E 31AP

LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Evidence

Report 55 – Volume 2

Evidence Code and Commentary

August 1999
Wellington, New Zealand

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

The Commissioners are:

The Honourable Justice Baragwanath – President
Judge Margaret Lee
DF Dugdale
Denese Henare ONZM
Timothy Brewer ED
Paul Heath QC

The office of the Law Commission is at 89 The Terrace, Wellington
Postal address: PO Box 2590, Wellington 6001, New Zealand
Document Exchange Number: SP 23534, Wellington
Telephone: (04) 473–3453, Facsimile: (04) 471–0959
E-mail: com@lawcom.govt.nz
Internet: www.lawcom.govt.nz

Report/Law Commission, Wellington, 1999
ISSN 0113–2334 ISBN 1–877187–35–6 (Volume 2)
ISBN Full Evidence set 1–877187–36–4
This report may be cited as: NZLC R55 – Volume 2

Evidence

Report 55 Volume 1 – Reform of the Law

Report 55 Volume 2 – Evidence Code and Commentary

Miscellaneous Paper 13 – Total Recall? The Reliability of Witness Testimony

Summary of contents

Contents

Evidence Code & Commentary

PART 1
PRELIMINARY

1 Title
This Act is the Evidence Code 1999.

2 Commencement
This Act comes into force on [date to be inserted].

3 Act to bind the Crown
This Act binds the Crown.

PART 1
PRELIMINARY

Section 1

C1 The significance of the title lies in the fact that a code is

- comprehensive in that it deals with the entire body of law in its subject area;
- systematic in that all of its parts form a coherent and integrated body;
- pre-emptive in that it displaces all other law in its subject area, except what the Code itself preserves;
- based on principles that inform the application of the rules and provide the basis for the future development of the law.

Section 2

C2 This Act starts to operate on [date to be inserted].

Section 3

C3 The Crown must comply with the provisions of this Code.

4 Definitions and interpretation
In this Act

Act does not include rules or regulations.

admission in relation to civil proceedings, means a statement that is
(a) made by a person who is or becomes a party to a proceeding; and
(b) adverse to the person's interest in the outcome of the proceeding.

associated defendant is defined in section 75 for the purposes of that section.

child means a person under the age of 17 years.

child complainant means a complainant who is a child when the proceeding commences.

circumstances relating to the statement is defined in section 16 for the purposes of Subpart 1 of Part 3.

clinical psychologist is defined in section 60 for the purposes of that section.

communication assistance means oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication with a person who
(a) does not have sufficient proficiency in the English language to understand the court proceedings or give evidence; or
(b) has a communication disability.

conviction means
(a) in sections 49 to 51, a subsisting conviction of
  (i) a New Zealand court or a court-martial conducted under New Zealand law in New Zealand or elsewhere; or
  (ii) a court established by, or court-martial conducted under, the law of Australia, United Kingdom, Canada or any other foreign country in respect of which an Order in Council has been made under section 124(4); and
(b) in sections 123 and 124, a subsisting conviction of a New Zealand or foreign court or a court-martial conducted under New Zealand or foreign law,
and includes a conviction before the commencement of this Code.

Section 4 continues overleaf

Section 4

C4 This section contains all the definitions used in this Code, or refers to definitions that are elsewhere in the Code.

C5 The exclusion of rules and regulations from the definition of **Act** means that it is immaterial whether the Acts Interpretation Act 1924 or the proposed new Interpretation Act is in force.

C6 The definition of **admission** is only relevant in civil proceedings – see *s 36* (admissions in civil proceedings). The definition means that an admission is admissible against a party only if that party has made it.

C7 The definitions of **child** and of **child complainant** follow s 23C(b) of the Evidence Act 1908. A child complainant must be under the age of 17 at the commencement of the proceeding rather than at the beginning of the actual hearing of the trial. Under s 12 of the Summary Proceedings Act 1957, a criminal proceeding commences when an information is laid.

C8 The definition of **communication assistance** is new. It is wider in meaning than the concept of interpretation or translation, and is sufficiently general to encompass current and future forms of assistance appropriate to all communication needs. "Communication disability" is not defined, but its ordinary meaning is adequate to include all those who are hearing-impaired, as well as those who can hear well but have difficulty speaking. Communication assistance does not, however, include the function of intermediaries, which some jurisdictions provide for, involving the rephrasing of questions to and answers from a witness.

C9 No specific reference is made to the Māori language in this definition because the relevant Code provisions are subject to the Māori Language Act 1987 – *s 81(8)*. A person who wishes to speak Māori in court is able to do so (and to receive assistance from an interpreter) without recourse to this Code, because s 4 of the Māori Language Act 1987 states that any party or witness has a right to speak Māori in legal proceedings whether or not they are able to understand or communicate in English.

C10 **Conviction** is defined to exclude a conviction that a court has overturned or one that is the subject of a free pardon by Her Majesty or the Governor-General.

Section 4 commentary continues overleaf

copy in relation to a document, includes a copy of a copy and a copy that is not an exact copy of the document but is identical to the document in all relevant respects.

counsel is defined in section 74 for the purposes of that section.

country includes a state, territory, province or other part of a country.

document means any record of information and includes
(a) anything on which there is writing or any image; and
(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
(c) anything from which sounds, images or writing can be reproduced, with or without the aid of anything else.

domestic violence in section 95 has the meaning given in section 3 of the Domestic Violence Act 1995.

drug dependency is defined in section 60 for the purposes of that section.

employed legal adviser is defined in section 53 for the purposes of Part 4.

enforcement agency means the Police of New Zealand and a body or organisation which has a statutory responsibility for the enforcement of an enactment.

expert means a person who has specialised knowledge or skill based on training, study, or experience.

Section 4 continues overleaf

C11 The definition of **copy** is relevant to *s 122* (authenticity of public documents) and *s 124* (proof of conviction by fingerprints). Whether something is a copy in terms of the definition depends on the purpose for which it is proffered. Thus, a black and white photocopy of a document printed in colour or a typed copy of a hand-written original would both be within this definition, if the purpose is to convey the contents of the document, because the copy would be identical in content to the original. If the purpose is to convey the colour or form of the original, however, neither would be a copy within the definition.

C12 **country** is defined to include a state, territory, province and other part of a country. It includes, for example, Australian states and Canadian provinces.

C13 **document** is defined in wide terms to mean any record of information. The intention is to ensure that all information (paper-based or otherwise) which might need to be put in evidence in court can in fact be produced. The definition covers a diverse range of documents, including all written documents, books, maps, plans, graphs, photographs, motion picture films, audio recordings, videotapes, compact disks, microfilm, computer disks and electronic data stored on a hard disk.

C14 **enforcement agency** is defined to include not just the Police, but also organisations like the New Zealand Customs Service, the Ministry of Fisheries and the Inland Revenue Department which have a statutory responsibility for enforcing an enactment: for example, the Customs and Excise Act 1996.

C15 The definition of **expert** codifies the common law rule that an expert must be a person qualified by specialised knowledge or skill based on training, study or experience. The qualification requirement is the essential basis for admitting expert evidence. As with the common law rule, it is intended to be wide and flexible. Thus a formal qualification is not the only way of proving that a person possesses the requisite knowledge and skill. In *Ministry of Agriculture and Fisheries v Hakaria and Scott* [1989] DCR 289, 294, the Court recognised a kaumātua as an expert competent to give expert evidence based on Māori tradition and custom.

