

Pūrongo | Report 148

# **Te Arotake Tuatoru i te Evidence Act 2006**

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## **The Third Review of the Evidence Act 2006**



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

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

***Kia whanake ngā ture o Aotearoa mā te arotake motuhake***

***Better law for Aotearoa New Zealand through independent review***

**The Commissioners are:**

Amokura Kawharu — Tumu Whakarae | President

Claudia Geiringer — Kaikōmihana | Commissioner

Geof Shirtcliffe — Kaikōmihana | Commissioner

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Kei te pātengi raraunga o Te Puna Mātauranga o Aotearoa te whakarārangi o tēnei pukapuka.

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23 February 2024

Tēnā koe Minister

**NZLC R148 — Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006**

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

Nāku noa, nā

A handwritten signature in blue ink, reading 'Amokura Kawharu'.

**Amokura Kawharu**

Tumu Whakarae | President



# Foreword

This report contains our advice for reform of the Evidence Act 2006. Our recommendations are designed to promote the just determination of court proceedings, in line with the Act's fundamental purpose.

It has been nearly 20 years since Parliament passed the Act on the advice of Te Aka Matua o te Ture | Law Commission. In doing so, Parliament took the radical step of bringing the previously disparate body of evidence law into one accessible statute. Parliament also added section 202 to the Act requiring the Commission to conduct operational reviews of the Act every five years. These reviews have helped to keep evidence law fit for purpose. However (as earlier recommended by the Commission) section 202 has been repealed and this is therefore our third and final review.

As with our previous reviews, we have concluded the Act is generally working well in practice. Nevertheless, several issues have been brought to our attention that we think require reform. Some of our recommendations are particularly noteworthy.

We make several recommendations to address long-standing issues with the current provisions governing hearsay evidence. These include the admission of mātauranga (Māori knowledge) and tikanga as evidence as well as the admission of statements from witnesses who, due to factors such as intimidation, are too fearful to give evidence in court.

We also make recommendations to address new and emerging issues. These include bringing the laws of medical privilege into alignment with the provision of modern healthcare and creating specific safeguards for evidence from prison informants.

We comprehensively examined the many operational issues with the Act's provisions governing admission of improperly obtained evidence. Our recommendations aim to provide greater clarity and certainty for judges weighing the important but competing interests at stake in these decisions.

We also make a number of recommendations aimed at increasing efficiency in civil proceedings. These include removing inconsistencies between the Act and the High Court Rules 2016 regarding hearsay evidence, clarifying the duty to cross-examine and clarifying the laws regarding legal and litigation privilege.

We are confident our recommendations will help guide the future reform work necessary to improve outcomes for everyone seeking justice in our courts.



**Amokura Kawharu**

Tumu Whakarae | President

# Acknowledgements

Te Aka Matua o te Ture | Law Commission acknowledges the contributions of everyone who has helped us in this review.

In particular, we acknowledge the generous contributions made by our Expert Advisory Group. These individuals provided guidance as we identified issues, developed policy proposals, considered feedback and developed reform recommendations. Our members were:

- Echo Haronga
- Associate Professor Anna High (Te Whare Wānanga o Otāgo | University of Otago)
- Mark Lillico (on behalf of Te Tari Ture o te Karauna | Crown Law Office)
- Adjunct Professor Elisabeth McDonald MNZM (Te Whare Wānanga o Waitaha | University of Canterbury)
- Jack Oliver-Hood
- Associate Professor Scott Optican (Waipapa Taumata Rau | University of Auckland)
- Tania Singh (on behalf of Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service).

We also thank the Judicial Advisory Committee for their regular feedback on our proposals. The Committee's members were Justice Mathew Downs, Justice Christine French and Judge Stephen Harrop.

We are grateful to those people and organisations who have discussed aspects of the project with us and provided helpful information during the course of our review. This includes members of the legal profession, legal professional bodies, Ngā Pirihimana o Aotearoa | New Zealand Police and New Zealand Family Violence Clearinghouse as well as many other people and organisations with an interest in our justice system. We also acknowledge the feedback we received from submitters and the Commission's Māori Liaison Committee.

We emphasise nevertheless that the views we express in this report are those of the Commission and not necessarily those of the people who have assisted our work.

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

The Commissioner responsible for this project is Amokura Kawharu. The Legal and Policy Advisers who worked on this project are Ruth Campbell, Tāneora Fraser, Dena Valente and Jesse Watts. Former Principal Legal and Policy Adviser Nichola Lambie led the preparation of our Issues Paper. We acknowledge the assistance provided by the law clerks who have worked on this project — Sophie Colson, George Curzon-Hobson, Kaea Hudson, Jack McNeill and Lucia Young. We also acknowledge the contribution of Justice Christian Whata, who provided valuable input as a Commissioner before returning to the Bench in mid-2023.

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# Executive summary

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## CHAPTER 1: INTRODUCTION

1. This is our third and final statutory review of the Evidence Act 2006. Chapter 1 sets out the approach we have taken to the review, its operational nature and scope, the matters addressed in this report and how we have assessed the need for reform.

## CHAPTER 2: TE AO MĀORI AND THE EVIDENCE ACT

2. In Chapter 2, we consider whether the Act adequately provides for the admission of mātauranga (Māori knowledge) and tikanga as evidence and whether there are other issues with how the Act recognises and provides for te ao Māori.

### Mātauranga and tikanga evidence

3. It has long been recognised the Act's rules against hearsay (section 17) and opinion evidence (section 23) can create challenges for the admission of mātauranga and tikanga evidence, particularly evidence deriving from the tradition of oral history or kōrero tuku iho in te ao Māori.
4. We recommend creating an exception to the hearsay rule for statements concerning the existence or content of mātauranga and tikanga. This is necessary to normalise the admission of tikanga and mātauranga (including oral history) and promote more efficient conduct of proceedings. In relation to the opinion rule, we recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee consider amending the Code of Conduct for Expert Witnesses to better recognise and provide for mātauranga and tikanga as a unique category of expert evidence.
5. We do not recommend introducing statutory guidance regarding the need to interpret and apply the Act having regard to te ao Māori. We are not persuaded such guidance would best address the operational issues we have identified and consider it may instead introduce uncertainty.

### Other issues

6. We received few submissions on other issues relating to how the Act recognises and provides for te ao Māori. We do not recommend reform to extend privilege to communications with kaumātua, tohunga and rongoā practitioners. We also do not recommend any further reform in relation to the procedures for giving evidence in court and their compatibility with tikanga. Te Aka Matua o te Ture | Law Commission recommended in its Second Review that the Act be amended to make it clear the courts can regulate procedures for giving evidence in a manner that recognises tikanga. Some of

the submissions we received lend further support to consideration of that recommendation.

## CHAPTER 3: HEARSAY

7. In Chapter 3, we consider the operation of the hearsay rules in sections 17 and 18.

### Hearsay statements when the maker of the statement is fearful of giving evidence

8. The Act currently only permits hearsay statements to be admitted in limited circumstances. Prompted by recent case law, we considered whether the Act should be amended to allow hearsay statements to be admitted when the maker of the statement is fearful of giving evidence and, if so, under what circumstances.
9. We recommend amending section 18 to include a new ground for admitting a hearsay statement where the maker of the statement has a reasonable fear of retaliation if they give evidence, they do not intend to give evidence because of that fear and it is in the interests of justice to admit their statement. We propose to define “fear of retaliation” as fear that a defendant or any other person will cause physical or other harm (including, for example, financial or social harm) to the maker of the statement or any other person.
10. We consider this approach strikes a more appropriate balance between the rights and interests of defendants and witnesses. A hearsay statement from a fearful person could be admitted, allowing their evidence to be considered by the court without putting them at risk. A defendant would not be able to benefit from the fear they have created in another person. At the same time, the proposed reform would protect the fair trial rights of defendants by confining the exception to an objective fear of retaliation (rather than a more general fear of giving evidence) and only allowing admission where it is “in the interests of justice”.

### When a person “cannot with reasonable diligence” be found

11. Under section 16(2), one of the circumstances in which a person is “unavailable as a witness” for the purpose of the hearsay rules is when they “cannot with reasonable diligence be identified or found”. We considered whether the lack of guidance in the Act as to what is required to satisfy the “reasonable diligence” requirement is creating inconsistency in approach or uncertainty as to what steps police should take to locate a witness. We do not recommend reform as we did not identify evidence of a problem in practice.

### Hearsay in civil proceedings

12. The Act determines the admissibility of evidence in both civil and criminal proceedings. In civil proceedings, the Act must also be read alongside the High Court Rules 2016. There are inconsistencies between the Act and the High Court Rules in relation to the process for challenging the admissibility of hearsay statements in civil proceedings and the admissibility of hearsay statements that are not challenged.
13. We recommend limiting the operation of section 17 in civil proceedings so that it only applies where a party challenges the admissibility of a hearsay statement in accordance with the relevant rules of court. We also recommend the court should have residual discretion to dispense with this requirement. Our recommendation sets out the circumstances in which a judge may give such a direction. This reform will improve the

operation of the hearsay provisions in civil proceedings to better achieve the purpose of the Act by (among other things) avoiding unjustifiable expense and delay.

## CHAPTER 4: DEFENDANTS' AND CO-DEFENDANTS' STATEMENTS

14. In Chapter 4, we consider the admissibility of defendants' and co-defendants' statements in criminal proceedings under sections 21, 22A and 27.

### Defendants' exculpatory statements

15. Under section 21, a defendant cannot offer their own hearsay statement in evidence. This means, for example, that a defendant who does not give evidence at trial cannot offer an exculpatory statement they made in a police interview. Case law has recognised the courts have a discretion to require the prosecution to offer evidence of a defendant's statement where it is necessary to ensure trial fairness. In practice, however, there appears to be inconsistency regarding when prosecutors choose to offer a defendant's exculpatory statement in evidence and when the courts will require them to do so.
16. We do not recommend reform of section 21. While inconsistency in approach is undesirable, codifying a discretionary approach is unlikely to increase consistency. Requiring the prosecution to offer defendants' police statements as a matter of course would fundamentally alter the way criminal proceedings are run and could lead to defendants electing not to give evidence in more (or even most) cases.

### Defendants' statements contained within hearsay statements

17. Under section 27(1), evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant. Section 27(3) provides that the hearsay provisions do not apply to such statements. On a strict interpretation, this means the hearsay provisions do not apply to a hearsay statement by a person other than a defendant that recounts something the defendant allegedly said. Case law has held that the admissibility of such statements must first be determined under the hearsay provisions before applying section 27. However, this approach requires a purposive interpretation of section 27(3) that is difficult to reconcile with its plain wording.
18. We recommend reform to clarify that the hearsay provisions apply to a hearsay statement made by a person other than a defendant that contains a defendant's statement. This recommendation is consistent with case law and the intention behind section 27(3).

### Admissibility of defendants' non-hearsay statements against co-defendants

19. Section 27(1) provides that a defendant's statement is only admissible against a co-defendant if it is admitted under section 22A. Section 22A was intended to codify the common law co-conspirators' rule, which was an exception to the rule against hearsay. However, the wording of section 22A only allows for the admission of hearsay statements. On the plain wording of the Act, a defendant's non-hearsay statement cannot be admitted against a co-defendant. This is contrary to the position at common law and does not appear to have been intended.
20. In its Second Review, the Commission recommended an amendment to address this issue by applying the requirements of the co-conspirators' rule to both hearsay and non-hearsay statements. However, as *te Kōti Mana Nui* | Supreme Court later pointed out in *Winter v R*,

this approach would not replicate the common law position either.<sup>1</sup> At common law, defendants' non-hearsay statements were admissible against co-defendants without having to satisfy the co-conspirators' rule.

21. We recommend reform to clarify that a defendant's non-hearsay statement is admissible against a co-defendant under section 27. This reflects the original intention to codify the common law position.

## CHAPTER 5: UNRELIABLE STATEMENTS

22. In Chapter 5, we consider section 28, which provides for the exclusion of unreliable defendants' statements offered by the prosecution in criminal proceedings.

### Wording of section 28

23. In *R v Wichman*, the majority of the Supreme Court held that indications of actual reliability (that a statement is true or untrue in fact) are relevant to the assessment in section 28 of whether "the circumstances in which the statement was made were not likely to have adversely affected its reliability".<sup>2</sup> This interpretation is arguably at odds with the plain wording of the section. We considered whether section 28 should be amended to make it easier to understand and apply, and to reflect the intention in *Wichman* that indications of actual reliability should only be considered where they are clear and obvious.
24. We do not recommend amending section 28. We did not identify evidence that its current wording is causing problems in practice. Recent case law suggests the courts are applying *Wichman* correctly and continuing to take a relatively cautious approach to admitting defendants' statements when reliability concerns are raised. Additionally, although the wording of section 28 does not necessarily reflect the approach in *Wichman*, any advantages of an amendment to clarify are outweighed by the risks of creating further uncertainty or leading the courts to place undue weight on actual reliability.

### Standard of proof for admissibility

25. We considered whether the "balance of probabilities" standard for admitting evidence under section 28(2) provides adequate protection against the risk of conviction based on a false confession. There is increasing recognition of the reliability risks associated with confessions and the undue weight they may be given by the fact-finder. There has also been an increase in the use of some investigatory techniques that may make it more difficult to assess the reliability of any resulting confession, such as "Mr Big" undercover operations and the Complex Investigation Phased Engagement Model for questioning suspects.
26. We do not recommend changing the standard of proof in section 28. There are good arguments in principle for raising the standard to reflect the significant risks of miscarriages of justice based on false confessions. However, there is no clear evidence of a problem in practice to warrant reform (for example, evidence of miscarriages of justice due to false confessions being admitted under section 28). Recent case law suggests the courts are taking a cautious approach to admitting potentially unreliable statements.

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<sup>1</sup> *Winter v R* [2019] NZSC 98, [2019] 1 NZLR 710.

<sup>2</sup> *R v Wichman* [2015] NZSC 98.

## CHAPTER 6: INVESTIGATORY TECHNIQUES AND RISKS OF UNRELIABILITY

27. In Chapter 6, we consider how the Act governs the admissibility of evidence obtained through investigatory techniques that risk producing unreliable evidence.
28. Sections 28 (unreliable statements), 29 (oppression) and 30 (improperly obtained evidence) were designed to operate alongside each other to exclude evidence that has been obtained unfairly and to ensure defendants' statements are sufficiently reliable to be considered by the fact-finder. Preliminary feedback suggested these provisions may not adequately address the use of certain techniques for questioning suspects that have the potential to produce unreliable confessions.
29. As discussed in Chapter 5, the Supreme Court in *R v Wichman* found that a court applying section 28 can consider indications the defendant's statement is likely to be true in fact.<sup>3</sup> This limits the circumstances in which evidence will be excluded under section 28. Further, the majority judgment in *Wichman* indicates that, where a statement is not excluded under section 28, any residual risks of unreliability stemming from the investigatory techniques used to obtain the statement are irrelevant to whether the statement was obtained "unfairly" so as to engage section 30. This approach, if adopted, could prevent the courts from excluding evidence to discourage, and ensure the justice system is not seen as condoning, investigatory conduct that risks producing unreliable evidence.
30. We do not recommend reform. We consider section 30 may already apply where investigators have acted in a manner that risked producing unreliable evidence. Such conduct may affect both whether evidence was "unfairly obtained" (and therefore engages section 30) and the application of the section 30 balancing test. This approach is consistent with the purpose and current wording of section 30. At this stage, there is no evidence of *Wichman* being applied in a manner that prevents consideration of risks of unreliability under section 30.

## CHAPTER 7: IMPROPERLY OBTAINED EVIDENCE

31. In Chapter 7, we consider the application of the section 30 balancing test, which determines whether improperly obtained evidence is admissible in criminal proceedings.

### The operation of the balancing test

32. There are long-standing concerns that the balancing test in section 30 may be leading to admissibility decisions that are too unpredictable and inconsistent and that it is too skewed towards admitting improperly obtained evidence.
33. We identify two issues with the application of the section 30 balancing test. First, the reasoning in some recent judgments indicates that judges sometimes give less weight to the impropriety than was anticipated when the balancing test was developed by the courts and subsequently codified in the Act. Second, the unstructured nature of the section 30 test has led to inconsistency in how the test is applied — in particular, whether and when some of the factors set out in section 30(3) will weigh in favour of admission or exclusion. We conclude section 30 should be amended to provide a clearer structure and guidance

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<sup>3</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [83]–[84].

on its application to encourage a more consistent approach. We make three recommendations to this end aimed at different elements of the section 30 test.

### **The wording of the balancing test in section 30(2)(b)**

34. We first recommend amending section 30(2)(b) to specify that the judge must exclude improperly obtained evidence unless satisfied it is in the public interest to admit it. This will more clearly signal that the courts should give significant weight to the impropriety as a starting point, consistent with the original intent of the balancing test. It will promote greater consistency in relation to the weight judges attach to improprieties and encourage the courts to clearly articulate why admission is in the public interest (where that is the case).
35. This recommendation should be implemented alongside our second recommendation, which would clarify the public interests to be weighed in the balancing test. Currently, section 30(2)(b) refers to a “balancing process” but does not specify what considerations are being balanced against each other or how the courts should decide what an “effective and credible system of justice” requires. If our first recommendation is accepted, we recommend amending section 30(2)(b) to require the judge to exclude improperly obtained evidence unless satisfied that the public interest in recognising the seriousness of the impropriety is outweighed by the public interest in having the evidence considered by the fact-finder at trial.
36. If our first recommendation is not accepted, this second recommendation could still be implemented on its own. We suggest alternative wording that would identify the relevant public interests without otherwise altering the nature of the section 30(2)(b) test.

### **Application of the section 30(3) factors in the balancing test**

37. Our third recommendation relates to the application of the factors set out in section 30(3) to which judges may have regard when applying the section 30(2)(b) balancing test. As drafted, each factor is worded in an open way that does not indicate whether it favours admission or exclusion, or whether the absence of a factor is relevant. This has led to confusion over the relevance of certain factors and inconsistency in how they are applied.
38. We recommend amending section 30(3) to specify to which public interest each factor relates (that is, the public interest in recognising the seriousness of the impropriety or the public interest in having evidence considered by the fact-finder at trial). This amendment would provide the courts with guidance as to how the relevance of each factor should be assessed, encouraging a more structured reasoning process. We consider this will lead to greater consistency and predictability in section 30 decisions.
39. This recommendation would need to be enacted alongside our second recommendation to clarify the interests to be weighed against each other under section 30(2)(b). If that recommendation is not accepted, we do not recommend amending section 30(3) to specify whether certain factors weigh in favour of admission or exclusion.
40. We also recommend several amendments to the individual factors listed in section 30(3). Some of these proposed amendments aim to improve the clarity and accessibility of the law. We recommend they be enacted as part of the package of section 30(3) reforms outlined above. Our recommendations to amend section 30(3)(b) (the nature of the impropriety) and repeal of section 30(3)(e) (other investigatory techniques) address more significant issues with the current case law. These could be implemented alone even if other amendments to section 30 are not pursued.

## Racial bias

41. Te Kōti Pira | Court of Appeal has recognised that a search influenced by racial bias could lead to a finding that evidence was improperly obtained.<sup>4</sup> We considered whether the application of section 30 in cases of potential racial bias is sufficiently clear. We do not recommend amending section 30 to explicitly address issues of racial bias. Although we acknowledge the serious concerns about Māori and other ethnic minorities being disproportionately stopped and searched by police, we do not consider there is clear evidence that racial bias is not being considered under section 30 when it ought to be.

## Role of causation under section 30(5)

42. We considered whether section 30(5) is sufficiently clear as to the role of causation in assessing whether evidence is “improperly obtained”. We do not recommend reform. We did not identify widespread concern about the current approach to causation. Further, causation would be difficult to define precisely, and any amendment could create further uncertainty or have unintended consequences.

## CHAPTER 8: PRISON INFORMANTS AND INCENTIVISED WITNESSES

43. In Chapter 8, we consider whether the Act sufficiently addresses the risk of unreliability posed by evidence given by prison informants and other incentivised witnesses.

### Admissibility of prison informant evidence

44. The Act does not specifically address the admissibility of prison informant evidence. Currently, it is admissible if it is relevant (section 7) and not excluded (under section 8, which requires exclusion of evidence if its probative value is outweighed by the risk it will have an unfairly prejudicial effect on, or needlessly prolong, the proceeding).
45. Prison informant evidence can be highly valuable to the prosecution case. However, it can be unreliable since prison informants are often incentivised to give evidence. Juries tend to find prison informant evidence highly persuasive even when warned about its potential unreliability. There have been high-profile instances of wrongful convictions based in part on false prison informant evidence.
46. We recommend a new provision requiring the judge to exclude prison informant evidence offered by the prosecution in a criminal proceeding unless satisfied on the balance of probabilities that the circumstances relating to the evidence provide reasonable assurance that it is reliable. The provision would also set out factors to which the judge must have regard when making that assessment.
47. This recommendation relates only to prison informant evidence. There are other classes of witnesses who are incentivised to give evidence. However, the risks of unreliability associated with other types of incentivised evidence have not been demonstrated to the same degree as with prison informant evidence. It would also be difficult to precisely define any wider class of incentivised witnesses.

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<sup>4</sup> *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835.



## Judicial directions

48. Section 122(2)(d) requires a judge to consider whether to warn the jury of the need for caution in deciding whether to accept prison informant evidence and the weight to be given to it. We do not recommend reform to enhance judicial directions on prison informant evidence. We are not persuaded mandatory or prescribed directions are necessary or appropriate. Our recommendation to introduce a reliability threshold for the admission of prison informant evidence would place less emphasis on judicial directions as a solution to the risks this evidence poses.

## Additional safeguards

49. We also do not recommend creating additional safeguards in relation to the use of prison informant evidence. Some safeguards have been introduced recently — the Solicitor-General has produced guidance for prosecutors on the use of prison informant evidence, and Police has established a central register of prison informants. These safeguards should be allowed to bed in. In addition, our recommended admissibility provision will necessarily improve record-keeping and disclosure since the court will require information about the informant and their proposed evidence to reach a view on admissibility.

## CHAPTER 9: VERACITY EVIDENCE

50. In Chapter 9, we consider the operation of the veracity rules (sections 37 and 38).

### Application of the veracity rules to single lies

51. We do not recommend reform to clarify whether the veracity rules apply to evidence of a single previous lie (or alleged lie). Recent case law confirms that evidence of a single lie can be veracity evidence and that the number of previous lies is relevant when assessing whether the evidence is “substantially helpful” (and therefore admissible under section 37). We agree that approach is consistent with the purpose of section 37 and is available on the current wording of the section.

### Assessing substantial helpfulness (section 37(3))

52. Section 37(3) purports to provide a non-exhaustive list of matters relevant to deciding whether veracity evidence is “substantially helpful”. We recommend its repeal as it does not perform a useful role in practice. It does not provide guidance on evaluative matters the court should consider. Some of the factors listed are redundant and others are examples of *types* of veracity evidence that may be substantially helpful depending on the circumstances. We consider their continued inclusion as statutory factors may cause confusion and unduly elevate the significance of some types of veracity evidence over others. We also consider it unnecessary to replace the factors in section 37(3) with a different list of factors. Case law already provides clear guidance on the assessment of substantial helpfulness and may continue to develop over time. Codifying that guidance would risk reducing the flexibility of the test for admissibility of veracity evidence.

### Application of section 38(2) when the defendant puts veracity in issue

53. Under section 38(2), the prosecution may only offer veracity evidence about the defendant with the judge’s permission and only if “the defendant has, in court, given oral evidence about his or her veracity or challenged the veracity of a prosecution witness by reference to matters other than the facts in issue”.

54. We recommend removing the requirement that the defendant put veracity in issue by giving oral evidence in court. This requirement does not reflect modern trial practices, which frequently involve defendants' evidential video interviews being played in court. These interviews may contain claims about the defendant's own veracity or challenges to the veracity of a prosecution witness. Further, the current law does not account for the different ways a defendant may put veracity in issue at trial — for example, by challenging the veracity of a prosecution witness in cross-examination. Our proposed amendment also includes safeguards aimed at avoiding potential unfairness to the defendant that might otherwise result from this reform.

### Use of the term “veracity” in other parts of the Act

55. The term “veracity” is used in other sections outside the veracity rules. In some of these sections, the term carries a different meaning. In section 37, “veracity” is concerned with evidence extraneous to the facts in issue. In other sections, it refers to the truthfulness of the witness in the particular proceeding. We do not recommend reform to make the different meanings of “veracity” in the Act explicit. We found no evidence of problems in practice. The courts are interpreting the term “veracity” appropriately having regard to the context in which it is used.

## CHAPTER 10: PROPENSITY EVIDENCE

56. In Chapter 10, we consider section 43, which governs propensity evidence offered by the prosecution about the defendant.

### The general operation of section 43(1)

57. Section 43(1) allows the prosecution to offer propensity evidence about a defendant in a criminal proceeding if its probative value outweighs the risk that it might have an unfairly prejudicial effect on the defendant. We considered whether it is operating as intended — in particular, whether propensity evidence is being too readily admitted and whether it is resulting in unpredictable and inconsistent admissibility decisions.
58. We do not recommend reform in relation to section 43(1). We conclude there is insufficient evidence of a problem in practice given mixed feedback from submitters and the difficulties of evaluating the application of section 43(1) through case law. We also do not consider amendment would change the frequency with which section 43(1) is litigated because of the importance of propensity evidence to both the prosecution and defence. We accept that some variance in case law is to be expected given the fact-specific nature of the section 43(1) test. However, we emphasise the importance of the courts providing clear reasoning for their approach to the section 43(1) assessment.

### Prior acquittal evidence

59. The Act does not specifically address the status of evidence that has previously been led at a trial against the defendant that resulted in an acquittal (prior acquittal evidence). The Supreme Court in *Fenemor v R* held that prior acquittal evidence should be treated like any other propensity evidence, with the judge considering whether the fact that evidence is prior acquittal evidence gives rise to any additional unfair prejudice.<sup>5</sup> However, case law

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<sup>5</sup> *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [4].

since then indicates that only in the rarest of circumstances will the acquittal dimension of proposed propensity evidence have a meaningful impact on the section 43(1) assessment of unfair prejudice.

60. We recommend amending section 43 to provide that, when assessing the prejudicial effect of prior acquittal evidence on the defendant, the judge must consider whether the defendant can fairly respond to the allegations in the present proceeding. The judge would have regard to the lapse of time since the earlier investigation and trial, the material available in relation to the earlier investigation and trial and any other relevant matters. This effectively codifies *Fenemor* and provides additional guidance for judges when assessing the prejudicial effect of prior acquittal evidence.

### The unusualness factor in section 43(3)

61. Section 43(3) sets out a non-exhaustive list of factors the judge may consider when assessing the probative value of propensity evidence. Section 43(3)(f) lists the extent to which the facts that are the subject of both the propensity evidence and the alleged offence are “unusual”. Case law has taken varying approaches to whether this “unusualness” relates to the type of offending compared to other types of offending, the characteristics of the particular offending or the nature of the offending compared to normal standards of behaviour.
62. We recommend repealing section 43(3)(f). Retaining the factor in any form is likely to cause continued confusion and inconsistency. To the extent that it is appropriate to consider unusualness, the focus should be on the distinctiveness of the characteristics of the propensity evidence and the alleged offending. Distinctiveness can appropriately be considered already under section 43(3)(c) (the extent of the similarity between the propensity evidence and the facts in issue).

### Relevance of reliability

63. It is unclear whether reliability should form part of the judge’s assessment when determining the admissibility of propensity evidence. There has been diverging case law on this point. Recently, the Supreme Court in *W (SC 38/2019) v R* found that reliability is relevant when assessing probative value under section 8 (general exclusion).<sup>6</sup> This approach since has been applied by one case in *te Kōti Matua | High Court* in the context of propensity evidence.<sup>7</sup>
64. We do not recommend reform. Recent case law suggests statutory amendment may be unnecessary following *W (SC 38/2019) v R*. Any benefits of reform are outweighed by the risk that it could cause confusion or lead to undue emphasis on reliability.

## CHAPTER 11: VISUAL IDENTIFICATION EVIDENCE

65. In Chapter 11, we consider the definition of “visual identification evidence” in section 4(1).
66. Sections 45 and 126 provide safeguards to address concerns about the reliability of visual identification evidence. The definition of visual identification evidence in section 4(1) refers to assertions that a defendant was “present or near” the place where the crime or relevant

<sup>6</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382.

<sup>7</sup> *R v Wallace* [2020] NZHC 2559.

acts occurred. It does not refer assertions about who performed a particular act (observation evidence). It is therefore unclear whether the definition includes observation evidence and whether sections 45 and 126 apply to such evidence. This issue may arise, for example, where the defendant admits being present at the scene of the crime but denies being the perpetrator. While there is conflicting case law on this issue, recent decisions have tended to treat observation evidence as visual identification evidence.

67. We recommend reform to clarify that the definition of visual identification evidence includes assertions that a defendant was the person observed performing an act constituting direct or circumstantial evidence of the commission of an offence. This would reflect the current approach of the courts and ensure clarity and certainty. It is appropriate that the safeguards for visual identification evidence apply to observation evidence as the risk of misidentification is just as real when identifying who performed an act as it is when identifying who was present or near the scene of a crime.

## CHAPTER 12: MEDICAL PRIVILEGE

68. In Chapter 12, we consider the operation of section 59, which governs privilege in criminal proceedings for certain communications made to, and information obtained by, medical practitioners and clinical psychologists. Section 59(5) extends the privilege to people “acting in a professional capacity on behalf of a medical practitioner or clinical psychologist”.

### Scope of the section 59(1)(b) exception

69. Section 59(1)(b) creates an exception to medical privilege in situations where a person “has been required by an order of a judge, or by other lawful authority, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or for any other purpose”. It is not clear whether court-ordered *treatment* (as opposed to a court-ordered *examination* or *test*) would be captured by this exception.
70. We recommend amending section 59(1)(b) to clarify that the exception does not apply to court-ordered treatment. This would reflect and codify the current and intended approach. Removing privilege from court-ordered treatment would be contrary to the policy rationale for medical privilege, which is to encourage individuals to seek treatment and engage fully and honestly when doing so without fear of recrimination in the criminal justice system.

### Acting “on behalf of” a medical practitioner or clinical psychologist

71. Section 59(5) provides that medical privilege extends to communications made or information obtained by a person acting in a professional capacity “on behalf of” a medical practitioner or clinical psychologist. There is some uncertainty as to when a person is acting “on behalf of” a medical practitioner or clinical psychologist and, accordingly, whether information received by them is privileged. Case law has interpreted section 59(5) narrowly.
72. We recommend amending section 59 to:
  - (a) extend the privilege to “health practitioners” as defined by the Health Practitioners Competence Assurance Act 2003; and
  - (b) remove the requirement in section 59(5) that, for medical privilege to apply, the person acting on behalf of a health practitioner must be doing so “in the course” of examination, treatment or care of the person by that health practitioner.

73. These amendments would allow the courts to take a broader interpretation of the section consistent with the policy objectives behind it and the reality of modern healthcare.

### **Protections for counselling and therapeutic notes**

74. Some submitters expressed concern that it has become increasingly common for defence counsel to make non-party requests for disclosure of counselling notes for complainants in sexual and family violence cases, and to use information contained in these notes to discredit the complainant. A related concern was raised in the context of te Kōti Whānau | Family Court in relation to notes about children and parties in civil proceedings.
75. We did not consult on this issue in our Issues Paper and so are not in a position to recommend reform. However, given the concerns of submitters, we recommend the Ministry of Justice examine protections for counselling notes and other personal records of complainants in sexual and family violence cases and of parties and children in civil cases.

## **CHAPTER 13: OTHER PRIVILEGE ISSUES**

76. In Chapter 13, we consider other issues relating to the privilege provisions in the Act.

### **Legal advice privilege and documents prepared but not communicated between clients and legal advisers**

77. Section 54 provides a privilege for “communications” with legal advisers that are intended to be confidential and made for the purpose of obtaining or providing legal advice (legal advice privilege). We recommend reform to clarify that the privilege extends to documents prepared but not communicated for the purpose of obtaining or providing legal advice. This is consistent with the pre-Act common law position, which section 54 was intended to codify, and with the purpose of the privilege to encourage full and frank communication with lawyers.

### **Termination of litigation privilege**

78. Section 56 establishes a privilege in relation to preparatory materials for court proceedings, known as “litigation privilege”. The Act does not address whether litigation privilege terminates and case law remains unsettled on this point.
79. We recommend reform to provide that litigation privilege does not terminate except as provided for in the Act. This is consistent with the purpose of the privilege to protect the adversarial process. If the privilege were to terminate, it would be difficult for lawyers to engage in the free and frank discussions necessary to properly prepare for litigation.
80. We also recommend clarifying that legal advice privilege and settlement privilege do not terminate except in accordance with the Act, to avoid creating unnecessary inconsistency. Case law and the purpose of the privileges support this approach.

### **Litigation privilege and confidentiality**

81. Unlike sections 54 (legal advice privilege) and 57 (settlement privilege), section 56 (litigation privilege) does not include any reference to confidentiality. This appears to be a drafting error. There is clear Supreme Court authority that, for litigation privilege to attach to a

communication or information, it must have been intended to be confidential.<sup>8</sup> We recommend amending section 56 to make this clear.

### Settlement privilege and the interests of justice exception

82. Section 57(3)(d) creates an “interests of justice” exception to settlement privilege. High Court decisions have largely confirmed that the application of section 57(3)(d) is informed by the pre-Act common law exceptions to settlement privilege, although some have suggested its scope may be wider.
83. We do not recommend reform to clarify the scope of section 57(3)(d). It is not necessarily a problem if the courts apply the exception more broadly than the pre-Act common law exceptions. Under the pre-Act common law, it would have been open to the courts to recognise new exceptions to the privilege. Most submitters said the provision is not causing problems in practice and preferred to let the law develop in the courts.

### Successive interests in privileged material

84. Section 66(2) provides for successive interests in privileged material. Following an amendment in 2017, the provision includes a drafting error that means a successor in title to the property of a person can only claim privilege if the person is deceased. This is not the intent of the provision, and the courts have not applied it that way. We recommend amendment to clarify that section 66(2) applies to all successors in title to property of the person whether or not the person is deceased.

## CHAPTER 14: TRIAL PROCESS

85. In Chapter 14, we address sections 88, 92 and 95, which deal with different aspects of the trial process.

### Restriction on disclosure of complainant’s occupation in sexual cases

86. Section 88 prevents questioning about or comment on the complainant’s occupation in a sexual case except with the permission of the judge. Research shows compliance with this section is low. Complainants are routinely asked about their occupation without the judge considering section 88. The section is also arguably too narrow. It does not apply, for example, to evidence about the complainant’s status as a student, mother or beneficiary or evidence about their education or qualifications.
87. We do not recommend reform of section 88. The requirement for judicial approval is clear on the face of the section so amendment is unlikely to improve compliance with it. Given the low compliance with the section, there is little to be gained by widening its scope. Additionally, we are concerned that widening the scope of section 88 may disrupt and lengthen proceedings or make it more difficult for counsel to humanise the complainant and contextualise their experiences. However, we consider there is a role for enhanced guidance and education for prosecutors and judges. We recommend Te Kura Kaiwhakawā | Institute of Judicial Studies consider developing new or existing guidance for judges on the application of section 88.

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<sup>8</sup> *Beckham v R* [2015] NZSC 98 at [93]–[94].

## Cross-examination duties

88. Section 92 requires a party to cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness if the witness could reasonably be expected to be in a position to give admissible evidence on those matters. Case law has confirmed the courts should take a flexible and purposive approach to section 92, but this is not clear on the face of the section.
89. We recommend amending section 92 to require a party to cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness “when it is reasonable to expect that ... the witness or the party that called the witness is or may be unaware of the basis on which their evidence is contradicted”. This would assure lawyers and judges that rigid and exhaustive cross-examination is not required under section 92.

## Cross-examination on behalf of another

90. Under section 95, parties may in certain circumstances be prevented from personally cross-examining a witness. Where this is the case, the party may have their questions put to the witness by a person appointed by the judge, who can be a lawyer. There is mixed case law on whether the appointed person is subject to the cross-examination duties in section 92 or whether they are simply required to ask the questions provided by the party.
91. We recommend amending section 95 to clarify that the role of a person appointed to ask questions on behalf of an unrepresented party is limited to putting that party’s questions to the witness. We also recommend clarifying that an appointed person is not acting as counsel for the party. The purpose of the section is to protect witnesses, not to assist unrepresented parties.

## CHAPTER 15: OTHER ISSUES

92. In Chapter 15, we examine three stand-alone issues relating to the operation of the Act.

### Section 9 (admission by agreement) and the role of the judge

93. We considered whether there is uncertainty about the extent to which section 9 (admission by agreement) permits admission of evidence that would otherwise be inadmissible under a specific provision in the Act or subject to exclusion under section 8 (general exclusion). We do not recommend reform. The uncertainty in case law does not appear to be causing problems in practice. Reform could lead to inefficiency and further uncertainty.

### Novel scientific evidence

94. We considered the application of the common law *Daubert*<sup>9</sup> factors, as affirmed in *Lundy*,<sup>10</sup> to novel scientific evidence and whether further guidance in the Act would be helpful. We do not recommend reform. Codifying *Lundy* is unnecessary and unlikely to improve understanding or increase clarity. The law should be left to develop in the courts.

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<sup>9</sup> *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993).

<sup>10</sup> *Lundy v R* [2018] NZCA 410.



## Evidence from undercover police officers

95. We considered whether sections 108–109 (which permit undercover police officers to give evidence anonymously in cases involving any offence punishable by at least seven years' imprisonment) are causing problems in practice.

### *Criminal proceedings*

96. We considered whether anonymity should be available in criminal cases involving offences with lower penalties. We do not recommend reform to change the seven-year threshold or add further qualifying offences to section 108. We are unpersuaded there is a problem in practice. The fact that undercover officers are not being deployed because an offence is not covered by the anonymity provisions is consistent with the legislative intention.

### *Criminal Proceeds (Recovery) Act proceedings*

97. It is unclear from section 108 whether proceedings under the Criminal Proceeds (Recovery) Act 2009 must relate to an offence that meets the seven-year threshold for anonymity to apply. We do not recommend reform to clarify the position. In practice, all the relevant cases we identified under the Criminal Proceeds (Recovery) Act related to offences that qualify under section 108 in any event. It is also unclear from the legislative history what was intended, so we are not in a position to recommend reform.

### *Other civil proceedings*

98. Civil proceedings against Police can arise from investigations into serious offences that would attract the protection of sections 108–109 in criminal proceedings. Currently, those sections do not apply in civil proceedings other than proceedings under the Criminal Proceeds (Recovery) Act, although the High Court may protect the identity of a witness in civil proceedings through discretionary exercise of its inherent power.
99. We do not recommend reform of sections 108–109 to protect the identity of undercover officers in civil cases against Police. This would be a significant widening of identity protection for undercover officers. It would raise fundamental issues about the appropriate balance between the public interest in calling evidence of undercover officers in civil cases, the principle of “open justice” and the procedural protections for plaintiffs in the New Zealand Bill of Rights Act 1990. This weighing exercise is outside the scope of our operational review.
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# Recommendations

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## CHAPTER 2: TE AO MĀORI AND THE EVIDENCE ACT

**R1**

Insert a new exception to section 17 to provide that the hearsay rule does not apply to a statement offered in evidence to prove the existence or content of mātauranga or tikanga.

**R2**

Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider amending the Code of Conduct for Expert Witnesses in Schedule 4 of the High Court Rules 2016 to better recognise and provide for mātauranga and tikanga as a unique category of expert evidence.

## CHAPTER 3: HEARSAY

**R3**

Amend section 18 to include a new ground for admitting a hearsay statement in a criminal proceeding where:

- a. the maker of the statement has a reasonable fear of retaliation if they give evidence and they do not intend to give evidence because of that fear; and
- b. it is in the interests of justice to admit their hearsay statement.

**R4**

Define “fear of retaliation” in section 16(1) as fear that a defendant or any other person will cause physical or other harm (including, for example, financial or social harm) to the maker of the statement or any other person.

**R5**

Insert a new section providing that:

- a. despite section 17, a hearsay statement is admissible in a civil proceeding unless its admissibility is challenged by another party;
- b. a challenge made by another party under subsection (1) must be made in accordance with the relevant rules of the court unless the judge directs otherwise; and
- c. the judge may give a direction under subsection (2) if:
  - i. having regard to the nature and contents of the statement, no party is substantially prejudiced by the failure to comply with the rules of court; or
  - ii. compliance was not reasonably practicable in the circumstances; or
  - iii. the interests of justice so require.

## CHAPTER 4: DEFENDANTS' AND CO-DEFENDANTS' STATEMENTS

**R6**

Amend section 27 to clarify that subpart 1 (hearsay evidence) applies to a hearsay statement made by a person other than a defendant that contains a defendant's statement.

**R7**

Amend section 27 to clarify that:

- a. a defendant's non-hearsay statement is admissible against a co-defendant; and
- b. a defendant's hearsay statement is only admissible against a co-defendant if it is admitted under section 22A.

## CHAPTER 7: IMPROPERLY OBTAINED EVIDENCE

**R8**

Amend section 30(2)(b) to require the judge to exclude improperly obtained evidence unless satisfied it is in the public interest to admit the evidence.

**R9**

If recommendation 8 is accepted:

- a. amend section 30(2)(b) to require the judge to exclude improperly obtained evidence unless satisfied that the public interest in recognising the seriousness of the impropriety is outweighed by the public interest in having the evidence considered by the fact-finder at trial; and
- b. repeal section 30(4).

OR

If recommendation 8 is not accepted, amend section 30(2)(b) to require the judge to determine whether exclusion is proportionate to the impropriety by balancing the public interest in recognising the seriousness of the impropriety against the public interest in having the evidence considered by the fact-finder at trial.

**R10**

Amend section 30(3) to provide the following:

For the purposes of subsection (2), when assessing the public interest in recognising the seriousness of the impropriety, the court may have regard to:

- a. the importance of any right breached or interest infringed by the impropriety and the seriousness of the intrusion on it;
- b. the extent to which it was known, or ought to have been known, that the evidence was being improperly obtained;
- c. whether the impropriety was necessary to avoid apprehended physical danger to the Police or others;
- d. the extent to which the impropriety resulted from urgency in obtaining the evidence; and
- e. any other relevant matters.

For the purposes of subsection (2), when assessing the public interest in having the evidence considered by the fact-finder at trial, the court may have regard to:

- a. the nature and quality of the improperly obtained evidence;
- b. the seriousness of the offence with which the defendant is charged; and
- c. any other relevant matters.

## CHAPTER 8: PRISON INFORMANTS AND INCENTIVISED WITNESSES

**R11**

Insert a new provision requiring the judge to exclude prison informant evidence (to be defined using the wording in section 122(2)(d)) offered by the prosecution in a criminal proceeding unless satisfied on the balance of probabilities that the circumstances relating to the evidence provide reasonable assurance that it is reliable. The new provision should require a judge in making their assessment to have regard to, among other matters:

- a. any indications that the evidence is unreliable, including its consistency with other evidence and whether it has led to the discovery of other evidence;
- b. whether the evidence could have been constructed on the basis of facts and information gained from sources other than the defendant;
- c. whether the witness has been incentivised to give their evidence and the nature of any incentives offered or received;
- d. whether the witness has any other motives to offer unreliable evidence;
- e. whether the witness has a record of lying; and
- f. whether the witness has any history of offering informant evidence in other proceedings and, if so, the circumstances and nature of that evidence and the outcome of those proceedings.

## CHAPTER 9: VERACITY EVIDENCE

**R12**

Repeal section 37(3).

**R13**

Amend section 38 to:

- a. remove the requirement in section 38(2)(a) for the defendant to give oral evidence in court so that the paragraph states “the defendant has put their veracity in issue or challenged the veracity of a prosecution witness by reference to matters other than the facts in issue”;
- b. insert a new subsection in section 38 stating that the defendant may put their veracity in issue or challenge the veracity of a prosecution witness by giving evidence at trial, through the conduct of the defence case (including in cross-examination) or in a defendant’s statement offered in evidence by any party;
- c. amend section 38(3)(c) to refer to whether any evidence given or statement made by the defendant about veracity was elicited by the prosecution or through investigative questioning; and
- d. insert a new paragraph in section 38(3) referring to the extent to which the defendant seeks to rely on the evidence of their own veracity or to challenge the veracity of a prosecution witness to support their case.

## CHAPTER 10: PROPENSITY EVIDENCE

**R14**

Amend section 43 to provide that, when assessing the prejudicial effect of prior acquittal evidence on the defendant, the judge must also consider whether the defendant can fairly respond to the allegations in the present proceeding, having regard to:

- a. the lapse of time since the earlier investigation and trial;
- b. the material available in relation to the earlier investigation and trial; and
- c. any other relevant matters.

**R15**

Repeal section 43(3)(f).

## CHAPTER 11: IDENTIFICATION EVIDENCE

**R16**

Insert a new paragraph in the definition of “visual identification evidence” in section 4(1) referring to evidence that is an “assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was the person observed performing an act constituting direct or circumstantial evidence of the commission of an offence”.

## CHAPTER 12: MEDICAL PRIVILEGE

**R17**

Amend section 59 to:

- a. remove the words “or for any other purpose” in section 59(1)(b); and
- b. replace references to “examination”, “examine”, “examined” and “test” with “assessment”, “assess” or “assessed” (as appropriate).

**R18**

Amend section 59 to:

- a. replace references to “medical practitioner or clinical psychologist” with “health practitioner”; and
- b. define “health practitioner” in section 59(6) as having the meaning given to it in section 5(1) of the Health Practitioners Competence Assurance Act 2003.

- R19** Amend section 59(5) to refer to “a person acting in a professional capacity on behalf of a health practitioner from whom the person is seeking assistance”.
- R20** The Ministry of Justice should examine protections for counselling notes and other personal records of complainants in sexual and family violence cases and of parties and children in civil cases.

## CHAPTER 13: OTHER PRIVILEGE ISSUES

- R21** Amend section 54(1) to:
- remove the requirement that the communication be made “between the person and the legal adviser”; and
  - extend the privilege to any document (in addition to any communication) that meets the requirements in section 54(1)(a) and (b).
- R22** Insert a new subsection in section 53 to provide that any privilege conferred under sections 54 (legal advice privilege), 56 (litigation privilege) or 57 (settlement privilege) does not terminate except as provided for in the Act.
- R23** Amend section 56(1) to provide that, in addition to the existing requirements, subsection (2) applies to a communication or information only if the communication or information is intended to be confidential.
- R24** Amend section 66(2) to clarify that a privilege held by a person under sections 54–57 can pass to the personal representative of that person on or after their death or other successor in title to property of that person.

## CHAPTER 14: TRIAL PROCESS

**R25**

Te Kura Kaiwhakawā | Institute of Judicial Studies should consider developing new or existing guidance for judges on the application of section 88. This could include guidance on when and how to grant permission for questioning pre-trial or intervene in potential breaches and whether to direct juries to ignore evidence given in breach of section 88.

**R26**

Amend section 92(1) to provide that, in any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness when it is reasonable to expect that:

- a. the witness is or may be in a position to give admissible evidence on those matters; and
- b. the witness or the party that called the witness is or may be unaware of the basis on which their evidence is contradicted.

**R27**

Amend section 95(5)(b) to clarify that:

- a. the role of a person appointed under section 95(5)(b) is limited to putting the unrepresented defendant's or party's questions to the witness; and
  - b. a lawyer appointed under section 95(5)(b) to put the unrepresented defendant's or party's questions to the witness is not acting as counsel for the defendant or party.
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## CHAPTER 1

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# Introduction

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- 1.1 Te Aka Matua o te Ture | Law Commission has undertaken a statutory review of the operation of the provisions of the Evidence Act 2006.<sup>1</sup> For reasons explained below, it is our third and final such review. This report sets out our findings from the review and makes recommendations for reform.
- 1.2 In this chapter, we provide an overview of the Act, explain the scope of our review and the process we have followed and summarise the matters addressed in this report.

## OVERVIEW OF THE EVIDENCE ACT 2006

- 1.3 The Act brings together most of the rules of evidence in a single statute. It governs what evidence can be admitted in criminal and civil court proceedings and how evidence can be given.<sup>2</sup> Evidence is used to establish the facts on which proceedings are determined. The rules of evidence are therefore vital to securing just processes and outcomes. This is reflected in the purpose of the Act, which is to “help secure the just determination of proceedings”.<sup>3</sup>
- 1.4 To achieve the Act’s purpose, its rules prescribe what evidence is admissible, any conditions for admissibility and what evidence must be excluded. Section 7 sets out the fundamental principle that all relevant evidence is admissible and evidence that is not relevant is inadmissible.<sup>4</sup> Evidence is relevant if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.<sup>5</sup> However, under section 8 (general exclusion), the judge must exclude evidence if its probative value is outweighed by the risk the evidence will:<sup>6</sup>
- (a) have an unfairly prejudicial effect on the proceeding; or
  - (b) needlessly prolong the proceeding.

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<sup>1</sup> The review is required by Evidence Act 2006, s 202 (now repealed).

<sup>2</sup> Some courts, including te Kōti Whenua Māori | Māori Land Court, te Kōti Taiao | Environment Court and te Kōti Whānau | Family Court are not bound by the Evidence Act 2006.

<sup>3</sup> Evidence Act 2006, s 6.

<sup>4</sup> Evidence Act 2006, s 7(1) and (2).

<sup>5</sup> Evidence Act 2006, s 7(3).

<sup>6</sup> Evidence Act 2006, s 8(1).



- 1.5 In a criminal proceeding, when determining whether the probative value of evidence is outweighed by the risk of unfair prejudicial effect, the judge must take into account the right of the defendant to offer an effective defence.<sup>7</sup>

### Background to enactment

- 1.6 The Act is based on the Commission's 1999 Report on the law of evidence and its proposed Evidence Code, which was the product of a decade-long review of evidence law in Aotearoa New Zealand.<sup>8</sup> At that time, the law of evidence was largely found in the common law, which was supplemented by some statutory provisions.<sup>9</sup> The purpose of the Commission's review was "[t]o make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy resolution of disputes".<sup>10</sup> With that purpose in mind, the Commission was asked to examine the law of evidence and make recommendations for its reform with a view to codification.<sup>11</sup>
- 1.7 The Evidence Code was intended to replace most of the common law and statutory provisions on the admissibility and use of evidence in court proceedings with one comprehensive scheme.<sup>12</sup> The Evidence Bill introduced by the Government in 2005 largely reflected the Commission's recommendations. The select committee that considered the Bill made a number of changes. The underlying purpose of reform, however, remained the same — the drawing together of the laws of evidence in one place.<sup>13</sup>

### Statutory reviews of the Act's operation

- 1.8 An important change made to the Bill at select committee stage was to insert a requirement that the Commission review the operation of the Act every five years to make sure it is working well in practice. This requirement became section 202. The Commission completed its first review in 2013 (2013 Review).<sup>14</sup> It reported that the Act was generally working well and there was widespread acceptance of the value of codification of the law in this area. It made several recommendations for reform, some of which were adopted in the Evidence Amendment Act 2016.
- 1.9 The Commission completed its Second Review of the Act in 2019 (Second Review).<sup>15</sup> As in the 2013 Review, it found the Act was generally working well but that important further amendments were warranted. Some of these recommendations have since been implemented by the Sexual Violence Legislation Act 2021. The Government intended to progress or further consider some other recommendations as part of the development

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<sup>7</sup> Evidence Act 2006, s 8(2).

<sup>8</sup> Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999); Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999).

<sup>9</sup> Including, but not limited to, the Evidence Act 1908, see Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.2].

<sup>10</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at xviii.

<sup>11</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at xviii.

<sup>12</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [8].

<sup>13</sup> Evidence Bill 2005 (256–2) (select committee report) at 1.

<sup>14</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013).

<sup>15</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019).

of an Evidence Amendment Bill. At the time of writing, no such Bill has been introduced to Parliament.

- 1.10 In its Second Review, the Commission also recommended the repeal of section 202, noting that no other area of the law is subject to regular statutory review by the Commission in this way. The Government accepted this recommendation and the Statutes Amendment Act 2022 repealed section 202.

## SCOPE AND TIMING OF THIS REVIEW

- 1.11 The Minister of Justice's letter referring this review to the Commission (dated 23 February 2022) requested the Commission to undertake the review in accordance with the requirements of section 202.<sup>16</sup> Therefore, although it has since been repealed, the scope and timing of this review continue to be governed by section 202. Section 202 requires the Commission to consider:
- (a) the operation of the provisions of the Act since the Second Review; and
  - (b) whether repeal or amendment of any provisions of the Act is "necessary or desirable".
- 1.12 We published terms of reference on 28 September 2022. The terms of reference confirmed the scope of our review pursuant to section 202 and highlighted some of the key areas we would address.<sup>17</sup> The terms of reference also confirmed the review would not consider amendments to the Act made by the Sexual Violence Legislation Act given the recency of those amendments.
- 1.13 In accordance with section 202, this report is due to the Minister of Justice by 23 February 2024.<sup>18</sup>

## OUR PROCESS

### Identifying potential operational issues

- 1.14 Given this scope, we have focused on identifying potential issues with the Act's operation since the Second Review. An example of an operational issue is where the wording or interpretation of a particular provision or combination of provisions may be resulting in uncertainty or inconsistency in practice. Because this is an operational review, we are not undertaking a first-principles review of the rules of evidence. However, if the underlying policy of a provision is not reflected in the wording of that provision or is not being achieved in practice (for example, due to other developments in the law), it may be necessary to re-examine that underlying policy as part of assessing how best to address the operational issue.
- 1.15 We identified potential issues with the operation of the Act through research and preliminary feedback from stakeholders. We examined appellate case law, commentary

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<sup>16</sup> Letter from Kris Faafoi (Minister of Justice) to Amokura Kawharu (President of the Law Commission) regarding the third statutory review of the Evidence Act 2006 (23 February 2022).

<sup>17</sup> The terms of reference are set out in Appendix 2.

<sup>18</sup> The Commission must report to the Minister within two years of the date on which the reference occurs (that is, within two years of 23 February 2022), see Evidence Act 2006, s 202(2).

and research published since 2018.<sup>19</sup> Operational issues are not always evident from case law and commentary. We also therefore invited preliminary feedback on potential issues for inclusion in this review from the judiciary, interested organisations and individuals within the legal profession and academic community.

- 1.16 In accordance with our statutory obligation to take into account te ao Māori (the Māori dimension) under section 5 of the Law Commission Act 1985, we examined potential operational issues in terms of how the Act recognises and provides for te ao Māori. As these are cross-cutting issues, we deal with them first.
- 1.17 The Minister of Justice's letter of referral also suggested four issues for our consideration:<sup>20</sup>
- (a) whether the process for determining whether improperly obtained evidence is admissible in criminal proceedings (section 30) gives sufficient weight to the impropriety;
  - (b) whether there should be additional controls on the admissibility of statements made by defendants to fellow prisoners;
  - (c) whether the provisions controlling anonymous evidence given by undercover police officers require amendment; and
  - (d) whether any clarifications are needed regarding privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists.
- 1.18 We met with our Expert Advisory Group, which we established for this review, and with the Judicial Advisory Committee established by the Chief Justice for this review to discuss our preliminary analysis of issues. We also discussed our proposed approach in relation to te ao Māori with the Commission's Māori Liaison Committee.

## Issues Paper

- 1.19 We published an Issues Paper on 8 May 2023.<sup>21</sup> The Issues Paper invited feedback on 66 questions. We sent the Issues Paper to interested parties, published it on our website and publicised it through media engagement.
- 1.20 We generally only included a matter in the Issues Paper if it met all the following criteria or if we considered that it could not be properly assessed against these criteria without first seeking submissions on the issue from interested parties:
- (a) First, the issue is more than minor or technical in nature (that is, the issue has the potential to cause a real problem in practice).
  - (b) Second, the issue relates to the operation of the Act since the Second Review or the issue pre-dates the last review but is of such significance that we think it should be included in this review given the repeal of section 202.
  - (c) Third, the issue was not comprehensively considered in the Commission's earlier reviews of the Act or new material (such as subsequent case law or commentary)

<sup>19</sup> Pursuant to the Evidence Act 2006, s 202(1)(a), we focused our research on the five years since the publication of the Issues Paper in the Second Review in March 2018.

<sup>20</sup> Letter from Kris Faafoi (Minister of Justice) to Amokura Kawharu (President of the Law Commission) regarding the third statutory review of the Evidence Act 2006 (23 February 2022).

<sup>21</sup> Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023).

suggests there is a need to revisit the conclusions reached by the Commission in its earlier review(s).

- 1.21 We also included one technical drafting issue relating to litigation privilege and confidentiality. We included this issue on the basis that the drafting problem appeared to be relatively uncontroversial and could be fixed easily.

### Consultation and further research

- 1.22 In consultation on the Issues Paper, we received a total of 46 submissions on one or more of the questions we asked. As is our usual practice, where we refer to or summarise a submission, we use the submitter's language as much as possible with minor edits for readability. We also met with several parties to discuss the issues and options for reform.
- 1.23 In formulating our recommendations, we analysed all submissions and the feedback received at our meetings. We developed our thinking to reflect many of the points raised. On some issues, we also undertook further research or updated our research.
- 1.24 Following this analysis, we convened further meetings with the Expert Advisory Group and Judicial Advisory Committee to receive feedback on our draft proposals for reform. We discussed our proposals in relation to te ao Māori with our Māori Liaison Committee. We revisited many of our provisional proposals following these discussions.

### Assessing the case for reform

- 1.25 Consistent with the Commission's approach in the Second Review, we have assessed the case for reform in relation to each issue by reference to the overarching purpose statement in section 6. As noted, the purpose of the Act is to help secure the just determination of proceedings. Section 6 also lists six objectives by which this purpose can be achieved. Accordingly, when we consider whether a potential amendment to the Act is necessary or desirable, we have taken into account whether the amendment helps to secure the just determination of proceedings by:<sup>22</sup>
- (a) providing for facts to be established by the application of logical rules;
  - (b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990;
  - (c) promoting fairness to parties and witnesses;
  - (d) protecting rights of confidentiality and other important public interests;
  - (e) avoiding unjustifiable expense and delay; and
  - (f) enhancing access to the law of evidence.
- 1.26 Because this is an operational review, we have considered the extent to which there is evidence of a problem in practice when determining whether reform is necessary or desirable. We also recognise that legislative amendment is not the only way to address an issue with the Act's operation. In assessing whether reform is necessary or desirable, we have also therefore considered whether the issue is best left to be resolved by the courts on a case-by-case basis or whether non-legislative measures (such as practice notes or guidance) are more appropriate alternatives to legislative amendment. Such

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<sup>22</sup> Evidence Act 2006, s 6. For discussion of the purpose provision, see Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC IP42, 2018) at [1.22]–[1.38].

options can be more flexible and responsive to changing circumstances or emerging best practice.<sup>23</sup>

- 1.27 We recognise it is important when making recommendations for legislative amendment to ensure, as far as practicable, that any reform does not have unintended consequences. The risk of unintended consequences may, in some cases, weigh against reform, particularly where there is limited evidence of an issue causing significant problems in practice.

## MATTERS ADDRESSED IN THIS REPORT

- 1.28 This report makes 27 recommendations for reform. Each chapter:
- (a) identifies the issues with a provision or provisions of the Act;
  - (b) summarises what we asked submitters in our Issues Paper;
  - (c) summarises and analyses the submissions and feedback we received in response; and
  - (d) explains our recommendations for reform of the Act or reasons for not recommending reform (as the case may be).
- 1.29 We have identified one issue in respect of which the law may be developed without the need for legislative amendment. In Chapter 2, we recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee consider amending the Code of Conduct for Expert Witnesses that forms part of the High Court Rules 2016.
- 1.30 In our Issues Paper, we invited submitters to raise any issue regarding the operation of the Act for our consideration. Some submitters suggested alternative options for reform from those we proposed in the Issues Paper. Some also raised new issues for our consideration. Where we have undertaken detailed analysis of a suggestion or new issue, this is noted in the relevant part of this report. We have not addressed all the suggestions or issues raised by submitters. In particular, we were unlikely to address suggestions or issues that fell outside the limited scope of our review, were raised by only one submitter, required further consultation or where the potential case for reform was not so certain or significant to justify expending resources on their analysis.
- 1.31 One issue raised with us by submitters concerns the adequacy of protections for counselling notes and other personal records of complainants in sexual and family violence cases and parties and children in civil cases. In Chapter 12, we explain that, because we did not consult on the issue, we did not have the opportunity to hear from other interested parties about the nature and scope of any problems in practice. However, given the issue was raised by several submitters and there are strong public interests involved, we recommend the Ministry of Justice examine the issue further.

## TERMINOLOGY USED IN THIS REPORT

- 1.32 References in our report to “the Act” are to the Evidence Act 2006 and references to a “section” are to sections of the Act unless otherwise stated.

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<sup>23</sup> For further detail, see Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [1.26]–[1.30].

- 1.33 References to our “Issues Paper” are to the Issues Paper we published for this review on 8 May 2023.<sup>24</sup>
- 1.34 References to the “Evidence Code” are to the Commission’s proposed Evidence Code published in 1999 as part of its review of the laws of evidence.<sup>25</sup>
- 1.35 References to the “2013 Review” are to the Commission’s first operational review of the Act, completed in 2013.<sup>26</sup>
- 1.36 References to the “Second Review” are to the Commission’s second operational review of the Act, completed in 2019.<sup>27</sup>
- 1.37 We use the term “fact-finder” as a generic expression to refer either to the jury (in a trial by jury) or the judge (in a judge-alone trial).
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<sup>24</sup> Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 / The Third Review of the Evidence Act 2006* (NZLC IP50, 2023).

<sup>25</sup> Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999).

<sup>26</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013).

<sup>27</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019).

## CHAPTER 2

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# Te ao Māori and the Evidence Act

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## INTRODUCTION

- 2.1 In this chapter, we consider issues relating to te ao Māori and the Evidence Act 2006. We address the following:
- (a) Mātauranga (Māori knowledge) and tikanga as evidence. We recommend introducing a new exception to the hearsay rule and recommend Te Komiti mō ngā Tikanga Kooti | Rules Committee consider amending the Code of Conduct for Expert Witnesses, in each case to better provide for the admission of this kind of evidence.
  - (b) Other potential issues with how the Act recognises and provides for te ao Māori. We do not recommend reform in relation to these other issues.

## BACKGROUND

- 2.2 When developing the Evidence Code, Te Aka Matua o te Ture | Law Commission examined issues of potential concern to Māori. This included considering how evidence relating to Māori custom is admitted in court and whether the confidentiality of communications on marae and with kaumātua, tohunga (in this context, spiritual leader) and rongoā (medicine) practitioners should be protected.<sup>1</sup> The Evidence Code did not expressly recognise te ao Māori or make specific provision for mātauranga, tikanga or te Tiriti o Waitangi | Treaty of Waitangi (the Treaty). However, several provisions in the Evidence Code and the resulting Act were drafted in a way that was intended to address those issues.
- 2.3 In the Commission's Second Review, it recommended the Act be amended to make it clear that courts can regulate procedures for giving evidence in a manner that recognises

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<sup>1</sup> Te Aka Matua o te Ture | Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 1997).

tikanga.<sup>2</sup> The Government accepted this recommendation in principle subject to further consideration of its potential operational impacts.<sup>3</sup>

- 2.4 In this review we focus on ensuring the Act is responsive to the growing use of mātauranga and tikanga evidence in court proceedings.
- 2.5 As we explain further below, mātauranga is a very general term that includes tikanga. It also includes kōrero tuku iho, meaning knowledge that has been conveyed orally down through generations. Mātauranga Māori and tikanga Māori comprise knowledge shared and accepted by Māori. Mātauranga ā-iwi and tikanga ā-iwi refer to the localised expressions of these that are shaped by the knowledge, experiences and circumstances of iwi.<sup>4</sup> We use the term “iwi” in its broader meaning, so mātauranga ā-iwi and tikanga ā-iwi may include (for example) mātauranga ā-waka and tikanga ā-waka, mātauranga ā-marae and tikanga ā-marae, mātauranga ā-hapū and tikanga ā-hapū or mātauranga ā-whānau and tikanga ā-whānau.<sup>5</sup> These localised expressions will often convey deeper, more contextual meaning than knowledge shared more by Māori more widely. In this chapter, when we refer to mātauranga and tikanga, we intend these words to include mātauranga Māori and tikanga Māori and mātauranga ā-iwi and tikanga ā-iwi (using “iwi” in its broader meaning). Mātauranga and tikanga evidence may comprise mātauranga Māori and/or tikanga Māori, mātauranga ā-iwi and/or tikanga ā-iwi or a combination of them depending on the context of the case.
- 2.6 The usual approach of the courts to tikanga has been to treat tikanga as something to be proved as a matter of fact by expert evidence in the same way as foreign law. Te Kōti Mana Nui | Supreme Court in *Ellis v R* noted the inappropriateness of this, given tikanga is not foreign law.<sup>6</sup> The Court also acknowledged, however, that the usual approach is a convenient and efficient way of providing unfamiliar material to the fact-finder.<sup>7</sup>
- 2.7 We proceed on the basis that, at present, the resolution of some claims will depend on the admission of mātauranga and tikanga as evidence. Our review is taking place within a wider context in which the courts are increasingly being called on to consider and recognise Māori rights and interests, including those arising under tikanga and the Treaty, as well as the general application of tikanga.<sup>8</sup> Evidence of mātauranga and tikanga is often central to determining these cases.

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<sup>2</sup> Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019), recommendation 2.

<sup>3</sup> *Government Response to the Law Commission Report: The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (September 2019) at 7.

<sup>4</sup> See Law Commission *He Poutama* (NZLC SP24, 2023) at [1.22] and [2.9]–[2.12].

<sup>5</sup> Law Commission *He Poutama* (NZLC SP24, 2023) at [1.22] (referring to different types of localised expressions of tikanga).

<sup>6</sup> *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at n 151 per Glazebrook J and [273] per Williams J.

<sup>7</sup> *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [273] per Williams J and [181] per Winkelmann CJ.

<sup>8</sup> Discussed in Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [2.7].



## MĀTAURANGA AND TIKANGA EVIDENCE

### Issue

- 2.8 Mātauranga and tikanga exist within te ao Māori. The Act's rules of admissibility have their origins in English common law. It has long been recognised that the rules against hearsay and opinion evidence can create challenges relating to the admission of mātauranga and tikanga evidence, particularly evidence deriving from the tradition of oral history or kōrero tuku iho in te ao Māori.

### *The rule against hearsay*

- 2.9 A hearsay statement is an out-of-court statement made by a person who is not a witness that is offered in evidence to prove the truth of its contents.<sup>9</sup> The Act contains a rule against hearsay in section 17, which provides that a hearsay statement is not admissible. The rationale for the rule concerns reliability and reflects the reliance placed on cross-examination as a way of testing the truth of evidence. If the maker of a statement is unavailable as a witness, a person giving evidence of the statement lacks first-hand knowledge of the event and their evidence cannot be tested properly under cross-examination.<sup>10</sup>
- 2.10 The rule in section 17 is subject to a general exception in section 18. The exception applies if two conditions are met. First, the circumstances relating to the statement “provide reasonable assurance that the statement is reliable”. Second, the maker of the statement is unavailable as a witness (for example, because they have died) or requiring them to appear as a witness would cause undue expense or delay.<sup>11</sup>

### *The rule against opinion evidence and the admissibility of expert opinion*

- 2.11 Section 23 codified the opinion rule, under which a statement of opinion is not admissible in any proceeding. Opinion evidence is excluded to prevent the admission of “unreliable, misleading or superfluous evidence”.<sup>12</sup> The role of the witness is to give direct evidence of their perceptions of the facts. In this respect, the opinion rule guards against witnesses drawing conclusions about facts as this is the role of the fact-finder.<sup>13</sup> It is also intended to guard against a witness giving their opinion in relation to facts that would otherwise be inadmissible.<sup>14</sup>
- 2.12 The opinion rule is subject to exceptions, including for opinions given by an “expert” witness.<sup>15</sup> The Act defines an expert as “a person who has specialised knowledge or skill

<sup>9</sup> Evidence Act 2006, s 4 (definition of “hearsay statement”).

<sup>10</sup> Law Commission *Hearsay Evidence* (NZLC PP10, 1989) at [1]–[8]; Law Commission *Evidence Law Reform: Te Ao Māori Consultation* (unpublished consultation paper, 1997) at [5].

<sup>11</sup> See also Evidence Act 2006, s 16(2) explaining “unavailable as a witness”.

<sup>12</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [72].

<sup>13</sup> Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at [10] and [12].

<sup>14</sup> Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV23.04].

<sup>15</sup> Evidence Act 2006, s 25. Section 24 also permits a witness to state an opinion in evidence if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard or otherwise perceived.

based on training, study or experience”.<sup>16</sup> Expert opinion evidence is admissible only 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.<sup>17</sup> The Code of Conduct for Expert Witnesses prescribes duties of expert witnesses. For example, the Code states that an expert witness has an overriding duty to assist the court impartially. The Code is set out in Schedule 4 of the High Court Rules 2016.<sup>18</sup>

### *Operation of the hearsay and opinion rules in relation to mātauranga and tikanga*

- 2.13 In our Issues Paper, we observed that the expert evidence provisions of the Act are routinely engaged to admit evidence of mātauranga and tikanga from pūkenga (experts). We also noted there is less clarity on the scope for admitting mātauranga or tikanga outside the expert evidence provisions.<sup>19</sup>
- 2.14 We explained the rules against hearsay and opinion evidence can potentially apply to evidence of mātauranga and tikanga and noted that few cases have expressly addressed the admissibility of mātauranga and tikanga under these rules.<sup>20</sup> When admissibility has been addressed, the courts have generally been permissive and pragmatic while recognising some difficulty with admitting evidence of mātauranga and tikanga through these rules.<sup>21</sup>
- 2.15 Case law also illustrates the influence of the hearsay rule in how the weight of oral history evidence may be assessed by a fact-finder. In *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General*, the Kōti Matua | High Court examined claims relating to the Crown’s acquisition and confiscation of ancestral land from Ngāti Te Ata in 1864 and later events.<sup>22</sup> The Court commented that, unlike other cases where facts could be drawn from a reasonably comprehensive documentary record, documentary evidence of detailed discussions and relationships between the parties was “scant to say the least”.<sup>23</sup> Many of the disputed facts were the subject of competing expert evidence. There was no objection by either party to the evidence adduced at the trial, so the Court proceeded on the basis it was admitted by agreement. Where evidence was hearsay, the Court took this into account when considering the weight to give to it. It said this was “particularly necessary in the case of some of the historical materials, which are not complete and thus the full context to certain events and communications is unknown”.<sup>24</sup>
- 2.16 We identified three other mechanisms for admitting mātauranga and tikanga evidence under the Act but noted these are generally limited to undisputed evidence. These are

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<sup>16</sup> Evidence Act 2006, s 4 (definition of “expert”).

<sup>17</sup> Evidence Act 2006, s 25(1).

<sup>18</sup> Compliance with the Code is required by s 26 of the Evidence Act 2006.

<sup>19</sup> Issues Paper at [2.29]–[2.30].

<sup>20</sup> Issues Paper at [2.22].

<sup>21</sup> For example, see *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461, [2012] BCL 396 at [41]–[42]; Issues Paper at [2.22]–[2.27].

<sup>22</sup> *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882.

<sup>23</sup> *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882 at [142].

<sup>24</sup> *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882 at [18].

agreed statements of fact (as in *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohū Inc*), giving notice of uncontroverted facts and reliance on published material.<sup>25</sup>

## Consultation

### What we asked submitters

- 2.17 We invited submissions on whether the Act should address the admissibility of mātauranga and tikanga. We also invited submissions on whether the Act should:
- (a) Option 1 — introduce statutory exceptions to the rules against hearsay and opinion evidence for evidence of tikanga and potentially mātauranga; and/or
  - (b) Option 2 — introduce guidance as to the need to interpret and apply the provisions of the Act having regard to te ao Māori.
- 2.18 Option 1 is based on the Australian approach.<sup>26</sup> In Australia, there were concerns about the effect of the hearsay and opinion evidence rules on the admission of evidence from Aboriginal people and Torres Strait Islanders. This resulted in the adoption of exceptions to these rules for evidence about traditional laws and customs.<sup>27</sup>
- 2.19 In the Issues Paper, we also suggested there may be merit in considering a broader exception to the hearsay and opinion rules to include other cultures with oral traditions and methods of storing knowledge.
- 2.20 Option 2 is more general in nature. It would guide judges in cases involving Māori interests to interpret provisions of the Act, and approach questions of relevance under section 7 having regard to te ao Māori.

### Results of consultation

- 2.21 Nine submitters addressed these questions.<sup>28</sup>
- 2.22 Most submitters, as well as people we spoke with during consultation, favoured reform. However, they had different views about the best reform path to follow.

### Should the Act be amended to address the admissibility of mātauranga and tikanga?

- 2.23 Four submitters expressed views on whether the Act should be amended to address the admissibility of mātauranga and tikanga. One submitter supported reform to offer more guidance.<sup>29</sup> Three did not consider reform is needed,<sup>30</sup> with two of them suggesting the law should be allowed an opportunity to develop through case law.<sup>31</sup>

<sup>25</sup> Issues Paper at [2.17].

<sup>26</sup> For example, in the Commonwealth legislation, see Evidence Act 1995 (Cth), s 72 (hearsay exception) and s 78A (exception to the opinion rule). These exceptions are replicated in most states and territories.

<sup>27</sup> For background, see Australian Law Reform Commission and others *Uniform Evidence Law: Report* (ALRC R102, NSWLRC R112, VLRC Final Report, December 2005), ch 19.

<sup>28</sup> Chapman Tripp, Te Tari Ture o te Karauna | Crown Law Office, Associate Professor Anna High, Adjunct Professor Elisabeth McDonald, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Te Rōpū Tauira Ture o Aotearoa | New Zealand Law Students' Association, Ngā Pirihimana o Aotearoa | New Zealand Police, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Wellington Community Justice Project.

<sup>29</sup> New Zealand Law Students' Association.

<sup>30</sup> Crown Law Office, New Zealand Police, Public Defence Service.

<sup>31</sup> Crown Law Office, Public Defence Service.

- 2.24 Submitters and people we spoke with held mixed views about the extent of any problem in practice. Te Tari Ture o te Karauna | Crown Law Office and Adjunct Professor Elisabeth McDonald were not aware of instances where the Act's rules have prevented the admission of relevant tikanga evidence. Others said they had experience of or were familiar with challenges parties can face when presenting tikanga evidence to a court, including having to respond to suggestions of inherent unreliability in relation to admitted evidence.<sup>32</sup> Chapman Tripp suggested many of the problems it had identified can be solved through upskilling lawyers and the judiciary, without legislative amendment.
- 2.25 Two submitters expressed concerns about progressing any reform of the Act while the classification of tikanga as either an issue of fact or question of law in respect of some claims may be unsettled.<sup>33</sup> Concerns were also raised about whether reform would in any event be able to address a more fundamental problem of fitting mātauranga and tikanga evidence within a non-Māori world view and structure.<sup>34</sup>

### Statutory exception to the rule against hearsay

- 2.26 Four submitters addressed the proposed exception to the rule against hearsay for evidence of mātauranga and tikanga. Two submitters supported reform,<sup>35</sup> one did not<sup>36</sup> and one commented on the proposal.<sup>37</sup>
- 2.27 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Chapman Tripp supported the proposed exception. The NZLS agreed with a statement by Chief Justice Black of the Federal Court of Australia, which was referred to in a joint report by the Australian, New South Wales and Victorian Law Reform Commissions (the Australian Commissions) that led to the introduction of the uniform Australian Evidence Acts:<sup>38</sup>
- ... [there remains] a serious question as to whether it is appropriate for the legal system to treat evidence of this nature as prima facie inadmissible and to only admit it by way of an exception to an exclusionary rule when such evidence is in precisely the form by which law and custom are maintained under indigenous customs.
- 2.28 The NZLS also quoted from the report itself in support of extending the proposed hearsay exception to encompass mātauranga Māori:<sup>39</sup>

Moreover, while the courts sometimes apply the hearsay rule flexibly with respect to evidence of traditional laws and customs, it has been observed that 'the ghost of hearsay — the preference of the written word over the spoken word — still impacts negatively on the assessment of Aboriginal oral historical evidence'.

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<sup>32</sup> Chapman Tripp, Karen Feint KC, Matthew Smith and feedback received through a wānanga with rōia Māori facilitated by Te Hunga Rōia Māori o Aotearoa (referred to subsequently in this chapter as "wānanga with rōia Māori").

<sup>33</sup> Crown Law Office, Public Defence Service.

<sup>34</sup> Karen Feint KC, Matthew Smith.

<sup>35</sup> Chapman Tripp, New Zealand Law Society.

<sup>36</sup> Crown Law Office.

<sup>37</sup> New Zealand Law Students' Association.

<sup>38</sup> See Australian Law Reform Commission and others *Uniform Evidence Law: Report* (ALRC R102, NSWLRC R112, VLRC Final Report, December 2005) at [19.72].

<sup>39</sup> See Australian Law Reform Commission and others *Uniform Evidence Law: Report* (ALRC R102, NSWLRC R112, VLRC Final Report, December 2005) at [19.73].

- 2.29 Chapman Tripp and Te Rōpū Taura Ture o Aotearoa | New Zealand Law Students' Association commented on the incompatibility between the hearsay rule and oral traditions of mātauranga and tikanga. Chapman Tripp submitted the proposed hearsay exception would formalise the position and ensure that reliable evidence regarding mātauranga and tikanga will be admissible.
- 2.30 The Crown Law Office did not support the proposed exception and said the current rules do not appear to present a barrier to the admission of relevant evidence.

### Statutory exception to the rule against opinion evidence

- 2.31 Four submitters addressed the proposed exception to the rule against opinion evidence. Two submitters did not support reform,<sup>40</sup> one gave qualified support<sup>41</sup> and one commented on the proposal.<sup>42</sup>
- 2.32 The Crown Law Office did not think the exception is needed. Chapman Tripp likewise said the current controls are adequate to enable reliable tikanga opinion evidence to be admitted while ensuring unreliable evidence is excluded. Chapman Tripp suggested the Act's definition of expert has a wide meaning and would permit evidence to be given by kaumātua and kuia, those with lived experience of "te kawa o te marae/tribal histories" as well as those with formal qualifications. In its view, removing the expertise requirement would risk lessening the quality of tikanga evidence available to the court and the respect due to pūkenga who provide evidence.
- 2.33 The NZLS gave qualified support for the proposed exception. It suggested it may be preferable for any such exception to be limited to members of the relevant whānau, hapū or iwi (similar to the membership requirement in the Australian exception) provided this is consistent with the New Zealand Bill of Rights Act 1990.
- 2.34 The proposed exception for opinion evidence would apply to evidence offered by a witness who would not need to meet the Act's definition of expert. In response to this aspect of the proposal, Associate Professor Anna High commented that, in such cases, the reliability threshold in section 18 (for hearsay evidence) and the substantial helpfulness test in section 25 may be important safeguards against unreliable representations of mātauranga or tikanga. She also commented that, on the other hand, the evidence would still be subject to the general exclusion provision in section 8. Expertise could be taken into account as a matter of threshold reliability in the assessment of probative value under that provision.
- 2.35 During consultation, we received feedback raising concerns about how the provision for expert opinion evidence is being used in practice. We heard, in particular, about the kinds of expertise that might be needed in order to offer mātauranga and tikanga evidence as opinion evidence, as well as potential barriers to being able to do so. These included the following:
- (a) In relation to localised issues, it is a person's whakapapa that makes them an expert on the tikanga of the relevant whānau, hapū or iwi.<sup>43</sup>

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<sup>40</sup> Chapman Tripp, Crown Law Office.

<sup>41</sup> New Zealand Law Society.

<sup>42</sup> Associate Professor Anna High.

<sup>43</sup> Natalie Coates, New Zealand Law Students' Association, wānanga with rōia Māori.

- (b) Mātauranga and tikanga evidence from within the relevant hapū or iwi may not reach the standard of independence expected by the Code of Conduct for Expert Witnesses. This can deter people from wanting to give relevant evidence.<sup>44</sup>
  - (c) Many people who want to give evidence would not qualify as an expert. Yet lived experience can also provide useful information that can be merged into other fact evidence.<sup>45</sup>
  - (d) Opinion evidence is essential to incorporating tikanga as part of the common law. When people are coming to this issue with different world views, it is essential to be able to explain those differences.<sup>46</sup>
  - (e) Some judges have experience and knowledge of applying tikanga frameworks that they will draw on in particular cases, while others will want more evidence (or expert assistance) in order to establish correct tikanga.<sup>47</sup>
- 2.36 There was no support for a broader exception to either the hearsay or opinion evidence rules to cover oral traditions of other cultures. The Crown Law Office and the NZLS indicated that defining the criteria for when such an exception applies would be very difficult and that, in any case, there is no present need for one.

#### General statutory guidance for interpreting the Act having regard to te ao Māori

- 2.37 Eight submitters addressed option 2, which contemplates introducing statutory guidance as to the need to interpret and apply the Act having regard to te ao Māori.
- 2.38 Three submitters expressed reservations about the proposed reform. The NZLS agreed with our preliminary view that the proposal could introduce uncertainty but encouraged the Commission to seek views of parties who may be better placed to comment on the need for it. The Crown Law Office did not support the proposal and expressed concern it would generate significant uncertainty. Chapman Tripp did not think a directive to interpret the Act consistently with tikanga would add much to the existing legal position that tikanga is part of New Zealand law.
- 2.39 Three submitters commented in favour of this option,<sup>48</sup> and two expressed a preference for it relative to the proposed hearsay and opinion evidence exceptions.<sup>49</sup> These submitters suggested the following:
- (a) An advantage of this option over the proposed exceptions is that it is conducive not only to admitting but also excluding evidence on a tikanga basis.<sup>50</sup>

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<sup>44</sup> Karen Feint KC, wānanga with rōia Māori.

<sup>45</sup> Karen Feint KC.

<sup>46</sup> Karen Feint KC.

<sup>47</sup> Karen Feint KC, Matthew Smith, wānanga with rōia Māori.

<sup>48</sup> Adjunct Professor Elisabeth McDonald (expressed support for the exception), New Zealand Law Students' Association, Wellington Community Justice Project.

<sup>49</sup> Associate Professor Anna High, Public Defence Service.

<sup>50</sup> Associate Professor Anna High.

- (b) An advantage of this option over the proposed exceptions is that it is the more flexible option. If reform is needed, this flexibility is important given the law in relation to tikanga is still in the early stages of evolution in some areas.<sup>51</sup>
- (c) This option is broader in application and provides a future-proof solution.<sup>52</sup>
- (d) The lack of express reference to te ao Māori or tikanga in the Act is surprising and outdated.<sup>53</sup>
- (e) The normalisation of consideration of te ao Māori will ensure Māori interests are protected and will help experiences of Māori in the justice system.<sup>54</sup>

### Preliminary comments

- 2.40 Before we address the need for reform, we make the following two preliminary comments.
- 2.41 First, we have considered whether reform should only address tikanga evidence or should address tikanga evidence as well as mātauranga evidence. In current discussions about the development of the law, the focus is primarily on tikanga concepts. However, for the purpose of reforming the laws of evidence, among submissions and feedback that favoured reform, there was support for extending reform to include mātauranga. Our own analysis is that, because mātauranga is a very general term that encompasses tikanga, it would be artificial to separate mātauranga from tikanga and vice versa. Current practice also demonstrates an increasing reliance on both mātauranga and tikanga evidence. Either or both may be relevant in a range of contexts.<sup>55</sup>
- 2.42 Second, we acknowledge that engagement between tikanga and state law continues to evolve but do not see this as a barrier to improving how mātauranga and tikanga evidence may be offered and admitted in court. As the legal profession and judiciary develop their knowledge and experience, over time, it is likely some claims will increasingly be able to be established through submissions alone.<sup>56</sup> As noted earlier, the Court in *Ellis* observed that, for now, treating tikanga as evidence is a convenient and efficient technique for providing relevant material to the court in relation to any claim where tikanga may be at issue.<sup>57</sup> In *Ellis*, Glazebrook and Williams JJ also emphasised the need to preserve the integrity of tikanga in its interactions with the common law. To some extent, treating tikanga as a matter of evidence (rather than law) may protect tikanga while issues of classification are resolved, because a court does not “determine” the content of tikanga when it is treated as evidence. We also agree with Chapman Tripp that testing tikanga as evidence can help ensure courts are well equipped to competently rule on issues as to tikanga.

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<sup>51</sup> Public Defence Service.

<sup>52</sup> New Zealand Law Students' Association.

<sup>53</sup> New Zealand Law Students' Association.

<sup>54</sup> New Zealand Law Students' Association.

<sup>55</sup> For case law examples, see Issues Paper at [2.28].

<sup>56</sup> See *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [125] per Glazebrook J.

<sup>57</sup> *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [273] per Williams J and [181] per Winkelmann CJ.



## Statutory exception to the rule against hearsay

### The need for reform

- 2.43 We consider reform in relation to the hearsay rule is necessary to normalise the admission of tikanga and mātauranga (including oral history), promote more efficient conduct of proceedings and address negative perceptions about the reliability of oral history. We recommend creating an exception to the hearsay rule for statements concerning the existence or content of mātauranga and tikanga.
- 2.44 The Act currently treats oral history as prima facie inadmissible due to the perceived inherent unreliability of hearsay. However, in te ao Māori, oral history can serve many purposes, including as a record of events, for social, cultural, legal<sup>58</sup> and political purposes and as a basis for understanding values and identity.<sup>59</sup> The importance of oral history to a fact-finder is therefore twofold — to help assess objective fact (as the preferred or only evidence available to a party) and to help assess how the interpretation of events, whether objectively true or not, affects the rights and interests of the relevant parties.
- 2.45 In its natural form, oral history may not be concerned primarily or even tangentially with objective historical truth.<sup>60</sup> From an evidence perspective, the difficulty with this is that the fact-finding process at trial is concerned with establishing facts.<sup>61</sup> In Canada, the courts have examined the implications of this issue in relation to indigenous land claims and identified the preference for written historical evidence over oral history as problematic in principle. The Supreme Court of Canada has said the courts must “come to terms with [indigenous] oral histories” and:<sup>62</sup>
- [T]he laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.
- 2.46 The NZLS, in citing the work of the Australian Commissions to address this issue through reforms to Australian evidence laws, expressed a similar view.
- 2.47 In more concrete terms, we heard during consultation that, in proceedings involving the Crown, whether the admissibility of mātauranga and tikanga hearsay evidence is challenged by the Crown will depend on what is at stake.<sup>63</sup> It appears from submitter feedback that hearsay objections to admissibility are usually unsuccessful. In this respect,

<sup>58</sup> For an example of the legal implications of oral history, see the discussion of mana whenua in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 from [391] onwards. See also the discussion of the legal implications of mana in Law Commission *He Poutama* (NZLC SP24, 2023) at [3.77]–[3.86].

<sup>59</sup> Regarding oral history generally, see Jane McRae *Māori Oral Tradition: He Kōrero nō te Ao Tawhito* (Auckland University Press, Auckland, 2017) at 11, 26, 30 and 202. For earlier accounts, see Makereti Papakura *The Old-Time Maori* (Victor Gollancz Limited, London, 1938) at 37 and 42 (whakapapa and other knowledge was passed down to an exacting standard of accuracy); Elsdon Best *The Māori as he was: A brief account of Māori life as it was in pre-European days* (Dominion Museum, Wellington, 1924) at 8.

<sup>60</sup> Ranginui Walker “The Relevance of Maori Myth and Tradition” in Michael King (ed) *Te Ao Hurihuri: Aspects of Maoritanga* (Reed Publishing, Auckland, 1992) at 170 and 180.

<sup>61</sup> For analysis of interactions between law (including the law of evidence) and history in the context of the Waitangi Tribunal, see Kayla Grant “A Finding of Fact? The Risks of Courts Settling Uncertain Histories” (2018) 24 AULR 149.

<sup>62</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1067 and 1069. See also *Tsilhqot’in Nation v British Columbia* [2014] 2 SCR 257. In New Zealand law, more accommodating approaches exist in jurisdictions where the Act does not apply and under s 105 of the Marine and Coastal Area (Takutai Moana) Act 2011. See Issues Paper at [2.32].

<sup>63</sup> Karen Feint KC.



the default settings for hearsay evidence, which assume prima facie inadmissibility of hearsay, do not reflect the general approach of the courts towards the admission of this type of evidence.<sup>64</sup>

- 2.48 Once admitted, any concerns about the reliability of mātauranga or tikanga evidence will be assessed as a matter of weight. Our proposal is not that reliability should in some sense matter less in relation to tikanga and mātauranga. As we discuss further below, it is to enable reliability to be considered on a basis properly reflective of its significance in an oral culture rather than being automatically questioned because it is not written or is technically hearsay. Counsel we spoke with are concerned this evidence is not being given due weight because, in a technical sense, it is still hearsay — the “ghost of hearsay” remains attached to the evidence, as noted in the report by the Australian Commissions.<sup>65</sup> For example, a witness may be asked whether they can attest to particular oral history having not been alive at the time of relevant events.<sup>66</sup> In this respect, the implicit preference in the hearsay rule for written historical evidence can create an unfair disadvantage for parties wanting to rely on mātauranga and tikanga evidence for two reasons. The first is that, by its very nature, oral history is unwritten. The second is that, where written records of relevant facts do exist, the records will often have been made by non-Māori and reflect a non-Māori perspective of those facts.
- 2.49 In assessing the case for reform against the Act’s purpose in section 6, these issues are relevant to section 6(c), which refers to promoting fairness to parties and witnesses, section 6(f), which relates to enhancing access to the law of evidence, and section 6(e), which relates to avoiding unjustifiable expense and delay.

### Recommendation

**R1**

Insert a new exception to section 17 to provide that the hearsay rule does not apply to a statement offered in evidence to prove the existence or content of mātauranga or tikanga.

- 2.50 In Chapter 3, we recommend a presumptive admissibility approach for hearsay evidence in civil proceedings. In addition to this general provision, we recommend the Act be amended to include a new exception to the hearsay rule, applicable in all proceedings (civil and criminal), to extend presumptive admissibility specifically to mātauranga and tikanga evidence that would otherwise be caught by the rule.
- 2.51 We agree with the NZLS that the new exception should operate as a complete exception to section 17 and not a modification of the general exception in section 18. As we have explained, section 18 includes a reliability test. A key purpose of our recommended exception is to remove that test from mātauranga and tikanga evidence.

<sup>64</sup> For example, see *Wakatu Incorporation v The Attorney-General* HC Nelson CIV-2010-442-181, 7 December 2010 at [45], as cited in *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 at [41] and n 23. In the 2010 judgment, Clifford J observed “it would be surprising” if appropriate evidence of oral history was not admissible because it did not fit easily within the concepts of hearsay and opinion evidence.

<sup>65</sup> Australian Law Reform Commission and others *Uniform Evidence Law: Report* (ALRC R102, NSWLRC R112, VLRC Final Report, December 2005) at [19.73].

<sup>66</sup> Wānanga with rōia Māori.

- 2.52 Sections 7 (relevance) and 8 (general exclusion) would continue to apply, and any residual concerns about relevance or reliability could be raised under these provisions or simply be treated as a matter of weight. The relevance and probative value of mātauranga and tikanga evidence do remain important matters for a fact-finder to consider. However, these qualities of evidence should be assessed primarily within an ao Māori framework by reference to ao Māori indicators of relevance and reliability.<sup>67</sup> General standards of evidence should not be applied automatically or without careful thought. In other words, evidence of mātauranga and tikanga should be assessed for what it is, including its oral nature and the values that underpin it, and not, for example, as evidence that lacks reliability because it is hearsay.
- 2.53 That said, we do not envisage that parties would resort to sections 7 and 8 to challenge mātauranga and tikanga evidence on a routine basis. We agree with Chapman Tripp that the proposed hearsay exception will instead formalise the current position where the courts usually admit the evidence notwithstanding the technical application of the hearsay rule and promote consistency of approach. The new exception would also work to signal to parties and the courts that oral history has intrinsic value and validity as a means of conveying knowledge within te ao Māori.
- 2.54 We consider the terms “mātauranga” and “tikanga” should not be defined for the purpose of the new exception. Any definition of them risks being either too narrow or prescriptive or, conversely, overly broad and unhelpful. They have in any case become familiar in legal use and have been referred to in legislation without being defined.<sup>68</sup>
- 2.55 Prompted by comments from members of our Māori Liaison Committee, we have considered whether “kōrero tuku iho” should also be referred to expressly in the hearsay exception. Some members considered kōrero tuku iho is sufficiently distinct from mātauranga to warrant separate mention because it can refer more specifically to tribal history and historical events than mātauranga does. We agree that kōrero tuku iho is a more specific term and can convey this meaning. However, we consider that mātauranga is a sufficiently general term to capture evidence of tribal history and historical events. There are many terms we could use to describe different aspects of mātauranga but do not consider further specificity is needed or would be helpful. It is clear that mātauranga can capture this kind of evidence.

## Amendments to the Code of Conduct for Expert Witnesses

### Our view

- 2.56 In relation to the opinion rule, we recommend that the Rules Committee consider reviewing and amending the Code of Conduct for Expert Witnesses to better recognise and provide for mātauranga and tikanga as a unique category of expert evidence.
- 2.57 In our Issues Paper, we sought feedback on whether the Act should be amended by introducing an exception to the opinion rule to provide clarity on how opinions about mātauranga and tikanga should be approached. We did not explore possible amendments to the Code of Conduct for Expert Witnesses. However, most of the

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<sup>67</sup> These may include, for example, whether there are waiata or whakataukī that support an account of kōrero tuku iho and the level of community support for an account of kōrero tuku iho.

<sup>68</sup> See, for example, Water Services Entities Act 2022, ss 5, 6, 14, 38 and 59.

concerns raised with us about the operation of the opinion rule related to matters covered by the Code and the way in which the Code requires expert witnesses to give and explain their evidence. Because these issues are best addressed by changes to the Code itself, reform of the Act through a new exception to the opinion evidence rule is neither necessary nor desirable.

- 2.58 Under section 25, an opinion given by an expert is admissible if the fact-finder is likely to obtain substantial help from the opinion.<sup>69</sup> The substantial helpfulness test is cast in general terms and encompasses any situation where the fact-finder may have difficulty understanding evidence or ascertaining the facts without the assistance of an expert.<sup>70</sup> Despite this, the Code of Conduct for Expert Witnesses is difficult to work with for some people who are asked to offer mātauranga and tikanga evidence. A key problem is the assumption in the Code that, when an expert witness gives evidence, they do so in a technical and professional capacity.
- 2.59 For example, the Code provides that an expert witness has an overriding duty to assist the court impartially and must state their qualifications as an expert, state the reasons for the opinions they give, specify any literature or other relevant material used or relied on and describe any examinations, tests or other investigations.
- 2.60 These aspects of the Code are creating problems:
- (a) Relevant mātauranga and tikanga expertise will often exist among members of the whānau, hapū or iwi that is a party to the proceeding. We heard during consultation it may be important to the party to have a person who is qualified through whakapapa to give evidence on that party's tikanga and mātauranga. However, this type of evidence can be criticised for not being sufficiently independent and there is uncertainty about when it can be offered.<sup>71</sup>
  - (b) We consider the reference in the Code to “qualifications” (rather than how a person is qualified) and the emphases on literature, tests and the like suggest experiential evidence is not a matter of expertise, despite the Act's definition of “expert”. This may be contributing to the uncertainty, which was also raised during consultation, about the scope for evidence of lived experience of mātauranga and tikanga.<sup>72</sup>
  - (c) We also consider the requirement for a statement of reasons may sometimes impose an obligation on a witness giving evidence about tikanga that is not consistent with tikanga itself. The example brought to our attention during consultation concerned pūkenga evidence that intentionally avoided spelling out reasons for a conclusion. The concern was that specifying reasons (as opposed to explaining the outcome) would have been divisive and undercut the mana of participants.<sup>73</sup>

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<sup>69</sup> Evidence Act 2006, s 25(1).

