, 24A–E and 28 apply (with any necessary modifications) to mobile video records.

14 See Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [16.15]–[16.16].

17.11 In our Issues Paper, we asked submitters whether any difficulties had arisen with the application of the Regulations in light of developments in recording technology. We expressed the preliminary view that the Regulations need to be simplified and use technology-neutral language to ensure there is room to accommodate new technology. We suggested that, if a technology-neutral approach were adopted, it might not be necessary to retain a separate part in the Regulations for mobile video records.

17.12 Key points that arose out of the submissions were:

- the need to use technology-neutral language;
- the distinction between Part 1 and Part 4 of the Regulations is unnecessary;
- the need for appropriate safeguards for storing and accessing video records; and
- the need to consider the interaction of the Regulations with other provisions governing access to and disclosure of video records.

The Regulations should be technology-neutral

17.13 The three submitters addressing this issue considered the references to physical technology in the Regulations should be addressed.[15] The New Zealand Bar Association said the Regulations are "plainly dated in terms of references to technology" and said the language needs to be updated to be technology-neutral. New Zealand Police said it would be beneficial if the Regulations were simplified through technology-neutral language. The New Zealand Law Society noted that the Regulations assume a recording of an interview will be stored on a physical storage device.

17.14 We suggest the Regulations should use technology-neutral language capable of covering the different ways video recordings may be created, stored and shared. For example:

- a video recording could be defined to include "electronic recordings";
- police could be required to "provide access" to recordings rather than provide a physical copy;[16]
- video records could be "stored securely" as opposed to being placed in "safe custody with the Police";
- references to "returning" a copy of a record could include "destroying" or "erasing"; and
- references to a "master copy" and a "working copy" in the Regulations should be reviewed to reflect the different ways that video records can be created and stored.

17.15 Police also noted that some defence counsel still expect to be given a DVD of the complainant's interview and do not want to access the mobile video record through a website link. Police said providing counsel with a securely encrypted link (for example, to Evidence.com) is more secure than providing a hard copy DVD, as it ensures only the

---

[15] The New Zealand Bar Association, the New Zealand Law Society and New Zealand Police.

[16] We note, for example, s 106(10) of the Act, which provides that:

> …a reference to a person being given a video record includes a reference to the person being given access to the video record, for example, being given access to an electronic copy of the video record through an Internet site.

(Inserted by s 59 of the Family Violence (Amendments) Act 2018, which came into force on 3 December 2018).

correct people have access to the video.[17] Police said the language of regulation 56(2)(b) should clarify that police can meet their obligations by giving defence counsel access to video records through a website link rather than by way of a physical copy.[18]

17.16 Where an interview record can be provided in more than one way, we consider the Regulations should clarify whether the prosecution may choose to provide access to a video record via a securely encrypted link or whether the defence may insist on being given a record on a physical data storage device (such as a DVD).

The distinction between Part 1 and Part 4 should be removed

17.17 The New Zealand Bar Association and Police considered it unnecessary to maintain a distinction in the Regulations between video record evidence (Part 1) and mobile video record evidence (Part 4). The New Zealand Bar Association said there is an arbitrary distinction between the circumstances in which mobile video recordings may be used compared with video recordings generally.

17.18 We consider the cross-referencing between Parts 1 and 4 of the Regulations is confusing and does not enhance access to the law of evidence in accordance with one aspect of the Act's purpose.[19] Removing the distinction between Parts 1 and 4 would increase the clarity of these provisions. We do not consider there is any policy rationale for maintaining a separate regime for mobile video records in domestic violence cases. It would be preferable for the same regime to apply to all video interviews, regardless of the type of case or the nature of the device on which the evidence is recorded.

The Regulations should ensure secure storage and access to video records

17.19 The New Zealand Law Society considered that regulations providing for electronic storage of evidence must, at a minimum, ensure:

- the security and integrity of the evidence in its original form so it is protected against subsequent alteration or editing;
- a proper "chain of evidence" or "evidence register mechanisms" that show who provided, and who has accessed, the evidence; and
- the opportunity for the defendant and their counsel to access and review the evidence in an appropriate and meaningful way.

17.20 The New Zealand Law Society raised the issue of who should be responsible for approving electronic storage facilities. It noted that regulation 55 gave the Commissioner of Police sole responsibility for approving a storage system or facility for mobile video records and queried whether this was appropriate.

---

17 See a detailed discussion of this above at [9.112]–[9.113].

18 Regulation 56(2)(b) provides that any reference in regs 20, 20A, 20B, 20C and 28 to "giving or showing a copy of a video record is to be treated as giving access to the mobile video record in the storage system or facility". We note that reg 57(1) and (2) provide that, where a copy of a mobile video record must be given to a lawyer under s 106(4) or (4B) of the Act, unless the judge directs otherwise, Police must provide access to enable the lawyer to view the relevant mobile video record in the storage system or facility. However, regs 57(3)(b)(ii) and 57(4) refer to a mobile video record provided on a portable storage device.

19 Section 6(f).

17.21 We consider the Regulations must contain safeguards to ensure video records are stored securely and protected from loss, tampering or unauthorised access. This should be the case whether the video record is stored in a filing cabinet or on an online storage system. We do not consider the Regulations are currently sufficient in this regard. Part 1 of the Regulations does not anticipate video records may be stored in facilities such as cloud-based evidence management platforms. While Part 4 allows video records to be transferred to a storage system or facility, this Part only applies to mobile video records in domestic violence cases involving adult complainants. Some of the provisions in Part 4 still rely on cross-referencing provisions in Part 1, which makes them difficult to follow.

17.22 Police told us some defence counsel have challenged the requirement to create an account on the Police-approved video storage provider (Evidence.com) in order to access and view mobile video records provided via a link. Police said that over half of defence counsel have not viewed a mobile video record where a link has been provided. We suggest any review of the Regulations should ascertain whether there are particular defence concerns about the use of storage systems such as Evidence.com.

The interaction between the Regulations and other provisions governing access and disclosure of information should be reviewed

17.23 Police raised the issue of how the regulations dealing with access to, and disclosure of, video records interact with legislation such as the Public Records Act 2005, the Official Information Act 1982 and the Privacy Act 1993. It suggested the Regulations should be a code for access to, and disclosure of, video records and should expressly be given paramountcy. Police suggested wording similar to section 42(2) of the Criminal Disclosure Act 2008 could be used.[20]

17.24 We suggest any review of the Regulations consider the interaction between the Regulations and other provisions dealing with access to, and disclosure of, video records.

SECURITY AND USE OF EVIDENCE RECORDED IN A HEARING PRIOR TO TRIAL

17.25 The prosecution may offer a video of the complainant's police interview as their evidence-in-chief. The video records of these interviews are subject to the Regulations.

17.26 A judge may also order that a complainant's evidence be recorded prior to the hearing.[21] This is a process supervised by the court and the Regulations do not presently apply to this pre-recording process and the resulting video records.

17.27 In *M v R*, the Court of Appeal accepted the Crown's submission that the Regulations were not intended to cover pre-trial cross-examination conducted in court before a judge with counsel and the accused present.[22] The Court stated:[23]

> Parliament has assumed that, where a judge determines that pre-trial evidence will be taken under the Evidence Act, that judge will determine how it is to be done. There is no

---

[20] This provides: "Without limiting subsection (1), nothing in this Act applies in respect of any video record made under the Evidence Regulations 2007 or any copy or transcript of such a video record."

[21] Although, as we note above at [9.10], pre-recording of cross-examination is rare following the Court of Appeal's decision in *M v R* [2011] NZCA 303, [2012] 2 NZLR 485.

[22] *M v R* [2011] NZCA 303, [2012] 2 NZLR 485 at [21]–[22].

[23] At [22].

need for a regulatory regime as the judge himself or herself can determine a regime which is tailor made for the particular witness in the particular case. It is only evidence taken under the evidential interview regime (that is, without Court supervision or party participation) that requires the regulatory framework.

17.28 A judge can regulate the process for pre-recording evidence in a manner that is appropriate for a particular case. In the High Court decision in *R v Aitchison*, for example, the complainant's evidence consisted of an evidential video interview (EVI) and pre-recorded cross-examination (conducted with communication assistance, under section 80 of the Act).[24] In that case, there were four pre-trial conferences to determine the procedure for giving evidence. In *R v Kereopa*, an order was made for a witness with terminal cancer to have her evidence recorded prior to trial before a deputy registrar of the District Court.[25] The Court considered that any direction about giving evidence under section 103 of the Act (alternative ways of giving evidence) should be given "in a manner that complies with the spirit of [the] Regulations and promotes a fair trial".[26] A number of directions were made as to how the recording of evidence was to proceed.[27]

17.29 In our Issues Paper, we noted that pre-recorded evidence is likely to contain the same kinds of sensitive material as video records of police interviews and similar privacy concerns will arise. We suggested it would be beneficial to have regulations addressing matters such as the custody, storage and use of the resulting video records. We said this will be particularly important if policy decisions are made to entitle all sexual and/or family violence complainants to have their evidence pre-recorded. Even if this does not occur, it would still be desirable for regulations to address these matters, given the pre-recording of evidence that may already occur under existing provisions of the Act.[28]

17.30 We asked submitters what restrictions would need to be placed around the storage and use of video records if the Act were amended to entitle certain witnesses to have their evidence pre-recorded (including cross-examination).

17.31 Submitters identified a number of considerations relating to the storage and use of pre-recorded evidence. We also received feedback on operational matters, such as rules on how evidence should be recorded and replayed. We discuss below whether regulation is necessary to cover storage and use, and access to, pre-recorded evidence and/or other technical and operational matters.

Storage, use and access to evidence recorded in a hearing prior to trial

17.32 The New Zealand Bar Association, Police and the Public Defence Service submitted that restrictions similar to those applying to storage and use of video records of interviews would be needed for pre-recorded evidence.

---

24 *R v Aitchison* [2017] NZHC 3222.

25 *R v Kereopa* [2008] DCR 29.

26 At [10].

27 At [11]. The directions included: the evidence was to be taken at the District Court before a deputy registrar, who was to administer an oath or affirmation; the order of the evidence; the deputy registrar was to state the date and time the evidence began and the details of any adjournment; each person present had to identify themselves before the witness was sworn or affirmed; and master and working copies of the video record were to be kept in a manner that complied with regs 14–18 of the Evidence Regulations.

28 See sections 103, 106A and 107 of the Act.

17.33 The New Zealand Law Society submitted that any pre-recording of evidence should be a process supervised by the court, and therefore the court should supervise and regulate access to and use of these recordings. It said that, prior to trial, access to recordings should be limited to the court and the parties to the proceedings, with use limited to that necessary for the purposes of the proceedings. However, any person should be able to apply to the court for access for other good reasons. The New Zealand Law Society considered it would ordinarily be inappropriate for the media to access or publish recordings of evidence until they are played at trial. It said that, after the recording is played at trial, access to (or publication of) this kind of evidence should be controlled by the court in the same way as other evidence given at trial.

17.34 The New Zealand Law Society also said it would likely be inappropriate for the defendant to retain certain categories of pre-recorded evidence, such as a complainant's evidence in a sexual case. It considered regulations could allow defence counsel to have a copy of the originally recorded evidence but prevent them from providing a copy to the defendant. The defendant could be provided with a full transcript of the evidence, subject to safeguards to minimise risk of misuse.