Section 4 commentary continues overleaf

expert evidence means the evidence of an expert based on the specialised knowledge or skill of the expert and includes evidence given in the form of an opinion.

fingerprint examiner is defined in section 124 for the purposes of that section.

foreign country means a country other than New Zealand.

formal procedure is defined in section 47 for the purposes of that section.

give evidence means to give evidence
(a) in the ordinary way, as described in section 83; or
(b) in an alternative way, as provided for by section 105; or
(c) in a way provided for under any other enactment.

good reasons is defined in section 47 for the purposes of that section.

Section 4 continues overleaf

C16 **expert evidence** is evidence offered by a properly qualified expert that is within that expert's area of expertise. The court is required to consider both whether the witness has the requisite knowledge and skill, and whether the proposed testimony is within the witness's competence. Expert evidence may consist of fact or opinion, or a mixture of both.

C17 **give evidence** is defined widely to include all the forms of giving evidence provided for in the Code and in other enactments. *Paragraph (c)* includes evidence taken on commission, or under an order for examination of a witness under Rule 369 of the High Court Rules or Rule 378 of the District Court Rules (see also s 55 of the District Courts Act 1947).

Section 4 commentary continues overleaf

hearsay means a statement that

(a) was made by a person other than a witness; and

(b) is offered in evidence at the proceeding to prove the truth of its contents.

Section 4 continues overleaf

C18 **hearsay** The definition of "hearsay" changes the law in that evidence a testifying witness gives about his or her own previous statement will no longer be regarded as hearsay. Evidence one testifying witness gives about a previous statement made by another testifying witness is also no longer regarded as hearsay. Such statements are admissible unless excluded by *s 37* (previous consistent statements rule).

C19 The main reason for not allowing one person to give evidence about another person's statement is because of the lack of opportunity to test the reliability of the statement in cross-examination. But if the maker of the statement is able to be cross-examined (the second limb of the definition of *witness*), then this objection no longer applies. A witness includes a person who gives evidence in any way permitted by this Code or any other enactment, including evidence given by means of statements pre-recorded on video or in an affidavit, provided that the person is available for cross-examination in the proceeding. The admissibility of a previous statement made by a witness is governed by the previous consistent statements rule stated in *s 37*. If the statement was made by a person who is not able to be cross-examined, the statement is hearsay and must comply with the hearsay rules.

C20 The definition of "hearsay" retains the common law requirement that to be hearsay, the statement must be offered to prove the truth of its contents. It is important, as it was under the common law, to know the purpose for which the statement is offered. Take the case where a witness testifies: "Bob told me the light was green for the yellow truck." If this evidence is offered to prove merely what Bob said, it is not hearsay because it is a report by the witness of something the witness personally heard. But if the evidence is offered to prove the truth of what Bob said – namely, that the light was green for the yellow truck – then it is hearsay because the witness did not personally see the light or the truck but is relying on what Bob told him or her.

C21 The definition of "hearsay" makes no distinction between first-hand hearsay and multiple hearsay, but this will be one factor to take into account when examining the circumstances relating to the statement in order to assess reliability under *ss 18* (hearsay in civil proceedings) and *19(a)* (hearsay in criminal proceedings).

Section 4 commentary continues overleaf

hearsay rule means the rule stated in section 17.

Section 4 continues overleaf

Section 4 commentary continued

C22 Under the definition, only a statement can amount to hearsay. "Statement" is defined as an assertion or non-verbal conduct intended as an assertion. Under the Code, non-verbal conduct not intended as an assertion – sometimes called an implied assertion – is not a statement, and therefore is not hearsay. An example often discussed is the action of a ship's captain in taking his entire family on a voyage in his ship (*Wright v Tatham* (1837) 7 Ad & El 313, 388; 112 ER 488, 516). The captain's action no doubt implies a belief in the seaworthiness of his ship, but it is not a statement for the purpose of the hearsay rules. A witness should be able to give direct evidence that he saw the captain take his family on the voyage. What the captain's action says about his belief in the ship's seaworthiness is a matter of inference for the fact-finder.

Section 4 commentary continues overleaf

hostile in relation to a witness, means a witness who

(a) exhibits, or appears to exhibit, a lack of truthfulness when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge; or

(b) gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness; or

(c) refuses to answer questions or deliberately withholds evidence.

incriminate means to provide information that is reasonably likely to lead to the criminal prosecution of a person.

informant is defined in section 66 for the purposes of that section.

information in sections 61 to 64 means a statement of fact or opinion which is given, or is to be given,

(a) orally; or

(b) in a document that is prepared or created after and in response to a requirement from the person requiring the information, but not for the principal purpose of avoiding criminal prosecution under New Zealand law.

informer is defined in section 65 for the purposes of that section.

Section 4 continues overleaf

C23 The definition of **hostile** clarifies the law in defining a hostile witness in terms of both the quality of the witness's evidence and the apparent attitude of the witness to the party who called him or her. A party who has permission will be able to cross-examine a hostile witness about a previous inconsistent statement – *s 94* (cross-examination by party of own witness) and *s 96* (cross-examination on previous statements of witnesses). See *s 96* for when such a statement must be shown to the witness.

C24 The definition of **incriminate** does not include providing information likely to expose a person to liability for a civil penalty.

C25 The definition of **information** applies only to *ss 61* to *64*, which concern the privilege against self-incrimination. In other sections of the Code, "information" has its ordinary meaning. According to the definition of "information", the privilege against self-incrimination will apply only to oral statements and to newly created documents (including video and audio recordings), admitted as testimonial statements, rather than as exhibits. The definition is intended to exclude the following from the ambit of this privilege:

- real evidence admitted in evidence as an article rather than as a statement;
- documents already in existence at the time the demand for information is made.

Section 4 commentary continues overleaf

international organisation means an organisation of states or governments of states or an organ or agency of such an organisation, and includes the Commonwealth Secretariat.

interpreter includes a person who provides communication assistance to a defendant or a witness.

journalist is defined in section 66 for the purposes of that section.

judge includes a Justice of the Peace, a tribunal and a community magistrate.

leading question means a question which directly or indirectly suggests a particular answer to the question.

legal adviser is defined in section 53 for the purposes of Part 4.

minister of religion is defined in section 59 for the purposes of that section.

news medium is defined in section 66 for the purposes of that section.

offer evidence includes eliciting evidence by cross-examining a witness called by another party.

official questioning means questioning in connection with the investigation of an offence or a possible offence by or in the presence of

(a) a police officer; or

(b) a person whose functions include the investigation of offences.

Section 4 continues overleaf

C26 The definition of **international organisation** covers all organisations to which states or governments of states belong. For clarity, it specifically mentions the Commonwealth Secretariat. The definition is based on those used in the Official Information Act 1982 and the Privacy Act 1993.

C27 The wide definition of "communication assistance" means that **interpreter** has an extended meaning, and includes anyone who enables or facilitates communication in any way.

C28 The definition of **leading question** codifies its current meaning. It is a narrower definition than that used in the Evidence Act 1995 (Aust). It does not include questions that assume the existence of a fact about which the witness has given no evidence. This type of question may be dealt with under *s 85* (unacceptable questions).

C29 **Offer evidence** is an inclusive term expressing the ways in which the *questioning* party can elicit evidence. It includes not only evidence given in examination in chief and re-examination by a party's witnesses, but also evidence obtained by cross-examining another party's witness, which the questioning was designed to elicit. Thus, if a defendant in a criminal proceeding elicits evidence in support of his or her truthfulness or propensity by cross-examining a prosecution witness, this will enable the prosecution to retaliate by offering evidence of the defendant's convictions relevant to truthfulness under *s 40(2)* or evidence of the defendant's propensity under *s 43(2)*.