<sup>70</sup> Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV25.01].

<sup>71</sup> Natalie Coates, Karen Feint KC.

<sup>72</sup> Karen Feint KC.

<sup>73</sup> Karen Feint KC.

**Recommendation****R2**

Te Komiti mō ngā Tikanga Kooti | Rules Committee should consider amending the Code of Conduct for Expert Witnesses in Schedule 4 of the High Court Rules 2016 to better recognise and provide for mātauranga and tikanga as a unique category of expert evidence.

- 2.61 We recommend the Rules Committee consider reviewing and amending the Code of Conduct for Expert Witnesses to clarify that, in relation to mātauranga and tikanga evidence:
- (a) an expert witness with lived experience of the relevant mātauranga and tikanga may be qualified by that experience;
  - (b) an expert witness may be qualified in accordance with tikanga;
  - (c) a whakapapa or personal relationship with a party does not mean that an expert witness is unable to offer expert evidence;
  - (d) the requirement to state reasons for an opinion can be met by an explanation for the opinion that accords with the tikanga being applied; and
  - (e) material relied on may include oral history.
- 2.62 The clarification suggested in (c) would enable counsel to brief a potential witness about their duty to the court with the understanding it is appropriate for them to offer evidence despite (or even because of) a whakapapa relationship. Given the likelihood that an expert witness in this context may have a personal relationship with a party in addition to any whakapapa link, the clarification should address both. It confirms, for the purpose of this particular context, the current legal position that an expert witness does not need to be independent of the party by whom the witness is briefed. Any potential conflict of interest is treated as a matter of weight, not admissibility.<sup>74</sup>
- 2.63 The clarification suggested in (e) would support our recommendation to introduce an exception to the hearsay rule for mātauranga and tikanga evidence. The two changes would work together in cases involving expert evidence that includes oral history and limit challenges to that type of evidence based on assumptions about its inherent unreliability.
- 2.64 We have considered the relative merits of amending the Code of Conduct for Expert Witnesses compared to enacting a new exception for opinion evidence. We think amending the Code has several advantages. It retains the substantial helpfulness gateway to the admissibility of expert opinion on mātauranga and tikanga. It also retains the express requirement that witnesses must qualify themselves as having expertise, which encourages parties to offer quality evidence, while clarifying how relevant qualifications may be established. It ensures a party can challenge evidence of another party on the basis a witness lacks relevant expertise or argue their own position is supported by a person with greater expertise. These are valuable tools to test expert witnesses offering evidence of mātauranga or tikanga. In addition, amending the Code rather than the Act may offer more flexibility for the future. This is because it may be relatively easier to

<sup>74</sup> *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750 at [99].

respond to evolving practice through changes to the Code than further amendment to the Act.

- 2.65 Enacting a new exception would have other disadvantages too. We agree with the issue raised by Chapman Tripp that removing the expertise requirement through a new exception would risk lessening the respect due to pūkenga who offer expert evidence. In addition, by not recognising expertise, a new exception may also risk lessening the respect due to people who have relevant and substantially helpful evidence within the meaning of section 25 but may not necessarily qualify as pūkenga in te ao Māori.
- 2.66 For the same reasons explained in relation to our proposed hearsay exception, it would not be necessary to define mātauranga or tikanga for the purposes of the suggested amendments.

## **General statutory guidance for interpreting the Act having regard to te ao Māori**

### ***Reform not recommended***

- 2.67 We do not recommend introducing statutory guidance as to the need to interpret and apply the provisions of the Act having regard to te ao Māori. Our conclusion on this is finely balanced.
- 2.68 The option has the advantage of future-proofing the Act to ensure the law has enough inbuilt flexibility to respond to new issues and the increasing engagement with tikanga by the courts. In cases involving Māori interests, it would expressly enable a court to have regard to te ao Māori in relation to any issue arising under the Act and guide a judge to consider questions of relevance under section 7 from an ao Māori perspective. As noted, some submitters supported the option for these reasons.
- 2.69 During consultation, the option was also viewed positively as offering a legislative tool to which counsel could point as additional justification for approaching the admissibility and use of evidence in a culturally sensitive way. It could provide credibility to arguments concerning mātauranga and tikanga evidence and allow judges a broader discretion to admit or exclude the evidence on a tikanga basis.
- 2.70 However, we remain of the view that interpretive guidance of general effect can be uncertain and may result in unintended consequences. On the one hand, initial uncertainty in any new law can be resolved through practice and judicial interpretation. On the other, concerns were raised with us in consultation about whether counsel and the judiciary have the required knowledge and skills to ensure the proposed guidance is applied appropriately. In time, upskilling among counsel and the judiciary may mean general interpretive guidance is not needed in any event.
- 2.71 We also consider our recommendations in relation to the hearsay and opinion evidence rules respond to the issues that have been identified with the way the Act is currently operating with respect to mātauranga and tikanga evidence. They respond in a way that should minimise argument, whereas general interpretive guidance may invite it. Relatedly, we do not have a clear picture of wider operational issues arising across the Act in relation to te ao Māori, and for this reason too, we are not in a position to recommend general interpretive guidance in the context of an operational review.
- 2.72 In assessing the case for reform against the Act's purpose in section 6, recommending general interpretive guidance may be inconsistent with section 6(e), avoiding unjustifiable expense and delay, and section 6(f), enhancing access to the law of evidence.

## Other matters

- 2.73 In its submission, Ngā Pirihimana o Aotearoa | New Zealand Police noted the importance of recognising principles of tikanga but expressed concern about the uncertain implications for criminal law of amending the Act to address the admissibility of mātauranga and tikanga evidence. Given the issues we have identified, we think it would be unjust to wait for the intersection of tikanga and state law to reach a settled state before reforming evidence law. That said, as noted, the key safeguards in section 7 and section 8 will continue to apply in respect of all mātauranga and tikanga evidence. Our recommendations are not intended to diminish the importance of first-hand personal knowledge and observation of facts relevant to establishing the commission of crimes.
- 2.74 We do not recommend further exceptions to the hearsay or opinion evidence rules to cover evidence of oral traditions from other cultures. Based on submissions received, there does not appear to be any problem in practice that warrants reform, and there was no support for it among submitters. In the absence of an identified problem, it would be speculative and inappropriate in an operational review to seek to identify the circumstances in which such exceptions might apply.

## OTHER POTENTIAL ISSUES

- 2.75 In our Issues Paper, we identified four other potential issues with how the Act recognises and provides for te ao Māori:<sup>75</sup>
- (a) The operation of section 30 and racial bias.
  - (b) Protections for confidential information and the desirability of any extension of privilege to communications with kaumātua, tohunga and rongoā practitioners.
  - (c) Judicial warnings on cross-cultural identification bias.
  - (d) Procedures for giving evidence in court and their compatibility with tikanga.
- 2.76 Our analysis of submissions and conclusions in relation to the operation of section 30 and racial bias are provided in Chapter 7.

## Consultation

### *What we asked submitters*

- 2.77 We invited feedback on whether there have been any significant developments in relation to these matters or significant concerns about how the law is operating with respect to them in practice. We also asked if there are any provisions in the Act failing to adequately provide for te ao Māori in practice and how any problems should be addressed.

### *Results of consultation*

#### Protections for confidential information

- 2.78 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service submitted that the scope of any extension of privilege to communications with kaumātua, tohunga and rongoā practitioners would need to be carefully considered. It noted there is a very clear

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<sup>75</sup> Issues Paper at [2.46]–[2.62].

definition of who is a doctor and who is a lawyer for the purpose of privileged communications. The Public Defence Service suggested communications with *tohunga* are arguably already covered by the privilege conferred in section 58 for communications with ministers of religion.

### Court procedure

- 2.79 Six submitters commented on court procedure. The Crown Law Office, NZLS, Police and Public Defence Service doubted the existence of a problem in practice regarding procedures for giving evidence in court and their compatibility with *tikanga* and/or the merits of reforming the Act to enable *pūkenga* evidence to be given differently to other types of expert evidence.
- 2.80 The Wellington Community Justice Project submitted it should be made clear in the Act that courts can regulate procedures in a manner that recognises *tikanga*. We also heard during consultation there may be shortcomings in resources available to support *mātauranga* and *tikanga* evidence being given in a *tika* (correct) way. For example, we heard that a *pūkenga* who was uncomfortable giving evidence in English did so due to the unavailability of translation services and that the ability to give evidence in a *whaikōrero* (a type of formal speech) style may depend on the judge and whether translation resources are available.<sup>76</sup> We also heard that, while requirements for written briefs can support party preparation and fairness, *mātauranga* and *tikanga* evidence can lose its power by being written down in the structured way expected for affidavits.<sup>77</sup>
- 2.81 Chapman Tripp proposed the addition of guidance to the Act to provide direction on matters to which a court should have regard when dealing with *tikanga* evidence, including guidance on whether *tikanga* evidence is most appropriately heard orally and correct approaches to challenging disputed evidence. Chapman Tripp also proposed that the guidance address the role of *pūkenga* appointed to assist the court. We see merit in these suggestions, but as Chapman Tripp itself acknowledged, consideration of them is beyond the scope of this review. This is because the issues may need to be addressed through a variety of mechanisms, including mechanisms that are not closely associated with the operation of the Act.

### Reform not recommended

- 2.82 We make recommendations relating to visual identification evidence in Chapter 11 that may help to address some of the concerns we noted in the Issues Paper about cross-cultural identification bias. We do not propose to make recommendations on protections for confidential information and court procedure in light of the very limited submissions we received on them. Only the Public Defence Service submitted on the confidentiality issues, and its submission urged caution in relation to any reform.
- 2.83 Some submissions on court procedure reflect a concern that any changes to current processes for admitting evidence may impact negatively on trial fairness. At the same time, there is still some ongoing concern that the current processes are already unfair as they inhibit evidence from being offered in its most appropriate form. In the Second Review, the Commission recommended the Act be amended to make it clear that courts

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<sup>76</sup> Karen Feint KC.

<sup>77</sup> Matthew Smith.

can regulate procedures for giving evidence in a manner that recognises tikanga. As noted earlier, the Government accepted this recommendation in principle. Its view, however, was that further consideration of the potential operational impacts was required.<sup>78</sup> We make no additional recommendations on court procedure. The fact there remains ongoing concern lends support to further consideration of the Commission's recommendation in the Second Review.

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<sup>78</sup> *Government Response to the Law Commission Report: The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (September 2019) at 7.



## CHAPTER 3

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# Hearsay

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## INTRODUCTION

- 3.1 In this chapter, we consider the following issues in relation to the hearsay provisions in the Evidence Act 2006:
- (a) The admissibility of hearsay statements when the maker of the statement is fearful of giving evidence. We recommend introducing a new ground to admit a hearsay statement when the maker of the statement has a reasonable fear of retaliation if they give evidence and it is in the interests of justice to admit the statement.
  - (b) When a person “cannot with reasonable diligence” be found. We do not recommend reform as we found no evidence of a problem in practice.
  - (c) Hearsay in civil proceedings. We recommend limiting the application of the hearsay rules in the Act in civil proceedings so that hearsay evidence is admissible unless challenged.

## BACKGROUND

- 3.2 The Act is based on the principle of orality.<sup>1</sup> This rests on the assumption that the fact-finder is likely to benefit from seeing and hearing witnesses give their evidence and recognises the fundamental importance of transparency in the administration of justice through the courts.<sup>2</sup> Evidence is therefore ordinarily given orally in court by witnesses who are available for cross-examination.<sup>3</sup> To facilitate this, section 71 provides that every person is eligible and compellable to give evidence in court unless they fall into one of the narrow exceptions in sections 72–75.<sup>4</sup>
- 3.3 A hearsay statement is an out-of-court statement made by a person who is not a witness that is offered in evidence to prove the truth of its contents.<sup>5</sup> Hearsay statements can

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<sup>1</sup> Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at 103. This is codified in s 83 of the Evidence Act 2006.

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

<sup>3</sup> Evidence Act 2006, s 4 (definition of “witness”).

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

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

only be admitted in limited circumstances. The general test for admitting hearsay statements is contained in section 18(1), which provides:

A hearsay statement is admissible in any proceeding if—

- (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
- (b) either—
  - (i) the maker of the statement is unavailable as a witness; or
  - (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

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

- (a) is dead; or
- (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
- (c) is unfit to be a witness because of age or physical or mental condition; or
- (d) cannot with reasonable diligence be identified or found; or
- (e) is not compellable to give evidence.

3.5 The Act does not provide any grounds to admit hearsay statements other than those listed in section 18(1)(b). Similarly, it does not provide any grounds for the court to find that a person is unavailable other than those listed in section 16(2).

## HEARSAY STATEMENTS WHEN THE MAKER OF THE STATEMENT IS FEARFUL OF GIVING EVIDENCE

### Issues

3.6 Presently, the Act does not provide for a hearsay statement to be admitted when the maker of the statement is available as a witness but may have a good reason not to give evidence. Prompted by recent case law concerning the interpretation of section 16(2), in our Issues Paper, we identified two issues with this position:

- (a) It may be creating practical issues, including uncertainty as to whether the categories of unavailability for hearsay purposes can be interpreted in a way that includes situations where a person is excused by the court from giving evidence.
- (b) It may not strike an appropriate balance between a defendant’s right to a fair trial, the public interest in having relevant evidence before a fact-finder and the interests of a potential witness who has a good reason not to give evidence.

### *The current law may be creating practical issues*

3.7 The current law presents several practical difficulties. First, there is uncertainty about whether and in what situations a hearsay statement can be admitted where the maker of the statement has a “just excuse” for not giving evidence. Under section 165 of the Criminal Procedure Act 2011, if a person refuses to give evidence, the court may order that they be detained in custody for a period not exceeding seven days.<sup>6</sup> However, the

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<sup>6</sup> Criminal Procedure Act 2011, s 165(3)(a).

court may exercise its discretion not to make such an order, thereby excusing a person from giving evidence, if they can offer a “just excuse”.<sup>7</sup> Recent case law suggests that having a “just excuse” under the Criminal Procedure Act could potentially constitute being “unavailable” for hearsay purposes, even though it is not recognised as a ground of unavailability in section 16(2) of the Evidence Act.<sup>8</sup> However, the courts have not yet been required to determine this issue.

- 3.8 Second, the current law may needlessly prolong trials where the case against the defendant relies substantially on the evidence of a person (such as the complainant) who is available as a witness but who the prosecution knows will refuse to give evidence in court. In such situations, the prosecution may need to summon the person under threat of imprisonment and have them declared hostile in court to have their previous statement admitted as evidence.<sup>9</sup>
- 3.9 Third, the current law may be deterring people who are frightened of intimidation or retaliation from cooperating with police by providing evidence against a defendant. This can lead to charges against a defendant being dropped due to lack of evidence.

### *The current law may not appropriately balance competing interests*

- 3.10 As we noted in our Issues Paper, there is a fundamental policy question about how the Act should respond to situations where a person has a good reason not to give evidence.<sup>10</sup>
- 3.11 This question engages competing interests.<sup>11</sup> As a general rule, it is in the interests of justice to have all relevant evidence before a fact-finder. The interests of the makers of hearsay statements are also important. In some cases, they may face adverse consequences such as intimidation or retaliation if they give evidence. As noted above, under the current law, they may be required to attend court and give evidence under threat of imprisonment even if they have good reasons for not giving evidence.
- 3.12 On the other hand, reliance on hearsay statements deprives a defendant of the opportunity to challenge that evidence in cross-examination. This engages a defendant’s fundamental right to a fair trial, which is enshrined under the New Zealand Bill of Rights Act 1990 and includes the right to cross-examine witnesses.<sup>12</sup>
- 3.13 The Act does not allow a hearsay statement to be admitted when the maker of a hearsay statement is available but may have a good reason not to give evidence. As we noted in our Issues Paper, this is consistent with the policy and legislative history of the Act.<sup>13</sup> Ultimately, greater weight was placed on a defendant’s right to a fair trial and the

<sup>7</sup> Criminal Procedure Act 2011, s 165(2)(a). See also s 159, which provides that it is not an offence to refuse to appear in court in response to a witness summons if the person has a “reasonable excuse”, and s 161, which provides that a judicial officer may issue a warrant to arrest a person who has failed to appear in response to a summons if “no reasonable excuse is offered” for that failure.

<sup>8</sup> Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 / The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [3.7]–[3.8].

<sup>9</sup> Issues Paper at [3.20].

<sup>10</sup> Issues Paper at [3.12].

<sup>11</sup> Issues Paper at [3.13]–[3.14].

<sup>12</sup> New Zealand Bill of Rights Act 1990, s 25(f). See also s 27. We discuss s 25(f) in Chapter 14.

<sup>13</sup> Issues Paper at [3.9]–[3.11].

importance of preserving the availability of cross-examination. Concerns about fearful witnesses were addressed instead through availability of alternative ways of giving evidence.<sup>14</sup>

- 3.14 In our Issues Paper, we suggested the hearsay rules may no longer strike an appropriate balance between these competing interests because of:<sup>15</sup>
- (a) the length of time since the Evidence Code was developed;<sup>16</sup>
  - (b) the uncertainty created by case law concerning the relationship between hearsay rules and the Criminal Procedure Act;
  - (c) criticism of the decision to remove from the Evidence Bill a discretion to excuse those in “close personal relationships” with defendants from giving evidence;<sup>17</sup> and
  - (d) developments in international human rights law from the European Court of Human Rights in *Al Khawaja and Tahery v United Kingdom*, where the Court found that “to allow the defendant to benefit from the fear he has engendered in witnesses would be incompatible with the rights of victims and witnesses”.<sup>18</sup>

## Consultation

### What we asked submitters

- 3.15 In our Issues Paper we noted that there are broadly two opposing legislative options for reform, which reflect the stark policy choice underlying this area of law:<sup>19</sup>
- (a) Option 1 — clarify that there is no jurisdiction to admit a hearsay statement by a person excused from giving evidence.
  - (b) Option 2 — introduce a new ground to admit a hearsay statement when a person has a good reason not to give evidence.
- 3.16 Option 1 gives priority to a defendant’s right to a fair trial by clarifying that a person who is available as a witness and compellable to give evidence must be available for cross-examination if their evidence is to be admitted in court. Under this option, concerns about witnesses who may have a good reason for not giving evidence would need to be addressed through the Act’s provision of alternative ways of giving evidence.<sup>20</sup> As noted above, this option seems broadly consistent with Parliament’s intention when passing the Act.

<sup>14</sup> See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 44–55; Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [344]–[347]; Evidence Bill 2005 (256–2) (select committee report) at 9. Common ways of giving evidence in an alternative manner include pre-recorded cross-examination or giving evidence via CCTV.

<sup>15</sup> Issues Paper at [3.26].

<sup>16</sup> The Evidence Code was published in 1999, with preliminary papers on hearsay evidence published as early as 1989. See Law Commission *Hearsay Evidence* (NZLC PP10, 1989).

<sup>17</sup> Issues Paper at [3.11] and [3.26]. See also Elisabeth McDonald “Hearsay in domestic violence cases” [2003] NZLJ 174 at 176.

<sup>18</sup> *Al-Khawaja and Tahery v United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [123]; Issues Paper at [3.31]–[3.38].

<sup>19</sup> Issues Paper at [3.14].

<sup>20</sup> Issues Paper at [3.16].

- 3.17 Option 2 gives priority to the public interest in ensuring relevant and reliable information is still available to the court when a potential witness has good reason not to give evidence.<sup>21</sup>
- 3.18 In our Issues Paper, we noted that, should option 2 be adopted, there is a further question about how “good reason” should be defined. We presented two options:<sup>22</sup>
- (a) Option 1 — a general ground that would apply when a judge is satisfied a person has a good reason not to give evidence.
  - (b) Option 2 — a narrow ground founded on fear. This option is broadly consistent with the approach taken in comparable jurisdictions, including England and Wales, and is largely consistent with developments in international human rights law.
- 3.19 Under either option, we identified two subcategories that could potentially warrant inclusion in any new ground:<sup>23</sup>
- (a) When a judge is satisfied a person has been intimidated by or on behalf of the defendant.
  - (b) When a person fears retaliation if they give evidence. This could have most application in situations where a complainant is in a violent relationship with the defendant but it would not necessarily be limited to such situations. It could also apply in situations where the defendant is part of a gang or other group.
- 3.20 Lastly, we asked submitters whether further safeguards would be desirable should a new ground be adopted.

## Results of consultation

### Clarifying the law

- 3.21 Five submitters addressed whether the law needed to be clarified at all. Three favoured clarification.<sup>24</sup> Two considered any issues with the current law could be addressed through case law.<sup>25</sup>
- 3.22 Those in favour of clarification expressed concern about the uncertainty the current law creates, referring in particular to the disjunct between the hearsay rules and section 165 of the Criminal Procedure Act.<sup>26</sup> Te Tari Ture o te Karauna | Crown Law Office observed that the courts are yet to determine whether a person who has been excused from giving evidence under section 165 of the Criminal Procedure Act is “unavailable” as a witness for the purposes of the hearsay provisions. It considered that approach would lack clarity and transparency, requiring a strained interpretation of the legislation. It also noted there is no statutory guidance as to what constitutes “just excuse” for the purposes of section 165 of the Criminal Procedure Act and, in any event, that determination is not made with the admission of hearsay evidence in mind. Associate Professor Anna High

<sup>21</sup> Issues Paper at [3.24].

<sup>22</sup> Issues Paper at [3.39].

<sup>23</sup> Issues Paper at [3.40].

<sup>24</sup> Te Tari Ture o te Karauna | Crown Law Office, Luke Cunningham Clere, Wellington Community Justice Project.

<sup>25</sup> Associate Professor Anna High, Adjunct Professor Elisabeth McDonald.

<sup>26</sup> Crown Law Office, Luke Cunningham Clere. Wellington Community Justice Project did not give reasons for its views.

noted that recent developments in case law concerning section 16(2)(c) of the Act (relating to people who are unfit to be a witness because of age or a physical or mental condition) suggest that a finding of “unavailability” under this section may be reached where a “just excuse” finding has separately been reached based on fear, trauma or intimidation.<sup>27</sup> Adjunct Professor Elisabeth McDonald said case law already indicates that a person who is excused from giving evidence is not compellable to give evidence.<sup>28</sup>

- 3.23 The Crown Law Office and Professor McDonald both noted that an anomaly exists under the current law. A person who can make themselves unable to be found may have their hearsay evidence admitted, but a person who comes to court but is too frightened or distraught to give evidence will not.<sup>29</sup>

### Hearsay statements from people who have a good reason not to give evidence

- 3.24 Twelve submitters responded to the question of whether hearsay statements should be admitted from people who have a good reason not to give evidence. Seven submitters supported this option,<sup>30</sup> four opposed it<sup>31</sup> and one said this issue warrants further consideration.<sup>32</sup>

- 3.25 Those in favour had a number of concerns with the current law:

- (a) Five submitters were concerned for people who are fearful of giving evidence, particularly victims of family or sexual violence.<sup>33</sup> New Zealand Family Violence Clearinghouse said alternative methods of giving evidence are not always effective at addressing these concerns.
- (b) Three submitters were concerned that defendants may have charges dropped against them or be offered a plea deal because of a lack of evidence.<sup>34</sup>
- (c) Two submitters were concerned about relying on section 16(2)(c) (relating to people who are unfit to be a witness because of age or a physical or mental condition) to

<sup>27</sup> Associate Professor Anna High cited *Downes v R* [2022] NZCA 639 at [37].

<sup>28</sup> Adjunct Professor Elisabeth McDonald cited *King v PFL Finance* [2015] NZCA 517.

<sup>29</sup> As we discuss later in this chapter, under s 16(2)(d) of the Evidence Act 2006, a person is “unavailable as a witness” for the purposes of the hearsay provisions if they “cannot with reasonable diligence be identified or found”.

<sup>30</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Crown Law Office, Luke Cunningham Clere, New Zealand Family Violence Clearinghouse, Ngā Pirihimana o Aotearoa | New Zealand Police, Ngā Whare Whakaruruhau o Aotearoa | Women’s Refuge.

<sup>31</sup> Auckland District Law Society, Criminal Bar Association, Stephen Hudson, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

<sup>32</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>33</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Crown Law Office, New Zealand Family Violence Clearinghouse, Women’s Refuge. The Crown Law Office did not specifically refer to victims of family or sexual violence, instead referring to the “vulnerable witness”. Community Law Centres o Aotearoa and New Zealand Family Violence Clearinghouse both noted that the issues in this area are compounded for migrant and ethnic victims as they may fear community exclusion and stigma for reporting family or sexual violence.

<sup>34</sup> Crown Law Office, New Zealand Family Violence Clearinghouse, New Zealand Police. Paulette Benton-Greig noted that scenarios similar to *Awatere v R* [2018] NZHC 883 are becoming more common with the use of mobile technologies that capture statements proximate to the incident. In that case, a complainant became too distressed to give evidence in court and so a prior police statement was rendered inadmissible as hearsay.

capture people with trauma.<sup>35</sup> The Crown Law Office noted this category is of very limited application and has a high threshold.<sup>36</sup>

- (d) Three submitters said specialised knowledge and experience on violence, including family and gang violence, is important to inform decision-making.<sup>37</sup>
- (e) Ngā Pirihimana o Aotearoa | New Zealand Police said prosecutors regularly deal with witnesses who are reluctant to give evidence in court due to pressure exerted on them by the defendant or others. This also has resourcing implications for Police.<sup>38</sup>
- (f) Police said the medical ground for unavailability in section 16(2)(c) is insufficient to address the fear and/or trauma experienced by some witnesses and may prevent them from giving evidence at trial.<sup>39</sup>
- (g) Police said the current law may be creating mistrust in the criminal justice system because it incentivises police to detain or compel potentially vulnerable people to give evidence.<sup>40</sup>

3.26 Those opposed to any new ground for admitting hearsay statements were concerned that it would undermine a defendant's right to a fair trial, including their right to cross-examine witnesses.<sup>41</sup> The Criminal Bar Association and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service both preferred alternative methods of protecting witnesses' interests. The Criminal Bar Association was also concerned that, if a new discretion is introduced, it will create delays.

### The scope of any new ground for admitting hearsay statements

- 3.27 Thirteen submitters addressed the scope of any new ground. Seven favoured a general discretion for situations where a person has a good reason not to give evidence<sup>42</sup> while four favoured a narrow discretion founded on fear.<sup>43</sup> Two did not express a particular view.<sup>44</sup>
- 3.28 A strong theme from submitters that favoured a more general discretion was that it is difficult to assess "fear", noting the complex nature of fear and violent relationships.<sup>45</sup>

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<sup>35</sup> Crown Law Office, New Zealand Family Violence Clearinghouse.

<sup>36</sup> The Crown Law Office cited *L (CA631/2021) v R* [2023] NZCA 246.

<sup>37</sup> Paulette Benton-Greig, New Zealand Family Violence Clearinghouse, Women's Refuge.

<sup>38</sup> New Zealand Police said prosecutors regularly deal with witnesses who are reluctant to give evidence in court due to pressure exerted on them by the defendant or others. See also, for example, *Rameka v R* [2019] NZCA 105.

<sup>39</sup> New Zealand Police said s 16(2)(c) is insufficient to recognise the fear experienced by witnesses and this might prevent them from being able to give evidence at trial.

<sup>40</sup> New Zealand Police said they do not often use provisions relating to the arrest and imprisonment of witnesses because it may undermine trust and confidence in Police and the wider justice system.

<sup>41</sup> Auckland District Law Society, Criminal Bar Association, Stephen Hudson, Public Defence Service.

<sup>42</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Associate Professor Anna High, Luke Cunningham Clere, New Zealand Family Violence Clearinghouse, Wellington Community Justice Project, Women's Refuge.

<sup>43</sup> Criminal Bar Association, Crown Law Office, New Zealand Law Society, Public Defence Service.

<sup>44</sup> Auckland District Law Society, New Zealand Police.

<sup>45</sup> Paulette Benton-Greig, New Zealand Family Violence Clearinghouse, New Zealand Law Society, Women's Refuge. The Crown Law Office and New Zealand Law Society noted these difficulties but still preferred a fear-based ground to a more general good reason ground.

- 3.29 The Wellington Crown Solicitor, Luke Cunningham Clere, submitted that a person could have a good reason not to give evidence if:
- (a) they are subject to intimidation attributable to any other party in the proceedings;
  - (b) they hold a reasonable fear of retaliation if they give evidence;
  - (c) they are entitled to assert the privilege against self-incrimination found in section 60 with respect to all or substantially all of their proposed evidence; or
  - (d) for any other reason it would be contrary to the interests of justice for them to be compelled to give evidence in the proceeding.
- 3.30 Luke Cunningham Clere submitted that, to keep the discretion within appropriate limits, a party seeking to establish (d) should bear the onus of showing that compulsion would be “contrary to the interests of justice”.
- 3.31 Submitters that preferred a narrower ground based on fear were concerned about the impact on fair trial rights of a more general ground.<sup>46</sup>
- 3.32 The Public Defence Service said that, while family violence is a vexed area, there are almost always complicated dynamics at play and reluctance to give evidence will not always be because the complainant fears reprisal from the defendant. It submitted that fear attributable to the defendant will likely be difficult to prove and the evidential threshold would need to be high.
- 3.33 The Crown Law Office supported the approach taken in England and Wales, which provides that fear is to be widely construed. It did not support a definition of fear that is limited to fear attributable directly to the defendant. It said this would set the bar too high and fail to account for common scenarios where the witness’s legitimate fear is not directly attributable to the defendant or where they legitimately fear retaliation even though no specific threats were made. It noted *R v Shabir* as illustrating a balanced approach.<sup>47</sup>

### Safeguards

- 3.34 Nine submitters addressed whether any new safeguards should be introduced alongside a new discretion. Three favoured the introduction of new safeguards<sup>48</sup> while four thought they were unnecessary.<sup>49</sup> Two did not express a particular view.<sup>50</sup>
- 3.35 Submitters that did not think additional safeguards were necessary said sections 8 (general exclusion) and 18(1)(a) (the reliability threshold for admitting a hearsay statement) were sufficient to protect fair trial rights.<sup>51</sup>
- 3.36 Submitters that supported new safeguards suggested the following additional safeguards could be inserted into the Act:

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<sup>46</sup> The Crown Law Office, Associate Professor Anna High, New Zealand Law Society and Public Defence Service all said that a general discretion would infringe too far on fair trial rights.

<sup>47</sup> We discussed *R v Shabir* in our issues Paper at [3.31]–[3.38].

<sup>48</sup> Criminal Bar Association, Public Defence Service, Wellington Community Justice Project.

<sup>49</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Crown Law Office, Women’s Refuge.

<sup>50</sup> Luke Cunningham Clere, New Zealand Law Society.

<sup>51</sup> Paulette Benton-Grieg, Crown Law Office, New Zealand Law Society. Community Law Centres o Aotearoa and Women’s Refuge generally supported Paulette Benton-Greig’s submission.



- (a) The Wellington Community Justice Project and Public Defence Service submitted that a judge should have the power to stop proceedings if the hearsay evidence is so unconvincing that a conviction would be unsafe.
- (b) The Criminal Bar Association submitted that, if a complainant's hearsay statement is admitted based on a determination of good reason and there is no independent corroboration to support their evidence, there must be a statutory presumption that the evidence is insufficient to prove the charge(s).
- (c) The Crown Law Office and Criminal Bar Association submitted that a hearsay statement should only be admitted under a new discretion where a judge is satisfied it is in the interests of justice to do so.
- (d) The Public Defence Service submitted that safeguards should also include a high threshold for admission and a requirement to consider whether alternative modes of evidence are available. It considered admission should be a last resort and the judge should be required to consider the risks to a fair trial (and that this risk increases the more important the evidence is to the prosecution case). It also said consideration could be given to limiting the exception to certain offences and/or setting out examples of circumstances that amount to good reasons/fear.

### The need for reform

- 3.37 We consider reform is desirable to address the practical issues with the current law and to better balance the competing interests at stake where a defendant has caused fear in another.

### Addressing practical issues with the current law

- 3.38 Some of the practical issues with the current law stem from the courts' recognition, noted above, of a potential avenue to admit hearsay statements that was not intended when the Act was passed. Recent cases suggest that a person who has a "just excuse" for not giving evidence under section 165 of the Criminal Procedure Act could be "unavailable" for hearsay purposes, potentially allowing their hearsay statements to be admitted.<sup>52</sup> There are several potential problems with this approach. First, the Criminal Procedure Act only applies to criminal proceedings.<sup>53</sup> There may be situations in civil proceedings where a person has a "just excuse" for not giving evidence.<sup>54</sup> Second, "just excuse" can only be assessed at trial when a witness is present but is not giving evidence.<sup>55</sup> It is preferable that evidential issues are able to be dealt with pre-trial where possible. Lastly, if the law is not clarified through statutory reform, resources are likely to be used to clarify the law through the courts. It is also possible that, without statutory guidance, judges may take different approaches to the assessment of "just excuse" in relation to the hearsay rules in the Act, creating further uncertainty for parties.
- 3.39 In addition to the uncertainty about the relationship between the hearsay rules and the Criminal Procedure Act, the current law may be creating other practical issues. Where a person is available as a witness but has a good reason for not giving evidence, there is

<sup>52</sup> See, for example, *Awatere v R* [2018] NZHC 883 at [39]; *King v PFL Finance* [2015] NZCA 517.

<sup>53</sup> Criminal Procedure Act 2011, s 3.

<sup>54</sup> See, for example, *Zespri Group Ltd v Gao* [2020] NZHC 109, Schedule — Hearsay Rulings at [26]–[28].

<sup>55</sup> Section 165 only applies to people "present in court". See Criminal Procedure Act 2011, s 165(1).

no mechanism in the Act for determining the admissibility of their hearsay statement pre-trial. If that person's evidence is crucial to the prosecution case (such as the complainant's evidence in a family violence case), the prosecution may need to summon the person under threat of imprisonment if they do not comply and, if necessary, have them declared hostile in court to have their previous statement admitted as evidence.<sup>56</sup> This could needlessly prolong trials where it is clear earlier in proceedings that the person will not give evidence in court.

- 3.40 The current law may also be deterring people who are frightened of intimidation or retaliation from cooperating with police by providing evidence against a defendant.<sup>57</sup> This can be a problem in two ways. First, a person may not come forward to police to make a complaint or provide information in the first instance because they are afraid they will be required to give evidence if the matter goes to trial. Second, where the person has already assisted police and charges have been laid, they may subsequently fail to make themselves available to give evidence. This may result in delays to proceedings or charges being dropped if the person's hearsay statement (such as their police statement) is unable to be admitted.
- 3.41 Some of the submitters that did not favour a new ground to admit hearsay statements were concerned it would create delays due to disputes over whether hearsay statements should be admitted or not.<sup>58</sup> In our view, the inverse is true. For the reasons outlined above, we consider the current law is leading to uncertainty and delays. Legislative amendment could simplify decision-making by clarifying the appropriate approach and allow the courts to resolve any disputes about admissibility pre-trial.

### *Balancing competing interests*

- 3.42 As we note above, the law in this area must balance competing interests. These include the defendant's right to a fair trial, the interests of people who make hearsay statements and the public interest in having all relevant evidence before a fact-finder.
- 3.43 The practical issues identified above suggest reform is needed to strike a better balance between those interests. As submitters noted:
- (a) The current law deprives the fact-finder of relevant and reliable evidence. This is of particular concern given the increased use of independently verifiable evidence, such as text messages and other electronic communications, sent proximate to an incident that might currently be inadmissible hearsay evidence.<sup>59</sup>

<sup>56</sup> This was illustrated in *Huritu v Police* [2021] NZCA 15 at [7]. The complainant was arrested on warrant to secure her attendance at the trial and then bailed to attend the retrial. A second warrant was executed for her arrest when she failed to appear but she could not be found. See also Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 122–125.

<sup>57</sup> See, for example, *Rameka v R* [2019] NZCA 105.

<sup>58</sup> The Criminal Bar Association, in particular, submitted that the practical implications of expanding the grounds for unavailability would be that the court is inundated with requests from complainants to be excused from evidence, adding significant delay to the criminal justice system.

<sup>59</sup> Paulette Benton-Greig submitted that situations akin to those in *Awatere v R* [2018] NZHC 883 are not uncommon (where a complainant in a violent relationship with the defendant resiles from giving evidence), citing Elisabeth McDonald and Paulette Benton-Greig "Arresting complainants: Negative impacts of well-intentioned reform" (paper presented at National Sexual Violence Conference, Wellington, November 2022). She also submitted that anecdotal evidence from people working directly with sexual and family violence victims suggests that such scenarios are increasing with the use of mobile technologies that capture statements made proximate to the incident.

- (b) The current law may result in charges being withdrawn or the prosecution offering plea bargains due to insufficient evidence.<sup>60</sup> In general, it is not in the interests of justice to have prosecutions fail because a potential witness declines to give evidence, particularly if that is caused by the defendant. As the Grand Chamber of the European Court of Human Rights (Grand Chamber) said in *Al Khawaja and Tahery v United Kingdom*, a defendant should not be allowed to benefit from the fear they have created in others.<sup>61</sup>
- 3.44 Two submitters preferred to rely on the common law to develop in the context of existing provisions in the Act to respond to situations where a person may have a good reason not to give evidence.<sup>62</sup> Associate Professor High suggested section 16(2)(c) (relating to unavailability due to age or physical or mental condition) could apply in cases involving fear, trauma or intimidation.<sup>63</sup> We agree section 16(2)(c) may apply in some cases where a person reasonably fears giving evidence. As we said in our Issues Paper, section 16(2)(c) would cover people who may be too traumatised to give evidence, in line with the original intention of the provision.<sup>64</sup> However, in our view, relying on section 16(2)(c) risks excluding people who may have a good reason not to give evidence but do not meet the legal tests under section 16(2)(c). That section refers to people who are “unfit” to give evidence and so responds to a different policy concern. We would prefer the Act to respond as directly as possible to different policy objectives.
- 3.45 Professor McDonald supported the potential approach left open by the courts of treating a person excused from giving evidence under section 165 of the Criminal Procedure Act as unavailable for hearsay purposes. As we note above, however, section 165 is not aimed at addressing the admissibility of hearsay statements and involves different considerations. We consider it is preferable for the Evidence Act to respond directly by making it clear when hearsay statements can be admitted.
- 3.46 Reform is also desirable to ensure fairness to parties and witnesses by allowing relevant evidence to be considered by the court in a way that does not put them at increased risk of retaliation. In assessing the case for reform against the Act’s purposes in section 6, this is relevant to section 6(c), which refers to fairness to parties and witnesses.
- 3.47 Some submitters said that alternative ways of giving evidence are preferable to admitting hearsay statements because they better protect fair trial rights by enabling cross-examination.<sup>65</sup> We agree that alternative ways of giving evidence are important mechanisms to address some witness concerns while also enabling cross-examination. Their importance is represented in the wide range of alternative means available in the Act. However, they do not respond to the issues we have identified with the current law. Where a person refuses to give evidence by any means due to fear of retaliation, a defendant may still benefit from the fear they have created in that person. The fact that

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<sup>60</sup> Crown Law Office, New Zealand Family Violence Clearinghouse, New Zealand Police.

<sup>61</sup> *Al-Khawaja and Tahery v United Kingdom* [2011] 4 ECHR 2127 (Grand Chamber) at [123].

<sup>62</sup> Associate Professor Anna High submitted that clarifying the law may result in unintended consequences. Adjunct Professor Elisabeth McDonald did not see a way to codify any exception that is not fraught.

<sup>63</sup> Referring to *Downes v R* [2022] NZCA 639 at [37].

<sup>64</sup> Issues Paper at [3.41]; Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [58].

<sup>65</sup> The Criminal Bar Association and Public Defence Service both referred to CCTV and video statements as methods of protecting witnesses’ interests that had less impact on fair trial rights.

alternative means of giving evidence are available does not mitigate the defendant's actions or otherwise respond to this concern. Alternative means also do not necessarily address the risk of retaliation to the person in situations where the defendant is aware of who is giving evidence. Witness anonymity orders are also unlikely to be of any practical use in situations where the person is already known to the defendant.

## Recommendations

**R3**

Amend section 18 to include a new ground for admitting a hearsay statement in a criminal proceeding where:

- a. the maker of the statement has a reasonable fear of retaliation if they give evidence and they do not intend to give evidence because of that fear; and
- b. it is in the interests of justice to admit their hearsay statement.

**R4**

Define “fear of retaliation” in section 16(1) as fear that a defendant or any other person will cause physical or other harm (including, for example, financial or social harm) to the maker of the statement or any other person.

- 3.48 We consider the Act should be amended to allow the admission of hearsay statements where the maker of the statement has a reasonable fear of retaliation and it is in the interests of justice to admit their hearsay statement.
- 3.49 In our Issues Paper, we said that providing a new ground for admitting hearsay statements in the Act could be achieved by either introducing a new category of “unavailability” in section 16(2) or providing a new alternative to the unavailability requirement in section 18(1)(b).<sup>66</sup>
- 3.50 We consider introducing a new alternative to the unavailability requirement in section 18(1)(b) is simpler and aligns better conceptually with the purpose of our recommendations. A person who does not intend to give evidence because of fear of retaliation is not necessarily “unavailable” as that word is usually understood in everyday language. Our recommended new ground to admit hearsay statements should therefore be understood as a general exception to the rule against hearsay.
- 3.51 As we also noted in our Issues Paper, the existing notice provision in section 22 (requiring a party to give advance notice of an intention to offer a hearsay statement in criminal proceedings) would also apply here.<sup>67</sup>
- 3.52 Our recommendations are broadly consistent with the approaches taken in comparative jurisdictions, which allow hearsay statements to be admitted in a broader range of situations than under the Act. For example, in England and Wales, a person is considered “unavailable” to give evidence if, “through fear”, they do not give evidence.<sup>68</sup> The

<sup>66</sup> Issues Paper at [3.23].

<sup>67</sup> Issues Paper at [3.25].

<sup>68</sup> Criminal Justice Act 2003 (UK), s 116(2)(e). The term “fear” is to be “widely construed” and includes fear of the death or injury of another person or of financial loss. See Criminal Justice Act 2003 (UK), s 116(3).

approach in England and Wales has also been implemented in South Australia.<sup>69</sup> In other Australian legislation, the categories for unavailability provide for situations where the party seeking to show unavailability has taken all reasonable steps to compel the person to give evidence without success.<sup>70</sup> In Canada, hearsay is admissible if it is sufficiently reliable and, in the circumstances, admission is “reasonably necessary”. This has allowed for greater use of hearsay evidence from witnesses who are technically “available”.<sup>71</sup>

3.53 Members of our Expert Advisory Group were generally supportive of our recommendations. They noted our proposed amendment would not address the wider issue of people who refuse to give evidence for reasons other than fear of retaliation (for example, women in abusive relationships who do not want their partner to go to prison). However, they accepted there was inadequate support for a broader exception and considered our recommendation would be an improvement over the current position.

3.54 The Judicial Advisory Committee supported a fear-based exception to the hearsay rule.

### *A fear-based approach*

3.55 In our view, a fear-based approach provides a more appropriate balance between the rights and interests discussed above than a general ground to admit hearsay statements. As explained by the Grand Chamber in *Al Khawaja and Tahery v United Kingdom*, preventing a defendant from benefiting from the fear they have created in another is a clear and principled reason to admit hearsay evidence.<sup>72</sup> We note that our recommendations are broad in that they would potentially capture any form of retaliation by or against any person. This is necessary to capture the wide variety of potentially complex circumstances involved where a person may reasonably fear giving evidence. However, given the importance of fair trial rights in this area, we consider any exception to the rule against hearsay needs to be carefully limited. This is why we have recommended that fear be limited to a reasonable fear of retaliation (as we discuss further below) and not a more general fear of giving evidence. This is also why we have recommended that a hearsay statement should only be admitted when it is in the interests of justice to do so (also discussed below). These requirements should operate to ensure that hearsay statements are not admitted where, for example, the potential retaliation is relatively minor.

3.56 The narrow scope of our recommended exception is in line with the other grounds on which hearsay statements can be admitted in the Act.<sup>73</sup> These grounds have clear, identifiable reasons on the face of the legislation. Creating a new ground for admissibility when a person has a good reason not to give evidence, without further explanation, would be out of step with the other limited grounds in the Act.

<sup>69</sup> Evidence Act 1929 (SA), s 34KA.

<sup>70</sup> Evidence Act 1995 (Cth), Dictionary, pt 2 cl 4; Evidence Act 1995 (NSW), Dictionary, pt 2 cl 4; Evidence Act 2008 (Vic), pt 2 cl 4; Evidence Act 1977 (QLD), s 93B; Evidence Act (ACT), Dictionary, pt 2 cl 4; Evidence (National Uniform Legislation) Act 2011 (NT), Schedule, pt 2 cl 4; Evidence Act 2001 (TAS), s 3B; Evidence Act 1977 (QLD), s 93B.

<sup>71</sup> See, for example, *R v Khan* [1990] 2 SCR 531 and *R v Rockey* [1996] 3 SCR 829.

<sup>72</sup> *Al-Khawaja and Tahery v United Kingdom* [2011] 4 ECHR 2127 (Grand Chamber) at [123].

<sup>73</sup> See Evidence Act 2006, ss 16(2) and 18(1).

- 3.57 Some submitters that preferred a more general ground were concerned that fear would be difficult to assess. We agree that assessing fear will not always be straightforward. However, our recommendations will mitigate this difficulty for the following reasons:
- (a) The fear must be reasonable. Evidence demonstrating objective fear should be easier to evaluate than evidence of subjective fear. This could include evidence about the nature of and reasons for the fear, any relevant cultural context and evidence from experts who work with victims of family, gang or sexual violence.<sup>74</sup>
  - (b) Our recommendations are limited to fear of retaliation, which is more tangible than a general fear of giving evidence.
- 3.58 Also, if we were to propose a more general discretion, we would anticipate that, in most cases, fear would still need to be established as the basis for a good reason.
- 3.59 As noted above, there may be situations where a person is appropriately captured both under section 16(2)(c) (unavailability due to age or physical or mental condition) because they are too traumatised to give evidence and under any new fear-based exception. However, we consider these to be conceptually different grounds for admission. Not all people who are protected by section 16(2)(c) due to the effects of trauma will have a reasonable fear of retaliation. This may be the case where, for example, the relevant person has suffered trauma but is largely unknown to the defendant. Conversely, a person who has a reasonable fear of retaliation will not always meet the section 16(2)(c) threshold.
- 3.60 Lastly, we acknowledge our recommendations are not a complete answer to “the vexed issue” identified in *Awatere v R* — that is, how the law of evidence and the courts should deal with victims of family violence who do not wish to give evidence for reasons of fear.<sup>75</sup> It may still be a significant hurdle for a witness to satisfy a judge that they have a reasonable fear of retaliation.<sup>76</sup> For example, a fear of the adverse emotional consequences of giving evidence would be unlikely to qualify under this category.<sup>77</sup> Additionally, even if a complainant is excused from giving evidence, the fact that their hearsay statement is relied on in court instead will not necessarily protect them from future violence.<sup>78</sup>

### Defining fear of retaliation

- 3.61 We do not consider it is necessary or desirable to exhaustively define “retaliation”. Doing so would risk focusing the inquiry on what the maker of the statement fears will be done

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<sup>74</sup> Some submitters were concerned that any discretion would need to consider these areas and involve advice from experts.

<sup>75</sup> *Awatere v R* [2018] NZHC 883 at [22]. In *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012), Elisabeth McDonald noted that extending the definition of unavailability to cover witnesses who are fearful “is probably unnecessary”. However, that was on the assumption that a decision to excuse a person from giving evidence triggers the hearsay provisions in the Act: at 149 and Appendix 1.

<sup>76</sup> Elisabeth McDonald “Hearsay in domestic violence cases” [2003] NZLJ 174 at 176.

<sup>77</sup> For a discussion of the different reasons why a complainant might be reluctant to give evidence against an abusive partner, see Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [229]–[231] and Elisabeth McDonald “Hearsay in domestic violence cases” [2003] NZLJ 174 at 176.

<sup>78</sup> As Elisabeth McDonald has said, “[t]hose who make sufficiently dire threats in order to decrease the amount of prosecution evidence are unlikely to be influenced by how the evidence was offered”: *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 148–149.

to them rather than whether there are objective grounds for their fear that are supported by evidence. For example, provided it is properly established, we cannot see a principled reason to distinguish between fear of physical retaliation and fear of other forms of retaliation such as financial or social retaliation. These may be equally harmful depending on the circumstances of the case. This is why we have recommended the Act define “retaliation” to include forms of retaliation that are non-physical such as financial or social retaliation. As we explain below, the definition would encompass retaliation by a defendant or any other person against the maker of the statement or any other person.

### Fear of retaliation by a defendant

- 3.62 We recommend defining fear of retaliation in a way that includes fear of retaliation by a defendant against the maker of the statement or any other person.
- 3.63 Where it can be shown that a person has been subject to intimidation that is attributable to the defendant, this would usually provide the clearest grounds for establishing fear. However, as we noted in our Issues Paper, it may be difficult to prove intimidation in any given case.<sup>79</sup> Some submitters noted the complex dynamics of family or gang violence where the threat of retaliation is part of the nature of the relationships involved and does not need to be made explicit.<sup>80</sup> Where a party can establish that the maker of a statement has a reasonable fear of retaliation by the defendant, this should provide a grounds for admitting the relevant statement. The alternative — a narrower exception for cases where there is direct evidence of a defendant causing fear — might have little utility in practice. The more general language we propose would still respond to fear caused by a defendant but may apply where evidence of that fear is contextual and there is no direct evidence of intimidation.
- 3.64 Some submitters noted that, in situations of family or gang violence, the maker of the statement may reasonably fear harm to others, particularly children.<sup>81</sup> We see no reason to distinguish this from fear of direct retaliation. This is why we have included reasonable fear of retaliation to the maker of the statement *or any other person* in our recommendations.

### Fear of retaliation by people other than a defendant

- 3.65 Fear of retaliation should also include fear of retaliation by people other than a defendant.
- 3.66 Some submitters noted that potential witnesses may fear retaliation from those in a gang or other group with the defendant who are acting with the knowledge and approval of the defendant. A definition of fear that requires it to be attributable only to a defendant may not capture situations where others are acting with a defendant’s knowledge and approval.<sup>82</sup>
- 3.67 Some submitters were concerned that this would allow people to be excused from giving evidence simply because a defendant was in a gang or other group. The maker of the

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<sup>79</sup> Issues Paper at [3.40].

<sup>80</sup> Paulette Benton-Greig, New Zealand Family Violence Clearinghouse, Women’s Refuge.

<sup>81</sup> Paulette Benton-Greig, New Zealand Family Violence Clearinghouse, Women’s Refuge.

<sup>82</sup> See similar comments by the Grand Chamber in *Al-Khawaja and Tahery v United Kingdom* [2011] 4 ECHR 2127 (Grand Chamber) at [123].

statement would, however, still need to establish that they have objective grounds for fear that are supported by evidence. This is unlikely to be established simply by showing that the defendant is in a gang, for example. As we discuss below, additional safeguards would also apply and would ensure the risk of prejudice to the defendant is taken into account.

### *Safeguards*

- 3.68 As some submitters noted, a number of provisions already operate effectively as safeguards to preserve fair trial rights:
- (a) A hearsay statement is only admissible if the circumstances relating to the statement provide reasonable assurance that the statement is reliable.<sup>83</sup>
  - (b) Under section 8 (general exclusion), a judge must exclude any evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding. The right of the defendant to offer an effective defence must be part of this consideration.<sup>84</sup>
  - (c) The veracity and propensity provisions in the Act permit a defendant to offer evidence in relation to any “person”, which would appear to include the maker of a hearsay statement.<sup>85</sup>
  - (d) In criminal proceedings, a judge has the power to dismiss a charge on their own motion or on application at any time.<sup>86</sup>
- 3.69 In addition to these safeguards, we recommend hearsay statements should only be admitted based on fear of retaliation where it is in the interests of justice to do so. The additional requirement for admission to be in the interests of justice is necessary to ensure that the impact on the defendant’s rights in the circumstances of the case is taken into account. We consider, for example, that it would not be in the interests of justice to admit a hearsay statement where the evidence only supports a slight fear of relatively minor retaliation and the hearsay statement is a key part of the case against the defendant.
- 3.70 Some submitters noted that many of the factors that would be relevant to an “interests of justice” assessment would be assessed under section 8 anyway.<sup>87</sup> They therefore did not consider it necessary to require admission to be in the interests of justice. However, in our view, whether the admission of hearsay evidence is in the interests of justice requires consideration of the wider circumstances of the case. This will include the reasons for and nature of a person’s fear, which may not be closely connected to a section 8 assessment.
- 3.71 Importantly, the interests of justice assessment will also enable judges to consider the relevance of alternative means of giving evidence. These are unlikely to negate a person’s fear of retaliation but may nevertheless be relevant to where the interests of justice lie in a particular case. For example, it would clearly not be in the interests of justice to admit

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<sup>83</sup> Evidence Act 2006, s 18(1).

<sup>84</sup> Evidence Act 2006, s 8(2).

<sup>85</sup> Evidence Act 2006, ss 37(1) and 40(2).

<sup>86</sup> Criminal Procedure Act 2011, s 147.

<sup>87</sup> Crown Law Office, New Zealand Law Society.



a person's hearsay statement if the maker of the statement was willing to give evidence in an alternative way.

- 3.72 Our recommended requirement for admission of these hearsay statements to be in the interests of justice is also broadly consistent with the approaches taken in England and Wales and South Australia.<sup>88</sup>

## WHEN A PERSON “CANNOT WITH REASONABLE DILIGENCE” BE FOUND

### Issue

- 3.73 Section 16(2)(d) states that a person is “unavailable as a witness” for the purposes of the hearsay provisions if the person “cannot with reasonable diligence be identified or found”. If a person is unavailable as a witness, their hearsay statement is admissible provided that the circumstances relating to the statement provide reasonable assurance that the statement is reliable.<sup>89</sup>
- 3.74 In our Issues Paper, we said that initial consultation identified a concern about the lack of guidance in the Act or case law as to what is required to satisfy the “reasonable diligence” requirement in section 16(2)(d).<sup>90</sup> We noted recent case law that had declined to adopt a guiding set of principles, instead saying that it “is a simple question of fact”.<sup>91</sup> We also noted this approach differs from some comparable jurisdictions where further guidance has been given.<sup>92</sup>

### Consultation

#### *What we asked submitters*

- 3.75 We sought feedback on whether the current approach to the reasonable diligence requirement is causing problems in practice and whether reform is necessary or desirable.<sup>93</sup> We also said the language of “reasonable diligence” used in section 16(2)(d) could be replaced with “all reasonable steps”, which is used in Australia and England and Wales. We said this may assist in focusing the inquiry more directly on which steps were (and were not) taken to find the person.

### Results of consultation

#### Problems in practice

- 3.76 Five submitters addressed whether section 16(2)(d) is causing problems in practice. One submitter, the Criminal Bar Association, said it is causing issues. Three submitters

<sup>88</sup> Criminal Justice Act 2003 (UK), s 116(4); Evidence Act 1929 (SA), s 34KA(4).

<sup>89</sup> Evidence Act 2006, s 18(1)(a).

<sup>90</sup> Issues Paper at [3.46].

<sup>91</sup> Issues Paper at [3.48]–[3.50].

<sup>92</sup> Issues Paper at [3.51]–[3.53].

<sup>93</sup> Issues Paper at [3.54]–[3.55].

responded that they are not aware of any issues in practice.<sup>94</sup> A further submitter had no issues with the status quo.<sup>95</sup>

- 3.77 The Criminal Bar Association submitted that “reasonable diligence” is too lenient a test and has resulted in hearsay statements being admitted when more could have been done to locate a witness. It said this is a growing issue given the wider use of pre-recorded video evidence.

#### Factors relevant to a section 16(2)(d) determination

- 3.78 Nine submitters addressed whether the Act should prescribe factors that are relevant to determining whether the section 16(2)(d) threshold is satisfied. Three submitters thought it should.<sup>96</sup> Six submitters said it should not.<sup>97</sup>
- 3.79 Submitters that supported prescribing factors were concerned with protecting fair trial rights and ensuring consistency in approach by police.<sup>98</sup>
- 3.80 Submitters that did not support prescribing factors were concerned with resourcing requirements for police,<sup>99</sup> upsetting the highly factual nature of the inquiry<sup>100</sup> and the effect on victims if police are required to pursue them.<sup>101</sup>

#### The wording of section 16(2)(d)

- 3.81 Ten submitters addressed whether the language in section 16(2)(d) should be amended to require “all reasonable steps” to be taken to find the person and/or secure their attendance at court. Three submitters supported amending the language in the way we suggested<sup>102</sup> and five did not.<sup>103</sup> Two did not express a particular view but said modernising the language may be useful.<sup>104</sup>
- 3.82 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and the Crown Law Office submitted that whether the “reasonable diligence” standard is met is a question of fact. The Crown Law Office said the courts already typically require evidence of the steps taken to locate a person and it is not necessary or desirable to introduce complexity into this area by establishing a set of guiding principles. For the same reason, it said there should not be guidance in a non-statutory instrument. The NZLS said further guidance would make the assessment less flexible and therefore less able to accommodate the various circumstances in which the hearsay provisions are likely to be engaged.

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<sup>94</sup> Auckland District Law Society, Crown Law Office, Adjunct Professor Elisabeth McDonald.

<sup>95</sup> New Zealand Police.

<sup>96</sup> Criminal Bar Association, Public Defence Service, Wellington Criminal Justice Project.

<sup>97</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Crown Law Office, Luke Cunningham Clere, New Zealand Police, Women’s Refuge.

<sup>98</sup> Criminal Bar Association, Public Defence Service.

<sup>99</sup> Crown Law Office, Luke Cunningham Clere, New Zealand Police.

<sup>100</sup> Luke Cunningham Clere.

<sup>101</sup> New Zealand Police, Women’s Refuge.

<sup>102</sup> Criminal Bar Association, Public Defence Service, Wellington Community Justice Project.

<sup>103</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Crown Law Office, New Zealand Law Society, Women’s Refuge.

<sup>104</sup> Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald.

## Reform not recommended

- 3.83 We do not recommend reform to provide further guidance as to what constitutes “reasonable diligence” or to amend the wording in section 16(2)(d).
- 3.84 Submitters did not identify any problems that the lack of guidance was having in practice. Without clear evidence of a problem in practice, we do not see legislative intervention as necessary or desirable. As we note above, there is clear and recent appellate authority that the inquiry is a simple matter of fact. Prescribing a list of relevant factors would risk unnecessarily upsetting the law in this area. Should problems arise, it is open to the courts to provide guidance.<sup>105</sup>

## HEARSAY IN CIVIL PROCEEDINGS

### Background

- 3.85 The Act determines the admissibility of evidence in both civil and criminal proceedings. In civil proceedings, the Act must also be read alongside the relevant rules of court, including the High Court Rules 2016 (HCR), which regulate practice and procedure.<sup>106</sup>
- 3.86 Under the High Court Rules, evidence-in-chief in civil proceedings is usually given by the witness reading a brief of evidence in court,<sup>107</sup> which is prepared in advance and served on all other parties before trial.<sup>108</sup> Documents are normally admitted in evidence by their inclusion in the “common bundle”. The common bundle is prepared in advance of trial and contains all the documents on which each party intends to rely.<sup>109</sup> HCR 9.5(4) provides that a document in the common bundle is “automatically received into evidence (subject to the resolution of any objection to admissibility)” when a witness refers to it in evidence or when counsel refer to it in submissions (other than closing submissions).
- 3.87 The rule against hearsay applies in civil proceedings. If evidence in a civil proceeding contains a statement by a person who is not a witness that is relied on to prove the truth of its contents, it is strictly inadmissible unless one of the exceptions in the Act applies.
- 3.88 In November 2022, Te Komiti mō ngā Tikanga Kooti | Rules Committee released its report, *Improving Access to Civil Justice*.<sup>110</sup> The Committee recommended that the Act and the High Court Rules be amended to allow documents in the common bundle to be admissible to prove the truth of their contents.<sup>111</sup> It explained this would “remove the artificial recitation of documents in the briefs of evidence” to avoid infringing the rule against hearsay.<sup>112</sup> It further explained that “presumptive admissibility of documentary evidence”

<sup>105</sup> In the comparative jurisdictions we have examined, guidance has come from the courts and not legislation.

<sup>106</sup> Rules of evidence are prescribed in pt 9 of the High Court Rules 2016 and pt 9 of the District Court Rules 2014. For simplicity, in this chapter, we refer to the High Court Rules only.

<sup>107</sup> Pursuant to s 83(1)(c) of the Evidence Act 2006 and r 9.12 of the High Court Rules 2016.

<sup>108</sup> High Court Rules 2016, r 9.7.

<sup>109</sup> High Court Rules 2016, r 9.4.

<sup>110</sup> Te Komiti Mō Ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022).

<sup>111</sup> Rules Committee *Improving Access to Civil Justice* (November 2022) at 58 (recommendation 22(b)).

<sup>112</sup> Rules Committee *Improving Access to Civil Justice* (November 2022) at [239].

would not “mean its truth cannot be challenged, or that admissible documents will be given any weight by a trial judge”.<sup>113</sup> Rather:<sup>114</sup>

... it merely puts the onus on a party seeking to dispute the narrative of events that emerges from contemporaneous documents to identify the documents it wishes to challenge, so that this can be addressed in the course of the trial itself if it becomes relevant to do so.

## Issues

- 3.89 In our Issues Paper we identified apparent inconsistencies between the Act and the High Court Rules in relation to:
- (a) the process for challenging the admissibility of hearsay statements in civil proceedings; and
  - (b) the admissibility of hearsay statements that are not challenged by any party.

### *Process for challenging hearsay statements in civil proceedings*

- 3.90 We noted in our Issues Paper that the High Court Rules prescribe clear procedures for challenging the admissibility of evidence, including hearsay statements.<sup>115</sup> These requirements are designed to ensure that any evidentiary issues are identified before trial.<sup>116</sup> However, we also noted the Act does not prescribe a process for challenging the admissibility of hearsay statements.<sup>117</sup> The courts have held that failure to adhere to the High Court Rules does not displace the mandatory statutory criteria for the admissibility of hearsay statements in the Act, meaning issues of hearsay can be raised at trial.<sup>118</sup>
- 3.91 We observed this creates a conflict between the Act and the procedures set out in the High Court Rules. A hearsay objection does not need to be made in advance of trial despite the clear obligation in the High Court Rules to raise admissibility challenges before trial.
- 3.92 Late challenges to hearsay statements have the potential to increase cost and delay, especially if an adjournment is needed to address admissibility issues.<sup>119</sup> The consequences for a party seeking to rely on hearsay statements can also be significant. Evidence may be ruled inadmissible at trial despite the pre-trial silence of any other party. This may affect a party’s trial preparation and strategy.

### *Admissibility of unchallenged hearsay statements*

- 3.93 HCR 9.5(1) provides that each document in the common bundle is considered to be admissible unless the court directs otherwise. However, we noted in our Issues Paper this

<sup>113</sup> Rules Committee *Improving Access to Civil Justice* (November 2022) at [243].

<sup>114</sup> Rules Committee *Improving Access to Civil Justice* (November 2022) at [243].

<sup>115</sup> Issues Paper at [3.61].

<sup>116</sup> Andrew Beck *A to Z of New Zealand Law* (online ed, Thomson Reuters, 2012) at [13.10.8.4].

<sup>117</sup> Issues Paper at [3.64].

<sup>118</sup> Issues Paper at [3.64]–[3.67]. See, for example, *Zespri Group Ltd v Gao* [2020] NZHC 109, Schedule — Hearsay Rulings at [12]; *Taylor v Asteron Life Ltd* [2020] NZCA 354, [2021] 2 NZLR 561 at [66]–[68].

<sup>119</sup> For example, see *Zespri Group Ltd v Gao* [2020] NZHC 109, Schedule — Hearsay Rulings at [14]. For a discussion of the courts’ approach to making pre-trial admissibility rulings, see Gillian Coumbe “Just prove it: Lay witness statements and admissibility in civil cases” (paper presented to Legalwise “Evidence and Advocacy Masterclass” webinar, 2 June 2022) at [94]–[108].

does not mean a hearsay statement is admissible if it is included in the common bundle.<sup>120</sup> The hearsay rules in the Act are described in absolute terms. A hearsay statement is not admissible unless it meets one of the exceptions in the Act.<sup>121</sup>

- 3.94 We observed the status of an unchallenged hearsay statement is, therefore, unclear.<sup>122</sup> Different outcomes are possible. On a strict interpretation of the Act, the court might exclude any hearsay statement it identifies on the basis that no argument has been made as to its admissibility under the statutory exceptions to the rule against hearsay.<sup>123</sup> We noted an alternative approach taken in some cases is to treat the parties, by failing to challenge a hearsay statement, as having agreed to its admission.<sup>124</sup>

## Consultation

### What we asked submitters

- 3.95 In our Issues Paper, we asked submitters whether the Act should be amended to clarify the relationship between the Act and the High Court Rules and/or promote greater compliance with the hearsay rules in civil proceedings. We identified two possible options for reform.<sup>125</sup> We noted that option 1 could be implemented alone or both option 1 and option 2 could be adopted together.

#### Option 1 – limit the operation of section 17 in civil proceedings

- 3.96 Option 1 was to amend the Act to limit the operation of section 17 (hearsay rule) to apply in civil proceedings only if a party challenges the admissibility of a hearsay statement in accordance with the relevant rules of court (unless the judge dispenses with this requirement).<sup>126</sup>
- 3.97 We noted this option could apply only to documents in the common bundle or it could be extended to briefs and oral evidence as well.

#### Option 2 – introduce a notice procedure for hearsay in civil proceedings

- 3.98 Option 2 was to introduce a notice procedure for hearsay in civil proceedings.<sup>127</sup> We noted that, unlike in criminal proceedings,<sup>128</sup> there is no requirement on a party seeking to offer a hearsay statement in evidence in a civil proceeding to give notice of their

<sup>120</sup> Issues Paper at [3.69].

<sup>121</sup> Evidence Act, s 17. See also *Taylor v Asteron Life Ltd* [2020] NZCA 354, [2021] 2 NZLR 561 at [68].

<sup>122</sup> Issues Paper at [3.70].

<sup>123</sup> See, for example, *Apollo Bathroom and Kitchen Ltd (In liq) v Ling* [2019] NZHC 237 at [15]–[17]. In this case, the admissibility of hearsay statements was challenged but only at trial after the Court drew attention to the hearsay nature of the evidence (at [17]). However, because no foundation was provided to support the admissibility of the statements under s 18, the case is potentially analogous to the situation where admissibility of hearsay statements is simply not addressed. See also *Brauninger v Westend* [2020] NZHC 2512 at [45].

<sup>124</sup> Issues Paper at [3.71]–[3.72]. We noted, however, that s 9 contemplates the existence of a written or oral agreement of the parties and it is debatable whether it was intended to apply when the parties simply do not turn their minds to the issue.

<sup>125</sup> Issues Paper at [3.75]–[3.89].

<sup>126</sup> Issues Paper at [3.76]–[3.83].

<sup>127</sup> Issues Paper at [3.84]–[3.89].

<sup>128</sup> Evidence Act 2006, s 22.

intention to do so. In criminal proceedings, notice enables the other party to decide whether to object and assists the judge in determining whether to admit the evidence.<sup>129</sup> Similar notice procedures apply to civil proceedings in England and Wales.<sup>130</sup>

### Results of consultation

#### Limiting the operation of section 17 in civil proceedings

- 3.99 Four submitters addressed whether section 17 should be limited in civil proceedings. Three submitters supported limiting section 17<sup>131</sup> and one did not.<sup>132</sup>
- 3.100 Those that supported limiting section 17 gave the following reasons:
- (a) There are good reasons to treat hearsay differently in civil proceedings compared to criminal proceedings because of the reliance on documentary evidence in civil proceedings.<sup>133</sup>
  - (b) Limiting section 17 would promote consistency and certainty.<sup>134</sup>
  - (c) Limiting section 17 would remove unnecessary expense.<sup>135</sup>
  - (d) Limiting section 17 would encourage evidentiary issues to be settled before trial.<sup>136</sup>
  - (e) Reliability can be dealt with as a matter of weight by a judge.<sup>137</sup>
- 3.101 The NZLS supported limiting section 17 in relation to documentary evidence but not witness briefs and oral evidence, saying that this would remove any incentive for discipline in the preparation and leading of evidence. NZLS further said this may increase costs and place well-resourced litigants in a better position to challenge evidence, creating barriers to accessing justice.
- 3.102 Two submitters said a judge should retain a discretion to hear late challenges.<sup>138</sup>
- 3.103 Wilson Harle did not support limiting section 17 in civil proceedings. It said the hearsay rule prevents admission of evidence that is of low relevance and probative value and promotes the just, efficient and speedy resolution of proceedings.

#### Requiring parties to give notice of their intention to offer a hearsay statement

- 3.104 Six submitters addressed whether the Act should be amended to require a party to give notice of their intention to offer a hearsay statement in evidence in a civil proceeding.

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<sup>129</sup> Evidence Bill 2005 (256–2) (select committee report) at 3–4.

<sup>130</sup> Civil Evidence Act 1995 (UK), s 2; Civil Procedure Rules (UK), r 33.2.

<sup>131</sup> Crown Law Office, New Zealand Law Society, Laura O’Gorman KC. Laura O’Gorman KC supported abolishing the hearsay rule entirely with respect to civil proceedings. The New Zealand Law Society only supported limiting s 17 with regards to documentary evidence.

<sup>132</sup> Wilson Harle.

<sup>133</sup> New Zealand Law Society.

<sup>134</sup> Crown Law Office, New Zealand Law Society.

<sup>135</sup> Crown Law Office, New Zealand Law Society.

<sup>136</sup> Crown Law Office.

<sup>137</sup> Laura O’Gorman KC.

<sup>138</sup> New Zealand Law Society, Laura O’Gorman KC.

Two favoured a notice requirement<sup>139</sup> and two opposed it.<sup>140</sup> Professor McDonald did not express a particular view but said a notice requirement may be difficult to enforce in practice. Wilson Harle preferred that any inconsistencies between the Act and the High Court Rules be addressed through amendment to the High Court Rules. However, if legislative amendment were to occur, it preferred the introduction of a notice requirement so the burden of introducing hearsay evidence lay with the party wishing to introduce it.

- 3.105 Of the two submitters in favour of a notice requirement, only the NZLS gave reasons. It said a notice requirement would mean evidence is more concise and limited to what is admissible, reducing overall costs.
- 3.106 Submitters against a notice requirement highlighted the potential practical problems with it. Laura O’Gorman KC made the point that hearsay issues are often impractical to address, or may not even arise, in advance of trial. She said that, in these situations, notice would not serve any useful purpose. Laura O’Gorman KC also said notice requirements would increase costs unnecessarily as other parties are already able to assess for themselves any prejudice they may face from hearsay evidence and raise objections. The Crown Law Office said a notice requirement would require parties to give notice even in respect of uncontroversial hearsay evidence to which the other party is unlikely to object.

#### Do the inconsistencies between the Act and the High Court Rules create any other problems?

- 3.107 Two submitters addressed whether the inconsistencies between the Act and the High Court Rules create problems in respect of the operation of other admissibility rules in civil proceedings.<sup>141</sup> Both submitters supported amending section 23 (opinion evidence) so that opinion evidence is admissible in civil proceedings unless challenged.

#### The need for reform

- 3.108 We conclude reform is desirable to address the relationship between the Act and the High Court Rules. The current approach in the Act creates uncertainty because parties may not know whether hearsay statements on which they seek to rely will be challenged at trial despite the clear obligations in the High Court Rules to identify evidentiary issues before trial. Relatedly, reform is desirable to encourage hearsay objections to be made in accordance with the High Court Rules so as to reduce late objections.
- 3.109 Reform is also desirable because the current approach appears inconsistent with the approach taken prior to the Act when a failure to object to documents in the common bundle pre-trial could mean that a party was estopped from raising objections at trial.<sup>142</sup>

<sup>139</sup> New Zealand Law Society, Wellington Community Justice Project.

<sup>140</sup> Crown Law Office, Laura O’Gorman KC.

<sup>141</sup> Crown Law Office, Laura O’Gorman KC.

<sup>142</sup> *Commerce Commission v Giltrap City Ltd* [2001] BCL 1008 (HC) at [25]–[28].

## Recommendation

**R5**

Insert a new section providing that:

- a. despite section 17, a hearsay statement is admissible in a civil proceeding unless its admissibility is challenged by another party;
- b. a challenge made by another party under subsection (1) must be made in accordance with the relevant rules of the court unless the judge directs otherwise; and
- c. the judge may give a direction under subsection (2) if:
  - i. having regard to the nature and contents of the statement, no party is substantially prejudiced by the failure to comply with the rules of court; or
  - ii. compliance was not reasonably practicable in the circumstances; or
  - iii. the interests of justice so require.

### *Limiting the operation of section 17 in civil proceedings*

3.110 We recommend limiting the operation of section 17 in civil proceedings for all hearsay evidence, including documentary evidence, witness briefs and oral evidence.

3.111 In our recommendation:

- (a) Part (a) adopts a presumption or starting point that a hearsay statement is admissible in civil proceedings. That presumption could be rebutted through a challenge to the admissibility of the hearsay statement.
- (b) Part (b) provides that a challenge to the admissibility of the hearsay statement must be made in accordance with the relevant rules of the court unless the judge directs otherwise. This means that, in accordance with the current High Court Rules,<sup>143</sup> challenges should be made before trial unless the rules provide otherwise. A party wishing to make a challenge other than in accordance with the rules could only do so if directed by the judge.
- (c) Part (c) provides grounds for the judge to dispense with the requirement for challenges to be made in accordance with the relevant rules. This would usually be to permit challenges to be made at trial.

3.112 If the admissibility of hearsay evidence is challenged, the court would determine admissibility under the Act's hearsay rules. If admissibility is not challenged, the reliability of the hearsay statement would be treated as a matter of weight by the fact-finder.

3.113 Our recommendation would avoid the need for the court to address admissibility issues with hearsay statements when no challenge has been made. We do not anticipate this would result in any significant change in civil litigation practice. As noted, this appears to be consistent with what the High Court Rules already envisage. Our recommendation focuses on improving the operation of the hearsay rules in civil proceedings to better

<sup>143</sup> See High Court Rules 2016, rr 9.5(2), 9.11; District Court Rules 2014, rr 9.5(2), 9.11.



- achieve the purpose in section 6, which is to help secure the just determination of proceedings by (among other things) avoiding unjustifiable expense and delay.<sup>144</sup>
- 3.114 Limiting the operation of the hearsay provisions in civil proceedings was supported by a majority of submitters. Submitters said this would promote certainty for litigants and practitioners, reduce unnecessary expense, reflect current practice and encourage evidentiary matters to be settled before trial.
- 3.115 Limiting the operation of section 17 in civil proceedings is also consistent with the recommendations of the Rules Committee in *Improving Access to Civil Justice* to allow documents in the common bundle to be admissible as to the truth of their contents.<sup>145</sup> Our recommendation does, however, stand on its own and does not rely on the Rules Committee's recommendations being adopted.
- 3.116 In our Issues Paper, we said that limiting the operation of section 17 in civil proceedings would result in different approaches to hearsay in criminal and civil proceedings.<sup>146</sup> In our view, there are good reasons to distinguish between civil and criminal proceedings in this context. The policy consideration of protecting a defendant's fair trial rights does not arise in civil proceedings. In addition, civil proceedings are typically heard by a judge rather than a jury so the concern about a jury's "supposed inability to make a proper assessment of evidence which has not been tested by cross-examination" does not often arise.<sup>147</sup> Rather, judges "are expected to have the skills to sift the wheat from the chaff and assess whatever evidence is available in accordance with its true significance".<sup>148</sup> For these reasons, there has long been debate about applying the same strict approach to hearsay in civil proceedings.<sup>149</sup>
- 3.117 As noted above, one approach taken in some cases to address unchallenged hearsay statements is to treat them as admissible under section 9 by implied agreement. We see a presumptive admissibility approach as preferable to a finding that a hearsay statement was admitted under an implied agreement because there was no objection to its admission. This is not the intention of section 9, which contemplates a prior agreement between parties as to the admissibility of evidence. Admitting hearsay statements under this section without any prior agreement stretches the meaning of section 9. Our recommendation would make the law clearer by making these unchallenged hearsay statements admissible and providing rules for challenging them.

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<sup>144</sup> Evidence Act 2006, s 6(e).

<sup>145</sup> Rules Committee *Improving Access to Civil Justice* (November 2022) at 58 (recommendation 22(b)).

<sup>146</sup> Issues Paper at [3.82].

<sup>147</sup> Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [7].

<sup>148</sup> Andrew Beck "Evidence rules in civil proceedings: A renaissance?" [2021] NZLJ 263 at 263. Also see Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [7].

<sup>149</sup> The Commission originally proposed, in a preliminary paper on hearsay, abolishing the hearsay rule in civil proceedings subject to a general power to exclude evidence that is unfairly prejudicial, misleading, confusing or time-wasting. It was of the view that, in a judge-alone civil case, "the judge, by reason of experience and training, should be able to assess the risks pertaining to hearsay evidence": Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [3] and [19]. Ultimately, the Commission did not adopt these proposals in its proposed Evidence Code and instead recommended a common set of hearsay rules for all proceedings.

- 3.118 Our recommendation is broadly consistent with the less restrictive approaches taken in some comparable jurisdictions where the hearsay rules have been limited or abolished in civil proceedings.<sup>150</sup>

### Documentary evidence

- 3.119 Limiting the operation of section 17 in civil proceedings in relation to documentary evidence recognises the significance of documentary evidence in civil proceedings.<sup>151</sup> It also reflects the fact that documents in the common bundle are potentially more at risk of infringing the rule against hearsay because they do not need to be produced by a witness.<sup>152</sup> We agree with the Rules Committee that documentary hearsay evidence can simply be weighed appropriately by the trial judge or identified and challenged by the other party before trial. That is particularly so given the Rules Committee's recommendation that the parties should produce a joint chronology setting out facts to be drawn from the documentary evidence.<sup>153</sup>
- 3.120 Limiting the operation of section 17 in civil proceedings in relation to documentary evidence was supported by all but one submitter that addressed the issue. Some submitters said this reflects what already happens in practice.

### Briefs and oral evidence

- 3.121 We recommend a presumptive admissibility approach should also apply to briefs and oral evidence. Several of the cases we identified in our Issues Paper where hearsay was at issue in civil proceedings involved hearsay statements in witness briefs.<sup>154</sup> Limiting a presumption of admissibility to documents in the common bundle would not, therefore, wholly address the issue of unchallenged hearsay statements.
- 3.122 The NZLS supported limiting the hearsay rules for documentary evidence but did not support extending a presumptive admissibility approach to briefs and oral evidence. It said this would remove any incentive for discipline in the preparation and leading of evidence. However, any party would still be able to challenge the admissibility of hearsay evidence offered in witness briefs and oral evidence. We note that, under the Rules Committee's recommendations, evidence given by witnesses will not be expected to traverse the events disclosed by the documentary record but rather address genuine issues of fact. This should mitigate against undisciplined practices and make it easier to identify any evidence a party wishes to challenge. The Rules Committee also recommended witness briefs be exchanged earlier in proceedings.<sup>155</sup> This should help to ensure parties have the opportunity to analyse them and decide whether to make such

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<sup>150</sup> See Civil Evidence Act 1995 (UK), s 1 (effectively abolishing the rule against hearsay); Evidence Act 1995 (Cth) ss 63 and 64, adopted in other uniform evidence act jurisdictions and abolishing the rule in relation to first-hand hearsay; Civil Evidence (Scotland) Act 1988, s 2.

<sup>151</sup> See discussion in Rules Committee *Improving Access to Civil Justice* (November 2022) at [237]–[239].

<sup>152</sup> If a document in the common bundle contains a statement made by someone who is not a witness and that statement is relied on for the truth of its contents, it will be a hearsay statement under the Evidence Act 2006 and inadmissible unless one of the exceptions in the Act applies.

<sup>153</sup> Rules Committee *Improving Access to Civil Justice* (November 2022) at 58 (recommendation 22(a)).

<sup>154</sup> Issues Paper at [3.81]. *Zespri Group Ltd v Gao* [2020] NZHC 109; *Taylor v Asteron Life Ltd* [2020] NZCA 354, [2021] 2 NZLR 561; *Matvin Group Ltd v Crown Finance Ltd* [2022] NZHC 2239.

<sup>155</sup> Rules Committee *Improving Access to Civil Justice* (November 2022) at 45 (recommendation 17).

a challenge. Accordingly, parties should still be incentivised to take care in the preparation and leading of evidence to avoid unnecessary admissibility challenges.

### Dispensing with the requirement to comply with the relevant rules of the court

- 3.123 We recommend the court should be able to dispense with the requirement that any objection comply with the relevant rules of court. There will be situations where evidence is not known to be hearsay until the trial (for example, if a late decision is made not to call a witness) or where the significance of a hearsay statement is not clear until the trial. A discretion to hear a late challenge would also help to address the concern that requiring objections to comply with the rules of court could unintentionally increase cost and delay at the pre-trial stage by incentivising parties to make unnecessary challenges to protect their position.
- 3.124 Grounds for dispensing with the requirement to comply with the rules of court should be similar to those relating to the power to dispense with notice requirements in respect of hearsay statements offered in criminal proceedings.<sup>156</sup> Our recommendation proposes the following grounds that:
- (a) having regard to the nature and contents of the statement, no party is substantially prejudiced by the failure to comply with the requirements; or
  - (b) compliance was not reasonably practicable in the circumstances; or
  - (c) the interests of justice so require.
- 3.125 This would allow a judge to consider the nature of the evidence, the reasons why it was not challenged and any prejudicial effect of allowing a late challenge. We see these broad considerations as necessary given the wide range of evidence and trial contexts that may come before a judge.
- 3.126 No submitters commented specifically on whether these grounds are appropriate or not. However, retaining a discretion to allow late challenges was supported by the submitters that commented on it.<sup>157</sup>

### *A notice procedure for hearsay in civil proceedings*

- 3.127 We do not recommend requiring a party to give notice of their intention to offer a hearsay statement in civil proceedings.
- 3.128 In our Issues Paper, we noted this option would increase the cost of pre-trial procedures, especially in complex cases with voluminous briefs and common bundles. If a notice procedure was introduced, the party proposing to offer hearsay statements in evidence would need to identify those statements and the reasons why they are admissible under the Act in advance of knowing whether a challenge to that evidence will be made. Some submitters noted this would result in parties having to identify hearsay evidence that is unlikely to be challenged. In complex civil proceedings with potentially large amounts of evidence, we anticipate this burden would be unduly onerous. Also, requiring parties to provide notice for all hearsay evidence they wish to admit would not remove the burden

<sup>156</sup> Evidence Act 2006, s 22(5).

<sup>157</sup> The New Zealand Law Society and Laura O’Gorman KC supported the court retaining discretion to hear late challenges to admissibility. However, the New Zealand Law Society also supported introducing a notice procedure and said late challenges should not generally be permitted where proper notice is given.

on other parties to identify what hearsay evidence they wish to challenge (although we acknowledge it would reduce the scope of any search). Lastly, as noted above, the Rules Committee has recommended requiring parties to produce chronologies setting out the relevant facts.<sup>158</sup> If this occurs, the evidence any party wishes to challenge should become easier to identify. For these reasons, placing a burden on the party preparing evidence to give notice of every hearsay statement is likely to create more cost and delay than relying on other parties to identify any hearsay evidence they wish to challenge.

- 3.129 In our Issues Paper, we also noted it had been observed that cases, including *Zespri Group Ltd v Gao*,<sup>159</sup> “demonstrate the increased readiness of the courts to enforce the rules of evidence”, which “in turn will encourage greater discipline on the part of lawyers in preparing briefs”.<sup>160</sup> We anticipate this trend to continue given the Rules Committee recommendations.

### Any other problems

- 3.130 The Crown Law Office and Laura O’Gorman KC supported amending the Act so that opinion evidence is admissible unless challenged in civil proceedings. We do not consider this is necessary or desirable. These submitters did not identify any issues in practice regarding the hearsay rules and opinion evidence. Also, different policy reasons underly the exclusionary rules against opinion evidence and hearsay evidence. Opinion evidence is excluded to prevent the admission of “unreliable, misleading or superfluous evidence”.<sup>161</sup> Hearsay statements are generally excluded to ensure that, if the evidence is to be offered, the maker of the statement must be a witness who can be cross-examined and observed by the fact-finder. Without evidence of a problem in practice, we do not see it as necessary or desirable to enable parties to include opinion evidence in documentary evidence or witness briefs unless it is challenged. This would risk incentivising parties to generate opinion evidence to support their case when it actually does not benefit a fact-finder to hear that evidence and would place a burden on opposing parties to challenge that opinion evidence.

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<sup>158</sup> Rules Committee *Improving Access to Civil Justice* (November 2022) at 58 (recommendation 22(a)).

<sup>159</sup> *Zespri Group Ltd v Gao* [2020] NZHC 109.

<sup>160</sup> Issues Paper at [3.89], citing Gillian Coumbe “Just prove it: Lay witness statements and admissibility in civil cases” (paper presented to Legalwise “Evidence and Advocacy Masterclass” webinar, 2 June 2022) at [111].

<sup>161</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at 22. See also Chapter 2 of this report.

## CHAPTER 4

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# Defendants' and co-defendants' statements

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## INTRODUCTION

- 4.1 In this chapter, we consider the admissibility of defendants' and co-defendants' statements in criminal proceedings under sections 21, 22A and 27 of the Evidence Act 2006. We address the following:
- (a) Defendants' exculpatory statements (section 21). We do not recommend reform. While there appears to be some inconsistency in practice as to when such statements are offered in evidence, legislative reform is unlikely to resolve this issue.
  - (b) Defendants' statements contained within hearsay statements. We recommend amending section 27 to clarify that the hearsay provisions apply to a hearsay statement made by a person other than a defendant that contains a defendant's statement.
  - (c) Admissibility of defendants' non-hearsay statements against co-defendants. We recommend amending section 27 to clarify that a defendant's non-hearsay statement is admissible against a co-defendant but a defendant's hearsay statement is only admissible against a co-defendant if it is admitted under section 22A.

## DEFENDANTS' EXCULPATORY STATEMENTS

### Issue

- 4.2 A defendant's statement is "exculpatory" if it asserts or tends to show the defendant did not commit the alleged offence. "Inculpatory" statements tend to establish the defendant's guilt.
- 4.3 Section 21 prevents a defendant from offering their own hearsay statement. This means a defendant who elects not to give evidence at trial cannot offer evidence of their own out-of-court statement to prove the truth of its contents (for example, an exculpatory statement made in a police interview). The prosecution may offer a defendant's

statement (under section 27) but the Act does not require them to. We discussed the history of sections 21 and 27 and their application by the courts in our Issues Paper.<sup>1</sup>

- 4.4 Case law has recognised the courts have a discretion to require the prosecution to offer evidence of a defendant's statement where it is necessary to ensure trial fairness.<sup>2</sup> Te Kōti Pira | Court of Appeal has indicated this will only occur in "exceptional cases".<sup>3</sup> Typically, the discretion is applied to prevent the prosecution from "cherry picking" parts of a "mixed" statement (one that contains both inculpatory and exculpatory aspects) that are helpful to its case.<sup>4</sup> Appellate case law suggests it is unlikely to be exercised in relation to wholly exculpatory statements.<sup>5</sup> Preliminary feedback from defence counsel indicated that, in practice, some prosecutors choose to offer such statements in evidence. As we discuss further below, there are also indications that te Kōti-ā-Rohe | District Court judges are requiring prosecutors to offer such statements in some cases.
- 4.5 These issues often arise in relation to defendants' statements made to police or other law enforcement officers during investigative questioning (for example, in video interviews). Many submitters commented on this type of statement specifically. There are also other types of mixed or exculpatory statements addressed in case law such as statements made by a defendant to a witness.<sup>6</sup>
- 4.6 In our Issues Paper, we identified two potential concerns with the current approach:<sup>7</sup>
  - (a) Potential inconsistency regarding when prosecutors offer evidence of a defendant's mixed or exculpatory statement. Defence counsel told us the approach taken by prosecutors varies between regions, with some choosing to offer wholly exculpatory statements and others not. We also noted that, while the case law is reasonably clear that the prosecution cannot cherry pick parts of "mixed" statements, recent case law suggests there may be continued uncertainty among counsel.<sup>8</sup>
  - (b) Concern about the policy underlying section 21 and its potential to cause unfairness to defendants. We noted defence counsel and a commentator<sup>7</sup> had suggested defendants' police statements should be placed before the fact-finder as a matter of course. Otherwise, the fact-finder is deprived of relevant evidence. In addition, juries may assume the defendant has not denied the offending and draw adverse inferences from that (although section 32 prevents them from being invited to draw such an inference and requires the judge to warn them not to do so).

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<sup>1</sup> Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [4.5]–[4.15].

<sup>2</sup> *R v King* [2009] NZCA 607, (2009) 24 CRNZ 527 at [19]; *R v Felise (No 1)* HC Auckland CRI-2008-092-8864, 8 February 2010 at [14]. This is based on the inherent powers of judges to control criminal proceedings.

<sup>3</sup> *S (CA481/2018) v R* [2019] NZCA 169 at [21].

<sup>4</sup> See, for example, *R v Felise (No 1)* HC Auckland CRI-2008-092-8864, 8 February 2010; *R v Parata* [2021] NZHC 3573; discussion in *Foster v R* [2021] NZSC 90 at [14].

<sup>5</sup> See *Foster v R* [2021] NZSC 90 at [14] (although we note this was a leave decision).

<sup>6</sup> As in *R v Felise (No 1)* HC Auckland CRI-2008-092-8864, 8 February 2010.

<sup>7</sup> Issues Paper at [4.3]–[4.29].

<sup>8</sup> See *R v Parata* [2021] NZHC 3573 at [36]–[53] where the prosecution sought to offer the defendant's police interview in evidence but to have certain parts of it excluded.

- 4.7 We noted the High Court of Australia had raised similar concerns about unfairness to defendants in *Nguyen v R*.<sup>9</sup> In that case, the Court referred to the prosecutorial obligation to act fairly and present all available, cogent and admissible evidence.<sup>10</sup> It considered it was inconsistent with that obligation for prosecutors to make tactical decisions not to call evidence to disadvantage the defendant.<sup>11</sup>

## Consultation

### What we asked submitters

- 4.8 We invited submissions on whether sections 21 and 27 are causing problems in practice, having regard to the case law recognising a judicial discretion to require prosecutors to offer defendants' statements to ensure trial fairness. In particular, we sought views on:
- (a) whether there are inconsistent approaches by prosecutors and/or uncertainty among counsel regarding when defendants' mixed or exculpatory statements should be offered; and
  - (b) whether (and in what circumstances) failure to offer such statements may be causing unfairness to defendants or contributing to miscarriages of justice.
- 4.9 We also invited submissions on how any problems should be addressed. In terms of inconsistency in prosecutorial practice, we suggested this could be addressed through prosecution guidelines specifying when prosecutors should offer (or consider offering) mixed or wholly exculpatory statements. Alternatively, or in addition, the Act could be amended to require mixed statements relied on by the prosecution to be offered in their entirety in line with existing case law.
- 4.10 As to the second issue, we said if there was widespread concern that the current approach is causing unfairness to defendants, legislative reform could be considered. For example, the Act could be amended to:
- (a) give the court discretion to admit a defendant's statement where it is necessary to avoid unfairness; and/or
  - (b) make defendants' police statements admissible as a matter of course.

### Results of consultation

- 4.11 Nine submitters responded to this question. Four submitters said there are problems with inconsistency in prosecution practice and unfairness to defendants.<sup>12</sup> Five submitters said

<sup>9</sup> *Nguyen v R* [2020] HCA 23. *Nguyen* is discussed in our Issues Paper at [4.16]–[4.18].

<sup>10</sup> *Nguyen v R* [2020] HCA 23 at [36]–[39].

<sup>11</sup> *Nguyen v R* [2020] HCA 23 at [45]. The Court's findings were limited to "mixed" statements given the relevant statutory scheme. However, *Nguyen* was not a case of "cherry picking" by the prosecution — the prosecution did not wish to rely on any part of the statement. The Court found (at [41] and [44]) that prosecutors would be expected to tender evidence of mixed statements unless there was "good reason" not to do so (for example, where the defendant declined to comment or in rare situations where the statement is demonstrably lacking in credibility or reliability).

<sup>12</sup> Auckland District Law Society, Te Matakahi | Defence Lawyers Association New Zealand, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

there is no justification for reform and good reasons to retain the current approach in section 21.<sup>13</sup>

### Inconsistency in prosecution practice

- 4.12 The four submitters that said there are problems in practice referred to variation both regionally and between individual prosecutors as to whether defendants' police statements will typically be offered in evidence.<sup>14</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) noted the decision not to offer a statement is sometimes made expressly for tactical reasons to force the defendant to give evidence. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service said there are also issues with the prosecution indicating it will offer a statement only to reverse that decision on the eve of the trial.
- 4.13 Submitters said inconsistency in prosecution practice makes it difficult for defence counsel to advise clients because they do not know whether a police interview will be offered in evidence.<sup>15</sup> The Auckland District Law Society (ADLS) and Te Matakahi | Defence Lawyers Association New Zealand also said that leaving the admissibility of defendants' exculpatory statements to the discretion of individual prosecutors introduces arbitrariness to criminal trials and undermines the even-handed administration of justice.
- 4.14 On the other hand, Te Tari Ture o te Karauna | Crown Law Office was not aware of any regional variation between Crown solicitors. It said that, while prosecutors may sometimes choose to offer an exculpatory statement, this depends on the circumstances of the case. For example, a defendant's exculpatory statement may be offered where evidence obtained since the statement was made makes it clear the defendant lied. It submitted case law is sufficiently clear to promote consistency so no amendment to prosecution guidelines is required.
- 4.15 Most submitters that addressed the point agreed that the law relating to "mixed" statements is reasonably clear<sup>16</sup> and that such statements are generally offered in full by the prosecution.<sup>17</sup> The Public Defence Service said the law is clear but there is still some inconsistency so supported legislative clarification. No other submitters supported legislative reform in relation to mixed statements specifically.

### Unfairness to defendants

- 4.16 Four submitters said the current approach causes unfairness to defendants for the following reasons:

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<sup>13</sup> Te Tari Ture o te Karauna | Crown Law Office, Associate Professor Anna High, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, Ngā Pirihimana o Aotearoa | New Zealand Police.

<sup>14</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, New Zealand Law Society (based on feedback received from defence counsel), Public Defence Service.

<sup>15</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>16</sup> Crown Law Office, Associate Professor Anna High, New Zealand Law Society, Public Defence Service (although noting there is still some inconsistency despite this).

<sup>17</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, New Zealand Law Society.