17.35 We consider it is necessary to regulate access to a complainant's pre-recorded evidence to prevent interference with the trial and to protect the complainant's privacy.[29] Prior to a hearing, it would ordinarily only be appropriate for the parties and the Court to access pre-recorded evidence. We consider strict rules are needed to govern access to pre-recorded evidence in cases involving sexual and family violence. For example, we do not consider a defendant should be given a copy of (or a link to) the complainant's pre-recorded evidence in such a case. This is to minimise the risk the defendant might use the video recording to harass or intimidate a complainant, give it to others to watch or put it on the internet.[30]

17.36 We note there is already a regime in place for accessing court documents in the Senior Courts (Access to Court Documents) Rules 2017 and District Court (Access to Court Documents) Rules 2017. Relevant access rules include the following:

- A judge may, on their own initiative or on request, direct that judgments, orders, documents or files may not be accessed without the permission of the judge.[31]
- A non-party may not access a document or court file in certain proceedings (including a proceeding brought under the Domestic Violence Act 1995) unless the judge is satisfied there is a good reason for permitting access.[32]
- A member of the public may only access a document containing evidence of a complainant or a person giving propensity evidence, or an electronically recorded document of interviews with a defendant if a judge permits it.[33]

---

29 We also note that complainants will be entitled to name suppression in many cases.

30 See above at [9.93] and [9.97] for discussion of these concerns in relation to evidential video interviews.

31 Senior Courts (Access to Court Documents) Rules 2017, r 5; and District Court (Access to Court Documents) Rules 2017, r 5.

32 Senior Courts (Access to Court Documents) Rules 2017, r 7; and District Court (Access to Court Documents) Rules 2017, r 7.

33 Senior Courts (Access to Court Documents) Rules 2017, r 8(4)(b) and (c); and District Court (Access to Court Documents) Rules 2017, r 8(3)(b) and (c).

- A judge may direct that the prosecutor, defendant or defendant's lawyer may not access the court file or any document relating to the criminal proceeding without the permission of the judge.[34]
- Where a judge grants a request for access to a court document, this may be granted subject to any conditions the judge thinks appropriate.[35]

17.37 Given the wide definition of "document" applied in those Rules, we consider the Rules are likely to apply to pre-recorded evidence that is in the custody and control of the court.[36] However, consideration could be given to specifically referring to pre-recorded witness evidence in the Rules.

17.38 The provisions in section 106 of the Act relating to video record evidence are also applicable. A video record that is to be offered by the prosecution as an alternative way of giving evidence must be offered for viewing by a defendant or their lawyer before it is offered in evidence, unless the judge directs otherwise.[37] The defendant's lawyer must be given a copy of a video record that is to be offered by the prosecution as an alternative way of giving evidence, unless 106(4A) applies or the judge directs otherwise.[38]

17.39 Any review of the Regulations could consider whether additional provisions are needed to regulate access to pre-recorded evidence. Our preliminary view is that regulations might be necessary to cover matters such as:

- the form in which access should be given, for example, whether a person would need to view the recording at a court or whether they could be provided with a secure website link or a DVD copy;
- whether there is an obligation to provide a transcript of the pre-recorded evidence to the defence and who is responsible for preparing this;[39] and
- provision for experts and for people considering applications for exercise of the Royal prerogative of mercy to have access to pre-recorded evidence, where appropriate.[40]

17.40 We consider regulations should be developed to create obligations around custody and use of records of pre-recorded evidence. Where appropriate, these provisions should be aligned with the regulations that apply to custody and use of video records of interviews

---

34 Senior Courts (Access to Court Documents) Rules 2017, r 9(3)(a); and District Court (Access to Court Documents) Rules 2017, r 9(3)(a).

35 Senior Courts (Access to Court Documents) Rules 2017, r 11(7); and District Court (Access to Court Documents) Rules 2017, r 11(7). The request may also be granted without conditions, refused or referred to a Registrar for determination.

36 The term "document" in relation to a criminal proceeding has the meaning set out in s 5 of the Criminal Procedure Act 2011: Senior Courts (Access to Court Documents) Rules 2017, r 4; and District Court (Access to Court Documents) Rules 2017, r 4. The meaning set out in s 5 includes "a document in an electronic form", "information recorded or stored by means of a tape recorder, computer or other device" and "photographs, films, negatives, tapes, or any other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced".

37 Section 106(3).

38 Section 106(4). In Chapter 9, we have recommended amendments to s 106(4)–(4C).

39 See reg 28 for the obligation to provide a transcript in respect of a video record covered by the Regulations.

40 See regs 20(1)(f), 20(3), 20A and 25–27 for provisions that apply in respect of a video record covered by the Regulations. We note that if the Criminal Cases Review Commission Bill 2018 (106-1) is passed, regulations may be needed to allow the Criminal Cases Review Commission to access pre-recorded evidence.

in Part 1 of the Regulations. These regulations should be framed in technology-neutral language and could include:

- the obligation to safeguard the record or means of accessing the record;[41]
- limitations on when the record may be shown and what it may be used for;[42]
- a prohibition on making any copies of the record;[43] and
- obligations to return or delete copies of the record, and any transcript of the record, at the conclusion of proceedings.[44]

17.41 Rather than having a separate regime in the Regulations, it may be possible to have regulations that apply to video records of both evidential video interviews and pre-recorded evidence.

Technical and operational matters

17.42 The submission made by BVA The Practice[45] set out a number of technical and operational matters that would need to be considered in relation to pre-recording.[46] It said the recording must be high quality and should have separate video feeds of the witness and questioning lawyer, and the capture technology must work seamlessly so the witness is not disrupted during pre-recording. BVA said the footage must be captured and stored in a way that enables it to be edited and transcribed. The footage must be capable of being easily shared with counsel, and not on a proprietary system that only works on certain devices. BVA said that the replay equipment must be high quality and be able to be used effectively in court.

17.43 Some technical and operational matters may not be appropriate to include in regulations, for example, the type of recording equipment to be used or the position of the screens in a courtroom. There may, however, be benefit in regulating matters such as:

- what must be on a video record (including the date and time);[47]
- what happens if there is technical failure during the pre-recording;[48]
- provisions that apply if a judge has made an order under section 106(7) of the Act for material to be edited from the pre-recorded evidence;[49] and
- how the pre-recorded evidence is to be stored by the court.[50]

---

41 See, for example, reg 31. See also reg 58.

42 See, for example, regs 20, 20A, 24, 24B, 32 and 34.

43 See, for example, regs 20A(2), 24, 24B, 24C, 27 and 33.

44 See, for example, regs 39–48.

45 This firm has a Crown Warrant for Palmerston North and the wider Manawatu region.

46 BVA suggested that there should be a pilot project and the outcome of this should guide the development of regulations to govern pre-recording of evidence.

47 See, for example, regs 8–10.

48 See, for example, reg 13.

49 See, for example, reg 55(4).

50 See regs 22 and 24B for provisions that apply if the Family Court or a judge or judicial officer in a civil proceeding has been supplied with a copy of a video record by Police.

SECURITY AND USE OF TRANSCRIPTS

17.44 A prosecutor must provide a defendant (or their lawyer) with a typed transcript of a video record of witness evidence that is intended to be offered by the prosecution as evidence in a criminal proceeding. This must be done as soon as practicable after a defendant has entered a not guilty plea.[51] While there are a number of rules regulating the custody and use of video records, there are very few rules governing custody and use of those transcripts in criminal proceedings. In light of the fact that transcripts may include very sensitive and personal information, we have considered whether greater regulation of transcripts is desirable.

17.45 Regulations 29 to 33 contain rules regarding the custody and use of copies of video records provided to defence counsel under section 106 of the Act. The video record:

- must be placed in safe custody;[52]
- may only be used for specified purposes;[53]
- must not be given to any person (other than an expert) without the permission of a judge;[54]
- may not be copied without the permission of a judge;[55]
- may only be viewed by the defendant in the presence of their lawyer;[56] and
- must be returned to police after the final determination of proceedings.[57]

17.46 These rules do not apply to the transcripts of those video records in criminal proceedings. The one restriction in Part 1 of the Regulations that does apply to transcripts is the general requirement that copies of video records and transcripts must be kept in a way that preserves the privacy of the people recorded on them.[58] While this requirement applies to a transcript in the custody of a lawyer, it does not apply to a transcript held by a defendant.[59] Part 4 contains a general requirement to keep a transcript of a mobile video record in a way that preserves the privacy of the people recorded on it.[60] This requirement is not restricted to any particular person, so would apply to defendants who are given a copy of a transcript of a mobile video record, as well as to lawyers.[61]

17.47 The Act and the Regulations do provide controls around access to and use of transcripts of video records in family and civil proceedings. Where a transcript is supplied to Oranga

---

51 Regulation 28. This requirement also applies to mobile video records by virtue of reg 56.

52 Regulation 31(1).

53 Regulation 32(1).

54 Regulations 32(2) and 32(3).

55 Regulation 33.

56 Regulation 32(5).

57 Regulation 31(2).

58 Regulation 37. This applies to transcripts by virtue of reg 48.

59 By virtue of reg 48, the requirements of reg 37 apply to a transcript or copy of a transcript in the custody of a lawyer for a party to the proceeding to which the transcript relates, the Police, the responsible department (currently Oranga Tamariki–Ministry for Children), the Family Court and an authorised advisor.

60 Regulation 58.

61 The requirement to provide a transcript to a defendant or a defendant’s lawyer in reg 28 applies to proceedings involving a mobile video record by virtue of reg 56.

Tamariki–Ministry for Children or the Family Court, it must be placed in safe custody, may only be copied or shown to others in certain circumstances and must be returned to police on request.[62] Where a judge or judicial officer has ordered disclosure of a transcript of a video record to the parties in civil proceedings (under section 119A of the Act), the transcript must be placed in safe custody, must not be copied or shown to others without permission of the judge or judicial officer and must be returned to police.[63]

17.48 Our Issues Paper noted that, if an unauthorised person were to access a transcript of a complainant's video interview with police, this would be a clear breach of the privacy of the people involved. Interviews can contain highly sensitive information, particularly in sexual and family violence cases. Unauthorised disclosure of this information could be extremely distressing for complainants and put their safety at risk. In our Issues Paper, we explained we had received anecdotal reports about transcripts of evidential video interviews in criminal cases being circulated, sometimes by defendants in prison. This has been attributed to the lack of regulation in this area.

17.49 We asked whether the regulations governing transcripts of video records in criminal proceedings sufficiently preserve the privacy of the people to whom they relate. If submitters considered they did not, we asked how the regulations could be improved. We suggested the regulations that restrict access to and use of video records and transcripts in family and civil cases could be extended so they also apply to transcripts in criminal cases. We noted that this could be done in whole or in part. For example, the defendant could be entitled to access the transcript but be restricted from copying it or showing it to any other person. Regulations could also govern the transcript's safe custody and return to police.

17.50 We received five submissions on this issue.[64] BVA, the New Zealand Law Society and the Public Defence Service did not support any changes that would restrict defendants' access to transcripts. They emphasised that defendants are entitled to access the evidence against them, and their ability to prepare their defence and properly instruct counsel depends on it. The New Zealand Law Society and the Public Defence Service considered that access to transcripts was particularly important given the current restrictions on defence access to video records of evidence of child complainants and witnesses in sexual and violent cases.[65] The New Zealand Law Society said that restricting a defendant to viewing a transcript in the presence of counsel would be impractical and unworkable. BVA commented that prisons are not adequately resourced to provide defendants with a place to store and study disclosure material (such as transcripts).