C30 The term **official questioning** is limited to questioning by or in the presence of a police officer or person whose functions include investigating offences. The latter category will include officials conducting investigations in order to enforce an enactment, such as customs officers or fisheries officers, and persons such as insurance investigators or store security staff. The width of this category means greater protection for a defendant's right of silence before trial under *ss 32* and *33*.

Section 4 commentary continues overleaf

opinion evidence means an opinion offered in evidence tending to prove or disprove any fact.

opinion rule means the rule stated in section 21.

party means a party to a proceeding.

previous statement means a statement made by a witness at any time other than at the hearing at which the witness is giving evidence.

previous consistent statements rule means the rule stated in section 37.

proceeding means a proceeding conducted by a court.

professional legal services is defined in relation to certain kinds of legal advisers in section 55 for the purposes of that section.

propensity evidence means evidence of
(a) the reputation or disposition of a person; or
(b) acts, omissions, events, or circumstances with which a person is alleged to have been involved,
which tends to show that person's propensity to act in a particular way or to have a particular state of mind, but does not include evidence of an act or omission which is itself one of the elements of the offence for which the person is being tried or the cause of action in the proceeding.

propensity rule means the rule stated in section 42.

Section 4 continues overleaf

Section 4 commentary continued

C31 The definition of **opinion evidence** is limited to opinion evidence offered to prove or disprove any fact. Evidence offered to prove that a person held a particular opinion is not the usual meaning given to "opinion evidence", and is excluded by the definition.

C32 Under the Code, statements a witness makes before the hearing at which the witness testifies are no longer regarded as hearsay. Such statements are now defined as **previous statements**. Previous statements are admissible unless they are excluded by *s 37* (previous consistent statements rule).

C33 The definition of **proceeding** does not include a hearing before an arbitrator. An arbitral tribunal has much greater flexibility than a court in determining the admissibility, relevance and weight of evidence - article 19(1) and (2) of the First Schedule of the Arbitration Act 1996. However, by virtue of article 19(3), witnesses appearing before an arbitral tribunal have the same privileges and immunities as witnesses in proceedings before a court, and will therefore have the privileges and other protection conferred by Part 4 of this Code.

C34 **Propensity evidence** is evidence that tends to show a person's tendency to behave in a particular manner. The tendency may be a manifestation of a person's disposition or simply a way of doing certain things that is distinctive of a particular person. The definition includes both aspects. Propensity evidence the prosecution offers about a defendant is covered by *s 45*, and is narrower than this definition.

Section 4 commentary continues overleaf

public document means a document that

(a) forms part of the official records of the legislative, executive or judicial branch of the Government of New Zealand or a foreign country, or of a person or body holding a public office or exercising a function of a public nature under the law of New Zealand or a foreign country; or

(b) forms part of the official records of an international organisation; or

(c) is being kept by or on behalf of a branch of government, person, body or organisation referred to in paragraph (a) or (b).

seal includes a stamp.

self-incrimination means the provision by a person of information that could reasonably lead to the criminal prosecution of the person.

sexual case means a criminal proceeding in which a person is charged with or is to be sentenced for

(a) an offence against any of the provisions of sections 128 to 142A or 144A of the Crimes Act 1961; or

(b) any other offence against the person of a sexual nature; or

(c) being a party to the commission of an offence referred to in paragraph (a) or (b); or

(d) conspiring with any person to commit any such offence.

statement means

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

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

Section 4 continues overleaf

C35 The definition of **public document** includes the official records of the legislative, executive or judicial branches of the Government of New Zealand or a foreign country. The term "legislative" is chosen as one of general import. It includes (because of the wide definition of **country** contained in the Code) the legislative bodies of the states or provinces of a federal country, as well as any federal legislative bodies. The definition also includes documents forming part of the official records of an international organisation (such as the United Nations and its specialist organs).

C36 **Sexual case** is defined in the same way as "cases of a sexual nature" in s 23A(1) of the Evidence Act 1908.

C37 The definition of **statement** is limited to spoken or written assertions, and to non-verbal conduct intended as an assertion. The definition reflects the natural meaning of "statement", and does not include non-verbal conduct that is not intended as an assertion, sometimes referred to as an implied assertion. See the discussion in C22.

Section 4 commentary continues overleaf

third party is defined in section 36 for the purposes of that section.

truthfulness rules means the rules stated in section 39.

video record means a recording on any medium from which a moving image may be produced by any means, and includes an accompanying sound track.

view is defined in section 82 for the purposes of that section.

visual identification evidence means evidence that is

(a) an assertion by a person, based wholly or partly on what the person saw, to the effect that a defendant or any other person was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at or about the time the act was done; or

(b) an account (whether oral or in writing) of such an assertion.

voice identification evidence means evidence that is an assertion by a person to the effect that a voice, whether heard first-hand or through mechanical or electronic transmission or recording, is the voice of a defendant or any other person who was connected with an act constituting direct or circumstantial evidence of the commission of an offence.

Section 4 continues overleaf

C38 **Video record** has been widely defined to include what is currently meant by videotapes and also any means of recording available in the future that preserves both visual and sound images.

C39 The definition of **visual identification evidence** extends to cover persons other than defendants whose identification may be crucial to determining the case or a fact in issue in the case: for example, the identification of one of the victims in *R v Tamihere* [1991] 1 NZLR 195 (CA). *Paragraph (a)* of the definition covers the common situation where an identifying witness, having given evidence of an out-of-court identification of an alleged offender, points to the defendant in court as the person identified. *Paragraph (a)* also covers a "dock identification", where the only evidence of a witness's identification of the alleged offender consists of the witness pointing in court to the defendant in the dock. It is anticipated that this way of identifying an alleged offender will be rare. *Paragraph (b)* covers the more usual case where an alleged offender is identified out of court (for example, in a live parade or photograph montage) and the identifier or another witness gives an account of that identification in court.

C40 **Voice identification evidence** means identification of a person by voice, whether heard first-hand (for example, by a person hidden in the same room as the speaker), or over the telephone or in a recording.

Section 4 commentary continues overleaf

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

(2) In this Act

(a) **truthfulness** is concerned with a person's intention to tell the truth and is not concerned with accuracy or error; and

(b) a reference to evidence about a person's **truthfulness** is to be understood as a reference to evidence that is solely or mainly about the person's truthfulness.

(3) A hearing commences for the purposes of this Code when the party having the right to begin commences to state that party's case or, having waived the right to make an opening address, calls that party's first witness.

C41 The definition of **witness** is intended to cover any person who gives evidence, including parties in civil proceedings and defendants who elect to give evidence in criminal cases, as well as persons whose evidence is taken on a commission. The ability to be cross-examined is an essential feature of being a witness. Thus, to come within the definition of witness, a person who gives evidence in an alternative way (for example, by pre-recorded video) must be available for cross-examination in the proceeding, albeit in an alternative way (for example, by close-circuit television or by videolink).

C42 *Section 4(2)(a)* gives **truthfulness** a narrower focus than credibility, which may also encompass the concept of genuine error through being mistaken. Much of propensity evidence that reflects badly on a person may arguably reflect also on their truthfulness. However, as the evidence is not solely or mainly about their truthfulness, the effect of *s 4(2)(b)* is that such evidence need not comply with the truthfulness rules.

C43 *Section 4(3)* sets out when a hearing commences for the purposes of the Code. It has particular relevance for *s 5(3)*, the effect of which is to apply the Code provisions to all hearings commenced after the commencement date of the Code.

5 Application

(1) This Code applies subject to the express provisions of any other Act.