- (a) It deprives the fact-finder of relevant and probative evidence.<sup>18</sup> Often such statements include the defendant's account of what happened, given at a point in time close to the events at issue and before the defendant had the opportunity to calculate a position based on pre-trial disclosure of evidence.<sup>19</sup>
  - (b) It confuses juries and creates a risk of speculation adverse to the defendant.<sup>20</sup> They may be left with the impression that the defendant did not give an explanation when arrested. While the jury sometimes finds out an interview occurred through cross-examination,<sup>21</sup> they remain unaware of its contents. Research has demonstrated jurors believe suspects who do not give an explanation in response to an allegation are more likely to be guilty.<sup>22</sup>
  - (c) It infringes fair trial rights, including the right to put forward a reasonable and proper defence.<sup>23</sup> The argument that the defendant can elect to give evidence at trial is no answer to this because it effectively compels them as a witness (in breach of section 25(d) of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights)).<sup>24</sup>
  - (d) It is inconsistent with the duty of prosecutors to present all credible and relevant evidence.<sup>25</sup>
  - (e) It discourages defendants from making statements to investigators.<sup>26</sup> If they say anything exculpatory, it may not be offered in evidence anyway, but if they say anything inculpatory, it will be used against them.
- 4.17 The Public Defence Service noted the onus is on the prosecution to prove the defendant guilty, not on the defendant to prove their innocence. It therefore rejected any suggestion that section 21 is required to ensure fairness to complainants (who are subject to cross-examination). Similarly, the ADLS and Defence Lawyers Association submitted that resistance to admitting defendants' statements on the basis that they are "self-serving" has no place in a system in which defendants are presumed innocent.
- 4.18 Based on the above concerns, three submitters supported reform to make defendants' police statements admissible as a matter of course — either as an exception to section 21<sup>27</sup> or by requiring the prosecution to offer them unless there is good reason not

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<sup>18</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, New Zealand Law Society, Public Defence Service.

<sup>19</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>20</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>21</sup> The Auckland District Law Society and Defence Lawyers Association New Zealand said this will "almost always" be the case. The Public Defence Service, on the other hand, submitted that, where a defendant's interview is not offered, there is inconsistency regarding whether and to what extent defence counsel is permitted to cross-examine the Officer in Charge in relation to the statement.

<sup>22</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>23</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>24</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>25</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service. The Auckland District Law Society and Defence Lawyers Association New Zealand also submitted it is inconsistent with r 13.12 of the Rules of Conduct and Client Care for Lawyers, which requires prosecution lawyers to act fairly and impartially.

<sup>26</sup> Public Defence Service.

<sup>27</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

to or the parties agree otherwise.<sup>28</sup> The NZLS instead proposed a new provision allowing the court to admit a defendant's statement where it is necessary to avoid unfairness. It suggested this would strike an appropriate balance between the prosecution's discretion and the defendant's fair trial rights.

- 4.19 Submitters in support of the current policy approach provided the following comments:
- (a) Defendants' out-of-court statements are presumptively inadmissible because they have not met the reliability threshold in section 18 (the exception to the rule against hearsay) and the defendant cannot be cross-examined despite being "available" to give evidence.<sup>29</sup>
  - (b) Defendants should not be able to put forward their version of events without being subject to cross-examination.<sup>30</sup> Associate Professor Anna High was concerned this would unfairly alter the balance in "he-said-she-said" trials.
  - (c) Admitting defendants' exculpatory statements makes it more likely that defendants will opt out of giving evidence at trial.<sup>31</sup>
  - (d) The right to silence prohibits juries from speculating about the absence of a defendant's statement and they are invariably told this.<sup>32</sup> Any concern that juries do not follow directions is a fundamental challenge to the system of jury trials and is not specific to this issue.<sup>33</sup>
- 4.20 The Crown Law Office considered it unnecessary to create a legislative judicial discretion to admit exculpatory statements for fairness reasons since the courts have already confirmed this discretion exists at common law. It said it would expect prosecutors to consider whether fair trial issues might arise if a defendant's exculpatory statement is not led — for example, where a positive defence to the charge has been raised.
- 4.21 The Wellington Crown Solicitor, Luke Cunningham Clere, said that, in practice, the prosecution usually does put defendants' statements before the fact-finder (for example, it said DVD interviews are routinely played). It therefore did not consider there was any unfairness in practice.
- 4.22 Ngā Pirihimana Aotearoa | New Zealand Police said it supported the current approach of the senior courts in not allowing admission of the statements to override the statutory purpose of section 21 in relation to wholly exculpatory statements. Police prosecutors reported that judges often require them to produce wholly exculpatory statements made by the defendant in cases that do not meet the "exceptional case" threshold suggested by the Court of Appeal in *S (CA481/2018) v R*.<sup>34</sup> Based on further discussion with Police, we understand that this is largely occurring in the District Courts and has not been subject to appeal. Police indicated it had occurred in family violence cases where the defendant's

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<sup>28</sup> Public Defence Service.

<sup>29</sup> Crown Law Office.

<sup>30</sup> Associate Professor Anna High, Luke Cunningham Clere, New Zealand Police.

<sup>31</sup> New Zealand Police.

<sup>32</sup> Crown Law Office, Luke Cunningham Clere. See Evidence Act 2006, s 32.

<sup>33</sup> Luke Cunningham Clere.

<sup>34</sup> *S (CA481/2018) v R* [2019] NZCA 169 at [21]. Police understood that, in some cases, this was done in reliance on s 113(3) of the Criminal Procedure Act 2011 (which allows the court to require the prosecution to call a witness).

police interview raises the issue of self-defence. Police considered this to be problematic because requiring prosecutors to offer defendants' police statements discourages defendants from giving evidence in court and means their statements are untested by cross-examination.

### Reform not recommended

- 4.23 We do not recommend amendment to increase consistency in prosecution practice or clarify when defendants' exculpatory statements should be offered in evidence. For reasons we explain below, we consider this is better addressed through case law.

### *Inconsistency in prosecution practice*

- 4.24 There was a clear view among most submitters that the case law preventing the prosecution from cherry picking parts of a mixed statement is settled. It appears prosecutors are generally offering defendants' statements in full where they wish to rely on any part of them. Accordingly, reform is unnecessary to clarify the law in this regard.
- 4.25 In relation to other exculpatory statements, there appear to be inconsistent approaches among prosecutors and, potentially, between the trial and appellate courts. The submissions we received indicate there are different understandings of the circumstances in which trial fairness considerations may require a defendant's statement to be offered. Ultimately, however, we conclude it is preferable for this to be addressed through case law rather than legislative amendment.
- 4.26 Recent appellate case law suggests the courts will only require the prosecution to offer a defendant's statement they do not wish to rely on in "exceptional cases"<sup>35</sup> — usually where it is necessary to prevent the prosecution from "cherry picking" parts of a statement.<sup>36</sup> In other cases, it is a matter of prosecutorial discretion whether to offer defendants' statements on which the prosecution does not wish to rely.
- 4.27 It appears there may be variation in this approach at the trial level. Police submitted that, despite the approach of the appellate courts, in practice, police prosecutors are sometimes required to produce wholly exculpatory defendants' statements. In our Issues Paper, we identified one District Court decision from 2013 where the Court ordered the prosecution to offer evidence of a statement on which it did not wish to rely.<sup>37</sup> The statement was relevant to the issue of self-defence. The Court considered it inappropriate and unfair to the defendant for the prosecution to decline to offer the statement for tactical reasons.<sup>38</sup>
- 4.28 This apparent uncertainty as to the scope of the judicial discretion may partially explain why prosecutors appear to be taking different approaches to offering defendants' statements. Organisations representing defence counsel unanimously reported inconsistent prosecution practices. While the Crown Law Office said it was unaware of variation in practice, its submission and those received from Luke Cunningham Clere and Police suggest they have different understandings of what occurs:

<sup>35</sup> *S (CA481/2018) v R* [2019] NZCA 169 at [21].

<sup>36</sup> *Frew v Police* [2022] NZHC 1961 at [37]–[39]; *Foster v R* [2021] NZSC 90 at [14] (leave decision). Compare *R v Singh* DC Tauranga CRI-2012-070-4867, 7 August 2013 at [47].

<sup>37</sup> *R v Singh* DC Tauranga CRI-2012-070-4867, 7 August 2013.

<sup>38</sup> *R v Singh* DC Tauranga CRI-2012-070-4867, 7 August 2013 at [47].

- (a) The Crown Law Office said there may be “individual cases” where prosecutors elect to offer a defendant’s exculpatory statement. The example it gave was a situation where admission of the statement would benefit the prosecution — that is, where evidence obtained since the statement was made suggests the defendant lied.
  - (b) Luke Cunningham Clere said that, in practice, prosecutors “usually” put defendants’ statements before the fact-finder and, in particular, that defendants’ DVD interviews are “routinely” played.
  - (c) Police did not expressly address this issue. However, as we have noted, it reported that Police prosecutors are often being required by the courts to offer evidence of defendants’ exculpatory statements. This suggests Police prosecutors are not routinely choosing to offer defendants’ exculpatory statements in evidence.
- 4.29 This variation in approach may make it difficult for defence counsel to predict whether a statement will be offered and therefore to advise their clients on the conduct of the case. It may also mean that defendants in similar situations are treated differently.
- 4.30 We considered whether it is desirable to amend the Act to encourage a more consistent approach — for example, by codifying the judicial discretion to require the prosecution to offer defendants’ statements for fairness reasons. However, if a new provision remained discretionary, any increase in consistency would likely be limited. The Judicial Advisory Committee was concerned such an amendment would significantly increase defence applications to admit statements, increasing the administrative burden on the courts. The Judicial Advisory Committee and some members of our Expert Advisory Group were also concerned it could result in significantly more defendants’ statements being offered by the prosecution, depending on how the provision is interpreted. Some Expert Advisory Group members said this could fundamentally alter the balance in criminal trials by allowing defendants to put their version of events before the court without being cross-examined. A member of our Expert Advisory Group also suggested it could lead to prosecutors only offering a defendant’s exculpatory statement if required to. Ultimately, we consider the risks of codification outweigh any potential increase in consistency.
- 4.31 Finally, we considered whether the prosecution guidelines could be amended to help encourage a more consistent approach among prosecutors. However, in the absence of any clear consensus in case law as to when the judicial discretion is likely to be exercised or the principles to be applied, it is difficult to know what any guidance would say (beyond simply indicating that prosecutors should take trial fairness into account, which is unlikely to be particularly helpful). There was also little support for this option from submitters.

### *Unfairness to defendants*

- 4.32 We are not satisfied there is a sufficient case for fundamentally altering the policy of section 21 — for example, by requiring defendants’ police statements to be offered as a matter of course. We acknowledge that, as some submitters emphasised, defendants’ police statements are often highly probative evidence and prosecutors have a general duty to present credible and relevant evidence to the court. However, such an amendment would represent a substantial change to the way criminal trials operate. It could lead to defendants electing not to give evidence in more (or even most) cases since they could rely on their police interview instead. This would deprive the prosecution of the ability to cross-examine the defendant on their version of events based on all relevant

evidence. Some of that evidence may not be available to investigators when interviewing the defendant — for example, evidence given by witnesses at trial.

- 4.33 There are existing protections in place that help to avoid unfairness to defendants if their statement is not offered in evidence. The courts have recognised that, where a defendant’s exculpatory police statement is not offered, the interests of fairness may require that the prosecution confirm the defendant denied the offending when questioned (for example, during cross-examination of a police witness).<sup>39</sup> We consider that is appropriate. It should prevent the jury from incorrectly assuming the defendant did not answer questions or maintain their innocence. In addition, if it does appear the defendant failed to answer questions or provide a defence before trial, section 32 requires the judge to warn the jury not to infer the defendant is guilty.

## DEFENDANTS’ STATEMENTS CONTAINED WITHIN HEARSAY STATEMENTS

### Issue

- 4.34 Section 27(3) provides that the hearsay provisions do not apply to a defendant’s statement offered by the prosecution in a criminal proceeding. This allows the prosecution to offer evidence of an out-of-court statement made by the defendant without having to establish that the circumstances relating to the statement “provide reasonable assurance that the statement is reliable” for the purpose of the hearsay exception in section 18(1)(a).<sup>40</sup>
- 4.35 It is unclear how section 27(3) is intended to operate when a defendant’s statement is contained within a hearsay statement made by a person other than the defendant. On a literal interpretation, section 27(3) allows the prosecution to offer a hearsay statement by a person other than a defendant that contains an account of something the defendant said, thereby bypassing section 18(1)(a). This issue arose in the Red Fox Tavern case in which two deceased people had given police statements claiming the defendants had confessed to a robbery. Te Kōti Matua | High Court held that the portions of the hearsay statements that contained statements made by the defendants were exempt from the hearsay provisions by virtue of section 27(3).<sup>41</sup> The Court of Appeal in *R v Hoggart* reversed this, finding admissibility must first be determined under the ordinary hearsay provisions before applying section 27.<sup>42</sup>
- 4.36 While *Hoggart* provides appellate authority on how section 27 is to be interpreted in relation to hearsay statements that contain defendants’ statements, commentators have observed this is difficult to reconcile with the plain wording of section 27.<sup>43</sup>
- 4.37 As outlined in our Issues Paper, there are good policy reasons for applying the hearsay provisions in the Act to hearsay statements that contain defendants’ statements.<sup>44</sup> If the

<sup>39</sup> *R v Boynton* [2013] NZHC 2415 (No 2) at [16]; *Police v Thomas* [2018] NZDC 7206 at [49].

<sup>40</sup> Evidence Act 2006, s 18(1)(a).

<sup>41</sup> *R v W* [2018] NZHC 2457 at [39], [48] and [67].

<sup>42</sup> *R v Hoggart* [2019] NZCA 89 at [50].

<sup>43</sup> Anna High “The Red Fox Tavern trial and the Evidence Act” [2020] NZLJ 69 at 70; Bernard Robertson “Student Companion — Evidence” [2019] NZLJ 157 at 157.

<sup>44</sup> Issues Paper at [4.36]–[4.37].

person who has first-hand knowledge of a defendant's statement is not available for cross-examination, it is important that the reliability of that statement is assessed. While section 18 provides for this, section 27 does not. Section 18 has also been designed specifically to respond to the inherent concerns with hearsay statements. Our review of the policy and legislative history of the Act did not show any intention to exempt hearsay statements containing defendants' statements from the hearsay provisions.<sup>45</sup>

## Consultation

### What we asked submitters

- 4.38 We asked submitters whether section 27 should be amended to clarify that a defendant's statement contained within a hearsay statement is subject to the hearsay provisions.

### Results of consultation

- 4.39 Nine submitters responded to this question. Six submitters supported our proposed amendment,<sup>46</sup> two opposed it<sup>47</sup> and one commented on the proposal but was neutral about reform.<sup>48</sup> No submitters supported a literal interpretation of section 27.
- 4.40 Submitters supporting reform noted the tension between a literal interpretation of the section and the approach of the Court of Appeal in *Hoggart*<sup>49</sup> and/or agreed with our views on the problems with allowing these statements to avoid the safeguards for hearsay statements.<sup>50</sup>
- 4.41 The Crown Law Office and Associate Professor High opposed reform on the basis that the Court of Appeal in *Hoggart* had already reached the correct position through a purposive interpretation of section 27.<sup>51</sup>
- 4.42 The Crown Law Office said that, despite the literal wording of section 27, it cannot have been Parliament's intent that defendants' statements would be admissible even where they are contained in a hearsay statement and so may be of suspect reliability.
- 4.43 Associate Professor High noted the approach in *Hoggart* was endorsed by te Kōti Mana Nui | Supreme Court in *W (SC 38/2019) v R*.<sup>52</sup> Associate Professor High was concerned our proposal, as phrased, would cause confusion because it would result in the defendant's statement itself (as contained within another person's hearsay statement) becoming subject to the reliability threshold.

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<sup>45</sup> This issue is not directly addressed in the Commission's previous publications on hearsay or confessions: see Issues Paper at [4.38].

<sup>46</sup> Auckland District Law Society, Luke Cunningham Clere, New Zealand Law Society, Public Defence Service, Te Tari Hara Tāware | Serious Fraud Office, Wellington Community Justice Project.

<sup>47</sup> Crown Law Office, Associate Professor Anna High.

<sup>48</sup> Adjunct Professor Elisabeth McDonald.

<sup>49</sup> *R v Hoggart* [2019] NZCA 89.

<sup>50</sup> Auckland District Law Society, Luke Cunningham Clere, New Zealand Law Society, Public Defence Service.

<sup>51</sup> *R v Hoggart* [2019] NZCA 89.

<sup>52</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382.

- 4.44 Adjunct Professor Elisabeth McDonald did not take a position on reform but said reliability is the main issue.<sup>53</sup>

### The need for reform

- 4.45 We consider reform is desirable to clarify the admissibility of defendants' statements contained within hearsay statements. The literal interpretation of section 27(3) is directly at odds with the policy underlying section 18(1)(a). There is also no indication Parliament intended section 27(3) to have this effect. Almost all submitters agreed a literal interpretation is undesirable because of the reliability concerns with second-hand hearsay statements. However, submitters took different views about whether amendment is needed in light of subsequent cases.
- 4.46 While a purposive approach to interpretation can largely resolve these problems, we think it is preferable for the legislative intention to be reflected in the plain wording of the section. This is consistent with section 6(f) (enhancing access to the law of evidence).

### Recommendation

**R6**

Amend section 27 to clarify that subpart 1 (hearsay evidence) applies to a hearsay statement made by a person other than a defendant that contains a defendant's statement.

- 4.47 We recommend amending section 27 to clarify that subpart 1 (hearsay evidence) applies to a hearsay statement made by a person other than a defendant that contains a defendant's statement.
- 4.48 We accept Associate Professor High's concern about the phrasing of our original proposal, which referred to "a defendant's statement contained within a hearsay statement" being subject to the hearsay provisions. This could imply the defendant's statement is itself subject to the hearsay provisions rather than the hearsay statement it is contained in. Our recommendation modifies our original proposal to clarify that only the hearsay statement by a person other than the defendant is subject to the hearsay provisions. The defendant's statement itself would continue to be governed by section 27(3). The reliability assessment in section 18(1)(a) would therefore focus on whether the circumstances relating to the hearsay statement mean it is likely to accurately convey what the defendant said. It would not be necessary to show the defendant's statement itself is likely to be reliable to have the hearsay statement admitted (although it would remain possible to exclude the defendant's statement under other provisions in the Act in appropriate cases).<sup>54</sup>

<sup>53</sup> Adjunct Professor Elisabeth McDonald queried whether the s 28 inquiry would cover this situation. Section 28 provides for exclusion of unreliable defendants' statements. It would not apply where the reliability concerns relate to a statement by another person that contains a defendant's statement (as opposed to the defendant's statement itself).

<sup>54</sup> Section 27(2) provides that evidence offered by the prosecution of a statement made by a defendant is not admissible against that defendant if it is excluded under ss 28, 29 or 30. These sections provide for exclusion of defendants' statements that are unreliable (s 28), influenced by oppression (s 29) or improperly obtained (s 30). We discuss these sections in Chapters 5–7.

## ADMISSIBILITY OF DEFENDANTS' NON-HEARSAY STATEMENTS AGAINST CO-DEFENDANTS

### Issue

- 4.49 Section 27 reformed the law relating to defendants' statements offered by the prosecution. Under the pre-Act common law, defendants' out-of-court statements were considered hearsay.<sup>55</sup> They were therefore inadmissible to prove the truth of their contents unless one of the exceptions to the rule against hearsay applied. Section 27 created a general rule that defendants' statements offered by the prosecution are admissible regardless of whether they are hearsay.<sup>56</sup>
- 4.50 Notwithstanding that general rule, defendants' statements offered by the prosecution are only admissible against a co-defendant if they meet the requirements in section 22A.<sup>57</sup> Section 22A sought to codify the common law co-conspirators' rule. It provides:
- In a criminal proceeding, a hearsay statement is admissible against a defendant if—
- (a) there is reasonable evidence of a conspiracy or joint enterprise; and
  - (b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and
  - (c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.
- 4.51 In its Second Review, the Commission said the combined effect of sections 27(1) and 22A is to impose greater restrictions on the admissibility of defendants' statements than existed at common law.<sup>58</sup> Section 27(1) says that a defendant's statement is only admissible against a co-defendant under section 22A, but section 22A only allows for *hearsay* statements to be admitted. This means a defendant's out-of-court statement will not be admissible against a co-defendant if:<sup>59</sup>
- (a) the defendant elects to give evidence at trial and does not adopt the statement in their testimony;<sup>60</sup> or
  - (b) the prosecution intends to rely on the statement for a purpose other than proving the truth of its contents.
- 4.52 At common law, there was no rule against admitting defendants' non-hearsay statements against a co-defendant. It does not appear to have been Parliament's intention to depart from the common law position on co-defendants' statements.<sup>61</sup>

<sup>55</sup> Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 72.

<sup>56</sup> Evidence Act 2006, s 27(1) and (3).

<sup>57</sup> Evidence Act 2006, s 27(1).

<sup>58</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.11].

<sup>59</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.8].

<sup>60</sup> See the discussion in *Fa'avae v R* [2012] NZCA 528, [2013] 1 NZLR 311 at [42].

<sup>61</sup> As the Commission has previously observed, in amending what would become s 27, "the Select Committee mistakenly believed it was maintaining the common law position": Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.91]. See also Evidence Bill 2005 (256–2) (select committee report) at 4, which states that the Committee's view was that the Act would "maintain the current law relating to statements by co-defendants".



- 4.53 The Commission concluded there was no principled basis for limiting section 22A to hearsay statements.<sup>62</sup> It recommended replacing section 22A with a new section 27AA.<sup>63</sup> The Commission's proposed section 27AA allowed for both hearsay and non-hearsay statements to be admitted if they met the requirements currently contained in section 22A.<sup>64</sup>
- 4.54 The Supreme Court in *Winter v R* commented on the operation of sections 27(1) and 22A and the Commission's proposed section 27AA.<sup>65</sup> It said that, while section 22A was intended to codify the common law, "the intention of codifying the common law was only partly achieved".<sup>66</sup> The wording of section 27(1) "arguably" means a defendant's non-hearsay statement can never be admitted against a co-defendant.<sup>67</sup> However, the Supreme Court noted the Commission's proposed section 27AA did not replicate the common law either.<sup>68</sup> This is because the common law provided for the admission of non-hearsay statements without the need to satisfy the threshold criteria for the co-conspirators' rule. By contrast, the proposed section 27AA would apply the same high threshold for co-conspirators' statements to all defendants' statements, whether or not they were hearsay.
- 4.55 Preliminary feedback, case law and commentary indicated there are good reasons to revisit how reform should address this issue:<sup>69</sup>
- (a) While Parliament and the Commission intended to codify the common law, this would not be achieved under the proposed section 27AA.
  - (b) While there are good policy reasons for adopting a cautious approach to the admission of defendants' hearsay statements against co-defendants,<sup>70</sup> these reasons are not applicable (or at least not to the same extent) to non-hearsay statements.
  - (c) It is unclear how the section 22A assessment would work in practice if non-hearsay co-defendants' statements required the same treatment as hearsay statements.<sup>71</sup>

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<sup>62</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.18].

<sup>63</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at 242 (R26), [15.21]–[15.22] and Appendix 1, cl 9.

<sup>64</sup> This recommendation also removed the notice requirement for adducing evidence under s 22A: Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.22].

<sup>65</sup> *Winter v R* [2019] NZSC 98, [2019] 1 NZLR 710 at [60]–[63].

<sup>66</sup> *Winter v R* [2019] NZSC 98, [2019] 1 NZLR 710 at [20].

<sup>67</sup> *Winter v R* [2019] NZSC 98, [2019] 1 NZLR 710 at [62].

<sup>68</sup> *Winter v R* [2019] NZSC 98, [2019] 1 NZLR 710 at [63].

<sup>69</sup> Issues Paper at [4.52].

<sup>70</sup> As recognised in *Winter v R* [2019] NZSC 98, [2019] 1 NZLR 710 at [40].

<sup>71</sup> For example, as the Supreme Court pointed out in *Winter*, there must be reasonable evidence of a conspiracy or joint-enterprise before hearsay can be admissible under the co-conspirators' rule, but this reasonable evidence cannot include hearsay evidence: *Winter v R* [2019] NZSC 98, [2019] 1 NZLR 710 at [63], citing at *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [13]. It is unclear how this test would operate if all co-defendants' statements had to go through the same assessment, regardless of whether they are hearsay.

## Consultation

### *What we asked submitters*

- 4.56 We asked submitters whether section 27 should be amended to clarify that a defendant's non-hearsay statement is admissible against a co-defendant but that, if the statement is hearsay, it is only admissible against a co-defendant if it is admitted under section 22A.

### *Results of consultation*

- 4.57 Eleven submitters responded to this question. Seven submitters supported amendment in some form<sup>72</sup> while two opposed reform.<sup>73</sup> Three took no position.<sup>74</sup>
- 4.58 Ethan Huda submitted the drafting of section 22A is causing problems for the admission of electronic communications and related electronic data. Evidence that would not otherwise be offered for a hearsay purpose (that is, to prove the truth of its contents) is nevertheless being presented as hearsay evidence so it can be admitted under section 22A. He suggested this unnecessarily consumes court time, much of it funded by legal aid. He considered the admissibility criteria in section 22A are unnecessary for non-hearsay statements. Where a statement is not hearsay because it is not relied on to prove the truth of its contents, any issues of unfair prejudice or misuse of the evidence can be dealt with through a combination of section 8 (general exclusion) and a strong judicial direction on the appropriate use of the statement. He suggested that, while most judges give strong directions, the Act should make it clear this is required.
- 4.59 The Crown Law Office agreed the current wording of section 27(1) may result in evidence being excluded that would have been admissible at common law. It said reform should clarify that a defendant's statement remains admissible if a defendant elects to give evidence. It said excluding such statements has no logical connection with the policy behind section 22A and noted that a co-defendant has greater protection in this situation through the ability to cross-examine the defendant.
- 4.60 Of the submitters that favoured reform, five supported our proposed amendment.<sup>75</sup>
- 4.61 The Crown Law Office supported reform but suggested instead amending section 22A to clarify that a defendant's statements are admissible against a co-defendant if:
- (a) they pass the requirements of the co-conspirators' rule but ultimately are not a "hearsay" statement because the defendant ultimately gives evidence; or
  - (b) the prosecution uses the statement for a non-hearsay purpose.
- 4.62 The Crown Law Office said it may be difficult to redraft section 22A to precisely capture the former common law without risking the creation of other unintended issues. It said that "in this already complex area", clarity should be the guiding principle rather than "rigid adherence to what the common law formerly provided".

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<sup>72</sup> Crown Law Office, Ethan Huda, Luke Cunningham Clere, New Zealand Law Society, New Zealand Police, Serious Fraud Office, Wellington Community Justice Project.

<sup>73</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>74</sup> Adjunct Professor Elisabeth McDonald, Laura O'Gorman KC, Public Defence Service.

<sup>75</sup> Ethan Huda, Luke Cunningham Clere, New Zealand Law Society, Serious Fraud Office, Wellington Community Justice Project.

- 4.63 The ADLS and Defence Lawyers Association opposed reform. They submitted amending section 27 to make defendants' non-hearsay statements admissible could unjustifiably disadvantage co-defendants by forcing them to rebut the evidence. They said this would inadvertently breach section 25(d) of the NZ Bill of Rights, which preserves the right not to be compelled to be a witness.
- 4.64 Three submitters took no clear position.<sup>76</sup> The Public Defence Service said feedback received from its lawyers was mixed. There was some preference for maintaining the same high threshold for co-conspirators' statements even if they are not hearsay but an acknowledgement that this may not have been Parliament's intention.

### The need for reform

- 4.65 For the reasons outlined in our Issues Paper, we consider reform is necessary to make it clear in the Act how sections 27 and 22A apply to defendants' non-hearsay statements.
- 4.66 Submitters reiterated the concerns raised during the Commission's Second Review, including the impact on multi-party drug trials involving large quantities of electronic communications and related data. Similar issues can be observed in case law.<sup>77</sup> We think this shows a real problem in practice.
- 4.67 Submitters also noted section 22A was intended to codify the common law, but this was not achieved in the drafting of section 22A or the previously proposed section 27AA. We think the common law approach ought to be reflected in the section. We see no basis for applying the cautious approach to the admission of defendants' hearsay statements against co-defendants to non-hearsay statements.

### Recommendation

**R7**

Amend section 27 to clarify that:

- a. a defendant's non-hearsay statement is admissible against a co-defendant; and
- b. a defendant's hearsay statement is only admissible against a co-defendant if it is admitted under section 22A.

- 4.68 We recommend amending section 27 to clarify that a defendant's non-hearsay statement is admissible against a co-defendant. A defendant's hearsay statement should continue to be admissible only if it satisfies section 22A. Submitters generally supported this approach. The most common reason given by submitters was that this was the position under the common law, which section 22A was intended to codify.
- 4.69 We consider requiring non-hearsay statements to meet the requirements in section 22A is undesirable and unjustified for three reasons. First, the main reason for restricting the use of defendants' statements in section 27(1) is to prevent defendants from making unreliable, self-serving statements against co-defendants and having these statements admitted by the prosecution while avoiding cross-examination.<sup>78</sup> However, a self-serving

<sup>76</sup> Adjunct Professor Elisabeth McDonald, Laura O'Gorman KC, Public Defence Service.

<sup>77</sup> See, for example, *R v Wellington* [2018] NZHC 1199 at [14].

<sup>78</sup> *R v Wellington* [2018] NZHC 2080 at [66], citing *R v Pearce* [2007] NZCA 40 at [26].

statement of this sort will invariably be a hearsay statement — that is, a statement that is relied on for the truth of its contents. The same risk does not arise with non-hearsay statements.

- 4.70 Second, the requirements of the co-conspirators' rule were not developed to determine the admissibility of non-hearsay statements and do not seem to serve any purpose in performing that role. If non-hearsay statements were subject to section 22A, they would need to be framed as being made "in furtherance of a conspiracy or joint enterprise" even if they were only offered to provide important background or context.
- 4.71 Third, requiring non-hearsay statements to meet the requirements in section 22A could cause undue expense and delay or mean that important evidence is inadmissible.
- 4.72 For these reasons, we think it is preferable for defendants' non-hearsay statements to be generally admissible against a co-defendant under section 27.
- 4.73 While the Crown Law Office supported making defendants' non-hearsay statements generally admissible against a co-defendant, it said this should be done by amending section 22A instead of section 27. We think this is undesirable. Section 22A is in subpart 1 of the Act, which deals with hearsay evidence. Section 22A is also subject to section 22, which requires notice to be given when hearsay evidence is offered in criminal proceedings, and expressly includes evidence called under section 22A. This could cause confusion when the evidence is not hearsay and unintentionally trigger the notice provision. For these reasons, amending section 27 is preferable.
- 4.74 We do not recommend requiring a judicial direction when non-hearsay evidence is admitted against a co-defendant. A warning is only needed when the evidence could cause significant prejudice because of its potential to be treated as a hearsay statement. Given this will not always be the case with non-hearsay evidence, we think it is preferable for judges to use their existing powers to decide whether to give a warning.
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## CHAPTER 5

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# Unreliable statements

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## INTRODUCTION

- 5.1 In this chapter, we consider the following issues relating to section 28 of the Evidence Act 2006, which provides for the exclusion of unreliable defendants' statements offered by the prosecution in criminal proceedings:
- (a) The wording of section 28 and its relationship to te Kōti Mana Nui | Supreme Court's decision in *R v Wichman*.<sup>1</sup> We do not recommend reform as there is insufficient evidence of a problem in practice.
  - (b) The standard of proof for admissibility. We do not recommend reform given the lack of available evidence of miscarriages of justice, recent trends in case law and limited support from submitters.

## BACKGROUND

- 5.2 Section 28 sets out when a defendant's statement offered by the prosecution in a criminal proceeding will be excluded because of reliability concerns. It recognises the risk of wrongful convictions based on false confessions.<sup>2</sup> The section applies if the "issue of the reliability of the statement" is raised by the defendant or a co-defendant on the basis of an evidential foundation or by the judge (section 28(1)). Once the issue of reliability is raised, the judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which it was made were not likely to have adversely affected its reliability (section 28(2)).
- 5.3 The focus of section 28 (as it is now applied by the courts) and of this chapter is on the reliability of a particular statement. The section 28 assessment considers the circumstances in which the statement was made. This can include whether the conduct of investigators (for example, when interviewing the defendant) may have adversely affected the reliability of the statement. However, the primary concern of the courts under section 28 is whether a statement is sufficiently reliable to be considered by the

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<sup>1</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

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

fact-finder.<sup>3</sup> In Chapter 6, we discuss a separate but related issue about the extent to which evidence can be excluded to discourage, and ensure the justice system is not seen as condoning, investigatory conduct that risks producing unreliable evidence (even if the specific evidence in question is likely to be reliable in fact).

## WORDING OF SECTION 28

### Issue

- 5.4 In our Issues Paper, we suggested the wording of section 28 may be unclear and out of step with how it is now applied by the courts following the Supreme Court's decision in *Wichman*.<sup>4</sup> In that case, the Court considered the admissibility of a confession made by the defendant in the context of a "Mr Big" undercover operation.<sup>5</sup> The majority held indications of the actual reliability (that is, the likely truth) of a statement can be considered under section 28.<sup>6</sup> This can include, for example, the degree to which the statement is consistent with other evidence and its general plausibility. This means the courts may admit a statement that would otherwise be excluded if the section 28 assessment was limited to the circumstances in which the statement was made.<sup>7</sup>
- 5.5 In its Second Review, Te Aka Matua o te Ture | Law Commission endorsed the majority's approach in *Wichman*.<sup>8</sup> It considered that, "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".<sup>9</sup> The majority of submitters favoured that approach. The Commission concluded the guidance in *Wichman* was sufficiently clear so no amendment was required.<sup>10</sup>
- 5.6 In the context of this review, we have not addressed again whether indications of actual reliability should be considered under section 28. That issue was considered in the Second

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<sup>3</sup> Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [5.18]–[5.19] and [5.21]. As discussed in our Issues Paper and below, the common law voluntariness rule that s 28 was in part designed to replace was also concerned with deterring unacceptable investigatory conduct. However, case law on s 28 has departed from that approach.

<sup>4</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

<sup>5</sup> A "Mr Big" operation involves undercover officers inducting the suspect into a bogus criminal organisation. At the conclusion of the operation, the suspect is interviewed by Mr Big — the boss of the organisation — to determine whether they will be allowed to join the organisation. The suspect is encouraged to confess to any previous wrongdoing that could be used against them. Cases discussing the use of this technique include *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 and *Lyttle v R* [2021] NZCA 46.

<sup>6</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [79]–[84].

<sup>7</sup> This was the deciding factor for Glazebrook J in *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753. In her separate judgment, she agreed with the majority that the statement should not be excluded under s 28 based on indications of actual reliability. But she said at [451]: "If just the circumstances are taken into account, this would fail the test under 28. There was a significant risk that an innocent person in Mr Wichman's position would falsely confess." It is not clear whether the majority would have excluded the evidence had they not considered indications of actual reliability. However, they did acknowledge the defendant was under pressure to confess and that "in circumstances of this kind, it is not inconceivable that someone who is innocent might think it worthwhile confessing" (at [86] per William Young J).

<sup>8</sup> Issues Paper at [6.19].

<sup>9</sup> Issues Paper at [6.19].

<sup>10</sup> Issues Paper at [6.23].

Review, and case law since then does not suggest reconsideration is necessary.<sup>11</sup> Rather, our focus is on whether the wording of section 28 sufficiently reflects the guidance in *Wichman* and, if not, whether that has the potential to cause problems in practice. This issue was not specifically considered in the Second Review and was raised in subsequent commentary.<sup>12</sup>

- 5.7 To understand the potential interpretational issues with section 28, it is necessary to provide some background. The decision in *Wichman* represented a departure from the original intent of section 28.<sup>13</sup> The Commission, when drafting the Evidence Code provision that became section 28, intended that it would serve two purposes.<sup>14</sup> The first was to ensure that defendants' statements are only admitted if they are sufficiently reliable to be considered by the fact-finder at trial. The second was to deter unacceptable police questioning practices that create a risk of unreliability. The actual truth of the statement was intended to be irrelevant — a view reinforced by the select committee that considered the Evidence Bill.<sup>15</sup>
- 5.8 As we explained in our Issues Paper, section 28 incorporated aspects of two separate common law rules:<sup>16</sup>
- (a) The voluntariness rule, under which confessions obtained by a promise, threat or other inducement by a person in authority were considered involuntary. Involuntary statements could only be admitted if the judge was satisfied that the means by which the confession was obtained were not likely to cause a false confession. The actual truth or falsity of the confession was irrelevant — the focus was on the tendency of the inducement to affect the reliability of the statement rather than the actual result.
  - (b) The fairness discretion, which allowed a defendant's statement to be excluded if (among other reasons) it was unreliable due to factors internal to the defendant such as fatigue, their psychological state or the influence of drugs or alcohol.
- 5.9 The majority in *Wichman* observed that combining these two separate rules complicated the situation.<sup>17</sup> While the truth of a statement was irrelevant under the voluntariness rule, it was not clear the same approach was required where the unreliability stemmed from internal factors.<sup>18</sup> The majority did not favour an approach that would see an obviously true confession (such as one leading to the discovery of physical evidence) excluded

<sup>11</sup> We found no indication, for example, that the approach in *Wichman* is leading to defendants' statements being admitted too readily where the circumstances raise reliability concerns. The courts have ruled defendants' statements inadmissible under s 28 in three recent cases (*Lyttle v R* [2021] NZCA 46; *R v Fawcett* [2021] NZHC 2406 (see also *Fawcett v R* [2017] NZCA 597, overturning Mr Fawcett's original conviction and ordering a retrial); *Gebhardt v R* [2022] NZCA 54).

<sup>12</sup> Bernard Robertson "Evidence section" ([2019] NZLJ 198 at 200; Bernard Robertson "Student Companion — Criminal Justice/Evidence" ([2021] NZLJ 166 at 166.

<sup>13</sup> Issues Paper at [5.6]–[5.10] and [5.18]–[5.22].

<sup>14</sup> Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [127] and [131].

<sup>15</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [109]; Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), Part II: Confessions and Improperly Obtained Evidence at [127] and [136]; Evidence Bill 2005 (256–2) (select committee report) at 4.

<sup>16</sup> Issues Paper at [5.6]–[5.9].

<sup>17</sup> Issues Paper at [5.6]–[5.9] and [5.19]–[5.20].

<sup>18</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [80]–[81].

under section 28 because the defendant was delusional.<sup>19</sup> The Commission did not address this issue when recommending the provision that would become section 28 in the Evidence Code.

- 5.10 *Wichman* has been criticised by one commentator as being inconsistent with the wording of section 28.<sup>20</sup> In particular, section 28(2) focuses on “the circumstances in which the statement was made”, which arguably does not include its actual reliability or unreliability. The majority in *Wichman* acknowledged that section 28(2) “is not an entirely easy provision and its language gives rise to a range of possible interpretations”.<sup>21</sup>
- 5.11 Additionally, section 28(1) uses different language to section 28(2) — it refers to “the issue of the reliability of the statement”. We said in our Issues Paper that it is potentially unclear whether the issue of reliability must be raised by reference to the circumstances in which the statement was made, its actual reliability or a mixture of both.<sup>22</sup>
- 5.12 We expressed the view that it is appropriate for the courts to exercise caution when deciding to admit a statement under section 28 based on indications of actual reliability.<sup>23</sup> We suggested that section 30 (improperly obtained evidence) may be able to address some of the concerns about the means used to obtain a defendant’s statement that were previously addressed by the voluntariness rule (as we discuss in Chapter 6). However, we noted section 30 should not be used as a general substitute for section 28. Exclusion under section 30 depends on the application of a balancing test, whereas section 28 results in automatic exclusion once a judge is satisfied section 28(2) is met.

## Consultation

### What we asked submitters

- 5.13 We sought feedback on whether the potential lack of clarity in the wording of section 28 is causing confusion in practice. We asked whether it is desirable to amend section 28 to make it easier to understand and apply and to ensure indications of actual reliability are only considered where they are clear and obvious (consistent with the decision in *Wichman*).<sup>24</sup> We identified three options for reform intended to reinforce that the section continues to focus primarily on the circumstances in which a statement was made but that clear indications of actual reliability or unreliability may be taken into account when deciding whether to admit the statement.<sup>25</sup>
- 5.14 We considered it important to retain the focus on the circumstances in which the statement was made given the difficulties in accurately assessing the truth of confession evidence. We also suggested section 28 should not be engaged where a defendant

<sup>19</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [81].

<sup>20</sup> Bernard Robertson “Evidence section” ([2019]) NZLJ 198 at 200; Bernard Robertson “Student Companion — Criminal Justice/Evidence” ([2021]) NZLJ 166 at 166.

<sup>21</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [82].

<sup>22</sup> See the discussion in Bernard Robertson “Evidence section” ([2019]) NZLJ 198 at 200.

<sup>23</sup> Issues Paper at [5.22].

<sup>24</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [84] per William Young J (emphasising that a reliability hearing is not a mini-trial and that “a confession induced by threats or promises of a character likely to result in a false confession will usually be held to be inadmissible”). See also at [436]–[438] per Glazebrook J.

<sup>25</sup> Issues Paper at [5.25]–[5.35].



makes a free and informed choice about whether to make a statement and what to say but it proves to be incorrect (for example, because they are mistaken or choose to lie of their own volition). We noted juries are routinely trusted to assess such evidence.

### Results of consultation

- 5.15 Ten submitters responded to this question. Four supported reform along the lines we had proposed<sup>26</sup> while three opposed it.<sup>27</sup> The remaining three submitters disagreed with the approach in *Wichman* and did not consider that indications of actual reliability should be treated as favouring admission under section 28.<sup>28</sup>
- 5.16 The submitters that supported amendment considered it desirable to align the wording of the section with *Wichman*<sup>29</sup> and to emphasise that only clear indications of consistency or inconsistency should be taken into account.<sup>30</sup> They did not identify any issues in practice with the current wording of section 28.
- 5.17 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) suggested it is appropriate to emphasise that the focus of section 28 is on the circumstances in which the statement was made and that indications of actual reliability should be considered only where they are clear without much further inquiry. It acknowledged this approach “may mean that evidence is unlikely to be excluded as a deterrent to poor police practises”. However, it considered these issues are better dealt with under section 30 or, in relation to the most serious improprieties, section 29 (statements influenced by oppression).
- 5.18 The submitters that opposed reform considered *Wichman* provides sufficient guidance.<sup>31</sup> Associate Professor Anna High noted subsequent case law does not suggest there are issues with its application. She was also concerned reform might overemphasise actual reliability. Ngā Pirihimana o Aotearoa | New Zealand Police suggested “[a]ny residual concerns about the admission of a defendant’s statement can be addressed under s 30”. It said reform could have unintended consequences.
- 5.19 The remaining three submitters expressed concern about the approach in *Wichman*. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service suggested *Wichman* should be reconsidered, noting the difficulty of accurately assessing actual reliability pre-trial and the risk of perpetuating unsafe questioning practices by police. It did not support any reform that might prevent the courts from reconsidering *Wichman* in future. The Auckland

<sup>26</sup> Criminal Bar Association, Luke Cunningham Clere, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Wellington Community Justice Project.

<sup>27</sup> Associate Professor Anna High, Adjunct Professor Elisabeth McDonald, Ngā Pirihimana o Aotearoa | New Zealand Police.

<sup>28</sup> Auckland District Law Society, Te Matakahi | Defence Lawyers Association New Zealand, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

<sup>29</sup> Criminal Bar Association. Similarly, the New Zealand Law Society supported clarifying that the courts can consider the statement’s consistency with other evidence (that is, the approach in *Wichman*). It said this can be a good indicator of reliability or unreliability (referring, in particular, to the situation where a defendant’s statement includes information that would only be known by a defendant if their account was true).

<sup>30</sup> Luke Cunningham Clere, New Zealand Law Society.

<sup>31</sup> Associate Professor Anna High, New Zealand Police. Adjunct Professor Elisabeth McDonald made a general comment (relating to the issues discussed in this chapter and a range of others) suggesting that “empirical research is needed to validate the reform of sections which will lead to unnecessary appellate consideration of an area that is now settled, in the main”.

District Law Society and Te Matakahi | Defence Lawyers Association New Zealand noted indications of reliability such as general plausibility and consistency with other evidence have been present in proven false confessions. While they supported taking into account indications that a statement is “patently untrue” (referring to *Lyttle v R*),<sup>32</sup> they were concerned about inviting judges to admit the statement on the basis it appears to be congruent with objective facts.

- 5.20 Finally, we note the Criminal Bar Association suggested section 28 should be capable of applying to a statement by any witness, not just defendants. Similarly, an individual submitter, Stephen Hudson, supported additional controls on the admissibility of other witnesses’ evidence on the basis that lies by witnesses are a leading cause of miscarriages of justice.

### Reform not recommended

- 5.21 We do not recommend amending section 28 to clarify its application. While some submitters supported clarification, none suggested the current wording of section 28 is causing problems in practice. Case law suggests the courts are aware of the guidance in *Wichman* and are applying it correctly. They have continued to take a relatively cautious approach to admitting defendants’ statements when reliability concerns are raised.<sup>33</sup> We saw no suggestion, for example, that indications of actual reliability are being considered where they are insufficiently clear.
- 5.22 In general, it is desirable for the Act to be as clear and accessible as possible.<sup>34</sup> We acknowledge that the current wording of section 28 does not necessarily make it clear that the approach set out in *Wichman* should be adopted. However, in this instance, we consider the potential benefits of codifying that approach are outweighed by the risks of:
- (a) creating further uncertainty through the need to interpret new legislative wording given the current approach is now reasonably clear in case law;
  - (b) cementing an approach that some submitters objected to in principle rather than leaving it open to the courts to develop the law in this area if that proves desirable in future; and
  - (c) prompting the courts to place greater emphasis on actual reliability than they do currently (which we would not support given the difficulties in accurately assessing the truth of confession evidence and the associated risk of miscarriages of justice).<sup>35</sup>
- 5.23 Our conclusion is reinforced by the fact that, as we discuss below, we do not recommend raising the standard of proof for admissibility under section 28 (an option that received little support from submitters). Had we recommended raising the standard of proof, that would have helped to offset the risk that the courts might place greater emphasis on actual reliability (as it would have required more convincing evidence of actual reliability before admitting a confession on that basis). If the current “balance of probabilities”

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<sup>32</sup> *Lyttle v R* [2021] NZCA 46.

<sup>33</sup> See, for example, *Lyttle v R* [2021] NZCA 46 at [178]–[208]; *R v Fawcett* [2021] NZHC 2406 at [226] and [291]–[293]; *Gebhardt v R* [2022] NZCA 54 at [78]–[84].

<sup>34</sup> Evidence Act 2006, s 6(f).

<sup>35</sup> See the discussion in our Issues Paper at [5.42].

standard is retained, however, there is a greater risk that expressly referring to actual reliability in section 28 could result in false confessions being admitted.

- 5.24 Some submitters disagreed with the approach in *Wichman*, suggesting that actual reliability should not be considered under section 28. As noted above, this issue was considered in the Commission’s Second Review and we have not revisited it. Case law since *Wichman* suggests the courts are continuing to take a cautious approach to admitting defendants’ statements under section 28.<sup>36</sup> Indications of *unreliability* (such as inconsistencies with other evidence or general implausibility) have been viewed as supporting exclusion in some cases, suggesting the approach in *Wichman* does not necessarily favour admission of evidence.<sup>37</sup>
- 5.25 Considering actual reliability may allow some evidence to be admitted under section 28 that would have been excluded under the common law voluntariness rule. As we discuss in Chapter 6, section 30 (improperly obtained evidence) may operate to exclude a statement where there are concerns about the conduct of investigators in obtaining it. Nonetheless, the need for caution in admitting statements under section 28 remains. Section 30 is not a substitute for section 28 since exclusion under section 30 depends on the application of a balancing test. By contrast, section 28 results in automatic exclusion once section 28(2) is met, in recognition of the significant risk of miscarriages of justice based on false confessions. For this reason, if the circumstances indicate the reliability of a statement may have been adversely affected, exclusion should be presumed unless there are clear and obvious indications the statement is true.<sup>38</sup>
- 5.26 We have not considered extending section 28 to other witnesses, as two submitters suggested.<sup>39</sup> This would represent a significant change in the policy underlying section 28, which is aimed at addressing the risk of false confessions by defendants and the significant weight likely to be given to such confessions. The same risk does not arise in relation to evidence given by other witnesses — although it may be unreliable for different reasons (as we discuss in relation to prison informant evidence in Chapter 8). The Supreme Court has recently confirmed reliability considerations may be taken into account when deciding whether to exclude a witness’s evidence under section 8 (general exclusion), which applies to all evidence.<sup>40</sup>

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<sup>36</sup> See, for example, *Lyttle v R* [2021] NZCA 46 at [178]–[208]; *R v Fawcett* [2021] NZHC 2406 at [226] and [291]–[293]; *Gebhardt v R* [2022] NZCA 54 at [78]–[84].

<sup>37</sup> *Lyttle v R* [2021] NZCA 46 at [201]–[208]; *R v Fawcett* [2021] NZHC 2406 at [290]–[293] and [298]; *Gebhardt v R* [2022] NZCA 54 at [79].

<sup>38</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [431]–[432] per Glazebrook J; Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (R142, 2019) at [6.22].

<sup>39</sup> Criminal Bar Association, Stephen Hudson.

<sup>40</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [48], [70] and [191]. The Court found that reliability could affect the relevance assessment under s 7 as well but only if the evidence was “so unreliable that it could not be accepted or given any weight at all by a reasonable jury or a judge in a judge-alone trial” (at [41]).

## STANDARD OF PROOF FOR ADMISSIBILITY

### Issue

- 5.27 In our Issues Paper, we queried whether the balance of probabilities standard for admitting a defendant's statement under section 28(2) provides adequate protection against the risk of conviction based on a false confession. We explained that the Evidence Code had proposed a "beyond reasonable doubt" standard for establishing the reliability of a defendant's statement, consistent with the approach under the common law voluntariness rule.<sup>41</sup> A beyond reasonable doubt standard still applies under section 29 (statements influenced by oppression).
- 5.28 We noted it was difficult to assess from case law whether the balance of probabilities standard was resulting in the admission of false confessions.<sup>42</sup> However, several developments had occurred since section 28 was enacted that we suggested may justify reconsideration of the appropriate standard of proof:<sup>43</sup>
- (a) Increasing recognition of the reliability risks associated with confessions and a growing body of evidence indicating they may be given undue weight by the fact-finder.
  - (b) The use in Aotearoa New Zealand of Mr Big undercover operations and the Complex Investigation Phased Engagement Model<sup>44</sup> for questioning suspects. These techniques have been the subject of considerable media scrutiny, have prompted concerns from defence counsel and have been used in a manner that produced unreliable statements in some cases.<sup>45</sup> They can involve significant interaction between investigators and suspects over an extended period of time — some of which may be informal and/or not recorded — making it potentially more difficult to accurately assess the reliability of any resulting confession.
  - (c) The finding in *Wichman* (and its application in subsequent cases) that indications of the actual reliability of a statement can be taken into account under section 28. Such indications have the potential to be misleading — for example, a defendant's statement could be consistent with other evidence due to "contamination" during the investigation or because the defendant knows the offender. This may mean a higher standard of proof for admissibility is appropriate.

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<sup>41</sup> Issues Paper at [5.37].

<sup>42</sup> Issues Paper at [5.41].

<sup>43</sup> Issues Paper at [5.38] and [5.42]–[5.43].

<sup>44</sup> The Complex Investigation Phased Engagement Model is an interview technique that uses a relaxed, conversational style to build rapport with the suspect or witness. The interviewers seek to get the suspect or witness talking by reframing the narrative, which can include introducing a "softer" accusation or rationalising, minimising and justifying the alleged offending. The use of the technique was discussed in *R v X* [2021] NZHC 2444.

<sup>45</sup> *Lyttle v R* [2021] NZCA 46 at [175]–[176] and [207]–[208]; *R v X* [2021] NZHC 2444 at [174]–[177] (although in *R v X* the statement was excluded under s 30 rather than s 28).

## Consultation

### What we asked submitters

- 5.29 In light of these developments, we asked submitters whether section 28(2) should be amended to adopt a standard of beyond reasonable doubt. We noted that raising the standard of proof for admissibility could provide greater protection against the risk of wrongful conviction based on false confession evidence. It would signal that the courts should err on the side of exclusion where there is limited evidence of reliability. On the other hand, we noted a beyond reasonable doubt standard could be considered too high a hurdle at the pre-trial stage since the court would not have access to all the evidence that would be available to the fact-finder at trial.

### Results of consultation

- 5.30 Ten submitters responded to this question. Three submitters supported raising the standard to beyond reasonable doubt.<sup>46</sup> Six submitters opposed this.<sup>47</sup> The remaining submitter, the Public Defence Service, said its lawyers had mixed views on this issue.
- 5.31 Submitters in favour of a beyond reasonable doubt standard said multiple cases internationally and in New Zealand show there is a high risk that false confessors will be convicted.<sup>48</sup> They also noted Glazebrook J's view in *Wichman* that indicators of reliability must be clear and obvious, saying this shows the need for a higher standard than the balance of probabilities.<sup>49</sup>
- 5.32 Most submitters that opposed a beyond reasonable doubt standard thought it would be inappropriate at the threshold stage where the judge is acting as a gatekeeper.<sup>50</sup> The NZLS observed the section 28 assessment often focuses on circumstances that can have large grey areas (for example, the likely impact of a defendant's mental or psychological issues on an interview). It therefore considered that requiring the prosecution to prove reliability beyond reasonable doubt would set the standard too high. It also expressed concern that a higher standard could lead to inconsistent findings if a judge were to admit evidence on the basis that they are satisfied of its reliability beyond reasonable doubt only for the evidence to be rejected by a jury applying the same standard.
- 5.33 Te Tari Ture o te Karauna | Crown Law Office and Police submitted there is no convincing case for change. Police said there is little evidence of unreliable statements being admitted or leading to unsafe convictions. The Crown Law Office suggested the exclusion

<sup>46</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Wellington Community Justice Project.

<sup>47</sup> Criminal Bar Association, Te Tari Ture o te Karauna | Crown Law Office, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Law Society, New Zealand Police.

<sup>48</sup> Auckland District Law Society and Defence Lawyers Association New Zealand, referring to overseas cases involving DNA exonerations and the New Zealand examples of Teina Pora, Mahua Fawcett and David Lyttle (all of whom were convicted based on confessions later found to be unreliable). The Wellington Community Justice Project also supported raising the standard of proof but did not provide reasons.

<sup>49</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [431]–[432]. They also cited *R v Hart* 2014 SCC 52, [2014] 2 SCR 544 at [105]: “The greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence.”

<sup>50</sup> Criminal Bar Association, Crown Law Office, Luke Cunningham Clere, New Zealand Law Society.

of confessions in *Lyttle*<sup>51</sup> and *Gebhardt*<sup>52</sup> demonstrates section 28(2) has meaningful application and the balance of probabilities standard does not set the bar too low.

- 5.34 The Public Defence Service submitted a higher standard is necessary and would help to offset concerns about considering actual reliability. However, it said its lawyers had mixed views on the appropriate standard. It expressed concern that a beyond reasonable doubt standard may be inappropriate pre-trial. Specifically, it noted a risk that, once this threshold is satisfied, it would effectively determine guilt and would be difficult to counter at trial. Alternatively, a beyond reasonable doubt standard might be nearly impossible to satisfy pre-trial.

### Reform not recommended

- 5.35 We do not recommend changing the standard of proof in section 28. We consider there are good arguments in principle for raising the standard to reflect the significant risk of miscarriages of justice based on false confessions.<sup>53</sup> However, given a beyond reasonable doubt standard was originally proposed by the Commission<sup>54</sup> and was specifically rejected in the Evidence Bill,<sup>55</sup> we would need clear evidence of a problem in practice to recommend reform.
- 5.36 As we noted in our Issues Paper, there is no clear evidence of false confessions being admitted under section 28 and resulting in miscarriages of justice.<sup>56</sup> Further, the courts have ruled defendants' statements inadmissible under section 28 in three recent cases.<sup>57</sup> These decisions tend to suggest the courts are exercising caution when deciding whether to admit statements made in circumstances that may have impacted their reliability. This is likely to influence decisions by trial judges in future.
- 5.37 There was also limited support from submitters for raising the standard of proof. Even among defence counsel, there was some concern about applying a beyond reasonable doubt standard at the threshold stage.
- 5.38 For completeness, we do not necessarily agree that applying a beyond reasonable doubt standard in section 28 is inappropriate pre-trial or would risk predetermining matters that are properly left to the jury. While ultimate reliability is a question for the jury, that is not what section 28 is concerned with.<sup>58</sup> Even following *Wichman*, the court's determination under section 28 relates primarily to the likely impact of the circumstances in which a

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<sup>51</sup> *Lyttle v R* [2021] NZCA 46.

<sup>52</sup> *Gebhardt v R* [2022] NZCA 54.

<sup>53</sup> Issues Paper at [5.42].

<sup>54</sup> Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 78.

<sup>55</sup> Cabinet Paper "Evidence Bill: Paper 2: Admissibility of Evidence" (4 December 2002) at [27].

<sup>56</sup> Although Mr Lyttle's unreliable statement was admitted at his original trial and he was convicted, his conviction was overturned on appeal (*Lyttle v R* [2021] NZCA 46). Other known examples in New Zealand of convictions based on unreliable statements related to trials occurring before the Evidence Act 2006 was in force (for example, *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277) or new evidence not available at the original trial (for example, *Fawcett v R* [2017] NZCA 597).

<sup>57</sup> *Lyttle v R* [2021] NZCA 46; *R v Fawcett* [2021] NZHC 2406 (see also *Fawcett v R* [2017] NZCA 597, overturning Mr Fawcett's original conviction and ordering a retrial); *Gebhardt v R* [2022] NZCA 54.

<sup>58</sup> By contrast, see our discussion in Chapter 8 relating to prison informant evidence (which requires consideration of the actual reliability of the statement).

statement was made.<sup>59</sup> If the evidence is admitted, it remains open to the jury to reach a different view on whether the statement is reliable *in fact* having regard to the totality of the evidence. A beyond reasonable doubt standard applies under section 29 (statements influenced by oppression), which involves consideration of factors similar to those in section 28.<sup>60</sup> Accordingly, should it become evident in future that statements are being too readily admitted under section 28 (for example, through subsequent exonerations), it may be appropriate to reconsider the standard of proof.

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<sup>59</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [84] per William Young J and [438] per Glazebrook J.

<sup>60</sup> Compare ss 28(4) and 29(4) of the Evidence Act 2006.

## CHAPTER 6

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# Investigatory techniques and risks of unreliability

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## INTRODUCTION

- 6.1 In this chapter, we consider how the Evidence Act 2006 governs the admissibility of evidence obtained through investigatory techniques that risk producing unreliable evidence. We conclude there is insufficient evidence of a problem in practice to recommend reform.

## ISSUE

- 6.2 In our Issues Paper, we noted that preliminary feedback expressed concern that the Act does not adequately address the use of certain investigatory techniques to obtain statements from defendants.<sup>1</sup> These concerns related in particular to “Mr Big” undercover operations and the Complex Investigation Phased Engagement Model (CIPEM) for questioning suspects, which have been criticised as having the potential to produce unreliable confessions.<sup>2</sup> This led us to consider whether sections 28 (unreliable statements), 29 (statements influenced by oppression) and 30 (improperly obtained evidence), as they are now applied by the courts, provide a coherent scheme for determining the admissibility of evidence obtained in a manner that risks producing unreliable evidence.
- 6.3 We discuss issues specific to section 28 in Chapter 5. As it is now applied by the courts, section 28 focuses on whether a particular statement by a defendant is sufficiently reliable to be considered by the fact-finder. In this chapter, we discuss a separate but related issue about the extent to which evidence can be excluded to discourage, and ensure the justice system is not seen as condoning, investigatory conduct that risks producing unreliable evidence (even if the specific evidence in question is likely to be reliable in fact).

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<sup>1</sup> Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [6.15].

<sup>2</sup> See Issues Paper at [5.38] for a discussion of these techniques and the criticism they have attracted.



- 6.4 Sections 28–30 were intended to operate alongside each other to perform the roles previously fulfilled by the common law voluntariness rule and the jurisdiction to exclude evidence that was obtained unfairly (the fairness discretion).<sup>3</sup> Section 30 also fulfils an additional role of providing for exclusion of evidence obtained in breach of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) and other legislation. As a scheme, sections 28–30 were designed to ensure defendants’ statements are sufficiently reliable to be considered by the fact-finder and to discourage the use of unacceptable methods to obtain evidence.<sup>4</sup> Section 29 is confined to rare cases of serious mistreatment of a defendant when obtaining a statement, whereas sections 28 and 30 have broader application.
- 6.5 As we discuss in Chapter 5, the wording of section 28 focuses on whether the circumstances in which a defendant’s statement was made may have adversely affected its reliability.<sup>5</sup> This stems from the common law voluntariness rule, which was concerned with the methods used to obtain a statement rather than whether it was true.<sup>6</sup> However, the majority of te Kōti Mana Nui | Supreme Court in *R v Wichman* found that a court applying section 28 can consider indications the defendant’s statement is actually reliable (that is, likely to be true).<sup>7</sup> This decision suggests section 28, as it is now applied by the courts, is primarily concerned with whether a statement is sufficiently reliable to be considered by the fact-finder.<sup>8</sup> Conduct by investigators that risks producing unreliable evidence will be relevant to that assessment but may not justify exclusion on its own if a statement is considered to be sufficiently reliable in fact.
- 6.6 As we discuss further in Chapter 7, section 30 is directly concerned with the methods used to obtain evidence. It governs the admissibility of evidence that is “improperly obtained”. This includes evidence obtained in breach of an enactment or rule of law (section 30(5)(a))<sup>9</sup> or unfairly (section 30(5)(c)). The “unfairness” limb is most often engaged where there has been a breach of the Chief Justice’s Practice Note on Police Questioning<sup>10</sup> but is not limited to such situations.<sup>11</sup> Once evidence is found to be improperly obtained, section 30(2) sets out a balancing test to determine whether it should be admitted or excluded.

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<sup>3</sup> Issues Paper at [6.1]. See also at [6.2]–[6.6] for a summary of the respective roles of each section.

<sup>4</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [91], [94] and [101].

<sup>5</sup> Section 28(2) requires the judge to exclude a statement, once the issue of its reliability has been raised, 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.

<sup>6</sup> *R v Fatu* [1989] 3 NZLR 419 (CA) at 430. See also *R v McCuin* [1982] 1 NZLR 13 (CA) at 15.

<sup>7</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [83]–[84] (see also at [433]–[438] per Glazebrook J, who dissented but agreed with the majority on this point). We also discussed this case in our Issues Paper at [6.7]–[6.14].

<sup>8</sup> Issues Paper at [5.18]–[5.19] and [5.21].

<sup>9</sup> But only if the breach is by a person to whom s 3 of the New Zealand Bill of Rights Act 1990 applies — that is, by the legislative, executive or judicial branches of the Government of New Zealand or any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law.

<sup>10</sup> *Practice Note on Police Questioning (s 30(6) Evidence Act 2006)* [2007] 3 NZLR 297. A breach of the Practice Note does not automatically mean evidence was obtained “unfairly” but is taken into account when making that assessment (Evidence Act 2006, s 30(6)). As we noted in our Issues Paper at [6.27], the Practice Note is limited in scope and does not address every type of police conduct that may result in unfairness. For example, evidence obtained through entrapment may also be unfairly obtained: *R v G* [2022] NZHC 2820 at [63].

<sup>11</sup> Issues Paper at [6.5].

- 6.7 In our Issues Paper, we suggested the majority decision in *Wichman* may have created a gap in the operation of sections 28–30 that was not intended when those sections were enacted.<sup>12</sup> It could lead to statements being admitted under section 28 that would previously have been excluded under the voluntariness rule due to concerns about the methods used to obtain them. Further, the majority judgment indicates that, where a statement is not excluded under section 28 (for example, due to indications of actual reliability), any residual risks of unreliability stemming from the investigatory methods used to obtain the statement are irrelevant to whether the evidence was obtained “unfairly” so as to engage section 30.<sup>13</sup> We suggested this could prevent the courts from calling on section 30 to fill the gap left in the operation of section 28 as compared to the voluntariness rule (that is, to address concerns about investigatory conduct that risks producing unreliable evidence).
- 6.8 In some cases, section 30 will apply anyway because there is some other basis on which to find the evidence was improperly obtained (such as a breach of the NZ Bill of Rights or the Chief Justice’s Practice Note on Police Questioning). Alternatively, section 29 may apply in rare cases where the high threshold for oppression is met. In other cases, however, we said the courts may have no mechanism to exclude evidence where they consider the conduct of investigators carried an unacceptable risk of producing unreliable evidence.
- 6.9 We acknowledged that it was not yet clear from subsequent case law whether *Wichman* will be applied in this way.<sup>14</sup> While several subsequent cases have involved arguments that the conduct of investigators carried an unacceptable risk of producing a false confession, in each case, the court was able to exclude the evidence on other grounds.<sup>15</sup>

## CONSULTATION

### What we asked submitters

- 6.10 We sought submissions on whether the potential gap we had identified in the operation of sections 28–30 was causing concern or problems in practice. We expressed our preliminary view that the courts should be able to consider the risk that an investigatory technique could produce unreliable evidence under section 30.<sup>16</sup> We suggested the administration of justice may be brought into disrepute if the courts are unable to exclude evidence resulting from practices they consider carry an unacceptable risk of producing unreliable evidence. This could encourage the use of similar techniques in future, increasing the risk of unreliable evidence more generally and undermining public trust and confidence in the justice system. These are the types of considerations section 30 is designed to address.

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<sup>12</sup> Issues Paper at [6.17]–[6.20].

<sup>13</sup> Issues Paper at [6.10]–[6.11] and [6.19]–[6.20].

<sup>14</sup> Issues Paper at [6.21].

<sup>15</sup> *Lyttle v R* [2021] NZCA 46 (evidence excluded under s 28, in part because it was inconsistent with other evidence so was likely to be unreliable in fact); *R v X* [2021] NZHC 2444 at [59]–[75] and [128]–[146] (evidence excluded under s 30 on the basis that it was obtained in breach of the Chief Justice’s Practice Note on Police Questioning); *R v Fawcett* [2021] NZHC 2406 at [238] and [301] (evidence excluded under s 28 based on factors internal to the defendant).

<sup>16</sup> Issues Paper at [6.25].

- 6.11 We asked submitters whether legislative reform is desirable to provide that the courts can have regard to the risk that an investigatory technique would produce unreliable evidence at both stages of the section 30 inquiry (that is, when determining whether the evidence was improperly obtained and when applying the balancing test). We suggested this could ensure sections 28–30 together cover the same ground as the voluntariness rule did at common law, as appears to have been the legislative intent.

### Results of consultation

- 6.12 Eleven submitters responded to this question. Six submitters supported amendment to clarify that the risk that an investigatory technique could produce unreliable evidence can be considered under section 30.<sup>17</sup> Five submitters opposed amendment.<sup>18</sup>
- 6.13 The Auckland District Law Society and Te Matakahi | Defence Lawyers Association New Zealand noted the courts have recognised there are reliability issues with some techniques being used by police, referring to Mr Big operations<sup>19</sup> and CIPEM.<sup>20</sup> Given this, they submitted consideration of the reliability risks associated with such techniques should be available and signalled to judges when applying the section 30 balancing exercise.
- 6.14 Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) submitted section 30 is the appropriate section to determine the admissibility of evidence that has been obtained through investigatory techniques known to carry a risk of producing unreliable evidence. It suggested some techniques that have resulted in unreliable confessions (such as Mr Big operations and CIPEM) have also, in some cases, been carried out in ways that could be deemed unfair. It emphasised, however, that these techniques may not be inherently unfair and a case-by-case assessment is required to determine whether their use engages the section 30 admissibility test.
- 6.15 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service considered the term “unfairly obtained” in section 30 should be broad enough to cover conduct that risks producing unreliable evidence. However, it supported reform on the basis that an express provision may encourage judges to treat such conduct more seriously. It suggested the more important amendment would be to clarify that the extent of the reliability risks is relevant to the application of the balancing test. It said it is often easier to convince the courts that evidence is improperly obtained than to convince them that exclusion is proportionate. On the other hand, the NZLS and Te Tari Ture o te Karauna | Crown Law Office considered

<sup>17</sup> Auckland District Law Society, Criminal Bar Association, Te Matakahi | Defence Lawyers Association New Zealand, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Wellington Community Justice Project.

<sup>18</sup> Tari Ture o te Karauna | Crown Law Office, Associate Professor Anna High, Luke Cunningham Clere, Ngā Pirihimana o Aotearoa | New Zealand Police. Adjunct Professor Elisabeth McDonald commented in relation to this chapter and others in the Issues Paper that she did not support any of the changes suggested and considered some empirical research is needed to validate the reform of sections that will lead to unnecessary appellate consideration of an area that is now settled in the main.

<sup>19</sup> Citing *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [74], [77] and [403].

<sup>20</sup> Noting *te Kōti Matua | High Court* has found this technique “to produce highly unreliable inculpatory statements” — presumably in reference to *R v X* [2021] NZHC 2444.

reliability risks can already be taken into account under other factors in the section 30(3) balancing test.<sup>21</sup>

- 6.16 Of the submitters against amendment, only the Wellington Crown Solicitor, Luke Cunningham Clere, expressly disagreed in principle with taking risks of unreliability into account under section 30. It submitted that it is appropriate to differentiate issues of impropriety and reliability and that the options presented in our Issues Paper would conflate them. It noted section 30 rightly requires some improper conduct to trigger the balancing test, while section 28 focuses on ensuring actually unreliable statements are not used against defendants. If section 28 is seen to permit the admission of evidence that is unreliable, this is reason to amend section 28 rather than section 30.
- 6.17 The remaining submitters did not argue against the courts considering the risk of unreliability associated with an investigatory technique under section 30. Rather, they were not sure that the decision in *Wichman* would prevent this so considered amendment would be premature.<sup>22</sup> Associate Professor Anna High noted *Wichman* does not mean the courts are *required* to admit evidence based on indications of actual reliability — actual reliability is relevant but not determinative. The Crown Law Office was concerned amendment could reduce the flexibility of the term “unfairly” in section 30, leading to too much emphasis on reliability compared to other types of unfairness.
- 6.18 Ngā Pirihimana Aotearoa | New Zealand Police suggested criticism of the Mr Big technique is overstated, as the technique mitigates risks of unreliability through its emphasis on honesty. It also said Mr Big and other undercover operations can serve to clear a suspect of an offence. In a follow-up discussion, Police emphasised there is nothing inherently unfair about techniques such as Mr Big and CIPEM. Rather, any technique can be unfair if it is taken to the extreme.

## REFORM NOT RECOMMENDED

- 6.19 We do not recommend amendment to clarify that section 30 may apply where the conduct of investigators risked producing unreliable evidence. There is insufficient evidence of a problem in practice requiring reform. At this stage, it remains unclear what effect *Wichman* will have in this regard. We found no evidence of *Wichman* being applied in a manner that prevents consideration of risks of unreliability under section 30, nor did submitters raise any other practical issues (for example, uncertainty among counsel as to when and how reliability concerns could be raised).
- 6.20 Almost all submitters considered that, where the conduct of investigators risks producing unreliable evidence, that may be relevant when assessing whether evidence is unfairly obtained under section 30(5)(c) and when applying the section 30(2) balancing test. Most submitters agreed this approach is already available on the wording of section 30 although they held differing views on whether clarification is nonetheless desirable in light of *Wichman*.

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<sup>21</sup> The New Zealand Law Society and Crown Law Office both cited the s 30(3)(b) factor (“the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith”). The Crown Law Office also referred to s 30(3)(a) (the nature of the right breached and the extent of the intrusion on it) and s 30(3)(c) (the nature and quality of the evidence).

<sup>22</sup> Crown Law Office, Associate Professor Anna High, New Zealand Police.

- 6.21 As we explain below, we consider that *Wichman* and subsequent case law leaves it open to the courts to consider investigatory conduct that risks producing unreliable evidence under section 30. We also agree with most submitters that the current wording of section 30 allows for this. For these reasons, we consider it would be premature to recommend legislative reform.
- 6.22 In *Wichman*, the majority disagreed with the Kōti Pira | Court of Appeal's approach of considering reliability risks associated with the Mr Big undercover technique under section 30.<sup>23</sup> By contrast, Glazebrook J (dissenting) agreed with the Court of Appeal that "the substantial risk of unreliability inherent in the technique is one factor to be considered in deciding whether statements obtained through the Mr Big technique are obtained unfairly".<sup>24</sup> The majority did, however, seem to accept that the "unfairness" limb of section 30 could be engaged in some cases where investigators use threats or inducements to place pressure on defendants to confess.<sup>25</sup> This may be viewed as an acknowledgment that, in some situations, conduct that risks producing unreliable evidence may be appropriately considered under section 30 even where it does not breach the NZ Bill of Rights or the Chief Justice's Practice Note on Police Questioning.<sup>26</sup>
- 6.23 The Crown Law Office referred to the Supreme Court's decision in *R v Chetty* (decided after *Wichman*) to demonstrate that investigatory techniques that risk producing unreliable evidence can be considered under section 30(5)(c).<sup>27</sup> The facts in *Chetty* included breaches of the Chief Justice's Practice Note on Police Questioning, but there was also another aspect of police conduct that contributed to the finding of unfairness. A detective had told Mr Chetty that he would be charged with rape, that rape carried a maximum penalty of 20 years' imprisonment and that he was on his own from that point on. The context in which this statement was made led the defendant to believe that, unless he told his interviewers what they wanted to hear, he would face 20 years' imprisonment.<sup>28</sup> The prosecution accepted this exchange meant Mr Chetty's subsequent admissions were unfairly obtained so the court did not consider in detail how the detective's conduct engaged section 30(5)(c).<sup>29</sup> The majority did, however, comment that the detective should not have told Mr Chetty the maximum sentence for rape.<sup>30</sup>
- 6.24 We agree that *Chetty* appears to be an example of the Court considering the risk that the conduct of investigators could result in an unreliable statement when assessing unfairness under section 30, albeit without doing so expressly. Similarly, in *Zurich v R*, the Court of Appeal referred to the fact that the defendant was interviewed while clearly intoxicated as a factor in deciding his statement was unfairly obtained.<sup>31</sup>

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<sup>23</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [69] (read in the context of *M v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [43], [46], [64]–[67] and [80]–[83]).

<sup>24</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [510]. See also at [511].

<sup>25</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [122].

<sup>26</sup> *Practice Note on Police Questioning (s 30(6) Evidence Act 2006)* [2007] 3 NZLR 297.

<sup>27</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [51] (read in the context of paras [28]–[29]).

<sup>28</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [13]–[14] and [51].

<sup>29</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [46] and [51].

<sup>30</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [51].

<sup>31</sup> *Zurich v R* [2020] NZCA 577 at [21](b).

- 6.25 We also agree with Associate Professor High’s observation that *Wichman* does not require the courts to admit a defendant’s statement under section 28 based on indications of actual reliability. Since *Wichman*, the courts have generally considered the consistency of a statement with other evidence and its general plausibility<sup>32</sup> in line with the majority’s finding that such matters are relevant to the section 28(2) inquiry.<sup>33</sup> However, they may still decide what weight to give those matters compared to concerns about the circumstances in which the statement was made (which remain the primary focus of section 28). In practice, this may mean *Wichman* does not significantly narrow the scope for the courts to exclude statements under section 28.
- 6.26 Where the primary concern is not the reliability of the statement in question but rather that investigators acted in a manner that risked producing unreliable evidence, we consider section 30 may apply (or section 29 in particularly egregious cases). This type of conduct may affect both whether evidence was unfairly obtained (under section 30(5)(c)) and the application of the balancing test.
- 6.27 This approach is available on the current wording of section 30, so amendment is not required to enable it. The wording of the “unfairly obtained” limb of section 30 is sufficiently broad to capture conduct that risks producing unreliable evidence (as *Chetty* and *Zurich* demonstrate). When applying the balancing test, the extent of the risk could be considered under the section 30(3)(a) factor (the nature of the right breached and the seriousness of the intrusion on it). As we discuss in Chapter 7, the courts have applied that factor to enable a broader consideration of the interests infringed by the impropriety, even where there is no breach of a “right” in a strict sense. We recommend an amendment to clarify that this is the correct approach. In our view, the section 30(3)(a) assessment could include consideration of the public interest in ensuring criminal investigations are conducted in a manner that is likely to produce reliable evidence. This is consistent with the primary rationale underlying section 30, which is to maintain an effective and credible system of justice.<sup>34</sup>
- 6.28 We do not consider this approach inappropriately conflates issues of reliability and impropriety. The section 30 analysis would continue to focus on the conduct of investigators rather than on the reliability of a particular statement (which is properly addressed by section 28).<sup>35</sup> If investigators act in a way that involves a significant risk of producing unreliable evidence — for example, by placing pressure on a defendant to confess — the admission of that evidence may undermine the credibility of the justice system and fail to deter similar conduct in future. Accordingly, it may properly be deemed unfair (and therefore “improper”) for section 30 purposes.

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<sup>32</sup> *Lyttle v R* [2021] NZCA 46 at [178]–[208]; *R v Fawcett* [2021] NZHC 2406 at [226] and [291]–[293]; *Gebhardt v R* [2022] NZCA 54 at [78]–[84].

<sup>33</sup> *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [84].

<sup>34</sup> See further Chapter 7 and the discussion in our Issues Paper at [7.15]–[7.20].

<sup>35</sup> As discussed in Chapter 7, the reliability of the evidence in question is relevant to the application of the s 30 balancing test (under the s 30(3)(c) factor) because it affects the public interest in having the evidence admitted at trial. It is an evaluative consideration to be weighed against the public interest in recognising the seriousness of the impropriety. However, s 30 does not provide for a threshold reliability assessment in the same way as s 28. It is not concerned with ensuring evidence is sufficiently reliable to be considered by the fact-finder.

- 6.29 We do not suggest that the use of certain investigatory techniques (such as Mr Big undercover operations or CIPEM) should automatically be deemed unfair for section 30 purposes. We agree with Police and the NZLS that a case-by-case assessment is required. The use of a particular technique may be unfair in some cases and not in others depending on how it is carried out (for example, the precise nature of any pressure exerted on a defendant) and the wider context (for example, whether the defendant was known to be vulnerable to manipulation). The focus under section 30 is on the nature of the conduct in a particular case.
- 6.30 Since this is our final statutory review of the operation of the Act, the Ministry of Justice may wish to monitor the development of case law in this area to ensure there remains scope under sections 28–30 for the courts to exclude evidence obtained through conduct that risks producing unreliable evidence.
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## CHAPTER 7

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# Improperly obtained evidence

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## INTRODUCTION

- 7.1 In this chapter, we consider section 30 of the Evidence Act 2006, which sets out a balancing test to determine whether improperly obtained evidence should be admitted or excluded. We discuss the following:
- (a) The operation of the section 30 balancing test. We identify two issues with the test as it is currently applied. First, some court decisions appear to give less weight to the seriousness of the impropriety than was intended when section 30 was enacted. Second, the test is applied inconsistently, making it difficult to predict outcomes.
  - (b) The wording of the balancing test in section 30(2)(b). We make two recommendations for reform to:
    - (i) specify that the judge must exclude improperly obtained evidence unless satisfied it is in the public interest to admit it; and
    - (ii) identify the two competing public interests that must be weighed against each other (the public interest in recognising the seriousness of the impropriety and the public interest in having the evidence considered by the fact-finder at trial).
  - (c) The application of the section 30(3) factors in the balancing test. We recommend specifying the public interest identified in section 30(2)(b) to which each factor relates. We also propose amendments to clarify the operation of some factors and to repeal factors that are not helpful.
  - (d) The role of causation in determining whether evidence is improperly obtained under section 30(5). We conclude it is preferable for the law on causation to be refined through case law rather than legislative amendment.



## BACKGROUND

- 7.2 Section 30 sets out a balancing test to determine whether improperly obtained evidence is admissible in criminal proceedings.<sup>1</sup> Once evidence is found to be improperly obtained, the court must:<sup>2</sup>
- ... determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.
- 7.3 Section 30(3) contains a non-exhaustive list of factors that the court may take into account when applying this balancing test. If the court finds that exclusion of the evidence is proportionate to the impropriety, it must exclude the evidence.<sup>3</sup>
- 7.4 In our Issues Paper, we discussed the history and underlying policy of section 30 and assessed how the courts have applied the balancing test.<sup>4</sup> We do not repeat the detail of that discussion here except to note the following key points.
- 7.5 First, section 30 is based on the balancing test adopted by te Kōti Pīra | Court of Appeal in *R v Shaheed*.<sup>5</sup> Prior to that, evidence obtained in breach of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) was subject to prima facie exclusion.<sup>6</sup> Te Aka Matua o te Ture | Law Commission's Evidence Code included an improperly obtained evidence provision that was based on the prima facie exclusionary rule but would have applied to "improperly obtained evidence" more broadly (including evidence obtained in breach of any enactment or rule of law or unfairly).<sup>7</sup> After the Evidence Code was published but before the Evidence Bill was drafted, the Court of Appeal in *Shaheed* overturned the prima facie exclusionary rule and replaced it with a balancing test. It considered the rule had led to an unduly rigid approach with almost all breaches of the NZ Bill of Rights resulting in exclusion of the evidence obtained.<sup>8</sup> The Government largely sought to codify the *Shaheed* approach when drafting the Evidence Bill<sup>9</sup> but applied it to improperly

<sup>1</sup> Evidence is "improperly obtained" if it is obtained in consequence of a breach of any enactment or rule of law by a person to whom s 3 of the New Zealand Bill of Rights Act 1990 applies, in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution or unfairly (Evidence Act 2006, s 30(5)).

<sup>2</sup> Evidence Act 2006, s 30(2)(b).

<sup>3</sup> Evidence Act 2006, s 30(4).

<sup>4</sup> Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [7.4]–[7.31].

<sup>5</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA).

<sup>6</sup> *R v Kirifi* [1992] 2 NZLR 8 (CA) at 12; *R v Butcher* [1992] 2 NZLR 257 (CA) at 266; *R v Goodwin* [1993] 2 NZLR 153 (CA) at 181 per Cooke P, and 191 and 194 per Richardson J. See also the discussion in *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [23]–[27].

<sup>7</sup> Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 84 and 86. The provision would have required exclusion of improperly obtained evidence unless it would be contrary to the interests of justice.

<sup>8</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [140] per Blanchard J (giving the judgment of Richardson P, Blanchard and Tipping JJ). Blanchard J's approach was also endorsed by Gault J (at [172]), McGrath J (at [192]) and Anderson J (at [200]–[201]).

<sup>9</sup> Cabinet Paper "Evidence Bill: Paper 2: Admissibility of Evidence" (4 December 2002) CAB 100/2002/1 at [29]; Letter from Joanna Davidson (Crown Counsel) to the Attorney-General "Legal Advice — Consistency with the New Zealand Bill of Rights Act 1990: Evidence Bill" (5 April 2005) at [6].

obtained evidence more generally (as the Commission had proposed in relation to the *prima facie* exclusionary rule).<sup>10</sup>

- 7.6 Second, there are three main rationales for exclusion of improperly obtained evidence: maintaining the integrity of the justice system, vindicating breaches of rights and deterring future improprieties.<sup>11</sup> All three have been recognised by the courts in Aotearoa New Zealand. The primary rationale for the balancing test formulated in *Shaheed* and reflected in section 30 is to maintain an effective and credible system of justice that commands the respect of the community.<sup>12</sup> However, the majority in *Shaheed* also saw the test as a way to vindicate breaches of rights and (to a lesser extent) deter future improprieties.<sup>13</sup> Since section 30 was enacted, the courts have made it clear that an effective and credible system of justice does not lightly condone police conduct that breaches rights<sup>14</sup> and may seek to reduce the risk of future improprieties.<sup>15</sup>
- 7.7 Third, there have been long-standing concerns about the section 30 balancing test from commentators and submitters in previous Law Commission reviews.<sup>16</sup> The test has been criticised as leading to inconsistent and unpredictable decisions and as being too skewed towards admitting improperly obtained evidence. Section 30 decisions are frequently the subject of appeals<sup>17</sup> and split decisions.<sup>18</sup>
- 7.8 Finally, the appellate courts have generally avoided providing detailed guidance on the balancing test. Before section 30 was enacted, the Court of Appeal in *R v Williams* laid out a structured approach to the *Shaheed* test with the aim of achieving more consistent results.<sup>19</sup> However, the Kōti Mana Nui | Supreme Court departed from this structured approach in *Hamed v R*, preferring instead to give the courts flexibility as to whether a

<sup>10</sup> See Evidence Act 2006, s 30(5).

<sup>11</sup> Issues Paper at [7.9]–[7.21]. To “vindicate” a right means to uphold its value and defend it against interference (*Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [253] per Blanchard J, [300] per Tipping J and [366] per McGrath J).

<sup>12</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148] per Blanchard J for the majority; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [187] per Blanchard J and [230] per Tipping J; Evidence Act 2006, s 30(2)(b).

<sup>13</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [142]–[143]. The majority also referred to vindicating breaches of rights when explaining how the balancing test would operate (see, for example, at [147], [149] and [153]).

<sup>14</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [28]. See also *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [66] per Elias CJ, [191] and [204] per Blanchard J and [252] per Tipping J.

<sup>15</sup> See, for example, *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [26], citing *R v Hoare* CA310/04, 21 April 2005 at [42].

<sup>16</sup> Issues Paper at [7.36]–[7.38].

<sup>17</sup> As at 31 October 2023, a Lexis Advance search for appellate court cases citing s 30 returned 499 results in the Court of Appeal and 59 results in the Supreme Court (including decisions on applications for leave to appeal). The High Court also considers appeals from District Court decisions, but in a case search, it is difficult to separate these from first-instance High Court decisions. A search of High Court decisions returned 515 results.

<sup>18</sup> For example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305; *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26; *R v Perry* [2016] NZSC 102; *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710; *R v Reti* [2020] NZSC 16, [2020] 1 NZLR 108; *Kalekale v R* [2016] NZCA 259; *W (CA226/2019) v R* [2019] NZCA 558.

<sup>19</sup> *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [147].

factor supported admission or exclusion in a particular case.<sup>20</sup> Gault J noted the application of the balancing test “may well depend on inclinations of particular judges”.<sup>21</sup>

## THE OPERATION OF THE BALANCING TEST

### Issue

- 7.9 The Minister of Justice suggested we consider whether the section 30 process for determining the admissibility of improperly obtained evidence in criminal proceedings gives sufficient weight to the impropriety.<sup>22</sup> We also received preliminary feedback suggesting that court decisions under section 30 are too unpredictable or inconsistent or unduly favour admission of improperly obtained evidence.
- 7.10 In our Issues Paper, we set out our analysis of a snapshot case study of section 30 decisions between 2019 and 2022.<sup>23</sup> The results must be treated with some caution. The review only covered three years and did not include te Kōti-a-Rōhe | District Court decisions (due to lack of availability on online databases). In addition, there are various reasons why the admission of improperly obtained evidence may not be challenged and why first-instance decisions may not be appealed. That said, of the cases we reviewed, improperly obtained real evidence (that is, physical evidence) was admitted in around two-thirds of cases.<sup>24</sup> The importance of the evidence to the prosecution case and the seriousness of the offence were often treated as significant (and sometimes determinative) factors favouring admission. By contrast, defendants’ statements that were improperly obtained were usually excluded.<sup>25</sup>
- 7.11 We questioned in the Issues Paper whether the courts’ current approach is consistent with the original intent of section 30.<sup>26</sup> As noted above, the section was based on the Court of Appeal’s decision in *R v Shaheed*.<sup>27</sup> While the majority in *Shaheed* clearly anticipated some rebalancing, they also indicated that, in most cases, the balancing test should not lead to results different from those reached under the prima facie exclusionary rule.<sup>28</sup> It was intended to give “appropriate and significant weight” to the fact there had

<sup>20</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [59] per Elias CJ, [189] per Blanchard J, [230] per Tipping J (suggesting the seriousness of the offence “is apt to cut both ways”) and [282] per Gault J.

<sup>21</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [282].

<sup>22</sup> Letter from Hon Kris Faafoi (Minister of Justice) to Amokura Kawharu (Tumu Whakarae | President, Law Commission) regarding the third statutory review of the Evidence Act 2006 (23 February 2022).

<sup>23</sup> Issues Paper at [7.26]–[7.31]. The case study considered 70 decisions in which evidence was found to be improperly obtained. It was limited to High Court, Court of Appeal and Supreme Court decisions available on LexisNexis, Westlaw and Capital Letter databases between 1 January 2019 and 31 December 2022. First-instance and appeal decisions were reviewed.

<sup>24</sup> Real evidence was considered in 54 of the 70 cases identified. The evidence was admitted in full in 35 cases, admitted in part in one case and excluded in 18 cases.

<sup>25</sup> Defendants’ statements were considered in 17 of the 70 cases identified. The evidence was only admitted in full in three cases and in part in one case. One case considered both real evidence and a defendant’s statement so is included in both categories.

<sup>26</sup> Issues Paper at [7.42].

<sup>27</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA).

<sup>28</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [156].

been a breach of rights.<sup>29</sup> Although a breach of rights might be “outweighed by the accumulation of other factors”,<sup>30</sup> the public interest in convicting those guilty of serious crimes would “not normally outweigh an egregious breach of rights”.<sup>31</sup>

- 7.12 We also questioned whether section 30 had led to an unnecessary degree of uncertainty and inconsistency. We noted it is a rule of law principle that the law be consistently applied, with like cases being treated alike.

## Consultation

### What we asked submitters

- 7.13 We sought feedback on whether the section 30 balancing test, as currently applied by the courts, is leading to evidence being admitted too often, to inconsistent or unpredictable decisions or to overemphasis on certain factors. If so, we asked whether this was problematic.

### Results of consultation

- 7.14 Eleven submitters responded to this question. Of those, eight raised issues with how the test is operating.<sup>32</sup> They referred to unpredictable or inconsistent decisions (five submitters),<sup>33</sup> improperly obtained evidence being too readily admitted (four submitters)<sup>34</sup> and factors such as the seriousness of the offence or the nature and quality of the evidence too easily outweighing improprieties (three submitters).<sup>35</sup> Five submitters also expressed concern that the current approach incentivises repeated improprieties.<sup>36</sup> Three submitters did not consider the current approach to be problematic based on the available evidence.<sup>37</sup>
- 7.15 The Auckland District Law Society (ADLS) and Te Matakahi | Defence Lawyers Association New Zealand suggested that whether evidence is excluded tends to hinge on who the decision-maker is. They said the current approach is arbitrary, provides no consequences for breaches of rights and encourages further illegality through frequent admission of improperly obtained evidence.
- 7.16 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service commented that section 30 is arguably *too* predictable in that improperly obtained evidence is consistently admitted.

<sup>29</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143].

<sup>30</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [144].

<sup>31</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143].

<sup>32</sup> Auckland District Law Society, Criminal Bar Association, Te Matakahi | Defence Lawyers Association New Zealand, Ethan Huda, Stephen Hudson, Luke Cunningham Clere, Don Mathias, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

<sup>33</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association New Zealand, Luke Cunningham Clere, Don Mathias.

<sup>34</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Ethan Huda, Public Defence Service.

<sup>35</sup> Criminal Bar Association, Stephen Hudson, Public Defence Service.

<sup>36</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Ethan Huda, Stephen Hudson (referring in particular to the fact that allowing evidence in on the basis that it relates to a serious offence incentivises unlawful action by police in serious matters), Public Defence Service.

<sup>37</sup> Associate Professor Anna High, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ngā Pirihimana o Aotearoa | New Zealand Police.

It said the current approach “promotes convictions above all else and potentially incentivises deliberate or reckless impropriety in obtaining evidence”. It considered the nature and quality of real evidence and its importance to the prosecution case are given more weight than serious breaches of privacy in unlawful searches. It saw the seriousness of the offence as operating “almost to the exclusion of all other factors”.

- 7.17 Ethan Huda referred to a perception within the New Zealand legal system that, unless there has been a particularly egregious violation, evidence obtained in a breach of right can still be admitted and used. He said police understand how far they can push an approach while still ensuring admissibility of evidence, which has resulted in certain breaches becoming normalised. He submitted the lack of punishment for such breaches has also resulted in an incremental erosion of rights over time.
- 7.18 The Criminal Bar Association, Ethan Huda and the Public Defence Service all said some defence counsel are reluctant to challenge the admissibility of improperly obtained evidence under section 30 due to a perception that the evidence is likely to be admitted under the balancing test. The Public Defence Service pointed out that a decision to challenge admissibility is not without cost to defendants. They can incur financial costs (including for legally aided defendants with repayment orders), costs to liberty in terms of extended periods in custody while a pre-trial hearing is set down or potential loss of a guilty plea credit on sentence if the plea is entered after an unsuccessful section 30 challenge.
- 7.19 The Wellington Crown Solicitor, Luke Cunningham Clere, said the unstructured nature of the balancing exercise means it is “likely that the law is being applied inconsistently”. Commentator Don Mathias considered that *outcomes* in section 30 cases are generally consistent but there is inconsistency in the *reasons* for decisions. He submitted this is problematic because it can make outcomes unpredictable, making it difficult for lawyers to advise clients. He suggested inconsistent reasoning may occur because judges first decide the outcome based on general notions of what is “just” and then look for reasons to support that conclusion. He said there is no attempt to show that like cases are treated alike.
- 7.20 Te Kāhui Tātari Ture | Criminal Cases Review Commission, while not commenting directly on the application of the balancing test, said that improperly obtained evidence is a known contributor to miscarriages of justice and forms the basis of a number of applications to the Commission.
- 7.21 On the other hand, Ngā Pirihimana o Aotearoa | New Zealand Police said that, while it is difficult to say whether there is inconsistency without more information, the courts do exclude improperly obtained evidence (especially defendants’ statements) where appropriate. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) and Associate Professor Anna High both considered that some variability is to be expected given the nature of the test, but it has not been shown this is resulting in unfair outcomes.
- 7.22 Several submitters commented on the difficulty in relying on case studies in this area. Luke Cunningham Clere and the NZLS both urged caution when relying on appellate case law because the prosecution is less likely to appeal than a defendant. On the other hand, the Public Defence Service said its perception is that more evidence is admitted than our case study showed due to District Court cases not being included and the admissibility of evidence not always being challenged (based on advice from counsel that challenges are unlikely to succeed).

## The need for reform

- 7.23 We conclude reform of the section 30 balancing test is desirable. This section summarises our reasons for that overall conclusion. We discuss specific issues with the wording of the provisions and our recommendations for reform later in this chapter.
- 7.24 We see two issues with the way the section 30 balancing test is currently applied. First, the reasoning in some judgments lends support to the concern expressed by several submitters that judges sometimes appear to give less weight to the impropriety than was anticipated when the balancing test was adopted in *Shaheed* (and later codified in section 30). As we have said, the Court in *Shaheed* envisaged the balancing test would give significant weight to the impropriety and that the public interest in convicting those guilty of serious crimes would not usually outweigh an egregious breach of rights.<sup>38</sup> The codification of the *Shaheed* test and its extension to other improprieties in section 30 indicates a similar approach was intended to apply to all improper conduct in the obtaining of evidence.<sup>39</sup>
- 7.25 In practice, of course, the weight given to an impropriety will vary depending on its seriousness. Some judgments we reviewed, however, did not clearly acknowledge the fact that an impropriety (and sometimes a significant one) had occurred at all. In other judgments, the impropriety was acknowledged but appeared to be given relatively little consideration in the balancing exercise. For example:
- (a) sometimes the impropriety was assessed as not very serious despite involving a significant breach of an important right or interest, because there was no evidence of bad faith by police (which, as we discuss below, is almost always the case); and
  - (b) the reasoning in some cases focused primarily on factors favouring admission (such as the fact that the evidence was important to the prosecution case or the defendant was charged with a serious offence), giving the impression that these factors will tend to outweigh even significant improprieties.
- 7.26 Deficiencies of this kind were evident primarily in decisions involving improperly obtained real evidence. The courts typically showed an appropriate level of caution when deciding whether to admit improperly obtained defendants' statements under section 30 (where concerns about coercion or the reliability of a statement may arise).
- 7.27 We stress that deficiencies in reasoning of this kind were not found in a large number of decisions. They were, however, common enough to lend support to the concern expressed by some submitters and some members of our Expert Advisory Group that improprieties are not always taken seriously by the courts or that some judges err on the side of admitting evidence. We are conscious, too, that submitters told us defence counsel are now less likely to advise clients to challenge improperly obtained evidence because of their perception that challenges are unlikely to succeed.<sup>40</sup>

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<sup>38</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143].