17.51 The Public Defence Service noted that a transcript is no different to any other witness statement and said it did not need special protections. The New Zealand Law Society observed that many other categories of sensitive evidence are routinely disclosed to defendants in prison (such as post-mortem statements, photographs of injuries and witness statements containing sensitive personal information). It was not aware of any substantive evidence that defendant access to transcripts was subject to widespread

---

62 Regulations 23–24. Oranga Tamariki–Ministry for Children is the "responsible department", which is defined in reg 3 as "the department that is, with the authority of the Prime Minister, for the time being responsible for the administration of the Oranga Tamariki Act 1989".

63 Regulation 24C.

64 BVA, the New Zealand Bar Association, the New Zealand Law Society, Police and the Public Defence Service.

65 See discussion of this issue above at [9.91]–[9.123].

abuse and said the appropriate response to any concerns is to provide legislative sanctions for misuse.

17.52 The New Zealand Bar Association did not see any basis for treating transcripts any differently from video records in terms of restrictions on use or distribution. Although it considered a video record is more sensitive, it said this does not justify the current divergence in obligations. Police supported additional restrictions governing access to and use of transcripts. It also noted that some defence counsel were seeking immediate access to transcripts, despite the prosecution not being required to provide them until a not guilty plea has been entered.[66] Police said earlier preparation of a transcript is not possible from a resourcing or financial perspective.

17.53 We note that defendants are entitled to timely and detailed disclosure of the case against them. This requires access to transcripts of video interviews to allow defendants to prepare their defence and instruct counsel.

17.54 We consider it desirable to provide greater regulation of the use of transcripts whilst ensuring defendants have access to the case against them and can effectively prepare their defence. We consider some of the restrictions and controls that apply to video records and to transcripts in civil and family proceedings (discussed at [17.45] and [17.47]) could be applied to transcripts provided in criminal proceedings without undermining a defendant's ability to know the case against them and prepare their defence.

17.55 We do not consider it desirable to restrict a defendant to accessing a transcript solely in the presence of their lawyer. Transcripts of video interviews may be lengthy, and defendants are likely to need time to read, absorb and reflect on the content. It is impractical to expect this to take place only in the presence of the defendant's lawyer. Further, unrepresented defendants need to be able to access transcripts to prepare for their hearing.

17.56 We consider it would be desirable if people who are entitled to a copy of a transcript (including lawyers and defendants) have an obligation to keep the transcript secure to ensure that others are not able to gain access to it. We realise there may be some limitations on the steps that can be taken by defendants who are in prison. We note the feedback that prisons are not set up to provide defendants with a place to store transcripts securely. However, it seems unsatisfactory from a complainant's perspective that a transcript of their interview, which may contain deeply personal and sensitive information, will not necessarily be held securely and may be available to other inmates. If the Regulations are reviewed, we suggest the Ministry of Justice consult with the Department of Corrections to determine how transcripts can be safeguarded when held by defendants in prison.

17.57 We note that defendants already appear to be under an obligation to keep transcripts of mobile video records in a way that protects privacy.[67] At a minimum, we suggest that the obligation to keep a copy of a transcript in a way that preserves the privacy of the

---

[66] Regulation 28(1) requires the prosecution to provide a typed transcript to the defence "as soon as practicable after the defendant has pleaded not guilty".

[67] Regulation 58 provides: "Until destroyed, a mobile video record, and any copy or transcript of the mobile video record, must be kept in a way that preserves the privacy of the persons recorded on it."

people recorded on it should be extended to defendants in all cases (not just in cases involving mobile video records).[68]

17.58 The Regulations could provide that a person who is entitled to a copy of a transcript must only use it for specified purposes (such as preparing the case), must not make a copy of the transcript without the permission of the judge (other than copies used solely for the lawyer's preparation), and must not provide the transcript to another person. These obligations would help to discourage defendants from circulating transcripts to others, including fellow inmates.

17.59 The Regulations could require lawyers and defendants to destroy, delete or return their copy of a transcript at the conclusion of the proceeding.

17.60 If the Regulations are amended to provide greater restrictions on use of transcripts, we suggest consideration should be given to sanctions for breaching these restrictions. We note there are offence provisions for misuse of video records in section 119 of the Act and regulation 63.[69] We consider that offence provisions could cover copying or supplying transcripts and unauthorised possession. In light of the difficulties defendants may face in securing transcripts in a prison context, we do not consider that inadvertent failure to keep the transcript secure should be an offence.

17.61 We note the concern expressed by Police that some defence counsel seek copies of transcripts earlier than required by the Regulations. This was not an issue raised by other submitters. We do not consider that any changes to the Regulations are required in response to this submission. In Chapter 9, we propose that defence counsel should be entitled to a copy of a complainant's evidential video interview (including interviews with child complainants and witnesses in sexual and violent cases).[70] This might result in defence counsel being less reliant on transcripts and reduce requests for immediate access to them.

DEFENCE COUNSEL ACCESS TO EVIDENTIAL VIDEO INTERVIEWS

17.62 In our Issues Paper, we asked whether section 106(4)–(4C) of the Act and regulation 20B, which restrict defence counsel access to video records of child complainants and witnesses in sexual or violent cases, had created any difficulties in practice. In Chapter 9, we discuss the submissions we received on this issue and conclude that the restrictions are problematic.[71] We recommend that section 106(4)–(4C) should be amended so that any video record that is to be offered as an alternative way of giving evidence must be given to the defendant's lawyer before it is offered in evidence, unless a judge orders otherwise.[72]

17.63 If section 106(4)–(4C) is amended as we propose, regulation 20B would no longer be required. This regulation refers to section 106(4A) and provides that defence counsel can only view video records of child complainants and witnesses in sexual or violent cases at

---

68 As explained above at [17.46], the requirement in Part 1 of the Regulations to keep transcripts in a way that preserves the privacy of the people recorded on it does not apply to a transcript held by a defendant.

69 See above at [9.118]–[9.119]

70 See above at [9.114] to [9.123].

71 See above at [9.95]–[9.122].

72 Recommendation 15.

certain places.[73] We suggest that any review of the Regulations could consider revoking this regulation. We also note that several other minor amendments to the Regulations would be necessary if section 106(4)–(4C) is amended.[74]

APPLICATION OF THE REGULATIONS TO MILITARY PROCEEDINGS

17.64 Our Issues Paper discussed the application of the Regulations to military proceedings and whether the Regulations are fit for purpose in a military context.

17.65 Regulation 3A was inserted into the Regulations in 2017 to facilitate the use of video record evidence in military proceedings. It provides that, if the Evidence Act provisions relating to video record evidence apply in a military proceeding, the Regulations also apply to the proceeding, with two exceptions. One of those exceptions is Part 4 of the Regulations, which relates to mobile video records.[75]

17.66 In our Issues Paper, we expressed a preliminary view that the exclusion of Part 4 from military proceedings might not be justified. We suggested there may be good policy reasons to enable the Defence Force to offer electronic recordings in evidence and to use new digital technology such as Evidence.com. We suggested it may also be timely to review whether the Regulations should continue to apply to military proceedings or whether it would be better to have separate tailor-made regulations.

17.67 We asked submitters whether there are any problems, or anticipated problems, in the application of the Regulations to military proceedings.

17.68 The New Zealand Law Society was unaware of any problems in the application of the Regulations to military proceedings. It said that, as far as practicable, law and procedures in military proceedings should be aligned with general criminal law and practice. The New Zealand Bar Association said that, in principle, it did not believe there was a rational basis for taking a different approach to military proceedings in relation to the matters dealt with in the Regulations.

17.69 We consulted the New Zealand Defence Force and the Judge Advocate General on the application of the Regulations to military proceedings. Both indicated that it may be useful if the Regulations covering mobile video record evidence in domestic violence matters were applicable to military proceedings, even if these were rarely used in practice. Although police generally prosecute cases of family violence involving military personnel, it is possible that such a case could come before the military justice system. The hypothetical example was given of an incident arising from a close personal relationship between two service members in an overseas area of operation where there are no police to attend.

17.70 Our consultation indicated that the language used in regulation 3A is ambiguous as to whether the Regulations are intended to apply to summary trials and summary appeals,

---

[73] These places are: premises under the control of Police or a Crown lawyer; other premises agreed to by Police or a Crown lawyer; and other premises as directed by a judge or judicial officer.

[74] In particular, amendments would be required to regs 20, 24D, 32, 56 and 57. These regulations all refer to s 104 and/or reg 20B.

[75] The other exception is reg 4(1)(b), which refers to a proceeding commenced by a Police employee. (We note that reg 3A contains a minor error by referring to reg "4(b)").

or whether they only apply to Court Martial trials.[76] The language seems to indicate an intention to apply to more than one kind of military proceeding. Regulation 3A does not specifically refer to Court Martial proceedings; rather, the heading refers to "certain military proceedings" and the text refers to the legislation under which proceedings may be brought. The Judge Advocate General commented that the reference to proceedings being conducted under "either of" the Armed Forces Discipline Act 1971 or the Court Martial Act 2007 was not quite correct as proceedings before the Court Martial actually engage elements of both Acts. Summary proceedings are brought under the Armed Forces Discipline Act.

17.71 However, the Regulations only apply when provisions of the Evidence Act relating to video record evidence are applied under the Armed Forces Discipline Act or the Court Martial Act. In Court Martial proceedings, the rules of evidence to be followed are those that apply in the High Court for criminal proceedings (including those in the Evidence Act).[77] The provisions of the Evidence Act that relate to jury trials apply to proceedings of the Court Martial, to the extent that they are applicable and subject to any necessary modifications.[78] This includes section 105(1)(b) of the Evidence Act, which enables a judge to direct that a witness's evidence is to be given in an alternative way so that:[79]

> …any appropriate practical and technical means may be used to enable the Judge, the jury (if any), and any lawyers to see and hear the witness giving evidence, in accordance with any regulations made under section 201.

17.72 There are no references to the Evidence Act in the Armed Forces Discipline Act. In proceedings under Part 5 and Part 5A of that Act (summary trials and appeals), all relevant evidence is admissible, subject to a general exclusionary rule.[80] There is therefore no requirement to apply provisions of the Evidence Act relating to video record evidence to summary trials and appeals. The Judge Advocate General said he was not sure the Regulations were intended to apply to summary trials and appeals and that, if it was the intention, it seems doubtful this has been achieved.

17.73 Both the New Zealand Defence Force and the Judge Advocate General considered it would be beneficial to have bespoke regulations covering the use of video recordings in military proceedings. The Judge Advocate General told us that the Regulations are not a good fit for the military justice system and highlighted some areas where the language of the Regulations does not easily fit with the context of military proceedings. For example, the references to judges and lawyers in the Regulations are not applicable to summary trials, where a defendant appears before a disciplinary officer and is represented by a

---

76 Regulation 3A provides (in part):

> 3A Application of regulations to certain military proceedings
>
> If the provisions of the [Evidence] Act relating to video record evidence are applied under the Armed Forces Discipline Act 1971 or the Court Martial Act 2007 to proceedings under either of those Acts,—
>
> (a) these regulations, apart from regulation 4(b) and Part 4, must be read as applying to those proceedings;
>
> …

77 Court Martial Act 2007, s 71.

78 Court Martial Act, s 70.

79 Court Martial Act, s 70(2).

80 Section 117ZK. Evidence must be excluded if its probative value is "outweighed by the risk that the evidence will (a) have an unfairly prejudicial effect on the outcome of the proceedings; or (b) needlessly prolong the proceedings".

defending officer.[81] The Judge Advocate General noted that, in the military system, a judge is not involved until quite late in the proceedings. He suggested that some of the tasks the Regulations require a judge to perform could instead be performed by the Judge Advocate General.[82] Although regulation 3A provides that any reference to Police is to be treated as including a reference to the Military Police, we were told by the New Zealand Defence Force and the Judge Advocate General that Military Police actually have quite a different role from that of Police. For example, Military Police do not commence prosecutions and neither do they have any law enforcement powers.[83]

17.74 The Judge Advocate General suggested that military-specific regulations could parallel the effect of the Evidence Regulations but use the language of military justice. He suggested these could be recast as Armed Forces Discipline Rules of Procedure, Armed Forces Discipline Regulations or Defence Force Orders (Discipline). He saw value in having as many rules as possible contained in one place. He said this is particularly important given the extra-territorial effect of the Armed Forces Discipline Act 1971 and the expectation that the military justice system can operate effectively in any environment at home or abroad.