(2) If any conflict arises between the High Court Rules or the District Courts Rules and this Code, the provisions of this Code prevail.

(3) This Code applies to all proceedings commenced before, on, or after the commencement of this Code except

(a) the continuation of a hearing that commenced before the commencement of this Code; and

(b) any appeal or review arising out of such a hearing.

Definitions: **Act**, **party**, **proceeding**, s 4. As to when a hearing commences, see s 4(3).

Section 5 Application

C44 The effect of *s 5(1)* is that if a Code provision overlaps with a specific provision in another Act, the provision in the other Act prevails. For example, the admissibility of certificates in blood-alcohol proceedings will continue to be governed by s 75 of the Land Transport Act 1998. A certificate that fails to comply with the requirements of that section will not be admissible by recourse to the hearsay rules in the Code.

C45 The only exceptions to *s 5(1)* are the High Court Rules and the District Courts Rules – *s 5(2)*. The District Courts Rules, unlike the High Court Rules, are not part of an Act, and thus do not prevail over the provisions of the Code; but they have been included in *s 5(2)* for the sake of clarity. If there is a conflict between the Code and the High Court Rules or the District Courts Rules, the Code prevails. But the High Court Rules and the District Courts Rules will continue to apply to matters not provided for in the Code or where those Rules and the Code provisions can exist side by side without conflict.

C46 The use of the word "express" in *s 5(1)* means that a provision in another Act on the same subject matter will prevail over a Code provision, but the other Act or provision does not have to state specifically that it prevails over the Code.

C47 A proceeding may be made up of a number of hearings: for example, a bail application, application under s 344A of the Crimes Act 1961 or other pretrial application, and the substantive hearing itself. The effect of *s 5(3)* is that the Code applies to any hearing commenced on or after the Code's date of commencement, even if the proceeding commences before that date. Hearings commenced before the Code comes into operation must be completed under the former law, as must appeals or reviews arising from such hearings.

PART 2
PURPOSE, PRINCIPLES AND MATTERS OF GENERAL APPLICATION

Subpart 1 – Purpose

6 Purpose

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

(a) promoting the rational ascertainment of facts; and

(b) promoting fairness to parties and witnesses; and

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

(d) avoiding unjustifiable expense and delay.

Definitions: **party**, **proceeding**, **witness**, s 4.

PART 2
PURPOSE, PRINCIPLES AND MATTERS OF GENERAL APPLICATION

Subpart 1 – Purpose

Section 6 Purpose

C48 *Section* 6 makes explicit the overriding purpose and objectives of the Code and is of considerable importance to interpreting the entire Code. The primary purpose of the Code reflects the reason for all court proceedings, namely, the just determination of disputes. The Code aims to achieve its primary purpose through the four stated objectives. Sometimes only one of the objectives will be significant, but more often a number will need to be assessed together and, depending on the issue to be decided, balanced against one another.

C49 *Section 6(a)* The first objective is to promote fact-finding based on logic and reason. Many trials require the court to decide what actually happened in the past. Trials also require fact-finders to analyse and evaluate evidence carefully.

C50 *Section 6(b)* The second objective is to help promote procedural fairness. The parties' right to present and defend their cases, the right of a defendant in a criminal proceeding to examine witnesses and the right to silence – all of which are mentioned specifically in the New Zealand Bill of Rights Act 1990 – are examples of rights this objective is intended to advance. *Section 6(b)* also seeks to promote the interests of those who are not parties, such as witnesses and victims. *Section 6(b)* is intended to have a wide scope and extends beyond procedural rights arising primarily in the trial, to procedural rights arising at other stages of the criminal and civil processes.

C51 *Section 6(c)* The third objective is to protect confidential communications made within certain relationships, such as those protected in Part 4 – Privilege and Confidentiality. It also protects other important public interests, examples being privacy issues and human rights.

C52 *Section 6(d)* The fourth objective is to promote efficiency both in time and cost. It is important that trials operate efficiently and speedily, not only for the participants but also for others waiting in the queue.

Subpart 2 – Principles and matters of general application

7 Fundamental principle – relevant evidence is admissible

(1) All relevant evidence is admissible in a proceeding except evidence that is inadmissible in accordance with this Code or any other Act or is excluded in accordance with this Code or any other Act.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant for the purposes of this Code if it has a tendency to prove or disprove anything that is of consequence to the determination of a proceeding.

Definitions: **Act**, **proceeding**, s 4.

Subpart 2 – Principles and matters of general application

Section 7 Fundamental principle – relevant evidence is admissible

C53 *Section 7* contains the first principle in evidence law: that all relevant evidence is admissible, and conversely, evidence that is not relevant is inadmissible. "Relevant" evidence is defined as evidence that according to logic and common sense has a tendency to prove or disprove anything that needs to be decided in order to determine a proceeding, including, for example, the truthfulness of a witness. Whether an item of evidence is relevant depends on the purpose for which it is offered. Thus evidence relevant for one purpose may not be relevant for other purposes. Evidence does not become irrelevant just because it may be rebutted or disbelieved; and evidence is not irrelevant merely because it relates to background matters or matters that may not be in dispute. Finally, the relevance of an item of evidence may not be apparent at the time the evidence is tendered. The judge has power under *s 14* to admit the evidence provisionally; that is, in anticipation that its relevance will be established in due course.

C54 Relevance is a necessary but not sufficient condition for the admissibility of evidence. Evidence that is relevant may nevertheless be inadmissible for other reasons: for example, if its probative value is outweighed by its unfairly prejudicial effect. But evidence that is not relevant is never admissible, the only exception being evidence admitted by the parties' consent under *s 9*.

C55 One important consequence of the fundamental principle in *s 7* is that evidence that is admissible is admissible for all the purposes for which it is relevant, unless a specific Code provision excludes its use for a particular purpose. For example, under *s 30*, the prosecution may not rely on evidence excluded by *s 27* (the reliability rule), *s 28* (the oppression rule) or *s 29* (the improperly obtained evidence rule) if another party offers that evidence.

8 General exclusion

(1) In any proceeding, a judge must exclude evidence if its probative value is outweighed by the risk that the evidence will

(a) have an unfairly prejudicial effect on the outcome of the proceeding; or

Section 8 continues overleaf

Section 8 General exclusion

C56 This is the general head under which relevant evidence may be excluded. To a considerable extent, *s* 8 codifies the existing common law rules for exclusion, embodied in the term "sufficient relevance" or "legal relevance", and makes it clear that relevant evidence can only be excluded if, on balance, its negative effect actually outweighs its probative value. *Section* 8 is in addition to – and overrides – specific rules on the admissibility of evidence. Thus, *s 8(1)* may nevertheless exclude relevant evidence that meets specific admissibility requirements.

C57 *Section 8(1)* removes any doubt about whether the power to exclude unfairly prejudicial evidence applies in civil cases. Both paragraphs of *s 8(1)* apply to both civil and criminal cases, whether being tried by a judge alone or a judge sitting with a jury. In practice, the judge will often have to hear the evidence (or receive a summary of it) to determine whether it is likely to be unfairly prejudicial.

C58 The positive side of the balancing principle in *s 8(1)* is "probative value". Probative value will depend on such matters as how strongly the evidence points to the inference it is said to support, and how important the evidence is to the ultimate issues in the trial.