<sup>39</sup> Cabinet Paper "Evidence Bill: Paper 2: Admissibility of Evidence" (4 December 2002) CAB 100/2002/1 at [29]; Letter to Joanna Davidson (Crown Counsel) to the Attorney-General "Legal Advice — Consistency with the New Zealand Bill of Rights Act 1990: Evidence Bill" (5 April 2005) at [6].

<sup>40</sup> Criminal Bar Association, Ethan Huda, Public Defence Service. See also Tania Singh "Criminal Practice Section: The exclusion of improperly obtained evidence" [2021] NZLJ 59 at 59.

- 7.28 We do not wish to speculate about whether the outcomes in particular cases may have been different if the seriousness of the impropriety had been given greater weight. Deficiencies in reasoning do not necessarily affect the outcome. For example, even if a particular judge clearly acknowledged the seriousness of an impropriety, it would not necessarily follow that they would exclude the evidence.
- 7.29 It is reasonable to conclude, however, that deficiencies in reasoning affect the outcome at least some of the time. In any event, the primary aim of section 30 is to maintain the integrity of the justice system. This is achieved not only by excluding evidence in appropriate cases but also by demonstrating respect for the rule of law and human rights in judgments of the courts. The courts must consistently show they are taking improper conduct by state agencies<sup>41</sup> seriously. We consider the wording of section 30 could provide better guidance to the courts on how to do so. As we discuss further in the next section, submissions showed significant and broad-based support for reform to require clear justification to admit improperly obtained evidence.
- 7.30 The second issue is that the unstructured nature of the section 30 balancing test has led to inconsistency in how the test is applied. For example, as we discuss later in this chapter, some of the section 30(3) factors are variously treated as favouring admission or exclusion of the evidence without good reason. This makes it difficult to predict outcomes, which affects the ability of counsel to advise their clients on whether to challenge the admissibility of evidence. It may also mean that similar cases are not being treated alike.
- 7.31 There was a perception among submitters that outcomes can depend on the inclinations of particular judges — consistent with the view expressed by Gault J in *Hamed*.<sup>42</sup> Support for this view is found in the number of split decisions on the application of the balancing test in the appellate courts.<sup>43</sup> Submitters were concerned that the flexible nature of section 30 and the lack of guidance on its application means it can be interpreted to fit the desired outcome rather than guiding principled decision-making. Similar views have also been expressed by commentators.<sup>44</sup>
- 7.32 These inconsistencies in section 30 decisions and perceptions about the application of the balancing test are concerning. They suggest that the section 30 test in its current form does not support public confidence in the justice system. We consider it is desirable

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<sup>41</sup> For the avoidance of doubt, s 30 can apply to evidence obtained unfairly by private individuals (see, for example, *Dabous v R* [2014] NZCA 7). However, such cases will be rare and will still involve a decision by the prosecutor to rely on the evidence (since s 30 only applies to criminal cases).

<sup>42</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [282].

<sup>43</sup> For example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305, *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26; *R v Perry* [2016] NZSC 102; *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710; *R v Reti* [2020] NZSC 16, [2020] 1 NZLR 108; *Kalekale v R* [2016] NZCA 259; *W (CA226/2019) v R* [2019] NZCA 558.

<sup>44</sup> See, for example, Scott Optican “The Kiwi Way: New Zealand’s Approach to the Exclusion in Criminal Trials of Evidence Improperly Obtained by the Police” (2021) 24 New Crim L Rev 254 at 269; Bernard Robertson “Student Companion — Evidence” [2020] NZLJ 99 at 99; Kent Roach “Reclaiming Prima Facie Exclusionary Rules in Canada, Ireland, New Zealand, and the United States: The Importance of Compensation, Proportionality, and Non-Repetition” (2020) 43(3) Manitoba Law Journal 1 at 26; Dimitrios Giannouloupoloulos *Improperly obtained evidence in Anglo-American and Continental Law* (Hart Publishing, Oxford, 2019) at 240–241; Bernard Robertson “Evidence” [2018] NZLJ 210 at 211; Nikita Mitskevitch and Tania Singh “*W v R (CA597/2016)* [2017] NZCA 522: A privacy dichotomy within the context of New Zealand’s human rights obligations and “seriousness” under s 30 of the Evidence Act” [2018] NZLJ 240 at 243; Scott Optican “*Hamed, Williams and the exclusionary rule: critiquing the Supreme Court’s approach to s 30 of the Evidence Act 2006*” (2012) NZ L Rev 605 at 620.

to provide a clearer structure to encourage a more consistent application of the balancing test while retaining sufficient flexibility to allow judges to address the particular facts before them.

### Overview of recommended amendments to section 30

- 7.33 In this chapter, we make three recommendations to help address the two issues identified above.
- (a) First, we recommend specifying in section 30(2)(b) that the judge must exclude improperly obtained evidence unless satisfied it is in the public interest to admit it. This recommendation will promote greater consistency in relation to the weight judges attach to improprieties and encourage the courts to clearly explain why admission is in the public interest (where that is the case).
  - (b) Second, we recommend identifying the competing public interests to be weighed against each other under section 30(2)(b). This recommendation is intended to resolve confusion about the current wording of the provision and provide a clearer framework to guide judicial decision-making.
  - (c) Third, we recommend clarifying the application of the section 30(3) factors. This recommendation would encourage a more structured approach to the balancing test, supporting more consistent judicial reasoning and more predictable outcomes over time. It would also help to ensure the factors are applied in a principled way that informs a proper assessment of the public interests on both sides of the balancing equation.
- 7.34 These recommendations are designed to work together. If, however, the first recommendation is not progressed, the other recommendations could still be implemented. We explain how this would work in relation to the section 30(2)(b) test when discussing the second recommendation.
- 7.35 Some submitters appeared to have broader concerns about the fairness of a balancing test where evidence has been improperly obtained.<sup>45</sup> In the context of this review, which is concerned with the operation of the Act, we have not undertaken a first-principles consideration of New Zealand's approach to exclusion of improperly obtained evidence. Instead, our recommendations aim to address the problems identified above (so far as possible) in a manner consistent with the underlying policy of section 30.<sup>46</sup>
- 7.36 Adjunct Professor Elisabeth McDonald expressed the view that empirical research is needed to justify reform. As noted above, we conducted a snapshot case study of section 30 decisions in te Kōti Matua | High Court, Court of Appeal and Supreme Court over a three-year period. Further review of cases, including at the District Court level, might have added to the information obtained in our study. However, it would have been difficult to undertake both because of the statutory timeframe for completion of this

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<sup>45</sup> In particular, the Auckland District Law Society and Te Matakahi | Defence Lawyers Association New Zealand considered our options for reform would not adequately protect defendants' rights. They said there should be a clear statement of principle that an effective and credible system of justice favours exclusion unless the prosecution satisfies the court that admission will not condone improprieties in gathering evidence and fail to give substantive effect to human rights and the rule of law. Similarly, Stephen Hudson advocated automatic exclusion of evidence that is unfairly obtained.

<sup>46</sup> For further detail, see our discussion of New Zealand's approach to exclusion of improperly obtained evidence in our Issues Paper at [7.6]–[7.8] and [7.15]–[7.21].



review and because of the limited online availability of District Court decisions. Further, as we have noted and submitters emphasised, there would have been significant limits to the utility of any such study. For example, it would not have shown the extent to which defendants are being deterred from challenging evidence due to the perception that such challenges are unlikely to succeed. We are not convinced a more extended empirical study would have added much to what we already know.

- 7.37 We consider there is sufficient evidence of a problem in practice to recommend reform based on our review of case law, the submissions we received, commentary on section 30 and our own analysis of deficiencies in the statutory wording.

## THE WORDING OF THE BALANCING TEST IN SECTION 30(2)(b)

### Specifying what the judge must be satisfied of

#### Issue

- 7.38 Currently, once the court has found that evidence was improperly obtained, it must apply the balancing test to determine whether or not the exclusion of the evidence is proportionate to the impropriety.<sup>47</sup> Section 30 does not identify a starting point for that determination — for example, by providing that the evidence should be excluded unless certain considerations outweigh others. It does not direct a court what to do if the factors for and against exclusion are evenly balanced.
- 7.39 This contrasts with other provisions in the Act that similarly require the court to consider competing interests. For example, admissibility provisions typically provide that certain evidence is inadmissible unless certain criteria are met,<sup>48</sup> require the court to exclude certain evidence “unless” satisfied of certain matters<sup>49</sup> or determine admissibility based on whether certain considerations are “outweighed” by others.<sup>50</sup>
- 7.40 As noted above, the current approach in section 30 may be considered inconsistent with the view expressed in *Shaheed* that, as a starting point, a breach of a constitutional right should be given significant weight.<sup>51</sup> While the reasoning in *Shaheed* was confined to breaches of the NZ Bill of Rights, the statutory extension of the test to other types of improprieties in section 30 suggests Parliament considered the same approach was warranted wherever evidence has been obtained unlawfully or unfairly.

#### Consultation

##### What we asked submitters

- 7.41 In our Issues Paper, we suggested it is arguable that, once a court has found evidence was obtained through improper means, the prosecution should have to show it is

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<sup>47</sup> Evidence Act 2006, s 30(2)(b).

<sup>48</sup> For example, ss 17–18 (hearsay); ss 23–25 (opinion evidence); s 35 (previous consistent statements).

<sup>49</sup> Evidence Act 2006, ss 28(2) and 29(2).

<sup>50</sup> Evidence Act 2006, ss 8 and 43(1). See similarly ss 57(3)(d), 68(2), 69(2) and 70(1), which relate to privilege and disclosure.

<sup>51</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143].

nonetheless appropriate to admit the evidence.<sup>52</sup> Otherwise, the courts may be seen as allowing improper conduct in the gathering of evidence without good reason. This may have a detrimental effect on public confidence in the justice system and increase the likelihood of future improprieties.

- 7.42 We asked submitters whether section 30(2)(b) should be amended to place an onus on the prosecution to satisfy the judge that the public interest favours admission of the evidence, similar to the approach in many Australian jurisdictions.<sup>53</sup> For example, it could require exclusion of improperly obtained evidence unless the public interest in its admission outweighs the public interest in its exclusion.<sup>54</sup>
- 7.43 We noted the adoption of this approach in Australia did not appear to have tipped the balance too far in favour of exclusion — if anything, it raised the question whether our option for reform would have a significant impact.<sup>55</sup> We suggested, however, that it may result in a modest rebalancing of the current approach by emphasising the need for clear justification to admit improperly obtained evidence.
- 7.44 We indicated we did not consider this option for reform would result in a return to the rigidity of the *prima facie* exclusionary rule that existed before *Shaheed* (or to the problem of judges compensating for that rigidity by introducing variability into the meaning of “unreasonable” search and seizure).<sup>56</sup> This is because the courts are now used to a much more flexible approach and to accommodating a broad range of factors in deciding whether to admit improperly obtained evidence.

### Results of consultation

- 7.45 Fifteen submitters commented on this option for reform. Ten supported amendment<sup>57</sup> while five disagreed there was a need for reform.<sup>58</sup> One additional submitter did not specifically comment on reform options but expressed concern about the number of breaches of rights being tolerated and suggested *Shaheed* did not envisage the changes that had actually occurred.<sup>59</sup>
- 7.46 The Public Defence Service suggested this amendment would help to create a mindset shift. It considered it was “appropriate that the prosecution (who are seeking to admit improperly obtained evidence) should carry the onus of convincing the judge why that should be allowed”.

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<sup>52</sup> Issues Paper at [7.45].

<sup>53</sup> Evidence Act 1995 (Cth), s 138(1); Evidence Act 2011 (ACT), s 138(1); Evidence Act 1995 (NSW), s 138(1); Evidence (National Uniform Legislation) Act 2011 (NT), s 138(1); Evidence Act 2001 (Tas), s 138(1); Evidence Act 2008 (Vic), s 138(1). These provisions state that improperly obtained evidence “is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained”. See also Issues Paper at [7.51]–[7.52].

<sup>54</sup> Issues Paper at [7.46].

<sup>55</sup> Issues Paper at [7.52]–[7.53].

<sup>56</sup> Issues Paper at [7.48]–[7.50].

<sup>57</sup> Alexandra Allen-Franks, Auckland District Law Society, Tim Cochrane, Criminal Bar Association, Defence Lawyers Association New Zealand, Stephen Hudson, Luke Cunningham Clere, Don Mathias, Public Defence Service, Wellington Community Justice Project.

<sup>58</sup> Tari Ture o te Karauna | Crown Law Office, Associate Professor Anna High, Adjunct Professor Elisabeth McDonald, New Zealand Law Society, New Zealand Police.

<sup>59</sup> Ethan Huda (referring, in particular, to the number of warrantless searches now carried out in New Zealand).

- 7.47 Luke Cunningham Clere observed it is reasonable to assume a return to presumptive inadmissibility would reintroduce some structure to the exercise. It suggested the strength of the presumption should depend on the seriousness of the impropriety as it would be counter to the interests of justice for technical, inadvertent or minor improprieties to result in exclusion. It was also unsure how much of a practical impact such a reform would have. It therefore considered clarifying the section 30(3) factors (which we discuss below) would be the most important reform.
- 7.48 Alexandra Allen-Franks considered this option to be consistent with the Court's aims in *Shaheed* — it would give considerable weight to the breach of a right while recognising there may be reasons why the evidence should be admitted in a particular case. It would also be consistent with the principle of maintaining the integrity of the justice system since it would require the courts to explore the issue of unlawful or illegal conduct. She agreed with the preliminary view in our Issues Paper that this approach would not return to the *prima facie* exclusionary rule. She suggested the Australian experience demonstrates this approach leads (in general) to careful consideration of whether evidence needs to be admitted in the context of a finding of impropriety or illegality. She did, however, consider the argument for reform to be stronger in relation to breaches of the NZ Bill of Rights and other enactments (compared to where evidence is obtained “unfairly”).<sup>60</sup>
- 7.49 Don Mathias also considered the Australian approach to be sensible. He noted the Australian experience does not suggest this change would result in too much evidence being excluded. To the contrary, he said the amendment may not ultimately lead to a change in results.
- 7.50 Tim Cochrane submitted our option for reform would provide marginally better protection against unjustified interference with rights to privacy and other implicated rights. He suggested it would not be overly onerous on the prosecution as they should reasonably be expected to be alive to public interest considerations in any event.
- 7.51 Four of the submitters that supported reform suggested more significant amendments than our option proposed. The ADLS and Defence Lawyers Association supported a more wholesale recalibration of section 30 to return to the *prima facie* exclusionary rule and more squarely reflect all three of the rationales for the exclusion of evidence. They were concerned that “a more diluted approach would fail to recognise police’s adoption of increasingly radical investigative methods that are designed to defeat or circumvent the protections offered by [the NZ Bill of Rights] and the [Chief Justice’s Practice Note on Police Questioning]”. The Public Defence Service noted some of its lawyers suggested the amendment could require the public interest in admission to *clearly* outweigh the public interest in exclusion. Stephen Hudson submitted unfairly obtained evidence should be automatically excluded to disincentivise unlawful action by police.
- 7.52 The submitters that opposed amendment were not convinced of the need for reform. Te Tari Ture o te Karauna | Crown Law Office considered amendment would be purely symbolic because in practice the prosecution already advances grounds for admission of the evidence and the judge must be satisfied that they favour admission. The NZLS saw weight in the argument that, if the Crown has obtained evidence in breach of the law or the defendant’s rights, it should have to justify the admission of that evidence. However,

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<sup>60</sup> Noting, in particular, that s 5 of the New Zealand Bill of Rights Act 1990 means every finding of a breach of a right is a finding that the restriction on the right was not justified.

it said this arguably already happens. It considered our option for reform would only affect those cases where the factors are evenly matched, which does not occur often enough to warrant amendment. Associate Professor High was also unsure the amendment would make any difference in practice and was concerned it would cause confusion in relation to existing case law.

- 7.53 Police was concerned our proposed amendment would risk giving less weight to the public interest in the investigation and prosecution of crime.

### *The need for reform*

- 7.54 We conclude reform is desirable to signal that the courts should give significant weight to the impropriety as a starting point (although the precise weight given to a particular impropriety will, of course, depend on its seriousness, as we discuss below). We see this as consistent with the original intent of the balancing test as set out in *Shaheed*. The Court of Appeal anticipated both that the breach of a right would be given significant weight and that, where it is outweighed by the accumulation of other factors, “the conscientious carrying out of the balancing exercise will at least demonstrate that the right has been taken seriously”.<sup>61</sup>
- 7.55 As discussed above, we heard significant concerns from submitters that section 30 decisions are not consistently giving effect to this original intent. Our snapshot case study suggested these concerns have merit. The reasoning in some judgments we examined did not appear to give significant weight to the impropriety or to demonstrate due regard for both sides of the balancing equation. Although this was not a large number of decisions, it was enough to bear out the concerns of submitters and commentators that section 30 is not being applied in a consistent and principled way.<sup>62</sup> We are also conscious of the point made by several submitters that defence counsel’s perceptions about the utility of section 30 may mean challenges are no longer being taken.
- 7.56 There is a strong public interest in ensuring that human rights and the rule of law are upheld. Public confidence in the justice system requires that the courts are not seen as routinely condoning improprieties in the gathering of evidence or failing to deter similar improprieties in future. On the other hand, public confidence in the justice system may also be damaged if relevant and probative evidence is withheld from the fact-finder without good reason, defendants are perceived as avoiding conviction based on technicalities or defence counsel are encouraged to challenge every possible impropriety. In some cases, it will be appropriate to admit improperly obtained evidence — particularly where the impropriety is minor, the offence serious and the evidence highly probative. Where that is the case, we think it is important that the courts clearly explain why admission is in the overall public interest notwithstanding the impropriety that has occurred.

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<sup>61</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [144].

<sup>62</sup> See, for example, Dimitrios Giannouloupoulos *Improperly Obtained Evidence in Anglo-American and Continental Law* (Hart Publishing, Oxford, 2018) at 240–241; Scott Optican “*Hamed, Williams and the exclusionary rule: Critiquing the Supreme Court’s approach to s 30 of the Evidence Act 2006*” [2012] NZ L Rev 605 at 636–637; Kent Roach “Reclaiming Prima Facie Exclusionary Rules in Canada, Ireland, New Zealand, and the United States: The Importance of Compensation, Proportionality, and Non-Repetition” (2020) 43(3) *Manitoba Law Journal* 1 at 26; Bernard Robertson “Student Companion — Evidence” [2020] NZLJ 99 at 99 (referring to s 30 as “a lottery”).

- 7.57 The wording of section 30(2)(b) does not signal the need for clear justification to admit improperly obtained evidence. It only requires the court to “determine *whether or not* the exclusion of the evidence is proportionate to the impropriety”. By contrast, other admissibility provisions in the Act require exclusion unless the court is satisfied a statutory test is met.<sup>63</sup> While section 30(2)(b) states that the balancing test must give “appropriate weight to the impropriety”, it does not indicate what “appropriate weight” means, nor does case law provide any clear guidance on this issue.
- 7.58 There was considerable support for reform from submitters. While submitters primarily focused on the options for reform, some referred to the desirability of a mindset shift<sup>64</sup> and of providing better protection against breaches of rights.<sup>65</sup>
- 7.59 The Judicial Advisory Committee did not support reform, although it conveyed a minority view among some judges that reform is desirable. The Committee noted the absence of any clear evidence that the current test is resulting in unfair outcomes. Some submitters made similar comments. On the other hand, some members of our Expert Advisory Group considered evidence of unfair outcomes is not relevant and is unlikely to be found since section 30 is not aimed at ensuring fair outcomes.
- 7.60 We agree with the latter view. Section 30 is not primarily concerned with achieving fair outcomes for individuals in the sense of ensuring the evidence presented to the fact-finder can support a safe conviction. That is addressed by other provisions such as section 28 (unreliable statements). Section 30 is concerned with the wider public interest in maintaining an effective and credible system of justice. Depending on the strength of the competing public interests at play (which we discuss in the next section), evidence must sometimes be excluded to demonstrate respect for the rule of law and the requirements of *procedural* fairness in obtaining evidence. Procedural fairness includes, for example, compliance with the rights of persons arrested or detained<sup>66</sup> and the Chief Justice’s Practice Note on Police Questioning.<sup>67</sup> Conduct by investigators that is unlawful or procedurally unfair will not necessarily result in *outcomes* that are unfair or convictions that are unsafe.<sup>68</sup> Accordingly, we do not consider evidence of unfair outcomes is needed to justify reform. Instead, we have focused on whether the reasoning in section 30 judgments shows the test is being applied as it was intended.

## Recommendation

**R8**

Amend section 30(2)(b) to require the judge to exclude improperly obtained evidence unless satisfied it is in the public interest to admit the evidence.

<sup>63</sup> Evidence Act 2006, ss 28 and 29.

<sup>64</sup> Public Defence Service.

<sup>65</sup> Alexandra Allen-Franks, Tim Cochrane.

<sup>66</sup> New Zealand Bill of Rights Act 1990, s 23.

<sup>67</sup> *Practice Note on Police Questioning* (s 30(6) Evidence Act 2006) [2007] 3 NZLR 297.

<sup>68</sup> Where an impropriety gives rise to concerns about the reliability of the evidence obtained, that can be considered under s 30(3)(c) as part of the balancing test (*R v Shaheed* [2002] 2 NZLR 377 (CA) at [151]). However, the focus of s 30 is on the improper conduct rather than preventing the admission of unreliable evidence (which is directly addressed by s 28).

- 7.61 This recommendation should be read and implemented alongside recommendation 9 below, which also relates to the wording of the section 30(2)(b) balancing test. Our discussion here relates to the general desirability of requiring exclusion of improperly obtained evidence unless the judge is satisfied of the case for admission. In the next section, we show how this could be incorporated into a revised section 30(2)(b) along with other amendments to identify the two competing public interests that must be weighed when applying the test.
- 7.62 In our Issues Paper, we described our option for reform as placing an “onus on the prosecution”, consistent with how the approach has been described in Australia.<sup>69</sup> On reflection, we prefer not to use that wording when describing our recommendation. Neither the Australian legislation nor the amendment discussed in our Issues Paper explicitly require the prosecution to meet a particular standard of proof. Rather, their key feature is that the evidence must be excluded unless the public interest in exclusion is *outweighed* by the public interest in admission. In practice, the prosecution would need to present evidence and submissions to enable the court to make such a finding. Ultimately, however, the question whether to admit the evidence would remain an evaluative one for the judge after weighing the relevant factors, consistent with most other admissibility provisions in the Act.<sup>70</sup>
- 7.63 There was strong support for this option for reform among submitters. Those who supported it generally considered it would encourage a more structured analysis of the seriousness of the impropriety and the reasons why admission of the evidence might nonetheless be justified. We agree. Our recommended reform would perform an important signalling function by demonstrating Parliament’s intent that the courts should give significant weight to the impropriety. It would also more clearly prompt the courts to explain why admission is nonetheless appropriate in the circumstances where that is the case. This would support public confidence in the justice system by helping to ensure the courts are seen as taking breaches of rights and laws seriously. We agree with the Australian Law Reform Commission that:<sup>71</sup>
- [T]he policy considerations supporting non-admission of the evidence suggest that, once misconduct is established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained.
- 7.64 The minority of submitters that did not support this amendment did so principally on the basis that it may not achieve anything in practice. A similar concern was expressed by some members of our Expert Advisory Group. The Crown Law Office and NZLS both said

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<sup>69</sup> See, for example, Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission *Review of the Uniform Evidence Acts* (ALRC DP 69/NSWLRC DP 47/VLRC DP, 2005) at [14.78]; Australian Law Reform Commission *Evidence (Volume 1)* (ALRC 26 (Interim), 1985) at 536–537.

<sup>70</sup> See, for example, ss 28(2), 29(2), 44(2) and 44AA(4). Compare ss 45(2) and 46, which require the prosecution to prove on the balance of probabilities that the circumstances in which an identification was made have produced a reliable identification. Unlike the assessment under s 30, this is essentially a factual inquiry.

<sup>71</sup> Australian Law Reform Commission *Evidence (Volume 1)* (ALRC 26 (Interim), 1985) at 536–537. See more recently Australian Law Reform Commission and others *Uniform Evidence Law: Report* (ALRC R102, NSWLRC R112, VLRC Final Report, December 2005) at [16.92], suggesting shifting the onus to the prosecution “emphasises that crime control considerations should be balanced equally with the public interest in deterring police illegality, protecting individual rights and maintaining judicial legitimacy”.

that, in practice, the prosecution already needs to establish a case for admitting the evidence. The NZLS added that our proposed amendment would only make any difference in cases where the factors are evenly matched, which is rare.

- 7.65 We accept there is a risk the amendment we propose will not have a significant practical impact. This will depend on how judges interpret and apply the amended provision, which is difficult to predict. The test would still depend on how the competing public interests are weighted so the courts would continue to have considerable flexibility in how they apply it in a particular case. We think it is likely, however, that the amendment would have an appreciable (though not radical) influence on the general tenor of section 30 judgments over time. If Parliament chooses to enact the amendment, that change would provide a powerful reinforcement of the intended effect of the section. We would expect this to be taken into account by the courts when interpreting (and making clear their interpretation of) the amended provision.
- 7.66 We do not expect our proposed amendment will change the outcome in the majority of cases.<sup>72</sup> As we have said, the majority of the judgments we reviewed did appear to give appropriate weight to the impropriety. Our recommendation is intended to ensure this approach is taken consistently and is reflected in judicial reasoning. In some cases, this may lead to a different result. In other cases, it will not.
- 7.67 We do not consider the impact of the amendment would be limited to cases where the factors are evenly matched (as the NZLS submitted). As we have said, currently some judgments do not sufficiently assess the factors relevant to the seriousness of the impropriety or appear to give them inadequate weight. Our proposed amendment would help to ensure both sides of the balancing equation are properly assessed and explained.
- 7.68 Police was the only submitter to suggest that our proposed amendment could shift the balancing test too far towards exclusion, giving less weight to the public interest in the investigation and prosecution of crime. It was notable that the Crown Law Office and Luke Cunningham Clere did not appear to share this view, instead suggesting the amendment may be of limited practical effect. Overall, there was little concern from submitters that our proposed amendment would result in too much evidence being excluded or lead to a return to the pre-*Shaheed* prima facie exclusionary rule. As we discussed in our Issues Paper, we see little risk of this given the courts are now used to a flexible balancing test and would continue to consider a wide range of factors when deciding whether to admit improperly obtained evidence.<sup>73</sup>
- 7.69 The Judicial Advisory Committee was concerned our proposed amendment could significantly increase the number of defence applications to exclude improperly obtained evidence, with resourcing implications for the courts. In the short term, we agree there may be an increase in defence applications although we do not necessarily accept this is

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<sup>72</sup> The Australian experience supports the view that any increase in exclusion of evidence is likely to be small. The adoption in Australian legislation of an onus on the prosecution to establish the case for admission may have led to a small increase in the number of cases in which improperly obtained evidence is excluded compared to the position at common law (Bram Presser “Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence” [2001] 25 MULR 757 at 784–785). Overall, our review of Australian case law suggests improperly obtained evidence is still admitted in more cases than not. However, our review of Australian cases was not comprehensive. It captured 47 criminal cases (from 2013–2023) in which evidence was found to be improperly obtained.

<sup>73</sup> Issues Paper at [7.48]–[7.50].

a bad thing. Any legislative amendment will take time to bed in while new case law develops. Over time, however, it should become clearer when the courts are likely to admit or exclude evidence under the new test. This will inevitably influence both prosecution decisions whether to offer improperly obtained evidence and defence decisions whether to seek its exclusion.

- 7.70 A related point was raised by Associate Professor High, who submitted that amendment could cause confusion in relation to existing case law. The impact on existing case law is always a consideration when amending legislation. In relation to section 30, however, the existing case law provides relatively little guidance on the application of the balancing test. It is also inconsistent in many respects (as we discuss further below). We consider our proposed amendments, taken together, will assist decision-making and increase certainty over time by providing more structure around the application of the balancing test. This should also help defence counsel to advise clients more accurately on whether an application to exclude improperly obtained evidence is likely to succeed.
- 7.71 In terms of the Act's purpose of securing the just determination of proceedings, we consider our proposed reform is consistent with section 6(a), which refers to "providing for facts to be established by the application of logical rules".<sup>74</sup> It would make it clear that the courts should err on the side of exclusion if there is any uncertainty about the result. We also see our recommendation as consistent with section 6(b), which refers to "providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990" (although section 30 does, of course, apply to a wider range of improprieties).<sup>75</sup>

## Clarifying the public interests to be weighed

### Issue

- 7.72 Section 30(2)(b) sets out the test for determining whether to exclude improperly obtained evidence. It requires the court to undertake "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".
- 7.73 As we explained in our Issues Paper, this provision (as well as the absence of clear case law on its application) has attracted criticism from commentators.<sup>76</sup> Although it refers to a "balancing process", it does not specify what considerations are being balanced against each other or how the courts should decide what an effective and credible system of justice requires.
- 7.74 The Supreme Court made it clear in *Hamed* that an "effective and credible system of justice" does not represent one side of the balancing equation — it can favour admission or exclusion depending on the circumstances.<sup>77</sup> As Blanchard J explained:<sup>78</sup>

<sup>74</sup> Evidence Act 2006, s 6(a).

<sup>75</sup> Evidence Act 2006, s 6(b).

<sup>76</sup> Issues Paper at [7.55]–[7.58].

<sup>77</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [60]–[63] per Elias CJ, [187]–[189] per Blanchard J, [229]–[230] per Tipping J and [258] per McGrath J.

<sup>78</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [187].



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

- 7.75 A minor amendment in 2017 sought to clarify that the need for an effective and credible system of justice is not a counterpoint to the impropriety.<sup>79</sup> However, because the provision refers to a “balancing process” that takes account of both “the impropriety” *and* “the need for an effective and credible system of justice”, it may still imply that these are the two considerations being balanced against each other.
- 7.76 Further, the 2017 amendment suggests the need for an effective and credible system of justice is the underlying aim of the section rather than one side of the balancing equation. That being the case, it is arguable section 30 should more clearly identify what is being “balanced” against what and how (if at all) the need for an effective and credible system of justice is relevant. As noted above, preliminary feedback and the submissions we received suggested decisions under section 30 are unpredictable and inconsistent. While it is difficult to say with certainty, the lack of guidance about the nature of the balancing test in section 30(2)(b) may be contributing to this.

## Consultation

### What we asked submitters

- 7.77 We sought feedback on whether section 30(2)(b) should be amended to clarify what is being “balanced” against what. If so, we suggested one option for reform would be to amend section 30(2)(b) to require the court to:
- ... determine whether exclusion is proportionate to the impropriety by balancing the public interest in recognising the seriousness of the impropriety against the public interest in having the evidence considered by the fact-finder at trial.
- 7.78 We said an alternative approach would be simply to refer to “the public interest in exclusion of the evidence” and “the public interest in the admission of the evidence” (similar to the Australian approach). This would retain greater flexibility to take into account any public interests the court considers relevant but would also provide less guidance on the nature of the key public interests at stake.
- 7.79 Finally, we asked whether the reference to “an effective and credible system of justice” should be removed from section 30(2)(b) based on preliminary feedback that its inclusion is unhelpful when setting out the balancing test. We suggested a separate subsection could be inserted stating that the purpose of the section 30 is to maintain an effective and credible system of justice if this was considered necessary.

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<sup>79</sup> Section 30(2)(b) originally required a balancing process that “gives appropriate weight to the impropriety *but also* takes proper account of the need for an effective and credible system of justice” (emphasis added). The “but also” was changed to “and” by s 10 of the Evidence Amendment Act 2016.

## Results of consultation

- 7.80 Twelve submitters responded to these questions. Eight submitters supported clarifying the balancing test,<sup>80</sup> two opposed reform<sup>81</sup> and two proposed more significant reform to protect defendants' rights.<sup>82</sup> Of the submitters that supported clarification, four explicitly agreed with our proposed wording,<sup>83</sup> one preferred the alternative approach of referring to the public interest in exclusion and the public interest in admission<sup>84</sup> and three did not express a clear view.<sup>85</sup>
- 7.81 Submitters in favour of clarification said our option for reform would better encapsulate the ultimate focus of the test,<sup>86</sup> make the test clearer and more workable<sup>87</sup> and usefully emphasise that the interests being balanced are both public interests.<sup>88</sup>
- 7.82 Associate Professor High, while supporting clarification of the test, preferred the alternative approach of referring to "the public interest in exclusion of the evidence" and "the public interest in the admission of the evidence" (similar to the Australian formulation). She said this language is simpler, which would minimise the risk of unintended consequences. Alexandra Allen-Franks submitted the Australian formulation is broad because it applies to both criminal and civil proceedings.<sup>89</sup> She noted this concern does not arise if section 30 remains limited to criminal proceedings (although she also suggested our proposed wording could apply to civil proceedings).
- 7.83 Police opposed amendment on the basis that it risks creating more uncertainty than it would solve. The ADLS and Defence Lawyers Association considered our proposed amendment would not adequately protect defendants' rights. They said there should be a clear statement of principle that an effective and credible system of justice favours exclusion unless the prosecution satisfies the court that admission will not condone improprieties in gathering evidence and fail to give substantive effect to human rights and the rule of law.
- 7.84 Seven submitters commented on whether the reference to an effective and credible system of justice should be removed or placed in a separate subsection. None specifically supported removing the reference from the section entirely although one noted its

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<sup>80</sup> Alexandra Allen-Franks, Criminal Bar Association, Associate Professor Anna High, Luke Cunningham Clere, Don Mathias, New Zealand Law Society, Public Defence Service, Wellington Community Justice Project.

<sup>81</sup> New Zealand Police. Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but said she did not support any of the proposed changes to s 30 and considered empirical research was required to validate any reform.

<sup>82</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>83</sup> Luke Cunningham Clere, Don Mathias, New Zealand Law Society, Public Defence Service.

<sup>84</sup> Associate Professor Anna High.

<sup>85</sup> Alexandra Allen-Franks, Criminal Bar Association, Wellington Community Justice Project.

<sup>86</sup> New Zealand Law Society.

<sup>87</sup> Public Defence Service.

<sup>88</sup> Don Mathias.

<sup>89</sup> Evidence Act 1995 (Cth), s 138; Evidence Act 2011 (ACT), s 138; Evidence Act 1995 (NSW), s 138; Evidence (National Uniform Legislation) Act 2011 (NT), s 138; Evidence Act 2001 (Tas), s 138; Evidence Act 2008 (Vic), s 138. Subsection (1) of these provisions refers to whether the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.

inclusion is not strictly necessary.<sup>90</sup> Three submitters supported the inclusion of a new subsection in section 30 stating that the purpose of the section is to maintain an effective and credible system of justice.<sup>91</sup> Two submitters said the reference to an effective and credible system of justice should remain in section 30(2).<sup>92</sup> Two submitters suggested alternative approaches.<sup>93</sup>

- 7.85 The submitters that favoured a new subsection agreed maintaining an effective and credible system of justice is properly understood as the underlying policy of the balancing test.<sup>94</sup> They considered placing it in a separate subsection would ensure it is not confused with a balancing factor. Don Mathias observed it is not strictly necessary to refer to this principle in the legislation since it reflects what the courts do anyway. However, he considered the inclusion of the term “did no harm” provided it is not subjected to minute legal analysis.
- 7.86 Police and the Criminal Bar Association preferred to retain the current reference to an effective and credible system of justice in section 30(2)(b). Police noted there is now clear guidance on the meaning of the phrase and amendment could create uncertainty.
- 7.87 Alexandra Allen-Franks and the NZLS did not express a view on whether the phrase should be retained in section 30(2)(b) but suggested different ways of incorporating it in the Act if it is removed from that paragraph. Alexandra Allen-Franks suggested that, if a separate provision is considered necessary, it should be added to section 6 (the purpose provision) to the extent it is not already captured. The NZLS said it should be added to section 30(3) as a factor in the balancing test. The NZLS was concerned moving the phrase to a separate subsection could mean it is given more weight than the other section 30(3) factors and cause unfairness in the application of the balancing test.

### *The need for reform*

- 7.88 We conclude reform is desirable to clarify the application of the balancing test. Most submitters that addressed this issue thought section 30(2)(b) is unclear and would benefit from reform. The Judicial Advisory Committee also thought the test could be stated in plainer language. We agree.
- 7.89 The current test set out in section 30(2)(b) is ambiguous.<sup>95</sup> It requires the courts to conduct a “balancing process” but does not state what considerations should be balanced against each other. It may erroneously imply that “the need for an effective and credible system of justice” is a counterpoint to the impropriety, favouring admission of the evidence. Although the Supreme Court has made it clear this is not correct,<sup>96</sup> recent case law suggests it is a misapprehension that persists. As recently as 2020, the Court of Appeal explained section 30(2)(b) as involving “a balancing process that weighs the

<sup>90</sup> Don Mathias.

<sup>91</sup> Associate Professor Anna High, Don Mathias, Public Defence Service.

<sup>92</sup> Criminal Bar Association, New Zealand Police.

<sup>93</sup> Alexandra Allen-Franks, New Zealand Law Society.

<sup>94</sup> Associate Professor Anna High, Don Mathias, Public Defence Service.

<sup>95</sup> See Issues Paper at [7.56]–[7.58].

<sup>96</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [60]–[63] per Elias CJ, [187]–[189] per Blanchard J, [229]–[230] per Tipping J and [258] per McGrath J. See also *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148].

impropriety *against* the need for an effective and credible system of justice”.<sup>97</sup> Other cases appear to treat the need for an effective and credible system as equivalent to the public interest in conviction.<sup>98</sup>

- 7.90 Given this confusion about the test as it is currently framed, amendment to clarify the position is consistent with the Act’s purpose of securing the just determination of proceedings by (among other things) providing for facts to be established by the application of logical rules and enhancing access to the law of evidence.<sup>99</sup>
- 7.91 It seems likely the lack of clarity about the interests being balanced under section 30(2)(b) and the place of “the need for an effective and credible system of justice” in the balancing exercise are contributing to the concerns we identified above in discussing the operation of the section 30 balancing test. Those concerns are that some judgments appear to give insufficient weight to the impropriety and that the application of the test is unpredictable and inconsistent. It is difficult to expect the courts to conduct a careful weighing of the competing public interests at stake or to do so in a consistent way when the provision does not specify what those interests are.

### Recommendation

#### R9

If recommendation 8 is accepted:

- a. amend section 30(2)(b) to require the judge to exclude improperly obtained evidence unless satisfied that the public interest in recognising the seriousness of the impropriety is outweighed by the public interest in having the evidence considered by the fact-finder at trial; and
- b. repeal section 30(4).

OR

If recommendation 8 is not accepted, amend section 30(2)(b) to require the judge to determine whether exclusion is proportionate to the impropriety by balancing the public interest in recognising the seriousness of the impropriety against the public interest in having the evidence considered by the fact-finder at trial.

- 7.92 Our preferred approach is to implement this recommendation together with recommendation 8 above. If, however, recommendation 8 is not progressed, this recommendation still stands and could be implemented on its own. We have shown in the recommendation text how section 30(2)(b) would be framed in each scenario. In both cases, the provision would identify the two public interests to be weighed against each other.
- 7.93 If recommendation 8 is accepted, the first public interest would need to be outweighed by the second public interest for the evidence to be admitted. Because the amendment

<sup>97</sup> *Lee v R* [2020] NZCA 276 at [38] (emphasis added).

<sup>98</sup> A recent case that remains subject to publication restrictions referred to an effective and credible system of justice as requiring those who offend to be held to account.

<sup>99</sup> Evidence Act 2006, s 6(a) and (f).

would specify when improperly obtained evidence must be excluded, section 30(4) would no longer be required and should be repealed. That provision currently requires judges to exclude any improperly obtained evidence if, in accordance with subsection (2), they conclude that its exclusion is proportionate to the impropriety.

- 7.94 If recommendation 9 is implemented as a stand-alone reform to section 30(2)(b), the court would balance the two public interests to determine whether exclusion is proportionate to the impropriety (similar to the current test in section 30(2)(b)). If this approach is taken, section 30(4) should be retained.

### Identifying the relevant public interests

- 7.95 We recommend amending section 30(2)(b) to specify that the test involves weighing two public interests: the public interest in recognising the seriousness of the impropriety and the public interest in having the evidence considered by the fact-finder at trial. As we explained in our Issues Paper, these two public interests reflect the competing concerns that:<sup>100</sup>
- (a) on the one hand, admitting improperly obtained evidence may compromise the integrity of the justice system by condoning the use of improper methods to obtain evidence, failing to give substantive effect to human rights and the rule of law or failing to deter future use of improper methods to obtain evidence; and
  - (b) on the other hand, excluding improperly obtained evidence may allow those who commit crimes to escape conviction, diminishing respect for the administration of justice and putting public safety at risk.
- 7.96 This recommendation is not intended to significantly change the law, but rather to reflect appellate authority on the meaning of an effective and credible system of justice and ensure it is consistently applied.<sup>101</sup> The amended language would spell out more clearly what this principle requires in the context of the section 30 balancing test. Most submitters that addressed the appropriate wording of section 30(2)(b) supported our proposed amendment, suggesting it would be clearer and better reflect the balancing process required of the courts.
- 7.97 Only one submitter supported the alternative approach we identified of referring to “the public interest in exclusion of the evidence” and “the public interest in the admission of the evidence”.<sup>102</sup> While a similar approach is taken in Australian legislation, as Alexandra Allen-Franks pointed out, that may be because the Australian provisions apply to civil cases as well (where slightly different public interest considerations may apply). We consider that specifying the nature of the public interests involved would be of greater assistance to the courts when applying the test, particularly since the factors listed in section 30(3) are non-exhaustive.
- 7.98 Luke Cunningham Clere’s submission included a proposed amendment to section 30(2)(b) similar to our recommendation, except it simply referred to “the seriousness of the impropriety” instead of “the public interest in recognising the seriousness of the

<sup>100</sup> Issues Paper at [7.62]–[7.65].

<sup>101</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [60]–[63] per Elias CJ, [187]–[189] per Blanchard J, [229]–[230] per Tipping J and [258] per McGrath J.

<sup>102</sup> Associate Professor Anna High.

impropriety”. This is similar to how the Court of Appeal in *Williams* explained this side of the balancing test.<sup>103</sup> On the other hand, Don Mathias considered it desirable to emphasise that the interests involved are both public interests. We agree with that view. It is important to emphasise that the balancing test does not involve weighing the defendant’s interests (in excluding the evidence) against the public’s interest (in admitting the evidence). As the Court of Appeal recognised in *Shaheed*, society’s long-term interests may sometimes be better served by excluding improperly obtained evidence.<sup>104</sup> A justice system that condones impropriety in the gathering of evidence may not command the respect of the community, and guilty verdicts reached on the basis of such evidence may lack moral authority.

- 7.99 The test we propose in section 30(2)(b) would require an assessment of the *relative* strength of the two public interests. So, for example, if the public interest in recognising the seriousness of the impropriety is assessed as being on the lower end of the spectrum, it would be outweighed more easily by the public interest in having the evidence considered by the fact-finder. The inverse would also apply.

### Removing the reference to the need for an effective and credible system of justice

- 7.100 We suggest removing the reference to an effective and credible system of justice from section 30(2)(b) to avoid confusion about its relevance. As we said in our Issues Paper, we consider the need for an effective and credible system of justice reflects the underlying rationale for the section 30 test. It is not a criterion that can be “balanced” against the impropriety.
- 7.101 There was some support from submitters for inserting a separate subsection in section 30 stating that the purpose of the section is to maintain an effective and credible system of justice. Having given more thought to this option, we are not convinced it is appropriate. In particular, the Legislation Design and Advisory Committee’s *Legislation Guidelines* state policy purpose provisions should be “unambiguous” and “not add uncertainty or otherwise have unintended legal effects on the interpretation of the legislation”.<sup>105</sup> As we have discussed, one of our reasons for recommending reform is that the reference to the need for an effective and credible system of justice *is* ambiguous and its intended effect is unclear on the face of the section. We are concerned that its inclusion as a purpose provision might be equally unclear.
- 7.102 If section 30(2)(b) is amended as proposed, we consider the need for an effective and credible system of justice will be reflected in the outcome. It is unnecessary to explicitly refer to it in section 30. By way of comparison, most provisions in the Act do not specify their purpose — although where that purpose is clear (for example, from the legislative history), it may still be considered by the courts where interpretative issues arise.
- 7.103 The NZLS supported including the need for an effective and credible system of justice as a factor in section 30(3). In our view this would be inappropriate, for the reasons

<sup>103</sup> *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [245]–[247] (referring to the seriousness or magnitude of the breach).

<sup>104</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148]. See also *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 per Blanchard J at [187].

<sup>105</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021), Supplementary Materials: “Designing purpose provisions and statements of principle”.

discussed above. This principle is not a factor to be “balanced” but rather the underlying rationale for the balancing test.

- 7.104 We also considered Alexandra Allen-Franks’ suggestion that the “need for an effective and credible system of justice” could be included in section 6 (the Act’s purpose provision) to the extent it is not already covered. To some extent, similar considerations are already reflected in section 6. For example, it states the Act’s overriding purpose is the “just determination of proceedings” that can be achieved by, among other things, “providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990”. While we see the need for an effective and credible system of justice as an important principle, we do not recommend its insertion as a general principle in section 6. As discussed above, even in the context of section 30, we are concerned such a principle may have uncertain application. It is not clear how it might (or should) influence the interpretation of other provisions in the Act. We therefore consider it undesirable to recommend such a change, particularly without having consulted on it.

## APPLICATION OF THE SECTION 30(3) FACTORS IN THE BALANCING TEST

### Background

- 7.105 In this section, we discuss issues relating to section 30(3), which sets out factors to which a judge may have regard when applying the section 30(2)(b) balancing test. The list is non-exhaustive — other matters may also be considered. The factors listed are:

- (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it;
- (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith;
- (c) the nature and quality of the improperly obtained evidence;
- (d) the seriousness of the offence with which the defendant is charged;
- (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used;
- (f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant;
- (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others;
- (h) whether there was any urgency in obtaining the improperly obtained evidence.

### Overview of recommended amendments to section 30(3)

- 7.106 First, we discuss the overall structure of section 30(3). We recommend reform to specify to which public interest each factor relates. This aligns with our recommendation above to clarify the public interests to be weighed against each other in the section 30(2)(b) balancing test. It would need to be implemented in combination with that recommendation.
- 7.107 We then discuss each of the factors listed in section 30(3) individually. We recommend several amendments to clarify their application. Some of our proposed amendments to the factors aim to improve their clarity and accessibility. This is consistent with



section 6(f), which refers to enhancing access to the law of evidence.<sup>106</sup> We recommend they be implemented as part of our proposed reform of section 30(3). Our recommendations to amend the wording of section 30(3)(b) (the nature of the impropriety) and repeal section 30(3)(e) (other investigatory techniques) address significant issues with the current case law. We consider they could usefully be implemented alone, even if other amendments to section 30(3) are not pursued.

7.108 For ease of reference, all our proposed amendments relating to section 30(3) are set out together in the recommendation below. We explain our reasons for each part of the recommendation in the remainder of this section.

#### R10

Amend section 30(3) to provide the following:

For the purposes of subsection (2), when assessing the public interest in recognising the seriousness of the impropriety, the court may have regard to:

- a. the importance of any right breached or interest infringed by the impropriety and the seriousness of the intrusion on it;
- b. the extent to which it was known, or ought to have been known, that the evidence was being improperly obtained;
- c. whether the impropriety was necessary to avoid apprehended physical danger to the Police or others;
- d. the extent to which the impropriety resulted from urgency in obtaining the evidence; and
- e. any other relevant matters.

For the purposes of subsection (2), when assessing the public interest in having the evidence considered by the fact-finder at trial, the court may have regard to:

- a. the nature and quality of the improperly obtained evidence;
- b. the seriousness of the offence with which the defendant is charged; and
- c. any other relevant matters.

## Clarifying how each factor affects the balancing test

### Issue

7.109 In our Issues Paper, we explained that each factor is worded in an open way that does not indicate whether it favours admission or exclusion or whether the absence of a factor is relevant.<sup>107</sup> We discussed how each factor had been applied by the courts<sup>108</sup> and noted apparent confusion over the relevance of certain factors and inconsistency in how they are applied.<sup>109</sup> We discuss this further in relation to individual factors below.

<sup>106</sup> Evidence Act 2006, s 6(f).

<sup>107</sup> Issues Paper at [7.73].

<sup>108</sup> Issues Paper at [7.80]–[7.146].

<sup>109</sup> Issues Paper at [7.72]. See, for example, the discussion of good faith or inadvertence (at [7.94]), the seriousness of the offence (at [7.107]–[7.109]) and other investigatory techniques (at [7.113]–[7.117]).



## Consultation

### What we asked submitters

7.110 We invited submissions on whether section 30(3) should be amended to clarify how each factor may affect the balancing exercise. We sought feedback on the following options for reform:

- (a) If our proposed amendment to section 30(2)(b) is adopted, we suggested section 30(3) could be amended to list which factors relate to the public interest in recognising the seriousness of the impropriety and which relate to the public interest in having the evidence considered by the fact-finder at trial.
- (b) If section 30(2)(b) is not amended, we raised the possibility of amending section 30(3) to specify which factors may favour admission of the evidence and which factors may favour exclusion. We suggested, however, that this option would be harder to achieve since the extent to which (if at all) a particular factor supports or reduces the case for admission or exclusion on the particular facts is an evaluative one.

### Results of consultation

7.111 Nine submitters responded to this question. Five supported amending section 30(3) to clarify the relevance of each factor<sup>110</sup> while four opposed amendment.<sup>111</sup> The majority of those in favour of reform did not express a clear view on the form of the amendment, with one submitter noting this would depend on the Commission's recommendations in relation to section 30(2)(b).<sup>112</sup> Two submitters expressly supported specifying to which public interest each factor relates (option (a) above).<sup>113</sup>

7.112 Luke Cunningham Clere submitted that revising the section 30(3) factors is the most important of the reforms proposed. It considered the unstructured nature of the section 30 balancing exercise means it is likely the law is being applied inconsistently. While it broadly supported our proposed amendments to section 30(2)(b), it had reservations about how much this would assist in structuring what is effectively a broad value judgment. It submitted that separating the factors into those relating to the seriousness of the impropriety and those relating to the public interest in having the evidence considered by the fact-finder at trial would:

- (a) encourage judges to adopt a more disciplined reasoning process, which it saw as preferable to having judges put all factors “in the mix” to reach a broad evaluative judgement; and

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<sup>110</sup> Criminal Bar Association, Luke Cunningham Clere, Don Mathias, Public Defence Service, Wellington Community Justice Project.

<sup>111</sup> Associate Professor Anna High, New Zealand Law Society, New Zealand Police. Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but said she did not support any of the proposed changes to s 30 and considered empirical research was required to validate any reform.

<sup>112</sup> Don Mathias.

<sup>113</sup> Luke Cunningham Clere, Wellington Community Justice Project.

- (b) reflect the underlying policy tension being balanced in section 30, namely the desire to have all probative evidence before the fact-finder and the desire to enforce adherence to the rule of law by public sector bodies.
- 7.113 Luke Cunningham Clere agreed with our assessment in the Issues Paper that it would be difficult to specify which factors favour admissibility and which favour exclusion as that is often fact-dependent.
- 7.114 Don Mathias and the Public Defence Service also supported separating the factors into statutory categories. Don Mathias said this would promote clarity, noting the absence of clear categories has led to complexity and artificiality in the case law. The Public Defence Service considered separating the factors into categories may help to improve the consistency of decision-making. It suggested making it clear that the factors listed under each category can either increase or decrease the relevant interest. The Public Defence Service also said an amendment to clarify the relevance of each factor is unlikely to address the concern that some factors are given more weight than others. It suggested we consider clarifying that no factor carries more weight than another on its face.
- 7.115 The submitters that opposed amending section 30(3) favoured the flexibility of the current provision. Police submitted it operates well, providing sufficient guidance and flexibility for judges. Associate Professor High was concerned the proposed reform risks limiting the ability of the courts to take a fact-specific approach. Similarly, the NZLS suggested some factors can cut both ways depending on the circumstances of the case.

### *The need for reform*

- 7.116 We conclude it is desirable to amend section 30(3) to clarify how each factor may affect the balancing test. We refer to our conclusions earlier in this chapter about the unpredictability of the section 30 test and the fact that some judgments appear to give insufficient weight to the impropriety. As we discuss further below in relation to the individual factors, there is significant confusion in case law about how some factors should affect the balancing test. This has led to some factors being applied in an inconsistent and unprincipled way.
- 7.117 Submitters that opposed reform favoured the flexibility of the current approach. However, we are concerned it is *too* flexible. Judgments sometimes apply factors in ways that were not intended and, in our view, are not always fully justified by the fact-specific nature of the assessment. For example, as we discuss further below, “good faith” (or the absence of bad faith) is often treated as favouring the admission of improperly obtained evidence despite clear authority that it should be neutral.
- 7.118 Other factors are sometimes said to “cut both ways” but the explanation for this is often generic rather than fact-specific. For example, the seriousness of the offence is generally seen as favouring admission of the evidence,<sup>114</sup> but some case law<sup>115</sup> and one submitter<sup>116</sup> suggested this factor can also favour exclusion. The argument is that, where the offence is serious (and therefore the consequences of conviction are more significant), it is more important that rights are protected. If this reasoning is accepted, it could apply in any

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<sup>114</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152]; *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [39]–[41].

<sup>115</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [65] per Elias CJ and [230] per Tipping J (the other judges did not consider this issue).

<sup>116</sup> Public Defence Service. See further our discussion of this factor below.

case where the offence is serious. It is not clear how a judge would then determine whether the seriousness of the offence favours admission or exclusion in a particular case. The Judicial Advisory Committee, although not supporting reform of section 30 more broadly, did say there might be benefit in clarifying that the seriousness of the offence does not “cut both ways”.

- 7.119 We agree with the submitters that suggested some degree of flexibility in the application of the section 30(3) factors is required to account for the facts of particular cases. This is an inherent feature of a balancing test. However, we consider the question of how each factor may affect the balancing test is one of principle that is better resolved through legislation. This will help to avoid similar cases leading to different results. As we discuss below, we consider it is possible to provide greater structure around the application of the section 30(3) factors while still retaining a sufficient degree of flexibility for the courts to address the specific facts before them. For example, it would remain open to the courts to decide what weight (if any) to give a factor in a particular case.

### Recommendation

- 7.120 We recommend separating the section 30(3) factors into two categories — factors relating to the public interest in recognising the seriousness of the impropriety and factors relating to the public interest in having the evidence considered by the fact-finder at trial.
- 7.121 As noted above, this recommendation would need to be implemented alongside recommendation 9 (clarifying the public interests to be weighed against each other under section 30(2)(b)). If that recommendation is not accepted, we do not recommend amending section 30(3) to specify that certain factors favour admission or exclusion of the evidence. We indicated in our Issues Paper that this would be difficult to achieve, and the submissions we received did not change that view. Such an approach would inadequately capture the nuance of the assessment we have described above and is likely to be unduly restrictive.
- 7.122 We agree with the submitters that considered separating the factors into categories would encourage a more structured reasoning process leading to greater consistency and predictability in section 30 decisions. This approach was also supported by some members of our Expert Advisory Group. In our view, it will help to ensure factors are applied in a principled way that gives appropriate weight to the impropriety without unduly restricting the ability of the courts to take a fact-specific approach.
- 7.123 Specifying which public interest each factor affects should provide the courts with some guidance as to how the relevance of the factor should be assessed while leaving it open to them to assess the weight to be given to that factor on the facts of the case. For example, as we discuss further below, specifying that the seriousness of the offence relates to the public interest in having the evidence considered by the fact-finder at trial would signal that, in general, the more serious the offence, the more likely the evidence will be admitted.<sup>117</sup> However, it would still be open to the court to treat that factor as carrying reduced weight or being neutral in appropriate circumstances (such as where

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<sup>117</sup> Consistent with *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152]; *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [38]–[41].

there are concerns about the reliability of the evidence, raising the possibility of an unsafe conviction).<sup>118</sup>

- 7.124 This is different to saying that certain factors may “cut both ways”, favouring exclusion or admission depending on the facts of the case. If a factor is treated as neutral or as carrying reduced weight, that will affect how the strength of the relevant public interest is assessed but it will not add weight to the other side of the balancing equation. For example, the fact that an impropriety was inadvertent may mean the public interest in recognising the seriousness of the impropriety is on the lower end of the spectrum (compared to where the impropriety is deliberate). It will then be easier for that public interest to be outweighed by the public interest in having the evidence considered by the fact-finder at trial, but the prosecution would still need to make the case for admission based on (for example) the probative value of the evidence and the seriousness of the offence. Whether the evidence is admitted or excluded would always depend on the relative strength of the two public interests.
- 7.125 As noted above, we considered an amendment to specify which factors favour admission and which favour exclusion. In general, if the public interest in recognising the seriousness of the impropriety is high, that will favour exclusion. If the public interest in having the evidence considered by the fact-finder at trial is high, that will favour admission. However, we think it is more appropriate to refer to the relevant public interests rather than specifying which factors favour admission or exclusion of the evidence, for three reasons:
- (a) It fits better with our recommended amendments to section 30(2)(b), making it clear how each of the public interests identified in that provision are to be assessed.
  - (b) Stating that factors favour admission or exclusion may imply they will always have that effect. As we have said, in some cases, it may be appropriate to treat certain factors as neutral. We think specifying the public interest to which each factor relates more accurately conveys this.
  - (c) Some factors are not accurately described as favouring either admission or exclusion. The “apprehended physical danger” and “urgency” factors will tend to decrease (rather than increase) the public interest in recognising the seriousness of the impropriety. This will make it more likely that the evidence is admitted, but we do not think it is appropriate to say these factors positively favour admission. They do not increase the public interest having the evidence considered at trial.
- 7.126 The Public Defence Service suggested clarifying that the listed factors may increase or decrease the relevant public interest. We think this is unnecessary as it should be self-evident from the nature of the factors themselves and the fact that our proposed amendment would list them as relevant when “assessing” the applicable public interest. It would also add complexity to the provisions.
- 7.127 We do not recommend attempting to indicate what weight should be given to different factors (for example, as the Public Defence Service suggested, by stating that no factor carries more weight than another on its face). We do not see how this could be usefully done through legislative amendment given that — as the Public Defence Service acknowledged — the weight given to each factor will vary depending on the circumstances of each case.

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<sup>118</sup> We discuss this issue further below in relation to the “seriousness of the offence” factor.

## The importance of any right breached and the seriousness of the intrusion on it (section 30(3)(a))

### Issue

- 7.128 Section 30(3)(a) only refers to breaches of “rights”. We noted in our Issues Paper that section 30 also applies to evidence obtained in breach of enactments or rules of law aside from the NZ Bill of Rights and evidence obtained unfairly (including, but not only, through breaches of procedural protections such as the Chief Justice’s Practice Note on Police Questioning).<sup>119</sup>
- 7.129 While we agreed with the courts that any breach of the NZ Bill of Rights will make exclusion more likely,<sup>120</sup> we suggested it is also open to the courts to attach particular importance to other rules of law and procedural protections where appropriate. For example, the Practice Note on Police Questioning provides important procedural protections during interrogations, some of which are of long standing and arguably of constitutional significance.<sup>121</sup>
- 7.130 In practice, the courts have taken an expansive view of section 30(3)(a). Where relevant, they have considered the importance of the protections in the Practice Note on Police Questioning and the extent to which they were breached.<sup>122</sup> We said this may mean reform is unnecessary. However, the plain wording of the provision does not reflect the approach of the courts, and a minor amendment could clarify its effect.

### Consultation

#### What we asked submitters

- 7.131 We asked submitters whether section 30(3)(a) should be amended to refer to the importance of any right, statutory requirement, rule of law or procedural protection breached and the extent of that breach.<sup>123</sup>
- 7.132 We suggested this factor could be listed as relating to the public interest in recognising the seriousness of the impropriety. We noted we would still expect this factor to be applied in an evaluative way. For example, if a breach was minor or technical, it may be given reduced weight, meaning the public interest in exclusion is assessed as lower than it might be if the breach was more significant.

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<sup>119</sup> Issues Paper at [7.81].

<sup>120</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [66] per Elias CJ and [191] per Blanchard J; *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [28].

<sup>121</sup> Issues Paper at [7.83].

<sup>122</sup> See, for example, *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [53]–[55]; *R v X* [2021] NZHC 2444 at [156]; *Edmonds v R* [2012] NZCA 472 at [77].

<sup>123</sup> Issues Paper at [7.86].

## Results of consultation

- 7.133 Ten submitters responded to this question. Seven supported our option for amendment<sup>124</sup> while two preferred to retain the current wording.<sup>125</sup> One submitter proposed a different amendment to this factor.<sup>126</sup>
- 7.134 Submitters on both sides agreed that the courts already interpret “any right” broadly. Those in favour of reform considered it is appropriate for the provision to reflect what actually happens<sup>127</sup> and the amendment would provide useful clarification.<sup>128</sup> Those against reform considered amendment is unnecessary given how the law has developed and is developing in the courts.<sup>129</sup>
- 7.135 Don Mathias did not see a need to amend section 30(3)(a) in the way proposed since the courts interpret the factor broadly. However, he proposed an alternative of rewording the factor to refer simply to the seriousness of the impropriety. He was unsure it is helpful for the factor to refer separately to the importance of the right and the extent of the breach, noting the courts tend to consider similar matters under both limbs. He said the extent of intrusion depends on how the right is described in the context of the case (for example, the right not to be unreasonably searched versus the right not to be unreasonably searched in a public place). He saw a risk this could lead to double counting of matters that diminish the exclusionary weight of an impropriety. For example, the fact a search occurred in a public place could be treated as diminishing both the importance of the right breached and the extent of the intrusion.<sup>130</sup>
- 7.136 If section 30 is amended to specify the relevance of each factor, six submitters agreed this factor should be listed as relating to the public interest in recognising the seriousness of the impropriety.<sup>131</sup> No other submitters addressed the point.

## The need for reform

- 7.137 We conclude it is desirable to amend section 30(3)(a) to clarify that it is not limited to breaches of rights recognised in the NZ Bill of Rights. Section 30 is also engaged where evidence is obtained in breach of other legislative requirements or rules of law or unfairly. While it is often appropriate to accord high importance to rights recognised in the NZ Bill

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<sup>124</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association New Zealand, Luke Cunningham Clere, New Zealand Law Society, Public Defence Service, Wellington Community Justice Project.

<sup>125</sup> Associate Professor Anna High, New Zealand Police. Additionally, Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but opposed reform of s 30 generally.

<sup>126</sup> Don Mathias.

<sup>127</sup> New Zealand Law Society, Public Defence Service.

<sup>128</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>129</sup> Associate Professor Anna High, Don Mathias, New Zealand Police.

<sup>130</sup> Don Mathias submitted this appears to be what occurred in *Tamiefuna v R* [2023] NZCA 163.

<sup>131</sup> Auckland District Law Society, Defence Lawyers Association, Luke Cunningham Clere, Don Mathias, Public Defence Service, Wellington Community Justice Project. Associate Professor Anna High disagreed on the basis of her more general submission that it would be unduly restrictive to amend s 30(3) to clarify the relevance of each factor (but did not express a view on how this factor should be classified if s 30(3) is amended).

of Rights,<sup>132</sup> these other grounds for finding that evidence is improperly obtained also protect important interests that should be weighed as part of the balancing test.

7.138 There was general agreement among submitters that the current wording of section 30(3)(a) does not reflect the breadth of the assessment undertaken by the courts. While the provision refers to the importance of any “right” breached, the courts often conduct a broader assessment of the interests infringed by the impropriety under this factor. For example, case law has recognised the importance to the balancing test of the interests protected by certain legal requirements and the guidelines in the Chief Justice’s Practice Note on Police Questioning.<sup>133</sup> The courts also sometimes refer to “rights” in a more general sense to describe protections that are not recognised in the NZ Bill of Rights.<sup>134</sup> The rights and interests recognised by the courts in this context include both public ones (such as the public interest in ensuring confessions are not extracted by improper means)<sup>135</sup> and private ones (such as privacy interests<sup>136</sup> and the right to protection of bodily integrity).<sup>137</sup>

7.139 As we explained in our Issues Paper, the section 30(3) factors are based on the Court of Appeal’s decision in *Shaheed*. The majority described the assessment now reflected in section 30(3)(a) as follows:<sup>138</sup>

The starting point should always be the nature of the right and the breach. The more fundamental the value which the right protects and the more serious the intrusion on it, the greater will be the weight which must be given to the breach.

7.140 The balancing test adopted in *Shaheed* only applied to breaches of the NZ Bill of Rights, which explains why the Court focused on the nature of the right and the breach. It appears that, although section 30 extended the application of the test to other types of impropriety, the *Shaheed* factors were largely replicated without change. We consider that, in light of the broader application of the section 30 test, the reasoning in the quote above also applies more broadly. The more fundamental the right or interest infringed by the impropriety and the more serious the intrusion on it, the more weight the courts should give to this factor.

7.141 We propose an amendment to section 30(3)(a) to make this clear. We emphasise we are not suggesting that the courts are applying the factor inappropriately or that legislative amendment is intended to change their approach. Rather, if section 30 is being amended anyway, it provides an opportunity to ensure the wording of this factor is clear and consistent with the approach taken by the courts. This should make it easier for counsel and judges to understand and apply the factor without the need for extensive reference

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<sup>132</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [66] per Elias CJ and [191] per Blanchard J; *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [28].

<sup>133</sup> See, for example, *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [53]–[55]; *Butland v R* [2019] NZCA 376 at [49]; *R v X* [2021] NZHC 2444 at [156]; *Edmonds v R* [2012] NZCA 472 at [77].

<sup>134</sup> *Jeffries v Ministry of Social Development* [2020] NZHC 1450 at [45]; *Butland v R* [2019] NZCA 376 at [49]; *M (CA84/2019) v R* [2019] NZCA 203 at [39].

<sup>135</sup> *R v JZH* [2009] NZCA 363 at [30], cited with approval in *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [49].

<sup>136</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [38] (suggesting a breach of an Information Privacy Principle could be relevant to the s 30 balancing exercise); *Butland v R* [2019] NZCA 376 at [49]–[50].

<sup>137</sup> *M (CA84/2019) v R* [2019] NZCA 203 at [39].

<sup>138</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [147].

to case law. It is consistent with section 6(f), which refers to enhancing access to the law of evidence.

### Recommendation

- 7.142 We recommend amending section 30(3)(a) to refer to “the importance of any right breached or interest infringed by the impropriety and the seriousness of the intrusion on it” (see recommendation 10 above).
- 7.143 This recommendation differs from the option for reform in our Issues Paper, which would have referred specifically to “the importance of any right, statutory requirement, rule of law or procedural protection breached and the extent of that breach”. We have decided this is unnecessarily prescriptive and would not accurately capture the intended application of this factor where evidence is obtained “unfairly”. The courts may find evidence has been obtained unfairly where there is no breach of a specific procedural protection. As discussed in Chapter 6, we consider this could include situations where evidence is obtained using investigatory techniques that risk producing unreliable evidence (for example, by placing pressure on a suspect to confess). Evidence may also be obtained “unfairly” through entrapment<sup>139</sup> or by third parties who are not subject to the NZ Bill of Rights or the Chief Justice’s Practice Note on Police Questioning.<sup>140</sup>
- 7.144 Referring instead to “any right breached or interest infringed” more simply and comprehensively captures the type of analysis the courts already conduct under this factor, as discussed above. Where the impropriety does not involve a breach of a right, the courts instead consider the importance of the public or private interests infringed by the illegality or unfairness.<sup>141</sup> We emphasise that this analysis is only conducted once the court is satisfied there has been an impropriety falling within section 30(5). This factor (with our proposed amendment) would then prompt an assessment of the importance of any right or interest infringed by that impropriety. It would not widen the basis for finding that evidence has been obtained “unfairly”, nor would it require the court to attach any particular level of weight to an interest once it is identified — it would remain open to the court to treat an interest as being of relatively low importance.
- 7.145 We considered the submission by Don Mathias that this factor could simply refer to the “seriousness of the impropriety”. He suggested there may be little point in referring to the importance of the right and the extent of the breach separately since similar considerations may affect both assessments. We agree that, in some cases, the courts describe the “right” in a fact-specific way that largely mirrors the assessment of the extent of the breach.<sup>142</sup> In other cases, however, the court recognises the importance of the right in a general sense (such as “the right to be secure against unreasonable search and seizure”) before assessing the extent of the breach by reference to the facts of the case.<sup>143</sup> We support that approach. As noted above, the fact that a right recognised in

<sup>139</sup> *R v G* [2022] NZHC 2820 at [63].

<sup>140</sup> *R v Reynolds* [2017] NZCA 611 at [48].

<sup>141</sup> See, for example, *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [49] and [54]; *T v R* [2016] NZCA 148 at [36], [41] and [43]; *Butland v R* [2019] NZCA 376 at [49]; *R v X* [2021] NZHC 2444 at [156].

<sup>142</sup> *Aranguiz v Police* [2019] NZHC 1765 at [46]; *Beanland v R* [2020] NZCA 528 at [45].

<sup>143</sup> *Lee v R* [2020] NZCA 276 at [40]–[42]; *Baylis v R* [2018] NZCA 271 at [56]; *S v Police* [2018] NZHC 1582, [2019] 2 NZLR 392 at [74]; *T v R* [2016] NZCA 148 at [43]; *Edmonds v R* [2012] NZCA 472 at [77]–[79].



the NZ Bill of Rights has been breached is of independent importance and will make exclusion more likely. The same can be true, although often to a lesser extent, of other interests protected under section 30. The public has a general interest in ensuring human rights and the rule of law are respected by investigators and upheld by the justice system. However, it is also critical that the courts consider the extent of the intrusion in each case. The more significant the intrusion, the higher the public interest in recognising the seriousness of the impropriety. For example, a strip search is a more serious intrusion on the right to be secure against unreasonable search and seizure than a perimeter search of a farm and should be weighted accordingly.

## Nature of the impropriety (section 30(3)(b))

### Issue

- 7.146 Section 30(3)(b) refers to “the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith”. In our Issues Paper, we discussed two issues in relation to this factor.
- 7.147 First, we queried whether its wording could cause confusion, particularly if section 30(2) is amended to refer to the “public interest in recognising the seriousness of the impropriety” as one side of the balancing equation. The seriousness of the impropriety is a broader consideration informed by several of the factors in section 30(3) (including, for example, whether there were alternative techniques available and whether there was any urgency). Although broadly framed, the courts generally accord section 30(3)(b) a narrower focus on the knowledge and intent of the people or agency that acted improperly. We also noted the courts have recognised negligence and carelessness (which are not specifically listed in section 30(3)(b)) may be taken into account.<sup>144</sup>
- 7.148 We received preliminary feedback that the courts may be reluctant to make findings that law enforcement officers acted in bad faith. It was suggested this sometimes results in section 30(3)(b) being given insufficient weight. We invited feedback on whether this is the case. We noted that, if this was a problem, reframing the section 30(3)(b) factor to shift the focus to the knowledge of the person or agency obtaining the evidence could assist. It may help to emphasise that knowingly acting improperly is always a serious matter and should be given significant weight in the balancing test.
- 7.149 Second, we noted there is conflicting case law on the relevance of good faith or inadvertence to the balancing test. The Court of Appeal has confirmed on several occasions that good faith is to be expected so should not favour admissibility.<sup>145</sup> Despite this, some recent cases appear to treat good faith or inadvertence as favouring admission of the evidence.<sup>146</sup>

<sup>144</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [161]; *Beanland v R* [2020] NZCA 528 at [47]; *Murray v R* [2016] NZCA 221 at [174]–[176]; *Ferens v R* [2015] NZCA 564 at [61]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [120]; *Alexander v Police* [2019] NZHC 2920 at [49]–[50].

<sup>145</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [149]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [130]; *Fenwick v R* [2017] NZCA 422 at [15].

<sup>146</sup> See, for example, *R v Vaitohi* [2022] NZHC 1165 at [117] and [120]; *Roskam v R* [2019] NZCA 53 at [42]; *McGarrett v R* [2017] NZCA 204 at [37]; *Kelly v Police* [2017] NZHC 1611 at [44]. In total, 15 of the 40 cases we examined in our snapshot case study in which improperly obtained evidence was admitted appeared to treat good faith or the fact that the impropriety was of low seriousness as a factor favouring admission of the evidence.

## Consultation

### What we asked submitters

- 7.150 In relation to the first issue (the wording of the factor), we invited submissions on whether section 30(3)(b) should be amended to refer to “the extent to which the investigatory techniques used were known, or ought to have been known, to be improper”. We noted this would remove the potentially confusing or problematic references to “the nature of the impropriety” and “bad faith”, instead directing attention to the knowledge of the people or agency obtaining the evidence. It would also clarify that the relevant conduct is not limited to deliberate or reckless behaviour but can also encompass (for example) negligence or carelessness.
- 7.151 As to the second issue (the relevance of good faith or inadvertence), we sought views on whether good faith and inadvertence should be treated as neutral. If so, we suggested the section 30(3)(b) factor could be listed as relating to the public interest in recognising the seriousness of the impropriety. This would indicate that good faith or inadvertence does not increase the public interest in having the evidence admitted at trial or positively favour admission of the evidence (although the fact that an impropriety was not deliberate would still affect the overall assessment).

### Results of consultation

- 7.152 Nine submitters responded to our question about rewording this factor. Of those, six supported our proposed amendment<sup>147</sup> and one opposed reform.<sup>148</sup> Two other submitters made general comments or suggested an alternative approach.<sup>149</sup>
- 7.153 The submitters in favour of reform agreed that good faith (or the absence of bad faith) should be a neutral factor and considered our proposed amendment would help to counteract the courts’ reliance on it.<sup>150</sup> The Public Defence Service said the use of the phrase “ought to have known” would rightly clarify that the court should require police officers to have sufficient understanding of their powers and obligations so they are not negligently or recklessly acting beyond them. Don Mathias supported our proposed amendment for the reasons identified in our Issues Paper — in particular, that the public is entitled to assume law enforcement officers will not deliberately breach the law or act unfairly and that treating good faith or inadvertence as positively favouring admission could be seen as undermining the rule of law and failing to deter future improprieties.<sup>151</sup>
- 7.154 Luke Cunningham Clere did not directly comment on this issue, but its proposed redraft of section 30 replaced this factor with “whether the impropriety was careless, reckless, or deliberate”. This wording retains the current references to recklessness and deliberateness. However, like our proposed amendment, it focuses solely on the

<sup>147</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association New Zealand, Don Mathias, Public Defence Service, Wellington Community Justice Project.

<sup>148</sup> New Zealand Police. Additionally, Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but opposed reform of s 30 generally.

<sup>149</sup> Luke Cunningham Clere, New Zealand Law Society.

<sup>150</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>151</sup> Issues Paper at [7.95].

knowledge or intent of the investigating agency, removes the reference to “bad faith” and clarifies that a wider range of conduct (including “carelessness”) can be considered.

- 7.155 The NZLS was neutral on this issue but agreed this factor is currently applied in a manner that focuses on the knowledge and intent of the investigating agency (rather than a wider assessment of the nature of the impropriety). It also agreed good faith should be a neutral factor.
- 7.156 Police opposed reform as it considered our option for amendment would create uncertainty, not clarity. It would raise questions about which techniques are considered “improper” and by whom. Police said our proposed amendment could arguably lead to exclusion of cogent and reliable evidence obtained through an investigatory technique that does not offend the NZ Bill of Rights or another directive based on an imprecise value judgement.
- 7.157 Five of the submitters that supported amendment also agreed this factor should be listed as relating to the public interest in recognising the seriousness of the impropriety.<sup>152</sup> No other submitters addressed this issue.

### *The need for reform*

- 7.158 We conclude it is necessary to amend section 30(3)(b) to clarify that it is concerned with the knowledge of the investigating agency and may extend to a wider range of conduct than is currently listed (including, for example, carelessness or recklessness).
- 7.159 The use of the phrase “nature of the impropriety” encompasses (or ought to encompass) a much broader set of concerns outside the scope of this factor. In recommendation 9 above, we have suggested a very similar phrase — “seriousness of the impropriety” — be used to describe one side of the balancing equation. We think that assessment involves a broad evaluation of the conduct that has led to a finding that evidence was improperly obtained under section 30(2)(a) and 30(5) encompassing several of the section 30(3) factors. If this recommendation is adopted, the continued reference in section 30(3)(b) to the “nature of the impropriety” will cause confusion.
- 7.160 The current wording does not reflect how the courts typically apply the section 30(3)(b) factor. The courts’ analysis of this factor typically focuses on the knowledge or intent of investigators rather than any broader assessment of the nature of the impropriety (which is more likely to occur under section 30(3)(a)).<sup>153</sup> The courts also take account of a wider range of knowledge than just the examples listed, including negligent or careless conduct.<sup>154</sup>
- 7.161 We also consider the reference to “bad faith” is problematic. On the one hand, it is rare for the courts to make a finding of bad faith.<sup>155</sup> On the other, the courts frequently refer to the fact that investigators acted in good faith (or did not act in bad faith) as favouring

<sup>152</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Don Mathias, Public Defence Service, Wellington Community Justice Project.

<sup>153</sup> See, for example, *T v R* [2016] NZCA 148 at [44]: “The particular focus of the nature of the impropriety is whether it was deliberate, reckless, or done in bad faith.”

<sup>154</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [161]; *Beanland v R* [2020] NZCA 528 at [47]; *Lee v R* [2020] NZCA 276 at [43]; *Murray v R* [2016] NZCA 221 at [174]–[176]; *Ferens v R* [2015] NZCA 564 at [61]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [120]; *Alexander v Police* [2019] NZHC 2920 at [49]–[50].

<sup>155</sup> As we said in our Issues Paper, we found no examples of such a finding in our snapshot case study.

admission of the evidence.<sup>156</sup> We prefer the view expressed in *Shaheed* that “the good faith of law enforcement agencies is to be expected at all times and is not something which, if present, should then add weight to argument for the admissibility of evidence”.<sup>157</sup> There was general support for this approach from submitters.

- 7.162 Our Expert Advisory Group expressed strong support for this reform, noting current case law is inconsistent and clarification is needed. They considered it desirable to amend this factor even if other changes to section 30 are not progressed. We agree it is important to clarify that the factor focuses on the extent of investigators’ knowledge of the impropriety (whether or not the impropriety is categorised as deliberate, reckless or in bad faith). It is also important to clarify that good faith does not favour admission of the evidence — and, conversely, that “bad faith” is not required to exclude it. Our recommended amendment to the wording of this factor could be progressed as a stand-alone reform whether or not our other recommendations for reform of section 30 are adopted.

### Recommendation

- 7.163 We recommend amending the section 30(3)(b) factor to refer to “the extent to which it was known, or ought to have been known, that the evidence was being improperly obtained” (see recommendation 10). If section 30(3) is amended to clarify how each factor affects the balancing test, this factor should be listed as relating to the public interest in recognising the seriousness of the impropriety. For the avoidance of doubt, however, our recommended amendment to the wording of the factor could be implemented on its own.
- 7.164 Our proposed amendment would direct the courts’ attention to the level of knowledge of investigators at the time of the impropriety, including knowledge that could reasonably be expected of them. This would include carelessness and negligence (in addition to recklessness and deliberateness), in line with existing case law. The wording “the extent to which” makes it clear this is an evaluative assessment. For example, actual knowledge of improper conduct would generally be more serious than carelessness.
- 7.165 We envisage the more general wording of our proposed amendment, which would omit specific terms such as “bad faith”, would direct attention to the degree of knowledge in each case and how that affects the overall assessment of the public interest in recognising the seriousness of the impropriety. In particular, our intention is to avoid a narrow focus on whether the “bad faith” criterion is satisfied and the conclusion that an absence of bad faith favours admission of the evidence. This would not, of course, prevent the courts from making a finding of bad faith where that is justified on the facts, but case law suggests this is rare.
- 7.166 As discussed above, our proposed amendment to section 30(3) would continue to allow the courts to treat certain factors as having reduced weight or as being neutral where appropriate. Accordingly, the fact that investigators did not know, and could not be

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<sup>156</sup> *Jeffries v Ministry of Social Development* [2020] NZHC 1450 at [48]; *R v Vaitohi* [2022] NZHC 1165 at [117] and [120]; *Roskam v R* [2019] NZCA 53 at [42]; *Waite v Police* [2019] NZHC 213 at [54(i)]; *McGarrett v R* [2017] NZCA 204 at [37]; *Kelly v Police* [2017] NZHC 1611 at [44].

<sup>157</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [149]. See also *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [130]; *Fenwick v R* [2017] NZCA 422 at [15].

expected to know, that they were acting improperly may mean the public interest in recognising the seriousness of the impropriety is assessed as being at the lower end of the spectrum. While this would not favour admission of the evidence, it would make it easier for the second public interest to outweigh the first. We consider this is appropriate. Where investigators could not have been expected to know of the impropriety (for example, where the law was unclear at the time), deterrence has no role to play and public confidence in the justice system is less likely to be impacted by admitting the evidence.

- 7.167 The wording we propose has changed slightly from the option in our Issues Paper, which referred to “the extent to which the investigatory techniques used were known, or ought to have been known, to be improper”. Police was concerned that the reference to improper investigatory techniques could create uncertainty, raising questions about which techniques are considered “improper”. Our intention is not to require a separate assessment of what is “improper”. This should occur before the balancing test is undertaken when determining whether the evidence was “improperly obtained” (as required by section 30(2)(a) and defined in section 30(5)). We have changed the wording of our proposal to use the term “improperly obtained” to make this link clear. In other words, the knowledge of the investigating agency would be assessed in relation to the conduct that has led to a finding that the evidence was improperly obtained. While we acknowledge the assessment of what is “improper” is not always straightforward, it is a task the courts already undertake as the first stage of the section 30 inquiry.
- 7.168 Finally, for the purposes of considering whether an impropriety was known or ought to have been known to an investigating agency, it is the actual and constructive knowledge of the agency that is relevant. Lack of knowledge by an individual officer will not necessarily be determinative. This is already the case under the current section 30(3)(b). For example, the High Court found in *Alexander v Police* that Police should ensure officers completing search warrant applications are sufficiently educated to know what information must be included.<sup>158</sup>

## Nature and quality of the evidence (section 30(3)(c))

### Issue

- 7.169 In our Issues Paper, we explained that this factor was intended to focus primarily on the probative value of the evidence, including its reliability.<sup>159</sup> The more probative and reliable the evidence, the greater the public interest in having it admitted at trial.
- 7.170 The centrality of the evidence to the prosecution case was also identified as relevant in *R v Shaheed* and was expressly incorporated into section 30(3)(c) in the Evidence Bill as introduced.<sup>160</sup> However, the reference to centrality was removed on the recommendation of the select committee, which found it difficult to see how this would be relevant since the seriousness of the offence is included as a separate factor.<sup>161</sup>

<sup>158</sup> *Alexander v Police* [2019] NZHC 2920 at [51] (citing *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [121]). See also *Elley v Police* [2021] NZHC 2097 at [44].

<sup>159</sup> Issues Paper at [7.99].

<sup>160</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152].

<sup>161</sup> Evidence Bill 2005 (256–2) (select committee report) at 4. See also (21 November 2006) 635 NZPD 6647 (in committee).

- 7.171 Notwithstanding this background, section 30 decisions often equate the nature and quality of the evidence with its centrality or importance to the prosecution case without explicitly assessing its probative value.<sup>162</sup> In our snapshot case study, the importance of the evidence was the factor relied on most often in admitting improperly obtained evidence despite not being included in section 30(3).<sup>163</sup> By contrast, the probative value of the evidence (including its reliability) was often not directly considered unless there were particular concerns about it.<sup>164</sup>
- 7.172 We noted that focusing on the importance of the evidence rather than its probative value could be problematic. For instance, it could provide a weaker deterrence against improper conduct by Police or other investigating agencies attempting to obtain evidence in situations where they have little other evidence against a suspect. By contrast, the probative value of the evidence does not depend on the adequacy of the other evidence available to support the prosecution.

## Consultation

### What we asked submitters

- 7.173 We sought views on whether it would be preferable for the courts to focus on the probative value of the evidence, including its reliability, rather than on the importance of the evidence to the prosecution case. If so, we suggested this might be achieved by amending section 30(3)(c) to refer to the “probative value of the evidence, including its reliability”. We suggested this factor could be listed as relating to the public interest in having the evidence considered by the fact-finder at trial.

### Results of consultation

- 7.174 Nine submitters responded to this question. Six supported amendment to focus on the probative value of the evidence.<sup>165</sup> Three opposed reform.<sup>166</sup>
- 7.175 The ADLS and Defence Lawyers Association considered that referring to probative value and reliability would be consistent with the rest of the Act. They said the current wording is ambiguous and invites consideration of the centrality of the evidence to the prosecution case, which reinforces an “ends justifies the means” approach.
- 7.176 The Public Defence Service agreed the importance of the evidence to the prosecution case should not be a factor and considered our proposed amendment would help to clarify that. It saw benefit in referring specifically to reliability, suggesting this could help to prevent unreliable evidence that is not excluded under section 28 from “slipping

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<sup>162</sup> See, for example, *D (CA419/2021) v R* [2021] NZCA 678 at [71]; *Mehrtens v R* [2018] NZCA 446 at [20]; *R v Vaitohi* [2022] NZHC 1165 at [124]–[126]; *Grigg v Police* [2021] NZHC 3611 at [52].

<sup>163</sup> Cited in 29 out of 40 cases in which improperly obtained evidence was admitted.

<sup>164</sup> See, for example, *Robertson v R* [2020] NZCA 658 at [31] where the nature of the impropriety called into question the reliability of the evidence.

<sup>165</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association New Zealand, Luke Cunningham Clere, Don Mathias, Public Defence Service.

<sup>166</sup> Crown Law Office, New Zealand Law Society, New Zealand Police. Additionally, Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but opposed reform of s 30 in general.

through the cracks”. It would have gone further, however, and expressly prohibited consideration of the centrality of the evidence to the prosecution case.

- 7.177 While Luke Cunningham Clere supported our proposed rewording of this factor, it would also have included a separate factor for “the importance of the evidence to the prosecution case”.
- 7.178 The Crown Law Office preferred the current wording, which it said is a more encompassing phrase and sits better with other considerations such as the nature of the right or interest breached and the nature of the impropriety. It did not consider our proposed amendment would steer judges away from considering the importance of the evidence to the prosecution case and suggested that, if that was the intention, it would be better to state it expressly.
- 7.179 The NZLS noted the current wording allows both probative value and importance to be taken into account, which it considered appropriate. It said the impact of exclusion (and whether it will result in the dismissal of the charge) should be a relevant consideration.
- 7.180 Police was wary of referring to reliability as it considered this could “blur the line” between sections 28 and 30.
- 7.181 If section 30 is amended to specify the relevance of each factor, three submitters agreed this factor should be listed as relating to the public interest in having the evidence considered by the fact-finder at trial.<sup>167</sup> The ADLS and Defence Lawyers Association disagreed. They submitted probative value and reliability should be a neutral factor except where the evidence is of only modest probative value or has clear reliability issues — in which case, it should favour exclusion.

### *Reform not recommended to the wording of this factor*

- 7.182 As we explain below, we remain of the view that it is generally preferable for the courts to focus on the probative value of the evidence (including its reliability) rather than its importance to the prosecution case when assessing this factor. We do not, however, recommend amending the wording of the factor to refer to “probative value”. We are not convinced this would make a significant difference in practice and it may risk causing confusion or uncertainty about the effect of the amendment.
- 7.183 In our view, the key rationale underlying this factor is that there is a higher public interest in admitting evidence that the fact-finder could safely rely on to establish guilt (particularly where the offence is serious). This depends on the probative value of the evidence. The fact that the evidence is important to the prosecution case does not, on its own, mean it can support a safe conviction — for example, the prosecution case may not be particularly strong. While excluding evidence that is important to the prosecution case may well result in a dismissal of charges, that is mainly cause for concern if there is compelling evidence that the defendant committed the offence. Accordingly, we consider focusing on the probative value of the evidence more accurately captures the concern underlying this factor. It may also reduce the risk that the courts are seen as “taking sides” — or as condoning improper conduct where it is seen as necessary to achieve a conviction.
- 7.184 Notwithstanding this, we do not recommend amending the wording of the factor for three reasons. First, as some submitters and members of our Expert Advisory Group

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<sup>167</sup> Luke Cunningham Clere, Don Mathias, Public Defence Service.



highlighted, amendment would not prevent the courts from considering the importance of the evidence to the prosecution case unless that was specifically prohibited. This is because the list of factors in section 30(3) is non-exhaustive (which we do not propose changing). We consider such a prohibition would be artificial and cause interpretational issues. As we observed in our Issues Paper, high probative value and importance will often go hand in hand. Accordingly, the effect of prohibiting consideration of one while listing the other as a relevant factor would be unclear. In ordinary language, evidence that is highly probative of crime might be said to be “important” evidence.

- 7.185 Second, we are not convinced our option for amendment would affect the conduct of investigators. We remain concerned that placing too much emphasis on the importance of the evidence to the prosecution case may fail to deter improper conduct in obtaining evidence that is likely to be crucial to the prosecution case. However, we are not convinced this issue would be avoided by focusing on probative value. As noted above, evidence that is crucial to the prosecution case often also has high probative value. Investigators might still take risks in obtaining such evidence if it is likely to be admitted on the basis that it is highly probative. We consider this concern is best addressed by ensuring this factor is not given undue weight. The amendments we propose to the balancing test in section 30(2)(b) and to categorise the factors in section 30(3) should assist by encouraging a more structured analysis of the competing public interests and requiring that the second public interest *outweigh* the first.
- 7.186 Third, where there are specific concerns about the reliability or probative value of the evidence, the courts already take this into account when assessing the nature and quality of the evidence under section 30(3)(c).<sup>168</sup> Amendment is not required to enable this.
- 7.187 Accordingly, we consider amending this factor to refer to the probative value of the evidence is unlikely to make a significant difference in practice. On the other hand, it may create confusion about the intended effect of the amendment.

#### **Recommendation on how this factor affects the balancing test**

- 7.188 We recommend listing the nature and quality of the evidence as relating to the public interest in having the evidence considered by the fact-finder at trial (see recommendation 10).
- 7.189 This factor was intended to recognise that there is a higher public interest in admitting evidence that is highly probative and reliable.<sup>169</sup> Such evidence is more likely to result in a safe conviction for the relevant offence. Equally, where the evidence is of low probative value or reliability, the public interest in its admission will be reduced (making exclusion of the evidence more likely). This is consistent with how the courts currently apply the factor, and we agree it is the correct approach.
- 7.190 We therefore do not support the removal of this factor or (as the ADLS and Defence Lawyers Association suggested) an amendment to specify that it is only relevant as a factor favouring exclusion where the evidence is of limited probative value or reliability.

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<sup>168</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [64].

<sup>169</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [143] and [151]; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [140].



## Seriousness of the offence (section 30(3)(d))

### Issue

7.191 In our Issues Paper, we observed there remains some uncertainty about how the seriousness of the offence is to be weighed, particularly where the reliability of the evidence is in question.<sup>170</sup> While the Court of Appeal said in *Underwood* that the seriousness of the offence always favours admission of the evidence,<sup>171</sup> subsequent case law has not consistently applied that approach.<sup>172</sup> Two Court of Appeal cases decided in 2018 both involved breaches of the Chief Justice's Practice Note on Police Questioning, giving rise to reliability concerns. In one case, the seriousness of the offence was treated as favouring admission of the evidence (although this was outweighed by other factors)<sup>173</sup> and in the other as favouring exclusion.<sup>174</sup> Neither decision gave reasons for the approach adopted. More recently, Winkelmann CJ giving the majority judgment in *Reti* said:<sup>175</sup>

If the offending is serious, that favours admission. However, if the offending is serious and the nature of the impropriety raises issues as to the quality of the evidence, that will tend to favour exclusion. That consideration does not apply in this case. But even where the nature of the impropriety does not impugn the quality of the evidence, there remains public interest in the careful and lawful investigation of offences, particularly serious offences.

7.192 We acknowledged in the Issues Paper that reliability concerns may affect the degree to which the seriousness of the offence should be taken into account. While the seriousness of the offence will ordinarily increase the public interest in having the evidence considered by the fact-finder at trial, that will not be the case (at least to the same extent) where the reliability of the evidence is in doubt — as the likelihood of a safe conviction is reduced.

### Consultation

#### What we asked submitters

- 7.193 We expressed our preliminary view that the seriousness of the offence should never be treated as independently favouring exclusion of the evidence. We noted all suspects have the same rights and procedural protections irrespective of the seriousness of the offence. Instead, we suggested that, where there are concerns about the reliability of the evidence, it may be appropriate to treat the seriousness of the offence as a neutral factor or to give it reduced weight (depending on the extent of the reliability concerns). The section 30(3)(c) factor (the nature and quality of the evidence) would also be given less or no weight. Overall, this would mean the public interest in admitting the evidence is significantly lower than would be the case if the evidence were reliable.
- 7.194 We invited submissions on whether this is the correct approach. If it is, we suggested this factor could be listed as relating to the public interest in having the evidence considered

<sup>170</sup> Issues Paper at [7.107]–[7.109].

<sup>171</sup> *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [39]–[41].

<sup>172</sup> Some cases continue to refer to the seriousness of the offence as a factor that can cut both ways. See, for example, *Grigg v Police* [2021] NZHC 3611 at [52].

<sup>173</sup> *Bowden v R* [2018] NZCA 618 at [28].

<sup>174</sup> *D (CA104/2017) v R* [2018] NZCA 173 at [36].

<sup>175</sup> *R v Reti* [2020] NZSC 16, [2020] 1 NZLR 108 at [90].

by the fact-finder at trial. This would indicate that the seriousness of the offence does not favour exclusion of the evidence.

### Results of consultation

- 7.195 Six submitters responded to this question. Only one submitter expressly supported our proposed approach (for the same reasons we gave in our Issues Paper).<sup>176</sup> Three suggested repealing this factor altogether.<sup>177</sup> One considered section 30 is working as intended and did not see a need for reform.<sup>178</sup> The Public Defence Service did not have a clear view.
- 7.196 The ADLS and Defence Lawyers Association said this factor should be repealed because it invites an approach that condones impropriety where the offending is serious and there is ambiguity in its application. Luke Cunningham Clere also omitted this factor from its proposed redraft of section 30. Although not expressly discussing this factor, it said that any factors not included in its draft were either subsumed by others or not logically relevant to the core issue.
- 7.197 The Public Defence Service observed this is not a straightforward issue. On the one hand, there is a public interest in serious offending being prosecuted. On the other, there is a heightened interest in recognising and preventing impropriety where the risk to a person's liberty is higher. It suggested that, if the seriousness of the charge is going to favour admission, it is essential that section 30(3)(c) be amended to include the consideration of reliability. It also said it could be helpful to provide guidance on how "seriousness" is defined.

### Repeal or amendment of this factor not recommended

- 7.198 We do not recommend amending the wording of this factor or repealing it. Some submitters supported its repeal on the basis that it risks condoning impropriety where the offending is serious. We also noted, when discussing the operation of the balancing test above, that some submitters were concerned this factor is sometimes given too much weight. We consider the appropriate way to address these concerns is through the amendments we have proposed to the section 30(2)(b) balancing test, which should help to ensure the public interest in recognising the seriousness of the impropriety is given sufficient weight.
- 7.199 The Public Defence Service suggested there are questions about how "seriousness" is defined and that some guidance in the Act may be helpful. A member of our Expert Advisory Group made a similar point. The Commission considered this issue in its Second Review and concluded no reform was necessary or desirable.<sup>179</sup> The submissions received in the Second Review indicated that the main users of the Act were comfortable with the guidance provided by the Court of Appeal in *Underwood v R*.<sup>180</sup> We are not aware of any

<sup>176</sup> Don Mathias.