17.75 The New Zealand Defence Force noted that the Ministry of Defence is currently undertaking an independent review of the military justice system and suggested these issues could be included as part of that work.[84]

17.76 We consider it would be preferable to have separate evidence regulations for military proceedings. There are a number of differences between the civilian and military justice systems, which can make the language of the Evidence Regulations inappropriate for a military context. This would contribute to the clarity and accessibility of the law of evidence for military personnel. These regulations should facilitate the use of video record evidence in cases that may come before the military justice system, which could include family violence matters. We consider that military evidence regulations should be consistent with the Evidence Regulations wherever possible. In addition, it will be important to ensure any evidence regulations applying to the military justice system clarify whether they apply to summary trials and summary appeals as well as Court Martial proceedings.

OTHER ISSUES WITH THE REGULATIONS

17.77 We discuss below three additional matters not addressed in our Issues Paper.

Family Court

17.78 One submitter commented that regulation 22 does not provide a process for a Family Court judge to obtain a copy of an evidential video interview of a child complainant for use in proceedings under the Domestic Violence Act. The submitter said this was a

---

81 Although he noted that this issue would be resolved by a conclusion that the Regulations do not apply to summary trials and appeals.

82 For example, reg 33, which provides "No person may make any copies of a lawyer's copy without the permission of a Judge."

83 We were told that Military Police only exercise the powers granted to them under the Armed Forces Discipline Act 1971.

84 We consulted the Ministry of Defence, which told us it did not wish to provide a submission on the application of the Evidence Regulations to military proceedings as its review of the military justice system was ongoing.

significant issue where protection orders are sought on behalf of children and defences filed. The submitter suggested that regulation 22 should be amended to provide the same processes as for accessing a video record in proceedings under the Care of Children Act 2004 or Oranga Tamariki Act 1989.

17.79 The New Zealand Law Society raised this issue in its submission on the Family and Whānau Violence Legislation Bill 2017.[85] The New Zealand Law Society suggested that regulations 22 and 24 should be amended to ensure that evidential interviews of children relating to criminal complaints and any transcripts are available to the Family Court in family violence proceedings.[86]

17.80 We note that regulation 22 is based on regulation 11B of the Evidence (Videotaping of Child Complainants) Regulations 1990.[87] That regulation allowed a Family Court judge to request a copy of a videotape of a child complainant's evidence in a sexual case for the purposes of proceedings under the Guardianship Act 1968 or the Children, Young Persons, and Their Families Act 1989. We have not located any background information concerning either the 1990 Regulations or the present Regulations to explain why regulation 22 is limited to certain Family Court proceedings.

17.81 Section 119A(2) of the Evidence Act allows a judge or judicial officer to order disclosure of an evidential video interview that may be given as evidence in a criminal proceeding to the parties in separate proceedings. However, this provision applies to proceedings *other than* criminal or Family Court proceedings.[88] It seems unsatisfactory that, in a general civil proceeding, an application could be made to access a video record of an interview with a child but there is no way of seeking access to that video record (and the associated transcript) when a protection order is sought on behalf of that child. We suggest this issue could be considered in any review of the Regulations.

---

85 New Zealand Law Society "Submission on Family and Whānau Violence Legislation Bill 2017" 24 May 2017, at [33]. The New Zealand Law Society did not refer to this issue in its submission on our Issues Paper.

86 Regulation 23 provides that where a video record is supplied to the Family Court under reg 22, police must also supply a copy of any existing transcript and this must be placed in safe custody. Regulation 24 provides that the Family Court may only copy or show the transcript for certain purposes.

87 These regulations were revoked, as from 1 August 2007, by reg 50 of the Evidence Regulations 2007.

88 Section 119A(1) provides:

> Unless subsection (2) applies, the Police must not disclose a copy or a transcript of any video record to which this section applies to parties in any proceedings other than—
>
> (a) criminal proceedings (disclosure of which is provided for in section 106); or
>
> (b) Family Court proceedings (disclosure of which is provided for in regulations made under section 201).

Section 119A(7) defines proceedings, for the purposes of the section, as proceedings in any court or tribunal other than criminal or Family Court proceedings. The rationale for s 119A(1) is discussed in the Evidence Amendment Bill 2015 (27-2) (select committee report) at 4–5:

> We were concerned that some bodies, such as tribunals, have powers to call and consider video record evidence but are not subject to the regime prescribed by the Act and regulations. Because there are no specific rules governing access to, and use of, video records outside criminal and family court proceedings, we make a number of recommendations to ensure a clear and broadly uniform regulatory approach to prevent misuse of video records. We recommend inserting new clause 33A, which would insert new section 119A(1), to prohibit the Police from releasing a video record of evidence to parties to proceedings outside criminal or family courts unless the relevant body orders it. We also recommend inserting new clause 33A, which would insert new section 119A(2) and 119B, to provide that the body may order release of the video record only if it would not jeopardise any pending criminal trial, and it is in the interests of justice to do so.

Judicial directions to address myths and misconceptions in sexual and family violence cases

17.82 In Chapter 12, we recommend that judicial directions should be developed to address myths and misconceptions that jurors may believe in sexual and family violence cases. We recommend these directions should be contained in a publicly available jury trials bench book, with the proviso that sufficient funding must be provided to enable these to be developed and regularly updated by the Institute of Judicial Studies.[89] If this recommendation is not adopted, we have suggested the judicial directions could be contained in the Evidence Regulations. We note that there is precedent for including judicial directions in the Regulations, namely regulation 49, which contains a judicial direction about the evidence of very young children.

Regulations are too repetitive

17.83 The New Zealand Bar Association commented that the Regulations are "prolix and repetitive" and apply substantially similar use and custody obligations to a range of recipients. They suggested the Regulations could contain a generic set of obligations (such as using a record for the purpose for which it was provided, not giving the record to others and destroying copies) and modifying their application where necessary.

17.84 We consider that a review of the Regulations should endeavour to remove repetition. For example, the same provisions could regulate video records of police interviews and records of witness's pre-recorded evidence.

89 See above at [12.107].

CHAPTER 18

Other issues with the Evidence Act

INTRODUCTION

18.1 In the course of our review, a number of submitters raised issues with the operation of the Evidence Act that we had not addressed in our Issues Paper. We have considered all of their suggestions and, on balance, have concluded that none of these issues warrants an amendment to the Act. In this chapter, we respond to four of the more significant issues raised by submitters. We consider:

- whether the provisions controlling anonymous evidence given by undercover police officers require amendment;
- whether there should be additional controls on the admissibility of statements made by defendants to fellow prisoners;
- whether an amendment is necessary to clarify 'unusualness' in propensity evidence; and
- whether the Act should provide for greater use of communication assistance.

ANONYMOUS EVIDENCE GIVEN BY UNDERCOVER POLICE OFFICERS

18.2 New Zealand Police asked us to consider whether sections 108 and 109 of the Act should be amended to make it easier for undercover officers to give evidence anonymously.

18.3 Sections 108 and 109 of the Act allow undercover police officers to give evidence without disclosing their identity in certain circumstances. Section 108(1) sets out the types of proceedings where this protection is available, including where a person is proceeded against for an offence punishable by imprisonment of seven years or more (the seven year threshold), or an offence under the Misuse of Drugs Act 1975 punishable by imprisonment of five years or more.[1]

[1] The protection is also available in any proceeding including any conspiracy to commit or attempt to commit such an offence, see s 108(1)(d). The protection is also available in proceedings where a person is being proceeded against under the Criminal Proceeds (Recovery) Act 2009 or ss 142A–142Q of the Sentencing Act 2002: s 108(6).

18.4 Where this threshold is met, section 109 provides that the protection for the undercover officer is available once the Commissioner of Police files a certificate in the court in which the proceeding is to be held. The particulars the certificate must set out are:[2]

(a) that during the period specified in the certificate the witness was a member of the Police and acted as an undercover officer;[3]

(b) that the witness has not been convicted of any offence (or of any offence other than any offences described in the certificate);[4]

(c) that the witness has not been found guilty of a breach of the Police Code of Conduct (or of any breach other those described in the certificate);[5] and

(d) whether, to the knowledge of the Commissioner of Police, the credibility of the Police witness in giving evidence in any other proceeding has been the subject of adverse comment by a judge and, if so, a statement of the relevant particulars.[6]

18.5 Once the certificate is filed, the Act prohibits evidence being given or questions being asked that could reveal the undercover police officer's identity except by leave of the judge.[7]

18.6 Police suggested sections 108 and 109 should be amended to:

- enable undercover police officers to give anonymous evidence in proceedings relating to a wider range of offences;
- extend sections 108 and 109 to civil proceedings;
- require the certificate to refer solely to breaches of the Police Code of Conduct that amount to serious misconduct; and
- broaden the definition of "undercover Police officer" so it can apply to overseas officers deployed on New Zealand operations.

Witness anonymity for undercover police officers

18.7 Police said the section 108 protection for undercover officers should be more widely available. It explained that section 108 is useful when prosecuting one-off crimes such as homicide but that prosecuting incidental offending detected in the course of covert operations is problematic. Covert operations can reveal evidence of a range of lesser but contributory offences that fail to meet the seven year threshold. For example, the seven year threshold in section 108(1) means undercover officers cannot give evidence anonymously in relation to offences against any of the provisions of the Psychoactive Substances Act 2012 and only in relation to one offence against the Arms Act 1983.[8]

2 Evidence Act 2006, s 108(2)–(4).

3 Section 108(2)(a).

4 Section 108(2)(b).

5 Section 108(2)(c).

6 Section 108(3).

7 Section 109(1). Leave may be granted under s 109(1)(d) if it fulfils the test prescribed by s 109(2). Although the defence will have a copy of the certificate filed by the Police Commissioner detailing whether the officer has previously been convicted of an offence or found guilty of a breach of the Police Code of Conduct, it is difficult to see how the defence will be able to gather much, if any, information as to the officer's credibility without knowing their identity.

8 Arms Act 1983, s 54 (use or attempted use of firearm, airgun, pistol, imitation firearm, restricted weapon, ammunition, or explosive to resist or prevent arrest or commit offence) is the only Arms Act offence that meets the s 108(1) threshold.

Police said it will not risk the safety and skills of a trained undercover officer by prosecuting persons suspected of (incidental) offending that is not the target of an undercover operation or does not attract the section 108 protection. To do so could put the undercover officer at personal risk, jeopardise the operation on which they are deployed, and shorten or terminate their undercover career.