C59 Under *s 8(1)(a)* the test for excluding unfairly prejudicial evidence is not met if the evidence is simply adverse to the interests of, say, a defendant in a criminal proceeding, since *any* evidence from the prosecution is going to be prejudicial to the defendant. The evidence must be *unfairly* prejudicial. There must be an undue tendency to influence a decision on an improper or illogical basis, commonly an emotional one; for instance, graphic photographs of a murder victim when the nature of the injuries is not in issue. Evidence will also be unfairly prejudicial if it is likely to mislead the jury; for example, if it appears far more persuasive than it really is, as is occasionally the case with some types of expert and statistical evidence. The judge will need to consider whether any misleading tendency can be countered by other evidence that is likely to be available, or by a suitable direction to the jury. Whether evidence has an unfairly prejudicial effect must be considered in terms of the proceeding as a whole, and not just from the point of view of a particular party or a defendant.

Section 8 commentary continues overleaf

(b) needlessly prolong the proceeding.

(2) When determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect, the judge must take into account the right of a defendant in a criminal proceeding to offer an effective defence.

Definitions: **judge**, **proceeding**, s 4.

C60 *Section 8(1)(b)* recognises explicitly, as the common law recognises implicitly, that sometimes the probative value of an item of evidence may not warrant the time spent in adducing or receiving it, particularly when it would simply repeat earlier evidence.

C61 The power in *s 8(1)* reforms the law contained in a line of authority (culminating in the decision of the Privy Council in *Lobban v R* [1995] 1 WLR 877) to the effect that in a criminal proceeding a defendant's right to present relevant evidence as part of his or her case is absolute and not subject to discretionary control. Under the Code, that right is not absolute, but is a factor the judge must consider in balancing probative value against unfairly prejudicial effect on the outcome of the proceeding – *s 8(2)*. In effect, *s 8(2)* obliges the judge to weigh the rights of competing parties as justice requires in the particular case.

9 Admission by consent

(1) In any proceeding, the judge may

(a) with the consent of all parties, admit evidence that is not otherwise admissible; and

(b) admit evidence offered in any form or way agreed by all parties.

(2) In a criminal proceeding, a defendant may admit any fact alleged against that defendant so as to dispense with proof of that fact.

(3) In a criminal proceeding, the prosecution may admit any fact so as to dispense with proof of that fact.

Definitions: **judge**, **party**, **proceeding**, s 4.

10 Code to be liberally construed

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

Note: As to the Code's purpose, see s 6.

Section 9 Admission by consent

C62 *Section 9(1)(a)* codifies the convenient practice in both civil and criminal proceedings which allows a judge, with the consent of all parties, to admit evidence that may otherwise not be admissible. For example, in the course of presenting their cases, parties sometimes introduce, without objection from the other side, evidence that is not strictly relevant to determining the proceeding. In the end, it saves time not to allow this sort of harmless evidence, rather than disrupt its flow by constant rulings on admissibility. *Section 9(1)(b)* allows a judge to admit evidence in any form (for example, in the form of an affidavit or a written brief) or in any way (for example, in any alternative way permissible under *s 105*) agreed between the parties.

C63 *Section 9(2) and (3)* replace and extend the provisions of s 369 of the Crimes Act 1961 to enable both the prosecution and the defence to admit facts so that they need not be proved.

Section 10 Code to be liberally construed

C64 This section is a reminder that it is to the purpose and principles of the Code, rather than to the common law, that judges and lawyers should look for answers to evidential issues.

11 Inherent powers not affected

(1) The powers inherent in a court to regulate and prevent abuse of its procedure are not affected by this Code except to the extent that this Code provides otherwise.

(2) A court must have regard to the purpose and principles of this Code when exercising inherent powers to regulate and prevent abuse of its procedure.

12 Evidential matters not provided for

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

Section 11 Inherent powers not affected

C65 *Section 11(1)* codifies the existing law on a court's inherent powers to regulate and prevent abuse of its procedure. It also recognises that a superior court may exercise its inherent jurisdiction "even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provisions" (*Taylor v Attorney-General* [1975] 2 NZLR 675, 680 (CA)). Thus, the effect of the Code on the court's inherent powers and jurisdiction is limited to requiring that they should not be exercised contrary to the express provisions of the Code.

C66 The Code expressly preserves the court's discretion to act in the interests of justice in a number of specific areas. Moreover, the over-arching purpose of the Code is to help secure the just determination of proceedings. *Section 11* will not, therefore, restrict the court's discretion to act in the interests of justice in individual cases.

C67 *Section 11(2)* is implicit in *s 11(1)*. However, it is included for the sake of clarity.

Section 12 Evidential matters not provided for

C68 This is the gap-filling provision. Evidential matters not expressly provided for should be determined in accordance with the purpose and principles of the Code.

13 Establishment of relevance of document

If a question arises concerning the relevance of a document, the judge may examine it and draw any reasonable inference from it, including an inference as to its authenticity and identity.

Definitions: **document**, **judge**, s 4.

14 Provisional admission of evidence

If a question arises concerning the admissibility of any evidence, the judge may admit that evidence subject to evidence being later offered which establishes its admissibility.

Definitions: **judge**, s 4.

Section 13 Establishment of relevance of document

C69 Authenticity is in the first place an aspect of relevance, and therefore of admissibility. Unless a document is authentic – that is, the document is what it purports to be – it is irrelevant and inadmissible. *Section 13* deals with authenticity in relation to admissibility: it abrogates the common law rule requiring the authenticity of a document to be proved by evidence extrinsic to the document. *Section 13* empowers a judge to examine a document and draw reasonable inferences about authenticity from the document itself. Thus a document that contains the necessary information can be self-authenticating. One type of document to which this section can sensibly apply would be electronic versions of statutes and law reports.

C70 The authenticity of a document may well remain in issue after the document is admitted and, indeed, may be a key issue in a case. In that event, the authenticity of the document concerns the weight, if any, the fact-finder is to give to it and will normally be the subject of additional relevant evidence. Authenticity as a matter of weight may be contributed to by a number of presumptions in Part 6 of the Code.

Section 14 Provisional admission of evidence

C71 *Section 14* recognises that the practicalities of court proceedings are such that, at the time evidence is adduced, other evidence may not have established its admissibility. This section permits the judge to admit evidence when it is tendered, subject to a later ruling on admissibility. If the other evidence is not forthcoming, the provisionally admitted evidence must be excluded from consideration.

15 Admissibility of evidence given to establish admissibility

Evidence given by a witness to prove the facts necessary for deciding whether other evidence should be admitted in a proceeding is not admissible in the proceeding unless the evidence given by the witness is inconsistent with the witness's subsequent testimony in the proceeding.

Definitions: **proceeding**, **witness**, s 4.

Section 15 Admissibility of evidence given to establish admissibility

C72 This section applies to all witnesses, including defendants who choose to give evidence. It applies to evidence given in any type of hearing held to determine the admissibility of evidence – whether pre-trial or in a voir dire, and whether under the Code or s 344A of the Crimes Act 1961 or any other enactment.

C73 This section changes the law as it applies to defendants. The existing law is that a defendant may be cross-examined on his or her voir dire evidence that is inconsistent with his or her testimony in the proceeding only if the statement that is the subject of the voir dire is ruled admissible. If the statement is ruled inadmissible, the defendant may not be cross-examined on his or her voir dire evidence (*Wong Kam-Ming v R* [1980] AC 247). *Section 15* makes inconsistent evidence given in an admissibility hearing admissible in the proceeding, irrespective of the fate of the statement that is the subject of the admissibility hearing.

PART 3
ADMISSIBILITY RULES

Subpart 1 – Hearsay evidence

16 Interpretation

(1) In this Subpart, **circumstances relating to the statement** include
  (a) the nature and contents of the statement; and
  (b) the circumstances in which the statement was made; and

Section 16 continues overleaf

PART 3
ADMISSIBILITY RULES

Subpart 1 – Hearsay evidence

C74 This part substantially reforms the law on hearsay. The overall purpose of the hearsay provisions in the Code is to simplify and rationalise the law in civil as well as in criminal proceedings.