<sup>177</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Luke Cunningham Clere.

<sup>178</sup> New Zealand Police. Additionally, Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but opposed reform of s 30 in general.

<sup>179</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [7.27]–[7.28].

<sup>180</sup> *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433.

developments that require us to revisit that general conclusion so we have not considered the issue again in this review.

### Clarifying how this factor affects the balancing test

#### The need for reform

7.200 We conclude it is desirable to clarify how the seriousness of the offence affects the balancing test. As we discussed in our Issues Paper, there remains some uncertainty about whether this factor favours admission or exclusion. The Judicial Advisory Committee noted this is a long-standing issue and said it may be helpful to clarify that this factor does not “cut both ways”.

7.201 We consider the seriousness of the offence is relevant to assessing the public interest in having the evidence considered by the fact-finder at trial. Where the crime is serious, there will usually be a higher public interest in having the defendant tried based on all relevant and probative evidence — particularly where there is a risk to public safety if the offender is not convicted. This was the original intent of the factor. As Blanchard J said in *Shaheed*:<sup>181</sup>

The example of the serial murderer given in *Attorney-General’s Reference* is compelling. Public confidence in the justice system would obviously be severely shaken were probative evidence to be excluded in such circumstances unless perhaps the breach was both fundamental and deliberate. Weight is given to the seriousness of the crime not because the infringed right is less valuable to an accused murderer than it would be to, say, an accused burglar, but in recognition of the enhanced public interest in convicting and confining the murderer. In contrast, where the crime with which the accused is charged is comparatively minor, it is unlikely that evidence improperly obtained will be admitted in the face of a more than minor breach of the accused’s rights.

7.202 For this reason, as the Court of Appeal found in *Underwood*, the fact an offence is serious generally favours admission of the evidence.<sup>182</sup> Where the offence is not very serious, this factor will carry less weight or no weight, making it unlikely the evidence will be admitted. We consider that is the correct approach.

7.203 The Public Defence Service submitted there is a stronger interest in recognising and preventing impropriety where the risk to a person’s liberty is higher. A similar point was made by two of the judges in *Hamed*.<sup>183</sup> As Tipping J observed, the public has “a vital interest in having a justice system that is above reproach, particularly when the penal stakes for the accused are high”.<sup>184</sup>

7.204 In our view, the current position (that seriousness can be treated as going either way) is unhelpful and confusing to judges. Further, we see the concerns raised by submitters as being most pronounced in situations where the impropriety may have affected the reliability of the evidence, raising the possibility of an unsafe conviction with significant penal consequences for the defendant. Where there is concern about the reliability of the evidence, this can already be taken into account under section 30(3)(c) (the nature

<sup>181</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152].

<sup>182</sup> *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [41].

<sup>183</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [65] per Elias CJ and [230] per Tipping J. See also *Ahuja v Police* [2019] NZHC 2010 at [70].

<sup>184</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [230] per Tipping J.

and quality of the evidence). It may also be appropriate in these situations to treat the seriousness of the offence as a neutral factor or as having reduced weight. In such cases, the seriousness of the offence may not strengthen the public interest in having the evidence admitted since the evidence is less likely to result in a safe conviction for that offence. In combination with the section 30(3)(c) assessment, this will usually mean the public interest in having the evidence considered by the fact-finder is low (or even non-existent), making exclusion the likely result.

- 7.205 However, we do not think the seriousness of the offence should be treated as a factor favouring exclusion of the evidence. It does not necessarily increase the public interest in recognising and preventing impropriety. Improprieties in gathering evidence of less serious offending may be equally damaging to public confidence in the justice system, as they may affect the rights of a larger number of people (if they are systemic) or indicate more widespread or routine disregard for the rule of law. This underscores the importance of taking improprieties seriously in every case irrespective of the seriousness of the offence.

### Recommendation

- 7.206 We recommend listing the seriousness of the offence as relating to the public interest in having the evidence considered by the fact-finder at trial (see recommendation 10).
- 7.207 In practice, the seriousness of the offence will be assessed alongside the probative value of the evidence to determine the strength of the public interest in having the evidence considered by the fact-finder at trial. The balancing exercise is most likely to result in admission of the evidence where both these factors carry significant weight (that is, where the evidence is highly probative of serious offending). Even then, the combined weight of these factors will not necessarily outweigh a serious impropriety.

### Other investigatory techniques (section 30(3)(e))

#### Issue

- 7.208 In our Issues Paper, we noted that both the availability and the absence of other investigatory techniques have been treated variously as favouring admission or exclusion of the evidence or as a neutral factor.<sup>185</sup> We explained that, in its Second Review, the Commission expressed the view that the known availability of other investigatory techniques will usually favour exclusion of the evidence.<sup>186</sup> This was because, if law enforcement officers know of a legitimate way to obtain evidence but choose not to use it, admitting the evidence may bring the administration of justice into disrepute. The Commission considered the *absence* of other known techniques will generally be a neutral factor as it would be inappropriate to justify improper conduct on the basis that there was no legitimate way to obtain the evidence.<sup>187</sup>

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<sup>185</sup> Issues Paper at [7.113].

<sup>186</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [7.36].

<sup>187</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [7.38]–[7.39]. The Commission said it would also be inappropriate to treat the absence of alternatives as favouring exclusion since the “nature of the impropriety” (including whether it was deliberate) is already considered as a separate factor.

7.209 Since the Second Review, case law has continued to take varying approaches to this factor. Some decisions have treated the availability of other techniques as favouring admission of the evidence.<sup>188</sup> In other cases, the absence of other techniques has been treated as favouring exclusion. For example, in *M (CA84/2019) v R*, the Court of Appeal took the latter approach because the evidence (fingernail clippings) was subject to a specific statutory regime (the Criminal Investigations (Bodily Samples) Act 1995) that required consent and there was no other statutory basis for obtaining the evidence.<sup>189</sup> The effect of admitting the evidence under section 30 where it had been obtained without consent would have been to “create a non-statutory exception to a statutory scheme which requires consent”.<sup>190</sup>

## Consultation

### What we asked submitters

- 7.210 In light of these recent decisions, we sought submissions on whether it is desirable to clarify whether and how the availability or absence of alternative techniques is relevant to the balancing exercise. We identified two possible options for reform:
- (a) Repeal section 30(3)(e), leaving the deliberateness of the impropriety to be considered under section 30(3)(b). We observed the underlying concern of section 30(3)(e) appears to be with investigators deliberately straying outside the bounds of their lawful authority. Either lawful alternatives are improperly disregarded or there are no lawful alternatives and investigators proceed anyway knowing they are acting unlawfully. We suggested the extent of investigators’ knowledge about the bounds of their lawful authority and the other options available to them could be considered under section 30(3)(c).
  - (b) Specify that section 30(3)(e) relates to the public interest in recognising the seriousness of the impropriety. This would indicate that the availability of alternative techniques generally favours exclusion of the evidence while the absence of alternative techniques is generally neutral.
- 7.211 If section 30(3)(e) is retained, we suggested it may be desirable to clarify that it applies to other investigatory techniques “not involving any impropriety”. Currently, it refers to other techniques “not involving any breach of rights”. As discussed in relation to section 30(3)(a), section 30 is not limited to breaches of rights in the narrow sense. We saw no reason to limit the application of section 30(3)(e) to cases involving breaches of rights.

<sup>188</sup> *Cooper v Police* [2020] NZHC 2514 at [38]; *Nassery v R* [2020] NZCA 511 at [44]; *Elley v Police* [2021] NZHC 2097 at [46]. Another recent case took a similar approach but remains subject to publication restrictions until final disposition of trial.

<sup>189</sup> *M (CA84/2019) v R* [2019] NZCA 203 at [50]–[51].

<sup>190</sup> *M (CA84/2019) v R* [2019] NZCA 203 at [51].

## Results of consultation

- 7.212 Nine submitters commented on whether section 30(3)(e) should be repealed. Four supported repeal<sup>191</sup> while five preferred to retain the provision.<sup>192</sup> Most did not give detailed reasons.
- 7.213 The ADLS and Defence Lawyers Association supported repeal and suggested the absence of alternative techniques should be treated as neutral.
- 7.214 The Public Defence Service preferred to keep the factor separate for now, at least until the impact of the proposed change to section 30(3)(b) becomes apparent. It was concerned that the section 30(3)(e) inquiry could be lost in the section 30(3)(b) consideration if they are merged. Police did not think there was sufficient concern to warrant amendment and suggested any issues were likely to be resolved by case law.
- 7.215 If this factor is retained, three submitters supported specifying that it relates to the public interest in recognising the seriousness of the impropriety.<sup>193</sup> Don Mathias agreed with our assessment in the Issues Paper that the availability of other techniques is generally aggravating although it may be treated as neutral in limited circumstances. He considered the absence of alternatives should not be relevant. The Public Defence Service submitted that both the existence and absence of alternative techniques should favour exclusion (the latter because there is no lawful authority for the technique to be used).
- 7.216 The NZLS did not express a clear view on this issue but agreed this factor will generally favour exclusion. However, it said there may be good reason to admit the evidence where it was unclear at the time that the techniques used were unlawful or unfair and the evidence could have been obtained through some other means. It considered a lack of alternatives is a neutral factor at best because the public are entitled to be protected from evidence-gathering methods that are not legislatively or judicially approved.
- 7.217 Lastly, three submitters expressed their agreement that, if section 30(3)(e) is retained, it should be amended to refer to other techniques not involving any impropriety (instead of any breach of rights).<sup>194</sup>

## The need for reform

- 7.218 We conclude reform is needed to address the inconsistency in how this factor is applied. One recent Court of Appeal decision referred to the controversy surrounding the interpretation of this factor.<sup>195</sup> It is clear that the known availability of other investigatory techniques was originally intended to favour exclusion of the evidence.<sup>196</sup> As the Commission observed in its Second Review, where investigators knew of a legitimate way to obtain the evidence but chose not to use it, admitting the evidence may bring the

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<sup>191</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association New Zealand, Luke Cunningham Clere.

<sup>192</sup> Don Mathias, New Zealand Law Society, New Zealand Police, Public Defence Service, Wellington Community Justice Project. Additionally, Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but opposed reform of s 30 in general.

<sup>193</sup> Don Mathias, Public Defence Service, Wellington Community Justice Project.

<sup>194</sup> Don Mathias, New Zealand Law Society, Public Defence Service. No other submitters commented on this issue.

<sup>195</sup> This case remains subject to publication restrictions until final disposition of trial.

<sup>196</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [150].

justice system into disrepute.<sup>197</sup> In practice, however, both the presence and absence of other investigatory techniques are applied as favouring admission or exclusion in different cases. We do not consider there is a principled basis for this.

- 7.219 We consider this factor is logically quite limited in its application but its presence in the section 30(3) list has led the courts to apply it more broadly in scenarios where we do not consider it to be relevant. For example, the courts have sometimes found that the fact the evidence could have been obtained lawfully favours admission in situations where investigators either did not know they were acting unlawfully or improperly<sup>198</sup> or did not know there was a lawful alternative available.<sup>199</sup> In the latter case, the factor does not apply on its plain wording — it refers to other techniques *known* to be available. In both these scenarios, it is difficult to see why the availability of alternatives should be relevant to the balancing test. On the one hand, investigators cannot be expected to use another technique if they do not realise it exists or consider they are acting lawfully. The majority of the Court of Appeal in *Williams* envisaged this factor will be relevant only where there is “a deliberate, reckless or grossly careless decision not to employ those other techniques”.<sup>200</sup> On the other hand, treating the fact that the evidence could have been obtained lawfully as positively favouring admission may encourage investigators to take shortcuts and is directly counter to the original intent of the factor. In *Shaheed*, the majority said when explaining that this factor favoured exclusion:<sup>201</sup>

It is of some reassurance to the community where evidence is excluded in such circumstances that, if the same situation arises again, the police do have an available means of obtaining the evidence in a proper way.

- 7.220 As we have said, the courts have also treated the *absence* of other techniques as favouring either admission or exclusion in different cases. We remain of the view, expressed in the Commission’s Second Review, that the absence of alternatives will generally be a neutral factor.<sup>202</sup> It would be inappropriate to justify improper conduct on the basis that there was no legitimate way to obtain the evidence. It would also be inappropriate to treat the absence of alternatives as favouring exclusion as this may duplicate the assessment of the nature of the impropriety and whether it was deliberate.
- 7.221 In our view, section 30(3)(e) is sometimes used to recognise policy considerations that are more appropriately considered under other factors. For example, in some cases, the courts have found this factor favours admission because the failure to use the alternative, lawful method did not lead to any additional restraint or prejudice to the defendant.<sup>203</sup> As discussed above, in *M (CA84/2019) v R*, the absence of any lawful alternative was treated as favouring exclusion because the evidence was obtained in breach of a carefully limited

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<sup>197</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [7.36].

<sup>198</sup> *Kueh v R* [2013] NZCA 616 at [51]–[53].

<sup>199</sup> *Rihia v R* [2016] NZCA 200 at [36].

<sup>200</sup> *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [127].

<sup>201</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [150].

<sup>202</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [7.38]–[7.39].

<sup>203</sup> *Rihia v R* [2016] NZCA 200 at [35]–[36]; *Cooper v Police* [2020] NZHC 2514 at [38]–[41] (although as noted above, in these cases, investigators did not appear to be aware of the availability of the lawful method so arguably the factor did not apply in any event).

statutory regime.<sup>204</sup> We suggest these types of considerations affect the assessment of the right or interest intruded on and the extent of the intrusion, which can be taken into account under section 30(3)(a).<sup>205</sup>

- 7.222 These examples demonstrate that section 30(3)(e) can effectively be interpreted and applied to favour any outcome. There is no consistent, principled understanding of its function. Further, it is sometimes applied in a manner that duplicates considerations under other factors.

### Recommendation

- 7.223 We recommend repealing section 30(3)(e) (see recommendation 10). We consider its inclusion in section 30(3) is unnecessary and leads to unpredictable results. Because of the confusion this factor is causing, this recommendation can be progressed whether or not our other recommendations for reform of section 30 are adopted.
- 7.224 We do not disagree with the original policy intent of this factor. Rather, we consider the same considerations can be addressed through other factors. Most members of our Expert Advisory Group agreed with this approach.
- 7.225 The key concern underlying this factor is that investigators should not deliberately stray outside the bounds of their lawful authority while disregarding other legitimate options for obtaining the evidence. It is therefore related to the section 30(3)(b) factor as the Court of Appeal has acknowledged.<sup>206</sup> Where investigators know they are acting improperly and proceed despite being aware of lawful alternatives, we suggest that can be taken into account under section 30(3)(b). Indeed, sometimes these types of considerations are already considered under section 30(3)(b) as well as under section 30(3)(e).<sup>207</sup> Repealing section 30(3)(e) will avoid duplication and help to ensure other techniques are only considered where they were known to be available (since section 30(3)(b) directly relates to the knowledge of investigators). As we have said, section 30(3)(e) already refers to other techniques known to be available but is not always applied this way.
- 7.226 As noted above, other considerations the courts sometimes take into account under this factor may be relevant under section 30(3)(a). For example, where Parliament has chosen to carefully limit the obtaining of the evidence by statute (and so there are no lawful alternatives available), that may affect the court's assessment of the importance of the right or interest breached.
- 7.227 We considered whether the issues we have identified with this factor could be addressed by retaining and clarifying the factor. However, as discussed above, the factor already makes it clear that it is limited to other *known* techniques — yet it has not always been applied in that way. Any attempt to further limit its effect may encounter similar issues. In any event, amendment would not alter the fact that similar considerations are addressed

<sup>204</sup> *M (CA84/2019) v R* [2019] NZCA 203 at [51].

<sup>205</sup> For example, in *M (CA84/2019) v R* [2019] NZCA 203, similar considerations were taken into account under s 30(3)(a) and (e) (compare [39] and [51]).

<sup>206</sup> *T v R* [2016] NZCA 148 at [54]–[55].

<sup>207</sup> See, for example, *McGarrett v R* [2017] NZCA 204 at [37]–[38], taking into account the reasons for investigators' failure to seek a search warrant under both s 30(3)(b) and s 30(3)(e).



by other factors, in particular section 30(3)(b). Overall, we consider the inclusion of this factor in section 30(3) creates confusion and does not add substantially to the analysis.

## Alternative remedies (section 30(3)(f))

### Issue

- 7.228 We explained in our Issues Paper that it was unclear why this factor had been included in section 30(3). The majority in *Shaheed* said alternative remedies (such as a declaration that a right has been breached or a reference to the relevant oversight body) will rarely be relevant because they are unlikely to provide vindication of the right breached.<sup>208</sup> Awards of compensation or reductions in sentence would likely lead to a “perception that the police could now breach the rules and still secure ... a result”.<sup>209</sup> The courts have frequently reinforced the view that there will rarely be any effective alternatives to exclusion.<sup>210</sup>
- 7.229 We also noted that there was some uncertainty about whether the absence of alternative remedies is relevant. It is sometimes treated as irrelevant or neutral<sup>211</sup> and other times treated as favouring exclusion of the evidence.<sup>212</sup>

### Consultation

#### What we asked submitters

- 7.230 We sought submissions on whether section 30(3)(f) should be repealed to simplify the application of the balancing test. In the rare case where an appropriate alternative remedy might be available, it could still be considered given the list in section 30(3) is non-exhaustive. We noted repealing section 30(3)(f) may also help to clarify that the absence of alternative remedies is not normally a factor that requires consideration. We expressed our preliminary view that this is properly treated as a neutral factor.

### Results of consultation

- 7.231 Eleven submitters responded to this question. Six supported repeal of the provision,<sup>213</sup> three opposed repeal<sup>214</sup> and two did not take a clear position.<sup>215</sup>

<sup>208</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [153].

<sup>209</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [154].

<sup>210</sup> See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR at [202] per Blanchard J and [247] per Tipping J; *R v Balsley* [2013] NZCA 258 at [34]; *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [21]. More recent decisions making this point remain subject to publication restrictions until final disposition of trial.

<sup>211</sup> *Ward v R* [2016] NZCA 580 at [58]–[59].

<sup>212</sup> *R v Balsley* [2013] NZCA 258 at [34]; *Ahuja v Police* [2019] NZHC 2010 at [71] (reversed in *Ahuja v Police* [2019] NZCA 643 but without comment on this point); *Police v Fox* [2017] NZDC 21454 at [31]; *Cameron v Police* [2015] NZHC 2957 at [54].

<sup>213</sup> Auckland District Law Society, Tim Cochrane, Defence Lawyers Association New Zealand, Associate Professor Anna High, Luke Cunningham Clere, Don Mathias.

<sup>214</sup> Criminal Bar Association, New Zealand Police, Wellington Community Justice Project. Additionally, Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but opposed reform of s 30 in general.

<sup>215</sup> New Zealand Law Society, Public Defence Service.

- 7.232 Associate Professor High considered the provision is redundant for the reasons expressed in *Shaheed* — there will rarely be any effective alternatives to exclusion. Don Mathias also supported repeal for the reasons discussed in our Issues Paper and to avoid the suggestion that law enforcement officials might be tempted to “buy” impropriety by paying compensation. Tim Cochrane cautiously supported repeal but with the proviso that, in at least some circumstances, the *absence* of alternative remedies should favour exclusion (rather than being a neutral factor).
- 7.233 The NZLS was neutral on whether this factor should be repealed but agreed it is only likely to be relevant in rare circumstances. The Public Defence Service suggested that, while there are usually no alternative remedies, it could be beneficial for the courts to be reminded of this (presumably by retaining the factor).
- 7.234 Only Police gave reasons for retaining the provision. It did not agree there will rarely be appropriate alternative remedies. It said that, in appropriate cases, a person may seek civil redress or complain to a body such as the Independent Police Conduct Authority or the Privacy Commissioner.
- 7.235 If this factor is retained, one submitter, Don Mathias, agreed it should be listed as relating to the public interest in having the evidence considered by the fact-finder at trial. However, he noted that attempting to specify its relevance at all only serves to emphasise its inappropriateness as a factor (presumably because it is not clearly relevant to either of the public interests to be weighed). On the other hand, the Public Defence Service and Tim Cochrane were concerned this approach might prevent the courts from treating the *absence* of alternative remedies as favouring exclusion.

### **The need for reform**

- 7.236 We conclude this factor should be repealed in the interests of simplifying the section 30(3) analysis. Most submitters and members of our Expert Advisory Group supported repeal since alternative remedies will rarely be appropriate and sufficient. Only Police submitted otherwise. The examples given by Police (the ability to seek civil redress or complain to the Independent Police Conduct Authority) are the same remedies the Court in *Shaheed* suggested would not generally be relevant.<sup>216</sup> We agree with the concerns expressed in *Shaheed* and *Hamed* that most alternative remedies will not adequately vindicate any right breached and that taking into account awards of compensation may lead to a perception that the admission of improperly obtained evidence can be “bought”.<sup>217</sup> We also note the difficulty of bringing civil claims and the limited powers of the Independent Police Conduct Authority.

### **Recommendation**

- 7.237 We recommend repealing section 30(3)(f) (see recommendation 10). We do not rule out the possibility that it may be appropriate to consider alternative remedies in rare

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<sup>216</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [153].

<sup>217</sup> *R v Shaheed* [2002] 2 NZLR 377 (CA) at [153]; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [202] per Blanchard J. See also *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [27].

situations.<sup>218</sup> That would remain open to the courts given the non-exhaustive nature of section 30(3). Removing this factor would, however, avoid prompting its routine consideration by counsel and the courts, which we think is unnecessary.

## Risks to safety and urgency (sections 30(3)(g) and (h))

### Issue

- 7.238 We noted in our Issues Paper that, since section 30 was enacted, the Search and Surveillance Act 2012 had come into force. Under that Act, constables have express warrantless powers to address urgent situations and risks to the safety of any person. We referred to commentary suggesting that urgency and apprehended physical danger should no longer affect the section 30 analysis because investigators should rely on the Search and Surveillance Act powers.<sup>219</sup>
- 7.239 However, we also said it is arguable that sections 30(3)(g) and (h) remain necessary to ensure urgency and risks to safety can be considered in a range of situations. For example, urgency or danger to a person could be a factor in a police interview being conducted improperly (which is not governed by the Search and Surveillance Act) or enforcement officers could fail to identify and invoke the appropriate warrantless power when they are involved in an urgent or high-risk situation.

### Consultation

#### What we asked submitters

- 7.240 We sought submissions on whether sections 30(3)(g) and (h) should be retained or repealed. In particular, we invited feedback on whether there are likely to be situations where evidence is obtained in urgent situations not adequately covered by the Search and Surveillance Act warrantless powers (including by law enforcement agencies other than Police).
- 7.241 If these factors are retained, we suggested they could be listed as relating to the public interest in recognising the seriousness of the impropriety. Unlike the other factors on this side of the balancing equation, these factors would *reduce* the public interest in recognising the seriousness of the impropriety (and hence the need for exclusion of the evidence).

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<sup>218</sup> For example, in *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [50]–[52], the fact that improperly obtained evidence had already been excluded in criminal proceedings (resulting in a discharge) was taken into account when deciding to admit the evidence in a subsequent forfeiture proceeding (although s 30 did not apply directly in that case since it is limited to criminal proceedings). See further the discussion of this issue in Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [7.53]–[7.64].

<sup>219</sup> Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EA30.12(9)].

## Results of consultation

- 7.242 Ten submitters responded to this question. Three submitters supported repealing sections 30(3)(g) and (h)<sup>220</sup> while six opposed repeal.<sup>221</sup> Luke Cunningham Clere suggested an alternative approach.
- 7.243 The ADLS and Defence Lawyers Association found it difficult to conceive a scenario in which evidence is obtained in urgent circumstances but a Search and Surveillance Act power is not engaged. They considered removing these factors would simplify the assessment.
- 7.244 On the other hand, the Crown Law Office considered there are likely to be situations falling outside the scope of the Search and Surveillance Act powers where a sense of urgency is understandable or even desirable. Similarly, the NZLS said it was appropriate to have the balancing test as a “fall back” where investigators have not complied with the Search and Surveillance Act requirements. This allows the court to take into account how significant the non-compliance was.
- 7.245 Police submitted these factors enable consideration of the realities of policing where sometimes challenging decisions must be made in difficult and dynamic situations involving a real risk of harm.
- 7.246 The Public Defence Service suggested the inclusion of these factors allows the courts to consider that, where there is *no* urgency or risk of physical danger, lawful techniques should be considered and used.
- 7.247 Luke Cunningham Clere did not comment specifically on whether these factors should be repealed. However, its proposed redraft of section 30 replaced them with one provision stating “whether any circumstances (such as urgency or a risk to safety) existed at the time of the impropriety that justify or excuse any careless, reckless, or deliberate conduct”. This suggests it views these factors as mitigating the careless, reckless or deliberate nature of an impropriety rather than as factors independently favouring admission.
- 7.248 If these factors are retained, four submitters agreed they should be listed as relating to the public interest in recognising the seriousness of the impropriety.<sup>222</sup> The Public Defence Service did note, however, that this could create confusion since they would operate differently from the other factors in this category (that is, they would reduce the seriousness of the impropriety). It referred to its earlier suggestion that any redraft of section 30(3) should make it clear the listed factors can either increase or decrease the relevant interest, suggesting this may provide clarity in relation to these factors in particular.

## Repeal not recommended

- 7.249 We do not recommend repealing these factors. As we noted in our Issues Paper, there may be situations outside the scope of the Search and Surveillance Act (for example,

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<sup>220</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Don Mathias.

<sup>221</sup> Criminal Bar Association, Crown Law Office, New Zealand Law Society, New Zealand Police, Public Defence Service, Wellington Community Justice Project. Additionally, Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but opposed reform of s 30 in general.

<sup>222</sup> Luke Cunningham Clere, Don Mathias, Public Defence Service, Wellington Community Justice Project.

during questioning of suspects) where urgency or risk to safety may properly be taken into account. The submissions we received did not respond to this concern in detail, and indeed most submitters favoured retaining these factors.

- 7.250 Luke Cunningham Clere submitted sections 30(3)(g) and (h) should be replaced with one factor referring to “whether any circumstances (such as urgency or a risk to safety) existed at the time of the impropriety that justify or excuse any careless, reckless, or deliberate conduct”. We agree urgency and risks to safety are closely connected to section 30(3)(b). For example, the urgency of a situation may affect the assessment of whether investigators “ought to have known” they were acting improperly under section 30(3)(b) or may lessen the seriousness of a known impropriety. We are not, however, aware of any difficulties with the application of these factors in their current form. We recommend retaining them as separate factors to avoid any suggestion that the courts should take a different approach to their application.

### Recommendation

- 7.251 If section 30(3) is amended as proposed, we have suggested listing these factors as relating to the public interest in recognising the seriousness of the impropriety (see recommendation 10). As discussed above in relation to that recommendation, the existence of urgency or apprehended physical danger will generally *decrease* that public interest. We do not think it is necessary to specify this since our recommended amendments to section 30(3) would simply state the listed factors may be taken into account when “assessing” the relevant public interest.
- 7.252 Our recommendation for reform of section 30(3) contains a minor amendment to the text of section 30(3)(h) (urgency). Rather than referring to *whether there was* urgency in obtaining the evidence, it would refer to the extent to which the impropriety *resulted from* urgency in obtaining the evidence. This would clarify the need for a link between the urgency and the impropriety, consistent with how the courts already apply the factor.<sup>223</sup> We do not suggest there is any problem in practice in this regard and do not intend to change the law. Rather, if section 30(3) is being amended anyway, we see it as an opportunity to make the effect of the factor clearer on its face and more consistent with how similar factors are presented. For example, section 30(3)(g) (apprehended physical danger) already refers to whether the impropriety was *necessary* to avoid apprehended physical danger, making it clear that a link between the impropriety and the apprehended physical danger is required.
- 7.253 We have suggested using the words “the extent to which the impropriety resulted from urgency” in section 30(3)(h) rather than referring to whether the impropriety was “necessary” given the urgency of the situation. We think this is more consistent with the evaluative nature of the factor. For example, the impropriety may not have been objectively “necessary” but may be more understandable in light of the urgency officers were acting under.

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<sup>223</sup> See, for example, *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [70]; *Johnson v R* [2020] NZCA 404 at [29]; *Alexander v Police* [2019] NZHC 2920 at [58] (all suggesting the urgency would need to help explain or justify the actions of Police to be relevant under s 30).

## Practicalities of policing

### Issue

7.254 We noted in our Issues Paper that Police had raised concerns about how readily the courts turn to section 30 over relatively technical breaches given the practical realities of policing. This had been raised with the Commission previously during the Second Review and it did not recommend reform.<sup>224</sup>

### Consultation

#### What we asked submitters

7.255 We expressed our preliminary view that, to the extent it is appropriate to take the practicalities of policing into account, this is already permitted by other factors in section 30(3) (for example, practicalities may be taken into account when assessing the nature of the impropriety and whether there was urgency or a risk to safety).<sup>225</sup> However, we invited submissions on whether there are situations where the practicalities of policing should be taken into account but are not currently.

#### Results of consultation

7.256 Six submitters responded to this question. Only Police supported reform. Five submitters did not consider a new factor to be necessary or desirable.<sup>226</sup>

7.257 Police referred to case law and observed that the practicalities of policing are well recognised by the senior courts and frequently taken into consideration. It considered this is the correct approach and should be expressly reflected in the Act. Police noted officers are required to respond to an infinite variety of circumstances at all hours and it cannot be expected there will always be adequate resources available in all locations to respond in a textbook manner. Officers must be able to make quick assessments without the benefit of legal advice. Even if legal advice can be obtained, sometimes police must decide how to proceed in situations where the law is unclear or an issue has not yet been decided by the courts. Officers acting in good faith cannot be expected to get it right every time. Finally, Police submitted that strict adherence to legal requirements in all circumstances may bring into question public faith in the justice system.

7.258 The submitters that opposed reform generally considered a separate factor unnecessary because the practicalities of policing are already taken into account under other factors (such as the nature of the impropriety and urgency).<sup>227</sup> They also expressed concern that adding a separate factor might wrongly signal that practical considerations or systemic issues can be used to justify or excuse improper evidence gathering.<sup>228</sup> The NZLS added

<sup>224</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [7.42].

<sup>225</sup> See further the discussion in our Issues Paper at [7.42]–[7.146].

<sup>226</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Don Mathias, New Zealand Law Society, Public Defence Service. Additionally, Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but opposed reform of s 30 in general.

<sup>227</sup> Don Mathias, New Zealand Law Society, Public Defence Service.

<sup>228</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, New Zealand Law Society, Public Defence Service.

that an amendment could unintentionally signify that convenience on the part of police can justify illegal or unfair activities. The Public Defence Service considered it would create significant evidential issues and invite an approach that excuses or condones impropriety.

### *Reform not recommended*

7.259 We do not recommend amendment to explicitly refer to the practicalities of policing.

7.260 Many of the recommendations for reform we make in this report aim to better reflect the current practice of the courts in legislation. Police submitted it would be consistent with that approach to expressly recognise the practicalities of policing in section 30. In this instance, however, we do not consider amendment is necessary or desirable for two reasons. First, unlike other areas where we recommend reform, consideration of the practicalities of policing is inherent in other factors in section 30(3). In our view, those other factors already facilitate consideration of the practicalities of policing to the extent that is appropriate. Including a separate factor would risk placing undue emphasis on these types of considerations. Second, referring to the “practicalities of policing” would be too broad and could undermine the rule of law. We explain these two points further below.

7.261 In relation to the first point, as Police acknowledged, the courts already have regard to the practicalities of policing under section 30. This includes when determining whether the evidence was improperly obtained (particularly where this depends on whether a warrant should have been obtained rather than relying on a warrantless search power),<sup>229</sup> when assessing the extent of the breach or nature of the impropriety (under section 30(3)(a) and (b))<sup>230</sup> and when assessing whether there was urgency or apprehended physical danger (under section 30(3)(g) and (h)).<sup>231</sup> We think that is the correct approach. In particular, the urgency and apprehended physical danger factors directly account for the realities of the situation in which police officers find themselves. We accept Police’s submission that it cannot be expected there will always be adequate resources available in all locations to respond in a textbook manner, but in our view, that will primarily be relevant where the situation is urgent or dangerous. Where the time can be taken to follow proper procedures (including waiting for further assistance or advice where necessary), that should be done.

7.262 As to the second point, we consider a “practicalities of policing” factor would be too broad. It would risk undermining the rule of law and fail to deter future improprieties by sending the message that enforcement officers can breach the law for reasons of convenience. For example, it will usually be more “practicable” for police to undertake a warrantless search rather than seeking a warrant. We would not wish to suggest that favours admission of improperly obtained evidence outside of specific situations that are already accounted for (that is, where there is urgency or apprehended physical danger).

<sup>229</sup> *McGarrett v R* [2017] NZCA 204 at [24]–[25]; *Nassery v R* [2020] NZCA 511 at [38]–[41]; *Renson v Police* [2021] NZHC 2342 at [31]; *Kerr v Police* [2017] NZHC 2595 at [21].

<sup>230</sup> *G v R* [2012] NZCA 152 at [34]; *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [57]; *Asgedom v R* [2016] NZCA 334 at [34]–[36]; *Nassery v R* [2020] NZCA 511.

<sup>231</sup> *Grant v Police* [2021] NZHC 2297 at [95]; *Alamoti v R* [2016] NZCA 402 at [54]–[57].



## OTHER MATTERS RAISED FOR INCLUSION IN THE BALANCING TEST

### Issue

- 7.263 Two potential new factors were raised with us in preliminary feedback, which we outlined in our Issues Paper.<sup>232</sup> These were:
- (a) the need to deter future improprieties; and
  - (b) the extent to which the impropriety intruded on reasonable expectations of privacy.
- 7.264 Our preliminary view was that it is unnecessary and undesirable to specify either of these as separate factors. We suggested they are already taken into account under existing factors when appropriate and recognising them separately would risk duplicating the analysis and potentially giving them undue emphasis.<sup>233</sup>

### Consultation

#### *What we asked submitters*

- 7.265 We invited feedback on this approach. We also asked submitters whether any other amendments to the section 30(3) factors were necessary or desirable.

#### *Results of consultation*

- 7.266 Five submitters responded to this question.
- 7.267 The ADLS and Defence Lawyers Association supported the inclusion of a new factor recognising the importance of excluding evidence to encourage future legality. This is similar to the need to deter future improprieties, which we discussed in our Issues Paper.
- 7.268 Tim Cochrane wrote a detailed submission urging the Commission to revisit the Supreme Court's decision in *R v Alsford* and clarify that breach of the Information Privacy Principles (IPPs) in the Privacy Act 2020 amounts to breach of an enactment for the purpose of section 30(5)(a).<sup>234</sup> While his primary submission was that the IPPs should be specifically referenced in section 30(5), in the absence of such an amendment, he supported an amendment referring specifically to privacy in section 30(3). He referred to the Commission's preliminary view, expressed in our Issues Paper, that privacy expectations are already captured by section 30(3)(a) (the importance of any right breached and the extent of the breach). He considered that, while certain privacy expectations are captured in this manner, section 30 currently fails to adequately protect rights of privacy by failing to give sufficient protection to the IPPs. Alexandra Allen-Franks noted in her submission that she supported Tim Cochrane's comments on *Alsford*.
- 7.269 Luke Cunningham Clere proposed a new factor relating to the seriousness of the impropriety — "any harm caused to the defendant or other persons (other than through the commencement of criminal proceedings) as a result of the impropriety". It referred, as examples, to property damaged or seized pursuant to an unlawful search or physical or psychological harm as a result of improper conduct.

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<sup>232</sup> Issues Paper at [7.150]–[7.152].

<sup>233</sup> For further discussion, see our Issues Paper at [7.150]–[7.152].

<sup>234</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710.



## Reform not recommended

7.270 Having considered the submissions received on these issues, we do not recommend any further amendments to section 30 to address them. We explain our reasons below.

### Encouraging future legality

7.271 We do not recommend including a new factor recognising the importance of excluding evidence to encourage future legality. We agree that encouraging future legality (or deterring future impropriety) is an overarching aim of section 30, as we discussed in our Issues Paper.<sup>235</sup> It is an aspect of the need to maintain an effective and credible system of justice. In our view, the importance of encouraging future legality informs the factors that the court may consider under section 30(3). It is unnecessary to include it as a factor in its own right, and to do so would be unhelpful given its breadth.

7.272 It is difficult to see how a judge would assess what weight to give such a factor in the circumstances of a particular case other than by reference to other more specific factors. In our view, the section 30(3)(b) factor is most relevant in this respect. Where the person or agency obtaining the evidence knew or ought to have known of the impropriety, there will be a stronger case for exclusion to avoid similar conduct in future. On the other hand, if they could not have known there was any impropriety (for example, where the law was unclear at the time), exclusion will be less necessary for deterrent purposes.

### Privacy

7.273 We do not propose any amendments to specifically address the status of the IPPs in section 30(5) or to refer to privacy interests in section 30(3).

7.274 In our view, if the IPPs are to be given express recognition in section 30(5), that should occur in the context of a broader consideration of the appropriate legal effect of the IPPs.<sup>236</sup> The courts can have regard to breaches of the IPPs when deciding whether evidence was improperly obtained although they are not determinative. The Court of Appeal in *Tamiefuna v R* considered breaches of the IPPs when finding there had been a breach of the right to be secure against unreasonable search and seizure (section 21 of the NZ Bill of Rights).<sup>237</sup> The Supreme Court has granted leave to appeal in *Tamiefuna* and may provide further guidance on the relevance of the IPPs to the section 30 analysis in its forthcoming decision.<sup>238</sup>

7.275 In relation to section 30(3), we remain of the view expressed in our Issues Paper that it is unnecessary and undesirable to add a new factor referring to privacy interests. The courts already routinely consider privacy interests under section 30(3)(a) where there has been an unlawful or unreasonable search (in breach of section 21 of the NZ Bill of

<sup>235</sup> Issues Paper at [7.19]–[7.20].

<sup>236</sup> The Privacy Act 2020 did not alter the legal status of the IPPs although it was enacted after the Supreme Court's decision in *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710. Section 31 provides "the IPPs do not confer on any person any right that is enforceable in a court of law" (s 31(1)) aside from those conferred by IPP 6(1) (s 31(2)). These provisions are similar to s 11 of the Privacy Act 1993.

<sup>237</sup> *Tamiefuna v R* [2023] NZCA 163 at [80]–[83] and [97].

<sup>238</sup> *Tamiefuna v R* [2023] NZSC 93 (leave decision).

Rights).<sup>239</sup> Where, as in *Tamiefuna*, the IPPs are taken into account in finding such a breach, they could also affect the assessment of the extent of the breach under that factor. Our proposed amendment to section 30(3)(a) would clarify that the factor is not limited to breaches of rights recognised in the NZ Bill of Rights. It would explicitly allow consideration of other interests infringed, including where evidence is obtained unfairly. Accordingly, if the IPPs — or privacy interests more generally — were considered when finding that evidence was obtained “unfairly” under section 30(5)(c),<sup>240</sup> they could also be taken into account under section 30(3)(a) when applying the balancing test.

- 7.276 Because of this, we do not consider a separate factor is required. Analysis of privacy interests is already covered by section 30(3)(a). Including it as a separate factor would risk giving greater weight to privacy interests than to other important interests that may be engaged under that factor.

### *Harm caused by the impropriety*

- 7.277 We agree that harm caused by the impropriety (such as property damage or physical or psychological harm to the defendant or others) may be a relevant consideration under section 30(3). It may increase the public interest in recognising the impropriety. Allowing the prosecution to rely on evidence obtained through an impropriety that causes significant harm is more likely to compromise the integrity of the justice system. There is also a stronger public interest in discouraging similar conduct in future.
- 7.278 However, we do not consider a separate factor is required to allow for this. We are not aware of this issue arising on a regular basis, and it was not suggested to us that the courts are failing to take it into account when it is relevant. Where harm has been caused by the impropriety (aside from that resulting from the commencement of criminal proceedings), we suggest this could be considered when assessing the extent of the intrusion under section 30(3)(a) or as an “other matter”.

## RACIAL BIAS

### Issue

- 7.279 In the te ao Māori chapter in our Issues Paper, we discussed the application of section 30 where racial bias may have influenced the obtaining of evidence.<sup>241</sup> We noted the Court of Appeal had recognised in *Kearns v R* that a search influenced by racial bias could lead to a finding that evidence was improperly obtained (a matter that was remitted back to the District Court for determination).<sup>242</sup> For example, section 19 of the NZ Bill of Rights (freedom from discrimination) could be engaged.

<sup>239</sup> See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [191] per Blanchard J; *Makaea v R* [2018] NZCA 284 at [45].

<sup>240</sup> As the Supreme Court in *Alsford* envisaged could potentially occur in relation to the IPPs: *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [38].

<sup>241</sup> Issues Paper at [2.46]–[2.50].

<sup>242</sup> *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835 at [38]–[42].

## Consultation

### What we asked submitters

- 7.280 We sought submissions on whether the application of section 30 in cases of potential racial bias is sufficiently clear as a result of *Kearns*. In particular, we asked whether counsel are confident raising issues of racial bias where appropriate and how judges approach such matters at trial.

### Results of consultation

- 7.281 Only three submitters responded to this question. Two supported reform to specify that discriminatory practices weigh against admissibility.<sup>243</sup> One submitted the Act is operating as intended.<sup>244</sup>
- 7.282 The ADLS and Defence Lawyers Association submitted there are systemic factors that act as a barrier to raising issues of racial bias under section 30. They said the polarising phenomenon of racism and misunderstood terminology such as “unconscious bias” and “systemic bias” can impact counsel’s confidence in raising the issue and judicial reception to related lines of questioning. They noted it is well-accepted that Māori are disproportionately disadvantaged by discriminatory state conduct and justice outcomes. In their submission, the lack of case law in this area compared to what is known about the disproportionate experience of Māori and minority cultures in police investigations suggests that section 30 is not being applied correctly in cases where bias may be an issue. They suggested specifying that discriminatory practice must weigh against admissibility.
- 7.283 Police considered the Act is working as intended. It noted *Kearns* appears to be authority for the proposition that racially motivated evidence gathering may breach the NZ Bill of Rights and be excluded under section 30.

### Reform not recommended

- 7.284 We do not recommend amending section 30 to explicitly address issues of racial bias.
- 7.285 We acknowledge the issues raised by the ADLS and Defence Lawyers Association. As we said in our Issues Paper, there is evidence that Māori and other ethnic minorities are stopped and searched by police disproportionately.<sup>245</sup> The Court of Appeal also referred in *Kearns* to the persistence of racially biased attitudes among a minority of police officers.<sup>246</sup> Despite this, there is very little section 30 case law considering racial bias. This may suggest there is a reluctance among counsel and judges to raise or consider issues of potential racial bias.
- 7.286 However, in light of the very limited submissions we received on this issue and the absence of any clear evidence that racial bias is not being considered by the courts where

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<sup>243</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>244</sup> New Zealand Police.

<sup>245</sup> Eugene Bingham, Felipe Rodrigues and Chris McKeen “Unwarranted: The little-known, but widely-used police tactic” *Stuff* (online ed, 2020).

<sup>246</sup> *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835 at [25].

it ought to be, we are not in a position to conclude that there is a problem in practice with the way the section 30 analysis is being applied.

- 7.287 We emphasise that, under section 30 as it is currently drafted, racial bias can be taken into account both when determining whether evidence has been improperly obtained and when applying the balancing test. Amendment is not required to enable that. For example, racial bias may lead to a finding that evidence was obtained in breach of the right to freedom from discrimination under section 19 of the NZ Bill of Rights (as the Court recognised in *Kearns*).<sup>247</sup> It could also render a search unlawful or unreasonable — for example, if the requirements for a warrantless search were not in fact met. Either of these findings would mean the evidence is improperly obtained. The importance of the right breached and the extent of the breach would then be a significant factor when applying the balancing test (under section 30(3)(a)).
- 7.288 *Kearns* provides clear authority for the fact that the courts can and should be considering these issues. Since our Issues Paper was published, we have become aware of another case in the District Court where two Māori men were stopped and their vehicle searched because they matched a certain profile.<sup>248</sup> The evidence obtained was excluded under section 30. This may suggest increasing awareness of, and willingness to address, potential racial bias in the gathering of evidence. Further case law and education may give counsel and judges greater confidence in raising and addressing concerns in this area.

## ROLE OF CAUSATION UNDER SECTION 30(5)

### Issue

- 7.289 For evidence to be “improperly obtained” under section 30(5)(a) or (b), it must have been obtained “in consequence” of the breach. By contrast, there is no causative language in section 30(5)(c) in relation to the unfairness limb. However, the Supreme Court has held there must “almost always” be a causative link between the unfairness and the obtaining of the evidence.<sup>249</sup>
- 7.290 If the courts find there is no causal link between the impropriety and the obtaining of the evidence, that is the end of the section 30 inquiry. The balancing test is not applied, and the evidence will not be excluded under section 30 irrespective of the seriousness of any impropriety.
- 7.291 In our Issues Paper, we explained the courts have applied various tests to determine whether the necessary causal link is established.<sup>250</sup> In some cases, the courts have taken a generous approach to causation, finding the necessary link where the impropriety was a “minor contributing cause” to the obtaining of a statement<sup>251</sup> or a search was “coloured

<sup>247</sup> *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835 at [22].

<sup>248</sup> Shannon Pitman “Police profiled two Whangārei Māori men as gang members when they conducted ‘unlawful’ search” *The New Zealand Herald* (online ed, Whangārei, 9 October 2023).

<sup>249</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [46]–[47].

<sup>250</sup> Issues Paper at [7.154]–[7.158].

<sup>251</sup> *R v Perry* [2016] NZSC 102 at [56]–[57].

by the impropriety”.<sup>252</sup> The emphasis is then placed on the balancing test in which the strength or weakness of the causal link can be taken into account as a relevant factor.<sup>253</sup> Other cases have taken a strict approach — for example, finding a defendant’s statement was not caused by an impropriety because the court considers the statement would have been made anyway.<sup>254</sup>

## Consultation

### What we asked submitters

- 7.292 In light of these apparent inconsistencies, we asked submitters whether it is desirable to clarify the role of causation in the section 30 analysis and, if so, what approach should be preferred.<sup>255</sup>
- 7.293 We noted a strict approach that considers what would have occurred “but for” the breach requires an assessment that is necessarily speculative. It may also be considered inconsistent with the need for an effective and credible system as significant breaches may be disregarded based on a threshold inquiry. Taking a more generous approach to causation at the threshold stage but taking into account the extent of the causal connection when applying the balancing test would allow for a transparent assessment of the overall public interest.
- 7.294 We suggested that, if a more generous approach to causation is supported, the following amendments could be considered:
- (a) amend section 30(5)(a) and (b) to broaden the wording specifying the required causal link (for example, “in consequence of” could be replaced with “in connection with”); and/or
  - (b) amend section 30(3) to reinforce that the extent of the causative connection between the impropriety and the obtaining of the evidence is a relevant factor in the balancing test.
- 7.295 We also acknowledged there are arguments in favour of retaining the current approach, which allows the courts to tailor their approach to the facts of a case. For example, a generous approach to causation may be considered more appropriate in the context of defendants’ statements compared to physical evidence given the danger of speculating about what a defendant may have done but for the breach.

### Results of consultation

- 7.296 Five submitters responded to this question. Three favoured reform to clarify the approach to causation<sup>256</sup> while two opposed it.<sup>257</sup>

<sup>252</sup> *S v Police* [2018] NZHC 1582, [2019] 2 NZLR 392 at [71]. See also *Nicol v R* [2017] NZCA 140 at [30]. Another more recent Court of Appeal decision remains subject to publication restrictions until final disposition of trial.

<sup>253</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [61]–[63]; *R v Perry* [2016] NZSC 102 at [59].

<sup>254</sup> See, for example, *W (CA226/2019) v R* [2019] NZCA 558 at [132] (compare Mallon J dissenting at [139]); *Swainbank v R* [2021] NZCA 93 at [59].

<sup>255</sup> Issues Paper at [7.160]–[7.164].

<sup>256</sup> Luke Cunningham Clere, Don Mathias, Public Defence Service.

<sup>257</sup> Crown Law Office, New Zealand Law Society. Additionally, Adjunct Professor Elisabeth McDonald did not specifically comment on this issue but opposed reform of s 30 in general.

- 7.297 The Public Defence Service supported amending section 30(5)(a) and (b) to replace “in consequence of” with “in connection with” to clarify that a generous view of causation should be taken. It said this would prevent unnecessary argument over causation and prevent highly speculative rulings based on the reasoning that a defendant “would have confessed anyway”. It said that, if the extent of causation is to be considered, that should occur as part of the balancing test.
- 7.298 Don Mathias supported both of our suggestions for amendment. Luke Cunningham Clere did not comment on whether section 30(5) should be amended but its proposed re-draft of section 30 included a new factor — “the strength of the causative link between the impropriety and the obtaining of the evidence, in particular whether the evidence would likely have been obtained without the impropriety”.
- 7.299 The Crown Law Office considered there was little point in attempting to clarify the approach to causation through legislative amendment given the difficulty of precise definition. However, it agreed that, broadly speaking, a less exacting test seems appropriate (and consistent with the notion of causation elsewhere) at the threshold stage. The extent of causation in the circumstances would then be relevant (when applying the balancing test) to the extent of the intrusion on the right or interest and the nature of the impropriety.
- 7.300 The NZLS submitted the current flexible approach to causation is appropriate. It was concerned that rewording section 30(5) to use the words “in connection with” risks including evidence that is too distinct from the impropriety. Further, while it acknowledged the degree of causation may be taken into account under section 30(3), it considered it unnecessary to include it as a factor since it will mainly be relevant at the threshold stage.

### Reform not recommended

- 7.301 We do not recommend reform to address the approach to causation under section 30.
- 7.302 We received comparatively little feedback from submitters on this issue, which suggests there is not widespread concern about the current approach to causation. There was some support for the general approach to causation we favoured — that is, taking a generous view of causation at the threshold stage and considering any attenuation of causation as part of the balancing test. However, there were mixed views on whether reform would achieve that or what kind of reform was appropriate.
- 7.303 Any attempt to clarify the approach to causation in section 30(5) (for example, by replacing “in consequence of” with “in connection with”) could create further uncertainty and have the potential for unintended consequences. We agree with the Crown Law Office that causation is difficult to define precisely so any amendment would remain broad and open to interpretation. As such, we think it is more appropriate to allow case law to develop. As we have noted, the Supreme Court in *Perry* (and the courts in some subsequent cases) appeared to favour a more generous approach to causation at the threshold stage.<sup>258</sup>

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<sup>258</sup> *R v Perry* [2016] NZSC 102 at [56]–[57]; *Nicol v R* [2017] NZCA 140 at [30]; *S v Police* [2018] NZHC 1582, [2019] 2 NZLR 392 at [71]. Another more recent Court of Appeal decision remains subject to publication restrictions until final disposition of trial.

7.304 We also have reservations about adding causation as an independent factor in the balancing test. As the courts have found, it can be relevant in some cases. However, we would not wish to suggest the courts should, as a matter of course, assess the relative strength of the causative connection and take that into account in the balancing test. To the extent it is relevant, it can be taken into account when assessing the extent of the intrusion under section 30(3)(a) or as an “other matter” relevant to the public interest in recognising the seriousness of the impropriety. Case law already supports this approach.<sup>259</sup> We see a risk that adding a separate causation factor could encourage the reasoning that evidence should be admitted because it “would have been obtained anyway” (for example, where a warrant would likely have been available had it been sought). That would raise similar issues as we have discussed in relation to the “other investigatory techniques” factor above (which we recommend repealing). It would fail to discourage investigators from taking shortcuts rather than following lawful procedures.<sup>260</sup>

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<sup>259</sup> *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [61]–[63]; *R v Perry* [2016] NZSC 102 at [59]; *Crawford v Police* [2018] NZHC 407, [2018] 3 NZLR 89 at [25].

<sup>260</sup> *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [129].

## CHAPTER 8

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# Prison informants and incentivised witnesses

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## INTRODUCTION

- 8.1 In this chapter, we consider whether the Evidence Act 2006 sufficiently addresses the risk of unreliability posed by evidence given by prison informants and other incentivised witnesses. We address the following:
- (a) The admissibility of prison informant evidence. We conclude reform is necessary to address the risks posed by prison informant evidence and recommend introducing a new provision to govern its admissibility.
  - (b) The use of judicial directions in relation to prison informant evidence that is admitted at trial. We consider the risks posed by prison informant evidence are best addressed at the admissibility stage and so do not recommend reform.
  - (c) Whether additional safeguards for the use of prison informant evidence are necessary or desirable. We conclude existing safeguards are appropriate and should be left to bed in alongside our recommendation to introduce a new provision to govern admissibility.
  - (d) Whether any proposed amendments or additional safeguards should also apply to other incentivised witnesses. We conclude it is preferable for this issue to be addressed by the courts on a case-by-case basis and so do not recommend reform.

## BACKGROUND

- 8.2 Prison informant evidence is evidence given in a criminal proceeding of a defendant's statement purportedly made to another person while they were both detained and offered by that other person (the prison informant).<sup>1</sup> This type of evidence is often called “jailhouse snitch” evidence or a “cellmate confession”.

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<sup>1</sup> Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25(3) E&P 217 at 217. In its submission to the review, Ngā Pirihimana o Aotearoa | New Zealand Police suggested that this terminology was incorrect and potentially problematic. It noted that “informer” has a distinct meaning under s 64 of the Evidence Act. It



- 8.3 Prison informants may be recipients of confessional or other evidence that may not otherwise be disclosed by the defendant.<sup>2</sup> Prison informant evidence can therefore be highly valuable to the prosecution case. However, there are risks associated with its use:
- (a) Prison informant evidence can be unreliable. This is because informants are often incentivised to give their evidence — that is, their evidence may be given in return for, or in the expectation or hope of, some advantage or benefit to them.<sup>3</sup> These can include improved prison conditions, preferential treatment from authorities, early parole or reduced or dismissed sentences or charges.<sup>4</sup>
  - (b) Juries tend to find prison informant evidence highly persuasive and give it undue weight even when warned about its potential unreliability.<sup>5</sup> This has been ascribed variously to:
    - (i) a psychological phenomenon known as the “fundamental attribution error” (whereby people attribute the behaviour of others to personal factors such as honesty or a desire to “do the right thing” rather than situational factors such as the promise of a reward);<sup>6</sup>
    - (ii) the fact that prison informants may present a credible account of events and be capable of lying convincingly;<sup>7</sup> and
    - (iii) the lack of proper records of incentives promised or received making it difficult to assess the motivations of the informant.<sup>8</sup>
- 8.4 Taken together and as acknowledged by te Kōti Mana Nui | Supreme Court in *W (SC 38/2019) v R*, these risks have led to a demonstrated link between prison informant evidence and miscarriages of justice.<sup>9</sup> Although much of the social science evidence of this link is from overseas jurisdictions, there have been high-profile cases in Aotearoa New

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refers to someone who is not called by the prosecution to give evidence. By contrast, “prison informant” as used in the Issues Paper refers to someone who is called as a witness in proceedings. For the purpose of this discussion and our recommendations for reform, we continue to use the terminology of “prison informant”. We consider this to be the generally accepted and understood terminology used by the courts and in the relevant literature.

<sup>2</sup> Marie Dyhrberg “Informants: finding the truth beneath self-interest” *New Zealand Lawyer* (New Zealand, 8 February 2001).

<sup>3</sup> See, for example, the comments on the incentivised nature of prison informant evidence by the Supreme Court in *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 (at [33]) and *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 (at n 104 and [88(c)]). Commentators have also noted the role that incentives play in prison informant evidence. See, for example, Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25(3) E&P 217 at 219; Patrick Anderson “Snitched on or stitched up? — a review of the law in New Zealand in relation to jailhouse informant evidence” [2021] NZLJ 199 at 121.

<sup>4</sup> Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25(3) E&P 217 at 219.

<sup>5</sup> See, for example, *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [74]–[86] (majority) and [233]–[239] (minority).

<sup>6</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [80] (majority) and [237] (minority).

<sup>7</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [83] (majority) and [240] (minority).

<sup>8</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [94]–[95] (majority) and [242]–[243] (minority).

<sup>9</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [76]–[79] (majority) and [221]–[225] (minority). The Court relied on three major studies from the United States that demonstrate a link between prison informant evidence and wrongful convictions: Brandon L Garrett *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, Cambridge (Mass), 2011); Samuel R Gross and Michael Shaffer *Exonerations in the United States 1989–2012: report by the National Registry of Exonerations* (National Registry of Exonerations, June 2012); Northwestern University School of Law Center on Wrongful Convictions *The Snitch System* (Northwestern University, 2004).

Zealand of wrongful convictions that have rested in part on false prison informant evidence.<sup>10</sup> These cases have attracted significant media and public attention.<sup>11</sup>

- 8.5 Incentives can also exist for other participants in the criminal justice system (besides prison informants) to give evidence of a defendant's alleged guilt. For example, a person facing criminal charges might share information about another individual's involvement in unrelated offending in the hope of receiving preferential treatment from investigating or prosecuting authorities. We return to this broader class of incentivised witnesses at the end of this chapter.

## ADMISSIBILITY OF PRISON INFORMANT EVIDENCE

### Issue

- 8.6 The Act does not specifically address the admissibility of prison informant evidence. Instead, it is assessed under sections 7 (relevance) and 8 (general exclusion).<sup>12</sup> In our Issues Paper, we provided an overview of the case law that guides admissibility decisions.<sup>13</sup> In *Hudson v R*, the Supreme Court held there is no presumption that prison informant evidence is inadmissible as this would be incompatible with the Act's intention that "reliability decisions should be made by a properly cautioned jury".<sup>14</sup> At the same time, the Court acknowledged the risk of unreliability posed by this type of evidence means it requires "careful scrutiny".<sup>15</sup>
- 8.7 The notion of "careful scrutiny" was elaborated on in two cases, *W (SC 38/2019) v R* and *R v Roigard*, heard by the Supreme Court concurrently.<sup>16</sup> There the Court held, in recognition of the risks posed by prison informant evidence, that reliability could be considered as part of the section 8 assessment. It considered that the judge is undertaking a gatekeeping role in this regard, leaving the ultimate decision on reliability to a properly cautioned jury.<sup>17</sup> The Court outlined a framework for assessing prison

<sup>10</sup> See, for example, the overturning of convictions against Mauha Fawcett, Teina Pora and Arthur Allan Thomas. Prison informant evidence has also featured in other high-profile (and sometimes controversial) convictions — for example, in the convictions of Scott Watson and David Tamihere, both of whom have appeals pending. Particularly significant in David Tamihere's case was the evidence given by "Witness C", later revealed to be Robert Conchie Harris, who was convicted in a private prosecution of eight counts of perjury for the evidence he gave at Mr Tamihere's 1990 trial: *Taylor v Witness C* [2017] NZHC 2610.

<sup>11</sup> See, for example, Phil Taylor "The murky world of jailhouse snitches" *New Zealand Herald* (online ed, 30 April 2018); Mike White "The tragic and terrible case of Mauha Fawcett's wrongful conviction" *Stuff* (online ed, 11 June 2022). A public petition entitled "Stop Jailhouse Informants From Causing Wrongful Convictions" was presented to Parliament in November 2019. The Justice Committee provided its final report in August 2023, declining to take the issue further. The Committee considered that juries were best placed to make assessments of reliability and also noted the Commission's consideration of this issue in the review of the Evidence Act. Justice Committee *Petition of Lois McGirr for Justice for All Inc: Stop jail-house informant testimony from causing wrongful convictions* (August 2023).

<sup>12</sup> Sections 27–30 may also be relevant — see *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [36]; *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [101] and n 6. See also discussion in Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper), ch 8 at n 20.

<sup>13</sup> Issues Paper at [8.16]–[8.21].

<sup>14</sup> *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [36].

<sup>15</sup> *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [33].

<sup>16</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382; *Roigard v R* [2020] NZSC 94.

<sup>17</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [69]–[70], [88] and [91] (majority) and [191] (minority).

informant evidence under the section 8 test. In our Issues Paper, we set out the different approaches of both the majority and minority.<sup>18</sup> We observed that the minority proposed a more detailed framework for scrutiny, which would have led to a different conclusion on the admissibility of some of the proposed evidence.

- 8.8 We described other non-legislative safeguards for the admissibility and use of prison informant evidence.<sup>19</sup> These include guidance for prosecutors from the Solicitor-General on the use of prison informant evidence (the Solicitor-General’s guidelines)<sup>20</sup> and a central register of prison informants maintained by Ngā Pirihimana Aotearoa | New Zealand Police.<sup>21</sup>
- 8.9 We highlighted the difficulties with assessing practical concerns given the recency of the judgments in *W (SC 38/2019) v R* and *Roigard*. However, we noted the division between the majority and minority highlights a difference in opinion as to how the reliability assessment should be approached. Preliminary feedback also highlighted continuing concerns about whether the majority’s approach is sufficient to protect against the risks posed by prison informant evidence.

## Consultation

### What we asked submitters

- 8.10 We asked submitters whether the current approach is sufficient to address the risks associated with prison informant evidence and, if not, whether the Act should be amended to include additional controls on its admissibility.
- 8.11 We presented three options for reform:<sup>22</sup>
- (a) Option 1 — create a reliability threshold. This would provide that evidence of a statement made by the defendant to another person while they were both detained is only admissible if it meets a certain threshold of reliability (for example, if the circumstances relating to the evidence provide reasonable assurance that that it is reliable).<sup>23</sup>
  - (b) Option 2 — create a reliability threshold in combination with a presumption of exclusion. This would create a presumption of exclusion that could only be displaced if the judge was satisfied (either on the “balance of probabilities” or “beyond reasonable doubt”) that the statement was reliable.
  - (c) Option 3 — specify relevant factors the judge should take into consideration when assessing reliability. This could be implemented alongside option 1 or 2. As with similar provisions in the Act governing specific reliability assessments (for example, sections 28 and 45), this would be a non-exhaustive list. It could be based on the factors outlined by either the majority or the minority in *W (SC 38/2019) v R*.

<sup>18</sup> Issues Paper at [8.18]–[8.19].

<sup>19</sup> Issues Paper at [8.21] and [8.53].

<sup>20</sup> Te Tari Ture o te Karauna | Crown Law Office *Solicitor-General’s Guidelines for Use of Inmate Admissions* (August 2021).

<sup>21</sup> As reported in Mike White “Law Commission will examine ‘jailhouse snitches’” *Stuff* (1 October 2022).

<sup>22</sup> Issues Paper at [8.31]–[8.39].

<sup>23</sup> Similar to the approach taken to the admissibility of hearsay evidence. Evidence Act 2006, s 18(1)(a).

## Results of consultation

### The need for reform

- 8.12 Fourteen submitters responded to this question. Three submitters considered reform is unnecessary<sup>24</sup> while eight supported reform.<sup>25</sup> Three submitters did not express a clear view on the appropriateness of the current approach.<sup>26</sup>
- 8.13 Submitters that did not support reform considered that the current approach is working well. Te Tari Ture o te Karauna | Crown Law Office and the Wellington Crown Solicitor, Luke Cunningham Clere, said the general rules in sections 7 and 8 and the availability of a direction on reliability under section 122(2)(d) once evidence is admitted are sufficient. The Crown Law Office also said the Solicitor-General's guidelines act as a threshold consideration in determining whether to introduce prison informant evidence. One submitter, Adjunct Professor Elisabeth McDonald, expressed more general concern about any change to the law leading to "unnecessary appellate consideration" in a reasonably settled area. She underlined the importance of having clear empirical evidence to validate any reform.
- 8.14 Submitters that supported reform considered that prison informant evidence carries an extremely high risk of unreliability and that this risk is inadequately addressed by the current law. Some submitters referred in detail to empirical evidence of the risks of prison informant evidence and highly publicised cases involving its use.<sup>27</sup> The Auckland District Law Society (ADLS) and Te Matakahi | Defence Lawyers Association New Zealand suggested "there must be miscarriages of justice which go unresolved because of the lack of record-keeping". Many were critical of the ability of the section 7 and 8 tests to address the risks associated with prison informant evidence at the admissibility stage, considering them to be low thresholds.<sup>28</sup> Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service commented that, under section 7, prison informant evidence "will likely always be probative".
- 8.15 Many of these submitters considered the availability of a judicial direction on reliability under section 122(2)(d) is insufficient to address the risks once the evidence has been admitted.<sup>29</sup> They referred to empirical evidence from mock trials and anecdotal experience of juror behaviour, which indicate juries overweight this type of evidence.<sup>30</sup> In

<sup>24</sup> Crown Law Office, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald.

<sup>25</sup> Auckland District Law Society, Criminal Bar Association, Te Matakahi | Defence Lawyers Association New Zealand, Associate Professor Anna High, Stephen Hudson, Justice For All Inc, Te Rōpū Tauira Ture o Aotearoa | New Zealand Law Students' Association, Ratonga Wawao ā-Ture | Public Defence Service.

<sup>26</sup> Te Kāhui Tātari Ture | Criminal Cases Review Commission, Te Kāhui Ture o Aotearoa | New Zealand Law Society, New Zealand Police.

<sup>27</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Te Rōpū Tauira Ture o Aotearoa | New Zealand Law Students' Association.

<sup>28</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>29</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>30</sup> This empirical evidence included a number of studies cited by the Supreme Court in *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [80]–[84] (majority) and [233]–[239] (minority). These included Stacy Ann Wetmore, Jeffrey S Neuschatz and Scott D Gronlund "On the power of secondary confession evidence" (2014) 20 Psychology, Crime & Law 339 at 346; Jeffrey S Neuschatz and others "Secondary Confessions, Expert Testimony, and Unreliable Testimony"

their view, this underlines the need for reform to address the risk of unreliability at the admissibility stage before it is presented to the jury.

- 8.16 Two submitters commented that New Zealand is out of step with comparable jurisdictions on this issue. The ADLS and Defence Lawyers Association referred to a Privy Council decision<sup>31</sup> and other jurisdictions, including Canada<sup>32</sup> and various US states,<sup>33</sup> that have recognised the “inherent” unreliability of prison informant evidence and taken steps to limit or control its use.
- 8.17 Three submitters did not express a clear view on the appropriateness of the current approach. Two submitters considered that not enough time had passed to fully assess the impact on practice of the Supreme Court’s decision in *W (SC 38/2019) v R* and the Solicitor-General’s guidelines for prosecutors.<sup>34</sup> Te Kāhui Tātari Ture | Criminal Cases Review Commission provided high-level comment based on the applications currently under its consideration, identifying “incentivised witness evidence to be in the top tier of our identified systemic issues”.

### Options for reform

- 8.18 Thirteen submitters commented on the options for reform. Three submitters did not support any options for reform.<sup>35</sup> The Crown Law Office and Luke Cunningham Clere expressed concern about reform in this area circumventing the proper role of the jury at trial. Luke Cunningham Clere underlined the importance of allowing the jury to be the ultimate decision-maker “on the basis of all available evidence, rather than having potentially significant evidence excluded from consideration”.
- 8.19 Ten submitters supported reform of the Act to include additional controls on admissibility.<sup>36</sup> Nine supported a presumption of exclusion in combination with a reliability threshold (option 2) either alone<sup>37</sup> or alongside factors for assessing reliability (option 3).<sup>38</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) supported options 1 and 3 together (a reliability threshold and factors for assessing reliability).

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(2012) 27 J Police Crim Psych 179; Christopher T Robertson and D Alex Winkelman “Incentives, Lies, and Disclosure” (2017) 20 U Pa J Const L 33; Evelyn M Maeder and Emily Pica “Secondary Confessions: The Influence (or Lack Thereof) of Incentive Size and Scientific Expert Testimony on Jurors’ Perceptions of Informant Testimony” (2014) 38 Law & Hum Behav 560.

<sup>31</sup> See consideration of the issue by the Privy Council in *Benedetto and Labrador v R* [2003] UKPC 27, [2003] 1 WLR 1545.

<sup>32</sup> See, for example, Peter Cory *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Manitoba Justice, 2001).

<sup>33</sup> See, for example, California Penal Code s 1127a(b)–(v); Texas Code of Criminal Procedure Art 39.14; Illinois Code of Criminal Procedure 1963 725 ILCS 5/115-21; Connecticut Public Act No. 19–131: An Act Concerning the Testimony of Jailhouse Witnesses; Revised Code of Washington 10.56.050.

<sup>34</sup> New Zealand Law Society, New Zealand Police.

<sup>35</sup> Crown Law Office, Luke Cunningham Clere, New Zealand Police.

<sup>36</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association New Zealand, Associate Professor Anna High, Stephen Hudson, Justice for All Inc, New Zealand Law Society, New Zealand Law Students’ Association, Public Defence Service, Wellington Community Justice Project.

<sup>37</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Justice for All Inc, New Zealand Law Students’ Association, Wellington Community Justice Project.

<sup>38</sup> Criminal Bar Association, Associate Professor Anna High, Stephen Hudson, Public Defence Service.

- 8.20 Submitters commented that reform would align with other sections of the Act, which contain specific thresholds for other types of evidence that present reliability concerns. Submitters that supported option 2 (a presumption of exclusion and a reliability threshold) considered a presumption of exclusion is the only option sufficient to address the risks associated with prison informant evidence. According to the ADLS and Defence Lawyers Association:

The safest pathway is a statutory presumption of exclusion ... [N]ot only is the evidence inherently unreliable, but jurors have also been shown to be incapable of accurately assessing reliability. Something has to change, the only reasonable pathway forward based on the experience of the last few decades, and the consensus in the literature, is a presumption of inadmissibility.

- 8.21 In our Issues Paper, we asked a further question about what standard should be required to displace any presumption of exclusion — either the balance of probabilities or beyond reasonable doubt. Of the five submitters that addressed this question, three preferred beyond reasonable doubt.<sup>39</sup> The ADLS and Defence Lawyers Association viewed this as a suitably high standard in light of the risks prison informant evidence presents and submitted a presumption of exclusion should only be displaced if the prosecution can prove beyond reasonable doubt that the evidence is truthful — for example, if it led to the discovery of a body.
- 8.22 Two submitters, Te Rōpū Tauira Ture o Aotearoa | New Zealand Law Students' Association and Associate Professor Anna High, preferred a balance of probabilities standard. They said it would preserve the proper constitutional roles of judge and jury by clearly signalling that the final decision as to reliability rests with the jury.<sup>40</sup> The Crown Law Office, although not supporting reform in this area, preferred a balance of probabilities standard for similar reasons. It was concerned that requiring the prosecution to prove an evidential matter to the same standard as all the elements of the offence (that is, beyond reasonable doubt) would be too onerous.
- 8.23 Five submitters supported option 3 — specifying factors to be considered when assessing reliability.<sup>41</sup> The Criminal Bar Association described such an approach as likely to assist judges, prosecutors and defence counsel in dealing with this type of evidence and noted similar approaches are taken elsewhere in the Act (for example, in section 30(3)). Four of those five submitters<sup>42</sup> referred positively to the list of factors suggested in the Issues Paper (based on the factors set out by the minority in *W (38/2019) v R*).<sup>43</sup> The NZLS considered these factors would help guide the courts' assessment without turning the admissibility inquiry into a “mini-trial”. The Criminal Bar Association emphasised that these factors should not be exhaustive as the circumstances of prison informant evidence can vary significantly and judges should retain some discretion in their assessment.

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<sup>39</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Justice for All Inc.

<sup>40</sup> Associate Professor Anna High did comment, however, that this was a provisional view and that there may be a place for different standards depending on different factors — for example, if information was solicited rather than offered, a higher standard of “beyond reasonable doubt” might be appropriate.

<sup>41</sup> Criminal Bar Association, Associate Professor Anna High, Stephen Hudson, New Zealand Law Society, Public Defence Service.

<sup>42</sup> Criminal Bar Association, Associate Professor Anna High, New Zealand Law Society, Public Defence Service.

<sup>43</sup> Issues Paper at [8.38]; *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [254]–[270].

- 8.24 Two submitters made additional suggestions for factors to include. Associate Professor High proposed the addition of “whether the witness has offered informant evidence against any other defendant in an unrelated matter”. The Public Defence Service also submitted that the list should refer to the informant history of the witness. In addition, it suggested the last factor on the list (whether the witness has a record of lying) should include consideration of possible future incentives. This would cover circumstances where a witness may not ask for anything at the time but may seek reward at a later date.

### The need for reform

- 8.25 We conclude reform is necessary to address the risk of unreliability associated with prison informant evidence. The empirical evidence extensively cited by the Supreme Court in *W (SC 38/2019) v R*<sup>44</sup> and referred to by a number of submitters<sup>45</sup> is compelling evidence of the significant risks posed by the use of prison informant evidence in criminal proceedings. That evidence, in the words of the Supreme Court, provides “plainly scientific support” for the proposition that prison informant evidence has contributed to miscarriages of justice.<sup>46</sup> As discussed above, although much of this empirical evidence comes from overseas jurisdictions, the risks have already been realised in a number of high-profile cases in New Zealand. We consider it significant that the Criminal Cases Review Commission has identified incentivised witness testimony as being in the “top tier” of systemic issues based on the cases that have been referred to it.
- 8.26 We do not consider these risks to be overstated. Police submitted that, in fact, prison informants open themselves up to personal risk by being labelled as a “snitch” and that the negative consequences of doing so would dissuade people from informing unless it was truthful.<sup>47</sup> Yet evidence shows prison informants can, and do, provide false testimony.<sup>48</sup> In *Hudson*, the Supreme Court commented that, although there may be adverse consequences for prisoners deemed to be “snitching” or “narking” on fellow inmates, this does not assure reliability as “such consequences might be thought to be at least as likely where the information provided to the police is true as where it is false”.<sup>49</sup>
- 8.27 Amending the Act to introduce a new standard of admissibility will explicitly acknowledge the risks associated with prison informant evidence and guard against them by requiring that evidence meet a certain standard of reliability before it can be admitted. Reform will

<sup>44</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [76]–[78] (majority) and [221]–[225] (minority). The Court relied on three major studies from the United States that demonstrate a link between prison informant evidence and wrongful convictions: Brandon Garrett *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, Cambridge (Mass), 2011); Samuel R Gross and Michael Shaffer *Exonerations in the United States 1989–2012: report by the National Registry of Exonerations* (National Registry of Exonerations, June 2012); Northwestern University School of Law Center for Wrongful Convictions *The Snitch System* (Northwestern University, 2004).

<sup>45</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association, Public Defence Service.

<sup>46</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [79] (majority). See also at [76]–[78] (majority) and [232] (minority).

<sup>47</sup> This argument was advanced by the prosecution in *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [32].

<sup>48</sup> See, for example, the conviction of Roberto Conchie Harris on eight counts of perjury for evidence he gave at David Tamihere’s 1990 trial for the murder of Swedish tourists Urban Höglin and Heidi Paakkonen (*Taylor v Witness C* [2017] NZHC 2610). Another example is the evidence from a prison informant in the trial of Joseph William Johnson for the murder of Palmiro MacDonald alleging Johnson confessed to him while in the shower block of Manawātū Prison. It was ruled inadmissible at a pre-trial hearing when Department of Corrections records showed that the informant and Mr Johnson were never in the shower block together in the period of their incarceration (*R v Johnson* [2018] NZHC 2998).

<sup>49</sup> *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [33].

bring prison informant evidence in line with other categories of evidence that carry similarly significant risks of unreliability, which are subject to additional controls on their admissibility. Examples include section 28 (unreliable statements), section 45 (visual identification evidence) and section 46 (voice identification evidence). We note the comments of Winkelmann CJ for the minority in *W (SC 38/2019) v R* referring to the “four leading categories of evidence most often associated with miscarriages of justice: eyewitness misidentification, flawed forensic evidence, false confessions and false informant evidence”. The Chief Justice observed:<sup>50</sup>

For each of these categories of evidence, except the false informant category, the Evidence Act provides either structured mechanisms to promote the collection of good quality evidence, or evidential thresholds that protect against the admission of unreliable evidence. In some cases it does both.

- 8.28 Our conclusion regarding the introduction of controls on admissibility is reinforced by the available empirical evidence relating to juror attitudes and behaviour towards this type of evidence. Various mock trial studies, again cited by the Supreme Court in *W (SC 38/2019) v R*<sup>51</sup> and referred to by a number of submitters,<sup>52</sup> have shown that jurors find prison informant evidence extremely persuasive — often as compelling as primary confession evidence. This is so even when they are given “enhanced” directions as to the potential for unreliability.<sup>53</sup> Even with the limitations of such studies,<sup>54</sup> the Supreme Court considered they provide insight into the reasons why prison informant evidence “figures to the extent it does in known miscarriages of justice”<sup>55</sup> and support an approach of careful scrutiny.<sup>56</sup> In light of this, we consider it particularly important for the Act to allow reliability concerns to be addressed at the admissibility stage before evidence is presented to a jury.
- 8.29 Some submitters were concerned that inserting additional admissibility provisions runs counter to both the proper, constitutional role of the jury in determining reliability and the general scheme of the Act.<sup>57</sup> We disagree. As we note above, other provisions in the Act contain admissibility thresholds for other types of evidence that carry particular risks of

<sup>50</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [227].

<sup>51</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [80]–[84] (majority) and [233]–[239] (minority). The Court cites a number of studies, including Stacy Ann Wetmore, Jeffrey S Neuschatz and Scott D Gronlund “On the power of secondary confession evidence” (2014) 20 Psychology, Crime & Law 339 at 346; Jeffrey S Neuschatz and others “Secondary Confessions, Expert Testimony, and Unreliable Testimony” (2012) 27 J Police Crim Psych 179; Christopher T Robertson and D Alex Winkelmann “Incentives, Lies, and Disclosure” (2017) 20 U Pa J Const L 33; Evelyn M Maeder and Emily Pica “Secondary Confessions: The Influence (or Lack Thereof) of Incentive Size and Scientific Expert Testimony on Jurors’ Perceptions of Informant Testimony” (2014) 38 Law & Hum Behav 560.

<sup>52</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>53</sup> See, for example, *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [84]–[85] and [246]; Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25(3) E&P 217 at 232; Patrick Anderson “Snitched on or stitched up? — a review of the law in New Zealand in relation to jailhouse informant evidence” [2021] NZLJ 119 at 123.

<sup>54</sup> *W (SC 38/2019) v R* [2020] NZSC 93, 1 NZLR 382 at [82] (majority) and [239] (minority). These limitations include “the limited number of empirical studies, that the studies all involved mock trials without actual consequences and do not involve either lengthy or group deliberation, and the limited composition of samples”.

<sup>55</sup> *W (SC 38/2019) v R* [2020] NZSC 93, 1 NZLR 382 at [239].

<sup>56</sup> *W (SC 38/2019) v R* [2020] NZSC 93, 1 NZLR 382 at [86].

<sup>57</sup> Crown Law Office, Luke Cunningham Clere.



unreliability. Amendment would also reflect the approach of the Supreme Court in *W (SC 38/2019) v R*, which clearly signalled a shift to a more active, pre-trial gatekeeping role for judges in assessing the reliability of prison informant evidence. Finally, as discussed further below, our recommended reform can properly reflect and preserve the distinct role of judge and jury.

## Recommendation

**R11**

Insert a new provision requiring the judge to exclude prison informant evidence (to be defined using the wording in section 122(2)(d)) offered by the prosecution in a criminal proceeding unless satisfied on the balance of probabilities that the circumstances relating to the evidence provide reasonable assurance that it is reliable. The new provision should require a judge in making their assessment to have regard to, among other matters:

- a. any indications that the evidence is unreliable, including its consistency with other evidence and whether it has led to the discovery of other evidence;
- b. whether the evidence could have been constructed on the basis of facts and information gained from sources other than the defendant;
- c. whether the witness has been incentivised to give their evidence and the nature of any incentives offered or received;
- d. whether the witness has any other motives to offer unreliable evidence;
- e. whether the witness has a record of lying; and
- f. whether the witness has any history of offering informant evidence in other proceedings and, if so, the circumstances and nature of that evidence and the outcome of those proceedings.

8.30 We recommend inserting a new provision into the Act that would define prison informant evidence and require it to be excluded unless the judge is satisfied on the balance of probabilities that the circumstances relating to the evidence provide reasonable assurance that it is reliable. As we explain below, our proposal draws on elements of sections 18, 28, 45 and 46, which govern the admissibility of other types of potentially unreliable evidence.

8.31 A key concern of submitters was that reform would collapse the distinction between the roles of judge and jury by requiring a judge to determine ultimate reliability. For reasons we expand on below, we do not consider our proposed amendment would have this effect. It would create a threshold inquiry into whether the evidence is sufficiently reliable for it to be put to the jury in a similar way to other provisions in the Act. Applying a “balance of probabilities” standard and referring to the circumstances relating to the evidence and “reasonable assurance” of reliability would underline this.

### *A presumption of exclusion displaced by a balance of probabilities standard*

8.32 Our proposed amendment would create a presumption of exclusion for prison informant evidence. We agree with submitters that this approach appropriately recognises the significant risks prison informant evidence carries. Making exclusion the default position would ensure that prison informant evidence is only admitted if it can be shown to be sufficiently reliable. This approach aligns with the treatment of other types of evidence in

the Act that pose a heightened risk of unreliability — in particular, section 28 (unreliable statements), section 45(2) (visual identification evidence) and section 46 (voice identification). All these sections provide that evidence is inadmissible or must be excluded unless it can be shown to meet a certain threshold of reliability.

- 8.33 Our recommended provision would adopt a balance of probabilities standard to rebut the presumption of exclusion for prison informant evidence. This would ensure a thorough and robust inquiry into reliability, commensurate with the risks this evidence poses, before it can be offered at trial. We consider balance of probabilities is the more appropriate standard than beyond reasonable doubt. First, we agree with submitters that favoured this approach that it most clearly maintains the distinction between the assessment of threshold reliability and ultimate reliability. In the words of Associate Professor High, it “signal[s] that the final decision as to reliability is still a matter for the jury”. A beyond reasonable doubt standard would require the prosecution to place significant evidence before the court to meet that standard and could turn the assessment into a “mini-trial”.<sup>58</sup>
- 8.34 Second, the balance of probabilities aligns with the standard applied in sections 28(2) and 46 which, as we note above, govern the admissibility of other types of potentially unreliable evidence.<sup>59</sup> We note that a beyond reasonable doubt standard is used in section 45(2) (the admissibility of visual identification evidence obtained in the absence of a formal procedure) and section 29 (statements obtained by oppression). We understand this was based on legislators’ concerns about the particular risks inherent in these types of evidence.<sup>60</sup> Although the risks involved in prison informant evidence are significant, we are not persuaded they are more substantial than the risks associated with other evidence subject to a balance of probabilities test so as to justify a higher threshold for admissibility.

### *Circumstances provide reasonable assurance of reliability*

- 8.35 The judge’s inquiry under our proposed amendment would be into whether circumstances relating to the prison informant evidence provide reasonable assurance that it is reliable. This wording is taken from section 18 (general admissibility of hearsay), which provides that a hearsay statement is admissible if (among other criteria) the circumstances relating to the statement provide reasonable assurance that the statement is reliable.<sup>61</sup> As with section 18, the reference to “*reasonable* assurance” (emphasis added)

<sup>58</sup> See discussion on the importance of avoiding a “mini-trial” in *W (SC 38/2019) v R* [2020] NZSC 93, [2021] 1 NZLR 382 at [71] and [88].

<sup>59</sup> The Commission’s original proposals for these sections included a threshold of beyond reasonable doubt, which was changed to balance of probabilities when the Evidence Bill was introduced — see Cabinet Paper “Evidence Bill: Paper 2: Admissibility of Evidence” (4 December 2002) at [10], [27] and [44]. We understand this was done on the basis that the beyond reasonable doubt threshold was too high and would preclude admission and consideration by the fact-finder.

<sup>60</sup> See, for example, *Hohipa v R* [2015] NZCA 73, where the Court suggested the different standard for visual identification evidence may reflect the “legislature’s estimation of the risks inherent in visual identification evidence” (at [67]).

<sup>61</sup> We note prison informant evidence often contains a defendant’s “hearsay statement” (as defined in s 4(1)), but under s 27(3), the hearsay rules do not apply to a defendant’s statement offered by the prosecution. In some circumstances, the prison informant evidence itself will be subject to the hearsay rules — for example, where the informant is unavailable as a witness and their evidence is presented through a written statement or recorded interview. This was the approach taken by the Court of Appeal in *R v Hoggart* [2019] NZCA 89 at [49]–[51], as discussed in Chapter 4. See also Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25(3) E&P 217 at 224.

would ensure the judge is concerned with threshold reliability rather than ultimate reliability.<sup>62</sup>

- 8.36 Our proposed amendment would direct the judge’s attention to the circumstances relating to the evidence. We favour the wording of “circumstances *relating to*” the evidence as in section 18 compared to the wording of “circumstances in which the statement was made” as in section 28. It allows for a broader inquiry into circumstances that may suggest an informant is lying about the contents of the defendant’s statement or whether it was made at all.
- 8.37 We emphasise the assessment would focus on the reliability of the *prison informant’s* evidence (that is, whether the informant is accurately communicating what the defendant said to them) rather than the reliability of the *defendant’s* statement itself.

### **Factors for assessing reliability**

- 8.38 Our recommended provision would require the judge to consider certain factors when assessing whether the circumstances relating to the evidence provide reasonable assurance of reliability. These are similar to the factors presented for discussion in our Issues Paper based on the minority approach in *W (SC 38/2019) v R*.<sup>63</sup> They received general support from the submitters that addressed them.<sup>64</sup> They also broadly align with the factors outlined in the Solicitor-General’s guidelines so will ensure some consistency in approach and practice.<sup>65</sup> The inclusion of these factors will promote clarity and certainty as to the application of the admissibility threshold. We agree with submitters that the list of factors should not be exhaustive.<sup>66</sup> As the Criminal Bar Association observed, the circumstances relating to prison informant evidence can vary significantly and so it is important to maintain some discretion and flexibility.
- 8.39 An inquiry into “the circumstances relating to the evidence” would allow consideration of a broad range of matters. As noted above, this wording is based on section 18, which determines the admissibility of hearsay evidence. The hearsay provisions allow consideration of (among other matters) the nature and contents of the statement, the circumstances relating to the making of the statement and the veracity of the maker of the statement.<sup>67</sup> Case law under section 18 also makes it clear that the “circumstances relating to the statement” can include consideration of whether the statement is corroborated by other evidence.<sup>68</sup> Our recommended provision would require consideration of similar types of factors when assessing the reliability of prison informant evidence.
- 8.40 One of the factors in our proposed provision refers to “any indications that the evidence is unreliable”. We emphasise that the judge’s assessment under this factor should focus on clear indications of unreliability based on other evidence or the content of the

<sup>62</sup> See, for example, *Adams v R* [2012] NZCA 386 at [26].

<sup>63</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [248] onwards.

<sup>64</sup> Criminal Bar Association, Associate Professor Anna High, New Zealand Law Society, Public Defence Service.

<sup>65</sup> Crown Law Office *Solicitor-General’s Guidelines for Use of Inmate Admissions* (August 2021) at [3.17.1]–[3.17.5].

<sup>66</sup> Criminal Bar Association, Associate Professor Anna High, Public Defence Service

<sup>67</sup> Evidence Act 2006, s 16(1) (definition of “circumstances”).

<sup>68</sup> See, for example, *Gao v Zespri Group Ltd* [2021] NZCA 442 at [50].

statement.<sup>69</sup> The judge would not be required to carry out an in-depth analysis of the truth of the evidence, which is matter for the jury.

- 8.41 The wording of our proposed amendment differs slightly from that presented in our Issues Paper. Factor (f) has been added in light of submissions by Associate Professor High and the Public Defence Service that whether an individual has offered informant evidence in other cases (the informant history of the witness) should also be considered. This is consistent with concerns raised by other submitters about “repeat offenders” who repeatedly come forward with false information.<sup>70</sup>
- 8.42 The Public Defence Service further submitted that consideration of incentives offered or received should encompass possible future incentives. It envisaged a situation where an informant may not seek anything in exchange for their evidence at the time it is offered but may request a reward at some future date. This would be a speculative exercise and one that may be difficult for the judge to carry out. That said, the possibility of future incentives could be relevant under factors (c) and (d) above if there is evidence that a person intended to seek reward in the future.
- 8.43 In our Issues Paper, we suggested that one of the factors for consideration could be “the significance of the evidence to the facts at issue, including the importance of those facts to the proceedings and the probative nature of evidence presented”. This was included in the minority discussion of the relevant factors in *W (SC 38/2019) v R*.<sup>71</sup> The NZLS queried its inclusion in the proposed reforms given that “relevance is already sufficiently dealt with under section 7 of the Act”. We agree this factor is not relevant to reliability. The admissibility of prison informant evidence should be determined based on a threshold reliability assessment. Unreliable evidence should not be permitted simply because it is important to the prosecution.<sup>72</sup> Accordingly, we do not include it in our recommendation.

## USE OF JUDICIAL DIRECTIONS

### Issue

- 8.44 Section 122(2)(d) requires a judge to consider whether to warn the jury of the need for caution in deciding whether to accept prison informant evidence and the weight to be given to it. In our Issues Paper, we outlined the case law that has developed in this area.<sup>73</sup> In *Hudson*, the Supreme Court rejected the argument that a standard form direction should be given in all cases involving prison informant evidence but held that a direction will “normally” be required.<sup>74</sup>

<sup>69</sup> We consider this approach to be consistent with the view of the Supreme Court in *R v Wichman* [2015] NZSC 98 that, in the context of s 28, indications of actual reliability should only be considered where they are clear and obvious. See our discussion on the application of s 28 in Chapter 5.

<sup>70</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Stephen Hudson.

<sup>71</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [254].

<sup>72</sup> The other provisions we have discussed that address the admissibility of evidence that may be unreliable do not provide for consideration of such matters (ss 18, 28, 45 and 46). We note that a reference to the centrality of the evidence to the prosecution case under s 30 was removed from the Evidence Bill at select committee stage (Evidence Bill 2005 (256–2) (select committee report) at 4). We discuss this issue in the context of s 30 in Chapter 7.

<sup>73</sup> Issues Paper at [8.41]–[8.42].

<sup>74</sup> *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [40]–[41].

- 8.45 This approach was affirmed by te Kōti Pira | Court of Appeal in *Baillie v R*, where it held that the considerations that justify “careful scrutiny” of prison informant evidence when deciding its admissibility apply similarly to judicial directions if prison informant evidence is presented at trial.<sup>75</sup> The Court set out a number of factors to which judges should consider directing the jury’s attention, including incentives promised or expected and how powerful they might be, the length of time it took the witness to disclose their evidence, any implausibility or inconsistency in the evidence and the risks of juries attributing the evidence to a desire to tell the truth rather than linking it with an incentive.<sup>76</sup>
- 8.46 In our Issues Paper, we noted that both the courts and commentators have been critical of the ability of judicial directions to address the risks of prison informant evidence, citing research that indicates such directions (even when enhanced) have no effect on verdicts.<sup>77</sup> Despite these concerns, the Supreme Court has been reluctant to do away with judicial directions completely,<sup>78</sup> noting that the Act proceeds on the basis that juries do listen and respond to judicial directions.<sup>79</sup>

## Consultation

### What we asked submitters

- 8.47 We sought feedback on whether section 122(2)(d), including the Court’s guidance in *Baillie*, is sufficient to address the risks associated with prison informant evidence once admitted at trial. If not, we asked whether it should be amended to enhance judicial directions to the jury. We presented two options for reform, one or both of which could be adopted:<sup>80</sup>
- (a) Option 1 — require judges to provide a warning to the jury on reliability in every case involving prison informant evidence.
  - (b) Option 2 — set out factors that a judge should consider including, or must include, in their warning. We did not express a view on what factors should be included but suggested the guidance provided by the court in *Baillie* may provide a useful starting point.

### Results of consultation

- 8.48 Ten submitters responded to this question. Three submitters considered section 122(2)(d) is sufficient to address the risks associated with prison informant evidence<sup>81</sup> while six

<sup>75</sup> *Baillie v R* [2021] NZCA 458 at [58].

<sup>76</sup> *Baillie v R* [2021] NZCA 458 at [59] (footnotes omitted).

<sup>77</sup> See, for example, *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [84]–[85] and [246]; Anna High “The exclusion of prison informant evidence for unreliability in New Zealand” (2021) 25(3) E&P 217 at 232; Patrick Anderson “Snitched on or stitched up? — a review of the law in New Zealand in relation to jailhouse informant evidence” [2021] NZLJ 119 at 123.

<sup>78</sup> The majority in *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 took the view that the available evidence on judicial directions gave even greater weight to the need for “careful scrutiny” of this evidence (at [86]). The minority concluded that the scheme of the Act proceeded on the basis that juries did listen to judicial directions and the available evidence did not make the case for getting rid of judicial directions (at [246]).

<sup>79</sup> *W (SC 38/2019) v R* [2020] NZSC 93, 1 NZLR 382 at [246] per Winkelmann CJ.

<sup>80</sup> Issues Paper at [8.47]–[8.51].

<sup>81</sup> Crown Law Office, Luke Cunningham Clere, New Zealand Law Society.

submitters said it is not.<sup>82</sup> One submitter considered that legislative reform should not be pursued in the absence of clear empirical evidence of a problem.<sup>83</sup>

- 8.49 Submitters that considered the current approach to be sufficient noted that existing case law means that a warning will essentially be given in all cases involving prison informant evidence even though that is not prescribed by the Act.<sup>84</sup> The Crown Law Office referred to the general guidance on judicial directions provided by the Supreme Court in *CT v R*<sup>85</sup> as well as the Supreme Court's comments in *Hudson* that a warning will normally be required in cases involving prison informant evidence.<sup>86</sup> On this basis and given the specific guidance provided by the Court of Appeal in *Baillie*,<sup>87</sup> the Crown Law Office considered it unnecessary to amend the Act to require any direction or prescribe its content. It further considered that it would be undesirable to do so. It said the current approach allows for judicial discretion as to whether to give a direction and what it should cover on the facts of each case rather than being applied "routinely or mechanistically". Two other submitters also considered it is preferable to retain judicial discretion as to whether to give a warning and what it should contain.<sup>88</sup>
- 8.50 Both the Crown Law Office and Luke Cunningham Clere reiterated the fundamental constitutional importance of reliability being determined by a properly cautioned jury and the risk of this being diminished by overly prescriptive rules on judicial directions.
- 8.51 Of the six submitters that expressed concern about the adequacy of section 122(2)(d), five pointed to evidence of jury behaviour as showing that judicial directions cannot overcome the "fundamental attribution error" that leads to juries placing undue weight on prison informant evidence.<sup>89</sup> The Public Defence Service said it had "clear anecdotal evidence that the appellate courts' optimism in respect of the effectiveness of directions may well be misplaced".
- 8.52 Although the majority of submitters considered section 122(2)(d) provides insufficient protection against the risks of prison informant evidence, far fewer submitters addressed whether and how it should be amended. Only three submitters said that section 122(2)(d) should be amended and none provided detailed reasons.<sup>90</sup> This may reflect a view among these submitters that amendment would be unlikely to address their concerns. For example, Justice for All Inc stated that "section 122(2)(d) has been an ineffective safeguard and is likely to still be ineffective even if it is modified".

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<sup>82</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association New Zealand, Stephen Hudson, Justice for All Inc, Public Defence Service.

<sup>83</sup> Adjunct Professor Elisabeth McDonald.

<sup>84</sup> Crown Law Office, Luke Cunningham Clere, New Zealand Law Society.

<sup>85</sup> *CT (SC 88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [50].

<sup>86</sup> *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289 at [40]–[41].

<sup>87</sup> *Baillie v R* [2021] NZCA 458.

<sup>88</sup> Luke Cunningham Clere, New Zealand Law Society.