18.8 Police submitted that section 108(1) should be amended to enable undercover police officers to give anonymous evidence in proceedings relating to a wider range of offences. It suggested sections 108 and 109 should be amended to enable undercover officers to give evidence anonymously in any case where a person is, or is to be, proceeded against for any offence punishable by 6 months' imprisonment or more, or alternatively it should be amended to include any offence punishable by imprisonment under the Arms Act 1983 or the Psychoactive Substances Act 2013.[9]

Our view

18.9 We have concluded that section 108 should not be amended as suggested by Police. The threshold in section 108(1) is the primary mechanism for balancing the public interest in allowing the effective use of undercover officers against the defendant's right to know the identity of their accuser. The importance of this threshold was recognised by Parliament when debating the Evidence (Witness Anonymity) Bill in 1986. The then Minister of Justice, Rt Hon Geoffrey Palmer, stated:[10]

> While the Government recognises that many of the convictions entered on the evidence of undercover agents are for offences with a lower maximum penalty than is stipulated in the Bill, and that arise from summary proceedings, the policy is simply–and it remains–that when the police use undercover agents for both the detection and prosecution of criminal offences and want to call them in proceedings, and when anonymity is sought, the proceedings should be brought only when significant penalties are involved.

18.10 Richard Northey MP also commented:[11]

> Evidence was given to the select committee that the undercover police operation was developed to deal specifically with serious offences, and the select committee was not asked to extend that operation to all summary and minor offences. The police realised that it should be restricted to the more serious offences because of the restriction it placed on the right of an accused to face the accuser.

18.11 It is clear that Parliament's intention was to limit the use of anonymous evidence to only the most serious offending.[12] The threshold in section 108(1) demonstrates a commitment to recognising the importance of the defendant's rights in this area. We are not persuaded that the threshold should be lowered without further evidence that the status

---

9 Police made a similar submission during the 2013 Review of the Act. See Law Commission *The 2013 Review of the Evidence Act* (NZLC R127, 2006) at [11.85]–[11.95].

10 (18 September 1986) 474 NZPD 4442. The Evidence (Witness Anonymity) Bill led to the enactment of s 13A of the Evidence Act 1908. Section 13A and the other sections relating to witness anonymity were reproduced in the Evidence Code and substantially imported as ss 108–120 of the Evidence Act 2006 with only some cosmetic changes (relating to the reordering and separation of some provisions).

11 (23 September 1986) 474 NZPD 4538.

12 (18 September 1986) 474 NZPD 4442. Rt Hon Geoffrey Palmer noted:

> … [t]he point is really that when there must be inroads on fundamental legal rights we must be concerned to see that those inroads are confined and narrowed to those areas of greatest concern to society.

See also *Police v G* YC North Shore CRN08244000639, 14 May 2009 at [9].

quo is causing problems in practice. We note that sections 108 and 109 already contain fewer protections for the fair trial rights of defendants than sections 110–118, which govern the giving of evidence by other anonymous witnesses.[13] If the seriousness of the offences in the Psychoactive Substances Act and Arms Act are not reflected in their penalties, a better policy response would be to reconsider the offences in those Acts rather than the threshold in section 108.[14]

18.12 In terms of prosecuting incidental offending detected during the course of undercover operations, we note, that once the section 108(1) threshold is met and a certificate is filed by the Commissioner of Police, an undercover police officer may give anonymous evidence on any matter in that proceeding.[15] This means sections 108 and 109 will allow undercover officers to anonymously give evidence relating to incidental offending detected during undercover operations, even if that offending does not independently meet the section 108(1) threshold, so long as the incidental offending is prosecuted in the same proceeding as more serious charges.[16]

Application of sections 108 and 109 in civil proceedings

18.13 Police commented that sections 108 and 109 only apply in criminal proceedings and proposed that these provisions should be amended to extend their application to civil proceedings. Police said the current law has caused issues in practice and referred to the 2017 High Court decision in *A & H v Attorney-General*.[17] In that case, an undercover police officer rented a storage unit from A. Police searched the storage unit (using a fake search warrant) in an attempt to bolster the credibility of the undercover officer. After the termination of this investigation, A brought a civil action against Police. Police said mounting a defence in *A & H* was made more difficult because the undercover officer

---

13 Unlike anonymity orders for undercover police officers, which apply automatically on the Police Commissioner issuing a certificate, anonymity orders under ss 110–118 require a court order. Other key differences are: a court cannot appoint independent counsel to assist in safeguarding the rights of the defendant; the absence of the explicit statement that a certificate should only be issued in exceptional circumstances; and the lack of the requirement to demonstrate that revealing the protected person's identity would put the safety of that person at risk.

14 In 2017, the Law and Order Select Committee conducted a review into the illegal possession of firearms. The Committee considered that the Arms Act penalties were out of date and should be reviewed: see Law and Order Committee *Inquiry into issues relating to the illegal possession of firearms in New Zealand* (7 April 2017) at 17. The Ministry of Health recently released a report on the Psychoactive Substances Act where it observed that the current penalties in the Act may not reflect the actual risk of harm, as the Act has developed to address substances that were intended to be covered by the Misuse of Drugs Act. While not making recommendations, it observed that stakeholders would like higher risk substances to receive higher penalties: see *Review of the Psychoactive Substances Act 2013* (Ministry of Health, 6 December 2018). The review also referred to the Psychoactive Substances (Increasing Penalty for Supply and Distribution) Amendment Bill 2018 (16-1), which, if passed, would increase the penalty for sale and supply of psychoactive substances from 2 to 8 years, bringing it within the s 108 threshold. Importantly, we also note that the Psychoactive Substances Act has a health and harm minimisation focus: s 3. The Government has also announced its intention to classify two particularly harmful psychoactive substances as Class A drugs and introduce a new temporary class designation, C1, so that new drugs can easily be brought under the Misuse of Drugs Act where necessary. Consequently, manufacture or supply of these substances will be an offence meeting the s 108 threshold, and undercover police officers will be able to give evidence anonymously in the prosecution of such offences: see Hon Dr David Clark and Hon Stuart Nash "Crackdown on synthetic drug dealers" (press release, 13 December 2018).

15 Section 109(1).

16 This would not apply where charges against a single defendant are heard separately or where there is more than one defendant and separate trials are ordered.

17 *A & H v Attorney-General* [2018] NZHC 986, [2018] 3 NZLR 439.

could not give evidence anonymously. This meant Police did not call the officer as a witness out of fear for his safety.

Our view

18.14 We note there is already precedent (albeit pre-dating the Evidence Act 2006) for allowing undercover police officers to give evidence anonymously in civil proceedings. In *Withey v Attorney-General* the Court made an order allowing an undercover officer to continue using his undercover identity in a civil proceeding that arose following the termination of an undercover operation.[18] The Judge noted that, without the evidence of the undercover officer, the plaintiff would not be able to proceed adequately or effectively.[19] Therefore, as the police officer still had legitimate concerns for his own safety, it was appropriate for the Court to make an order preserving the officer's anonymity in the civil proceedings, using its inherent and implied powers.[20]

18.15 Ultimately, the scenarios that gave rise to *A & H* and *Withey* are highly unusual. This, together with the adaptability conferred by the court's inherent powers, suggests an amendment extending sections 108 and 109 to civil proceedings is unnecessary.

Matters that must be disclosed in the section 108 certificate

18.16 Police noted that a certificate filed in accordance with section 108(2) must disclose any instances where the undercover officer has been found guilty of breaching the Police Code of Conduct.[21]

18.17 Police said the requirement to include all breaches of the Police Code of Conduct in the certificate means minor instances of police misconduct are disclosed, even though they have no relevance to the officer's credibility. For instance, a practice has arisen of recording matters such as upheld complaints about an officer's language or attitude. Police submitted that only instances of serious misconduct or matters otherwise relating to an officer's honesty or integrity should have to be included in the certificate.

Our view

18.18 In our view, restricting the matters that must be disclosed in the certificate to *serious misconduct* would be too narrow–it could exclude minor matters that nevertheless have a bearing on an assessment of the officer's integrity.[22] It might also be unfair to the defendant in a more general sense. Once a certificate is filed by the Commissioner, a

---

18 *Withey v Attorney General* HC Palmerston North CP10/95, 18 May 1998.

19 At 9.

20 At 9. It is also notable that the cause of action, malicious prosecution, relied on demonstrating that the undercover officer's identification of Mr Withey was deliberately wrong and dishonestly pursued to effect his conviction. Even in this context, where the Court noted that the undercover officer's credibility would be of the utmost importance, an anonymity order could still be justified under the Court's inherent jurisdiction.

21 Section 108(2)(c) provides that the certificate must state:

> … that the witness has not been found guilty of a breach of the code of conduct prescribed under section 20 of the Policing Act 2008, or (as the case may require) that the witness has not been found guilty of any breach of that kind, other than a breach described in the certificate.

22 It could, for example, exclude matters such as "using any Police databases for any unauthorised or personal purpose" or "failure to declare a conflict of interest": Police Code of Conduct, May 2015 at 8. These are situations where an officer has put personal interests ahead of professional obligations and could have a bearing on an assessment of integrity.

defendant may only ask questions or lead evidence about the undercover officer's true identity with leave from the judge under section 109(1)(d). The judge must not grant leave, unless satisfied of the matters set out in section 109(2).[23] The Act evidently sets a high threshold for challenging the effect of a section 108 certificate. The certificate is likely to be the only material on which the defendant could base a section 109(1)(d) application. We are reluctant to recommend the suggested limitation on disclosure, which would further narrow the defendant's ability to challenge the effect of a section 108 order.

18.19 Additionally, we note that, if minor matters such as complaints relating to an officer's attitude or language are included in the certificate but truly have no bearing on credibility or integrity, these matters will not affect the officer's entitlement to give evidence anonymously.[24]

The definition of "undercover Police officer"

18.20 Police expressed concern that the definition of "undercover Police officer" does not include overseas law enforcement officers. It suggested this could cause problems where undercover operations are undertaken in partnership with other countries (particularly transnational online offending). Police noted that the definition of "undercover Police officer" in section 108(5) of the Evidence Act is narrower than the definition of "undercover Police officer" in section 65(5) of the Births, Deaths, Marriages, and Relationships Registration Act 1995, which is similar but includes members of a "corresponding overseas law enforcement agency".

Our view

18.21 Without evidence demonstrating that the current definition is causing problems in practice, we have decided not to recommend amending the definition.

DEFENDANT'S STATEMENT TO A FELLOW PRISONER

18.22 Section 122 governs judicial directions about evidence that may be unreliable in criminal proceedings tried with a jury. Section 122(2)(d) provides that a judge must consider giving a direction as to reliability whenever evidence is given of a statement by the defendant to another person while both the defendant and the other person were detained in prison, a police station or another place of detention.[25] There are no provisions in the Evidence Act that specifically control the admissibility of a statement made to a fellow prisoner; however, where the unfairly prejudicial effect of the evidence outweighs its probative value, the evidence may be excluded under section 8.

---

[23] Under s 109(2), the judge must be satisfied that:

(a) there is some evidence before the Judge that, if believed by the jury, could call into question the credibility of the witness; and

(b) that it is necessary in the interests of justice that the defendant be enabled to test properly the credibility of the witness; and

(c) that it would be impractical for the defendant to test properly the credibility of the witness if the defendant were not informed of the true name or address of the witness.

[24] Credibility is relevant to an application for leave under s 109(1)(d) to give evidence or put questions relating to the true identity of an anonymous police witness: s 109(2).

[25] Section 122(2)(d) was not in the Commission's 1999 proposed Code. It was added by the select committee, which cited concerns about the reliability of this kind of evidence: see Evidence Bill 2005 (256-2) (select committee report) at 12.