Section 16 Interpretation

C75 The definition of **circumstances relating to the statement** sets out the factors to be considered in deciding whether there is reasonable assurance that a hearsay statement is reliable in terms of *s 18* (hearsay in civil proceedings) and *s 19(a)* (hearsay in criminal proceedings). The factors are cumulative but may, on occasion, overlap. They do not include either the truthfulness of the witness who relates the hearsay or the consistency of the statement with other evidence not directly related to the statement. The truthfulness of the witness who relates the hearsay can be tested before, and assessed by, the fact-finder. It is important to distinguish between circumstances relating to the statement and other evidence in the case: hearsay that the circumstances relating to the statement indicate to be reliable should not be held inadmissible because it contradicts other evidence.

C76 In *s 16(1)(a)* the nature of the statement could include, for example, whether the statement was first-hand hearsay or multiple hearsay. A hearsay statement is more likely to be reliable if the maker of the statement had personal knowledge of the matters dealt with in the statement, than if the maker of the statement has merely repeated what he or she heard from someone else. Generally, the probability of error increases with the number of times an oral statement has been transmitted.

C77 In *s 16(1)(b)* the circumstances in which the statement was made could include, for example, the physical environment (including noise level), the mental alertness of both the maker and receiver of the statement, or the conduct of the person to whom the statement was made. It may also be relevant to consider the time when the statement was made in relation to the event it refers to.

Section 16 commentary continues overleaf

(c) any circumstances that relate to the truthfulness of the maker of the statement; and
(d) any circumstances that relate to the accuracy of the observation of the maker of the statement.

(2) The maker of a statement is **unavailable as a witness** for the purposes of this Subpart if the maker
(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.

Section 16 continues overleaf

C78 *Section 16(1)(c)* and *(d)* enable questions to be raised about any motive the maker of the statement might have to lie, or the reliability of his or her observation.

C79 The term "maker of the statement" is not defined. Whether a person is the maker of a statement is a question of fact. The question is likely to arise only in cases where more than one person was involved in preparing a statement, as when a police officer records the statement of a person being interviewed. The principle is stated in *Cross on Evidence*:

> The key question in any doubtful case involving collaboration in preparing some written statement is whether the alleged statement maker has unequivocally adopted it as a statement for whose accuracy he or she is responsible. (para 17.24)

C80 The combined effect of the definitions of "witness" and "give evidence" is that a person is only unavailable as a witness if he or she cannot give evidence in any of the ways provided for in the Code, or cannot be cross-examined in a proceeding even in an alternative way, such as by close-circuit television or videolink. The categories of "unavailability" listed in *s 16(2)* follow those in s 2(2) of the Evidence Amendment Act (No 2) 1980, extended to cases of extreme youth as well as old age. *Paragraph (b)* assumes that persons within New Zealand would not be prevented by practicalities from being witnesses. Advancing technology may mean that this will increasingly be the case for overseas residents as well. Trauma, or the severe impairment of a statement maker's emotional state will make it necessary for the judge to consider under *para (c)* whether the maker is unfit to attend because of his or her mental condition, particularly if the maker is a child. There is a new category for those who are not compellable as witnesses; for example, a defendant in a criminal proceeding – *s 75*.

C81 Hearsay evidence may be offered to prove the factors that constitute circumstances relating to the statement under *s 16(1)*, and the unavailability of witnesses under *s 16(2)*. The hearsay rule will apply to such evidence.

Section 16 commentary continues overleaf

(3) Notwithstanding subsection (2), the maker of a statement is not to be regarded as unavailable as a witness if the unavailability was brought about by the party offering the statement for the purpose of preventing the maker of the statement from attending or giving evidence.

Definitions: **party**, **statement**, **truthfulness**, **witness**, s 4.

17 Hearsay rule

Hearsay is not admissible except

(a) as provided by this Subpart or any other Act; or

(b) where this Code provides that this Subpart does not apply and the hearsay is both relevant and not otherwise inadmissible under this Code.

Definitions: **Act**, **hearsay**, s 4.

C82 *Section 16(3)* covers the situation where a party offering a hearsay statement induces the unavailability of the maker of the statement (for example, the party kidnaps or kills the maker of the statement, or pays him or her to go into hiding). Such a party will not be able to have a hearsay statement admitted on the ground that the maker of the statement is unavailable.

Section 17 Hearsay rule

C83 *Section 17* sets out the hearsay rule for the purpose of the provisions that follow: hearsay is inadmissible unless allowed by this Subpart or by any other Act. The reference to "this Subpart" in *para (a)*, in conjunction with the terms of *para (b)*, means that hearsay made admissible by other Code provisions (eg, visual identification evidence under *para (b)* of the definition) must nevertheless comply with the hearsay rules unless the operation of the hearsay rules is expressly excluded (eg, in a number of Code provisions dealing with documentary evidence: *ss 115, 116, 122, 123, 124, 125* and *126*). The reference to "any other Act" means that a miscellany of hearsay statements will continue to be admissible under their own statutory schemes (for example, certificates in blood-alcohol proceedings under s 75 of the Land Transport Act 1998). The effect of *s 5(1)* is that if a hearsay statement fails to comply with the statutory regime governing the admissibility of the particular class of hearsay to which the statement belongs, the statement will not be admissible under the Code's hearsay rules.

C84 In both civil and criminal proceedings, hearsay may be admitted by consent under *s 9*.

18 Hearsay in civil proceedings

In a civil proceeding, hearsay is admissible if the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable and

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

(b) requiring the maker of the statement to be a witness would cause undue delay or expense.

Definitions: **hearsay**, **party**, **proceeding**, **statement**, **witness**, s 4; **unavailable as a witness**, s 16.

Section 18 Hearsay in civil proceedings

C85 The effect of *s 18* is that (in the absence of consent – *s 9*) two conditions must be present before a hearsay statement is admissible as evidence. First the judge must be satisfied that the circumstances in which the statement was made were such that it ought to be reliable. Second, *either* there must be proof that the maker of the hearsay statement is unavailable as a witness, *or* the expense or delay involved in calling the maker of the statement as a witness is not warranted – for example, if a party intends to prove a minor issue about which there is unlikely to be any real doubt. If the conditions for admissibility are not met, the party wanting to offer the hearsay must either call the maker of the statement as a witness to give that evidence, or do without the hearsay.

C86 It is anticipated that a party would give notice voluntarily in relation to significant hearsay in civil proceedings, in order to give other parties sufficient time to consider whether to consent. Such notice would be similar to the notice required in criminal proceedings, and it is expected that it will come to be routinely given – for example, as part of the process of exchanging briefs of evidence before trial – so that cases can be heard efficiently and without unnecessary delays. Costs sanctions might follow if the proceeding has to be adjourned (for example, to allow rebuttal evidence to be called) or abandoned and recommenced.

19 Hearsay in criminal proceedings

In a criminal proceeding, hearsay is admissible if

(a) the circumstances relating to the hearsay statement provide reasonable assurance that the statement is reliable; and

(b) either

(i) the party who proposes to offer the hearsay as evidence gives notice of the proposal in accordance with section 20(1); or

(ii) the requirement to give notice is waived by all other parties to the proceeding; or

(iii) in accordance with section 20(3), the judge dispenses with the requirement to give notice; and

(c) either

(i) no party has given notice of objection under section 20(2) or otherwise objects to the admission of the statement as evidence; or

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

(iii) requiring the maker of the statement to be a witness would cause undue delay or expense.