<sup>89</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association New Zealand, Justice for All Inc, Public Defence Service.

<sup>90</sup> Auckland District Law Society, Stephen Hudson, Public Defence Service.

## Reform not recommended

- 8.53 We do not recommend reform to amend section 122(2)(d) to enhance judicial directions on the use of prison informant evidence. We are not persuaded that the lack of mandatory or prescribed judicial directions is causing problems in practice. The Crown Law Office considered that, as a result of recent case law, judicial directions will in effect be given in every case involving prison informant evidence. This aligns with earlier feedback we received that judges will always give a warning about unreliability when this type of evidence is offered.
- 8.54 Our conclusion on this issue is reinforced by our recommendation above to introduce a new provision governing the admissibility of prison informant evidence. A number of submitters referred to the difficulties juries experience in using and weighing this type of evidence.<sup>91</sup> Some of these submitters thought this made judicial directions ineffective in that they come at too late a stage to address the risks of unreliability.<sup>92</sup> As we note above, this emphasises the importance of addressing reliability risks at the admissibility stage before evidence is presented to a jury.
- 8.55 Finally, as the Commission has previously emphasised, it is important to maintain discretion and flexibility in judicial directions.<sup>93</sup> We agree with the Crown Law Office that retaining discretion provides “scope for the unknown” and allows judges to decline to provide a direction where to do so would unnecessarily emphasise evidence or where there are good reasons not to do so on the facts of the case.
- 8.56 More guidance on this issue may be forthcoming from the courts. The Supreme Court has granted leave to appeal in *Tihema v R* on the question of whether the principles in *W (SC 38/2019) v R* and *Roigard* were correctly applied in a judicial direction concerning the evidence of a prison informant.<sup>94</sup>

## ADDITIONAL SAFEGUARDS

### Issue

- 8.57 In *W (SC 38/2019) v R*, the Supreme Court considered that additional safeguards for the use of prison informant evidence were “important and necessary”.<sup>95</sup> It went on to outline some of the safeguards used in some overseas jurisdictions, including the use of approval committees to review and agree to the use of prison informant evidence, record-keeping and disclosure requirements and prosecutorial policies that limit the use of prison informant evidence.<sup>96</sup> The Court ultimately concluded that further guidance for prosecutors and a central register of prison informants should be explored further.<sup>97</sup>

<sup>91</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association, Public Defence Service.

<sup>92</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association.

<sup>93</sup> See, for example, Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [11.107]; Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [2.62] (judicial directions on cross-racial identifications) and [13.21] (judicial directions in cases of delay).

<sup>94</sup> *Tihema v R* [2023] NZSC 37 at [1].

<sup>95</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [91]. Minority agreement at [218].

<sup>96</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [92](a)–(e).

<sup>97</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [93] (majority) and [218] (minority).



- 8.58 In our Issues Paper, we noted that commentators had expressed support for additional safeguards in this area.<sup>98</sup> Since *W (SC 38/2019) v R*, the Solicitor-General has produced guidance for prosecutors on the use of prison informant evidence<sup>99</sup> and Police has set up and is maintaining a central register of prison informants.<sup>100</sup>

## Consultation

### What we asked submitters

- 8.59 We asked submitters whether other safeguards were necessary or desirable to address the risks associated with prison informant evidence and, if so, what these should be. We did not express a view on this but outlined some possible options to inform submitters' views. These included enhancing existing prosecutorial policies and guidance, oversight and approval of decisions to use prison informant evidence and more robust record-keeping.<sup>101</sup>

### Results of consultation

- 8.60 Ten submitters responded to this question. Four considered additional safeguards are necessary<sup>102</sup> while four did not.<sup>103</sup> Two submitters, the NZLS and Associate Professor High, considered that it is too soon to assess the impact of recent developments and so did not express a firm view on whether any additional safeguards are necessary or desirable.
- 8.61 Those submitters that did not consider additional safeguards necessary or desirable had mixed views as to why. Luke Cunningham Clere considered that additional safeguards are unnecessary as the current approach is sufficient. In contrast, the ADLS and Defence Lawyers Association, both of whom supported reform more generally, considered that additional safeguards would be insufficient because only statutory reform on admissibility can address the risks of prison informant evidence.
- 8.62 Those submitters that supported the introduction of additional safeguards expressed particular concern about the lack of record-keeping.<sup>104</sup> They said this makes it difficult to identify and assess reliability concerns. Both the Criminal Bar Association and the Public Defence Service favoured a central register and gave suggestions as to what information this should hold, including:
- (a) incentives offered, accepted or declined;
  - (b) any history of the witness acting as a prison informant in other cases and the circumstances and outcomes of those cases; and
  - (c) the type and nature of interactions between informants and Police.

<sup>98</sup> See, for example, Scott Optican "Evidence" [2021] NZ L Rev 313 at 328–329; Anna High "The exclusion of prison informant evidence for unreliability in New Zealand" (2021) 25(3) E&P 217.

<sup>99</sup> Crown Law Office *Solicitor-General's Guidelines for Use of Inmate Admissions* (August 2021).

<sup>100</sup> Mike White "Law Commission will examine 'jailhouse snitches'" *Stuff* (online ed, 1 October 2022).

<sup>101</sup> See discussion in the Issues Paper at [8.53].

<sup>102</sup> Criminal Bar Association, Stephen Hudson, Justice For All Inc, Public Defence Service.

<sup>103</sup> Auckland District Law Society, Defence Lawyers Association, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald.

<sup>104</sup> Criminal Bar Association, Public Defence Service.



- 8.63 These submitters also emphasised the importance of ensuring information held on the register is discoverable and disclosed to defence counsel.<sup>105</sup>
- 8.64 The Public Defence Service supported requiring the prosecution to make an application in each instance it wishes to use prison informant evidence, judges to provide reasoning for their decision to admit and all prison informant statements to be recorded to “mitigate against coaching and accidental tainting, and show body language”.

### Reform not recommended

- 8.65 We do not recommend reform to introduce additional safeguards on the admissibility or use of prison informant evidence. Our conclusion on this issue is reinforced by our recommendation above to introduce a new admissibility provision for prison informant evidence. We consider this proposed amendment will also improve record-keeping and disclosure because the court will necessarily require information to determine admissibility. The reform we have recommended to specify the factors that a judge must consider when determining admissibility will therefore drive any changes needed to police record-keeping and disclosure practices.
- 8.66 A number of submitters, including some of those expressing support for additional safeguards, were positive about the potential impact of the Solicitor-General’s guidelines. They observed, however, that the guidelines are still relatively new and so it is difficult to draw clear conclusions about how they are working in practice.<sup>106</sup> We consider this safeguard should be allowed to bed in alongside our recommended admissibility provision. Feedback from submitters on other potential safeguards (such as limiting the number of prison informants called in one proceeding or requiring interviews to be recorded) could be useful considerations for future iterations of the guidelines.
- 8.67 Submitters were less positive about current approaches to record-keeping and disclosure. As with the Solicitor-General’s guidelines, the development of a central register is relatively new and many of the concerns raised by submitters may pre-date its establishment. Further feedback from Police on the central register of prison informants indicated the challenges of collecting relevant information. Police said it was not in a position to comment at this stage on how the register is operating in practice. We consider it would be inappropriate to recommend a statutory record-keeping requirement until the operation of the new register can be properly assessed.
- 8.68 Defence lawyers raised a number of concerns about the current approach to disclosure of relevant information about prison informant evidence.<sup>107</sup> Disclosure obligations are only as good as the information that is collected and made available, so any change in practice in this area is very closely intertwined with the collection and recording of relevant information. In our view, any relevant information about prison informants and the circumstances relating to their evidence should be disclosed to the defence in line with the general disclosure obligations under section 13(2)(a) of the Criminal Disclosure Act 2008. Any concerns about how this is currently working in practice would be properly addressed by the Criminal Disclosure Act rather than by reform of the Evidence Act.

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<sup>105</sup> The Auckland District Law Society and Defence Lawyers Association New Zealand also commented on their experiences of disclosure in response to an earlier question.

<sup>106</sup> Criminal Bar Association, Crown Law Office, New Zealand Law Society, New Zealand Police, Public Defence Service.

<sup>107</sup> Auckland District Law Society, Criminal Bar Association, Defence Lawyers Association, Public Defence Service.

## OTHER INCENTIVISED WITNESSES

### Issue

- 8.69 The main focus of our Issues Paper chapter was on prison informant evidence. However, we acknowledged — as the Supreme Court did in *W (SC 38/2019) v R* and *Roigard* — that there is also a class of witnesses that can be said to be incentivised in the context of the broader criminal justice system.<sup>108</sup> We noted that the material concern with prison informant evidence is its unreliability. That concern does not come from the fact of detention at the time of the alleged interaction between the informant and the defendant but from the incentives available or offered to the informant in return for giving evidence.<sup>109</sup> There may be other incentives just as powerful and as compelling for witnesses who are not detained.
- 8.70 In *W (SC 38/2019) v R*, the Court was split on whether this wider class of witness should be approached on the same basis as prison informants. The majority limited its approach to prison informants and left consideration of other incentivised witnesses for when those cases arise.<sup>110</sup> The minority went further and would have applied its framework to what it described as “incentivised secondary confession evidence”.<sup>111</sup>
- 8.71 In *Baillie*, the Court of Appeal again declined to expand the class of witnesses who should be covered by the “careful scrutiny” approach to prison informant evidence, holding that the issue should be reserved for more extensive argument in a relevant case.<sup>112</sup> It did, however, make two further points on the issue of scope. First, the Court said there are clear definitional difficulties with identifying a wider class of incentivised witnesses and that even the definition of “prison informant” is open to debate. Second, the Court acknowledged that the reliability concerns identified in *W (SC 38/2019) v R* with respect to prison informant evidence will sometimes also be presented in relation to other incentivised witnesses. In such cases, the option to issue a reliability direction under section 122 is open to the judge.<sup>113</sup>

### Consultation

#### What we asked submitters

- 8.72 We sought feedback on whether any amendments to the Act or additional safeguards should apply to a wider class of incentivised witnesses beyond prison informants. If so, we asked how that wider class should be defined.

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<sup>108</sup> See discussion in Issues Paper at [8.54]–[8.62].

<sup>109</sup> Issues Paper at [8.59].

<sup>110</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [87].

<sup>111</sup> Defined as “witnesses the Crown wishes to call who will give evidence alleging that the defendant has in some way admitted guilt in return for some advantage or benefit — an advantage or benefit that operates within the criminal justice context. The witnesses were not involved in the offending and, typically, their only source of knowledge for their evidence is the statements they claim the defendant made to them”: *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [201].

<sup>112</sup> *Baillie v R* [2021] NZCA 458 at [69].

<sup>113</sup> *Baillie v R* [2021] NZCA 458 at [69].

### Results of consultation

- 8.73 Eleven submitters addressed this question. Four supported extending any amendments to the Act or additional safeguards to a broader range of incentivised witnesses<sup>114</sup> while six did not.<sup>115</sup> One submitter did not express a clear view.<sup>116</sup>
- 8.74 Those submitters that supported extending amendments and safeguards to other incentivised witnesses did so on the basis that the concerns about the risks of prison informant evidence apply equally to other types of incentivised witnesses. Three submitters commented on the similarities between evidence of prison informants and other incentivised witnesses.<sup>117</sup> They considered it immaterial whether the witness was in prison at the time of the alleged confession as both groups of witnesses have been incentivised to give their evidence. These submitters did not, however, express a clear view as to how that broader class of incentivised witnesses should be defined.<sup>118</sup>
- 8.75 Those submitters that opposed extending any amendments and safeguards to other incentivised witnesses did so based on the lack of clear evidence to justify any such extension compared with the empirical evidence on the risks associated with prison informant evidence.<sup>119</sup> To the extent that evidence from other incentivised witnesses does pose a risk of unreliability, submitters considered this could either be appropriately dealt with through existing provisions of the Act<sup>120</sup> or left to the courts to address on a case-by-case basis.<sup>121</sup>

### Reform not recommended

- 8.76 We do not recommend any reform concerning a broader class of incentivised witnesses. The reasons for this are both principled and practical.
- 8.77 First, our recommendation represents a significant shift in approach to the admissibility of prison informant evidence. It is based on the substantial risks of unreliability that prison informant evidence has been shown to carry. While acknowledging that incentives can exist for other types of witnesses, the risks of unreliability associated with those incentives have not been demonstrated to the same degree as with prison informant evidence. Given the significance of our proposed amendment, we consider it appropriate, at least initially, to confine it to the narrower and more easily identifiable class of prison informant evidence. The extension of the reliability threshold to a wider class of evidence

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<sup>114</sup> Auckland District Law Society, Defence Lawyers Association, Stephen Hudson, Public Defence Service.

<sup>115</sup> Crown Law Office, Criminal Bar Association, Associate Professor Anna High, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Law Society.

<sup>116</sup> New Zealand Police commented on the similarities between prison informants and other incentivised witnesses. It was not clear, however, whether it considered any reform should apply to both groups of witnesses or simply that prison informants were not deserving of “special” treatment to begin with.

<sup>117</sup> Auckland District Law Society, Defence Lawyers Association, Public Defence Service.

<sup>118</sup> The Auckland District Law Society and the Defence Lawyers Association New Zealand referred to “accomplices and witnesses generally who gain or hope for advantage by making statements in support of a prosecution”, and the Public Defence Service considered it could include “any witness who is given favourable treatment or an advantage as a result of, or in conjunction with making their statement/giving evidence”. It gave the example of informants not in prison who have unrelated charges withdrawn or reduced or witnesses who receive a cash reward for information.

<sup>119</sup> Criminal Bar Association, Crown Law Office, New Zealand Law Society.

<sup>120</sup> Criminal Bar Association, Crown Law Office, New Zealand Law Society.

<sup>121</sup> Associate Professor Anna High, Luke Cunningham Clere.

is something that could be examined at a later stage once the courts have had the opportunity to consider further the range and effects of different types of incentives on witness evidence.

- 8.78 Second, it is notable that, among submitters in favour of an expanded approach, there was no clear view or consensus as to who should be included in the wider class of incentivised witnesses. This mirrors the concerns of the courts in *W (SC 38/2019) v R* and *Baillie* about the difficulties in defining this potential group of witnesses. Following consultation on this issue, we are not in any better position to attempt that definitional exercise.
- 8.79 In the meantime, this issue can be addressed by the courts on a case-by-case basis, taking into account the particular circumstances of the case.<sup>122</sup> In this respect, we suggest that the types of considerations set out in our proposed amendment on the admissibility of prison informant evidence above may be useful to judges considering other cases involving incentivised witnesses.
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<sup>122</sup> We are aware of one case, currently subject to publication restrictions, where the Court of Appeal has distinguished the approach of *W (SC 38/2019) v R* to prison informants from reliability concerns about eye-witness accomplice evidence more generally.

## CHAPTER 9

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# Veracity evidence

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## INTRODUCTION

9.1 In this chapter, we consider the operation of the veracity rules (sections 37 and 38) in the Evidence Act 2006. We address the following:

- (a) The application of the veracity rules to single lies. We conclude the application of the veracity rules to evidence of single lies is well understood by the courts and that no amendment is needed.
- (b) Assessing substantial helpfulness under section 37(3). We recommend repealing section 37(3) in its entirety on the basis that it is not fulfilling its intended function of providing guidance on matters relevant to assessing whether veracity evidence is “substantially helpful”.
- (c) The application of section 38(2) when a defendant puts veracity in issue. We recommend reform to extend the circumstances in which the prosecution can offer evidence about a defendant’s veracity.
- (d) The use of the term “veracity” in other parts of the Act. We conclude there is no evidence this is causing problems in practice and do not recommend reform.

## BACKGROUND

9.2 In our Issues Paper, we discussed the history of the veracity rules.<sup>1</sup> Section 37(1) sets out the general rule that a party may not offer evidence in a civil or criminal proceeding about a person’s veracity unless the evidence is “substantially helpful” in assessing that person’s veracity. “Veracity” is defined in section 37(5) as “the disposition of a person to refrain from lying”. Te Kōti Mana Nui | Supreme Court has held that the veracity rules do not apply to evidence that is of direct relevance to the case.<sup>2</sup> The scope of the veracity rules is therefore relatively narrow, only capturing evidence that would not otherwise be relevant to the facts in issue.

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<sup>1</sup> Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [9.2]–[9.4].

<sup>2</sup> *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [135] and [138].

## APPLICATION OF THE VERACITY RULES TO SINGLE LIES

### Issue

- 9.3 In our Issues Paper, we said there was mixed case law on whether and how the veracity rules apply to evidence of a single lie told on a previous occasion.<sup>3</sup> In one early case, *R v Tepu*, te Kōti Pīra | Court of Appeal suggested evidence of a single lie does not engage the veracity rules in section 37 because it does not show a disposition or tendency to lie more generally.<sup>4</sup> This would mean that evidence of a single lie could be admitted without meeting the test of substantial helpfulness. Since then, the Supreme Court and Court of Appeal have found that evidence of a single lie does engage the veracity rules and that the number of previous lies (or alleged lies) will be relevant when assessing substantial helpfulness.<sup>5</sup> The Court of Appeal in 2022 suggested evidence of a single lie will seldom be “substantially helpful”.<sup>6</sup>
- 9.4 Several provisions in the Act indicate a single previous lie can be considered under the veracity rules. For example, section 37(3)(a) refers to a “lack of veracity ... when under a legal obligation to tell the truth (for example, in *an* earlier proceeding or in *a* signed declaration)” and section 37(3)(b) refers to “*1 or more* offences that indicate a propensity for a lack of veracity”.

### Consultation

#### What we asked submitters

- 9.5 We sought feedback on whether the treatment of single lies under the veracity rules is creating confusion or uncertainty in practice and whether legislative clarification is desirable. We expressed our preliminary view that evidence of a single lie should be subject to the veracity rules so that the heightened relevance test of substantial helpfulness applies.<sup>7</sup> This would be consistent with Te Aka Matua o te Ture | Law Commission’s original intention, recent case law on this issue and the wider scheme of the Act. However, we noted this did not necessarily mean legislative amendment is required — the matter could simply be left to the courts.<sup>8</sup>

#### Results of consultation

- 9.6 Twelve submitters commented on this issue. Three supported amendment to clarify that evidence of a single lie must be assessed for admission under the veracity rules,<sup>9</sup> three supported a different amendment to prevent the admission of single lies as veracity

<sup>3</sup> Issues Paper at [9.7]–[9.12].

<sup>4</sup> *R v Tepu* [2008] NZCA 460, [2009] 3 NZLR 216 at [19].

<sup>5</sup> *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [73]; *Williams v R* [2021] NZCA 535 at [84]–[89]. We are aware of two other Court of Appeal cases that have applied the approach in *Best* but remain subject to publication restrictions until final disposition of trial.

<sup>6</sup> This case is subject to publication restrictions until final disposition of trial.

<sup>7</sup> Issues Paper at [9.13]–[9.14].

<sup>8</sup> Issues Paper at [9.15].

<sup>9</sup> Auckland District Law Society, Te Matakahi | Defence Lawyers Association New Zealand, Ethan Huda.

evidence in relation to complainants of family and sexual violence<sup>10</sup> and three did not consider reform is needed.<sup>11</sup> Two other submitters were not aware of any uncertainty in the law currently but had no issue with clarifying that evidence of a single lie can be veracity evidence.<sup>12</sup> One submitter made general comments but did not express a clear view on the need for reform.<sup>13</sup>

- 9.7 The Auckland District Law Society (ADLS), Te Matakahi | Defence Lawyers Association New Zealand and Ethan Huda supported reform to clarify that evidence of a single lie does engage the veracity rules. The ADLS and Defence Lawyers Association suggested that the inclusion of “disposition” in the definition of veracity implies single incidents are excluded. They suggested replacing the term “veracity” with “truthfulness” (as the Commission recommended in the Evidence Code) or amending section 37 to make it clear that a “disposition” can be demonstrated through the telling of a single lie. Ethan Huda considered the magnitude of lies does not depend only on repetition and that some single lies can be significant.
- 9.8 Paulette Benton-Greig, Community Law Centres o Aotearoa and Ngā Whare Whakaruruhau o Aotearoa | Women’s Refuge submitted the Act should be amended to halt the admission of single lies as veracity evidence in relation to complainants of family and sexual violence. They noted evidence of single lies, including prior complaints made by a complainant, are often treated as particularly significant in sexual and family violence cases and admitted as relevant veracity evidence. They considered single lies do not show a tendency to lie.
- 9.9 Submitters that did not consider reform is necessary all agreed evidence of a single lie already engages the veracity rules.<sup>14</sup> Associate Professor Anna High and Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) both commented that case law has already reached the correct interpretation — that is, a single instance of lying can engage the veracity rules but will seldom be “substantially helpful”.

### Reform not recommended

- 9.10 We do not recommend reform to address the treatment of single lies under the veracity rules. We remain of the view that evidence of a single lie should be subject to the veracity rules. The number of previous lies or alleged lies will then be relevant when assessing whether the evidence is substantially helpful. As noted, this approach has been endorsed by a majority of the Supreme Court and applied in several recent Court of Appeal cases. The Court of Appeal has also suggested that evidence of a single lie will seldom be “substantially helpful”.<sup>15</sup> In our view, these developments displace the earlier suggestion

<sup>10</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Ngā Whare Whakaruruhau o Aotearoa | Women’s Refuge. In addition to their own submissions on this issue, Community Law Centres o Aotearoa and Women’s Refuge supported Paulette Benton-Greig’s submission.

<sup>11</sup> Associate Professor Anna High, Adjunct Professor Elisabeth McDonald, Te Kāhui Ture o Aotearoa | New Zealand Law Society.

<sup>12</sup> Luke Cunningham Clere, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

<sup>13</sup> Stephen Hudson said any laws that can stop or reduce lies being presented in court as the truth can only be good for the justice system.

<sup>14</sup> Associate Professor Anna High, Adjunct Professor Elisabeth McDonald, New Zealand Law Society. Luke Cunningham Clere and the Public Defence Service also were not aware of any uncertainty in the law currently, although they were not opposed to clarifying that evidence as a single lie can qualify as veracity evidence.

<sup>15</sup> This case remains subject to publication restrictions until final disposition of trial.

in *Tepu* that evidence of a single lie is not veracity evidence.<sup>16</sup> Because of this, we do not think amendment is needed.

- 9.11 As we explained in our Issues Paper, this approach is consistent with the wording of section 37 as a whole and with the Commission's intent when it recommended the adoption of a "substantially helpful" test in the Evidence Code. The purpose of the test was to avoid the admission of evidence that is of marginal relevance and may distract the fact-finder from the real issues in dispute.<sup>17</sup> We cannot see why evidence of a single lie should be exempt from this test.
- 9.12 We acknowledge the concern expressed by some submitters about the admission of evidence of single lies of complainants in sexual and family violence cases.<sup>18</sup> In our view, however, treating evidence of single lies as veracity evidence provides greater protection for complainants. Requiring evidence of a single lie to be "substantially helpful" means it will face greater scrutiny to be admitted than it would if the veracity rules did not apply.<sup>19</sup> Case law suggests evidence of a single prior complaint is unlikely to be considered "substantially helpful" (and therefore admissible) where the complainant does not accept the prior complaint was false.<sup>20</sup>

## ASSESSING SUBSTANTIAL HELPFULNESS (SECTION 37(3))

### Relevance of the matters listed in section 37(3)

#### Issue

- 9.13 Section 37(3) purports to provide a non-exhaustive list of matters relevant to deciding whether veracity evidence is substantially helpful. This list did not appear in the draft provision in the Evidence Code but was based on examples given by the Commission in its report of matters that could be considered when assessing substantial helpfulness.<sup>21</sup>
- 9.14 The list reflects the common law exceptions to the collateral issues rule, which was abolished by section 37.<sup>22</sup> However, the relevance of some of the matters listed was called into question by the Supreme Court's decision in *Hannigan v R*.<sup>23</sup> The majority found that the veracity rules do not apply to evidence that is of direct relevance to the case (even if that evidence bears on veracity).<sup>24</sup> This led the Commission to recommend the repeal of section 37(3)(c) (previous inconsistent statements) in its Second Review since a previous inconsistent statement will almost always have some relevance to the

<sup>16</sup> *R v Tepu* [2008] NZCA 460, [2009] 3 NZLR 216 at [19].

<sup>17</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [152] and [157].

<sup>18</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Women's Refuge.

<sup>19</sup> Evidence of a single lie would be generally admissible provided it was "relevant" under s 7 of the Evidence Act 2006 (assuming no other specific admissibility provisions in the Act apply).

<sup>20</sup> *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [85], [88] and [91]. A more recent Court of Appeal case on this point remains subject to publication restrictions until final disposition of trial.

<sup>21</sup> Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C179].

<sup>22</sup> Simon France (ed) *Adams on Criminal Law — Evidence* (online looseleaf ed, Thomson Reuters) at [EA37.03(7)].

<sup>23</sup> *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612.

<sup>24</sup> *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [135] and [138].



facts in issue.<sup>25</sup> The Government has accepted this recommendation but the provision has not yet been repealed.<sup>26</sup>

- 9.15 In our Issues Paper, we noted we had received preliminary feedback suggesting that section 37(3)(d) and (e) (bias and motive to be untruthful) are also redundant following *Hannigan* because they will also almost always be directly relevant to the case.<sup>27</sup> Preliminary feedback suggested their inclusion is causing confusion in practice.<sup>28</sup> The Commission did not consider these provisions in its Second Review.

## Consultation

### What we asked submitters

- 9.16 We asked submitters whether section 37(3)(d) and (e) perform any useful role in practice or whether they should be repealed (in addition to section 37(3)(c) as recommended in the Commission's Second Review).

### Results of consultation

- 9.17 Nine submitters addressed this question. Seven considered section 37(3)(d) and (e) should be repealed<sup>29</sup> while two considered they should be retained.<sup>30</sup>
- 9.18 Submitters that supported repeal considered section 37(3)(d) and (e) redundant for the reasons outlined in our Issues Paper and said they could cause confusion.<sup>31</sup>
- 9.19 Submitters that opposed repeal generally agreed that section 37(3)(d) and (e) are not frequently relied on but considered they may be relevant in some cases. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service noted mixed views on this issue among its lawyers but suggested possible bias or motive to lie could be raised in relation to credibility and past behaviour and so bring the evidence within the veracity rules. The NZLS also said that evidence of an issue between a defendant and a witness showing bias or motive to lie may bolster evidence that a witness has a disposition to lie in the proceedings. It considered it artificial to separate a general disposition to lie from a motive to lie in the particular proceedings.

## The need for reform

- 9.20 We conclude section 37(3)(d) and (e) have no useful role in practice and should be repealed. They address matters that are, simply put, not veracity evidence. A person's

<sup>25</sup> Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at 232 (R24).

<sup>26</sup> *Government Response to the Law Commission report: The Second Review of the Evidence Act 2006 Te Arotake Tuarua i te Evidence Act 2006* (September 2019) at 6.

<sup>27</sup> Issues Paper at [9.21].

<sup>28</sup> Issues Paper at [9.21].

<sup>29</sup> Auckland District Law Society, Te Tari Ture o Karauna | Crown Law Office, Defence Lawyers Association New Zealand, Associate Professor Anna High, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, Ngā Pirihimana o Aotearoa | New Zealand Police.

<sup>30</sup> New Zealand Law Society, Public Defence Service.

<sup>31</sup> Auckland District Law Society, Crown Law Office, Defence Lawyers Association New Zealand, Associate Professor Anna High, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Police.

bias or motive to be untruthful in a proceeding is relevant to the reliability of their evidence and does not, therefore, engage the rules.<sup>32</sup> This view was shared by most submitters. They considered that, post-*Hannigan*, these provisions are “redundant”, seldom relied on and prone to cause confusion if retained.<sup>33</sup>

- 9.21 The NZLS and Public Defence Service submitted there may be cases where motive or bias will be relevant to veracity and so section 37(3)(d) and (e) should be retained. We consider these cases will be rare.<sup>34</sup> If they do arise, the relevance of motive or bias could still be considered by the courts on a case-by-case basis. Section 37(3) is non-exhaustive and consideration of whether or not evidence is substantially helpful is not confined to the factors set out there.
- 9.22 Our recommendation to repeal section 37(3)(d) and (e) is linked to our discussion on the substantial helpfulness threshold more generally. We discuss our recommendation for reform in relation to both these issues below.

## Guidance on assessing substantial helpfulness

### Issue

- 9.23 In our Issues Paper, we noted that, if section 37(3)(c)–(e) are repealed, this would leave only section 37(3)(a) (lack of veracity on the part of the person when under a legal obligation to tell the truth) and 37(3)(b) (that the person has been convicted of one or more offences that indicate a propensity for a lack of veracity).<sup>35</sup> We suggested these matters provide examples of *types* of veracity evidence that may be substantially helpful depending on the circumstances. Section 37(3) does not therefore give guidance on the kind of evaluative matters the court should consider when assessing whether veracity evidence is substantially helpful. This contrasts with other provisions in the Act that do give guidance on evaluative matters relevant to determining the admissibility of evidence.<sup>36</sup>
- 9.24 We explained that some factors relevant to the substantial helpfulness inquiry have been identified in *Best v R* and *Horton v R*.<sup>37</sup> These include the remoteness in time of the previous acts or events, the number of previous acts or events, the nature and seriousness of those acts or events and the extent to which the acts or events are accepted by the person to whom the evidence relates.

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<sup>32</sup> Issues Paper at [9.22].

<sup>33</sup> Auckland District Law Society, Crown Law Office, Defence Lawyers Association New Zealand, Associate Professor Anna High, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Police.

<sup>34</sup> In the Issues Paper, we noted we had been unable to identify any cases where veracity evidence has met the substantial helpfulness threshold because it revealed a bias or motive to lie. Issues Paper at [9.23], n 32.

<sup>35</sup> Issues Paper at [9.25].

<sup>36</sup> See, for example, s 30(3) (improperly obtained evidence) and ss 43(3)–(4) (propensity evidence).

<sup>37</sup> Issues Paper at [9.26]–[9.28], referring to *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [73]–[74] and *Horton v R* [2021] NZCA 82 at [30].

## Consultation

### What we asked submitters

- 9.25 We asked whether section 37 should be amended to provide guidance on the factors relevant to assessing whether veracity evidence meets the threshold of substantial helpfulness. If so, we sought feedback on what factors should be included.

### Results of consultation

- 9.26 Eight submitters addressed this question. Four submitters considered section 37(3) should be amended to provide guidance on the substantial helpfulness threshold<sup>38</sup> while three did not.<sup>39</sup> The Public Defence Service said its lawyers had mixed views on whether this would be helpful.
- 9.27 Submitters in support of additional guidance considered it would ensure certainty and consistency in the Act. The ADLS and Defence Lawyers Association agreed section 37(3)(a) and (b) pose difficulties and supported amendment to provide evaluative factors for a court to consider. In their view, this would be for clarity only as the factors described in *Best* and *Horton* are already being used by the courts. However, they expressed two concerns about these factors. First, they were concerned by the Court of Appeal's comment in *Horton* that an assessment of "extenuating circumstances" related to prior convictions was relevant to the substantial helpfulness inquiry. They considered it risked introducing a reliability inquiry, which goes to weight rather than substantial helpfulness.<sup>40</sup> Second, they considered reference in *Best* to the need to determine if a lie is malicious or fraudulent<sup>41</sup> sits uncomfortably with the role of the judge as a gatekeeper. In their view, this reinforces the difficulty defendants often face in meeting the substantial helpfulness threshold.
- 9.28 The NZLS said reform would ensure some consistency in approach across the Act, referring to the factors for assessing the probative value of propensity evidence under section 43(3).
- 9.29 Two submitters that did not support amendment to provide guidance — the Wellington Crown Solicitor, Luke Cunningham Clere, and Adjunct Professor Elisabeth McDonald — suggested section 37(3) could be repealed in its entirety. Professor McDonald said it is "hardly referred to" and case law provides sufficient guidance. Associate Professor High considered guidance on assessing substantial helpfulness should be left to develop through case law.
- 9.30 The Public Defence Service expressed "mixed views" on amendment. It noted some of its lawyers considered guidance could be helpful as long as the factors were sufficiently

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<sup>38</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, New Zealand Law Society, New Zealand Police.

<sup>39</sup> Associate Professor Anna High, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald.

<sup>40</sup> In *Horton* [2021] NZCA 82, the Court of Appeal held that evidence of extenuating circumstances relating to previous convictions can be relevant when assessing substantial helpfulness. They gave the example of "significant material hardship" on the part of the complainant — for example, financial pressure leading to dishonesty offending such as burglary or theft — as that bears on the extent to which the conviction illustrates a wider propensity to lie (at [30]). See also *R v Chase* [2016] NZHC 2665 at [44].

<sup>41</sup> *Best v R* [2016] NZSC 122 at [73].

general and non-exhaustive to allow for flexibility in particular cases. Others were concerned it could become “too limiting” or cause greater confusion than already exists.

### *The need for reform*

- 9.31 We conclude reform of section 37(3) is desirable. However, for reasons we explain below, we propose the repeal of the provision rather than amending it to provide guidance on substantial helpfulness.
- 9.32 The wording of section 37(3) suggests it is intended to give guidance on evaluative matters relevant to the substantial helpfulness test. However, the section as currently drafted does not do that.<sup>42</sup> Submitters shared the view that section 37(3) does not currently provide useful guidance on the application of the substantial helpfulness test. Most submitters favoured some sort of reform — either to amend section 37(3) to provide clearer guidance or to repeal it completely.
- 9.33 If sections 37(3)(c)–(e) are repealed as we have suggested, that would leave only sections 37(3)(a) and (b). As we commented in our Issues Paper, these paragraphs provide examples of *types* of veracity evidence that may be substantially helpful.<sup>43</sup> For the reasons outlined below, we do not consider it is necessary or helpful to highlight these in legislation.
- 9.34 We do not consider the status quo (retaining section 37(3), whether as drafted or with the repeal of section 37(3)(c) and (e)) to be desirable. It might be argued there is no harm caused by leaving this subsection as is. One submitter commented that it is rarely referred to in practice.<sup>44</sup> However, the provision does not provide the guidance it purports to offer. This is inconsistent with the purpose of the Act to help secure the just determination of proceedings by (among other things) providing for facts to be established by the application of logical rules<sup>45</sup> and enhancing access to the law of evidence.<sup>46</sup>

### *Recommendation*

**R12**

Repeal section 37(3).

- 9.35 We recommend repealing section 37(3) in its entirety. This is desirable to address both concerns with the relevance of the factors in section 37(3)(d) and (e) (as outlined above) and with the approach to assessing substantial helpfulness more generally.
- 9.36 We explained above our conclusion that section 37(3)(d) and (e) have no useful role in practice and should be repealed. With the recommendation of the Commission in its Second Review to repeal section 37(3)(c), this would leave only sections 37(3)(a) and (b). As we note above, these paragraphs refer to *types* of veracity evidence rather than evaluative matters to be taken into account when assessing whether veracity evidence

<sup>42</sup> Issues Paper at [9.25]–[9.30].

<sup>43</sup> Issues Paper at [9.25].

<sup>44</sup> Adjunct Professor Elisabeth McDonald.

<sup>45</sup> Evidence Act 2006, s 6(a).

<sup>46</sup> Evidence Act 2006, s 6(f).

is substantially helpful. For this reason, we do not consider it necessary or desirable to retain them in section 37(3).

- 9.37 In our Issues Paper, we suggested section 37(3)(a) and (b) could be retained in a separate subsection that makes clear they are examples of types of veracity evidence that may be substantially helpful. The NZLS agreed that retaining section 37(3)(a) and (b) has merit, as the factors may give weight to evidence of a disposition to lie. We did not receive any other submissions addressing this point or expressing any clear support for the usefulness of the examples in section 37(3)(a) and (b). Professor McDonald commented that section 37(3) is rarely referred to in practice, suggesting the examples are not helpful or necessary.
- 9.38 Retaining section 37(3)(a) and (b) in a separate provision may also elevate the significance of these types of evidence over other potentially relevant types of veracity evidence. We emphasise they are only *examples* of relevant types of veracity evidence. As the Supreme Court said in *Best*, it is “not necessarily the case that the evidence of a type set out in s 37(3) will *always* be substantially helpful.”<sup>47</sup> There are also other types of veracity evidence that are frequently admitted by the courts. For example, “ordinary lies” that do not fall within section 37(3)(a) may still be capable of being “substantially helpful”.<sup>48</sup>
- 9.39 Several submitters considered section 37(3) should be amended to provide further guidance on the factors relevant to assessing “substantial helpfulness”.<sup>49</sup> However, no submitters suggested the absence of guidance is causing problems in practice, nor was there a clear view among submitters as to the type of guidance that might be helpful. Accordingly, we do not recommend reform along these lines.
- 9.40 The Public Defence Service expressed concern that specifying factors in legislation may be overly prescriptive and inflexible. We agree that, in light of the fact-specific nature of veracity evidence, it is important to keep the factors sufficiently open to allow the law to develop. Statutory amendment risks elevating certain factors over others simply by their inclusion in statute. Additionally, although any list of factors could be non-exhaustive (as is the case in similar provisions under sections 30(3) and 43(3)), a statutory list may lend itself to a “tick-box” approach by the courts and so inhibit consideration of any other factors not listed.
- 9.41 Although we did not consult on the total repeal of section 37(3), it was proposed by two submitters.<sup>50</sup> We agree that repealing section 37(3) is the most appropriate approach to addressing the problems with its current application and ensuring clarity and certainty in the Act. Our recommendation to repeal this subsection is not intended to indicate any change in policy or approach and would not alter the threshold for admissibility. It would simply recognise that the subsection is not fulfilling its apparent purpose of providing

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<sup>47</sup> *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [72] (emphasis added). See *Ieremia v R* [2020] NZCA 17 and *Key v R* [2010] NZCA 115 as examples of cases where evidence of a witness’s prior convictions for minor dishonesty offending is generally unlikely to be substantially helpful to assessing their veracity. See also *Horton v R* [2021] NZCA 82 at [29]–[31] where the Court agreed with the view expressed in *Ieremia* and *Key* and considered that the complainant’s history of dishonesty offending, although “fairly extensive and sustained”, had limited relevance to her now giving evidence of assault and rape.

<sup>48</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.75].

<sup>49</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, New Zealand Law Society, New Zealand Police.

<sup>50</sup> Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald.

guidance on matters relevant to assessing substantial helpfulness nor any other useful purpose.

- 9.42 Our conclusion on repeal is supported by the existence of case law on the assessment of substantial helpfulness that has developed largely independently from section 37(3).<sup>51</sup> Submitters did not suggest there is a lack of clarity about how the substantial helpfulness inquiry should be conducted — indeed, they considered guidance had been provided by the case law.<sup>52</sup> The material concern was that this approach is not necessarily reflected in, or derived from, the statutory guidance. The fact that there is now detailed guidance in case law lessens the need for statutory guidance. We emphasise this existing case law would remain unaffected. Further guidance on the factors relevant to assessing substantial helpfulness could continue to be refined, developed or expanded on a case-by-case basis.
- 9.43 We do not consider repeal and the subsequent absence of statutory guidance will cause uncertainty or confusion beyond that which can reasonably be expected with any reform. First, section 37(3) is rarely relied on currently, with the guidance provided in case law proving more helpful and relevant in practice. Second, several other provisions in the Act state a threshold for admissibility but do not provide specific guidance on when or how that threshold will be met.<sup>53</sup> This is not, therefore, an unusual approach to take.

## APPLICATION OF SECTION 38(2) WHEN THE DEFENDANT PUTS VERACITY IN ISSUE

### Background

- 9.44 Section 38(2) sets out the limited circumstances in which the prosecution may offer evidence about a defendant's veracity in a criminal proceeding. Under section 38(2)(a), the prosecution may only offer evidence about the defendant's veracity if:
- ... the defendant has, in court, given oral evidence about his or her veracity or challenged the veracity of a prosecution witness by reference to matters other than the facts in issue.
- 9.45 Under section 38(2)(b), the judge must also grant permission before the prosecution can offer the veracity evidence. Section 38(3) lists the matters the judge may take into account in determining whether to grant permission.
- 9.46 The rationale for the rule is to allow the prosecution to correct any false impressions made by the defence about the defendant's veracity and to protect witnesses from gratuitous attacks on their credibility.<sup>54</sup> It codified two common law rules:<sup>55</sup>

<sup>51</sup> See the discussion of *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 and *Horton v R* [2021] NZCA 82 in the Issues Paper at [9.26]–[9.28].

<sup>52</sup> The Auckland District Law Society and Defence Lawyers Association New Zealand both noted that the courts are already applying the *Best* and *Horton* guidance.

<sup>53</sup> Most notably s 8 but also s 25 on the admissibility of expert opinion evidence, which uses the language of “substantial help”.

<sup>54</sup> Issues Paper at [9.45].

<sup>55</sup> Issues Paper at [9.33] and [9.39]–[9.40].

- (a) The rule that, if the defendant offers good character evidence about themselves, the prosecution can introduce bad character evidence about the defendant in rebuttal.<sup>56</sup>
  - (b) The rule that, if the defendant attacks the character of a prosecution witness, the prosecution can “retaliate” by offering evidence of the defendant’s own bad character (the “tit for tat” rule).<sup>57</sup>
- 9.47 Section 38(2) attempts to balance protection for the defendant (preventing them from being cross-examined about matters that are unfairly prejudicial) against the need for the fact-finder to hear all relevant evidence (including ensuring a defendant cannot give a misleading impression of their own character or the character of other witnesses).<sup>58</sup>

## Issues

- 9.48 Section 38(2) is only triggered if the defendant (a) gives oral evidence in court and (b) puts veracity at issue in that evidence. As originally enacted, it only required that the defendant had “offered evidence about his or her veracity or has challenged the veracity of a prosecution witness”. However, it was amended in 2016 following a recommendation in the Commission’s 2013 Review to clarify that the defendant must give the relevant evidence orally in court.<sup>59</sup>
- 9.49 In our Issues Paper, we discussed whether it remains appropriate in light of modern trial practices to limit section 38(2)(a) to cases where the defendant gives evidence in court.<sup>60</sup> At common law, this approach was justified on the basis that, if the defendant does not give evidence, the fact-finder is not being asked to assess their credibility. However, we noted it is now common for the prosecution to play the defendant’s evidential video interview in court and invite the fact-finder to draw conclusions from it. The defendant may make claims about their own veracity or challenge the veracity of a prosecution witness in their evidential interview. Currently, such statements cannot be rebutted unless the defendant chooses to give evidence that addresses their veracity, thereby opening the door for the prosecution to offer veracity evidence in response.
- 9.50 We acknowledged, however, that there are arguments in favour of the current approach.<sup>61</sup> Currently, the prosecution may choose to play the defendant’s out-of-court statement and invite the fact-finder to draw conclusions from it but may not offer it as evidence of a defendant’s veracity unless the defendant has triggered section 38(2). A defendant cannot offer their out-of-court statement without giving evidence in court.<sup>62</sup> It might be considered unfair if the prosecution could trigger section 38(2) by offering a defendant’s out-of-court statement in evidence and then rely on assertions made in that statement to offer veracity evidence about the defendant.
- 9.51 A separate but related issue stems from the requirement in section 38(2)(a) that the defendant put veracity in issue *in their oral evidence*. As we discussed in our Issues Paper,

<sup>56</sup> Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [189]–[190].

<sup>57</sup> Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [196]–[197].

<sup>58</sup> Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [204].

<sup>59</sup> Evidence Amendment Act 2016, s 13. See also Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.108]. For further background on the legislative history of s 38(2)(a), see our Issues Paper at [9.38]–[9.40].

<sup>60</sup> Issues Paper at [9.35]–[9.36].

<sup>61</sup> Issues Paper at [9.37].

<sup>62</sup> Evidence Act 2006, s 21 (which prevents a defendant from offering their own hearsay statement).

this means it does not apply where veracity is put in issue through some other aspect of the conduct of the defence (for example, during cross-examination of prosecution witnesses).<sup>63</sup> This appears to be inconsistent with both the common law approach and the Commission's original intent.<sup>64</sup>

## Consultation

### What we asked submitters

9.52 We asked whether section 38(2) should be amended to extend the circumstances in which the prosecution can offer evidence about a defendant's veracity.<sup>65</sup> In particular, we asked if section 38(2) should apply (whether or not the defendant gives evidence) when veracity is put in issue by:

- (a) assertions made in the defendant's statement to police (or other prosecuting agency); and/or
- (b) the conduct of their defence.

### Results of consultation

9.53 Eight submitters commented on the current approach under section 38(2) and the need for reform. Five submitters favoured reform<sup>66</sup> and three opposed it.<sup>67</sup>

### The need for reform

- 9.54 Submitters generally focused on the options for reform, although some expressed views on whether reform is generally desirable.
- 9.55 Considerations of fairness featured prominently in submissions — both those in support of and those against reform. Submitters in support of reform referred to the unfairness they considered arises from the current application of section 38(2). The NZLS described it as creating “significant loopholes” that allow challenges to a witness's veracity to be put before the fact-finder without repercussions. Te Tari Ture o te Karauna | Crown Law Office similarly noted a “significant concern” that a defendant who does not give evidence in court may bolster their own veracity or denigrate the veracity of another without facing any consequences.
- 9.56 Submitters that opposed reform were concerned any reform would cause significant unfairness to defendants. This was elaborated on with reference to our options for reform, discussed below. These submitters considered the current approach is appropriate. The ADLS and Defence Lawyers Association, for example, said the prosecution currently has options and does not have to introduce a defendant's statement. They remarked that the prosecution can choose not to if the statement is

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<sup>63</sup> Issues Paper at [9.42] and [9.44].

<sup>64</sup> Issues Paper at [9.43]. *R v Clark* [1953] NZLR 823 (CA) at 830. See also discussion in Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [196]–[197].

<sup>65</sup> Issues Paper at [9.49].

<sup>66</sup> Crown Law Office, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Law Society, New Zealand Police.

<sup>67</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.



exculpatory and that any challenges to a witness's honesty or reliability are part and parcel of cross-examination.

### Options for reform

- 9.57 All five submitters in support of reform supported extending section 38(2) to apply when veracity is put in issue by assertions made in the defendant's statement to police or another prosecuting agency.<sup>68</sup>
- 9.58 Submitters that supported this proposal referred to the now common practice of the prosecution playing a defendant's pre-trial statement in court.<sup>69</sup> The Crown Law Office and NZLS considered amendment would allow the prosecution to correct or challenge any assertions made about veracity in a pre-trial statement whether or not the defendant gives evidence. Ngā Pirihimana o Aotearoa | New Zealand Police saw value in reviewing section 38(2) given changes in trial practice. Professor McDonald commented that it is "odd" for section 38(2) not to be triggered currently by a pre-trial statement, particularly when juries consider and assess the reliability of out-of-court statements in other situations under the Act.
- 9.59 The Public Defence Service raised three concerns about the unfairness such an amendment would create for defendants:
- (a) Defendants would not be cautioned before making a statement or have the benefit of legal advice that any attack they make on the veracity of a complainant could result in the admissibility of evidence at trial to impugn their own veracity. Even if cautioned to this effect, it is unlikely a defendant would fully understand the risks and consequences at that stage. Alternatively, they may simply refuse to give a statement, which could then prejudice them at trial.
  - (b) It could incentivise the prosecution to play the defendant's video statement in every case so they could offer veracity evidence about the defendant, regardless of whether it is relevant to the case.
  - (c) It would put the defendant in a difficult situation if a complainant lied about anything in their statement. If the defendant pointed that out, they would risk opening themselves up to an attack on their own veracity.
- 9.60 The Public Defence Service considered that, if such an amendment was made, it should be mandatory to consider whether the issue can be resolved by editing the video statement to refer only to the relevant parts rather than being introduced as a whole and triggering the application of section 38(2).
- 9.61 The Crown Law Office and NZLS, both of which supported reform, noted similar concerns about potential unfairness to the defendant. Both submitters considered, however, that this would be ameliorated by existing safeguards — namely, the prosecution would still need judicial permission to offer veracity evidence about a defendant under section 38(2) (guided by the factors in section 38(3)) and would still have to meet the "substantially helpful" requirement in section 37(1). The Crown Law Office also noted the significance of the requirement under section 38(2)(a) that the "triggering" veracity evidence must be

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<sup>68</sup> Crown Law Office, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Law Society, New Zealand Police.

<sup>69</sup> Crown Law Office, Adjunct Professor Elisabeth McDonald, New Zealand Law Society, New Zealand Police.

related to “matters other than the facts in issue”. It suggested this will be relatively uncommon in the context of police interviews, which focus on the criminal allegations in question.

- 9.62 Three submitters considered section 38(2) should also apply, whether or not the defendant gives evidence, when veracity is put in issue by the conduct of their defence (such as through cross-examination of a prosecution witness).<sup>70</sup> The two other submitters that supported reform did not explicitly comment on this option.<sup>71</sup>
- 9.63 The Crown Law Office submitted this approach would be fair because, if the defence “choose as a matter of strategy” to make either positive statements about the defendant’s own veracity or negative statements about a witness’s veracity in cross-examination, the prosecution should be able to respond. The requirement for the judge to give permission for the prosecution to offer veracity evidence would act as an important safeguard if a defence witness lashes out in an unexpected manner. The Crown Law Office considered a judge is unlikely to grant permission in these circumstances, referring to the Court of Appeal’s decision in *Blake v R*.<sup>72</sup>
- 9.64 The Public Defence Service had several concerns about such an amendment, including that, in practice, the section would be triggered in almost every family or sexual violence trial (as the veracity of a complainant will frequently be put in issue by the nature of the defence). They were also concerned that it would lead to an increase in trial counsel incompetence appeals either because section 38(2) was inadvertently triggered or because trial counsel was too cautious.

### The need for reform

- 9.65 We conclude it is desirable to amend section 38(2) to extend the circumstances in which the prosecution can offer evidence about a defendant’s veracity.
- 9.66 Our conclusion is based on the original policy objectives of the section — that the prosecution should (a) be able to correct any false impressions made by the defence about the defendant’s veracity and (b) protect witnesses from gratuitous attacks on their credibility.<sup>73</sup> We are not seeking to revisit these although we acknowledge long-standing concerns about the logic and appropriateness of the “tit for tat” rule,<sup>74</sup> which were alluded to by submitters that did not support reform.<sup>75</sup> The question is whether these objectives are being met by the current law. Several submitters did not think they are.<sup>76</sup> They considered the current requirements to engage section 38(2) have created gaps that allow one-sided and potentially inaccurate views of the defendant’s veracity to go unchallenged and the veracity of prosecution witnesses to be challenged without consequence.

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<sup>70</sup> Crown Law Office, Luke Cunningham Clere, New Zealand Law Society.

<sup>71</sup> Adjunct Professor Elisabeth McDonald, New Zealand Police.

<sup>72</sup> *Blake v R* [2010] NZCA 61, [2010] BCL 264.

<sup>73</sup> Issues Paper at [9.45].

<sup>74</sup> See Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [205].

<sup>75</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>76</sup> Crown Law Office, Luke Cunningham Clere, New Zealand Law Society, New Zealand Police.

- 9.67 We agree with this assessment. In the case of the requirement in section 38(2)(a) for the defendant to give evidence, the original justification was that, if the defendant does not give evidence, the fact-finder is not being asked to assess the credibility of their testimony and so evidence about their veracity is irrelevant.<sup>77</sup> However it is no longer accurate to say that a defendant's credibility is not in issue if they do not give evidence in court given that it is now common for the prosecution to play the defendant's evidential video interview in court. In the case of the requirement for veracity to be put in issue by the defendant in their oral evidence, this is too narrowly constructed. It fails to take account of the different ways in which veracity may be put in issue at trial — for example, through challenges to the veracity of a prosecution witness made in cross-examination.
- 9.68 The Commission's original formulation in the Evidence Code was broadly worded and would have allowed the prosecution to offer veracity evidence about the defendant regardless of whether the defendant gave evidence.<sup>78</sup> The Commission also appeared to contemplate that veracity could be put in issue by others than just the defendant — for example, a defence witness.<sup>79</sup> However, this approach was rejected at select committee stage and Parliament reinstated existing law that limited the opportunity for the prosecution to call evidence as to the defendant's veracity to situations where the defendant had offered evidence about their own veracity or challenged the veracity of a prosecution witness.<sup>80</sup> Uncertainty remained, however, because the Act did not make it clear whether the defendant had to give evidence in court for the section to be triggered.
- 9.69 In a subsequent 2008 Report, the Commission considered Parliament's intention was uncertain. It favoured a "strict approach" to the interpretation of the section — a defendant only puts their veracity in issue if they give oral evidence.<sup>81</sup> On this basis, the Commission's 2013 Review recommended amendment to expressly limit section 38(2) to situations where the defendant "in court, has given oral evidence" and the Act was amended accordingly.<sup>82</sup> In the Commission's view, the amendment was simply clarificatory rather than the result of a detailed policy analysis.<sup>83</sup> In its Second Review, the Commission questioned the policy underlying this amendment but did not recommend further reform given the recency of the change.<sup>84</sup> Given this history, our proposed reform would not only give effect to the original intention of the Commission in its codification of the law, it would also provide absolute clarity of a much-debated and discussed section.

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<sup>77</sup> Issues Paper at [9.35].

<sup>78</sup> See Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [218]; Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 110 and [C188]; Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [3.33]–[3.36].

<sup>79</sup> See Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C189].

<sup>80</sup> Evidence Bill 2005 (256–2) (select committee report) at 6. See also Issues Paper at [9.39].

<sup>81</sup> Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [3.37]–[3.40] and [9.15].

<sup>82</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.104]–[6.108] and R13.

<sup>83</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.108].

<sup>84</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [14.27].

- 9.70 The developments outlined above may indicate a more conscious decision to err on the side of a defendant's fair trial rights.<sup>85</sup> The formulation of section 38 was a compromise to "balance protection of the defendant against the need for the fact-finder to hear all relevant evidence".<sup>86</sup> Submitters were cognisant of how finely balanced those competing considerations are. Several submitters that supported reform referred to the potential for unfairness to the defendant that might be caused by any reform. Nonetheless, they considered the balance is not being appropriately struck. We agree, following our conclusion above that the current approach has created gaps that may prevent the prosecution from correcting any false impressions made about a defendant's veracity and cause unfairness to prosecution witnesses who have their veracity impugned.
- 9.71 We do not consider that reform in this area would dramatically shift the balance in favour of the prosecution. Rather, it would help strike the correct balance intended by the rule. We acknowledge, however, as did many submitters, the potential unfairness to defendants of this reform. As we observed in the Issues Paper, one reason for retaining the requirement for the defendant to give evidence would be to prevent the prosecution from offering a defendant's police statement and then using that as the basis for introducing veracity evidence.<sup>87</sup> This problem was acknowledged by a number of submitters, including those that supported reform. For example, removing the requirement may unknowingly open defendants up to challenges to their own veracity through comments they may make in their police interview and are not seeking to rely on at trial. Reform to remove the requirement for veracity to be put in issue by the defendant in oral evidence may also cause unfairness where veracity is put in issue not through a strategic or deliberate approach by the defence but through an unexpected response to a line of questioning or a witness "lashing out".<sup>88</sup>
- 9.72 We agree with the Crown Law Office and NZLS, however, that any unfairness caused to the defendant by reform can be appropriately mitigated through the existence of other safeguards under the veracity rules. These include:
- (a) the requirement under section 38(2)(a) that the triggering veracity evidence relate to "matters other than the facts in issue";
  - (b) the requirement that any veracity evidence be "substantially helpful"<sup>89</sup> as well as complying with section 38;<sup>90</sup>
  - (c) the fact that, under section 38(2)(b), the prosecution must obtain the judge's permission to offer veracity evidence about a defendant; and

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<sup>85</sup> See, for example, Evidence Bill 2005 (256–2) (select committee report): "We consider that the clause as introduced would move the balance in favour of the prosecution" (at 6); Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019): "We note the Commission has consistently taken the view that defendants' rights in this area should be protected" (at [14.27]).

<sup>86</sup> Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [204].

<sup>87</sup> Issues Paper at [9.37].

<sup>88</sup> Public Defence Service. This was also mentioned by the Crown Law Office in its submission supporting reform.

<sup>89</sup> Evidence Act 2006, s 37(1), which states that s 37 applies to all evidence "about a person's veracity".

<sup>90</sup> Evidence Act 2006, s 37(2).

- (d) the factors in section 38(3) that inform a judge's decision whether to grant permission (in particular, under section 38(3)(c), "whether any evidence given by the defendant about veracity was elicited by the prosecution").

9.73 Additionally, we consider the specifics of our proposed reform, outlined below, can also mitigate potential unfairness to defendants.

## Recommendation

### R13

Amend section 38 to:

- a. remove the requirement in section 38(2)(a) for the defendant to give oral evidence in court so that the paragraph states "the defendant has put their veracity in issue or challenged the veracity of a prosecution witness by reference to matters other than the facts in issue";
- b. insert a new subsection in section 38 stating that the defendant may put their veracity in issue or challenge the veracity of a prosecution witness by giving evidence at trial, through the conduct of the defence case (including in cross-examination) or in a defendant's statement offered in evidence by any party;
- c. amend section 38(3)(c) to refer to whether any evidence given or statement made by the defendant about veracity was elicited by the prosecution or through investigative questioning; and
- d. insert a new paragraph in section 38(3) referring to the extent to which the defendant seeks to rely on the evidence of their own veracity or to challenge the veracity of a prosecution witness to support their case.

9.74 Part (a) of our recommendation would remove the requirement for the defendant to give oral evidence in court before the prosecution can offer veracity evidence about the defendant. Section 38(2) would be capable of applying whether or not the defendant chooses to give evidence at trial. For the reasons we have outlined above, we consider this will better achieve the original policy underpinning this section.

9.75 Part (a) would also require the defendant to put veracity "in issue". It would clarify that the defendant must bear some responsibility, whether directly or indirectly, for the circumstances that trigger section 38 and open the door to the prosecution offering evidence about the defendant's veracity.

9.76 The term "put in issue" is already used in section 38(3)(a) but, for the avoidance of doubt, part (b) of our recommendation would clarify the situations in which a defendant may put their veracity in issue or challenge the veracity of a prosecution witness. The reference to "the conduct of the defence case" will help ensure section 38 is not triggered by an unexpected outburst by a witness, which was a concern of several submitters. We also acknowledge the concerns of the Public Defence Service that allowing section 38(2) to be triggered by the conduct of the defence case will result in more counsel competency appeals. We do not consider this concern warrants departing from our recommendations. There are strong policy reasons for allowing the prosecution to respond to challenges to a witness's veracity made through the conduct of the defence.

9.77 Section 38(3) lists considerations to which the judge may have regard when determining whether to grant the prosecution permission to offer evidence of a defendant's veracity

under section 38(2)(b). Parts (c) and (d) of our recommendation propose amendments to this list to cover situations where the defendant puts veracity in issue or challenges the veracity of a prosecution witness other than by giving oral evidence in court.

9.78 We recommend the following amendments to section 38(3):

- (a) Amend section 38(3)(c) to refer to whether any evidence given or statement made by the defendant was elicited by the prosecution *or in response to investigative questioning*.<sup>91</sup> Section 38(3)(c) guards against a situation where the prosecution, as a matter of tactic, might “lure” a defendant into offering evidence of their own veracity or attacking the veracity of a prosecution’s witness.<sup>92</sup> This amendment would ensure the same rationale applies where the defendant has put veracity in issue in their police interview and it is offered in evidence by the prosecution.
- (b) Insert a new paragraph in section 38(3) to make clear the judge should consider the extent to which the defendant seeks to rely on the evidence of their own veracity or to challenge the veracity of a prosecution witness to support their case. This could apply, for example, where the prosecution offers a defendant’s out-of-court statement in evidence that includes an assertion about veracity that the defendant is not seeking to rely on at trial. Some submitters expressed concern that the prosecution could trigger section 38(2) by offering a defendant’s statement in evidence and then rely on assertions made in that statement to offer veracity evidence about the defendant. Our recommendation would clarify that the judge can consider this concern when deciding whether to grant permission under section 38(2)(b). In these circumstances, there is less justification for permitting the prosecution to offer veracity evidence about a defendant. The policy rationale for broadening the rule is not engaged in this situation because the defendant is not seeking to rely on an impression that may be false. More practically, if a defendant is not seeking to rely on the part of the statement about veracity, the parties can simply agree to edit it. Although opposed to reform, the Public Defence Service supported this safeguard and said it should be mandatory to consider whether the issue can be resolved by way of editing the statement rather than triggering the section.

9.79 If this recommendation is adopted, a consequential amendment will be required to section 38(3)(a), which currently includes the words “in the defendant’s evidence”. It will need to be amended to reflect the wider range of circumstances in which veracity could be put in issue under our recommendation.

9.80 Finally, we emphasise our recommendation is aimed at striking an appropriate balance between protecting the defendant from being cross-examined about matters that are unfairly prejudicial and the need for the fact-finder to hear all relevant evidence. As such, our recommendation to extend the situations in which the prosecution can offer veracity evidence is closely tied to our proposed amendments to section 38(3), which provide safeguards for defendants. Our recommendations regarding section 38(2) should not be

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<sup>91</sup> “Investigative questioning” is already defined in s 4(1) as “questioning in connection with the investigation of an offence or a possible offence by, or in the presence of, (a) a member of the Police; or (b) a person whose functions include the investigation of offences”.

<sup>92</sup> Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV38.07(3)].

adopted without also adopting our recommendations regarding section 38(3) as this would tip the balance too far in favour of the prosecution.

## USE OF THE TERM “VERACITY” IN OTHER PARTS OF THE ACT

### Issue

- 9.81 Section 4(1) states that, “unless the context otherwise requires”,<sup>93</sup> “veracity has the meaning given in section 37”.<sup>94</sup> As we have said, section 37(5) defines “veracity” as “the disposition of a person to refrain from lying”.
- 9.82 The term “veracity” is used in other sections of the Act outside the veracity rules, namely, section 4(1) (definition of “hostile witness”), section 16(1) (definition of “circumstances” for the purposes of the hearsay provisions) and section 35(2)(a) (previous consistent statements). In our Issues Paper, we noted that, in some of these sections, the intended meaning of veracity differs from its meaning in the veracity rules.<sup>95</sup> In sections 37 and 16(1), “veracity” is concerned with evidence extraneous to the facts in issue (that is, the general disposition of the person to refrain from lying).<sup>96</sup> By contrast, in the section 4(1) definition of “hostile witness” and in section 35(2)(a), it refers to the truthfulness of the witness in the particular proceeding. We considered, however, that case law did not suggest this difference in meaning was causing problems in practice.<sup>97</sup>

### Consultation

#### What we asked submitters

- 9.83 We asked whether it is desirable to amend the Act to make the different meanings attached to “veracity” explicit instead of having to rely on case law.<sup>98</sup> We suggested this could be done by changing the references to “veracity” in the section 4(1) definition of “hostile witness” and section 35(2)(a) to “honesty” or “truthfulness”.<sup>99</sup>

#### Results of consultation

- 9.84 Seven submitters addressed this issue. Three supported reform to clarify the meaning of “veracity” in the context of the definition of “hostile witness” and the previous consistent statements rule.<sup>100</sup> Four considered reform is unnecessary.<sup>101</sup>

<sup>93</sup> Evidence Act 2006, s 4(1).

<sup>94</sup> Evidence Act 2006, s 4(1) (definition of “veracity”).

<sup>95</sup> Issues Paper at [9.52]–[9.53].

<sup>96</sup> *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [120].

<sup>97</sup> For example, in *Body v R* [2019] NZCA 378 at [19] and n 4, the Court noted it was applying the term “veracity” “[a]s that phrase is understood in the context of s 35” (when referring to a challenge to the witness’s veracity in relation to matters in dispute in the proceeding).

<sup>98</sup> Issues Paper at [9.56].

<sup>99</sup> Issues Paper at [9.57].

<sup>100</sup> Associate Professor Anna High, Luke Cunningham Clere, New Zealand Law Society.

<sup>101</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Adjunct Professor Elisabeth McDonald, Public Defence Service.

- 9.85 The submitters that supported reform did not suggest the current wording is causing problems in practice. However, they considered amendment could improve the clarity and accessibility of the law and avoid confusion.<sup>102</sup> Luke Cunningham Clere suggested using the term “truthfulness” instead of veracity in the definition of “hostile witness” and in section 35(2)(a). Associate Professor High preferred the term “honesty” since “truthfulness” had been used in the Evidence Code and was removed at the select committee stage.<sup>103</sup>
- 9.86 Submitters that did not support reform considered that, although the current wording is “clumsy”,<sup>104</sup> it is not causing problems in practice and amendment could cause confusion.<sup>105</sup>

### Reform not recommended

- 9.87 We do not recommend reform to make the different meanings of “veracity” in the Act explicit. The submissions we received did not suggest the use of the term “veracity” in the definition of “hostile witness” or section 35(2)(a) is causing problems in practice, nor did we find any evidence of such problems in case law. It seems clear the courts are interpreting the term “veracity” appropriately having regard to the context in which it is used. Accordingly, we do not think amendment is needed to clarify the position or to enhance access to the law of evidence. Conversely, amendment could cause uncertainty (for example, if it led to a perception that the law has changed in some way).

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<sup>102</sup> Associate Professor Anna High, New Zealand Law Society.

<sup>103</sup> Evidence Bill 2005 (256–2) (select committee report) at 5. The Committee considered “the word “veracity” is more appropriate as it places the emphasis upon the intention to tell the truth, whereas “truthfulness” is more readily confused with factual correctness”.

<sup>104</sup> Adjunct Professor Elisabeth McDonald.

<sup>105</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.



## CHAPTER 10

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# Propensity evidence

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## INTRODUCTION

10.1 In this chapter, we consider section 43 of the Evidence Act 2006, which governs propensity evidence offered by the prosecution about the defendant. We address the following:

- (a) The general operation of section 43(1). We do not recommend reform in the absence of clear evidence of a problem in practice.
- (b) Prior acquittal evidence. We conclude reform is desirable to clarify the approach to prior acquittal evidence as propensity evidence and recommend that section 43(3) be amended to include guidance as to the specific factors judges should consider when assessing its unfair prejudicial effect.
- (c) The unusualness factor in section 43(3)(f). We conclude multiple approaches to the assessment of unusualness are causing uncertainty in practice. We recommend the repeal of section 43(3)(f).
- (d) The relevance of reliability when determining the admissibility of propensity evidence. We do not recommend reform. There is clear case law on this issue, and statutory amendment would risk causing uncertainty in practice.

## BACKGROUND

10.2 Propensity evidence is evidence that tends to show a person's propensity to act in a particular way or have a particular state of mind.<sup>1</sup> As *te Kōti Mana Nui* | Supreme Court has observed, the rationale for admitting propensity evidence rests on the concepts of linkage and coincidence — the greater the linkage and coincidence provided by the propensity evidence, the greater the probative value that evidence is likely to have.<sup>2</sup>

10.3 In general, a party in a civil or criminal proceeding may offer propensity evidence about any person.<sup>3</sup> However, this is subject to certain limitations.<sup>4</sup> Section 43 controls the admissibility of propensity evidence offered by the prosecution about defendants. In our

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<sup>1</sup> Evidence Act 2006, s 40(1)(a).

<sup>2</sup> *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [3] (majority) and [51] and [81] (minority).

<sup>3</sup> Evidence Act 2006, s 40(2).

<sup>4</sup> Evidence Act 2006, s 40(3).

Issues Paper, we observed that section 43 is one of the most frequently litigated provisions in the Act.<sup>5</sup> We attributed this to the significance of propensity evidence to both the prosecution and the defence case and to the “intensely fact-specific nature” of the admissibility test.<sup>6</sup>

## THE GENERAL OPERATION OF SECTION 43(1)

### Issue

- 10.4 Section 43(1) allows the prosecution to offer propensity evidence about a defendant in a criminal proceeding if its probative value outweighs the risk that it might have an unfairly prejudicial effect on the defendant. In our Issues Paper, we referred to preliminary feedback from defence lawyers that identified two concerns about the section 43(1) test as it is being applied by the courts:<sup>7</sup>
- (a) It sets the threshold for admitting propensity evidence too low, resulting in propensity evidence being too readily admitted.
  - (b) It prevents the development of precedent, resulting in unpredictable and inconsistent admissibility decisions.

### The section 43(1) threshold

- 10.5 In our Issues Paper, we questioned whether the current approach under section 43 reflects the original policy objectives of the section.<sup>8</sup> We referred to Te Aka Matua o te Ture | Law Commission’s early work on codifying the law of evidence where the expressed intention was for the admission of propensity evidence to be “strictly limited”.<sup>9</sup> The Commission sought to codify the common law on similar fact evidence so that evidence of a defendant’s propensity should generally be prohibited unless its probative value “sufficiently outweighs” the danger of prejudicial effect.<sup>10</sup> This language became “clearly outweighs” in the Evidence Code but was changed to “outweighs” in the Evidence Bill. The Solicitor-General’s view was that the language of “clearly outweighs” would change the common law approach (by making it harder to admit propensity evidence) rather than codify it.<sup>11</sup>
- 10.6 On this basis, we considered that, although a higher standard for propensity evidence may have originally been intended, when the Evidence Bill was drafted section 43 was not intended to change the threshold for admitting propensity evidence (whether to make it higher or lower than at common law). Despite this, the passing of the Act and subsequent judicial interpretation of section 43 has resulted in a “sea change” in the way

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<sup>5</sup> As at 14 October 2022, a Lexis Advance search for cases citing s 43 of the Evidence Act 2006 returned 969 results. Most s 43 cases deal with the appropriate application of the s 43(1) tests: Scott Optican “Evidence” [2019] 4 NZ L Rev 565 at 577.

<sup>6</sup> Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 / The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [10.3].

<sup>7</sup> Issues Paper at [10.4].

<sup>8</sup> Issues Paper at [10.10].

<sup>9</sup> Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [291].

<sup>10</sup> Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at 9–10 and [249].

<sup>11</sup> Issues Paper at [10.11]–[10.12].

propensity evidence is assessed.<sup>12</sup> We noted a general acceptance that section 43 provides for a wider range of propensity evidence to be admitted than was possible under the common law similar fact rule. However, there are differing views on whether this is problematic and whether further elaboration of the section 43(1) test would be helpful.<sup>13</sup>

### *The development of precedent*

- 10.7 The Act does not provide guidance on how judges should perform the weighing exercise required by section 43(1). In our Issues Paper, we noted a second concern heard in preliminary feedback that this was inhibiting the development of precedent.<sup>14</sup> We provided an overview of case law on how the section 43(1) test has been applied by the courts.<sup>15</sup> An early case heard under the Act, *R v Healy*, suggested that the correct balance to be reached on the section 43(1) test was a matter that would be “developed over time”.<sup>16</sup> In *Vuletich v R*, however, the Kōti Pira | Court of Appeal explicitly rejected the need for any standard in applying the section 43(1) test.<sup>17</sup> The leading case on section 43, *Mahomed v R*,<sup>18</sup> has also been criticised on the basis that the Supreme Court did not provide any further guidance on the application of the section 43(1) test,<sup>19</sup> leading to continued unpredictability.<sup>20</sup> We observed, however, that more recent appellate decisions have not raised similar concerns, indicating that the courts may now be reasonably comfortable applying the section 43(1) test in the absence of any more precise guidance.<sup>21</sup>
- 10.8 Some recent appellate cases point to one of the central difficulties with seeking to evaluate the operation of section 43(1) through case analysis. In *Grigg v R*, the Court of Appeal observed that, if a court applies the provisions to the case with which it is dealing, there should seldom be a need to refer to another case. This is because the outcome in each case will turn on the weight to be given to the factors set out in section 43(3) and (4).<sup>22</sup> In *Brown v R*, the Court considered judges should avoid “pointless attempts to reconcile” one propensity ruling with another, describing propensity evidence as “fact

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<sup>12</sup> Issues Paper at [10.14].

<sup>13</sup> Issues Paper at [10.5].

<sup>14</sup> Issues Paper at [10.15].

<sup>15</sup> Issues Paper at [10.6]–[10.8].

<sup>16</sup> *R v Healy* [2007] NZCA 451 at [52].

<sup>17</sup> *Vuletich v R* [2010] NZCA 102 at [27] per Glazebrook J and [96] per Randerson J (Baragwanath J dissenting at [52]).

<sup>18</sup> *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

<sup>19</sup> See, for example, Scott Optican “The Supreme Court and the Law of Evidence” in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) 409 at 414–418 and Richard Mahoney “Evidence” [2012] NZ L Rev 721 at 729.

<sup>20</sup> See, for example, Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington 2018) at [EV43.04(2)] and Richard Mahoney “Evidence” NZ L Rev 547 at 549.

<sup>21</sup> See, for example, *Grigg v R* [2015] NZCA 27 at [17]. Wild J described the propensity provisions as “comprehensive and admirably clear and concise”.

<sup>22</sup> *Grigg v R* [2015] NZCA 27 at [17].

and circumstance specific”.<sup>23</sup> This view is also shared by many commentators who consider variance to be inherent in the test and not necessarily problematic.<sup>24</sup>

## Consultation

### What we asked submitters

- 10.9 We asked submitters whether the current threshold for admitting propensity evidence under section 43(1) is causing problems in practice. We explained that section 43 seeks to balance the competing interests of ensuring that a fact-finder has all the relevant evidence before them and guarding against the risk that the fact-finder might make unwarranted and prejudicial assumptions about the defendant.<sup>25</sup> We said that it is ultimately a question of policy whether that balance is being appropriately struck.
- 10.10 If submitters considered reform is necessary or desirable, we presented two possible options for reform, which could be implemented together or separately. The options were based on comparable Australian provisions. They would create a higher threshold for admissibility and seek to facilitate the development of precedent. The two options were:<sup>26</sup>
- (a) Option 1 — amend section 43(1) to require probative value to substantially outweigh the risk of unfair prejudice; and/or
  - (b) Option 2 — amend section 43(1) to require propensity evidence to have significant probative value.
- 10.11 We observed that both options may more closely reflect the Commission’s original intention that the codified test should continue to favour exclusion.<sup>27</sup> We highlighted the risk of such an approach — namely, that it could lead to propensity evidence being too readily excluded. This has led some Australian jurisdictions to change their approach to make propensity evidence more readily admissible in child sexual offending cases. We acknowledged, however, that courts in Aotearoa New Zealand have taken a different approach to the admission of propensity evidence in child sexual offending cases so similar reasoning is unlikely to apply here.<sup>28</sup>

### Results of consultation

- 10.12 Thirteen submitters addressed this question. Four expressed concern about how section 43(1) is operating in practice,<sup>29</sup> three of whom also commented on the options for

<sup>23</sup> *Brown v R* [2020] NZCA 97 at [13].

<sup>24</sup> See, for example, Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, Lexis Nexis) at [EVA43.15] saying “doubt attaches to whether [the Act] could” provide guidance on how the weighing up exercise should occur. Compare Scott Optican “Evidence” [2015] NZ L Rev 473 at 485–486: “fundamental common law methodology — together with basic tenets of jurisprudential constancy — demands some judicial effort at ensuring consistent application of the s 43 balancing test. Indeed, the whole point of judgments giving statements of principle as to how s 43 should be approached is to create precisely that kind of regularity.” See also Law Commission *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending and Bad Character* (NZLC R103, 2008) at [35]; Issues Paper at [10.9].

<sup>25</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [167]–[169].

<sup>26</sup> Issues Paper at [10.21]–[10.27].

<sup>27</sup> Issues Paper at [10.23].

<sup>28</sup> Issues Paper at [10.23]–[10.24].

<sup>29</sup> Auckland District Law Society, Te Matakahi | Defence Lawyers Association New Zealand, Stephen Hudson, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

reform.<sup>30</sup> Nine submitters said section 43(1) is operating well in practice and did not consider reform necessary or desirable.<sup>31</sup>

- 10.13 One submitter, Te Kāhui Tātari Ture | Criminal Cases Review Commission, did not specifically comment on the operation of section 43(1) or the need for reform. It noted it was considering 37 open applications where propensity evidence had been raised as an issue.

### The need for reform

- 10.14 Submitters that considered there is a problem in practice expressed strong concerns that the section 43(1) test is operating to the detriment of defendants and described an “urgent” need for reform. These submissions reflected the two concerns set out in our Issues Paper — that too much propensity evidence is being admitted and that the current approach has led to a lack of precedent. The Auckland District Law Society (ADLS) and Te Matakahi | Defence Lawyers Association New Zealand described a “general consensus that the pendulum has swung too far”. Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service referred to propensity evidence “usually” being admitted. These submitters viewed this as a departure from the Commission’s original intention and the objective of codification. The ADLS and Defence Lawyers Association also referred to the conflicting and “irreconcilable” chain of case law as creating an inconsistent approach to admissibility. They described decision-making as “insufficiently regulated, arbitrary and ... something resembling a ‘lottery’”.
- 10.15 These submitters considered statutory amendment necessary to address these problems because judicial directions are inadequate to address prejudicial effect. The ADLS and Defence Lawyers Association referred to academic and appellate authority suggesting it is unrealistic to rely on trial directions to constrain the proper use of propensity evidence. Stephen Hudson, who was convicted of murder following a trial involving propensity evidence, gave a more personal perspective. He agreed trial directions are ineffective at ensuring unbiased assessment of propensity evidence. He said in relation to his case that, once the evidence was admitted, “[t]he onus had changed from the Crown having to prove my guilt to me having to prove my innocence”.
- 10.16 Submitters opposing reform considered section 43(1) is operating appropriately. Two submitters considered the section is achieving the intended policy objective of ensuring fact-finders have probative evidence available to reach a just and fair determination of facts.<sup>32</sup> Two submitters, Associate Professor Anna High and Ngā Pirihi mana o Aotearoa | New Zealand Police, described judges as being experienced in the application of the section 43(1) test. Te Tari Ture o te Karauna | Crown Law Office and Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) drew attention to other subsections in section 43 that provide additional constraints on admissibility — namely, the requirement

<sup>30</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>31</sup> Paulette Benton-Greig, Te Tari Ture o te Karauna | Crown Law Office, Associate Professor Anna High, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ngā Pirihi mana o Aotearoa | New Zealand Police. Paulette Benton-Greig’s submission was supported by Community Law Centres o Aotearoa and Ngā Whare Whakaruruhau o Aotearoa | Women’s Refuge.

<sup>32</sup> Luke Cunningham Clere, New Zealand Law Society.

for specificity under section 43(2) and the factors set out in sections 43(3) and (4) to guide decision-making under section 43(1).

- 10.17 Some submitters disagreed with the suggestion that too much propensity evidence is being admitted under the section 43(1) test and considered that the correct balance is being struck.<sup>33</sup> Two submitters, the Crown Law Office and the Wellington Crown Solicitor, Luke Cunningham Clere, referred to their own experience and recent te Kōti-ā-Rohe | District Court and te Kōti Matua | High Court cases where propensity evidence was ruled inadmissible.<sup>34</sup> They suggested these are examples of controls on the threshold test operating appropriately. In a more general comment, Luke Cunningham Clere cautioned against drawing conclusions about admissibility from appellate authorities as this sample is unlikely to be representative. It said the defence is far more likely to pursue an appeal in marginal cases where evidence has been admitted than the prosecution is in similar cases where evidence has been excluded.
- 10.18 One submitter, Paulette Benton-Greig, suggested that, even if more propensity evidence is being admitted, this is not necessarily concerning. In her view, any change to admit more propensity evidence was an important shift to allow consideration of more background and contextual evidence relevant to sexual and family violence cases. Her submission was supported by Community Law Centres o Aotearoa and Ngā Whare Whakaruruhau o Aotearoa | Women's Refuge.
- 10.19 These submitters did not consider the lack of precedent as problematic. Three submitters referred to the “fact-specific” nature of propensity evidence and thus the difficulty and, in their view, the undesirability of creating hard and fast rules for its admission.<sup>35</sup>

### Options for reform

- 10.20 Of the four submitters that raised concerns about section 43(1), three addressed the options for reform. Two submitters, the ADLS and Defence Lawyers Association, supported option 1 (amending section 43(1) to require probative value to substantially outweigh the risk of unfair prejudice). They considered this would provide a better framework for considering propensity evidence and would align with the test for admissibility of veracity evidence under section 37. They were not concerned that the Australian experience of propensity evidence being excluded too readily in child sexual offending cases would be replicated in New Zealand due to the existence of section 43(3)(f) (the “unusualness” factor, discussed in more detail below).
- 10.21 The Public Defence Service similarly considered that option 1 would help to redress the imbalance in the admission of propensity evidence it observed in its submission. However, it suggested that, to really make an impact, both options should be enacted together.

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<sup>33</sup> Crown Law Office, Luke Cunningham Clere, New Zealand Police.

<sup>34</sup> The Crown Law Office's submission cited 10 recent High Court cases where Crown applications to admit propensity evidence were rejected either in full or partially: *R v Ngarongo* [2023] NZHC 547; *R v E* [2022] NZHC 2868; *R v Prasad* [2021] NZHC 3513; *R v M* [2021] NZHC 1767; *R v Filoa* [2021] NZHC 1357; *R v Ahlawat* [2021] NZHC 1129; *R v Heremaia* [2021] NZHC 473; *R v Richardson* [2021] 243. Two other cases cited by the Crown Law Office are subject to publication restrictions pending final disposition of trial.

<sup>35</sup> Associate Professor Anna High, Luke Cunningham Clere, New Zealand Law Society.

- 10.22 Five submitters that opposed reform raised concerns about enacting either option.<sup>36</sup> Paulette Benton-Greig and Associate Professor High expressed concern that a heightened threshold for the admissibility of propensity evidence may lead to evidence being too readily excluded in sexual and family violence cases, as evidenced by the Australian experience. The Crown Law Office highlighted the practical difficulties of legislative amendment, noting that any attempt to elucidate probative value and unfair prejudice in statute would simply replicate the same problems of interpretation as at common law. Additionally, as the same test and similar definitional issues arise in relation to the general exclusion test under section 8, any amendment to section 43 would require consideration of consequential amendment to section 8.

### Reform not recommended

- 10.23 We do not recommend reform to amend the section 43(1) test. While there are firmly held views among defence lawyers on the need for reform, we do not consider there is clear enough evidence of a problem in practice to support reform.
- 10.24 Some submitters considered propensity evidence is now being routinely admitted to the extent that it is impacting on the fair trial rights of defendants.<sup>37</sup> Others considered the section 43(1) test is working well in practice, that judges are experienced in applying the test and that they are striking the right balance in admitting or excluding propensity evidence.<sup>38</sup> We acknowledge, as we did in our Issues Paper, the difficulties in relying on case analysis to reach a determination on this point.<sup>39</sup> This is due both to the fact-specific nature of the propensity assessment making it difficult to carry out case comparisons and the different factors that may influence whether any appeal is pursued.<sup>40</sup> We have been unable to draw conclusions from the available case law about whether decisions to admit or exclude propensity evidence are being appropriately made. We have also been unable to identify any particular tendency in judicial decision-making.<sup>41</sup>
- 10.25 It is also unclear whether any change to the section 43(1) threshold would make a difference to the frequency with which it is litigated. As noted by the Commission in an early report, propensity evidence can be hugely significant to both the prosecution and the defence case and so will be vigorously contested.<sup>42</sup> The number of appeals may simply be a reflection of that fact rather than pointing to a problem with the application of the test. Whatever the test might be, it is likely to continue to be a source of contention.
- 10.26 The second concern we identified in our Issues Paper was that the section 43(1) test may be leading to inconsistent outcomes and preventing the development of precedent. Some submitters described the case law as a series of “irreconcilable” and “arbitrary”

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<sup>36</sup> Paulette Benton-Greig, Crown Law Office, Associate Professor Anna High. Paulette Benton-Greig’s submission was supported by Community Law Centres o Aotearoa and Women’s Refuge.

<sup>37</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>38</sup> Crown Law Office, Associate Professor Anna High, Luke Cunningham Clere, New Zealand Police.

<sup>39</sup> Issues Paper at [10.9].

<sup>40</sup> This description of the propensity assessment as “fact-specific” was shared by some submitters: see Associate Professor Anna High, Luke Cunningham Clere and the New Zealand Law Society.

<sup>41</sup> This can be distinguished from our approach in Chapter 7 on improperly obtained evidence. In contrast to the case law on s 30, we did not find any clear indications in the case law on s 43(1) that it is being applied inconsistently or that evidence is being too readily admitted.

<sup>42</sup> Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [268].



decisions that have created an inconsistent approach.<sup>43</sup> Most submitters agreed that the assessment does result in different outcomes but said this is not arbitrary or problematic, merely a necessary consequence of the nature of propensity evidence.<sup>44</sup> In this respect, most submitters considered the issues we had identified in our Issues Paper to be acceptable consequences of the fact-specific inquiry required by the section 43(1) test.

- 10.27 For these reasons, we do not recommend reform. We emphasise we do not agree that the nature of propensity evidence means clear precedent and judicial guidance can *never* develop. The courts have a responsibility to articulate the reasons for their decisions, including their reasons for taking a different approach to cases with similar facts. We note, as we do in Chapter 7, that it is a basic rule of law principle that the law be consistently applied, with like cases being treated alike. While each case applying section 43(1) may turn on its own facts and involve “value judgments based on judicial knowledge and experience”,<sup>45</sup> reasons should still be given for the approach taken to the threshold assessment in any given case.

## PRIOR ACQUITTAL EVIDENCE

### Issue

- 10.28 The Act does not specifically address the status of evidence that has previously been led at a trial against the defendant that resulted in an acquittal (prior acquittal evidence). In *Fenemor v R*, the Supreme Court confirmed that prior acquittal evidence should be treated the same as any other kind of propensity evidence about a defendant.<sup>46</sup> It added that, when assessing the prejudicial effect of the evidence, the judge must consider whether the fact the propensity evidence is prior acquittal evidence gives rise to any, or any additional, unfair prejudice (“the acquittal dimension”).<sup>47</sup> To the extent that it does, the judge should consider how this additional dimension affects the overall balance between probative value and unfair prejudice — focusing in particular on the unfairness of expecting a defendant to respond again to the evidence in question given it was not regarded as sufficient to result in a conviction on the previous occasion.
- 10.29 In our Issues Paper, we commented that appellate law since *Fenemor* indicates that the acquittal dimension of proposed propensity evidence has hardly ever had a meaningful impact on the section 43(1) assessment of unfair prejudice.<sup>48</sup> We referred in particular to *Brooks v R*, a split decision of the Court of Appeal in which the majority admitted propensity evidence from proceedings heard 23 years earlier where most of the records had been lost.<sup>49</sup> Several other Court of Appeal and Supreme Court cases still subject to publication restrictions have taken a similar approach.<sup>50</sup>

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<sup>43</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

<sup>44</sup> Associate Professor Anna High, Luke Cunningham Clere, New Zealand Law Society.

<sup>45</sup> Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [35].

<sup>46</sup> *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [4]–[5].

<sup>47</sup> *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [4].

<sup>48</sup> Issues Paper at [10.30].

<sup>49</sup> *Brooks v R* [2019] NZCA 280, [2020] 2 NZLR 161.

<sup>50</sup> Issues Paper at [10.32]–[10.35].



## Consultation

### *What we asked submitters*

- 10.30 We sought feedback on whether the approach to prior acquittal evidence is causing problems in practice and, if so, whether section 43 should be amended to provide guidance on the factors that should be considered when assessing its prejudicial effect.
- 10.31 If reform is considered necessary or desirable, we said one possible approach would be to amend section 43 to require a judge, when assessing the prejudicial effect of prior acquittal evidence, to consider certain factors. This could include whether the defendant is able to respond fairly to the allegations in the present proceedings, having regard to the lapse of time since the earlier trial and the material available to the court.<sup>51</sup>
- 10.32 The purpose of such an amendment would be to elevate the significance of these matters in the court's assessment of unfair prejudice so as to better recognise the potential unfairness if defence counsel are unable to rely on contemporaneous material to respond to the prior acquittal evidence.<sup>52</sup> We noted, however, that this option may not go far enough.

### *Results of consultation*

- 10.33 Eight submitters addressed this question. Three expressed the view that the current approach is causing problems in practice and that reform is necessary or desirable.<sup>53</sup> Five said that the law is working well and no reform is required.<sup>54</sup> The Criminal Cases Review Commission noted it had received some applications that “raised specific issues around the unfairness of the use of prior acquittal evidence”.

### *The need for reform*

- 10.34 Submitters that were critical of the current approach considered that prior acquittal evidence is rarely excluded.<sup>55</sup> They focused on the unfairness of prior acquittal evidence to defendants, viewing it as uniquely prejudicial compared to other types of propensity evidence. Although the courts have tended to focus on the unfairness caused by loss of documents or the length of time between the prior acquittal and the current proceedings, these submitters considered the unfairness is not limited to historical trials. All three submitters referred to the “unjust” and “prejudicial” effect on a defendant of having to defend both sets of allegations when the prior acquittal evidence has already been litigated, defended and found not to meet the required standard of proof of beyond reasonable doubt.
- 10.35 Submitters in support of the current approach disagreed that prior acquittal evidence is inherently unfair.<sup>56</sup> Two submitters emphasised that an acquittal is not a finding of

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<sup>51</sup> Issues Paper at [10.38].

<sup>52</sup> Issues Paper at [10.39].

<sup>53</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>54</sup> James Carruthers, Crown Law Office, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Law Society.

<sup>55</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>56</sup> James Carruthers, Crown Law Office, Luke Cunningham Clere, New Zealand Law Society.

innocence. Luke Cunningham Clere said it “only means that a fact-finder was not sure beyond a reasonable doubt of [the defendant’s] guilt”. James Carruthers elaborated that we do not, and cannot, know the reasons why an earlier jury acquitted the defendant, including whether it was a marginal decision. Both submitters noted that propensity evidence does not have to be proven to any evidential standard to be admissible. Fact-finders do not need to be convinced beyond reasonable doubt that the conduct at issue actually occurred before they can take it into consideration. To the extent that any unfair prejudice is caused by the acquittal dimension, submitters considered this could be appropriately dealt with under the current approach.<sup>57</sup>

### Options for reform

- 10.36 The ADLS, Defence Lawyers Association and Public Defence Service considered section 43 should be amended to explicitly address the use of prior acquittal evidence. The ADLS and Defence Lawyers Association submitted that prior acquittal evidence should not be admissible at all. The Public Defence Service noted that some of its lawyers supported making prior acquittal evidence presumptively inadmissible unless the prosecution satisfies a high standard for admission.
- 10.37 In the absence of reform to exclude prior acquittal evidence, however, all three submitters supported reform to provide more guidance on the factors to be considered when assessing the prejudicial effect of prior acquittal evidence. The Public Defence Service commented that statutory guidance should have a focus on circumstances similar to *Brooks* (where there had been a significant lapse in time between the previous and current trial) but should also take account of the desirability of finality in litigation and the inherent unfairness of the defendant having to respond to an allegation twice. The ADLS and Defence Lawyers Association submitted reform should include, at a minimum, a requirement that the court be satisfied the defendant is able to respond (again) to the allegation. In their view, however, this would be largely ineffectual without also increasing the general threshold for propensity evidence and requiring the prosecution to prove the alleged propensity beyond reasonable doubt.
- 10.38 Four submitters that did not support reform raised concerns about treating prior acquittal evidence differently from other types of propensity evidence.<sup>58</sup> The NZLS and James Carruthers noted that inconsistencies could arise if prior acquittal evidence is treated differently from similar types of evidence such as evidence of historical complaints that were not reported to police or did not proceed to trial. Submitters also considered potential inconsistencies with other types of evidence in different proceedings. James Carruthers said there are other proceedings that could raise similar concerns for defendants as prior acquittal evidence that proceed anyway — for example, trials for historical offending that proceed despite the passage of time or potential loss of contemporaneous witnesses or evidence. The Crown Law Office also commented that a presumption that missing evidence causes unfair prejudice to the defendant runs counter to general principles of criminal law. It said speculation is normally impermissible in drawing factual conclusions, and in the context of a conviction appeal, evidence lost through undue delay will not be assumed to assist the defendant.

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<sup>57</sup> James Carruthers, Crown Law Office, Luke Cunningham Clere, New Zealand Law Society.

<sup>58</sup> James Carruthers, Crown Law Office, Luke Cunningham Clere, New Zealand Law Society.

## The need for reform

- 10.39 We conclude reform is desirable to clarify the approach to prior acquittal evidence. The Supreme Court in *Fenemor* provided clear guidance on how prior acquittal evidence should be assessed under section 43, but subsequent case law suggests it has not always been applied consistently and coherently. Statutory amendment to codify *Fenemor* would promote clarity and consistency in approach.
- 10.40 This conclusion is reinforced by two additional considerations. First, we consider reform is important in the context of our broader concerns noted above about the application of the section 43(1) balancing test and the lack of general guidance for the assessment of “unfair prejudice” in this context. Statutory amendment on prior acquittal evidence would provide at least some specific guidance in the application of the test. Second, further guidance from the courts may be unlikely to be forthcoming in the foreseeable future given the Supreme Court declined leave to appeal in *Brooks*.<sup>59</sup>
- 10.41 Neither the Commission nor Parliament originally intended prior acquittal evidence to be treated differently from other types of propensity evidence.<sup>60</sup> It is clear from submissions, however, that this type of evidence remains a matter of concern for many defence lawyers. It is also notable that the Criminal Cases Review Commission has identified prior acquittal evidence as an emerging issue in the applications that have been made to it. We think clarifying the approach to prior acquittal evidence in the Act will respond to these concerns in a way that is consistent with both the original intention to permit the evidence (when appropriate) and existing practice concerning when it should be admitted.

## Recommendation

### R14

Amend section 43 to provide that, when assessing the prejudicial effect of prior acquittal evidence on the defendant, the judge must also consider whether the defendant can fairly respond to the allegations in the present proceeding, having regard to:

- a. the lapse of time since the earlier investigation and trial;
- b. the material available in relation to the earlier investigation and trial; and
- c. any other relevant matters.

- 10.42 We recommend amending section 43 to introduce a new provision providing guidance on the specific factors to be considered by judges when assessing the prejudicial effect of prior acquittal evidence. This new provision would apply to the assessment of prior acquittal evidence alongside the existing factors for assessing the prejudicial effect of propensity evidence set out in section 43(4). Taken together, these provisions will set out the considerations a judge must consider in their assessment and application of the section 43(1) test.
- 10.43 The Supreme Court in *Fenemor* held that, when a judge is considering the extent of any unfair prejudice on the defendant, they should examine whether the fact that propensity

<sup>59</sup> *Brooks v R* [2019] NZSC 107 at [17].

<sup>60</sup> *Fenemor v R* [2011] NZSC 127 at [5]–[6].

evidence is prior acquittal evidence gives rise to any, or any additional, unfair prejudice (“the acquittal dimension”).<sup>61</sup> Subsequent cases have provided guidance on the factors that may be relevant to that acquittal dimension, including the passage of time between the previous trial and current proceedings and the availability of contemporaneous material.<sup>62</sup> We recommend including these factors in the new provision as specific examples. Other cases have suggested a relevant factor is the risk of overwhelming the trial with prior acquittal evidence and the consequential impact this might have on jury decision-making.<sup>63</sup> In our view, this consideration is not unique to prior acquittal evidence and is already considered under section 8 (general exclusion) where relevant. It is not necessary to include it in a specific provision aimed at prior acquittal evidence.

- 10.44 We recommend keeping the new provision sufficiently flexible to accommodate the specific facts of any case. For this reason, it should allow any other relevant matters to be taken into account when assessing whether the defendant can fairly respond to the allegations.
- 10.45 Our recommendation is limited to prior acquittal evidence. This type of evidence can be distinguished from incidents of previous allegations and charges that were dropped or dismissed before reaching trial. An acquittal has the force of a ruling on a matter by the court that, in all other situations, is barred from being prosecuted again.<sup>64</sup>
- 10.46 Some submitters considered amendment would treat prior acquittal evidence differently from other propensity evidence.<sup>65</sup> However, the purpose of any amendment would be to highlight the factors specific to prior acquittal evidence in the court’s assessment of unfair prejudice rather than to signal a different approach. This will support the courts to better recognise and articulate the particular unfairness that can be associated with prior acquittal evidence through, for example, the loss of records associated with a trial from many years prior. The same test for admission would continue to apply to all propensity evidence, including prior acquittal evidence, under section 43(1).