18.23 During consultation, two individual submitters noted that such evidence is inherently unreliable, especially when there is a likelihood the evidence was obtained by inducement. On this basis, they suggested its admissibility should be subject to specific controls in the Act.[26]

Our view

18.24 In New Zealand, the Supreme Court's 2011 decision in *Hudson v R* is the leading authority on evidence of a statement by a defendant to a fellow prisoner. The Supreme Court noted the potential risks of admitting such evidence, including that fellow prisoners are likely to have motives to co-operate with the authorities (in terms of sentence, parole or other reward).[27] The Court noted it has sometimes been suggested that evidence of an admission made by a defendant to a fellow prisoner should be treated as presumptively inadmissible; however, the Court explained that such an approach would not be consistent with the scheme of the Act.[28] Unlike the situation with hearsay evidence, for example, there is no reliability threshold for the admission of such evidence; rather, section 122(2)(d) and the scheme of the Act as a whole indicate "a legislative intention that reliability decisions ought to be made by a properly cautioned jury".[29] The position in England[30] and Australia[31] is similar.

18.25 Several Canadian provinces have introduced non-legislative measures aimed at reducing the risks posed by evidence of a statement by a defendant to a fellow prisoner, for example, the creation of the In-Custody Informer Committee in Ontario,[32] and prosecutorial guidelines on the use of such evidence.[33] In the United States there have

---

26 One individual submitter suggested we adopt similar non-legislative measures to those adopted in some Canadian jurisdictions. We refer to these below.

27 *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [33].

28 At [35]–[36].

29 At [36].

30 In England and Wales, the judge has discretion to exclude a confession under both common law and statute: see Police and Criminal Evidence Act 1984 (England and Wales), ss 78 and 82(3); and *R v Mason* [1987] 3 All ER 481. However, there is no requirement for a specific warning for evidence of defendants' statements to fellow prisoners: *R v Stone* [2005] EWCA Crim 105 at [84].

31 See Evidence Act 1995 (Cth), s 165; Evidence Act 1995 (NSW), s 165; Evidence Act 2008 (Vic), s 165; Evidence Act 2001 (Tas), s 165; Evidence Act 2011 (ACT), s 165; and Evidence (National Uniform Legislation) Act 2011 (NT), s 165. In Australia, such evidence will almost always necessitate a warning: *Pollitt v R* (1992) 108 ALR 1 (HC).

32 The Committee was created in 1998 and is an external body that must give approval for "in-custody informer evidence" to be given at trial on behalf of the Crown. See FTP Heads of Prosecutions Committee Working Group *Report on the Prevention of Miscarriages of Justice* (Department of Justice Canada, 2011) at 98–100; and Ontario Ministry of the Attorney General *Crown Prosecution Manual* (14 November 2017) at D19.

33 See Manitoba Department of Justice *In-Custody Informer Policy* (5 November 2001); Ontario Ministry of the Attorney General *Crown Prosecution Manual* (14 November 2017) at D19; Alberta Ministry of Justice and Solicitor General *Crown Prosecutor's Manual* (20 May 2008) at "In-Custody Informant Evidence"; Office of the Director of Public Prosecutions *Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* (1 October 2007) at 22-1; and Nova Scotia Public Prosecution Service *Crown Attorney Manual: Prosecution and Administrative Policies for the PPS* (8 August 2002) at "In-Custody Informers".

also been various state-level reforms addressing evidence of defendants' statements to fellow prisoners.[34]

18.26 While we agree that the admissibility of evidence of a statement by a defendant to a fellow prisoner may pose significant risks and requires careful scrutiny, the clear legislative intention was that reliability decisions should be made by a properly cautioned jury.[35] In the absence of evidence of problems in practice, we have concluded that this issue is beyond the scope of an operational review of the Evidence Act.

18.27 As the North American experience demonstrates, thorough consideration of this issue would require an assessment of, and consultation on, a broad range of possible legislative and non-legislative options for controlling the admissibility and use of this evidence. Reform efforts in Canada have underlined that "policies and practices aimed at reducing the risk of in-custody informers precipitating wrongful convictions must cut across the entire justice system".[36] These are not matters we have considered or consulted on in this operational review of the Act.

THE 'UNUSUALNESS' OF PROPENSITY EVIDENCE

18.28 Section 43(3) of the Act provides a list of factors a judge may take into account when considering the probative value of propensity evidence offered by the prosecution.[37] One of the factors is section 43(3)(f), which provides the probative value of propensity evidence should be assessed in light of:

> 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.

18.29 During consultation, Professor Elisabeth McDonald suggested the concept of 'unusualness' in section 43(3)(f) should be clarified. She noted the courts have interpreted the unusualness factor in two ways: some cases focus on whether the type of offending is unusual (by comparing different types of offending) while others focus on whether there is a distinctive pattern of offending.[38]

---

34 In 2011, California passed SB 687, which amended the Penal Code to prevent a judge or jury from convicting a defendant based on the uncorroborated testimony of a prison informant. A similar provision was also added to Art 38.075 of the Texas Code of Criminal Procedure in 2010. See also Illinois Statute 725 ILCS 5/115–21, which requires the court to conduct a pre-trial hearing to determine whether evidence of a defendant's statements to a fellow prisoner are reliable (on the balance of probabilities) unless the defendant waives the hearing. There is a constitutional requirement that exculpatory evidence that is material to either guilt or punishment must be disclosed: see *Brady v Maryland* 373 US 84 (1963) and *Giglio v United States* 405 US 150 (1972). However, certain states have introduced legislation that codifies (and builds on) this requirement. For instance, the Florida Supreme Court, responding to a report by the Florida Innocence Commission, amended the Florida Rule of Criminal Procedure 3.220 to heighten disclosure requirements when evidence of a defendant's statements to a fellow prisoner is used by the prosecution: see 3.220(b)(1)(M).

35 *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [36].

36 FTP Heads of Prosecutions Committee Working Group *Report on the Prevention of Miscarriages of Justice* (Department of Justice Canada, 2011) at 104.

37 We did not discuss propensity evidence in our Issues Paper as we were not aware of the propensity provisions causing any particular problems in practice. See Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018), at [1.53]–[1.54].

38 The other possibility for comparing types of offending is to compare offending to normal standards of behaviour. However, the courts have criticised such an approach as most criminal offending will be unusual when measured against normal standards of behaviour. See *R v Browne* [2017] NZHC 1281 at [34] and *Preston v R* [2012] NZCA 542 at [52].

Our view

18.30 Most of the cases that focus on the *type* of offending have involved sexual offending against children and sexual offending against adult women. For instance, there is a line of authority that has held that sexual offending against children is inherently unusual,[39] while sexual offending against adult women is not unusual.[40] This approach has been criticised on the basis that it focuses on the unusualness of the desire underpinning an offence rather than criminality, and the assertions about the unusualness of certain types of offending lack an empirical basis.[41]

18.31 Cases focusing on whether there is a *distinctive pattern* of offending consider whether a distinctive act or modus operandi is common to both the offending and the propensity evidence.[42] This approach has been criticised because section 43(3)(c) already directs a judge to consider the extent of the similarity between the propensity evidence and the alleged offending.[43] This approach has also been criticised for re-introducing the striking similarity test of the pre-Act common law.[44]

18.32 We agree with the criticisms about focusing on the *type* of offending when assessing unusualness under section 43(3)(f). When assessing unusualness, we consider the focus should be on whether there is a distinctive pattern of offending. This approach appears to align with the Commission's original intention in its 1999 report.[45] While there may be some overlap between sections 43(3)(c) and 43(3)(f), the two factors are not interchangeable as it is possible for offending to be similar yet not unusual.[46] Given that unusualness is only one factor in the assessment under section 43(3), we do not consider this approach risks re-introducing the concept of striking similarity.

---

39 *R v O* [2017] NZCA 472; *W v R* [2017] NZCA 405; *Cox v R* [2016] NZCA 60; *Robin v R* [2013] NZCA 105; *Smith v R* [2010] NZCA 361; and *Solicitor-General v Rudd* [2009] NZCA 401.

40 *Vuletich v R* [2010] NZCA 102. In *Vuletich*, an obiter comment suggested that arson would also be considered inherently unusual: at [38(f)].

41 See Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 5.5.3(1)(c). See also Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV43.04(8)]; and Elisabeth McDonald and others *Feminist Judgments Aotearoa New Zealand Te Rino: a Two-Stranded Rope* (Hart Publishing, Oxford; Oregon, Portland, 2017) at 467.

42 *Utatao v R* [2017] NZCA 162; *Avison v R* [2017] NZCA 358; and *R v Katipa* [2017] NZHC 1066. Examples of distinctive patterns of offending include a defendant repeatedly using a traditional Māori weapon to threaten complainants (*Utatao v R)* and a defendant repeatedly forging official documents to conceal offending (*Avison v R*).

43 Elisabeth McDonald and others *Feminist Judgments of Aotearoa New Zealand: Te Rino: a Two-Stranded Rope* (Hart Publishing, Oxford; Oregon, Portland, 2017) at 467.

44 Prior to the Evidence Act, the courts developed a requirement that the two events needed to be strikingly similar before they could be considered as propensity evidence (then called 'similar fact evidence'). This required the court to look for particular and often peculiar aspects of past events and test whether this peculiarity was replicated in the offending before the court: *Preston v R* [2012] NZCA 542 at [49].

45 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 197. Elisabeth McDonald points out that, while the Law Commission's original report does not comment in detail on the concept of unusualness, early drafts of s 43 were described as drawing on s 404(b) of the Federal Rules of Evidence, which focused on whether there is an unusual modus operandi.

46 For instance, it is possible for a defendant to commit offences that are similar without being unusual (for example, stealing money out of an employer's cash register), and for a defendant to commit offences that are similar and unusual (for example, stealing money out of an employer's cash register and leaving Monopoly money in its place). In the latter situation, the evidence has a greater probative value, and it is appropriate for s 43 to acknowledge this by including unusualness as a separate factor.

18.33 To date, decisions comparing different types of offending appear to be confined to the area of sexual offending.[47] The courts seem to be moving away from assessing unusualness by reference to the type of offending. For instance, in *Heke-Gray v R*, a 2018 case involving adult sexual offending, the Court of Appeal criticised the 'type of offending' approach and favoured focusing on the distinctive aspects of the offending.[48] In another 2018 decision, the Court of Appeal applied the distinctive pattern of offending approach in the context of a domestic violence case.[49] In light of this trend towards focusing on whether there is a distinctive pattern of offending when considering unusualness in section 43(3)(f), we have concluded that it is unnecessary to amend the provision.

COMMUNICATION ASSISTANCE

18.34 Section 80 of the Act enables a defendant or a witness to be provided with communication assistance to enable them to understand the proceeding or give evidence.[50] In most cases this will involve language interpretation, although the Act's broad definition of "communication assistance" enables courts to respond to communication difficulties however they manifest.[51] Our consultation highlighted that increased use of communication assistance earlier in the criminal justice process could be of considerable value.

18.35 Communication assistants (usually specialist speech-language therapists) may be engaged to carry out initial assessments of the communication needs of defendants and witnesses.[52] Generally, communication assistance focuses on planning future communication based on the initial assessment. Assistance is then provided if issues arise during the proceeding. For instance, at trial, a communication assistant may alert the judge if they believe a question has not been understood by the witness or they may use visual aids to assist a witness to understand questions.[53] They may also assist pre-trial to

---

47 This analysis seems to have been avoided in cases with drug offences. See *Ihaaka v R* [2013] NZCA 405; *Rei v R* [2012] NZCA 398; and *Preston v R* [2012] NZCA 542.

48 *Heke-Gray v R* [2018] NZCA 153 at [44].

49 Publication of this judgment remains subject to a suppression order at the time of completion of this report.

50 Defendants are entitled to communication assistance to enable them to understand the proceeding and to give evidence: s 80(1). Witnesses are entitled to communication assistance to enable them to give evidence: s 80(3). However, a judge has discretion to refuse communication assistance if they consider the defendant or witness is sufficiently able to understand questions put orally and can adequately respond to them: s 81(1). See *R v Moeke* [2017] NZHC 1314.