Note: This section does not apply to evidence of a defendant's statement offered by the prosecution in a criminal proceeding. Subpart 3 applies in that case.

Definitions: **hearsay**, **judge**, **party**, **proceeding**, **statement**, **witness**, s 4; **unavailable as a witness**, s 16.

Section 19 Hearsay in criminal proceedings

C87 In criminal as in civil proceedings, there is an overriding requirement that hearsay evidence should meet a threshold of reliability. In addition, at least one of the factors listed under *s 19(b)* and at least one of those listed under *(c)* must be present.

C88 A judge may be expected to take different factors into account, depending on whether the prosecution or the defence is offering the hearsay. If a hearsay statement forms part of the prosecution case and is crucial to proving a defendant's guilt, a judge will want to ensure that the circumstances relating to the statement give such assurance of reliability that the defendant's right to a fair trial will not be jeopardised by his or her inability to cross-examine the maker of the statement.

C89 *Section 19(c)(i)* The words "otherwise objects" allow a party to object without having given notice under *s 20(2)*. This is likely to arise in one of two situations. First, if the judge has excused the failure to give notice of intention to offer hearsay and a party wishes to object to the hearsay; or second, if the judge excuses the failure to give notice of objection.

C90 *Section 19(c)(ii)* A defendant in a criminal proceeding is "unavailable" for the purposes of this section because "unavailable" is defined to include a statement maker who is not compellable to give evidence. Under *s 75(1)* a defendant is not compellable for either the prosecution or the defence.

C91 *Section 19(c)(iii)* In a criminal proceeding, those who are available to give evidence should normally do so in open court in the presence of the judge, jury and defendants. It is expected, therefore, that the discretion will only be exercised to avoid unjustifiable delay or expense in proving a point that is not important to determining the proceeding and about which there is unlikely to be any real doubt.

20 Notice of hearsay in criminal proceedings

(1) A notice of a proposal to offer a hearsay statement as evidence in a criminal proceeding must be given

(a) in writing to every other party to the proceeding and include the contents of the statement and, subject to the terms of any witness anonymity order, the name of the maker of the statement; and

(b) a sufficient time before the hearing to provide all other parties to the proceeding with a fair opportunity to prepare to meet the statement.

(2) A party to a criminal proceeding who is given notice of a proposal to offer a hearsay statement as evidence must, if that party objects to the admission of the statement as evidence, give notice of objection as soon as practicable to the party proposing to offer the statement.

(3) The judge may dispense with the requirement to give notice under subsection (1) or (2)

(a) if having regard to the nature and contents of the hearsay statement, no party is substantially prejudiced by the failure to give notice under subsection (1); or

(b) if giving notice was not reasonably practicable in the circumstances; or

(c) in the interests of justice.

Definitions: **hearsay**, **judge**, **party**, **proceeding**, **statement**, **witness**, s 4.

Section 20 Notice of hearsay in criminal proceedings

C92 *Section 20(1)* The notice requirements are intended to apply with a degree of flexibility. Thus the prosecution can comply by making disclosure in the usual way, so long as the prosecution makes its intention to offer a hearsay statement as evidence clear. The defence will need to give a simple notice. However, a defendant who gives notice of an intention to offer hearsay evidence should not be treated as having elected to call evidence, and there should be no adverse comment about any later decision not to offer the evidence. A notice should identify by name all persons whose statements are to be offered as hearsay evidence, except in cases where an anonymity order has been made.

C93 The requirement to give notice of objection under *s 20(2)* enables disputes about the admissibility of hearsay to be determined before trial.

C94 *Section 20(3)* In excusing a party from having to give notice, it is open to a court exercising its inherent powers to allow any other party to call or recall a witness to rebut unexpected hearsay. One situation where a judge may appropriately apply the exemption in the interest of justice under *para (c)* is where the hearsay evidence was not known to counsel and is unexpectedly disclosed while a witness gives evidence at trial.

Subpart 2 – Opinion evidence and expert evidence

21 Opinion rule

Opinion evidence is not admissible in a proceeding except as provided by sections 22 to 24.

Definitions: **opinion evidence**, **proceeding**, s 4.

22 Admissibility of non-expert opinion evidence

A witness may offer opinion evidence in a proceeding if the opinion evidence is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

Definitions: **opinion evidence**, **proceeding**, **witness**, s 4.

23 Admissibility of expert opinion evidence

(1) Subject to section 25, a witness may offer expert evidence that is opinion evidence in a proceeding if that opinion evidence is likely to substantially help the fact-finder to understand other evidence in the proceeding or to ascertain any fact that is of consequence to the determination of the proceeding.

Section 23 continues overleaf

Subpart 2 – Opinion evidence and expert evidence

C95 The major reform in this Subpart is to make the admissibility of expert opinion evidence subject to the test of substantial helpfulness to the fact-finder – either in understanding other evidence or in determining material facts.

Section 21 Opinion rule

C96 *Section 21* is the basic rule excluding opinion evidence unless one of the exceptions applies. The aim is to prevent the admission of unsatisfactory opinion evidence and to avoid the court hearing evidence that is simply a waste of time, but to allow opinion evidence if it will assist the fact-finder by providing information that otherwise would not be available.

Section 22 Admissibility of non-expert opinion evidence

C97 *Section 22* codifies the existing common law. As an example, it will often be impossible for a witness to refer to the speed at which a vehicle was observed to be travelling without resorting to opinion evidence, since the witness is unlikely to have been carrying equipment capable of measuring the exact speed of moving vehicles.

Section 23 Admissibility of expert opinion evidence

C98 In order to comply with *s 23(1)*, evidence must be from a qualified expert (as defined in *s 4*); the opinion must be expert evidence (also defined in *s 4*); and the evidence must be substantially helpful to the court or jury. The first two requirements form the qualification rule.

C99 The requirement of substantial helpfulness is new. It replaces the common law rules that exclude expert opinion evidence (mainly the common knowledge rule and the ultimate issue rule) with a more rational test that assesses the reliability and value of the expert opinion. It functions as an *additional* safeguard, supplementing the qualification requirements and will exclude even opinion evidence coming from a properly qualified expert, if it is unsatisfactory for other reasons. Examples are where the evidence is based on an underlying scientific theory whose validity has not been established; or where questions about the reliability of the procedures and techniques used in a particular case have not been satisfactorily answered.

Section 23 commentary continues overleaf

C100 Recent New Zealand cases that have dealt with the admissibility of expert scientific evidence include *R v Calder* (HC Christchurch, 12 April 1995, T154/9) and *R v Brown* (HC Auckland, 19 September 1997, T126/95). Both judgments referred to the non-exhaustive guidelines the United States Supreme Court in *Daubert v Merrell Dow* 509 US 579 (1993) considered would be useful in assessing the reliability of scientific evidence:

- whether the scientific theory or technique can be (and has been) subjected to empirical testing to see if it can be falsified;
- whether the scientific theory or technique has been subjected to peer review and publication, increasing the likelihood that substantive flaws in methodology will be detected;
- the known or potential rate of error of a scientific technique;
- whether the scientific theory or technique has attracted widespread acceptance within a relevant scientific community.