## THE UNUSUALNESS FACTOR IN SECTION 43(3)(f)

### Issue

- 10.47 Section 43(3) sets out a non-exhaustive list of factors the judge may consider when assessing the probative value of propensity evidence. Section 43(3)(f) is the “unusualness factor”. It refers to the extent to which the acts, omissions, events or circumstances that are the subject of the propensity evidence, and those that constitute the offence for which the defendant is being tried, are unusual.

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<sup>61</sup> *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298 at [8].

<sup>62</sup> *Mead v R* [2013] NZCA 59 at [16]–[19].

<sup>63</sup> *RPG v R* [2015] NZCA 275. In this case, the prior acquittal evidence related to more serious offending than the present charges and had already been the subject of three earlier trials. While the propensity evidence was deemed to be highly probative, there was a risk it would overwhelm the present trial given that all the evidence from the earlier trials would need to be offered and it would be difficult for the jury not to give that disproportionate weight in their assessment of the present charges (at [25]).

<sup>64</sup> New Zealand Bill of Rights Act 1990, s 26(2).

<sup>65</sup> James Carruthers, Luke Cunningham Clere, New Zealand Law Society.

- 10.48 In our Issues Paper, we observed there have long been questions about how “unusualness” should be assessed.<sup>66</sup> We identified three distinct approaches that have emerged in the case law:
- (a) Whether the *type of offending* is unusual compared to other types of offending.
  - (b) Whether the *characteristics of the offending* are unusual — that is, whether the characteristics common to the propensity evidence and the alleged offending disclose something distinctive and different.
  - (c) Whether the *nature of the offending* is unusual, as compared to normal standards of behaviour.
- 10.49 In its Second Review, the Commission considered the correct approach was to focus on distinctive characteristics and patterns of offending, noting this appeared to align with the Commission’s original intention in the development of the Evidence Code.<sup>67</sup> It observed there was a trend towards this approach to assessing unusualness in the courts, and for this reason, it concluded it was unnecessary to amend the provision to clarify the correct approach.<sup>68</sup>
- 10.50 Cases since the Second Review have continued to take varying approaches to assessing unusualness.<sup>69</sup> For example, sexual offending against children has now been generally accepted to be “unusual” based on the nature of the offending compared to normal behaviour.<sup>70</sup> Other types of offending such as arson<sup>71</sup> and bribery and corruption<sup>72</sup> have also been deemed to be “unusual”. Other cases have continued to focus on the unusualness of the common characteristics between the propensity evidence and the alleged offending.<sup>73</sup> This approach is generally taken where the alleged propensity is specific rather than general in nature. We noted that, on the one hand, the different approaches may be causing uncertainty. On the other hand, we said different approaches may be appropriate when aimed at assessing different situations.

## Consultation

### What we asked submitters

- 10.51 We sought feedback on whether section 43(3)(f) is causing problems in practice and, if so, whether and how it should be amended. If reform was considered desirable, we presented two options for consideration:

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<sup>66</sup> Issues Paper at [10.43].

<sup>67</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.32].

<sup>68</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.33].

<sup>69</sup> Issues Paper at [10.45].

<sup>70</sup> See, for example, *Rowell v R* [2020] NZCA 9 at [13]–[16]; *R v C* [2021] NZHC 1715 at [46]–[48]; *Armishaw v R* [2019] NZCA 456 at [36]; *Faaosofia v R* [2020] NZCA 405 at [32]; *R v Stevens* [2020] NZHC 760 at [31]–[36]; *T v R* [2022] NZHC 189 at [19]; *R v F* [2022] NZHC 1341 at [48]; *Kennedy v R* [2022] NZHC 2977 at [27].

<sup>71</sup> *R v Ahlawat* [2021] NZCA 610 at [37].

<sup>72</sup> *Goel v R* [2022] NZCA 263 at [63].

<sup>73</sup> We are aware of a number of cases applying this approach, all of which are subject to publication restrictions until final disposition of trial.

- (a) Option 1 — amend section 43(3)(f) to clarify how unusualness should be assessed.
  - (b) Option 2 — repeal section 43(3)(f) altogether.<sup>74</sup>
- 10.52 We highlighted that there is no consensus on the “correct” interpretation of unusualness and that each of the approaches identified above is subject to criticism for different reasons. For this reason, we suggested it may be desirable to leave it to the courts to determine the appropriate approach on a case-by-case basis. Repealing section 43(3)(f) would be more straightforward than attempting to clarify its application and appropriate if the concerns associated with this factor are insurmountable. It would, however, represent a more significant shift in practice.

## Results of consultation

### The need for reform

- 10.53 Nine submitters addressed this question. Only three submitters explicitly addressed whether section 43(3)(f) is causing problems in practice with the majority focusing on the options for reform. Of those three submitters, two expressed the view that section 43(3)(f) is causing problems in practice.<sup>75</sup> Both of these submitters drew their concerns from the lack of a starting point or comparator against which to assess unusualness. Luke Cunningham Clere said this means decisions are based on “speculation, assumptions and anecdotes (such as references to ‘judicial experience’ or non-scientific reviews of past precedent)”. The Public Defence Service also considered that the lack of a comparator for “unusualness” was leading to inconsistent application.
- 10.54 Although this question was not directly addressed in other submissions, concerns about inconsistency were reflected in some submitters’ responses regarding options for reform. For example, Police expressed the view that reform would “improve consistency of practice” and the ADLS and Defence Lawyers Association supported clarification to ensure the section is applied “consistently and effectively”.
- 10.55 The Crown Law Office did not consider section 43(3)(f) is causing problems in practice. It described this issue as a “matter of judicial assessment in particular fact situations”. Further, it was not concerned by the courts taking different approaches in different situations. It did not see any unfairness arising from this as defendants “can be advised with as much certainty as any other aspect of litigation” how the courts may consider unusualness on the facts of the case.

### Options for reform

- 10.56 Of the nine submitters that addressed the need for reform, seven supported reform<sup>76</sup> while one (the NZLS) opposed it. The Crown Law Office did not directly express a view on reform having already expressed its view that section 43(3)(f) is not causing problems in practice.

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<sup>74</sup> Issues Paper at [10.48]–[10.49].

<sup>75</sup> Luke Cunningham Clere, Public Defence Service.

<sup>76</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, Te Rōpū Tauira Ture o Aotearoa | New Zealand Law Students’ Association, New Zealand Police, Public Defence Service.

- 10.57 Six submitters supported amending section 43(3)(f) to clarify how unusualness should be assessed.<sup>77</sup> Two of these submitters did not express a clear view on the appropriate approach to clarification.<sup>78</sup> One submitter, Luke Cunningham Clere, supported amendment to clarify that a range of different approaches will be appropriate in different circumstances. Three submitters supported amendment to clarify that “unusualness” should focus on the distinctiveness of the characteristics of the offending.<sup>79</sup> They considered this approach would reflect the original policy intent of the provision. They rejected concerns this would lead to a reversion to the common law similar fact rule — the ADLS and Defence Lawyers Association on the basis that the Commission had never intended to depart from this with codification and the Public Defence Service on the basis that the courts are clear this is not the test to be applied.
- 10.58 Adjunct Professor Elisabeth McDonald suggested section 43(3)(f) “could” be repealed but did not go into detail as to why. The Public Defence Service noted mixed views on this among its lawyers but said some did support repeal. Four submitters expressed concern about repealing section 43(3)(f) completely.<sup>80</sup> The ADLS and Defence Lawyers Association said it should be retained as it was “a useful way to safeguard against the introduction of evidence that shows no more than a general tendency to commit the offence concerned”. Luke Cunningham Clere and Te Rōpū Tauira Ture o Aotearoa | New Zealand Law Students’ Association were concerned about the impact of repeal on cases involving child sexual offending where a clear line of cases has emerged characterising such offending as “inherently unusual”.
- 10.59 The NZLS did not consider reform was necessary or desirable. In its view, the unusualness factor should retain flexibility to account for the different purposes for which propensity evidence can be used.

### The need for reform

- 10.60 We conclude it is necessary to reform section 43(3)(f). The majority of submitters agreed that some manner of reform is required. Submitters expressed concern that the current approach is creating inconsistency. This stems from the lack of definition or guidance in the Act as to what “unusualness” means and, crucially, the lack of an objective comparator against which “unusualness” is to be assessed. This has led to the courts adopting varying approaches. We consider it is unsatisfactory to lack any common understanding or objective standard for applying the unusualness criterion.
- 10.61 Two submitters disagreed reform is required. They considered that taking different approaches to unusualness is not problematic due to the different purposes for which propensity evidence is used and the range of factual scenarios in which it applies. Although the nature of propensity evidence and the section 43 test may be fact-specific, we do not consider this extends to the criteria to be applied when assessing probative

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<sup>77</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Luke Cunningham Clere, New Zealand Law Students’ Association, New Zealand Police, Public Defence Service.

<sup>78</sup> New Zealand Law Students’ Association, New Zealand Police.

<sup>79</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Public Defence Service.

<sup>80</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Luke Cunningham Clere, New Zealand Law Students’ Association.



value. In our view, it underlines the importance of having clear and well-understood factors to guide the application of the test to different factual scenarios.

## Recommendation

**R15**

Repeal section 43(3)(f).

- 10.62 We recommend repealing section 43(3)(f). Although the majority of submitters supported reform to clarify the meaning of “unusual”, there was no consensus on what the correct definition should be. As many submitters acknowledged, there are considerable difficulties with each potential approach to assessing unusualness.<sup>81</sup> This is further complicated by the lack of any clear indication of intent in legislative materials.<sup>82</sup>
- 10.63 For the reasons outlined above, however, we do not consider it is appropriate to leave the courts to decide what is “unusual” on a case-by-case basis. Similarly, we do not recommend amendment to clarify that a range of different approaches might be appropriate depending on the circumstances of the case and the reasons for which propensity evidence is offered (as one submitter suggested). Neither of these approaches would assist clarity, certainty and consistency in decision-making.
- 10.64 The majority of submitters that supported a clarificatory amendment supported focusing on the distinctiveness of the characteristics of the propensity evidence and the alleged offending.<sup>83</sup> To the extent that it is appropriate to consider unusualness, we consider this is the correct approach. We agree with the previously expressed view of the Commission that this is the likely original intention behind the factor.<sup>84</sup> Early drafts of section 43 discussed the US Federal Rules of Evidence, section 404(b) of which creates an exception to the exclusion of propensity evidence on the grounds of “identity” — that is, an unusual *modus operandi*.<sup>85</sup> In our view, and for reasons on which we expand below, this approach most fully captures the rationale of “linkage and coincidence” underlying the admission of propensity evidence. It speaks directly to the degree of connection between two sets of behaviour (the behaviour demonstrated in the propensity evidence and the alleged offending) in a way that is not captured by approaches based on the type or nature of offending.

<sup>81</sup> See discussion in our Issues Paper at [10.48].

<sup>82</sup> See Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 197: “Although the Law Commission expressed the view that they were primarily codifying the common law, there is little discussion of the validity of this particular line of inquiry in the Commission’s research.” See also the absence of discussion on the meaning of “unusualness” in the Commission’s original discussion of the propensity rules (Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [277]; Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 2, 1999) at [C205]) and at select committee stage (Evidence Bill 2005 (256–2) (select committee report)).

<sup>83</sup> The Auckland District Law Society, Defence Lawyers Association New Zealand and Public Defence Service all supported this approach. The New Zealand Law Students’ Association noted the potential advantages as well as the drawbacks of such an approach.

<sup>84</sup> Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.32].

<sup>85</sup> See Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at Appendix C. See also Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 197.



- 10.65 We also agree with the previously expressed view of the Commission that an approach that focuses on distinctiveness does not risk reverting the common law similar fact rule.<sup>86</sup> As it is only one factor in the assessment under section 43(3), it does not risk reintroducing the concept of striking similarity as in the common law similar fact rule.<sup>87</sup>
- 10.66 However, we do not consider that it is necessary to retain the “unusualness” factor with this definition. The distinctiveness of the behaviours demonstrated in the propensity evidence and the alleged offending could still be considered under section 43(3)(c) (the extent of the similarity between the propensity evidence and the facts in issue). In its Second Review, the Commission considered that, although there is some overlap between sections 43(3)(c) and 43(3)(f), they should be maintained as separate factors.<sup>88</sup> It considered the two were not interchangeable as offending could be similar yet not unusual. It gave the example of a defendant who steals money out of an employer’s cash register on two occasions (similar but not unusual) and a defendant who steals money out of an employer’s cash register and replaces it with Monopoly money on two occasions. The latter, it suggested, has greater probative value, and this should be acknowledged by maintaining unusualness as a separate factor.
- 10.67 The probative value of the evidence is, however, determined by the strength of the relevant factors rather than the number of factors that apply. As the Court of Appeal has held:<sup>89</sup>
- The task of analysing the relevant matters in s 43(3) of the Evidence Act requires careful evaluation and an acknowledgement that the circumstances of each case have to be carefully considered. In some cases just one of the factors in s 43(3) will be determinative while in others, each factor may carry similar weight.
- 10.68 Accordingly, while we agree that events may be “similar” but not “unusual”, we consider the distinctiveness of common characteristics would add weight to the section 43(3)(c) factor. This view was shared by most members of our Expert Advisory Group. For this reason, we do not consider it is necessary to maintain a separate factor for “unusualness”. Retaining the factor in any form is likely to cause continued confusion over its relevance and appropriate application.
- 10.69 Repealing section 43(3)(f) would mean that the unusualness of the type or nature of offending (compared either to other types of offending or to normal standards of behaviour) would no longer be identified explicitly as a relevant factor. Two submitters were concerned about the potential impact of this, particularly in the context of the courts treating sexual offending against children as inherently unusual.<sup>90</sup> We do not agree with this concern for two reasons.

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<sup>86</sup> Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuatoru i te Evidence Act 2006* (NZLC R142, 2019) at [18.32].

<sup>87</sup> Prior to the Evidence Act 2006, 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, 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].

<sup>88</sup> Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [18.32].

<sup>89</sup> *M v R* [2019] NZCA 357 at [17].

<sup>90</sup> Luke Cunningham Clere, New Zealand Law Students’ Association.

- 10.70 First, we do not consider repeal of the unusualness factor would have a marked impact on outcomes in child sexual offending cases. Members of our Expert Advisory Group agreed with this assessment. In our analysis of child sexual offending cases post-*Thompson*, unusualness was not the single determinative factor in decisions to admit propensity evidence.<sup>91</sup>
- 10.71 We acknowledge the importance of propensity evidence in cases involving child sexual offending. There may be a greater willingness to admit evidence of previous offending in these cases on the basis of unlikely coincidence.<sup>92</sup> As the Court of Appeal observed in *Smith*, “a man who has two sets of children, neither of whom knows the other, making similar allegations against him would be, if both were false, very unlucky”.<sup>93</sup> We do not consider repeal of section 43(3)(f) would change this, and the existence of section 43(3)(c) would ensure that distinctiveness, including the unlikelihood of two similar allegations, could still be considered.
- 10.72 Additionally, as we noted above, while recent reforms in Australia have sought to bolster the probative value of propensity evidence in cases involving child sexual offending, this was in response to concerns that are unlikely to arise in New Zealand’s different legislative context.<sup>94</sup>
- 10.73 Second, we query the policy basis for treating particular conduct (in this case, child sexual offending) as “inherently” unusual. It is not clear that treating a type of conduct as inherently unusual is probative of an individual’s tendency towards a particular behaviour or state of mind. It is a blanket statement rather than a consideration that shows the necessary “linkage and coincidence” between an individual and both the current offending and previous behaviour. This approach may simply rationalise admitting evidence in the absence of any such link. Additionally, there is a question about how the court determines that a particular type of offending is “inherently unusual”. Arguably, any type of offending is “inherently unusual” when compared to normal standards of behaviour since the vast majority of individuals will not offend.
- 10.74 This highlights the difficulties more generally of relying on an approach to unusualness that is defined by the nature or type of offending. Both these approaches require reference to an external comparator, which is not defined in the Act. Such an exercise would either require the court to refer to large amounts of empirical evidence<sup>95</sup> or to rely on individual judicial assessments of societal norms.<sup>96</sup> By comparison, a “distinctive

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<sup>91</sup> Other factors were also relevant, including the frequency with which the alleged acts or events have occurred (s 43(3)(a)) and the connection in time (s 43(3)(b)) and similarities (s 43(3)(c)) between the propensity evidence and offending in issue. See, for example, *Faasofia v R* [2020] NZCA 405 at [34]; *Falamoe v R* [2022] NZHC 1341 at [51]; *Armishaw v R* [2019] NZCA 456 at [36]; *R v Stevens* [2020] NZHC 760 at [22] and [30]; *T v R* [2022] NZHC 189 at [19].

<sup>92</sup> Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 196.

<sup>93</sup> *Smith v R* [2010] NZCA 361 at [17].

<sup>94</sup> The changes in Australia were made in response to the higher threshold for admissibility that exists in Australian legislation — see Issues Paper at [10.23] and [10.27] and the discussion at para [10.11] above. Since we are not recommending reform of the s 43(1) threshold, there is no reason to think that removing the unusualness factor would result in propensity evidence being too readily excluded in child sexual offending cases in New Zealand. The overall test for admitting such evidence will remain the same.

<sup>95</sup> As was the case in *Thompson v R* [2019] NZCA 385, where the court referred to the diagnosis of paraphilic disorder in the Diagnostic Statistical Manual of Mental Disorders (DSM-5) and a volume of academic studies on child sex offending in support of its conclusion (at [32]–[33]).

<sup>96</sup> *Thompson v R* [2019] NZCA 385 at [31] and n 23.

characteristics” approach does not require this. The relevant comparison is between the behaviours demonstrated in the propensity evidence and the alleged offending, both of which are already before the court.

- 10.75 On this basis, we consider repeal to be the most effective and appropriate solution to the issues identified. This was supported by some submitters<sup>97</sup> and unanimously by the members of our Expert Advisory Group. This would mean “unusualness” would no longer be listed as a relevant factor in the assessment of probative value.

## RELEVANCE OF RELIABILITY

### Issue

- 10.76 In our Issues Paper, we noted it is unclear whether reliability should form part of the judge’s assessment when determining the admissibility of propensity evidence.<sup>98</sup> The Act only directly addresses the reliability of propensity evidence under section 43(3)(e), which refers to whether the allegations made by a propensity witness “may be the result of collusion or suggestibility”. The Court of Appeal has taken the view that challenges to the credibility and reliability of propensity witnesses are generally issues for the fact-finder at trial.<sup>99</sup>
- 10.77 This approach has been called into question indirectly by the decision of the Supreme Court in *W (SC 38/2019) v R*.<sup>100</sup> The Court held that the evaluation of probative value (in that case, under section 8) can include considerations of reliability.<sup>101</sup> The Supreme Court has previously held that there is “little or no” practical difference between the tests in section 43 and section 8.<sup>102</sup> The Court’s approach in *W (SC 38/2019) v R* has been applied subsequently to propensity evidence at High Court level.<sup>103</sup> However, a later Court of Appeal judgment, subject to publication restrictions, did not consider *W (SC 38/2019) v R* and referred to earlier case law that suggested reliability issues should be assessed and resolved at trial.<sup>104</sup>

### Consultation

#### What we asked submitters

- 10.78 We asked submitters whether section 43(3)(e) should be amended to clarify that, when assessing the probative value of propensity evidence, the judge may consider the

<sup>97</sup> Adjunct Professor Elisabeth McDonald. The Public Defence Service also noted some support for this option among defence lawyers.

<sup>98</sup> Issues Paper at [10.50].

<sup>99</sup> See, for example, *Fraser v R* [2019] NZCA 662 at [27], citing *Lyons v R* [2015] NZCA 318 at [28]; *W (CA290/2017) v R* [2017] NZCA 405 at [19]; *George v R* [2017] NZCA 318 at [26].

<sup>100</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382.

<sup>101</sup> *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [48] (majority) and [191] (minority).

<sup>102</sup> *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [66]–[67].

<sup>103</sup> *R v Wallace* [2020] NZHC 2559 at [34].

<sup>104</sup> The case is subject to publication restrictions until final disposition of trial. It cited, with approval, *George v R* [2017] NZCA 318 at [26].

reliability of the proposed evidence.<sup>105</sup> We expressed the view that, following the Supreme Court's decision in *W (SC 38/2019) v R*, it would be inconsistent to continue to apply a higher bar to the consideration of reliability under section 43 than section 8.

- 10.79 We noted that such an amendment may be unnecessary since *W (SC 38/2019) v R* has already been applied to a propensity case in the High Court. We referred, however, to the later Court of Appeal judgment that took a different approach to the relevance of reliability. On this basis, we suggested amendment may be necessary or desirable to ensure consistency.

### Results of consultation

- 10.80 Ten submitters addressed this issue. Five supported reform<sup>106</sup> while four opposed it.<sup>107</sup> One submitter, the NZLS, agreed that “the reliability of proposed evidence should be capable of being considered as part of the admissibility assessment” but did not express a view on whether legislative amendment is necessary or desirable to achieve this.
- 10.81 All submitters agreed that reliability is a relevant consideration under the section 43 assessment. They disagreed on whether legislative reform is necessary or desirable. Submitters that supported reform considered amendment would ensure clarity and consistency as to the relevance of reliability across the Act by addressing the current inconsistency between sections 8 and 43.<sup>108</sup> They also referred to the current illogicality of reliability only being relevant to consideration of “collusion or suggestibility” under section 43(3)(e) and could see no reason to limit consideration of reliability in this way.<sup>109</sup>
- 10.82 Submitters that opposed reform were not convinced legislative amendment would be helpful. The Crown Law Office considered there was no evidence of unreliable propensity evidence being admitted to warrant reform. Associate Professor High and Police considered amendment is unnecessary following the Supreme Court's clear guidance in *W (SC 38/2019) v R*. Associate Professor High noted there is nothing in section 43 that conflicts with that decision. In particular, the section 43(3) factors are not exhaustive so the express reference to collusion or suggestibility does not currently preclude consideration of other factors that might be relevant to reliability. Associate Professor High also expressed concern that amending section 43 could in fact cause confusion, on the face of the Act, as to whether considerations of reliability are also relevant to the section 8 assessment (which does not refer expressly to reliability).

### Reform not recommended

- 10.83 We conclude reform is not necessary or desirable. The purpose of amendment would be to clarify the relevance of reliability to the assessment of probative value under section 43 by making it explicit in the provision. As we noted in our Issues Paper, this would have the

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<sup>105</sup> Issues Paper at [10.58].

<sup>106</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Luke Cunningham Clere, New Zealand Law Students' Association, Public Defence Service.

<sup>107</sup> Crown Law Office, Associate Professor Anna High, Adjunct Professor Elisabeth McDonald, New Zealand Police.

<sup>108</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Luke Cunningham Clere, New Zealand Law Students' Association, Public Defence Service.

<sup>109</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, New Zealand Law Students' Association, Public Defence Service.

benefit of ensuring the courts take a consistent approach to the assessment of probative value under both sections 8 and 43.

- 10.84 We consider, however, that these potential benefits are outweighed by the risk that statutory amendment could cause confusion. Associate Professor High was concerned that amending section 43 to refer to reliability without also amending section 8 might raise questions about the relevance of reliability under section 8. We considered a more general amendment to bring reliability within the definition of “probative value” but this was not supported by the Judicial Advisory Committee or our Expert Advisory Group, both of which considered it would risk confusion and unduly highlight reliability under section 43.
- 10.85 Our conclusion is supported by the judicial reasoning on this issue from the Supreme Court in *W (SC 38/2019) v R* and evidence that the courts are generally applying it. A number of submitters considered this rendered statutory amendment unnecessary. As noted above, we are aware of one example of the Supreme Court’s approach being applied by the High Court in the context of section 43, which suggests reform may not be necessary to ensure a consistent approach between sections 8 and 43. To the extent that the subsequent Court of Appeal decision we refer to above did not consider *W (SC 38/2019) v R*, this may be a single incident more than a signal of more widespread uncertainty or disagreement. Given the recency of the Supreme Court’s decision, it can be expected there will be a necessary period of settling in for the courts in its application.
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## CHAPTER 11

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# Visual identification evidence

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## INTRODUCTION

- 11.1 In this chapter, we consider the definition of “visual identification evidence” in section 4(1) of the Evidence Act 2006. We recommend reform to clarify that it includes assertions that a defendant was the person observed performing an act constituting direct or circumstantial evidence of the commission of an offence. This would mean the safeguards for visual identification evidence in sections 45 and 126 apply to such evidence.

## ISSUE

- 11.2 Section 4(1) defines visual identification evidence as an assertion that a defendant “was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done”. Under section 45, visual identification evidence can only be admitted if it has been obtained through a formal procedure<sup>1</sup> or there is a “good reason” for not undertaking the procedure.<sup>2</sup> If the case against the defendant depends wholly or substantially on the correctness of visual identification evidence, under section 126, a judge must warn the jury of “the special need for caution” before finding a defendant guilty. These protections are designed to address reliability concerns with visual identification evidence.<sup>3</sup>
- 11.3 In our Issues Paper, we said it was uncertain whether these provisions apply if the defendant admits to being present at the scene of the offence but denies being the perpetrator. An example is if a defendant does not dispute their presence at a group assault but claims they were mistakenly identified as the person seen holding a weapon or committing the assault.<sup>4</sup> Evidence of the alleged actions of a person is known as observation evidence. We considered this uncertainty stemmed from the definition of

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<sup>1</sup> Evidence Act 2006, s 45(3) sets out what constitutes a “formal procedure”.

<sup>2</sup> Evidence Act 2006, s 45(4) sets out the circumstances in which there will be “good reasons” for not following a formal procedure.

<sup>3</sup> Te Aka Matua o te Ture | Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [187].

<sup>4</sup> Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [11.5]–[11.10].

visual identification evidence, which focuses on assertions that a defendant was “present or near” a place and not assertions that the defendant was the person who committed a particular act.

- 11.4 We explained there is conflicting case law on this issue. Some cases have held that the definition of visual identification evidence does not include observation evidence.<sup>5</sup> Other cases have held that it does.<sup>6</sup> The result of either approach is significant. Under the former interpretation, the section 45 and 126 protections will not apply. Under the latter, they will.
- 11.5 In 2022, te Kōti Pīra | Court of Appeal in *Pink v R* considered whether a section 126 warning should have been given where the defendant admitted being at the scene of the offending and holding the weapon used in the attack but claimed he was intervening to confiscate the weapon and stop the attack.<sup>7</sup> The Court found that, in both cross-examination and its closing address, the defence had implicitly advanced the possibility that the eyewitnesses may have arrived at the scene before the defendant confiscated the axe and therefore had seen someone else wielding it. This meant identification was a live issue so section 126 was engaged. The Court acknowledged the difficulties with the definition of visual identification evidence, noting there is no “bright line distinction” between visual identification evidence and observation evidence.<sup>8</sup> After examining the earlier authorities, it concluded:<sup>9</sup>

[I]t is wrong to suggest that an identification warning is only required when the defendant denies being at the scene. A warning may still be required where the defendant admits being present and it is a live issue as to whether he or someone else present was the perpetrator.

- 11.6 Despite the decision in *Pink*, we noted in our Issues Paper the conflicting case law on this point meant it remained unsettled.<sup>10</sup> Since we published our Issues Paper, however, the Court of Appeal has considered the definition of visual identification evidence in two further cases.<sup>11</sup> Both cases supported the approach in *Pink* and earlier authority that there is no “bright line distinction” between visual identification evidence and observation evidence.<sup>12</sup> In one case, the Court found that, although it was not disputed the defendant was present at the scene, a jury warning was required because identification of the defendant as the perpetrator was still in issue.<sup>13</sup> In the other, the prosecution conceded section 45 applied to circumstances in which the defendant admitted her presence at the scene but denied participating in the assault. However, it argued the failure to meet the requirements of section 45 did not result in a miscarriage of justice. The Court of Appeal disagreed and held the introduction of inadmissible visual identification evidence created a real risk the outcome of the trial was affected. The Court also indicated a jury warning

<sup>5</sup> See, for example, *R v Turaki* [2009] NZCA 310; *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762.

<sup>6</sup> See, for example, *R v Uasi* [2009] NZCA 236, [2010] 1 NZLR 733; *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788.

<sup>7</sup> *Pink v R* [2022] NZCA 306.

<sup>8</sup> *Pink v R* [2022] NZCA 306 at [59].

<sup>9</sup> *Pink v R* [2022] NZCA 306 at [59].

<sup>10</sup> Issues Paper at [11.5]–[11.15]. See *R v Howard* [2017] NZCA 159 at [26]; *R v Turaki* [2009] NZCA 310 at [92]–[93]; *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [42].

<sup>11</sup> *Sheed v R* [2023] NZCA 488; *Tupuivao v R* [2023] NZCA 254.

<sup>12</sup> *Sheed v R* [2023] NZCA 488 at [40]–[45]; *Tupuivao v R* [2023] NZCA 254 at [24].

<sup>13</sup> *Sheed v R* [2023] NZCA 488 at [45].

may have been required.<sup>14</sup> These cases suggest the law may be more settled than when we consulted on this issue.

## CONSULTATION

### What we asked submitters

- 11.7 We asked submitters if the definition of visual identification evidence in section 4(1) should be amended to explicitly include observation evidence. We expressed a preliminary view that it should so that the protections in sections 45 and 126 would apply whenever the identity of the perpetrator is in issue.<sup>15</sup> We agreed with the reasoning in *Pink* that, even when the accused admits their presence at the scene, the risk of mistaken identification can be just as real.<sup>16</sup>
- 11.8 We suggested that, if reform was considered necessary or desirable, one option would be to insert a new paragraph into the definition of visual identification evidence as follows:<sup>17</sup>
- ... evidence that is an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was the person observed performing an act constituting direct or circumstantial evidence of the commission of an offence.

### Results of consultation

- 11.9 Eight submitters addressed this question. Four supported reform<sup>18</sup> and four opposed it.<sup>19</sup> Submitters in support of reform considered observation evidence raised the same risks as visual identification evidence and should therefore be subject to the same protections.<sup>20</sup> These submitters considered amendment to make clear observation evidence is part of visual identification evidence would ensure the section 45 and 126 safeguards would apply to this type of evidence.
- 11.10 Te Tari Ture o te Karauna | Crown Law Office, which opposed reform, agreed that observation evidence could give rise to the same risks as visual identification evidence. It disagreed, however, that reform is necessary to address this. It considered the distinction between identification evidence and observation evidence is, in principle, sound. It expressed concern that our proposed amendment could lead to cases where there is no dispute as to the presence or identity of a defendant, only a dispute as to a witness's description or characterisation of the defendant's conduct, being subject to unnecessary identification procedures and warnings. This concern was shared by the Wellington Crown Solicitor, Luke Cunningham Clere, which considered the same risks of misidentification did not arise in relation to observation evidence. In its view, "evidence of

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<sup>14</sup> *Tupuivao v R* [2023] NZCA 254 at [22] and [26].

<sup>15</sup> Issues Paper at [11.19].

<sup>16</sup> *Pink v R* [2022] NZCA 306 at [53], citing *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [35].

<sup>17</sup> Issues Paper at [11.20].

<sup>18</sup> Auckland District Law Society, Criminal Bar Association, Te Matakahi | Defence Lawyers Association New Zealand, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

<sup>19</sup> Te Tari Ture o te Karauna | Crown Law Office, Luke Cunningham Clere, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ngā Pirihimana o Aotearoa | New Zealand Police.

<sup>20</sup> Auckland District Law Society, Defence Lawyers Association, Public Defence Service.



what a person who we know was present at the scene of the crime did while they were present” is simple eyewitness evidence that should be treated the same as any other eyewitness evidence.

- 11.11 To similar effect, the New Zealand Law Society (NZLS) considered it unnecessary to widen the scope of section 45 to include observation evidence. It preferred an approach in which a formal procedure is only required if identification is at issue and would be resolved by the procedure. It acknowledged that determining whether identification is “at issue” would require a judgement call by investigators. It said the situations described in the Issues Paper where a defendant admits to being at the scene would be capable of amounting to a good reason not to follow a formal procedure under section 45(4)(d) (that the investigator or prosecutor could not reasonably anticipate that identification would be an issue).<sup>21</sup>
- 11.12 In addition, the Crown Law Office queried whether there is material uncertainty in the case law so as to necessitate reform. In its view, the recent Court of Appeal decision in *Tupuivao v R*<sup>22</sup> indicates the courts are already applying the approach in *Pink* where the reliability of identification is in issue.
- 11.13 Two submitters addressed the practical implications of any reform. Ngā Pirihimana o Aotearoa | New Zealand Police was concerned it would impose an undue administrative burden by requiring police to carry out a formal identification procedure in every case where a witness says they saw a person commit a crime. The Crown Law Office did not think reform would change police behaviour. It said that, to the extent police might not follow formal identification procedures when they should, this is a training issue.<sup>23</sup>
- 11.14 Three submitters, while opposing reform (including our proposed amendment), did suggest other possible approaches. The Crown Law Office suggested that, if the definition is to be amended, it should include some explicit wording that it applies to observation evidence only in circumstances when the reliability of the identification is in issue. Two submitters, Luke Cunningham Clere and the NZLS, did not support amending the definition but more tentatively supported amending section 126 to address situations like the one arising in *Pink*.<sup>24</sup> Luke Cunningham Clere said this would maintain the distinction between observation and identification evidence with respect to the use of formal identification procedures while still making the fact-finder cognisant of the relevant risks. The NZLS said amendment to section 126 along these lines would be beneficial in cases where there would be little utility in carrying out a formal procedure but there is nevertheless a risk of misidentification. However, both submitters said this approach is potentially already available under section 126. Luke Cunningham Clere also thought judicial guidance might achieve the same purpose.

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<sup>21</sup> In the Issues Paper, we suggested there would be a good reason for not following a formal identification procedure if the defendant admits being present and does not suggest the witness was mistaken as to who they saw commit the offence (at [11.21]).

<sup>22</sup> *Tupuivao v R* [2023] NZCA 254.

<sup>23</sup> They gave the failure of the police to conduct a formal identification procedure in *Tupuivao v R* as an example: [2023] NZCA 254.

<sup>24</sup> Neither submitter said exactly what those situations were. In *Pink*, the defendant admitted to holding the weapon, but his counsel also suggested implicitly during cross-examination that the witness may have seen someone else with the weapon: *Pink v R* [2022] NZCA 306 at [60]–[63].

## THE NEED FOR REFORM

- 11.15 We conclude reform is desirable to clarify that the definition of visual identification evidence includes observation evidence. As we said in our Issues Paper, the Act is unclear on this point. Under the current section 4(1) definition, it is not obvious that observation evidence can be included in the plain meaning of visual identification evidence. Rather, the courts can only take this approach by adopting a purposive interpretation of the definition. In this respect, the courts have taken different approaches — although a clearer approach, tending towards the inclusion of observation evidence, may be emerging from *Pink* and its application in two subsequent Court of Appeal cases. Legislative amendment would reflect the current approach of the courts and ensure clarity and certainty.
- 11.16 To the extent the current definition might be interpreted as excluding observation evidence, it may not adequately protect against misidentifications. This view was shared or accepted by a number of submitters.<sup>25</sup> We agree. While in some cases it can be difficult to clearly differentiate between observation evidence and simple identification evidence, correctly identifying the person who did the act is still of profound importance. The risk of misidentification is just as real when identifying who committed an act as it is when identifying who was “present or near” the scene. There may also be a particular risk of cross-racial misidentification when those present at the scene of a crime are of a similar ethnicity.

## RECOMMENDATION

### R16

Insert a new paragraph in the definition of “visual identification evidence” in section 4(1) referring to evidence that is an “assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was the person observed performing an act constituting direct or circumstantial evidence of the commission of an offence”.

- 11.17 We recommend amending the definition of visual identification evidence in section 4(1) to clarify that it includes observation evidence. This would mean that, in accordance with section 45, a formal identification procedure would need to be followed in relation to this type of evidence. It would also require a judge to direct the jury, under section 126, when the case depends “wholly or substantially” on the correctness of a witness’s visual identification of the defendant as the person performing the relevant act.
- 11.18 Our recommendation will address the risks associated with misidentification of the defendant where a person asserts they saw the defendant performing an act constituting direct or circumstantial evidence of the commission of an offence. For the reasons stated above, we consider that observation evidence should not be put before a fact-finder without the protections in sections 45 and 126.
- 11.19 Amending section 4(1) would clarify that *both* section 45 and section 126 apply to observation evidence as opposed to amending either of those sections in isolation. As the Court of Appeal has acknowledged on several occasions, it is the drafting of the

<sup>25</sup> Auckland District Law Society, Crown Law Office, Defence Lawyers Association New Zealand, Public Defence Service.

section 4(1) definition of visual identification evidence that creates difficulties when it is clear the defendant was present but denies they were the person doing the relevant act.<sup>26</sup> The same point has been made in commentary.<sup>27</sup>

- 11.20 Submitters opposed to reform raised two main concerns with our proposed amendment: that it may be overly inclusive of observation evidence and that it may result in an increased administrative burden for Police and the courts. We address these two concerns in turn.
- 11.21 First, we do not agree our proposed amendment is overly inclusive. There are existing safeguards in the Act to avoid unnecessary use of formal identification procedures when identification is not a significant issue. Section 45(4) lists in its “good reasons” for not undertaking a formal procedure that “no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant”. As we said in our Issues Paper, this may apply where the defendant admits to being at the scene and does not deny the witness saw them commit the offence when this is put to them in an interview. In addition to the reasons listed in section 45(4), *te Kōti Mana Nui* | Supreme Court has found that the list of “good reasons” in section 45(4) is not exhaustive.<sup>28</sup> For example, it is well established in case law that identification based on strong recognition evidence (where, for example, the witness knows the defendant) can satisfy this ground.<sup>29</sup> Even when a formal procedure is not followed, the prosecution can still admit visual identification evidence under section 45(2) if it can prove beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification. This acts as a backstop in situations where a formal procedure should have been undertaken but the evidence that the defendant was the person observed committing an offence is overwhelming.
- 11.22 As also noted by the NZLS, an identification procedure should be held as soon as possible after an event, meaning that it may be required before a defendant has given a statement confirming their presence at the scene of an offence. In other words, under current law and practice, a formal procedure may already have been or need to be undertaken before the defendant admits their presence.
- 11.23 Section 126 is also drafted to avoid identification warnings being required unnecessarily. Section 126 only requires an identification warning to be given 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”. No warning would be needed if a witness’s evidence met the definition of visual identification evidence but identification was not a significant issue at trial.
- 11.24 Second, to the extent our recommendation could result in an increased administrative burden for police and the courts, we think this is justified given the risks of

<sup>26</sup> *Pink v R* [2022] NZCA 306 at [49]; *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [26]; *Witehira v R* [2011] NZCA 658 at [46]–[47].

<sup>27</sup> Nick Chisnall “Reducing the risk of misidentification: it starts with the Evidence Act 2006’s definition of “Visual Identification Evidence”” [2015] NZLJ 299 at 299.

<sup>28</sup> *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [25].

<sup>29</sup> *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [17]; *Thornton v R* [2017] NZCA 256 at [28]. Recognition by a witness does not, however, automatically mean that no formal procedure is required. It will still depend on the circumstances of the case: *Galloway v R* [2018] NZCA 211 at [35].

misidentification. Under our proposed amendment, identification procedures might sometimes be run when they are not ultimately required. As noted above, it appears this already occurs to some degree under the current law. We consider this is preferable to not having formal identification procedures run when there is a risk of misidentification. For example, in a group attack situation where it is clear the defendant was present, it will be important to know if a witness can or cannot identify the defendant through a formal procedure. This will be especially important where people in the group appeared to look similar to the witness (for example, if they are of a similar ethnicity) and/or where a key issue is who started a fight where several people have already pleaded guilty to assault.

- 11.25 For completeness, we note that eyewitness evidence will continue to be admissible without being subject to a formal procedure. A witness's description of actions they observed can be and is regularly severed from the question of who performed those actions. Descriptions of an alleged offender's appearance would remain admissible provided they do not include a positive identification (for instance, making a dock identification during the trial).
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## CHAPTER 12

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# Medical privilege

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## INTRODUCTION

- 12.1 In this chapter, we consider the operation of section 59 of the Evidence Act 2006, which governs privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists. We address the following:
- (a) The scope of the exception to privilege created by section 59(1)(b). We recommend clarifying that court-ordered treatment does not fall within this exception.
  - (b) The circumstances in which someone acts “on behalf of” a medical practitioner or clinical psychologist under section 59(5). We recommend amending section 59(5) to clarify the meaning of “on behalf of”. We also recommend widening the privilege created by section 59 to apply to communications made to a broader range of health practitioners.
  - (c) Protections for the counselling and therapeutic notes of sexual and family violence complainants and parties in te Kōti Whānau | Family Court proceedings. This was a new issue raised by several submitters. We recommend the Ministry of Justice examine protections for counselling notes and other personal records of complainants in sexual and family violence cases or parties and children in Family Court proceedings.

## BACKGROUND

- 12.2 Section 59 creates a privilege in criminal proceedings for communications made to, and information obtained by, medical practitioners and clinical psychologists in the course of the examination, treatment or care of a person in relation to drug dependency or other conditions or behaviour that may manifest in criminal conduct. Section 59(5) extends the privilege to people “acting in a professional capacity on behalf of a medical practitioner or clinical psychologist”.
- 12.3 In our Issues Paper, we examined the origins and purpose of medical privilege, noting that some form of medical privilege has existed in statute since the late 19th century.<sup>1</sup> We noted three policy justifications for the existence of a medical privilege:<sup>2</sup>

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<sup>1</sup> Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [12.5]–[12.9].

<sup>2</sup> Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [290]–[293].

- (a) Society has a general interest in encouraging people to seek medical attention and to communicate openly and honestly when doing so.
  - (b) The public has a general preference for and expectation of privacy when it comes to medical consultations.
  - (c) In the criminal justice context of someone seeking treatment for drug dependency or other behaviours that might manifest in criminal conduct, compliance with the law is more likely to be achieved through medical treatment than through prosecution.
- 12.4 If people are aware that any information they share in the course of seeking medical attention could be used against them in court, this could prevent them from seeking medical attention or inhibit communication or engagement when they do so.<sup>3</sup> Medical privilege recognises that, in particular circumstances, the public interest in confidentiality outweighs the public interest in securing the administration of justice by placing all relevant evidence in front of a court.<sup>4</sup>

## SCOPE OF THE SECTION 59(1)(b) EXCEPTION

### Issue

- 12.5 Section 59(1)(b) creates an exception to medical privilege in situations where a person “has been required by an order of a judge, or by other lawful authority, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or for any other purpose”. We received preliminary feedback that it is not clear whether court-ordered *treatment* (as opposed to a court-ordered *examination* or *test*) would be captured by section 59(1)(b). For example, it may not be clear whether information obtained in the course of a rehabilitative counselling programme a person has been directed to attend as part of an extended supervision order (ESO) under the Parole Act 2002 would be privileged.
- 12.6 In our Issues Paper, we observed it is unlikely the section 59(1)(b) exception was intended to apply so broadly as to cover court-ordered treatment.<sup>5</sup> Earlier versions of this exception and subsequent discussion were focused on ensuring that information required by the court to resolve particular medico-legal questions (such as fitness to stand trial) is not withheld on the basis of privilege.<sup>6</sup> We considered that such a broad interpretation would be at odds with the underlying policy of the section (to encourage people to seek treatment).<sup>7</sup> It could also have unintended consequences — for example, that information obtained during compulsory treatment under the Mental Health (Compulsory Assessment

<sup>3</sup> Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [306].

<sup>4</sup> *C v Complaints Assessment Committee* [2006] NZSC 48, [2006] 3 NZLR 577 at [13].

<sup>5</sup> Issues Paper at [12.13]–[12.15] and [12.19].

<sup>6</sup> See s 9(2) of the Evidence Further Amendment Act 1895 (carried over to s 8 of the Evidence Act 1908), which created a privilege “unless the sanity of the patient be the matter in dispute”; and s 32(2)(a) of the Evidence Amendment Act (No 2) 1980, which held medical privilege did not apply in civil proceedings “in respect of any proceeding in which the sanity, testamentary capacity or other legal capacity of the patient is the matter in dispute”. See also the discussion of the Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I “Report on Medical Privilege” at 13.

<sup>7</sup> Issues Paper at [12.20]–[12.22].

and Treatment) Act 1992 or the Substance Addiction (Compulsory Assessment and Treatment) Act 2017 would not be privileged.<sup>8</sup>

- 12.7 A related concern with the scope of section 59(1)(b) is that it appears to permit information obtained for one purpose (for example, an assessment as part of a preventive detention application under the Sentencing Act 2002) to be similarly excepted from privilege and so used for another unrelated purpose (for example, to support criminal charges in unrelated offending).<sup>9</sup> This issue was identified in Te Aka Matua o te Ture | Law Commission's 2013 Review but not resolved due to the lack of submissions addressing it.<sup>10</sup> The Commission recommended the issue be explored in the context of a wider review of the Criminal Procedure (Mentally Impaired Persons) Act 2003 but, to date, we are not aware of any subsequent consideration of this issue. In our Issues Paper, we suggested that an approach that would permit information obtained for one purpose to be used for another could be inconsistent with the original policy justification underlying the existence of medical privilege.

## Consultation

### What we asked submitters

- 12.8 We sought feedback on whether section 59(1)(b) should be amended to clarify its application to court-ordered treatment. We expressed a preliminary view that it would be desirable to amend section 59(1)(b) to clarify the circumstances in which the exception applies.<sup>11</sup>
- 12.9 We sought feedback from submitters on two alternative options for reform:<sup>12</sup>
- (a) Option 1 — amend section 59(1)(b) to remove the words “for any other purpose”.
  - (b) Option 2 — amend section 59(1)(b) to remove the words “for any other purpose” *and* limit the exception by reference to the purpose for which the information or communication is obtained.

### Results of consultation

#### The need for reform

- 12.10 Ten submitters addressed this question. Eight agreed section 59(1)(b) should be amended to clarify the scope of its application<sup>13</sup> while two opposed reform.<sup>14</sup>

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<sup>8</sup> Issues Paper at [12.21].

<sup>9</sup> See, for example, *R v King* CA162/05 18 July 2005 where evidence of further offending made to a psychiatrist and psychologist for the purpose of an assessment for preventive detention was admissible in the defendant's retrial where additional charges were added based on the information disclosed.

<sup>10</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.111]–[10.119].

<sup>11</sup> Issues Paper at [12.23].

<sup>12</sup> Issues Paper at [12.24]–[12.30].

<sup>13</sup> Auckland District Law Society, Criminal Bar Association, Emeritus Professor John Dawson, Te Matakahi | Defence Lawyers Association New Zealand, Manatū Hauora | Ministry of Health, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ngā Pirihimana o Aotearoa | New Zealand Police, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service.

<sup>14</sup> Te Tari Ture o te Karauna | Crown Law Office, Luke Cunningham Clere.

- 12.11 Several submitters that supported amendment said reform would be in line with the original intention of the provision — ensuring relevant information is available to the court to reach a determination — which was never intended to include court-ordered treatment.<sup>15</sup> Emeritus Professor John Dawson said there is a very clear expectation of confidentiality and privilege in court-ordered treatment settings (particularly in cases of compulsory treatment or where treatment is a condition of parole or supervision orders). If that were not the case, he submitted, there would be no incentive for people to engage fully and honestly in those treatment programmes. He supported a more substantial redrafting of section 59, including the inclusion of a purpose provision, and expressed concern that more piecemeal amendments could further complicate an already complex provision.
- 12.12 Of the submitters that opposed amendment, the Wellington Crown Solicitor, Luke Cunningham Clere, thought legislative clarification is unnecessary following *R v Tamati*.<sup>16</sup> It considered this decision is consistent with the view that court-ordered treatment is not included in the scope of the section 59(1)(b) exception. Te Tari Ture o te Karauna | Crown Law Office understood the rationale behind the proposed reform but was concerned about the “overly restrictive” practical implications it might have (discussed below in relation to the options for reform).

### Options for reform

- 12.13 Of the submitters supporting reform, four submitters supported option 1<sup>17</sup> and four supported option 2.<sup>18</sup> Submitters in favour of option 1 (remove the words “for any other purpose”) saw it as clarifying the correct approach that court-ordered treatment does not fall within the section 59(1)(b) exception.
- 12.14 The Crown Law Office, which opposed reform, expressed concern that excluding treatment from the section 59(1)(b) exception would limit the availability of important information to the courts. It suggested section 59(1)(b) currently provides another route for securing disclosure of information where defendants do not consent to the disclosure of health information under other legislative regimes. In particular, it was concerned reform might limit the availability of information required by judges to assess risk under the ESO<sup>19</sup> and public protection order (PPO)<sup>20</sup> regimes or to decide whether to impose preventive detention.<sup>21</sup>
- 12.15 Manatū Hauora | Ministry of Health noted a risk that removing “or for any other purpose” may inadvertently narrow the scope of clinical assessments covered by the exception. It said the clinical process for assessment can be broader than just examination and tests,

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<sup>15</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Ministry of Health, New Zealand Law Society.

<sup>16</sup> *R v Tamati* [2021] NZHC 1451.

<sup>17</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, New Zealand Law Society, New Zealand Police.

<sup>18</sup> Criminal Bar Association, Emeritus Professor John Dawson, Ministry of Health, Public Defence Service. New Zealand Police also expressed “tentative support” for option 2.

<sup>19</sup> Parole Act 2002, s 107F(2A).

<sup>20</sup> Public Safety (Public Protection Order) Act 2014, s 9(b).

<sup>21</sup> Sentencing Act 2002, s 88(1)(b).



giving the example of gathering information from others close to a patient such as parents or whānau to inform assessment. Professor Dawson commented similarly that “examination or test” should be replaced with “assessment”. The latter term is more widely understood in the healthcare context and covers examinations and tests as well as other actions that might not sit neatly within the current wording of the provision. He gave the example of information obtained by a nurse carrying out observations on a ward being used to inform assessment or diagnosis (as was the case in *R v Parkinson*).<sup>22</sup>

- 12.16 Two submitters, the Crown Law Office and Professor Dawson, suggested there are sometimes difficulties in clearly delineating between “assessment” and “treatment” so as to exclude information obtained during treatment from the section 59(1)(b) exception in a workable way. The Crown Law Office commented that the divide between actions taken as part of assessment and those taken as part of treatment may not always be clear, while Professor Dawson observed assessment and treatment will often take place simultaneously in the court-ordered context.<sup>23</sup>
- 12.17 Four submitters expressed a preference for option 2 (remove the words “or for any other purpose” and limit the exception by reference to the purpose for which the information or communication was obtained).<sup>24</sup> In addition to expressing support for option 1, Ngā Pirihimana o Aotearoa | New Zealand Police also expressed “tentative” support for option 2.
- 12.18 Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service saw option 2 as more closely reflecting the intention behind medical privilege and ensuring the exception “only operates to the extent necessary for the court to be able to make relevant determinations”.
- 12.19 In support of option 2, Professor Dawson drew attention to section 59(1A). He viewed this as an important qualifier that the section 59(1)(b) exception applies only to the communications made or information obtained during the court-ordered examination or test and that any past medical records or notes remain privileged. He suggested section 59(1)(b) could be amended to refer to information “freshly” or “newly” learned in the course of examination or test to make this distinction clearer.
- 12.20 Four submitters raised concerns about the practical implications of option 2.<sup>25</sup> The Auckland District Law Society (ADLS) and Te Matakahi | Defence Lawyers Association New Zealand were supportive of the “protective sentiment” underlying option 2 but suggested current shortcomings in the court system mean flexibility in the use and reuse of information should be retained. They noted the long waitlist to obtain forensic mental health reports means it will often benefit the defendant if reports from a previous proceeding are reused in another. The Crown Law Office again expressed concern that

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<sup>22</sup> *R v Parkinson* [2017] NZCA 600.

<sup>23</sup> See also John Dawson “Medical Privilege and Court-Ordered Psychiatric Reports” (2012) 25 NZULR 239 at 260: “assessment will often take place during a remand of the patient to hospital for a period of about two weeks. During this assessment period, treatment may be provided — even treatment for a condition that may manifest itself in criminal conduct (it may be the very condition and conduct that has produced the current charges).”

<sup>24</sup> Criminal Bar Association, Emeritus Professor John Dawson, Ministry of Health, Public Defence Service.

<sup>25</sup> Auckland District Law Society, Crown Law Office, Defence Lawyers Association New Zealand, Luke Cunningham Clere.

this approach may limit the availability of important information to judges when making decisions about whether to impose preventive detention or grant bail.

- 12.21 Luke Cunningham Clere submitted there is a far stronger public interest in the administration of justice that outweighs any desirability of limiting the use of information gathered through a court-ordered examination to the proceedings for which it was ordered. It considered voluntary confessions to serious criminal offending unrelated to the report but made in the course of court-ordered assessment should not be privileged.

### The need for reform

- 12.22 We conclude it is desirable to amend section 59(1)(b) to clarify that the exception does not apply to court-ordered treatment. Although there is little evidence of a problem in practice currently, the different interpretations of the current position raised in preliminary feedback and by submitters suggest it is desirable to resolve any ambiguity.
- 12.23 The majority of submitters thought the exception does not, and was never intended to, apply to court-ordered treatment. We agree and consider amendment would clarify and codify the current (and intended) approach. Removing privilege from court-ordered treatment would be contrary to the objective of medical privilege — to encourage individuals to seek treatment and engage fully and honestly when doing so.<sup>26</sup> Additionally, it would be more encompassing than the intention behind the section 59(1)(b) exception, which was to ensure that information required by the court to reach a specific legal determination (for example, on fitness to stand trial) was not privileged.<sup>27</sup>
- 12.24 The Crown Law Office expressed concern that the exclusion of court-ordered treatment from the section 59(1)(b) exception would lead to important and “highly relevant” information being withheld from the court. For example, it said information obtained during court-ordered treatment will often be highly relevant to assessing risk for the purposes of imposing ESOs, PPOs and preventive detention. This was echoed by Luke Cunningham Clere, which considered that a wide privilege or a prohibition on information being used for other purposes would “undermine the importance of holding people to account for serious crimes”.
- 12.25 The Crown Law Office’s preference to include court-ordered treatment in the section 59(1)(b) exception does not reflect current practice as understood by other submitters. The withholding of potentially relevant information is a necessary result of a privilege. The fact that privilege is recognised in various circumstances in the Act is a clear signal from Parliament that, in some circumstances, other interests outweigh the desirability of having all relevant information disclosed.
- 12.26 It is not clear that our proposed reform will affect how assessments are made for the purposes of imposing ESOs, PPOs or preventive detention. We received informal feedback that information obtained from treatment does not currently form part of health assessment reports under these regimes beyond noting what treatment programmes a person has completed and, if relevant, a “pass” or “fail”. We understand restrictions on treatment information are well understood in this regard although the ability of patients

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<sup>26</sup> Issues Paper at [12.5]–[12.6].

<sup>27</sup> Issues Paper at [12.19]–[12.21].

to waive the privilege may be less so.<sup>28</sup> Some people subject to these types of orders have expressed frustration that medical practitioners or clinical psychologists will not share treatment information as part of those assessments even when an indication of progress or engagement may benefit them.<sup>29</sup> If there are broader concerns about the availability of relevant health information for the purposes of making a determination on ESOs, PPOs or preventive detention, we consider these would best be addressed through the legislation governing those regimes.

- 12.27 Finally, we acknowledge the concerns raised by Professor Dawson that further amendment, as opposed to more substantial redrafting, will further complicate the section as a whole. We have some sympathy for the view that this section is complex and would benefit from more extensive redrafting. However, we did not consult on more extensive amendments. Given the potential impact of substantial redrafting, it would be inappropriate to make such a recommendation in the absence of consultation. We anticipate that our recommended reform set out below will clarify rather than confuse the approach to medical privilege.

## Recommendation

**R17**

Amend section 59 to:

- a. remove the words “or for any other purpose” in section 59(1)(b); and
- b. replace references to “examination”, “examine”, “examined” and “test” with “assessment”, “assess” or “assessed” (as appropriate).

- 12.28 We recommend removing the words “or for any other purpose” from section 59(1)(b) and amending the language of the section to refer to “assessment” rather than “examination” or “test”.
- 12.29 The removal of the words “or for any other purpose” will clarify that the section 59(1)(b) exception only applies to court-ordered assessments — it does not apply to court-ordered treatment. This was the preferred approach of the majority of submitters that supported reform.
- 12.30 Some submitters raised concern about the removal of these words unduly restricting the operation of the section and so reducing flexibility. We consider our recommendation to amend the section to refer to “assessment” rather than “examination or test” will assist in this regard by providing a more expansive approach to acts carried out in the course of evaluation and diagnosis. As noted by Professor Dawson, “assessment” is the more widely understood terminology and captures all actions carried out in the course of diagnosis and prior to treatment. It was also the preferred language used by the Ministry of Health in its submission. Our recommendation affects the rest of the section, which refers to “examination”, “examine”, “examined” and/or “test” in multiple provisions.<sup>30</sup> We

<sup>28</sup> Under s 65 of the Evidence Act 2006, a person who has a privilege conferred (in this case, the patient) may waive that privilege either expressly or impliedly and so allow that information to be shared.

<sup>29</sup> We heard this via feedback and submissions made to the Commission’s ongoing review on preventive detention and post-sentence orders.

<sup>30</sup> Evidence Act 2006, ss 59(1)(a), 59(1A), 59(2), 59(3), 59(4) and 59(5).

recommend consequential amendment to section 59 to refer to assessment across the whole provision to ensure consistency.

- 12.31 The Crown Law Office and Professor Dawson were concerned it may be difficult to clearly distinguish between acts done for the purposes of assessment and those done for the purpose of treatment. We received informal feedback from stakeholders that, for health practitioners, in practice, the assessment/treatment distinction is well understood. Professor Dawson remarked in his submission that it would be “unwise” to try to completely separate assessment and treatment as treatment may be provided in the course of assessment ordered by the courts.<sup>31</sup>
- 12.32 Section 59(1A) makes clear that the exception applies only to information newly learned in the course of court-ordered assessments. We consider section 59(1A), with our proposed amendment, will give effect to the intention of the section — that neither information obtained during previous court-ordered treatment nor information obtained where treatment is the sole aim of what has been ordered by the court (for example, compulsory treatment under mental health legislation) can be disclosed under the section 59(1)(b) exception. There may be some situations, however, where treatment is not the sole aim of a process but is provided in the course of assessments ordered by the courts. This was the situation envisaged by Professor Dawson. This may require the courts to consider whether information is drawn from assessment or treatment on the facts of a particular case. In some circumstances (where the source of the information cannot be clearly identified), it may result in information obtained from treatment during the assessment process being excepted from the privilege. We are content, however, that the overarching purpose of the medical privilege provision and the exception to it will be achieved.
- 12.33 We do not recommend amending the section to limit the use of information to the proceedings and the purpose for which it was obtained. There was some support among submitters for such a limitation. However, no submitters expressed a view on whether its absence is causing confusion or problems in practice either in the courts or for health practitioners working in this area. Two submitters, the ADLS and Defence Lawyers Association, raised concerns about the practical problems such a limitation might create. In particular, they referred to the difficulties of obtaining new health assessments for each new proceeding or purpose in light of the current resource constraints at te Kōti-ā-Rohe | District Court level. In the absence of clear evidence of problems being caused by the current approach and in light of the potential implications of reform on resources and processes, we do not consider reform is desirable.

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<sup>31</sup> See also his 2012 article, John Dawson “Medical privilege and court-ordered psychiatric reports” (2012) 25 NZULR 239 at 260.

## ACTING “ON BEHALF OF” A MEDICAL PRACTITIONER OR CLINICAL PSYCHOLOGIST

### Issue

- 12.34 Section 59(5) states that medical privilege extends to communications made to or information obtained by:
- ... a person acting in a professional capacity on behalf of a medical practitioner or clinical psychologist in the course of the examination or treatment of, or care of, the person by that medical practitioner or clinical psychologist.
- 12.35 In our Issues Paper, we noted there is some uncertainty as to when a person is “acting on behalf of” a medical practitioner or clinical psychologist and, accordingly, whether information received by them is privileged.<sup>32</sup> The courts have interpreted this provision narrowly — holding, for example, that it can only be claimed in a situation where a medical practitioner or clinical psychologist has already initiated examination, treatment or care and not before. In other words, there must be a pre-existing relationship between a patient and a medical practitioner or clinical psychologist.<sup>33</sup>
- 12.36 Case law has also taken a narrow view of the categories of healthcare practitioners who might qualify as acting “on behalf of” a medical practitioner or clinical psychologist. In pre-Act cases, the courts held this included hospital nurses acting at the direction of a medical practitioner or clinical psychologist<sup>34</sup> but not a counsellor working in a programme to which the defendant had been referred by a psychologist.<sup>35</sup> More recently, in *D (CA54/2018) v R*, it was argued that a call-taker at a mental health helpline was acting in a professional capacity on behalf of a medical practitioner or clinical psychologist by filtering and referring calls to the local Crisis Assessment Team (CAT) for that team’s intervention.<sup>36</sup> Te Kōti Pira | Court of Appeal did not consider it necessary to provide a definitive answer to this question.<sup>37</sup> Te Kōti Mana Nui | Supreme Court accepted the interpretation of section 59 potentially gave rise to a point of public importance but declined leave to appeal as it was not an appropriate case to consider the issue.<sup>38</sup>
- 12.37 In our Issues Paper, we expressed a preliminary view that reform could be desirable to address ongoing uncertainty as to whether and when information shared with healthcare practitioners other than medical practitioners or clinical psychologists is protected by

<sup>32</sup> Issues Paper at [12.32].

<sup>33</sup> *R v Hodgson* HC Timaru CRI-2008-076-001397, 30 March 2009 at [46]. This point was not challenged on appeal to the Court of Appeal, heard as *R v X (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181.

<sup>34</sup> *R v Rapana* [1995] 2 NZLR 381 (HC) at 383. In this case, communications made by Mr Rapana were not privileged as they had been made to a nurse who had “offered to make a preliminary assessment as to whether a formal psychiatric examination of Mr Rapana was required”.

<sup>35</sup> *R v Gulliver* CA51/05, 9 June 2005 at [42]. This was on the basis that the equivalent section of the Evidence Amendment Act (No 2) 1980 only contemplated “vertical delegation or instruction where the delegate or person instructed is involved in carrying out the course of treatment, or part of it, being undertaken by the clinical psychologist” and not “horizontal delegation” where services are provided independently of the referrer.

<sup>36</sup> *D (CA54/2018) v R* [2019] NZCA 1.

<sup>37</sup> *D (CA54/2018) v R* [2019] NZCA 1. The Court concluded that privilege did not attach as D was not seeking treatment for drug dependency or another condition or behaviour that might manifest in criminal conduct (as per s 59(1)(a)). The suicidal ideation for which he sought help was the result of the allegations being made against him and the subsequent police investigation rather than the result of his sexual attraction towards young children.

<sup>38</sup> *D (SC 26/2019) v R* [2019] NZSC 72 at [7].

medical privilege.<sup>39</sup> We suggested it was unclear whether section 69 (conferring a general discretion to prevent disclosure of confidential information) provides adequate protection.<sup>40</sup> The Commission intended section 69 to provide “fallback” protection for information not captured by section 59.<sup>41</sup> We also observed that the current approach may be inconsistent with modern multi-disciplinary team approaches to healthcare and the increased use of digital and remote healthcare services.<sup>42</sup>

## Consultation

### *What we asked submitters*

- 12.38 We sought feedback on whether section 59 should be amended to clarify when communications to, or information obtained by, healthcare professionals other than a medical practitioner or clinical psychologist are privileged.
- 12.39 We presented two options for how section 59 could be amended:<sup>43</sup>
- (a) Option 1 — amend section 59(5) to clarify the meaning of “on behalf of”.
  - (b) Option 2 — expand the section 59 privilege to apply to a broader range of healthcare practitioners beyond only medical practitioners and clinical psychologists. This presents a further question about how to define those practitioners, whether by reference to the Healthcare Practitioners Competence Assurance Act 2003 (HPCA Act) or by formulating a definitive list of professions to be covered.

### *Results of consultation*

#### *The need for reform*

- 12.40 Twelve submitters addressed this question. Three did not express a clear view,<sup>44</sup> although two of those expressed more tentative support for reform.<sup>45</sup> Seven expressed broad support for amending section 59 to clarify when communications to, or information obtained by, healthcare practitioners other than a medical practitioner or clinical psychologist are privileged.<sup>46</sup> Two opposed any reform.<sup>47</sup>
- 12.41 The submitters that supported amendment generally focused on the options for reform. A smaller number of submitters discussed why reform is desirable. They considered a strict interpretation of “acting on behalf of” could cause unfairness to individuals and that

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<sup>39</sup> Issues Paper at [12.46].

<sup>40</sup> Issues Paper at [12.40]–[12.41].

<sup>41</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.123].

<sup>42</sup> Issues Paper at [12.43].

<sup>43</sup> Issues Paper at [12.47].

<sup>44</sup> Crown Law Office, Luke Cunningham Clere, New Zealand Police.

<sup>45</sup> Luke Cunningham Clere, New Zealand Police.

<sup>46</sup> James Carruthers, Criminal Bar Association, Emeritus Professor John Dawson, Ministry of Health, New Zealand Law Society, Te Poari o ngā Kaihaumanu Hinengaro o Aotearoa | Psychotherapists Board of Aotearoa New Zealand, Public Defence Service.

<sup>47</sup> Auckland District Law Society, Defence Lawyers Association New Zealand.

the section 69 discretion provides inadequate protection in circumstances deemed to fall outside the scope of section 59.<sup>48</sup>

- 12.42 James Carruthers drew a comparison to healthcare more generally where individuals may be able to choose to see various practitioners for the same problem. He gave the example of choosing to see either a chiropractor, osteopath or physiotherapist for back problems. He considered it is unfair and arbitrary for someone to be in a worse-off position (that is, subject to the less stringent protections of section 69) with respect to privilege because of which health practitioner they chose to approach with their concern. Te Poari o ngā Kaihaumanu Hinengaro o Aotearoa | Psychotherapists Board of Aotearoa New Zealand similarly described the anomaly of having what they view as two nearly identical professions — clinical psychology and psychotherapy — receiving different treatment under the Act. They noted this is “confusing for the public, and makes little practical sense now that psychotherapists are regulated under the HPCA Act”.
- 12.43 The Ministry of Health said “privilege should not be reduced simply because it might be another healthcare professional fulfilling part of a treatment programme” and observed that the proposed reform options would fit with the health system’s current models of interdisciplinary clinical assessment and care.
- 12.44 The two submitters that opposed reform, the ADLS and Defence Lawyers Association, considered the question of whether someone is acting “on behalf of” a medical practitioner or clinical psychologist is a fact-specific question that is best left to the court to determine on a case-by-case basis. They said that, although there is “understandable concern” that the courts have taken a narrow approach to this question (as in *R v Hodgson*),<sup>49</sup> this could be confined to the facts of the case. Any person seeking to rely on section 59 could now argue that healthcare provision has changed since the Act was passed and earlier cases decided so as to support a wider reading of the phrase “on behalf of”.

### Options for reform

- 12.45 Eight submitters commented on the options for reform. Two of those submitters did not express a clear view.<sup>50</sup>
- 12.46 One submitter, Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS), supported option 1 (clarify when someone is acting “on behalf of” a medical practitioner or clinical psychologist under section 59(5)) alone. It said option 1 is “more closely aligned to the purpose of the section”. James Carruthers favoured a broad interpretation of section 59 and supported option 1 in addition to option 2. Professor Dawson also supported options 1 and 2. He considered the underlying policy of the section meant privilege should extend to other personnel who act as a conduit to treatment. He suggested amending section 59(5) to use wording of “people from whom a referral is being sought” or, alternatively, “those through whom a person is seeking assistance”.

<sup>48</sup> James Carruthers, Ministry of Health, Psychotherapists Board of Aotearoa New Zealand.

<sup>49</sup> *R v Hodgson* HC Timaru CRI-2008-076-001397, 30 March 2009.

<sup>50</sup> New Zealand Police noted that there “may be merit” in option 2 (extending the privilege to a wider group of health practitioners), and the Public Defence Service noted “different views” among defence counsel as to the correct approach.

- 12.47 Two submitters noted potential drawbacks of option 1, focusing on its narrowness. The Public Defence Service said some of its lawyers were concerned it may “not go far enough” and could leave many healthcare interactions uncovered — particularly those where practitioners make assessments or provide treatment independently of medical practitioners or clinical psychologists. The Crown Law Office similarly observed that it may not fully capture interactions with forensic nurses who, they said, play an important role in criminal proceedings in light of the current shortage of medical practitioners and clinical psychologists (as noted in *Maaka-Wanahi v Attorney-General*).<sup>51</sup>
- 12.48 Five submitters supported option 2 (to extend the privilege to a wider range of healthcare practitioners).<sup>52</sup> The Psychotherapists Board said option 2 would better reflect the reality of modern healthcare practice. It said that, in day-to-day clinical work, psychotherapists work independently of clinical psychologists and frequently without any input from a medical practitioner (in this case, a psychiatrist).
- 12.49 Fewer submitters expressed a clear view on how that wider class of healthcare practitioners should be defined. Some submitters supported an approach guided by the professions regulated under the HPCA Act.<sup>53</sup> The Ministry of Health commented the Mental Health (Compulsory Assessment and Treatment) Act was amended in 2021 to adopt a broader definition of “mental health practitioner” in line with the HPCA Act.<sup>54</sup> Professor Dawson supported such an approach as it would allow the HPCA Act to expand or contract over time, in line with contemporary healthcare structures and systems, without requiring concurrent amendment to the Evidence Act.
- 12.50 Other submitters were critical of an approach based on the HPCA Act on the basis that it would be either too narrow or too broad. The ADLS and Defence Lawyers Association were concerned it would expand section 59 to cover a much wider range of health practitioners who treat relatively minor issues, damaging the public perception of justice if potentially vital information was withheld from criminal proceedings on this basis.
- 12.51 In contrast, other submitters (including some who supported this option) raised concerns that defining the privilege by reference to the HPCA Act would be too restrictive.<sup>55</sup> The Public Defence Service said this approach would “leave no room for development through case law in the event it is considered that some healthcare professionals have been missed”. The Ministry of Health and Professor Dawson both commented that it would not capture other roles in the health sector — for example, peer support workforces, counsellors, receptionists and call centre/helpline workers (as in *D (CA54/2018) v R*).<sup>56</sup>
- 12.52 Other submitters supported different approaches. The Psychotherapists Board proposed a more specific amendment to section 59, specifically naming psychotherapists alongside medical practitioners and clinical psychologists. James Carruthers noted the Commission’s central focus in the development of the Evidence Code was on “clarity and

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<sup>51</sup> *Maaka-Wanahi v Attorney-General* [2023] NZHC 187 at [6].

<sup>52</sup> James Carruthers, Criminal Bar Association, Emeritus Professor John Dawson, Ministry of Health, Psychotherapists Board of Aotearoa New Zealand.

<sup>53</sup> Emeritus Professor John Dawson, Ministry of Health, Psychotherapists Board of Aotearoa New Zealand.

<sup>54</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2(1) (definition of “mental health practitioner”).

<sup>55</sup> Emeritus Professor John Dawson, Ministry of Health, Public Defence Service.

<sup>56</sup> *D (CA54/2018) v R* [2019] NZCA 1.



certainty” so saw the appeal of an approach guided by the HPCA Act. He questioned, however, whether this would truly promote the purpose of section 59. He preferred a more subjective approach to the privilege that would apply to anyone a person approached in the belief that they were qualified to assist them with their condition.

### The need for reform

- 12.53 We conclude it is desirable to reform section 59 to clarify the scope of section 59(5) and the status of disclosures made to health practitioners who are not medical practitioners or clinical psychologists. We received submissions from a range of interested parties expressing support for reform, including prosecution and defence counsel and (to a lesser extent) submitters in the healthcare sector. Submitters highlighted two key concerns with the current approach. First, it has the potential to cause significant unfairness to individuals by subjecting relevant interactions to two different approaches to admissibility (under section 59 or section 69) depending on which type of health practitioner is engaged. Second, the limited scope of the privilege does not align with current models of healthcare provision and practice. These views are consistent with our preliminary view expressed in the Issues Paper.<sup>57</sup>
- 12.54 We consider reform is consistent with the policy objective of the privilege, which is to encourage individuals to seek help and treatment for drug dependency and other conditions that may manifest in criminal conduct without fear of recrimination in the criminal justice system. As the Torts and General Law Reform Committee observed, “the force of the rationale of privilege is not reduced merely because it is the nurse, physiotherapist and the like” who sees the patient.<sup>58</sup> In this respect, we note the Court of Appeal’s view in *Parkinson v R* that the policy justifications underlying medical privilege “require a generous interpretation” of section 59(1)(a).<sup>59</sup> Reform would ensure the courts can apply section 59 in a way that meets those underlying policy objectives.

### Recommendation

**R18**

Amend section 59 to:

- a. replace references to “medical practitioner or clinical psychologist” with “health practitioner”; and
- b. define “health practitioner” in section 59(6) as having the meaning given to it in section 5(1) of the Health Practitioners Competence Assurance Act 2003.

**R19**

Amend section 59(5) to refer to “a person acting in a professional capacity on behalf of a health practitioner from whom the person is seeking assistance”.

- 12.55 We recommend amending section 59 to extend the privilege beyond medical practitioners and clinical psychologists to “health practitioners”. We also recommend

<sup>57</sup> Issues Paper at [12.42]–[12.46].

<sup>58</sup> Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I “Report on Medical Privilege” at 14.

<sup>59</sup> *R v Parkinson* [2017] NZCA 600 at [34].

clarifying the meaning of “on behalf of” under section 59(5). Although these were presented as separate options in the Issues Paper, several submitters supported both options together. We consider combining both options best addresses the original concern raised with us about the uncertainty caused by a narrow interpretation of “on behalf of”.

- 12.56 Extending the privilege to apply to a wider range of health practitioners was the preferred approach of most submitters that supported reform. We recommend the relevant class of “health practitioners” should be defined by reference to the HPCA Act. We are guided in this respect by the principles of clarity and certainty that underpin the Act as a whole and the Commission’s previous consideration of this provision.<sup>60</sup> We agree with Professor Dawson that, in addition to providing clarity and certainty, this approach also allows flexibility for the law to expand or adapt as healthcare provision continues to develop and as emerging healthcare professions are registered and regulated under the HPCA Act.
- 12.57 We make two comments in response to concerns about this approach being either too broad or too narrow. The ADLS and Defence Lawyers Association expressed concern this approach would widen the application of medical privilege to such an extent that it undermines the administration of justice and public faith in the justice system. We do not consider that broadening the categories of health practitioners covered by the privilege will have this result. The rest of section 59 is narrowly constructed and will remain so — the privilege only applies when a person is seeking help for drug dependency or other conditions that may manifest in criminal conduct and only to communications the person believes are necessary to facilitate care or treatment for those conditions. For this reason, the section is naturally self-limiting. Professor Dawson’s suggestion to limit the provision to health practitioners (as defined by the HPCA Act) working *only* in the relevant areas of practice (that is, addiction and mental health) could be a solution to any concerns about unintended widening of scope. We do not consider this to be necessary, however, in the context of the rest of the provision.
- 12.58 Some submitters expressed concern that an approach based on the HPCA Act would be too narrow. It would not cover wider allied healthcare staff who may be the recipients of relevant information — for example, receptionists (who were considered to be within scope by the Torts and General Law Reform Committee)<sup>61</sup> or other call-takers (as was at issue in *D (CA54/2018) v R*).<sup>62</sup> For this reason, we also consider it desirable to amend section 59(5) to clarify when someone is acting “on behalf of” a health practitioner. We propose this should be done by deleting the requirement in section 59(5) that, for the privilege to apply, the person acting in a professional capacity on behalf of a health practitioner must be doing so “in the course” of examination, treatment or care of the person by that health practitioner.

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<sup>60</sup> See, for example, Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [308]; Law Commission *The 2013 Review of the Evidence Act 2013* (NZLC R127, 2013) at [10.125].

<sup>61</sup> Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I “Report on Medical Privilege” at 15.

<sup>62</sup> *D (CA54/2018) v R* [2019] NZCA 1. The Court of Appeal did not find it necessary to provide a definitive answer to whether a mental health helpline call-taker was acting “on behalf of” a medical practitioner or clinical psychologist as it held that privilege did not apply because D was not seeking treatment for drug dependency or any other condition or behaviour that might manifest in criminal conduct. The Supreme Court declined leave to appeal although noted that it gave rise to a point of public importance: *D (SC 26/2019) v R* [2019] NZSC 72.

- 12.59 In our view, it is the inclusion of the words “*in the course of* the examination or treatment of, or care for, the person by that medical practitioner or clinical psychologist” that draws the parameters of the section narrowly. It suggests a person must have already been seen by a medical practitioner or clinical psychologist, and examination or treatment already initiated, for the subsection to apply.<sup>63</sup> Removing this wording would permit the courts to take a generous interpretation of the section, including bringing receptionists and call-takers within its scope. The original intention of the Torts and General Law Reform Committee in the development of the privilege was that it should cover “tasks both preliminary as well as following actual examination or treatment by the doctor” and “extend to the doctor’s receptionist”.<sup>64</sup> We also consider our recommendation better reflects the nature of many healthcare interactions where, currently, a patient may engage with a number of different professionals and practitioners ahead of being assessed or treated by a doctor or clinical psychologist.
- 12.60 Finally, we note James Carruthers favoured a more subjective approach to the question of which professions might be covered by the privilege. He suggested it should be sufficient for a person seeking assistance to have genuinely believed that the person they consulted was appropriately qualified to assist with their condition. This option was considered and rejected by the Commission previously as risking uncertainty.<sup>65</sup> For the same reason, we do not propose amendment along these lines now. We consider, however, that the section retains an important subjective element in that it only applies to communications a patient believes are necessary to enable or facilitate care and treatment for drug dependency or other conditions that may manifest in criminal conduct.

## PROTECTIONS FOR COUNSELLING AND THERAPEUTIC NOTES

### Issue

- 12.61 Although we did not consult on this issue, four submitters raised concerns about the approach to the disclosure of counselling records of complainants in sexual and family violence cases.<sup>66</sup>
- 12.62 These submitters expressed concern that it has become increasingly common for defence counsel to make non-party requests for disclosure of counselling notes for complainants in sexual and family violence cases and to use information contained in these notes to discredit the complainant. Submitters described this practice as traumatising to complainants, a potential inhibitor to help-seeking behaviours, a deterrent to reporting offences and engaging in the criminal justice process and contrary to normal

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<sup>63</sup> This was indeed the approach adopted by the Court of Appeal in the pre-Act case *R v Gulliver* CA51/05, 9 June 2005, where it was held that privilege did not attach to apply to communications made to a counsellor in a programme for sexual offenders to whom the defendant had been referred by a clinical psychologist. This was on the basis that s 59(5) only contemplated “vertical delegation or instruction where the delegate or person instructed is involved in carrying out the course of treatment, or part of it, being undertaken by the clinical psychologist” and not “horizontal delegation”, where services are provided independently of the referrer (at [42]).

<sup>64</sup> Torts and General Law Reform Committee *Professional Privilege in the Law of Evidence* (March 1977) at Appendix I “Report on Medical Privilege” at 15.

<sup>65</sup> Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [308].

<sup>66</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, New Zealand Family Violence Clearinghouse, Ngā Whare Whakaruruhau o Aotearoa | Women’s Refuge.

expectations of privacy and confidentiality in the context of a therapeutic relationship. They supported the introduction of a “sexual assault communications privilege”, similar to what exists in some Australian jurisdictions,<sup>67</sup> which would create a privilege for the counselling notes of sexual and family violence complainants.

- 12.63 We received an additional submission from Vivienne Crawshaw KC that made a similar point in the civil Family Court context. She referred to a recent case where notes taken by a lawyer for a child were held not to be privileged but instead confidential under section 69.<sup>68</sup> Her concern was that section 69 may not be strong enough to protect information like this and other types of information like counselling notes. She did not suggest information is being released inappropriately but rather that the current statutory scheme may not provide enough certainty. In her view, this could be appropriately dealt with by “beefing up” the protections in section 69.

### Our view

- 12.64 Section 69 creates a discretion for a judge to give a direction not to disclose confidential information. Section 69(3) refers to particular factors to be considered in the exercise of that discretion, including “society’s interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences”.<sup>69</sup> The Commission explained the justification for such a provision when developing the Evidence Code:<sup>70</sup>

The Law Commission recognises that compelling the production of personal information about victims of sexual assault — particularly if the victims sought counselling as a result of the assault — may deter the reporting of such offences to the police and, in some cases, may force victims to choose between seeking treatment and reporting of the offence. By requiring the judge to take account of society’s interest in protecting the privacy of victims of sexual offences, the section seeks to limit disclosure to those cases where the information concerned is of substantial probative value, and to prevent speculative “fishing expeditions”.

- 12.65 It is clear from submissions received and the anecdotal experiences reported in them that some submitters did not consider section 69 is currently operating as intended. A search of recent cases found a relatively small number in which this issue has arisen although we recognise that these will not give a full picture of practice as, in the majority of cases, pre-trial decisions about disclosure are not reported.<sup>71</sup>
- 12.66 We are not in a position to recommend reform on this issue. This is a new issue raised with us by submitters. We did not consult on it in our Issues Paper and so did not have the opportunity to hear from other interested parties on the nature and extent of any problems in practice or on possible options for reform.

<sup>67</sup> See, for example, Criminal Procedure Act 1986 (NSW) ch 6, pt 5, div 2; Evidence Act 1929 (SA), s 67E.

<sup>68</sup> *DN v Family Court at Auckland* [2019] NZHC 2346, [2019] NZFLR 205. In this case, the applicant sought discovery of notes and correspondence of discussions with a previous lawyer for the children involved and with teachers of one of the children.

<sup>69</sup> Evidence Act 2006, s 69(3)(g).

<sup>70</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [306].

<sup>71</sup> Search on Lexis Nexis and Westlaw databases for “section 69” and “medical” and/or “sexual” and/or “counselling notes” from 1 February 2019. This search returned 10 results of judgments primarily in te Kōti Matua | High Court or te Kōti Whānau | Family Court, with one in te Kōti Pira | Court of Appeal and one in te Kōti Take Mahi | Employment Court.

- 12.67 However, this issue was raised with us spontaneously by several submitters. It is clearly causing considerable concern to those working in the sexual and family violence sector. As the Commission previously explained, there is a strong public interest in protecting the privacy of victims of sexual offences. There is also a public interest in ensuring that people who have experienced sexual assault and family violence seek support and treatment and that offending is reported and dealt with appropriately in the justice system. Submitters considered there is a risk that neither of those interests are being met, with the knowledge that counselling records may be disclosed acting as a deterrent to both help-seeking behaviours and engagement with the criminal justice process.

## Recommendation

### R20

The Ministry of Justice should examine protections for counselling notes and other personal records of complainants in sexual and family violence cases and of parties and children in civil cases.

- 12.68 Given submitters suggest section 69 may not be providing sufficient protection for the counselling records of sexual and family violence complainants, we recommend the Ministry of Justice review the adequacy of current protections. This is particularly important in light of other more recent amendments to the Act made through the Sexual Violence Legislation Act 2021 aimed specifically at reducing potential trauma to sexual violence complainants giving evidence in court. The Ministry's review should include broader consideration of protections from disclosure of records in family violence cases — section 69 currently only refers explicitly to victims of sexual violence under section 69(3)(g).
- 12.69 We also suggest the Ministry consider the approach taken to personal records of parties and children in Family Court proceedings. In this context, different public interests may be engaged such as maintaining the free flow of information required for the efficacy of the role of the lawyer for the child.<sup>72</sup> If there is any uncertainty as to the extent to which this type of information is protected by section 69, this should be explored by the Ministry alongside the adequacy of protections for complainants in sexual and family violence cases.

<sup>72</sup> See discussion in *DN v Family Court at Auckland* [2019] NZHC 2346, [2019] NZFLR 205 at [29]–[30].

## CHAPTER 13

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# Other privilege issues

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## INTRODUCTION

13.1 In this chapter, we consider the following issues relating to the privilege provisions in the Evidence Act 2006:

- (a) The application of legal advice privilege (section 54) to documents prepared but not communicated between clients and legal advisers. We recommend amending section 54 to clarify that that legal advice privilege applies to documents prepared for the purpose of obtaining or providing legal advice but not communicated.
- (b) Termination of litigation privilege (section 56). We recommend reform to clarify that litigation privilege (alongside other legal privilege does not terminate except as provided in the Act.
- (c) Litigation privilege and confidentiality (section 56). We recommend amending section 56 to clarify that litigation privilege only applies to a communication or information if it was intended to be confidential.
- (d) Settlement privilege and the interests of justice exception (section 57(3)(d)). We do not recommend reform to the interests of justice exception to settlement privilege.
- (e) Successive interests in privileged material (section 66(2)–(4)). We recommend amending section 66 to clarify that a personal representative or any other successor in title is entitled to assert a successive interest in a privilege.

## LEGAL ADVICE PRIVILEGE AND DOCUMENTS PREPARED BUT NOT COMMUNICATED BETWEEN CLIENTS AND LEGAL ADVISERS

### Issue

- 13.2 Section 54 provides for “legal advice privilege”. It codifies what was solicitor-client privilege at common law. Under section 54, communications with legal advisers are privileged provided the communication was intended to be confidential and was made in the course of and for the purpose of obtaining (or providing) professional legal services.
- 13.3 In our Issues Paper, we noted that section 54 only refers to “communications” with legal advisers.<sup>1</sup> However, at common law, solicitor-client privilege extended to material brought

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<sup>1</sup> See Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [13.2].

into existence for the purpose of obtaining or providing legal services even if the material was not in fact communicated.<sup>2</sup> We said that section 54 appears to be inconsistent with Te Aka Matua o te Ture | Law Commission's intention when developing the Evidence Code, which was to codify the common law position in relation to solicitor-client privilege.<sup>3</sup> We noted some te Kōti Matua | High Court authority for the proposition that legal advice privilege extends to documents prepared but not communicated. However, we said these decisions do not explain how that position is available on the current wording of section 54.<sup>4</sup> Lastly, we noted the authors of *Mahoney on Evidence* have observed that excluding documents prepared for the purpose of obtaining legal advice but not actually communicated to a lawyer "is arguably inconsistent with the policy rationale for the privilege, namely to encourage full and frank communication with lawyers".<sup>5</sup>

## Consultation

### What we asked submitters

- 13.4 In our Issues Paper, we asked whether section 54 should be amended so that legal advice privilege applies to documents prepared but not communicated for the purpose of obtaining or providing legal advice.<sup>6</sup>
- 13.5 We presented one option for reform, which was to amend section 54(1) so that the privilege applies to communications *and related documents*.<sup>7</sup> We noted the word "document" is broadly defined in the Act to mean "any material ... and information electronically recorded or stored".<sup>8</sup> The requirements in sections 54(1)(a) and (b) would, however, still apply. This means the related document would need to have been intended to be confidential and made in the course of and for the purposes of obtaining or providing legal services. We said this would avoid the need to further define the concept of "related document" as it would only capture documents connected to the request for or provision of legal advice. Documents that are merely sent to a lawyer but not prepared for the purpose of seeking legal advice would not attract the privilege.<sup>9</sup> We noted this option is similar to approaches adopted in Australia.<sup>10</sup>

<sup>2</sup> This included drafts and working papers prepared by lawyers or notes prepared by clients that were not in fact communicated. See, for example, *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209 (HC) at 213; *Saunders v Commissioner, Australian Federal Police* (1998) 160 ALR 469 at 472; Simon France (ed) *Adams on Criminal Law — Evidence* (online looseleaf ed, Thomson Reuters) at [EC20.09(5)].

<sup>3</sup> Issues Paper at [13.3]; Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [254]. Also see Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C244] which states that the relevant provision "spells out what is essentially the present law on privilege for legal advice".

<sup>4</sup> Issues Paper at [13.4].

<sup>5</sup> See Issues Paper at [13.5]; Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV54.02(2)].

<sup>6</sup> Issues Paper at 202.

<sup>7</sup> Issues Paper at [13.6].

<sup>8</sup> Evidence Act 2006, s 4 (definition of "document").

<sup>9</sup> See, for example, *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [165] and [169].

<sup>10</sup> In Australia, legal advice privilege extends to confidential documents "whether delivered or not" prepared by the client, lawyer or another person for the dominant purpose of the lawyer or one or more of the lawyers providing legal advice to the client: Evidence Act 1995 (Cth), s 118(c); Evidence Act 1995 (NSW), s 118(c); Evidence Act 2008 (Vic), s 118(c); Evidence Act 2011 (ACT), s 118(c); Evidence (National Uniform Legislation) Act 2011 (NT), s 118(c).

### Results of consultation

- 13.6 Ten submitters addressed whether section 54 should be amended so that legal advice privilege applies to preparatory documents that meet the conditions described in sections 54(1)(a) and (b) but are not communicated. Eight supported this approach.<sup>11</sup> Two did not.<sup>12</sup>
- 13.7 Submitters that supported amendment said that section 54 does not accurately reflect the previous common law position,<sup>13</sup> that clarification would resolve uncertainty and related costs<sup>14</sup> and that the purpose of legal advice privilege supports the privilege covering preparatory documents.<sup>15</sup>
- 13.8 However, submitters that supported reform took different views regarding our proposed amendment. Two agreed with what we proposed<sup>16</sup> while two were concerned that “related documents” would not capture documents prepared in relation to the provision of legal services by people other than the lawyer and the person seeking legal services.<sup>17</sup> Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) gave a reason for this view, saying the conceptual link should be back to the legal advice itself and not the qualifying communication.
- 13.9 Te Matakahi | New Zealand Defence Lawyers Association and Auckland District Law Society did not support amendment. They said a person is unlikely to be deterred from seeking legal advice simply because his or her preparatory notes are not privileged, particularly as those notes may still be confidential under section 69 (general discretion not to disclose confidential information).

### The need for reform

- 13.10 We conclude the Act should be amended to clarify that legal advice privilege applies to documents prepared but not communicated for the purpose of obtaining or providing legal advice. This was supported by the vast majority of submitters on this issue.
- 13.11 As we noted in our Issues Paper, it does not appear that there was any intention to depart from the previous common law approach when the Act was passed.<sup>18</sup> The High Court has also considered section 54 and said it applies to documents not communicated despite

<sup>11</sup> Bell Gully, Te Tari Ture o te Karauna | Crown Law Office, Luke Cunningham Clere, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Laura O’Gorman KC, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service, Professor Michael Stockdale and Associate Professor Rebecca Mitchell, Wilson Harle.

<sup>12</sup> Auckland District Law Society, Te Matakahi | Defence Lawyers Association New Zealand.

<sup>13</sup> Bell Gully, Wilson Harle.

<sup>14</sup> Bell Gully, Crown Law Office, New Zealand Law Society.

<sup>15</sup> New Zealand Law Society, Public Defence Service, Professor Michael Stockdale and Associate Professor Rebecca Mitchell.

<sup>16</sup> Laura O’Gorman KC, Professor Michael Stockdale and Associate Professor Rebecca Mitchell.

<sup>17</sup> New Zealand Law Society, Wilson Harle.

<sup>18</sup> Issues Paper at [13.5]. The Commission’s intent when developing the Evidence Code was to restate the existing law (Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C244]). The wording of s 54 when it was enacted was identical to the wording proposed by the Commission, and we found no evidence of any Parliamentary intent to alter the common law position.



the wording of the section being clear that it only applies “in respect of any communication”.<sup>19</sup>

- 13.12 Additionally, reform would better realise the purpose of legal advice privilege, which is to encourage full and frank communication with lawyers.<sup>20</sup> This supports the privilege applying to documents prepared but not communicated. Otherwise, parties would be incentivised to minimise preparation for communicating with lawyers, which would clearly affect the effectiveness of any future communication.

## Recommendation

### R21

Amend section 54(1) to:

- a. remove the requirement that the communication be made “between the person and the legal adviser”; and
- b. extend the privilege to any document (in addition to any communication) that meets the requirements in section 54(1)(a) and (b).

- 13.13 We recommend amending section 54(1) to clarify that legal advice privilege applies to every communication and document that meets the requirements of subsections (a) and (b). We therefore recommend removing the requirement that the communication be between the person seeking legal advice and the legal adviser and extending the privilege to any document that meets the requirements in subsections (a) and (b). This recommendation is consistent with the previous common law position that section 54 was intended to codify. It is also similar to approaches taken in Australian legislation.<sup>21</sup>
- 13.14 Some submitters were concerned that our suggested amendment to extend the privilege to “related documents” would not capture documents that are prepared by people other than the lawyer and the person seeking legal advice but nevertheless meet the requirements of subsections (a) and (b). The NZLS said it would not be clear from our suggested amendment whether the “related documents” would have to be related to the communications between the person and the legal adviser or the relevant legal advice. We agree. We also note that neither the current wording of section 54(1) nor the option we presented in our Issues Paper would cover *communications* between the lawyer and others (besides the person seeking legal advice) even if they meet the requirements of subsections (a) and (b). Provided these communications are intended to be confidential and made in the course of and for the purpose of seeking or providing legal advice, they should attract privilege.<sup>22</sup> As noted above, this is consistent with the intention of section 54 to capture the previous common law position. We also consider that these communications are appropriately captured in principle. It would be odd, for example, if

<sup>19</sup> *R v Huang* HC Auckland CRI-2005-004-21953, 19 September 2007 at [54]–[56]; *Bain v Minister of Justice* [2013] NZHC 2123 at [143].

<sup>20</sup> Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV54.02(2)].

<sup>21</sup> Evidence Act 1995 (NSW), s 118(c); Evidence Act 2008 (Vic), s 118(c); Evidence Act 2011 (ACT), s 118(c); Evidence (National Uniform Legislation) Act 2011 (NT), s 118(c).

<sup>22</sup> For clarity, our recommendations would give a witness being cross-examined the right to refuse to disclose any communications with their legal adviser to the cross-examiner that meet the requirements of (a) and (b).

a document prepared by an expert in the course of and for the purpose of a lawyer providing legal advice attracted privilege but communications between that expert and the lawyer about the document did not.

- 13.15 We also consider that “document” is the appropriate term to cover materials that are not communicated. Document is defined in the Act as any “material... that bears symbols (including words and figures), images, or sounds or from which symbols, images or sounds can be derived”. The definition also includes “information electronically recorded or stored, and information derived from that information”. We note the word “information” is used with respect to litigation privilege. However, we prefer the term “document” because it has a definition in the Act and is consistent with the language used in the prior case law.<sup>23</sup>

## TERMINATION OF LITIGATION PRIVILEGE

### Issue

- 13.16 Section 56 establishes a privilege in relation to preparatory materials for court proceedings, known as “litigation privilege”.<sup>24</sup> The purpose of litigation privilege is to protect the adversarial process.<sup>25</sup> The Act does not address whether (and, if so, when) litigation privilege terminates.
- 13.17 In our Issues Paper, we noted the question of whether litigation privilege should terminate is a long-standing issue that was considered in both the Commission’s previous reviews of the Act.<sup>26</sup> Case law since the Second Review demonstrates that the law remains unsettled on this point — a fact that continues to attract attention from commentators.<sup>27</sup>
- 13.18 There are different views on whether litigation privilege should terminate.<sup>28</sup> One view is that litigation privilege should terminate once the litigation that created the privilege (and any related litigation) comes to an end.<sup>29</sup> The rationale behind this approach is that, once the litigation has concluded, there is no need for the privilege to endure. This is the approach taken in Canada and favoured by the Commission in its Second Review.