51 See s 4 definition of "communication assistance" and Andrea Ewing "Communication Assistance: Update" (paper presented to the New Zealand Law Society Criminal Law Symposium Intensive Conference, October 2018) 103 at 105–106. Ewing notes that communication assistance most commonly consists of language interpretation but would also include the provision of a hearing loop, specialist use of visual aids and diagrams to explain difficult questions or the use of a specialist intermediary to conduct a young complainant's evidence via cross-examination.

52 We are aware that, in the past, people not trained as speech-language therapists have provided communication assistance. There is currently no specific course or training scheme for communication assistants in New Zealand. Speech-language therapists with appropriate experience begin working as communication assistants by observing experienced communication assistants, who provide support and mentoring: Letter from Sally Kedge (Director of Talking Trouble Aotearoa NZ) to the Law Commission regarding Communication Assistants (21 November 2018) and email from Sally Kedge (Director of Talking Trouble Aotearoa NZ) to the Law Commission regarding Communication Assistants (30 November 2018).

53 See for instance *R v Rao* [2018] NZDC 14278 at [8]:

enable counsel to take instructions and to ensure the person understands the charges, evidence and court processes. Communication assistants are usually appointed to assist during a trial although occasionally they are appointed to assess a witness before they record an evidential video interview (EVI).

18.36 During consultation, the members of the District Court Kaupapa Māori Advisory Group and two judges from the Sexual Violence Court Pilot suggested there would be significant benefits in using communication assistants earlier in the criminal justice process, for example, where police are interviewing a vulnerable witness.

18.37 The District Court Kaupapa Māori Advisory Group noted that failure to identify communication assistance needs at an early stage could substantially undermine fair trial rights. It also highlighted the possibility that defendants and witnesses could go through the entire court process without their need for communication assistance ever being identified.

18.38 The judges from the Sexual Violence Court Pilot noted that failing to use communication assistance at a sufficiently early stage can cause unnecessary expenditure of time and money. By way of example, they referred to the 2018 District Court decision in *R v Rao* where an intellectually disabled complainant gave evidence (with a communication assistant) that she had initially lied for fear she would be in trouble for having sex with the defendant in a public place.[54] The Judge in that case commented that, if a communication assistant had been used when police originally interviewed the complainant, the truth would have emerged much earlier and that "money and time could [have been] saved".[55]

18.39 One member of the District Court Kaupapa Māori Advisory Group also noted there is a disconnect between asking the fact-finder to rely on an EVI of a witness conducted without communication assistance and that same witness having been assessed as needing communication assistance when giving evidence at trial.

18.40 Courts have not interpreted the entitlement to communication assistance as being limited to hearings. For example, in 2017, the High Court in *R v Aitchison* interpreted communication assistance as covering pre-recorded cross-examination.[56] The courts have also interpreted defendants' entitlement to assistance (to enable them to "understand the proceeding") as encompassing more than just the trial itself. In *Barton v R* the Court of Appeal agreed with the District Court that some special measures would be necessary to ensure Mr Barton, who had communication difficulties, had a fair trial.[57] The Court commented that this would perhaps include "other specialised communication assistance to enable Mr Barton to instruct counsel".[58] In *H v Police*, the High Court allowed an appeal and ordered a new trial where a cognitive impairment had undermined the defendant's ability to communicate with his counsel, thereby preventing

---

> [The communication assistant] drew very simple pictures to illustrate to the complainant what was being discussed. She then wrote a series of alternative responses for the complainant. They varied between: (i) "it happened like that"; (ii) "it didn't happen like that"; (iii) "I can't remember" and the complainant would be asked to point to which one applied.

54 See *R v Rao* [2018] NZDC 12581 and *R v Rao* [2018] NZDC 14278.

55 *R v Rao* [2018] NZDC 12581 at [10]–[11].

56 *R v Aitchison* [2017] NZHC 3222. See also Ashooja Chandra "Competent communication – the use of communication assistants in trial: *R v Aitchison* [2017] NZHC 3222" [2018] NZLJ 150.

57 *Barton v R* [2012] NZCA 295.

58 At [36].

him having a fair trial.[59] These cases envisage a broad scope for communication assistance, including in pre-trial matters.

Our view

18.41 Communication difficulties pose a significant obstacle for many defendants and witnesses.[60] The right to a fair hearing is fundamental to justice, and there is no doubt that some defendants require specialist assistance to fully access this right.[61] Greater use of communication assistance could help ensure fairness to all parties by better enabling witnesses to give the best possible evidence.[62] As *Rao* illustrates, the failure to use communication assistance early enough in the trial process may also compromise the quality of the evidence obtained and add to the cost and duration of the trial.[63]

18.42 Expertise is required to identify those who need communication assistance and to provide the necessary support. We are aware that, in some parts of the country, communication assistants are already unable to meet demand for their services.[64] We understand that some experienced communication assistants are currently training more speech-language therapists to carry out communication assistance roles. However, there are still fewer than 20 communication assistants nationwide. Moreover, most communication assistants work together on cases. We understand that only about six communication assistants have sufficient experience to handle a case independently. Accordingly, greater funding would be necessary if communication assistants were to be available to provide assistance at an earlier stage in the criminal justice process.

18.43 We support the pragmatic approach the courts have taken to communication assistance, and in light of this we do not consider legislative reform is necessary. We understand there is a High Court and District Court combined working party investigating how the use of communication assistance might be improved and how to achieve a more uniform approach to communication assistance nationwide.[65] We support these efforts to improve access to communication assistance across the justice system.

---

59 *H v Police* [2017] NZHC 714 at [28]–[30].

60 See S A Lount and others “Hearing, Auditory Processing, and Language Skills of Male Youth Offenders and Remandees in Youth Justice Residences in New Zealand” (2017) 60(1) JSLHR 121. In this recent New Zealand study, 64 per cent of the sample group of male youth offenders and remandees were identified as language impaired compared to 10 per cent of the control group.

61 See ss 25 and 27 of the New Zealand Bill of Rights Act 1990. Section 25 provides minimum standards of criminal procedure. Section 27 concerns the right to natural justice.

62 Promoting fairness to parties and witnesses is a purpose of the Evidence Act: s 6(c).

63 *R v Rao* [2018] NZDC 12581 and *R v Rao* [2018] NZDC 14278.

64 Letter from Sally Kedge (Director of Talking Trouble Aotearoa NZ) to the Law Commission regarding Communication Assistants (21 November 2018). Nearly all communication assistants contract through two organisations, Talking Trouble Aotearoa New Zealand and Moretalk. The communication assistants working for these organisations are trained speech-language therapists.

65 Talking Trouble Aotearoa NZ “Specialised communication assistance in justice contexts” <www.talkingtroublenz.org>.

Appendix 1

Draft Evidence Amendment Bill

Law Commission

Evidence Amendment Bill

Contents

			Page
1	Title		2
2	Commencement		2
3	Principal Act		2
4	Section 4 amended (Interpretation)		2
5	New section 11A inserted (Recognition of tikanga Māori)		3
	11A	Recognition of tikanga Māori	3
6	Section 22 amended (Notice of hearsay in criminal proceedings)		3
7	Section 22A repealed (Admissibility of hearsay statement against defendant)		3
8	Section 26 amended (Conduct of experts in civil proceedings)		3
9	New section 27AA inserted (Admissibility of statement against co-defendant)		3
	27AA	Admissibility of statement against co-defendant	3
10	Section 27 amended (Defendants' statements offered by prosecution)		3
11	Section 32 amended (Fact-finder not to be invited to infer guilt from defendant's silence before trial)		3
12	Section 37 amended (Veracity rules)		4
13	Section 38 amended (Evidence of defendant's veracity)		4
14	Section 44 replaced (Evidence of sexual experience of complainants in sexual cases)		4
	44	Evidence of sexual experience or sexual disposition of complainants in sexual cases	4
15	Section 44A replaced (Application to offer evidence or ask question about sexual experience of complainant in sexual cases)		5
	44A	Application to offer evidence or ask questions about sexual experience or sexual disposition of complainants in sexual cases	5

16	Section 47 replaced (Conviction as evidence in civil proceedings)	6
	47 Conviction evidence in civil proceedings	6
17	Section 49 replaced (Conviction as evidence in criminal proceedings)	6
	49 Conviction evidence in criminal proceedings	6
18	Section 85 amended (Unacceptable questions)	7
19	Section 106 amended (Video record evidence)	7
20	Section 122 amended (Judicial directions about evidence which may be unreliable)	7
21	New section 126A inserted (Judicial directions about misconceptions arising in sexual cases or family violence cases)	7
	126A Judicial directions about misconceptions arising in sexual cases or family violence cases	8
22	Section 202 repealed (Periodic review of operation of Act)	8

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Evidence Amendment Act **2019**.

2 Commencement

(1) **Section 21** comes into force on a date set by Order in Council.

(2) If **section 21** has not earlier been brought into force under **subsection (1)**, it comes into force on **X**.

(3) The rest of this Act comes into force on the day after the date of Royal assent.

3 Principal Act

This Act amends the Evidence Act 2006 (the **principal Act**).

4 Section 4 amended (Interpretation)

(1) In section 4(1), replace the definition of **sexual case** with:

> **sexual case** means—
>
> (a) a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for,—
>
> (i) an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961; or
>
> (ii) any other offence against a person of a sexual nature; and
>
> (b) for the purpose of **section 44** only, a civil proceeding that involves issues in dispute of a sexual nature

(2) In section 4(1), insert in its appropriate alphabetical order:

> **tikanga Māori** has the meaning given in **section 11A**

5 New section 11A inserted (Recognition of tikanga Māori)

After section 11, insert:

11A Recognition of tikanga Māori

(1) The court may regulate its procedures in relation to the giving of evidence in a way that recognises tikanga Māori.

(2) The court's power under **subsection (1)** must not be exercised in a way that is inconsistent with the provisions of this Act or any other enactment.

(3) For the purposes of this Act, **tikanga Māori** means Māori customary values and practices.

6 Section 22 amended (Notice of hearsay in criminal proceedings)

Repeal section 22(2)(i).

7 Section 22A repealed (Admissibility of hearsay statement against defendant)

Repeal section 22A.

8 Section 26 amended (Conduct of experts in civil proceedings)

(1) In the heading to section 26, after "**civil**", insert "**or criminal**".

(2) In section 26(1), after "civil", insert "or criminal".

9 New section 27AA inserted (Admissibility of statement against co-defendant)

Before section 27, insert:

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.

10 Section 27 amended (Defendants' statements offered by prosecution)

(1) In section 27(1), replace "section 22A" with "**section 27AA**".

(2) In section 27(3), delete "except section 22A".

11 Section 32 amended (Fact-finder not to be invited to infer guilt from defendant's silence before trial)

(1) In the heading to section 32, delete "**be invited to**".

(2) In section 32(2)(a), replace “no person may invite the fact-finder to” with “the fact-finder may not”.

12 Section 37 amended (Veracity rules)

Repeal section 37(3)(c).

13 Section 38 amended (Evidence of defendant’s veracity)

In section 38(2)(a), replace “challenged” with “given oral evidence challenging”.

14 Section 44 replaced (Evidence of sexual experience of complainants in sexual cases)

Replace section 44 with:

44 Evidence of sexual experience or sexual disposition of complainants in sexual cases

(1) In a sexual case, unless a Judge gives permission, no evidence can be given and no question can be put to a witness that relates directly or indirectly to—

(a) the sexual experience of the complainant with the defendant (except to establish the mere fact that the complainant has sexual experience with the defendant):

(b) the sexual experience of the complainant with any person other than the defendant:

(c) the sexual disposition of the complainant.