<sup>23</sup> See, for example, *Kupe Group Ltd v Seamar Holdings Ltd* [1993] 3 NZLR 209 (HC).

<sup>24</sup> Litigation privilege is different to legal advice privilege. Legal advice privilege applies to any communications between a legal adviser and any person seeking legal advice that meet the requirements in s 54(1). Litigation privilege applies to all materials made, received, compiled or prepared for the “dominant purpose” of preparing for a proceeding. This can include material that would be covered by legal advice privilege but can also include other material created to prepare for litigation such as communications with witnesses.

<sup>25</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.62]; *Jeffries v Privacy Commissioner* [2010] NZSC 99, [2011] 1 NZLR 45 at [16].

<sup>26</sup> See Issues Paper at [13.8]. See Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.58]–[10.65]; Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [16.19]–[16.30].

<sup>27</sup> See, for example, Allison Ferguson and Guy Tompkins “Update on Evidence Act for Civil Litigators” (paper presented to New Zealand Law Society Evidence Act Update for Civil Litigators webinar, 14 June 2022) at 36–41; Sean McAnally “Litigation privilege: permanent or temporary?” [2022] NZLJ 8.

<sup>28</sup> See Issues Paper at [13.11]–[13.12].

<sup>29</sup> See Issues Paper at [13.11].

- 13.19 Another view is that litigation privilege should not terminate. This appears to be the preferred approach in England and Wales.<sup>30</sup> It treats litigation privilege the same as legal advice privilege and settlement privilege (both of which do terminate),<sup>31</sup> thereby promoting a more coherent scheme. This approach would also avoid the practical difficulties that would inevitably arise in trying to determine when litigation, including any “related litigation”, is at an end.<sup>32</sup>
- 13.20 Lastly, we also observed that, for the other types of privilege in the Act, privileged documents remain privileged unless that privilege is waived.<sup>33</sup>

## Consultation

### What we asked submitters

- 13.21 We asked submitters whether the uncertainty in the Act is causing any problems in practice. If so, we asked whether the Act should be amended to clarify whether (and, if so, when) litigation privilege terminates.<sup>34</sup>
- 13.22 We also said that, if the preferred view is that litigation privilege should not terminate, it may be desirable to amend the Act by including a new provision that *also* confirms the position with respect to legal advice privilege and settlement privilege.<sup>35</sup> While the position in respect of these privileges is more settled, it would be inconsistent to amend the Act to address the termination status of one but not the other legal privileges.

### Results of consultation

- 13.23 Five submitters responded to the question of whether the uncertainty in the Act is causing problems in practice.<sup>36</sup> All submitters said that it is. The NZLS expressed a general view about the undesirability of having divergent and inconclusive authority on the issue and the potential for this to continue and lead to further problems in practice. The specific practical concerns highlighted by submitters included confusion as to whether litigation privilege endures in related litigation brought many years after the original proceedings,<sup>37</sup> uncertainty as to the confidentiality of interactions with factual and expert witnesses, which can affect the fullness and frankness of those interactions,<sup>38</sup> and practical challenges for decisions about what to reveal during discovery or disclosure.<sup>39</sup>

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<sup>30</sup> See discussion in *NZH Ltd v Ramspecs Ltd* [2015] NZHC 2396 at [31].

<sup>31</sup> See Issues Paper at [13.12].

<sup>32</sup> Difficulties in assessing when the privilege should end were recognised in *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319 and by the Commission in Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.62]–[10.63].

<sup>33</sup> See, for example, *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293 at [22], citing *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [44].

<sup>34</sup> Issues Paper at [13.19].

<sup>35</sup> Issues Paper at [13.20].

<sup>36</sup> Auckland District Law Society, Bell Gully, Defence Lawyers Association New Zealand, New Zealand Law Society, Wilson Harle.

<sup>37</sup> Bell Gully.

<sup>38</sup> Wilson Harle.

<sup>39</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, New Zealand Law Society.

- 13.24 Ten submitters addressed whether litigation privilege should terminate.<sup>40</sup> All submitters said that it should not. Reasons given were the “chilling effect” on free and frank discussion that temporary privilege would have,<sup>41</sup> the difficulties of privilege “re-attaching” in related proceedings<sup>42</sup> and that the policy rationale for privilege supports enduring privilege.<sup>43</sup> Two submitters also commented on the importance of ensuring certainty for clients as to the status of their communications at the time they make them.<sup>44</sup>
- 13.25 Five submitters commented on our proposed provision to clarify that litigation privilege, along with legal advice privilege and settlement privilege, does not terminate except as provided for in the Act. Four submitters supported this amendment.<sup>45</sup> James Anson-Holland did not support amendment to clarify that settlement privilege does not terminate. He considered that the policy principles underpinning settlement privilege support the privilege terminating once a settlement has been reached as the need for privilege has ended. The only exception to this would be in related disputes.

### The need for reform

- 13.26 We conclude reform is necessary to clarify whether litigation privilege terminates. Submitters were clear the current, unsettled case law is causing problems in practice. Submitters identified two issues in particular. First, the current uncertainty is causing issues with respect to disclosure or discovery of documents from previous proceedings because it is unclear whether those documents are privileged.<sup>46</sup> Second, the current uncertainty makes it difficult to engage in free and frank conversations with expert and factual witnesses because it is unclear whether those discussions will remain confidential.<sup>47</sup>
- 13.27 These are issues that affect the efficient and effective preparation for litigation, creating unnecessary expense and delay. Reform to clarify whether litigation privilege terminates will help to avoid unjustifiable expense and delay — a key principle in the Act.<sup>48</sup>

### Recommendation

#### R22

Insert a new subsection in section 53 to provide that any privilege conferred under sections 54 (legal advice privilege), 56 (litigation privilege) or 57 (settlement privilege) does not terminate except as provided for in the Act.

<sup>40</sup> Auckland District Law Society, Bell Gully, Crown Law Office, Defence Lawyers Association New Zealand, Te Tari Taake | Inland Revenue, Luke Cunningham Clere, New Zealand Law Society, Laura O’Gorman KC, Public Defence Service, Wilson Harle.

<sup>41</sup> Auckland District Law Society, Bell Gully, Crown Law Office, Defence Lawyers Association New Zealand, Luke Cunningham Clere, New Zealand Law Society, Laura O’Gorman KC, Wilson Harle.

<sup>42</sup> Bell Gully, Crown Law Office, Luke Cunningham Clere.

<sup>43</sup> Crown Law Office, New Zealand Law Society, Wilson Harle.

<sup>44</sup> Bell Gully, Laura O’Gorman KC.

<sup>45</sup> Bell Gully, New Zealand Law Society, Laura O’Gorman KC, Wilson Harle.

<sup>46</sup> Auckland District Law Society, Bell Gully, Defence Lawyers Association New Zealand, Wilson Harle.

<sup>47</sup> Wilson Harle.

<sup>48</sup> Evidence Act 2006, s 6(e).

### *Litigation privilege should not terminate except in accordance with the Act*

- 13.28 We recommend amending the Act to clarify that litigation privilege does not terminate except as provided for in the Act.<sup>49</sup>
- 13.29 Whether litigation privilege should terminate is ultimately a question of policy. Litigation privilege is a “limitation on the general policy of openness and disclosure in litigation”.<sup>50</sup> The limitation on disclosure for material created “for the dominant purpose of preparing for a proceeding or an apprehended proceeding” is justified by the need to protect “the interests of justice in proper preparation for litigation”.<sup>51</sup> The relevant policy question when considering whether litigation privilege should terminate is therefore whether temporary privilege is sufficient to enable parties to properly prepare for litigation. We conclude it is not, for the following reasons.
- 13.30 All submitters said litigation privilege should not terminate. Most submitters were concerned that, if the Act were amended to clarify that litigation privilege *did* terminate, it would make it difficult to engage in the free and frank discussions necessary to properly prepare for litigation because of the knowledge that any documents produced could be disclosed in the future. Given the purpose of the privilege is to protect the adversarial process,<sup>52</sup> part of which is lawyers engaging in free and frank discussions with experts and witnesses,<sup>53</sup> it would be inconsistent with the purpose of the privilege for it to terminate. This universal support among submitters for enduring privilege is notable because all submitters were lawyers or legal professional organisations who can be expected to work with and understand privilege. We do not consider that lawyers have a particular interest in privilege enduring. In adversarial proceedings, there are always two or more parties, with the benefits and frustrations of privilege shared by all parties involved.
- 13.31 There are also recognised difficulties that accompany the termination of litigation privilege. It is unlikely that parties will know when litigation, including any related litigation, will end.<sup>54</sup> Because of this, it becomes difficult for parties to know whether material remains privileged or not. Another related issue is that privilege may have to “re-attach” to documents after they have been disclosed if they become privileged again in later related litigation.<sup>55</sup> If other parties to the litigation have already gained access to previously privileged documents, this calls into question the practical use of privilege in these situations.
- 13.32 We also consider it would promote coherency and consistency across the Act if litigation privilege endured, similar to legal advice privilege and settlement privilege. This point was

<sup>49</sup> Mechanisms for termination in the Act include waiver (s 65) and the powers of a judge to disallow privilege (s 67).

<sup>50</sup> *Jeffries v Privacy Commissioner* [2010] NZSC 99, [2011] 1 NZLR 45 at [19].

<sup>51</sup> Evidence Act 2006, s 56(1); *Jeffries v Privacy Commissioner* [2010] NZSC 99, [2011] 1 NZLR 45 at [16].

<sup>52</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.62]. See also the Supreme Court’s formulation of the purpose for privilege in *Jeffries v Privacy Commissioner* [2010] NZSC 99, [2011] 1 NZLR 45 at [16]. The Court describes the purpose as “the interests of justice in proper preparation for litigation”.

<sup>53</sup> *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA) at 605–606.

<sup>54</sup> See recognition of this issue in *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319 and by the Commission in Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.62]–[10.63].

<sup>55</sup> Bell Gully, Crown Law Office, Luke Cunningham Clere, Wilson Harle.

made by several submitters.<sup>56</sup> Some of these submitters noted that the reasons for each privilege are not so distinct that they should be treated differently in this regard.<sup>57</sup>

- 13.33 In its Second Review, the Commission preferred to let this issue develop through case law.<sup>58</sup> We consider a different approach is now justified because case law since the Second Review remains unsettled as to whether privilege terminates.<sup>59</sup> We also received substantially more submissions on this point than in the Second Review.<sup>60</sup> As we note above, all submitters considered this to be a problem and supported reform to confirm that litigation privilege does not terminate.
- 13.34 We were pressed by a member of our Expert Advisory Group to consider further the reasoning of the Supreme Court of Canada in *Blank v Minister of Justice*, which held that litigation privilege does terminate.<sup>61</sup> We acknowledge the member's views and note, as we do above, that whether litigation privilege should terminate is ultimately a question of policy. It is reasonable to conclude that the public interest in openness and disclosure in litigation requires litigation privilege to terminate once proceedings end. However, for the reasons given above, we take a different view.

### **Clarifying the law with respect to litigation privilege, legal advice privilege and settlement privilege**

- 13.35 We also recommend amending the Act to clarify that legal advice privilege and settlement privilege do not terminate except in accordance with the Act. All but one submitter who commented on this point supported clarification.<sup>62</sup>
- 13.36 Clarifying the law with respect to litigation privilege but not legal advice privilege or settlement privilege would create unnecessary inconsistency in the Act between these privileges. It may also open arguments as to whether legal advice privilege or settlement privilege properly endure under the Act given that the Act would otherwise only specify that litigation privilege endures.
- 13.37 As we note above, the settled position with respect to legal advice privilege is that it does not terminate.<sup>63</sup> There is no authority that conclusively determines that settlement privilege does not terminate. The High Court has suggested that it does not terminate,<sup>64</sup> and the Kōti Pira | Court of Appeal in *T v R* confirmed that it does not terminate in the

<sup>56</sup> Bell Gully, Crown Law Office, New Zealand Law Society, Laura O'Gorman KC.

<sup>57</sup> Crown Law Office, New Zealand Law Society, Wilson Harle.

<sup>58</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [16.24]–[16.30].

<sup>59</sup> See commentary on this point in Allison Ferguson and Guy Tompkins "Update on Evidence Act for Civil Litigators" (paper presented to New Zealand Law Society Evidence Act Update for Civil Litigators webinar, 14 June 2022) at 36–41; Sean McAnally "Litigation privilege: permanent or temporary?" [2022] NZLJ 8.

<sup>60</sup> Law Commission *The Second Review of the Evidence Act 2006 / Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [16.21]–[16.23].

<sup>61</sup> *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319 at [34]. See also Issues Paper at [13.11].

<sup>62</sup> Bell Gully, the New Zealand Law Society, Laura O'Gorman KC and Wilson Harle supported amending the Act to clarify that legal advice privilege and settlement privilege also do not terminate except in accordance with the Act. James Anson-Holland did not.

<sup>63</sup> *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293 at [22], citing *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [44].

<sup>64</sup> *Jung v Templeton* HC Auckland CIV-2007-404-5383, 30 September 2009 at [64].

criminal context with respect to plea discussions.<sup>65</sup> The Court of Appeal explained that the rationale for the privilege is to encourage frank discussions between prosecution authorities and defendants with the aim of enhancing the prospect of agreement being reached.<sup>66</sup> This reasoning is equally applicable in the civil context when parties are negotiating a settlement.

- 13.38 In our view, it is consistent with the purpose of settlement privilege to confirm that settlement privilege endures in the Act. This is consistent with the view of the majority of submitters and the reasoning of the Court of Appeal in *T v R*.<sup>67</sup> Parties may well engage in free and frank discussions under temporary privilege if they could be certain about when negotiations would end, what the outcome might be and the possibilities of any related negotiations or litigation opening in the future. These possibilities, however, are rarely known to parties at the time they are conducting their negotiations. It is difficult to see how the reason for settlement privilege ends when a settlement is reached given parties have likely undertaken free and frank discussions to reach a settlement on the basis that their communications will have enduring protection.

## LITIGATION PRIVILEGE AND CONFIDENTIALITY

### Issue

- 13.39 In our Issues Paper, we noted that, unlike sections 54 and 57, section 56 does not include any reference to confidentiality.<sup>68</sup> We said this appears to be a drafting error. There is clear authority from te Kōti Mana Nui | Supreme Court confirming that, for litigation privilege to attach to a communication or information, it must have been intended to be confidential.<sup>69</sup>

### Consultation

#### What we asked submitters

- 13.40 We asked submitters whether the absence of a reference to confidentiality in section 56 is creating confusion or otherwise causing problems in practice. We said it may be desirable to correct the drafting issue by amending section 56(1) so that it provides as follows (additions underlined):

Subsection (2) applies to a communication or information only if the communication or information is:

(a) intended to be confidential; and

(b) made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the proceeding).

<sup>65</sup> *T v R* [2020] NZCA 15. See also *Re Harder* [2023] NZHC 620 at [15].

<sup>66</sup> *T v R* [2020] NZCA 15 at [28].

<sup>67</sup> *T v R* [2020] NZCA 15.

<sup>68</sup> Issues Paper at [13.22].

<sup>69</sup> *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505 at [93]–[94].



### Results of consultation

- 13.41 Nine submitters responded to this question.<sup>70</sup> No submitters had experienced problems in practice with the absence of a reference to confidentiality. Some submitters commented that there was a general understanding among practitioners that confidentiality is a prerequisite for privilege.<sup>71</sup> Te Tari Ture o te Karauna | Crown Law Office and NZLS also referred to Supreme Court authority confirming the requirement for confidentiality.
- 13.42 However, despite the lack of confusion in practice, all submitters that commented on whether the Act should be amended supported reform to clarify the correct approach. Wilson Harle, for example, commented that this would “correct what appears to be a drafting error, bring the drafting of section 56 in line with other provisions in the Act, and remove any potential for uncertainty”.

### The need for reform

- 13.43 In our view, it is desirable to clarify the law in the Act. Where possible, the Act should reflect settled law to promote certainty and accessibility. This is consistent with section 6(f), which refers to enhancing access to the law of evidence. Currently, the only way to know if confidentiality is a prerequisite to litigation privilege is to access the Supreme Court’s judgment in *Beckham v R*.<sup>72</sup> Although no submitters identified issues with this, submitters were all lawyers, academics, law firms or legal professional organisations. It can be expected that the rules of litigation privilege are familiar to these submitters.

### Recommendation

**R23**

Amend section 56(1) to provide that, in addition to the existing requirements, subsection (2) applies to a communication or information only if the communication or information is intended to be confidential.

- 13.44 We recommend amending section 56(1) to provide that, in addition to the existing requirements, subsection 2 applies to a communication or information only if it is intended to be confidential. We consider this amendment is a minor correction to a drafting error and reflects settled law and practice.

<sup>70</sup> Auckland District Law Society, Crown Law Office, Defence Lawyers Association New Zealand, Luke Cunningham Clere, Laura O’Gorman KC, Professor Michael Stockdale and Associate Professor Rebecca Mitchell, Wilson Harle.

<sup>71</sup> Luke Cunningham Clere, Wilson Harle.

<sup>72</sup> *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505.



## SETTLEMENT PRIVILEGE AND THE INTERESTS OF JUSTICE EXCEPTION

### Issue

- 13.45 In our Issues Paper, we explained that section 57(3)(d) codified the previous common law exceptions to settlement privilege into a general “interests of justice” exception.<sup>73</sup> It provides that settlement privilege does not apply to:

... the use in a proceeding of a communication or document made or prepared in connection with any settlement negotiations or mediation if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of the settlement negotiations or mediation.

- 13.46 We noted several High Court decisions that have largely confirmed that the pre-Act common law exceptions now inform the test under section 57(3)(d), although some have suggested its scope may be wider.<sup>74</sup>
- 13.47 We said that some uncertainty in the case law might be expected at this stage, particularly since section 57(3)(d) has not yet been considered by the Court of Appeal or Supreme Court. We noted, however, that concerns have been expressed about any interpretation of the interests of justice exception that would see it applying to a broader range of situations than the common law exceptions. It has been argued that any significant expansion to the common law exceptions to settlement privilege would inappropriately erode the protections of the privilege.<sup>75</sup>
- 13.48 We noted the rationale for settlement privilege is twofold. First, parties should be encouraged to settle disputes out of court, secure in the knowledge that whatever is said for that purpose will remain confidential and will not be used against them in later proceedings. Second, the law should respect the parties’ agreement to communicate on a without prejudice basis.<sup>76</sup>

### Consultation

#### What we asked submitters

- 13.49 Given the recent cases that have tested the boundaries of settlement privilege and the concerns expressed by commentators, we asked for feedback on whether section 57(3)(d) is causing problems in practice.<sup>77</sup> If so, we asked whether the Act should be amended to clarify the scope of the exception.

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<sup>73</sup> Issues Paper at [13.24]–[13.28].

<sup>74</sup> Issues Paper at [13.29]–[13.34].

<sup>75</sup> Issues Paper at [13.36], citing James Anson-Holland “The Limits of Settlement Privilege in New Zealand: Distilling the Guiding Principles” [2022] 30 NZULR 79 at 98.

<sup>76</sup> See, for example, *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713 at [11]; *Sheppard Industries Ltd v Specialised Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [23]–[32].

<sup>77</sup> The question posed in our Issues Paper was “Is section 53(3)(d) causing problems in practice? If so, should the Act be amended to clarify the scope of the exception?” This was a typographical error and should have referred to section 57(3)(d).

### Results of consultation

- 13.50 Six submitters responded to this question. Four submitters had not experienced any problems in practice,<sup>78</sup> although the ADLS and Defence Lawyers Association noted it may be a more contentious problem in civil proceedings.
- 13.51 The NZLS did not explicitly address whether section 57(3)(d) is causing problems in practice but noted the potential issue with the exception is that it may assess “interests of justice” in a way that is limited to the interests of the party without due consideration of the broader policy reasons of the section.<sup>79</sup>
- 13.52 One submitter considered section 57(3)(d) is causing problems in practice. James Anson-Holland outlined some recent decisions he considered relied on “interests of justice” as a stand-alone exception without reference to any established common law exceptions. He expressed concern that extension in this way is unprincipled and risks rendering the established common law exceptions obsolete and eroding the strong public policy principle encouraging the settlement of disputes.
- 13.53 Three submitters addressed whether the Act should be amended to clarify the scope of section 57(3)(d). One said it should<sup>80</sup> and two said it should not.<sup>81</sup> Laura O’Gorman KC supported clarifying section 57(3)(d) to ensure there is no weakening of the common law position it was intended to codify.
- 13.54 James Anson-Holland and the NZLS did not support amendment and preferred instead to let the courts develop the law. The NZLS said it is not necessarily an issue that new exceptions may be developed under the interests of justice test as this would have been open to the courts at common law anyway. It did say, however, that care should be taken not to erode the reasons for privilege. It cited *Smith v Shaw* as a positive example of the courts interpreting section 57(3)(d).<sup>82</sup>
- 13.55 James Anson-Holland submitted that any attempt to clarify the scope of the exception in statute may cause further confusion and replicate the original difficulties faced by the Commission when considering whether to codify the common law exceptions. He also observed that the courts have traditionally had the role of setting the boundaries of settlement privilege. In his view, litigation on the new provision is to be expected and that, even with his concerns about some recent decisions weakening the established common law exceptions to settlement privilege, the first-instance decisions “that have properly analysed the interests of justice exception” so far have been encouraging.<sup>83</sup> Both James Anson-Holland and the NZLS were concerned that some cases have approached the

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<sup>78</sup> Auckland District Law Society, Defence Lawyers Association New Zealand, Luke Cunningham Clere, Laura O’Gorman KC.

<sup>79</sup> It considered this was the approach that had been taken in *Smith v Claims Resolution Service Ltd* [2021] NZHC 3424 at [39].

<sup>80</sup> Laura O’Gorman KC.

<sup>81</sup> James Anson-Holland, New Zealand Law Society.

<sup>82</sup> *Smith v Shaw* [2020] NZHC 238, [2020] 3 NZLR 661. In this case, the Court had rejected an application to order disclosure of privileged material under the interests of justice exception, finding that the case fell far short of the high threshold of “unambiguous impropriety”. The Court observed that “given the very clear policy reasons for and benefits of settlement privilege, it is right that any exceptions to it are narrow”. See paragraphs [45]–[46].

<sup>83</sup> Citing *Smith v Shaw* [2020] NZHC 238, [2020] 3 NZLR 661; *Gibbs v Windmeyer* [2021] NZHC 2582.

“interests of justice” test as a question of how relevant the privileged material is to the proceedings. They said this undermines the purpose of the privilege.

### Reform not recommended

- 13.56 We do not recommend reform to clarify the scope of section 57(3)(d). As noted above, the cases that have considered section 57(3)(d) so far have largely confirmed that the pre-Act common law exceptions now inform the court’s exercise of discretion under the statutory “interests of justice” exception. Limiting section 57(3)(d) to the previous common law exceptions is undesirable because, as NZLS noted in its submission, it is not necessarily a problem that the courts may apply the interests of justice exception more broadly than the pre-Act common law exceptions. Creating new exceptions or modifying existing ones would have been open to the courts at common law anyway. As the Commission noted in its 2013 Review:<sup>84</sup>

We consider there is a greater risk in seeking to spell out the exceptions. There is a difficulty in adequately capturing them in statutory form. In addition, a provision that unwittingly introduces limits on or differences with the pre-existing law may continue to invite courts to seek to employ other sections of the Act to circumvent the provision. In our view it is better that the Act acknowledge the courts’ role in setting the boundaries of the privilege.

- 13.57 We agree with the concerns of some submitters that approaching the “interests of justice” exception to settlement privilege as a question of how relevant the privileged material is to the current proceedings risks undermining the purpose of the privilege.<sup>85</sup> This approach would essentially render the privilege useless because any material that was sufficiently relevant to any given proceeding would lose the protection of the privilege. This is not, however, the approach that most of the case law has taken. It would also be a significant departure from the previous common law exceptions and contrary to the views of commentators if the courts were to adopt this view.<sup>86</sup>
- 13.58 Lastly, all but one submitter said section 57(3)(d) is not causing any issues in practice. Most submitters preferred to let the courts develop the law. The only submitter who supported reform did so on the basis it would prevent erosion of the privilege but did not consider the provision is causing problems in practice.<sup>87</sup> Notably, the only submitter who said section 57(3)(d) is causing problems still preferred to let the courts develop the law on the basis that the appellate courts are likely to consider the scope of the exception properly against the broader rationale for the privilege.<sup>88</sup>

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<sup>84</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.57].

<sup>85</sup> James Anson-Holland and the New Zealand Law Society said that reducing the interests of justice test to one of relevance risks eroding the purpose of settlement privilege.

<sup>86</sup> See Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA57.12]; James Anson-Holland “The Limits of Settlement Privilege in New Zealand: Distilling the Guiding Principles” [2022] 30 NZULR 79 at 98.

<sup>87</sup> Laura O’Gorman KC.

<sup>88</sup> James Anson-Holland.

## SUCCESSIVE INTERESTS IN PRIVILEGED MATERIAL

### Issue

- 13.59 In our Issues Paper, we noted a potential drafting issue with section 66, which deals with successive interests in privileged material.<sup>89</sup> Section 66(2) provides:

On or after the death of a person who has a privilege conferred by any of sections 54 to 57 in respect of a communication, information, opinion, or document, the personal representative of the deceased person or other successor in title to property of the deceased person —

(a) is entitled to assert the privilege against third parties; and

(b) is not restricted by any of sections 54 to 57 from having access or seeking access to the privileged matter.

- 13.60 We noted that the words “or other successor in title to property of the *deceased* person” (emphasis added) means that a successor in title can no longer claim privilege while the prior owner of the property survives.<sup>90</sup> After examining the history of the section, we said it does not appear this was intended. In fact, the courts in practice have dealt with issues under section 66 as if there is no requirement for a successor in title to receive the title from a deceased person.<sup>91</sup>

### Consultation

#### What we asked submitters

- 13.61 In our Issues Paper, we expressed a preliminary view that the insertion of “deceased” in respect of successors in title in section 66(2) was a drafting error. We asked for feedback on whether section 66(2) should be amended to remove the word “deceased” from the phrase “successor in title to property of the deceased person”.<sup>92</sup>

#### Results of consultation

- 13.62 Six submitters responded to this question, all of whom supported amending section 66(2).<sup>93</sup> The NZLS and Professor Michael Stockdale and Associate Professor Rebecca Mitchell agreed the current wording is a drafting error. Bell Gully noted that, although many practitioners understood the section to apply in circumstances where there has not been a death, there is sufficient ambiguity to cause problems in practice.
- 13.63 However, two submitters noted that simply removing the word “deceased” would not solve the problem as the whole section is still qualified by the words “[o]n or after the

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<sup>89</sup> Issues Paper at [13.39]–[13.46].

<sup>90</sup> Issues Paper at [13.44].

<sup>91</sup> Issues Paper at [13.46], citing Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA66.4]. See *Whitley (as liquidator of Property Ventures Ltd (in liq)) v Connell (sued as a firm)* [2022] NZHC 2994 at [62]–[64]; *Katoria Trustee Ltd (ato CA Quinn Trust) v Toon* [2022] NZHC 3037 at [35]–[37]. Neither case refers to ss 66(2)–(4) when determining who “owned” the privilege in the relevant material. We have not identified any other decisions that address the impact of the amendment to s 66(2).

<sup>92</sup> Issues Paper at [13.47]–[13.48].

<sup>93</sup> Auckland District Law Society, Bell Gully, Defence Lawyers Association New Zealand, Paul Michalik, New Zealand Law Society, Professor Michael Stockdale and Associate Professor Rebecca Mitchell.

death of a person”.<sup>94</sup> They offered two possible alternatives. Paul Michalik suggested removing the reference to time limitation completely and splitting the section to provide for the two distinct categories of successive privilege holders (a personal representative of a deceased privilege-holder has died and a successor in title to the property of a privilege-holder).

13.64 Bell Gully suggested amending section 66(2) in the following way:

If a person has a privilege conferred by any of sections 54 to 57 in respect of a communication, information, opinion, or document, the personal representative of the person on or after their death, or other successor in title to property of the person —

(a) is entitled to assert the privilege against third parties; and

(b) is not restricted by any of sections 54 to 57 from having access or seeking access to the privileged matter.

### The need for reform

13.65 We conclude section 66(2) should be clarified. The current wording is the result of a drafting error and does not achieve the intention of the provision. All submitters supported clarification. Bell Gully also said the current wording is causing issues where a holder of a privilege ceases to exist but has not died — for example, where a company has been de-registered. In the case law we examined in our Issues Paper, the courts seem to be applying section 66(2) in the context of company liquidation and receivership as if there is no requirement for a successor in title to property to have received it from a deceased person.<sup>95</sup>

### Recommendation

#### R24

Amend section 66(2) to clarify that a privilege held by a person under sections 54–57 can pass to the personal representative of that person on or after their death or other successor in title to property of that person.

13.66 As some submitters noted, simply removing the word “deceased” from the end of section 66(2) would not solve all of the issues with that section. The whole section would still only have effect “[o]n or after the death of a person”.

13.67 We agree with Bell Gully’s suggested approach, which is to retain substantially the current text except for the addition of the initial qualifying words “On or after the death” and the removal of the word “deceased” with regards to the successor in title to property of a person. This achieves the Commission’s original intention when it recommended amending the section in the 2013 Review. That is, the provision should apply to all successors in title to property of the person whether or not the person is deceased, but that for personal representatives, the provision would only apply on or after the death of the person.<sup>96</sup>

<sup>94</sup> Bell Gully, Paul Michalik.

<sup>95</sup> Issues Paper at [13.46].

<sup>96</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.184]–[10.189].

## CHAPTER 14

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# Trial process

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## INTRODUCTION

14.1 In this chapter, we consider three provisions in the Evidence Act 2006 that deal with aspects of the trial process. We address the following:

- (a) The restriction on disclosure of complainants' occupation in sexual cases (section 88). We conclude it is preferable for low compliance to be addressed through judicial and legal education rather than legislative reform and make a recommendation for enhanced guidance for prosecutors and judges. We do not recommend reform to widen section 88 to protect a wider range of information.
- (b) Cross-examination duties (section 92). We recommend amending section 92 to clarify that an obligation to cross-examine only arises if the witness or the party that called the witness is or may be unaware of the basis on which their evidence is contradicted.
- (c) Cross-examination on behalf of another (section 95). We recommend amending section 95(5)(b) to clarify that the role of a person appointed to cross-examine on behalf of an unrepresented party is limited to putting the party's questions to the witness. If a lawyer is appointed to this role, they do not act as counsel for the unrepresented party.

## RESTRICTION ON DISCLOSURE OF COMPLAINANT'S OCCUPATION IN SEXUAL CASES

### Issue

14.2 Section 88 prevents questioning about or comment on the complainant's occupation in a sexual case except with the permission of the judge.<sup>1</sup> Permission can only be granted if the evidence is "of sufficient direct relevance to the facts in issue that to exclude it would be contrary to the interests of justice".<sup>2</sup> Section 88 re-enacted an existing rule of

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<sup>1</sup> Evidence Act 2006, s 88(1).

<sup>2</sup> Evidence Act 2006, s 88(2).

evidence<sup>3</sup> that was first enacted in 1985 in response to complainants' requests for further protection of their identity and privacy in sexual cases.<sup>4</sup>

14.3 In our Issues Paper, we identified two issues in relation to section 88:<sup>5</sup>

- (a) Compliance with the section is low. Research published by Adjunct Professor Elisabeth McDonald in 2020 highlighted that complainants are routinely asked about their occupation or whether they are employed or studying without the judge considering section 88.<sup>6</sup> We noted preliminary feedback that questions about a complainant's occupation are often used as a way of "settling" the complainant and that judges may be reluctant to intervene and interrupt a complainant at an early stage of their testimony.<sup>7</sup>
- (b) The scope of the section may be too narrow in that it only refers to "occupation".<sup>8</sup> It does not apply, for example, to evidence about the complainant's status as a student, parent or beneficiary or evidence about their education or qualifications.<sup>9</sup> It also does not differentiate between the complainant's occupation at the time of the offending and at the time of the trial.<sup>10</sup> This may result in the complainant being asked about both when only one is relevant.

## Consultation

### What we asked submitters

14.4 We sought feedback from submitters on:<sup>11</sup>

- (a) whether there is an issue with low compliance with section 88 and, if so, how that should be addressed; and
- (b) whether section 88 should be amended to protect a wider range of personal information and, if so, what it should include.

<sup>3</sup> Evidence Act 1908, s 23AA.

<sup>4</sup> Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 96.

<sup>5</sup> Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [14.2]–[14.3].

<sup>6</sup> Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 200–203 and 243. See also Elisabeth McDonald *In the absence of a jury: Examining judge-alone rape trials* (Canterbury University Press, Christchurch, 2022) at 117–118.

<sup>7</sup> Issues Paper at [14.5].

<sup>8</sup> Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 201 and 243.

<sup>9</sup> Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 243. See also, for example, *R v Morgan (No 1)* [2016] NZHC 1427 at [9] (finding that "occupation" under s 88 does not include beneficiary status).

<sup>10</sup> Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 200–201.

<sup>11</sup> Issues Paper at [14.2]–[14.10].

## Results of consultation

### Low compliance

- 14.5 Eleven submitters responded to the question about low compliance with section 88. Nine indicated concerns about the current application of section 88 and discussed how low compliance might be addressed.<sup>12</sup> Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service did not comment explicitly on issues of low compliance but considered that, “to the extent” there is a problem with low compliance, this is on the part of prosecutors and should be addressed through prosecutorial guidance and education.
- 14.6 Only one submitter, the Auckland District Law Society (ADLS), considered there is no cause for concern about the way the section is currently being applied. It said that “any relevant information should be admitted, and irrelevant information omitted in trial, irrespective of the category”.
- 14.7 The majority of submitters did not specifically comment on the extent of non-compliance with section 88 in practice but were supportive of steps to improve compliance, indicating some acceptance of a problem.<sup>13</sup> Some submitters also referred to Professor McDonald’s 2020 research, as set out in our Issues Paper, and expressed support for her conclusions and recommendations.<sup>14</sup>
- 14.8 A number of submitters highlighted concerns about the impact on complainants of non-compliance with section 88. Paulette Benton-Greig, Te Tari Ture o te Karauna | Crown Law Office, New Zealand Family Violence Clearinghouse and Ngā Pirihimana o Aotearoa | New Zealand Police all drew attention to the breach of privacy and dignity of complainants that can occur with disclosure of occupation. Some submitters also commented on the effects of disclosure of occupation on proceedings more broadly. The New Zealand Family Violence Clearinghouse and Ngā Whare Whakaruruhau o Aotearoa | Women’s Refuge expressed concern that the complexities of the relationship between employment and control and abuse may not be fully understood by the fact-finder in sexual cases. Women’s Refuge described how economic abuse and coercive control by partners can affect a complainant’s employment status and position (for example, by dictating, directly or indirectly, where and how they are employed or by controlling their access to money and finances). It concluded that “the misinterpretation of the significance of a victim’s occupation or employment status can create harmful assumptions and judgements attributed to the victim, instead of being more appropriately attributed to the perpetrator’s behaviour”.

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<sup>12</sup> Paulette Benton-Greig, Te Tari Ture o Karauna | Crown Law Office, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Family Violence Clearinghouse, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ngā Pirihimana o Aotearoa | New Zealand Police, Ngā Whakaruruhau o Aotearoa | Women’s Refuge. Paulette Benton-Greig’s submission was supported by Community Law Centres o Aotearoa and, in addition to their own submissions on this question, Women’s Refuge.

<sup>13</sup> Paulette Benton-Greig, Crown Law Office, Luke Cunningham Clere, New Zealand Family Violence Clearinghouse, New Zealand Law Society, New Zealand Police, Women’s Refuge. Paulette Benton-Greig’s submission was supported by Community Law Centres o Aotearoa and, in addition to its own submissions on this question, Women’s Refuge.

<sup>14</sup> Paulette Benton-Greig, Crown Law Office, Adjunct Professor Elisabeth McDonald. Paulette Benton-Greig’s submission was supported by Community Law Centres o Aotearoa and Women’s Refuge.



- 14.9 Despite the concerns expressed by submitters, none considered statutory amendment would help improve compliance. There was a clear view among submitters that the best way to improve compliance would be through:
- (a) amending practice notes and guidelines to ensure section 88 is brought to the attention of counsel and judges;<sup>15</sup> and
  - (b) educating lawyers and judges on the section, how it should be applied and how any breaches should be dealt with.<sup>16</sup>

### Scope of section 88

- 14.10 Eleven submitters responded to the question of whether section 88 should be amended to protect a wider range of information. Professor McDonald referred us to her 2020 research and recommendation that the scope of section 88 should be extended,<sup>17</sup> which was supported by Associate Professor Anna High in her submission.
- 14.11 Nine submitters thought the scope of section 88 should be broadened.<sup>18</sup> Several of these submitters considered the policy behind the section — that questioning complainants about their occupation may cause unnecessary shame, embarrassment or fear of harassment — applies equally to other types of personal information about a complainant.<sup>19</sup> Accordingly, they saw no justification for limiting section 88 to a complainant's occupation. Many submitters were also concerned that the attitudes or stigma attached to information about occupation and other types of personal information could perpetuate or reinforce rape myths and misconceptions — for example, a perception that a particular woman is the “type of person” who would make a false complaint.<sup>20</sup>
- 14.12 Two submitters opposed any reform in this area.<sup>21</sup> The Public Defence Service did so on the basis that the actual intention of section 88 was to protect anonymity and so protect the complainant from fear or risk of intimidation. It submitted the policy reasoning set out in the Issues Paper — preventing indignity, trauma or intimidation — was the intention of *all* the changes proposed by the Evidence Amendment Bill (No 2) 1980 rather than section 88 alone. Along with the ADLS, which also opposed reform, it considered relevant

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<sup>15</sup> Crown Law Office, Luke Cunningham Clere, New Zealand Law Society.

<sup>16</sup> Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service. The Crown Law Office also thought education may assist but considered pragmatic measures and reminders were more likely to be effective.

<sup>17</sup> Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 500 (recommendation 48).

<sup>18</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Crown Law Office, Associate Professor Anna High, Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald, New Zealand Family Violence Clearinghouse, New Zealand Law Society, Women's Refuge. In addition to their own submissions on this issue, both Community Law Centres o Aotearoa and Women's Refuge endorsed Paulette Benton-Greig's comments.

<sup>19</sup> Paulette Benton-Greig, Crown Law Office, Adjunct Professor Elisabeth McDonald. Community Law Centres o Aotearoa and Women's Refuge supported Paulette Benton-Greig's submission on this issue.

<sup>20</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, New Zealand Family Violence Clearinghouse, Women's Refuge. In addition to their own submissions on this issue, both Community Law Centres o Aotearoa and Women's Refuge endorsed Paulette Benton-Greig's comments.

<sup>21</sup> Auckland District Law Society, Public Defence Service.

evidence should be permitted and that any distress caused to the complainant by questioning needed to be balanced against a defendant's fair trial rights.

- 14.13 Submitters that supported broadening section 88 suggested what other types of information it should cover. There was general support for the recommendations in Professor McDonald's 2020 report, which would cover the complainant's occupation at both the time of the alleged offence and the time of trial, whether the complainant was unemployed or studying, any care responsibilities and educational qualifications.<sup>22</sup> Other suggestions included the complainant's immigration status,<sup>23</sup> whether they were receiving benefits<sup>24</sup> and extending the protection to all complainants in sexual and family violence cases or other vulnerable witnesses.<sup>25</sup>

## Reform not recommended

### Low compliance

- 14.14 We do not recommend reform to address concerns about low compliance with section 88. As we observed in the Issues Paper, the requirement for judicial approval is already clear on the face of the Act. Low compliance appears to stem from its interpretation and application at trial rather than from a drafting issue. This conclusion is consistent with the submissions we received on this issue, none of which considered that statutory amendment is the appropriate way to address low compliance. On this basis, we do not consider statutory amendment would improve compliance with the provision.
- 14.15 We agree with submitters that legal and judicial education is the most effective way to raise awareness among individual practitioners and ensure consistent application. The Solicitor-General's Guidelines for Prosecuting Sexual Violence currently refer to section 88 in providing guidance that "prosecutors must be mindful of the statutory prohibition on disclosing the complainant's contact details (including their occupation, residential address, email address or telephone number)".<sup>26</sup> This is in addition to other guidance on dealing with victims of crime in accordance with the Victims' Rights Act 2002.<sup>27</sup> We are aware that the Guidelines for Prosecuting Sexual Violence are being reviewed, which will present an opportunity to further highlight the section 88 restriction.

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<sup>22</sup> Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch 2020) at 500 (recommendation 48). The factors identified in McDonald's recommendations were supported, in some form, by Paulette Benton-Greig, Community Law Centres o Aotearoa, the Crown Law Office, Luke Cunningham Clere, the New Zealand Law Society and Women's Refuge.

<sup>23</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, New Zealand Family Violence Clearinghouse. In addition to its own submissions on this issue, Community Law Centres o Aotearoa endorsed Paulette Benton-Greig's comments. Women's Refuge also supported Paulette Benton-Greig's submission on this issue.

<sup>24</sup> Community Law Centres o Aotearoa, Crown Law Office.

<sup>25</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, New Zealand Law Society, Women's Refuge. In addition to their own submissions on this issue, both Community Law Centres o Aotearoa and Women's Refuge endorsed Paulette Benton-Greig's comments.

<sup>26</sup> Crown Law Office *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (3 July 2023) at [6.17].

<sup>27</sup> Crown Law Office *Victims of Crime — Guidelines for Prosecutors* (1 December 2014) at [6]. These guidelines also refer to the need for prosecutors to be mindful of the specific needs of particular victims, including victims of sexual offending (at [15]).

- 14.16 Additionally, judicial guidance could be provided to judges to assist with dealing with breaches of section 88. Responsibility for providing such guidelines should be with Te Kura Kaiwhakawā | Institute of Judicial Studies.<sup>28</sup> This guidance could cover when and how to appropriately intervene in a potential breach of section 88 at trial but also whether and when a judge should direct juries to ignore evidence given in breach of section 88. We note the conclusion of Professor McDonald in her 2020 research that judges should “consider immediately directing juries to ignore evidence” given in breach of section 88.<sup>29</sup> This is on the basis not only of the inadmissibility of the evidence but to guard against potential embarrassment or shame on the part of the complainant. We further consider a judicial direction may play an important role in addressing any prejudices or misconceptions that may have arisen from the evidence given, which was a central concern of a number of submitters.<sup>30</sup>
- 14.17 Judicial guidance could also address issues relating to the case management process. Early identification of evidence that may require the judge’s permission under section 88 will ensure this is considered at an early stage, outside of proceedings. Guidance could emphasise the role of the judge in preventing breaches of section 88 at the pre-trial stage and provide guidance as to how to manage section 88 considerations as part of the case management process.
- 14.18 Finally, this guidance should be supported by additional training by the relevant professional bodies. The NZLS commented that it is aware of training on this issue already being provided in some Crown Solicitors’ offices.

**R25**

Te Kura Kaiwhakawā | Institute of Judicial Studies should consider developing new or existing guidance for judges on the application of section 88. This could include guidance on when and how to grant permission for questioning pre-trial or intervene in potential breaches and whether to direct juries to ignore evidence given in breach of section 88.

### Scope of section 88

- 14.19 We do not recommend amending section 88 to cover a wider range of information. There was a strong view among submitters that the section’s policy rationale applies equally to other information about a complainant and clear support for amendment to expand the scope of section 88. Submitters were concerned the narrow scope of the section means improper lines of questioning on other issues can go unchallenged. Several submitters considered this allows juries to draw improper inferences from responses to questioning and could contribute to perpetuating or reinforcing rape myths and misconceptions.

<sup>28</sup> We note that not all educational materials or guidance for judges (“bench books”) are currently publicly available, so there may be existing guidance on this issue. Accordingly, this work may be able to be carried out as an expansion or amendment to existing materials of Te Kura Kaiwhakawā | Institute of Judicial Studies.

<sup>29</sup> Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 203.

<sup>30</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, New Zealand Family Violence Clearinghouse, Women’s Refuge. In addition to their own submissions on this issue, both Community Law Centres o Aotearoa and Women’s Refuge endorsed Paulette Benton-Greig’s comments.

- 14.20 We agree that this is cause for concern. We do not consider, however, that reform would necessarily address submitters' concerns. As discussed above, the prevailing view among submitters was that there is low compliance with section 88. If this is the case, there is little to be gained currently by widening it to apply in a broader number of circumstances.
- 14.21 Additionally, we are concerned about the unintended consequences of such a reform. Widening the scope of the section would create a much larger set of information that would be "off limits". This may have practical implications for trial processes. For example, it may lead to a greater number of interruptions due to parties challenging lines of questioning or seeking leave from the judge to ask particular questions. This would disrupt and lengthen proceedings and could inadvertently cause more distress to a complainant.
- 14.22 These concerns were shared by the project's Judicial Advisory Committee and our Expert Advisory Group. They appreciated the good intention any amendment would have but considered the potential disadvantages outweighed the potential benefits. Both the Judicial Advisory Committee and our Expert Advisory Group expressed particular concern that widening the scope of the section could also make it more difficult for counsel to humanise the complainant and contextualise their experiences by preventing most background information from being heard by the fact-finder.
- 14.23 The Judicial Advisory Committee considered the concerns of submitters could be better addressed through section 85 (requiring judges to disallow "unacceptable questions"). Members of our Expert Advisory Group suggested the new prosecution guidelines on sexual violence may also assist.<sup>31</sup>

## CROSS-EXAMINATION DUTIES

### Issue

- 14.24 Section 92 establishes a duty to cross-examine witnesses. Section 92(1) states:
- In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
- 14.25 Section 92 codified a long-standing common law rule concerned with fairness to the witness and the party that called them.<sup>32</sup> It ensures the witness has an opportunity to reply to any criticism of their evidence based on competing evidence that is to be called later.<sup>33</sup> A second purpose of section 92 is to ensure accuracy in fact-finding. The fact-finder should not be denied the opportunity to assess the evidence from all perspectives, including, for example, conflicting recollections of events.<sup>34</sup>

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<sup>31</sup> Crown Law Office *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (3 July 2023).

<sup>32</sup> *Browne v Dunn* (1893) 6 R 67 (HL). The rule was affirmed by the Kōti Pira | Court of Appeal in *Gutierrez v R* [1997] 1 NZLR 192 (CA) at 199.

<sup>33</sup> See, for example, *C v R* [2019] NZCA 653 at [76]; *Martin v R* [2015] NZCA 606 at [44]; *Alesco New Zealand Ltd v Commissioner of Inland Revenue* [2013] NZCA 40 at [44]; *Pitceathly v R* [2010] NZCA 95 at [22]. It is there to protect the interests of the party that called the witness, *not* the interests of the party who is cross-examining the witness. Additionally, the rationale of accuracy in fact-finding is also said to underpin section 92: Issues Paper at [14.13].

<sup>34</sup> *Wallace v Attorney-General* [2022] NZCA 375 at [155], citing *R v Dewar* [2008] NZCA 344 and *R v S* (2002) 19 CRNZ 442 (CA).

- 14.26 In our Issues Paper, we suggested there may be some uncertainty as to what is required to discharge the section 92 duty.<sup>35</sup> A literal interpretation of section 92 requires cross-examination of witnesses on every item of evidence in a party's case that meets the requirements in section 92(1).<sup>36</sup> The courts have confirmed a flexible and purposive approach should be taken to determine whether a breach of section 92 has occurred. Section 92 "need not be slavishly followed where the witness is perfectly well aware that his or her evidence is not accepted on a particular point".<sup>37</sup>
- 14.27 Neither the reasons for section 92 nor the courts' general approach are, however, apparent on the face of the section. We noted this may be causing lawyers to "err in the direction of excess" to avoid potential non-compliance with the duty,<sup>38</sup> resulting in unnecessary and overcautious questioning.<sup>39</sup> This has the potential to cause problems in both civil and criminal proceedings. In the former, it may lead to unnecessarily lengthy cross-examination causing unjustifiable expense and delay.<sup>40</sup> In the latter, repetitive and improper questioning can have an impact on vulnerable witnesses.<sup>41</sup>
- 14.28 Commentators have also suggested that section 92 does not provide the judge with sufficient guidance as to (a) when to intervene in repetitive questioning or (b) when the trial counsel's duty to put the case is discharged.<sup>42</sup>

## Consultation

### What we asked submitters

- 14.29 We asked submitters whether section 92 should be amended to clarify the extent of a party's cross-examination duties. If so, we asked for views on our preferred option for reform, which was to amend section 92 to state that the obligation to cross-examine only arises if the witness or the party that called the witness may be unaware of the basis on which their evidence is challenged.
- 14.30 This proposed amendment was based on Te Aka Matua o te Ture | Law Commission's original recommendation to expressly limit the duty to when "the witness or the party who called the witness may be unaware that they are a part of the cross-examining party's case".<sup>43</sup> This was intended by the Commission to encourage parties to address

<sup>35</sup> Issues Paper at [14.13]–[14.18].

<sup>36</sup> Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV92.03].

<sup>37</sup> *R v Dewar* [2008] NZCA 344 at [44]; *R v S* [2009] NZCA 227 at [27]. Affirmed in *Kent Sing Trading Company Ltd v JNJ Holdings Ltd* [2019] NZCA 388 at [92] and *Manukau v R* [2013] NZCA 217 at [24].

<sup>38</sup> Richard Mahoney "Putting the Case Against the Duty to Put the Case" [2004] NZ L Rev 313 at 337.

<sup>39</sup> Issues Paper at [14.20]. See also Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [404]; Andrew Barker KC *Submission to Rules Committee on Consultation Paper on Improving Access to Civil Justice* (July 2021) at [28]; Te Komiti mō ngā Tikanga Kooti | Rules Committee *Improving Access to Civil Justice* (November 2022) at [191].

<sup>40</sup> Issues Paper at [14.19]–[14.20].

<sup>41</sup> Issues Paper at [14.21]–[14.27].

<sup>42</sup> Issues Paper at [14.21]–[14.27].

<sup>43</sup> It is unclear why this was the case. The Cabinet paper that sought agreement on the proposal to codify the cross-examination duty in the Evidence Bill reflected the Commission's proposed wording: Cabinet Paper "Evidence Bill: Paper 4: The Trial Process" (4 December 2002) at [21].

these issues during examination-in-chief.<sup>44</sup> This recommendation was not included, however, in the Evidence Bill introduced into Parliament.

### Results of consultation

- 14.31 Nine submitters responded to this question. Six considered the scope of section 92 is causing problems in practice.<sup>45</sup> Two said amendment is not warranted<sup>46</sup> and one was “neutral”.<sup>47</sup>

### The need for reform

- 14.32 Two submitters considered the scope of section 92 is unclear and that there are differing views of what it requires.<sup>48</sup> The Public Defence Service drew attention to the divergent approaches of different judges and practitioners: some judges will criticise counsel for “not putting every little point” to a witness, while others will criticise them for doing so. In other cases, a judge may not intervene in questioning but sum up or deliver a verdict in a judge-alone trial in a way that discounts issues that were not put in cross-examination. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) said in the context of civil proceedings that, given the uncertainty and the potential for criticism from judges, it is not surprising lawyers often take a cautious approach to the section.
- 14.33 Some submitters that supported reform expressed particular concern about the impact of section 92 on witnesses in criminal proceedings. Paulette Benton-Greig and Women’s Refuge were particularly concerned about the harm caused to vulnerable witnesses (including sexual violence complainants and children and young people) by lengthy and repetitive questioning. Professor McDonald referred to her previous research on adult rape trials where she similarly observed complainants’ distress at lengthy and repetitive questioning by defence counsel in reliance on the section 92 duty.<sup>49</sup>
- 14.34 The NZLS focused its submission on the application of section 92 in the civil jurisdiction and supported reform on the basis it would increase efficiency in these proceedings. It observed that, in civil cases, pleadings and written briefs (or affidavits) are exchanged in advance of the hearing, and so with the exception of fresh or updating evidence, both parties will be aware of the evidence each intends to offer. On this basis, the purpose of section 92 (to provide a witness an opportunity to respond and allow the fact-finder the opportunity to assess conflicting evidence) has already been achieved and requiring a party to “put its case” in cross-examination adds little if anything once pleadings and briefs are exchanged.

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<sup>44</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [403]–[404]. See also Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at [C334].

<sup>45</sup> Paulette Benton-Greig, Adjunct Professor Elisabeth McDonald, New Zealand Law Society, Public Defence Service, Women’s Refuge. In addition to its own submission on this issue, Women’s Refuge endorsed Paulette Benton-Greig’s comments. Community Law Centres o Aotearoa also supported Paulette Benton-Greig’s submission on this issue.

<sup>46</sup> Auckland District Law Society, Luke Cunningham Clere.

<sup>47</sup> Crown Law Office.

<sup>48</sup> New Zealand Law Society, Public Defence Service.

<sup>49</sup> Elisabeth McDonald and others *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 354–358.

- 14.35 The ADLS and Wellington Crown Solicitor, Luke Cunningham Clere, both opposed reform. The ADLS submitted the provision is there to ensure that the defence case is properly heard and responded to and said it is important this is done before a jury. Luke Cunningham Clere suggested the section is appropriately worded at present and that any issues can instead be addressed through education or practice notes. It was concerned a judge may not be well placed to know if a witness or party is unaware of the basis on which their evidence is challenged.
- 14.36 The Crown Law Office was “neutral” about reform. On the one hand, it said the proposed amendment reflects the current law and so there may be some utility in amendment. It also suggested reform may give judges greater scope to intervene in unnecessarily lengthy cross-examination. It was, however, doubtful it would address more “entrenched” problems in practice such as overly cautious behaviour of lawyers or judicial hesitancy to intervene that stems from other causes (such as a concern about being appealed).

### Options for reform

- 14.37 Five submitters supported amending section 92 to clarify that the obligation to cross-examine only arises if the witness or party who called the witness may be unaware of the basis on which their evidence is challenged.<sup>50</sup> One submitter, the Public Defence Service, expressed partial support for amendment along these lines.
- 14.38 Paulette Benton-Greig considered that, if section 92 was limited as proposed, this would ensure the duty only arose where a complainant has not already had a fair opportunity to comment on evidence being offered by the defence that will challenge the complainant’s evidence. She considered evidence-in-chief and prior questions in cross-examination could provide those opportunities to comment. Her submission was endorsed by Women’s Refuge and Community Law Centres o Aotearoa.
- 14.39 The NZLS supported amendment in the context of civil proceedings. It considered the proposed change would remove the need for protracted cross-examination and so improve efficiency and reduce hearing time. It said this is consistent with both the purpose of the Act<sup>51</sup> and the objectives of the High Court Rules 2016 and the District Court Rules 2014.<sup>52</sup> It also said amendment would be consistent with te Komiti mō ngā Tikanga Kooti | Rules Committee’s proposal to place more emphasis in civil proceedings on documents rather than factual witness evidence.<sup>53</sup>
- 14.40 However, the NZLS considered the section 92 duty should remain unchanged for evidence led at trial (for example, updating evidence) or where a submission expressly contradicts a witness’s evidence. It proposed an additional amendment to expressly provide that, in a civil proceeding, a witness for a party is deemed to be aware of contradictory evidence contained in a brief of evidence or affidavit served on that party by another party to the proceeding. It said this will place an ancillary obligation on lawyers to ensure the opposition briefs of evidence are circulated to witnesses for any response.

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<sup>50</sup> Paulette Benton-Greig, Adjunct Professor Elisabeth McDonald, New Zealand Law Society, Women’s Refuge. In addition to its own submissions on this issue, Women’s Refuge endorsed Paulette Benton-Greig’s comments. Community Law Centres o Aotearoa also supported Paulette Benton-Greig’s submission on this issue.

<sup>51</sup> Evidence Act 2006, s 6(e).

<sup>52</sup> See High Court Rules 2016, r 1.2 and District Court Rules 2014, r 1.3.

<sup>53</sup> Rules Committee *Improving Access to Civil Justice* (November 2022) at [2](d).



- 14.41 It was more sceptical, however, about the benefits of reform in criminal proceedings. It commented that it is relatively common for witnesses in criminal proceedings to not come up to brief or for evidence not included in a prosecution witness's formal written statement to become available — sometimes unexpectedly. Because of this, counsel can get unexpected benefits from detailed cross-examination. It thought many practitioners would probably continue with their current cross-examination practices. Additionally, trial judges may be reluctant to intervene both because, as the defendant is not required to file formal statements, it can be less clear what is in dispute and because judges do not want to be seen as favouring either side in front of a jury.
- 14.42 Similarly, although it considered the scope of section 92 to be unclear, the Public Defence Service was unconvinced the proposed amendment would address the problem in the criminal jurisdiction. It supported an amendment that would change the current requirement to “put the case” to the witness by removing the need to put every small aspect of the case to them. However, it was not sure the proposed wording of the amendment would have that effect.
- 14.43 It also expressed some concern about the proposed test of whether “the witness or the party who called the witness may be unaware of the basis on which their evidence is challenged”. It questioned if this was an objective or subjective standard and whether evidence being “challenged” in the proposed amendment meant the same thing as evidence being “contradicted” (which is the wording currently used in section 92). The former approach may in fact broaden the cross-examination duties of defence counsel. Lastly, it noted particular concern about any approach that would suggest that, if the defence case is put to a complainant in examination-in-chief, there is no need for the defence to do so in cross-examination. It said that this would unduly restrict cross-examination by the defence.

### The need for reform

- 14.44 We conclude reform is necessary to clarify the extent of cross-examination duties. This will give lawyers and judges greater assurance that rigid and exhaustive cross-examination is not required by section 92.
- 14.45 A majority of submitters said reform is desirable due to the concerns we raised in our Issues Paper. These included that the duties under the section are uncertain, leading to improper or unnecessarily repetitive questioning in some criminal cases and unnecessary and overcautious questioning in civil cases. We consider this is contrary to the Act's purpose of helping to secure the just determination of proceedings by, among other things, promoting fairness to parties and witnesses and avoiding unjustifiable expense and delay.<sup>54</sup>
- 14.46 These problems have endured in spite of efforts by the appellate courts to address them. We also think practice notes and education are insufficient to address them given they stem from uncertainty about what the section itself requires.

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<sup>54</sup> Evidence Act 2006, ss 6(c) and (e).



## Recommendation

### R26

Amend section 92(1) to provide that, in any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness when it is reasonable to expect that:

- a. the witness is or may be in a position to give admissible evidence on those matters; and
- b. the witness or the party that called the witness is or may be unaware of the basis on which their evidence is contradicted.

- 14.47 We recommend amending section 92(1) to clarify that an obligation to cross-examine only arises if the witness or the party that called the witness is or may be unaware of the basis on which their evidence is contradicted. Submitters agreed this could generate increased efficiency in civil cases. While submitters were more divided about the benefits in criminal cases, we think clarifying the scope of section 92(1) will have a positive impact on criminal proceedings by providing firmer assurances to both judges and counsel that rigid and exhaustive cross-examination is not required.
- 14.48 We have, however, modified the wording of our original proposed amendment. We accept the Public Defence Service's concerns about the divergence between the language of our original proposal and the current language of section 92(1). It said it was unclear whether the test in our proposal was intended to be subjective or objective and whether the term "challenge" could mean something different to "contradicted". Section 92(1) currently has an objective test and uses the term "contradicted" rather than "challenged". We agree a subjective test would be unworkable. We also think consistency with the current wording of section 92(1) is desirable to avoid implying a difference where none is intended.
- 14.49 Taking this into account, we recommend section 92(1) be amended to require a party to cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness "when it is reasonable to expect that ... the witness or the party that called the witness is or may be unaware of the basis on which their evidence is contradicted". This incorporates the existing approach under section 92(1), which focuses on whether the witness "could reasonably be expected" to give evidence on a relevant issue. It also retains the objective test adopted by Parliament when passing the Evidence Bill.
- 14.50 Our recommendation makes it clear the test is about what it is reasonable for cross-examining counsel to expect of the opposing party, or the witness in the particular circumstances of the case, at the time of cross-examination. As such, cross-examining counsel should consider the characteristics of the witness or the party that called them, including factors such as vulnerability (for example, a witness with a cognitive impairment) or familiarity with the legal process (for example, an expert witness who frequently appears in court). We also think this recommendation focuses judicial attention on the evidence that is most likely to result in a miscarriage of justice if a witness is not given an opportunity to respond.
- 14.51 Our recommendation refers to "the witness or the party that called the witness". This ensures that, if a witness can be expected to be aware of a significant matter

contradicting their evidence but the party that called them cannot be, the matter must still be covered in cross-examination. For example, the defence might plan to call a witness who will give evidence that a prosecution witness is lying about being present when the alleged offending occurred. The prosecution *witness* might be aware this contradictory evidence is likely to be led because they know the defence witness can prove their actual whereabouts around the time of the offence. However, it might be reasonable to expect the *prosecution* to be unaware of this contradiction because the witness has convincingly lied to the prosecutor. In this scenario, defence counsel would need to put the contradictory evidence to the prosecution witness because it would be reasonable to expect the prosecution is unaware of the basis on which the witness's evidence will be contradicted.

- 14.52 The ADLS and Public Defence Service were concerned about cross-examination becoming overly restricted under our proposed amendment. We agree that the fact an issue has been addressed by the prosecution in examination-in-chief should not prevent the defence from directly putting its case to the witness. However, we do not think our recommendation would lead to this outcome. The duty to cross-examine sets a minimum standard for counsel to comply with before they can rely on a witness's response, or lack thereof, in their closing address. It is a floor, not a ceiling. It does not limit the kinds of questions that counsel can ask. Rather, judges can disallow questions under section 85 if they consider them to be "improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand". While the question of what is "needlessly repetitive" will be affected by what is required by cross-examination duties, we do not think this can extend to preventing the defence from putting the case to a witness even when the prosecution has put much of a defendant's case to them in examination-in-chief. The defence having an opportunity to put their case to the witness is not "needless" repetition and has been recognised as a fundamental common law right.<sup>55</sup> Section 25(f) of the New Zealand Bill of Rights Act 1990 also guarantees the right of the defence to examine witnesses for the prosecution under the same conditions as the prosecution.<sup>56</sup>

## CROSS-EXAMINATION ON BEHALF OF ANOTHER

### Issue

- 14.53 Section 95(1) provides that, in cases involving sexual offending, family violence or harassment, the defendant is not entitled to cross-examine personally the complainant or certain other vulnerable witnesses.<sup>57</sup> Section 95(2) also allows the judge to prevent any

<sup>55</sup> See *The Queen v Dagg* [1962] NZLR 817 (CA) at 820 per North J, *R v L* [1999] 2 NZLR 54 (CA) at 61; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis, Wellington, 2015) at 1365. The Supreme Court has noted that cross-examination is "fundamental to the adversarial trial" — see *Minister of Justice v Kim* [2021] NZSC 57, [2021] 1 NZLR 338 at [414]–[415].

<sup>56</sup> Section 25(f) was based on art 14(3)(e) of the International Covenant on Civil and Political Rights and is aimed at "equality of arms", ensuring that defendants have the same rights to cross-examination as the prosecution — see Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* [1984–1985] I AJHR A6 at 102. However, case law has tended to take a broader interpretation of s 25(f), viewing it as concerned with ensuring wider fair trial rights beyond just parity between prosecution and defence — see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis, Wellington, 2015) at 1365–1375.

<sup>57</sup> Evidence Act 2006, s 95(1).

party from personally cross-examining a witness.<sup>58</sup> When a party is prevented from personally cross-examining a witness, they may have their questions put to the witness by a person appointed by the judge under section 95(5)(b). The person appointed can include a lawyer.

- 14.54 In 2020, the Principal Family Court Judge issued guidance to te Kōti Whanau | Family Court judges noting there were differing views on the role of counsel appointed to put a party's questions to a witness under section 95(5)(b).<sup>59</sup> This guidance indicated that, rather than merely asking the party's questions, counsel are required to comply with the rules governing cross-examination, including cross-examination duties under section 92. However, the courts have continued to express differing views on whether the role of counsel appointed under section 95(5)(b) is simply to ask the provided questions verbatim, as held by te Kōti Matua | High Court in *Irving v Irving*,<sup>60</sup> or whether they have broader duties.<sup>61</sup>
- 14.55 We said in our Issues Paper that it appears there is uncertainty and inconsistency in practice and that this has significant implications for people appointed under section 95(5)(b) and the parties being assisted.<sup>62</sup>

## Consultation

### What we asked submitters

- 14.56 We expressed a preliminary view that the correct approach (as held in *Irving*) is that the role of a person appointed under section 95(5) is limited to putting the unrepresented party's questions to the witness.<sup>63</sup>
- 14.57 We asked submitters whether section 95 should be amended to clarify that:
- (a) the role of a person appointed under section 95(5)(b) is limited to putting the unrepresented party's questions to the witness; and/or
  - (b) a lawyer appointed under section 95(5)(b) to put the defendant's or party's questions to the witness is not acting as counsel for the defendant or party.

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<sup>58</sup> The grounds for making such an order are set out in section 95(3). They include the characteristics of the witness and their relationship to the unrepresented party.

<sup>59</sup> See discussion in *Irving v Irving* [2021] NZHC 2269 at [9]–[10].

<sup>60</sup> *Irving v Irving* [2021] NZHC 2269.

<sup>61</sup> See Issues Paper at [14.36], discussing *Irving v Irving* [2021] NZHC 2269, *Finley v Wiggins* [2020] NZFC 6481, [2020] NZFLR 958, *Millar v R* [2021] NZCA 548; *Ross v Family Court* [2021] NZHC 3204.

<sup>62</sup> Issues Paper at [14.39].

<sup>63</sup> Issues Paper at [14.40]–[14.41], discussing *Irving v Irving* [2021] NZHC 2269.

### Results of consultation

- 14.58 Ten submitters responded to this question. Nine supported amendment to clarify the role of a person appointed under section 95(5)(b).<sup>64</sup> One opposed it.<sup>65</sup>
- 14.59 Submitters in support of reform considered amendment to clarify that a person appointed under section 95(5)(b) is limited to putting the unrepresented party's questions to a witness would better reflect the purpose of the section.<sup>66</sup> As we observed in our Issues Paper, it exists to protect witnesses from being personally cross-examined by their alleged abuser, not to assist the unrepresented party.<sup>67</sup>
- 14.60 A number of submitters commented in particular on the role of a lawyer appointed under section 95(5)(b) and considered reform is important to clarify that, even when a lawyer is appointed, they are also limited to putting the questions of the unrepresented party to the witness.<sup>68</sup> Submitters considered, again, that this would better reflect the purpose of the section. Two submitters highlighted that, if there is potential for a lawyer appointed under section 95(5)(b) to have wider involvement in a case (for example, questioning other witnesses or making submissions), they should be clearly and distinctly appointed as *amicus curiae* or standby counsel.<sup>69</sup>

### The need for reform

- 14.61 We recommend amending section 95(5)(b) to clarify the role of the person appointed to put questions to the witness. The majority of submitters supported such a clarification.
- 14.62 In particular, submitters emphasised that the role of any lawyer appointed for a limited purpose needs to be clearly specified. Both case law and submissions suggest there has been inconsistent practice regarding the role of a lawyer appointed under section 95(5)(b).<sup>70</sup> Submitters also expressed concern about lawyers straying beyond the limited purpose of the section and noted that, if a wider role is actually needed or intended, the court should appoint an *amicus* or assisting counsel. We agree. We also acknowledge the unfairness if some unrepresented parties have the benefit of a court-appointed counsel providing wider assistance during cross-examination and others do not.

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<sup>64</sup> Paulette Benton-Greig, Community Law Centres o Aotearoa, Vivienne Crawshaw KC, Luke Cunningham Clere, New Zealand Family Violence Clearinghouse, New Zealand Law Society, Public Defence Service, Alan Webb. In addition to its own submissions on this issue, Community Law Centres o Aotearoa endorsed Paulette Benton-Greig's comments. Women's Refuge also supported Paulette Benton-Greig's submission on this issue.

<sup>65</sup> Auckland District Law Society.

<sup>66</sup> Paulette Benton-Greig, Vivienne Crawshaw KC, New Zealand Family Violence Clearinghouse, New Zealand Law Society. Community Law Centres o Aotearoa and Women's Refuge supported Paulette Benton-Greig's submission on this issue.

<sup>67</sup> Issues Paper at [14.41].

<sup>68</sup> Paulette Benton-Greig, Vivienne Crawshaw KC, Luke Cunningham Clere, New Zealand Family Violence Clearinghouse, New Zealand Law Society, Public Defence Service, Alan Webb. Community Law Centres o Aotearoa and Women's Refuge supported Paulette Benton-Greig's submission on this issue.

<sup>69</sup> New Zealand Law Society, Public Defence Service.

<sup>70</sup> See, for example, Issues Paper at [14.34]–[14.38].

## Recommendation

**R27**

Amend section 95(5)(b) to clarify that:

- a. the role of a person appointed under section 95(5)(b) is limited to putting the unrepresented defendant's or party's questions to the witness; and
- b. a lawyer appointed under section 95(5)(b) to put the unrepresented defendant's or party's questions to the witness is not acting as counsel for the defendant or party.

14.63 We recommend that the role of any person appointed under section 95(5)(b), including a lawyer, should be expressly limited to putting the unrepresented party's questions to the witness. They should not be subject to wider duties such as cross-examination duties under section 92. For the avoidance of doubt, we also recommend making it clear that, where a lawyer is appointed under section 95(5)(b), they are not acting as counsel for the unrepresented party. As we say above, the role of a lawyer should be clearly defined if appointed for a limited purpose.

14.64 We are not persuaded the role of a lawyer appointed under section 95(5)(b) should be wider. The NZLS expressed concerns about ensuring self-represented litigants comply with the rules regulating cross-examination. However, we do not think appointing a lawyer under section 95(5)(b) is the appropriate way to achieve this. As we note above, the purpose of section 95 is to protect witnesses, not to assist unrepresented parties. There are many reasons why people self-represent, including financial reasons. We do not consider expanding the role of lawyers appointed under section 95(5)(b) is an appropriate response to the challenges they may face. It would also cause unfairness to other self-represented litigants by providing an advantage to those that are prevented from personally cross-examining witnesses.

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## CHAPTER 15

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# Other issues

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## INTRODUCTION

- 15.1 In this chapter, we consider three stand-alone issues relating to parts of the Evidence Act 2006. We address the following:
- (a) Section 9 (admission by agreement) and the role of the judge. Based on feedback received, we do not recommend reform.
  - (b) Novel scientific evidence. We do not recommend reform. We have not found evidence of a problem and conclude it is preferable to let the law develop in the courts.
  - (c) Evidence from undercover police officers (sections 108 and 109). We do not recommend reform due to a lack of evidence of problems in practice and the limited scope of this review.

## SECTION 9 (ADMISSION BY AGREEMENT) AND THE ROLE OF THE JUDGE

### Issue

- 15.2 Section 9(1)(a) permits a judge to admit evidence that is not otherwise admissible with the written or oral agreement of all parties. It applies in both civil and criminal proceedings.
- 15.3 Section 9 is based on a provision recommended by Te Aka Matua o te Ture | Law Commission in the Evidence Code.<sup>1</sup> The intent was to avoid unnecessarily lengthening proceedings by dispensing with the requirement for admissibility rulings on relatively insignificant evidence.<sup>2</sup> The Commission also noted the section was “in line with the objective of avoiding unjustifiable expense and delay”.<sup>3</sup> However, section 9(1)(a) is worded more broadly than the Commission’s explanation would suggest. It simply states that the judge may, “with the written or oral agreement of all parties, admit evidence that is not otherwise admissible”. It neither explains how the judge should determine whether to exercise the power to admit nor imposes any limits on it.

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<sup>1</sup> Te Aka Matua o te Ture | Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999) at 36.

<sup>2</sup> Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) (Issues Paper) at [15.3]–[15.5].

<sup>3</sup> Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at [31].

- 15.4 In our Issues Paper, we explained that case law differs on the extent to which section 9(1)(a) permits admission by agreement of evidence that is otherwise inadmissible under another provision of the Act or is subject to exclusion under section 8 (general exclusion).<sup>4</sup>

## Consultation

### *What we asked submitters*

- 15.5 We sought feedback on whether section 9 should be amended to clarify the scope of the court's power to admit evidence by agreement under section 9(1)(a).

### *Results of consultation*

- 15.6 Four submitters addressed this question.<sup>5</sup> None saw a need to amend section 9. The Wellington Crown Solicitor, Luke Cunningham Clere, and Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service did not have concerns with the way section 9(1)(a) operates in practice. Te Kāhui Ture o Aotearoa | New Zealand Law Society (NZLS) questioned whether the significance of the issue warranted reform. The Auckland District Law Society (ADLS) considered reform is not needed because inadmissible evidence should not be within the scope of a section 9(1)(a) agreement.
- 15.7 The Public Defence Service considered there may be undesirable consequences of pursuing reform to section 9. It said the defendant needs to be able to run the case the way they wish and there would be significant uncertainty if section 9 agreements were routinely subjected to judicial approval. It also questioned whether there would need to be pre-trial argument in relation to section 9 agreements. In its view, either situation would defeat the purpose of section 9 of avoiding unnecessary expense and delay.

## Reform not recommended

- 15.8 We do not recommend reform in respect of section 9(1)(a). The uncertainty in case law does not appear to be creating any problems in practice, and reform to address it may lead to inefficiency and further uncertainty.
- 15.9 In practice, it appears from submissions there is an expectation that, in the case of evidence that is potentially subject to exclusion under section 8(1)(a) (general exclusion of prejudicial evidence), the evidence should not be offered under section 9(1)(a) by agreement.<sup>6</sup> Inadmissible evidence may otherwise be offered by agreement. As noted by the Public Defence Service, where such evidence is material or significant in volume, it may be useful (and sufficient) for the parties to seek judicial guidance at an early stage on the use of section 9. We also note a comment by the Public Defence Service that the judge can resort to the residual discretion in section 9(1) in the rare instances where admission by agreement is problematic.

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<sup>4</sup> The case law is summarised in the Issues Paper at [15.6].

<sup>5</sup> Auckland District Law Society, Luke Cunningham Clere, Te Kāhui Ture o Aotearoa | New Zealand Law Society, Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service. Adjunct Professor Elisabeth McDonald and Ngā Pirihimana o Aotearoa | New Zealand Police also submitted on the options for reform we presented in the Issues Paper.

<sup>6</sup> Luke Cunningham Clere, Adjunct Professor Elisabeth McDonald.

## NOVEL SCIENTIFIC EVIDENCE

### Issue

- 15.10 Through preliminary feedback, a question was raised with us about the need for additional guidance in the Act on the admissibility of scientific evidence based on methodologies that are novel or are argued to lack scientific validity (novel scientific evidence).<sup>7</sup>
- 15.11 Expert opinion evidence is admissible under section 25 if it is likely to be of substantial help to the fact-finder. In applying the substantial helpfulness test to novel scientific evidence, the courts consider several non-statutory factors identified by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc.*<sup>8</sup> These factors include the extent to which the evidence has been tested, peer reviewed and generally accepted by the scientific community.<sup>9</sup>
- 15.12 In *Lundy v R*, te Kōti Pira | Court of Appeal reaffirmed the relevance of the *Daubert* factors<sup>10</sup> and considered it “axiomatic” that expert evidence must meet a reliability threshold before it can assist a fact-finder.<sup>11</sup> It also said the validity of a methodology must be established pre-trial through a track record of acceptance in a body of scientific opinion<sup>12</sup> and judges and juries cannot be expected to resolve these complex scientific debates.<sup>13</sup>
- 15.13 We said in our Issues Paper that we had not identified evidence of a problem in practice with the approach in *Lundy*. We also said it is not yet clear what impact *Lundy* will have — in particular, whether it might be leading to more frequent pre-trial consideration of scientific evidence and/or a stricter approach to assessing reliability under section 25.<sup>14</sup> We therefore expressed the preliminary view that reform would be premature.

### Consultation

#### What we asked submitters

- 15.14 We asked submitters whether there are problems in practice determining the admissibility of novel scientific evidence since the decision in *Lundy* and, if so, what amendments to the Act (if any) are appropriate to address them.

<sup>7</sup> See also Jack Oliver-Hood “Challenging the Admissibility of Scientifically Invalid Evidence” [2018] NZ L Rev 399.

<sup>8</sup> *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993). Endorsed in New Zealand in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [138]–[139].

<sup>9</sup> *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [138].

<sup>10</sup> *Lundy v R* [2018] NZCA 410 at [237]–[248].

<sup>11</sup> *Lundy v R* [2018] NZCA 410 at [239].

<sup>12</sup> *Lundy v R* [2018] NZCA 410 at [241]–[242].

<sup>13</sup> *Lundy v R* [2018] NZCA 410 at [241] and [243].

<sup>14</sup> Issues Paper at [15.21]–[15.24]. We noted that *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98, [2020] 3 NZLR 247 suggests the courts may now be more willing to exclude expert evidence on the basis that the relevant methodology has not received general acceptance within the scientific community (see at [497]–[498]).



## Results of consultation

- 15.15 Six submitters addressed this question. Five submitters said there is no issue requiring reform.<sup>15</sup> One submitter did not express a position.<sup>16</sup>
- 15.16 Luke Cunningham Clere agreed with our preliminary view that amendment to codify the approach in *Lundy* would be premature and that it may be preferable to let the law develop in the courts. Ben Vanderkolk and the ADLS noted the rarity of these issues. Both considered the content of the *Daubert* factors is clear and appropriate. Three submitters also agreed it is appropriate for the admissibility of cutting-edge and highly technical scientific evidence to be determined pre-trial, as clarified in *Lundy*.<sup>17</sup>

## Reform not recommended

- 15.17 We remain of the view that it is better to let the law develop in the courts. All submitters supported the approach in *Daubert* as affirmed in *Lundy*. None considered codification will increase clarity. In our Issues Paper, we suggested it may be difficult to define what class of evidence the *Lundy* test should apply to. It is also unclear whether the *Daubert* factors are equally applicable to all classes of scientific evidence. Given the potential for uncertainty if the *Lundy* test is codified, we think the flexibility of the current approach is preferable.

## EVIDENCE FROM UNDERCOVER POLICE OFFICERS

### Issue

- 15.18 The Minister of Justice's letter referring this review to the Commission suggested we may wish to consider whether the provisions governing anonymous evidence of undercover police officers require amendment.<sup>18</sup>
- 15.19 Sections 108–109 set out a process by which an undercover police officer can give evidence under an assumed name to protect their true identity. The protection is only available in proceedings involving the prosecution of sufficiently serious crimes. It is also only available once the Commissioner of Police files a certificate in court confirming the witness acted as an undercover officer and addressing specified matters that may affect the officer's credibility.<sup>19</sup> These limits seek to balance two competing interests. On the one hand, it is important that undercover officers can provide evidence at trial safely and not be subjected to a significant risk of reprisal so that criminals can be prosecuted and do not escape conviction.<sup>20</sup> On the other, the right to a fair trial must be upheld. This includes the right of a defendant to know the name of their accuser so that the defendant

<sup>15</sup> Auckland District Law Society, Luke Cunningham Clere, New Zealand Law Society, Public Defence Service, Ben Vanderkolk.

<sup>16</sup> Te Matakahi | Defence Lawyers Association New Zealand.

<sup>17</sup> Defence Lawyers Association New Zealand, Public Defence Service, Ben Vanderkolk.

<sup>18</sup> Letter from Hon Kris Faafoi (Minister of Justice) to Amokura Kawharu (President of the Law Commission) regarding the third statutory review of the Evidence Act 2006 (23 February 2022).

<sup>19</sup> Evidence Act 2006, ss 108(2)–(3) and 109(1).

<sup>20</sup> *R v Hughes* [1986] 2 NZLR 129 (CA) at 134 and 142–143 per Cooke P and 151 per McMullin J.

can investigate their credibility and use that information to mount a fair defence.<sup>21</sup> In *Wilson v R*, te Kōti Mana Nui | Supreme Court described the protection of undercover police officers' identity under sections 108–109 as demonstrating Parliament's acceptance of the legitimacy of undercover operations and their impact on court proceedings.<sup>22</sup>

- 15.20 Under section 108(1), the protection of identity is limited to proceedings involving an offence punishable by at least seven years' imprisonment (for convenience, the "qualifying threshold")<sup>23</sup> and proceedings in respect of certain prescribed offences (the "qualifying offences").<sup>24</sup> Under section 108(6), protection also applies with "any necessary modifications" to proceedings under the Criminal Proceeds (Recovery) Act 2009 or sections 142A to 142Q of the Sentencing Act 2002 (relating to forfeiture).
- 15.21 During consultation for the Commission's Second Review, Police submitted that various aspects of sections 108–109 should be amended. In its final report, the Commission concluded the suggested amendments were unnecessary.<sup>25</sup>
- 15.22 We said in our Issues Paper that our review of case law and commentary did not identify any issues with sections 108–109 that may justify reform. We also acknowledged that the nature of the protections for undercover officers may make any issues with the procedures in the Act difficult to identify through such a review. We said the fact these issues were raised again suggested there may be ongoing concerns with their operation.<sup>26</sup>

## Consultation

### What we asked submitters

- 15.23 We asked submitters if sections 108–109 are causing problems in practice and, if so, how they should be amended.

### Results of consultation

- 15.24 Four submitters addressed this issue. Three submitters said they are unaware of problems in practice.<sup>27</sup> Police submitted there are several problems in practice requiring reform and made suggestions for reform.
- 15.25 As an overarching comment, Police said undercover officers will not be deployed if there is uncertainty regarding the availability of protection under sections 108–109. Police commented that undercover operations are both expensive and high risk for the individuals involved, their families and the Police network. Police then raised three issues

<sup>21</sup> *R v Hughes* [1986] 2 NZLR 129 (CA) at 144 per Cooke P and 152–153 per McMullin J. In enacting the predecessor of section 108, Parliament sought to give effect to the reasoning of the dissenting judges Cooke P and McMullin J in *R v Hughes*. See Protection of Undercover Police Officers Bill 1986 (33–1), explanatory note. See also (8 July 1986) 472 NZPD 2741, (8 July 1986) 472 NZPD 2746, (11 September 1986) 474 NZPD 4190–4191 and (18 September 1986) 474 NZPD 4441–4443.

<sup>22</sup> *Wilson v R* [2015] NZSC 189 at [37].

<sup>23</sup> Evidence Act 2006, s 108(1)(a).

<sup>24</sup> Evidence Act 2006, s 108(1)(b)–(d). Section 108(1)(b) refers to offences against the Misuse of Drugs Act 1975 with a qualifying threshold of five years' imprisonment.

<sup>25</sup> See Issues Paper at [15.29].

<sup>26</sup> Issues Paper at [15.32].

<sup>27</sup> Auckland District Law Society, Luke Cunningham Clere, New Zealand Law Society.

relating to availability of protections in criminal proceedings, proceedings under the Criminal Proceeds (Recovery) Act and other civil proceedings, respectively.

### Criminal proceedings — qualifying threshold and qualifying offences

- 15.26 Police did not dispute that anonymity should be limited to proceedings involving serious offences, as was Parliament’s intention when it passed the Protection of Undercover Police Officers Bill in 1986.<sup>28</sup> However, Police “do not agree the considerations in 1986, and the criminal environment at that time, are necessarily applicable in 2023”. Police said recent amendments adding further qualifying offences to section 108(1) indicate “acceptance by Parliament that section 108 should be available in a wider range of circumstances and for offences with lower penalties”. It also submitted the current scope of qualifying offences is out of step with equivalent provisions in section 45 of the Search and Surveillance Act 2012, which sets out when trespass surveillance and interception can be used.<sup>29</sup> Section 45 includes the same qualifying threshold as section 108(1)(a) of a seven-year minimum term of imprisonment. However, it also contains several other qualifying offences, including some offences that were added to section 45 since the Commission’s Second Review. Police commented that some undercover operations may actually be less intrusive than trespass surveillance and the use of interception devices.
- 15.27 Further discussions with Police clarified that it did not have a list of specific offences it thought should attract protection. Rather, in its view, the current qualifying threshold of at least seven years’ imprisonment is problematic because it withholds protection in situations where undercover operations would be helpful. Because of this, Police said it has to create “workarounds” by selecting investigations based on whether an additional offence with protection under sections 108–109 is available such as money laundering.<sup>30</sup> Police considered amending section 108 to cover the same offences as section 45 of the Search and Surveillance Act would be a step forward but would not resolve the problems Police saw with the qualifying threshold itself.
- 15.28 Police said concerns about potential overuse of the protections for undercover officers following a lowering of the qualifying threshold could be addressed by some other oversight mechanism. It said that the Act is not the right place to address oversight and did not want to speculate on what the correct oversight mechanism might be.

### Proceedings under the Criminal Proceeds (Recovery) Act

- 15.29 Police said there is uncertainty about how section 108 applies where a person is being, or is to be, proceeded against under the Criminal Proceeds (Recovery) Act. It said that it appears the offence at issue needs to be a qualifying offence under section 108(1) for that protection to apply. However, it thought clarity would be desirable.

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<sup>28</sup> Enacted as the Evidence Amendment Act 1986. The New Zealand Police submission refers to the passing of the “Evidence (Witness Anonymity) Bill in 1986” but this Bill was enacted in 1997 and explicitly does not relate to undercover officers. We have assumed the submission was meant to refer to the Protection of Undercover Police Officers Bill 1986.

<sup>29</sup> Including in relation to offences under the Psychoactive Substances Act 2013 and the Arms Act 1983 and the offence in s 308A of the Crimes Act 1961 of discharging a firearm to intimidate.

<sup>30</sup> For example, an undercover operation could be effective in investigating a suspected case of someone dealing in prescription medicines/products, but these offences are not qualifying offences, meaning that Police would need to prosecute the person for an offence meeting the qualifying threshold or a qualifying offence instead.

### Other civil proceedings

- 15.30 Police accepted that undercover officers will rarely be called to give evidence in civil proceedings. However, Police submitted that certainty is desirable and sections 108–109 should protect an undercover officer’s identity whether the proceedings are criminal in nature or not. In our further discussion, Police said that, while these cases are not common, this is an ongoing issue and the fact it only arises infrequently does not mean there is no need for additional protection.
- 15.31 Police also said it is illogical that civil proceedings are not covered by sections 108–109. While the courts have discretionary powers to protect the identity of undercover officers, discretionary protection is too uncertain.
- 15.32 Police also told us the same safety concerns reflected in sections 108–109 can arise in civil proceedings and civil proceedings can be brought against Police as an offshoot or consequence of an investigation of an offence. It also noted the Act already gives protection in civil proceedings under the Criminal Proceeds (Recovery) Act.

### Reform not recommended

#### *Criminal proceedings*

- 15.33 We do not recommend reform to lower the qualifying threshold or add further qualifying offences to section 108(1). We are not persuaded there is a problem in practice. The fact that undercover officers are not being deployed because the offence is not covered by section 108(1) is not evidence of a problem. Rather, it is a direct consequence of the underlying policy choices made by Parliament in 1986, which were reaffirmed with the passing of the Act in 2006.
- 15.34 Recent amendments to section 108 to create additional qualifying offences do not indicate that Parliament intended to change that underlying policy. Further, recent amendments to the Search and Surveillance Act regarding the use of trespass surveillance and interception were contained in the same legislation that made amendments to section 108. It therefore appears that the differences in scope between section 45 of the Search and Surveillance Act and section 108 of the Evidence Act were intended.

#### *Criminal Proceeds (Recovery) Act proceedings*

- 15.35 We also do not recommend reform to section 108 regarding the use of anonymous evidence by undercover officers in cases under the Criminal Proceeds (Recovery) Act.
- 15.36 We agree with Police that the drafting of section 108(6) is unclear as to whether proceedings under the Criminal Proceeds (Recovery) Act must relate to a qualifying offence under section 108(1). The provision simply states that section 108 applies with “any necessary modifications” in “any case” where a person is proceeded against under that Act.
- 15.37 Despite the ambiguity, we have found no evidence it is causing problems in practice. All the cases we have identified under the Criminal Proceeds (Recovery) Act that also utilised the protections of sections 108–109 relate to qualifying offences under section 108(1).

- 15.38 The ambiguity (and the risk of a problem arising in the future) could be addressed through redrafting section 108(6). However, we have been unable to ascertain a clear policy intent through research on the provision and so are not in a position to recommend reform.

### Other civil proceedings

- 15.39 We do not recommend reform to sections 108 and 109 to protect the identity of undercover officers in civil cases against Police. We acknowledge the concern raised by Police that civil proceedings can arise from investigations into serious offences. In such cases, the consequences of disclosing the identity of a witness who is an undercover officer are likely to be similar whether the proceeding in which they are giving evidence is civil or criminal. We agree the lack of clear protection in these civil cases is a gap that may undermine the purpose of sections 108–109 in protecting the identity of undercover officers.
- 15.40 We also acknowledge it is undesirable for Police to be unable to defend civil claims properly due to uncertainty about the extent of identity protection that may be available for undercover officers investigating offences covered by section 108(1). That uncertainty may give plaintiffs an unfair advantage, keep valuable evidence from the fact-finder and risk reputational damage to Police if it is found civilly liable for a claim it could otherwise defend. It may also result in added expense and delay if Police needs to make convoluted pleadings to protect an officer's identity.
- 15.41 However, extending sections 108 and 109 to include civil proceedings against Police would be a significant broadening of identity protection for undercover officers. It would raise two important issues. First, the principle of open justice recognises the public interest in open hearings and is fundamental to the accountability of the court system.<sup>31</sup> Ordinarily, this requires the public identification of witnesses.<sup>32</sup> The principle should only be departed from to the extent necessary to serve the interests of justice.<sup>33</sup>
- 15.42 Second, in civil proceedings against the Crown, the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) confers the right to have the proceedings heard in the same way as civil proceedings between individuals.<sup>34</sup> Under current law, te Kōti Matua | High Court may protect the identity of a witness in civil proceedings through discretionary exercise of its inherent power.<sup>35</sup> In one case, the Court granted an undercover officer anonymity to enable the defence to proceed adequately and effectively.<sup>36</sup> The reform sought by Police would make identity protection of undercover officers automatic. In effect, Police would

<sup>31</sup> The principle of open justice has been affirmed on many occasions by the senior courts, including in civil cases. See, for example, *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2] “[t]he principle of open justice is fundamental to the common law system of civil and criminal justice”.

<sup>32</sup> *Clark v Attorney-General (No 1)* [2005] NZAR 481 (CA) at [36] (open justice includes the public identification of all involved in proceedings).

<sup>33</sup> *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [3].

<sup>34</sup> New Zealand Bill of Rights Act 1990, s 27(3).

<sup>35</sup> See *Her Majesty's Attorney-General for England and Wales v R* HC Auckland CP641/98, 24 October 2000 at [2]. Te Kōti-ā-Rohe | District Court is founded on statute and therefore only has “implied powers” to manage its procedures. Implied powers might include the capacity to provide protection for undercover officers but this has not been tested. For general discussion of inherent powers, non-party suppression orders and witness anonymity, see *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [110], [113]–[114], [124]–[125] and [169]–[172].

<sup>36</sup> *Withey v Attorney-General* HC Palmerston North CP10/95, 18 May 1998 at 9.

have an advantage that is not available to other civil defendants, thus limiting the plaintiff's right to have their claim determined through a normal process.

- 15.43 As we explained in Chapter 1, the Act's purpose is to help secure the just determination of proceedings. Section 6 states that this can be achieved by, among other things, providing rules of evidence that recognise the importance of the rights affirmed by the NZ Bill of Rights, promoting fairness to parties and witnesses and protecting rights of confidentiality and other important interests.<sup>37</sup> The public interest in calling evidence of undercover officers in civil cases needs to be weighed carefully against the open justice principle and the plaintiff's right under the NZ Bill of Rights to have their claim determined in the same way as civil proceedings between individuals. We consider this weighing exercise to be beyond the scope of our operational review of the Act. Any limitation on open justice and the plaintiff's procedural rights under the NZ Bill of Rights is instead a matter that deserves a full policy analysis.
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<sup>37</sup> Evidence Act 2006, s 6(b), (c) and (d).

## APPENDIX 1

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# List of submitters

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Te Aka Matua o te Ture | Law Commission received 46 submissions on its Issues Paper. This comprised 25 organisational submissions and 21 individual submissions, primarily from lawyers and academics.

## ORGANISATIONS

- Auckland District Law Society (now “The Law Association”)
- Bell Gully
- Chapman Tripp
- Criminal Bar Association
- Te Kāhui Tātari Ture | Criminal Cases Review Commission
- Te Tari Ture o te Karauna | Crown Law Office
- Coalition for the Safety of Women and Children (Auckland)
- Community Law Centres o Aotearoa
- Te Matakahi | Defence Lawyers Association New Zealand
- Te Tari Taake | Inland Revenue
- Justice for All Inc
- Luke Cunningham Clere
- Manatū Hauora | Ministry of Health
- New Zealand Air Line Pilots’ Association
- New Zealand Family Violence Clearinghouse (as convenor of a workshop of stakeholders from the family and sexual violence sectors)
- Te Kāhui Ture o Aotearoa | New Zealand Law Society
- Te Rōpū Tauira Ture o Aotearoa | New Zealand Law Students' Association
- Ngā Pirihimana o Aotearoa | New Zealand Police
- Te Poari o ngā Kaihaumanu Hinengaro o Aotearoa | Psychotherapists Board of Aotearoa New Zealand
- Ratonga Wawao ā-Ture Tūmatanui | Public Defence Service
- Te Tari Hara Tāware | Serious Fraud Office

- Talking Trouble Aotearoa NZ
- Wellington Community Justice Project
- Wilson Harle
- Ngā Whare Whakaruruhau o Aotearoa | Women's Refuge

## INDIVIDUAL SUBMITTERS

- Alexandra Allen-Franks
  - James Anson-Holland
  - Paulette Benton-Greig
  - James Carruthers
  - Tim Cochrane
  - Vivienne Crawshaw KC
  - Emeritus Professor John Dawson
  - Associate Professor Anna High
  - Ethan Huda
  - Stephen Hudson
  - Associate Professor Carrie Leonetti
  - Don Mathias
  - Adjunct Professor Elisabeth McDonald
  - Paul Michalik
  - Laura O'Gorman KC (now Justice O'Gorman)
  - Nick Preece
  - Lynette Stevens
  - Professor Michael Stockdale and Associate Professor Rebecca Mitchell (joint submission)
  - Ivan Tarlton
  - Ben Vanderkolk
  - Alan Webb
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## APPENDIX 2

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# Terms of reference

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Te Aka Matua o te Ture | Law Commission will undertake a review of the Evidence Act 2006 (the Act) in accordance with section 202 of the Act.

This will be the Commission's third review of the Act. The first review was completed in 2013 and the second review was completed in 2019. This will also likely be the Commission's final review of the Act under section 202, as the Statutes Amendment Act 2022 has now repealed section 202 from the Act.

## SCOPE OF THE REVIEW

In accordance with section 202 of the Act, the Commission will consider:

- the operation of the provisions of the Act in civil and criminal proceedings, with a particular focus on the operation of the Act since the Commission's second review; and
- whether repeal or amendment of any provisions of the Act are necessary or desirable.

The Commission will publish an issues paper for public consultation in mid-2023. The issues paper will explore issues with the operation of the Evidence Act and options for reform. Some key areas that the issues paper will address include:

- the admissibility of defendants' statements in criminal proceedings (ss 27-30);
- the process for determining the admissibility of improperly obtained evidence in criminal proceedings (s 30);
- the admissibility of statements allegedly made by defendants to fellow prisoners and other incentivised witnesses; and
- the admissibility of propensity evidence offered by the prosecution about defendants (s 43).

The review will include consideration of te Tiriti o Waitangi | the Treaty of Waitangi, ao Māori perspectives on evidence and any matters of particular concern to Māori.

This review will not consider amendments to the Act made by the Sexual Violence Legislation Act 2021 given the recency of those amendments.

The Commission is required to report to the Minister in February 2024.

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