(2) **Subsection (1)** is subject to the application requirements in **section 44A**.

(3) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters, including the reputation for having a particular sexual disposition.

(4) The Judge must not grant permission under **subsection (1)** to bring the evidence or ask the question unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

(5) The permission of the Judge is not required to rebut or contradict evidence permitted to be given under this section.

(6) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, **subsection (1)** does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.

(7) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

15 Section 44A replaced (Application to offer evidence or ask question about sexual experience of complainant in sexual cases)

Replace section 44A with:

44A Application to offer evidence or ask questions about sexual experience or sexual disposition of complainants in sexual cases

(1) An application under **section 44(1)** must comply with **subsections (2) to (5)** (as relevant) unless—

(a) every other party has waived those requirements; or

(b) the Judge dispenses with those requirements.

(2) A party who proposes to offer evidence about the sexual experience or sexual disposition of a complainant must make a written application, which must include—

(a) the name of the person who will give the evidence; and

(b) the subject matter and scope of the evidence; and

(c) the reasons it is claimed that the evidence meets the test in **section 44(4)**.

(3) A party who proposes to ask any question about the sexual experience or sexual disposition of a complainant must make a written application, which must include—

(a) the name of the person who will be asked the question; and

(b) the question; and

(c) the scope of the questioning sought to flow from the initial question; and

(d) the reasons it is claimed that the question meets the test in **section 44(4)**.

(4) If any document is intended to be produced as evidence of the sexual experience or sexual disposition of a complainant, the application required under **subsection (2)** must be accompanied by a copy of the document.

(5) An application must be made and a copy of the application must be given to all other parties—

(a) as early as practicable before the case is to be tried so that all other parties are provided with a fair opportunity to respond to the evidence or question:

(b) unless a Judge otherwise permits under **subsection (6)**, no later than when a case management memorandum (for a judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011.

(6) The Judge may dispense with any of the requirements in **subsections (2) to (5)** if,—

(a) having regard to the nature of the evidence or question proposed to be offered or asked, no party is substantially prejudiced by the failure to comply with a requirement; and

(b) compliance was not reasonably practicable in the circumstances; and

(c) it is in the interests of justice to do so.

16 Section 47 replaced (Conviction as evidence in civil proceedings)

Replace section 47 with:

47 Conviction evidence in civil proceedings

(1) Evidence of the fact that a person has been convicted of an offence (**conviction evidence**) is admissible in a civil proceeding and on the proof of the conviction it will be presumed, unless the contrary is proved on the balance of probabilities, that the convicted person committed that offence.

(2) A party who wishes to offer conviction evidence must first inform the Judge of the purpose for which the evidence is to be offered.

(3) A party who wishes to offer evidence to rebut the presumption in **subsection (1)** (**rebuttal evidence**) must inform the Judge before doing so and indicate the nature of the evidence they propose to offer.

(4) This section—

(a) is subject to any other provision in this Act that excludes the conviction evidence or the rebuttal evidence:

(b) does not displace the availability of a challenge to conviction evidence under section 8, except that a challenge may not be made on the basis that the presumption in **subsection (1)** is itself unfairly prejudicial:

(c) is subject to section 48:

(d) does not affect a provision in any other enactment to the effect that a conviction or a finding of fact in a criminal proceeding is to constitute conclusive evidence for the purposes of any other proceeding.

17 Section 49 replaced (Conviction as evidence in criminal proceedings)

Replace section 49 with:

49 Conviction evidence in criminal proceedings

(1) Evidence of the fact that a person has been convicted of an offence (**conviction evidence**) is admissible in a criminal proceeding and on the proof of the conviction it will be presumed, unless the contrary is proved on the balance of probabilities, that the convicted person committed that offence.

(2) A party who wishes to offer conviction evidence must first inform the Judge of the purpose for which the evidence is to be offered.

(3) A party who wishes to offer evidence to rebut the presumption in **subsection (1)** (**rebuttal evidence**) must inform the Judge before doing so and indicate the nature of the evidence they propose to offer.

(4) This section—

(a) is subject to any other provision in this Act that excludes the conviction evidence or the rebuttal evidence:

(b) does not displace the availability of a challenge to conviction evidence under section 8, except that a challenge may not be made on the basis that the presumption in **subsection (1)** is itself unfairly prejudicial.

18 Section 85 amended (Unacceptable questions)

(1) Replace section 85(1) with:

(1) In any proceeding, if the Judge considers a question is improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand, the Judge must disallow the question or direct the witness not to answer it.

(2) Replace section 85(2)(a) with:

(a) the age, maturity, or vulnerability of the witness; and

19 Section 106 amended (Video record evidence)

Replace section 106(4) to (4C) with:

(4) A copy of a video record that is to be offered by the prosecution as an alternative way of giving evidence—

(a) must be given to a defendant's lawyer unless the Judge directs otherwise; and

(b) must be dealt with in accordance with any regulations made under section 201.

20 Section 122 amended (Judicial directions about evidence which may be unreliable)

After section 122(2), insert:

(2A) The defendant's inability to offer evidence responding to the evidence which may be unreliable is irrelevant to whether or not a Judge gives a warning under subsection (1).

21 New section 126A inserted (Judicial directions about misconceptions arising in sexual cases or family violence cases)

After section 126, insert:

126A Judicial directions about misconceptions arising in sexual cases or family violence cases

In a sexual case or family violence case, the Judge may give a direction to the jury to address any relevant misconception relating to sexual cases or family violence cases.

22 Section 202 repealed (Periodic review of operation of Act)

Repeal section 202.

Appendix 2

Lists of Submitters and Consultees

List of Submitters

The Law Commission received submissions from the following organisations and persons during the course of this review:

Organisations

- Aotearoa New Zealand Centre for Indigenous Peoples and the Law
- Auckland District Law Society Incorporated
- BVA The Practice
- Crown Law Office
- Auckland Sexual Abuse HELP Foundation/Family Action/Counselling Services Centre
- New Zealand Bar Association
- New Zealand Law Society
- New Zealand Police
- Public Defence Service
- Te Ohaaki a Hine - National Network Ending Sexual Violence Together, Tauiwi Caucus

Individuals

- Paulette Benton-Greig
- Dr Andrew Butler
- John Corbett
- Isla Doidge
- Mitchell East
- Toby Gee
- Mike Kalaugher
- Paul King
- Christina Laing
- Dr Dru Marsh
- Dr Don Mathias
- Professor Elisabeth McDonald MNZM
- Bridget McLay
- Chris Medlicott
- Chris Patterson
- Warren Pyke
- Bernard Robertson

- Rabindra Roy
- Terry Singh
- Christopher Stevenson
- Matthew Timmins

Consultation List

The Law Commission consulted with the following organisations and persons during the course of this review:

Organisations

- Crown Law Office
- Criminal Bar Association
- District Court Kaupapa Māori Advisory Group
- Institute of Judicial Studies
- Barristers of Mānuka Chambers, Manukau
- Ministry of Defence
- Ministry of Justice
- New Zealand Bar Association
- New Zealand Defence Force
- New Zealand Police
- Public Defence Service
- Representatives of the Governing Board of the District Court Sexual Violence Pilot
- Rules Committee
- Louise Nicholas and other representatives of Skylight Trust

Individuals

- Jonathan Eaton QC
- John Katz QC
- Sally Kedge
- Robert Lithgow QC
- Professor Elisabeth McDonald MNZM
- Simon Mount QC
- Principal Judge Newhook of the Environment Court
- Judge Advocate General Kevin Riordan ONZM
- Judge Smith of the Environment Court
- Professor Yvette Tinsley
- Dr Warren Young QSO

Appendix 3

Terms of Reference

TERMS OF REFERENCE

SECOND REVIEW OF THE EVIDENCE ACT 2006

Section 202 of the Evidence Act 2006 (the Act) requires the Minister of Justice to refer a review of the operation of the Act to the Law Commission by 28 February 2017. The Law Commission must report to the Minister of Justice within two years of the referral. This will be the second statutory review of the Act. The first review of the Act was a technical review that was required to be completed within one year of the referral. This second review will be more comprehensive than the first review, but will not be a first principles review.

The review will include (but not be limited to) the following matters:

1. As required by s 202 of the Act, the Law Commission will consider:
   - (a) The operation of the provisions of the Act, taking into account the matters already considered in the first statutory review of the Act;
   - (b) Whether those provisions should be retained or repealed; and
   - (c) Whether any amendments are necessary or desirable.

2. The review will focus on the operation of the following provisions where, in several cases, Courts have indicated the provision requires particular attention, including:
   - (a) Section 26 (conduct of experts): in light of *Lisiate v R* [2013] NZCA 129, (2013) 26 CRNZ 292.
   - (b) Section 28 (unreliable statements): in light of *R v Wichman* [2015] NZSC 198.
   - (c) Section 30 (improperly obtained evidence): in light of *R v Wichman* [2015] NZSC 198 and *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204 (criminal proceedings) and *Commissioner of Police v Marwood* [2015] NZCA 608 and *Marwood v Commissioner of Police* [2016] NZSC 139 (civil proceedings).
   - (d) Section 31 (prosecution may not rely on certain evidence offered by other parties): in light of *Boskell v R* [2014] NZCA 538.
   - (e) Section 32 (fact-finder not to be invited to infer guilt from silence before trial): operational issues such as the relationship between s 32 and veracity provisions, and whether s 32 applies to judge alone trials.
   - (f) Sections 37 and 38 (veracity): in light of *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612.
   - (g) Section 40 (propensity): in light of *Mahomed v R* [2011] NZSC 52 and *Taniwha v R* [2016] NZSC 123.
   - (h) Sections 44 and 40(3)(b) (sexual experience): in light of *B (SC12/2013) v R* [2013] NZSC 151.
   - (i) Section 49 (conviction as evidence in criminal proceedings): in light of *Morton v R* [2016] NZSC 51.
   - (j) Section 122 (judicial directions about evidence that may be unreliable): in light of *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 and *L v R* [2015] NZSC 53, [2015] 1 NZLR 658.

3. It will revisit matters identified in the first statutory review that the Law Commission recommended be kept under review at the second statutory review:

   (a) Section 4 (definition of "witness").

   (b) Sections 10 and 12 (the status of the common law).

   (c) Section 49 (conviction evidence in trials of co-defendants).

   (d) Sections 56 and 57 (termination of privileges).

   (e) Sections 31 and 90 (the relationship between these provisions: co-defendants seeking to offer a defendant's statement in evidence may seek to "use" it when questioning a witness and s 90(1) may prevent them from doing so).

4. The review will consider the rules of evidence as they relate to sexual violence and family violence, including, in particular:

   (a) Section 35 (previous consistent statements).

   (b) Section 37 (veracity).

   (c) Section 40 (propensity).

   (d) Section 44 (sexual experience).

   (e) Section 122(2)(e) (judicial directions about evidence which may be unreliable: the alleged conduct of the defendant occurred more than 10 years previously).

   (f) Section 125(2)(b) (judicial directions about children's evidence: suggestions as to tendencies of children to invent or distort).

   (g) Section 127 (delayed complaints or failure to complain in sexual cases).

5. The review will consider whether the Evidence Regulations 2007 are comprehensible and fit for purpose, or whether they require review in the future.

6. The review will consider s 202 (Law Commission periodic review of Act).

The Law Commission will consult with experts, interested parties, and the general public. The Commission will report to the Minister with its recommendations within two years of receiving the reference (February 2019).