Under the Code, these factors will continue to be important in the inquiry about reliability that is inherent in the substantial helpfulness test. As the Court in *Daubert* emphasised, "The focus . . . must be solely on principles and methodology, not on the conclusions that they generate". (595)

C101 Some of these guidelines – for example, falsification by empirical testing or a rate of error – have been formulated specifically for testing the reliability of scientific evidence (ie, evidence based on scientific theory or technique), and will not be appropriate for evaluating evidence based on specialised knowledge and skills. Such evidence is not amenable to verification by empirical testing. When considering the reliability of expert evidence, it is essential to be clear about the purpose for which the evidence is offered: evidence that is valid and reliable for one purpose may be invalid and unreliable for another purpose.

Section 23 commentary continues overleaf

(2) Expert evidence that is opinion evidence is not inadmissible by reason only that it is about
(a) an ultimate issue to be determined in a proceeding; or
(b) a matter of common knowledge.

Section 23 continues overleaf

C102 Expert evidence is likely to be substantially helpful if it will help the fact-finder to understand the evidence of certain witnesses and avoid drawing the wrong inferences from their evidence. Examples are evidence about the nature of the disability of an intellectually disabled witness and the ways that disability affects his or her behaviour, understanding and communication, and evidence about the level of intellectual and emotional development of a child witness.

C103 *Section 23(2)* The common knowledge rule and the ultimate issue rule are formally abolished. The combined effect of *ss 7* (fundamental principle – relevant evidence is admissible) and *23(1)* effectively abolish them, but *s 23(2)* puts it beyond doubt. Under the Code, the inquiry should no longer be whether the opinion evidence is about an ultimate issue or a matter of common knowledge, but whether the evidence is substantially helpful. While expert opinion evidence will not be excluded just because it contains matters of common knowledge, the evidence is unlikely to be substantially helpful unless it goes beyond matters of common knowledge.

Section 23 commentary continues overleaf

(3) Subject to subsection (4), to the extent that expert evidence that is opinion evidence is based on fact, the opinion evidence may be relied on by the fact-finder only to the extent that the facts on which it is based, other than facts pertaining to the general body of knowledge or skill comprising the witness's expertise, are or will be established in that proceeding by admissible evidence or will be judicially noticed.

Section 23 continues overleaf

C104 *Section 23(3)* If the expert opinion evidence is based on fact, those facts must be proved by admissible evidence or be judicially noticed (see *s 114*) before the fact-finder can rely on the opinion. This requirement does not apply to facts that are part of the general body of knowledge or skill going to make up the expert's expertise. For example, the fact that a certain pathological condition generally takes a particular course does not have to be proved by other evidence, as it is a part of the general knowledge that makes one who possesses it an expert. But if the expert expresses an opinion, based on a patient's symptoms observed over time, that the patient was suffering from a particular pathological condition, the fact of those observed symptoms must be proved by admissible evidence, including admissible hearsay.

C105 The practical effect of *s 23(3)* is that if expert opinion evidence is offered with no evidence laying the factual foundation for the opinion and counsel declines to undertake to the court that such evidence will be offered later in his or her case, then the judge can decline to admit the opinion evidence. If the evidence of the underlying facts is offered, the jury can be directed that it must find those facts proved before it can rely on the expert's opinion. If the fact-finder is a judge, he or she must go through a similar mental process.

C106 *Section 23(3)* does not apply if expert opinion evidence is not based on fact. For example, it will not operate to prevent an expert giving opinion evidence about an economic theory.

Section 23 commentary continues overleaf

(4) If expert evidence that is opinion evidence is offered in relation to the sanity of a person, evidence of any statement about that person's state of mind made to the expert by that person is admissible to establish the facts on which the expert's opinion is based and neither the hearsay rule nor the previous consistent statements rule applies to evidence of any such statement.

Definitions: **expert evidence**, **hearsay rule**, **opinion evidence**, **previous consistent statements rule**, **proceeding**, **statement**, **witness**, s 4.

C107 *Subsection (4)* allows an expert to give evidence in chief of the content of a statement about the state of mind of a person whose sanity is in issue, which is made to the expert by that person. Neither the hearsay rule (*s 17*) nor the previous consistent statements rule (*s 37*) applies to such a statement. Evidence of the statement cannot be used for any purpose other than to establish facts on which the expert bases his or her opinion about the person's sanity.

C108 *Section 23* is subject to *s 25*: expert opinion evidence is not admissible unless written notice is given, waived or excused.

24 Expert witnesses in cases involving certain complainants in sexual cases

(1) This section applies to every sexual case in which the complainant, at the time of the alleged offence, was a child.

(2) Subject to section 25, in a case to which this section applies, an expert witness may offer evidence on whether the complainant's behaviour as described in evidence given in the proceeding by a person other than the expert witness, was, from the expert witness's professional experience or knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

Section 24 continues overleaf

Section 24 Expert witnesses in cases involving certain complainants in sexual cases

C109 *Section 24* re-enacts the substance of s 23G(2)(c) of the Evidence Act 1908. Unlike s 23G(2)(c), *s 24* applies if the complainant was under the age of 17 at the time of the alleged offence. It is the complainant's behaviour around the time of the offence that is relevant in *s 24(2)*, and it does not cease to be relevant just because the complainant is over 17 at the commencement of the proceeding. *Section 24* is subject to *s 25*, which requires written notice to be given of the intention to call expert evidence.

C110 Expert opinion evidence under *s 24(2)* is based primarily on specialised knowledge and skill, rather than scientific theory or technique, for the simple reason that it would be unthinkable to conduct experiments by subjecting children to sexual abuse and comparing them with a control group. *Section 24(2)* enables an expert to express an opinion on whether the complainant's observed behaviour is or is not consistent with the behaviour of sexually abused children of the same age group. The purpose of such evidence is not diagnostic. Rather, the purpose of the evidence is educative: to impart specialised knowledge the jury may not otherwise have, in order to help the jury understand the evidence of and about the complainant, and therefore be better able to evaluate it.

C111 Part of that purpose is to correct erroneous beliefs that juries may otherwise hold intuitively. That is why such evidence is sometimes called "counter-intuitive evidence": it is offered to show that behaviour a jury might think is inconsistent with claims of sexual abuse is not or may not be so; that children who have been sexually abused have behaved in ways similar to that described of the complainant; and that therefore the complainant's behaviour *neither proves nor disproves that he or she has been sexually abused*. The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance. This is similar to the use of expert evidence to dispel myths and misconceptions about the behaviour of battered women.

Section 24 commentary continues overleaf

(3) An expert witness offering evidence under subsection (2) must give reasons for his or her opinion, including such evidence as is necessary for the expert witness to give a fair and balanced explanation of the research and experience on which that opinion is based.

Definitions: **child**, **expert**, **expert evidence**, **opinion evidence**, **proceeding**, **sexual case**, **witness**, s 4.

C112 In the present state of knowledge, evidence of behaviour consistent with sexual abuse cannot, on its own, prove that sexual abuse has occurred. But as with any item of circumstantial evidence, it can combine with other evidence so that in its totality the evidence amounts to proof of sexual abuse beyond reasonable doubt. Thus, the weight that may be given to evidence of behaviour consistent with sexual abuse will depend on the surrounding circumstances as established by other evidence in the case. The judge can be expected to give the jury a direction in this respect that is tailored to the particular facts of the case.

C113 *Section 24(3)* is new in requiring the expert to give a fair and balanced explanation of his or her conclusions by reference to research and experience. The effect of *s 24(3)* is to provide a fuller picture within which the expert's opinion can be evaluated. For example, if an expert expresses an opinion that the complainant's behaviour is consistent with the behaviour of sexually abused children of the same age group, *s 24(3)* requires the expert to tell the jury whether that behaviour may also be consistent with the complainant having had other traumatic experiences that had nothing to do with sexual abuse.

25 Admissibility, notice and disclosure of expert evidence

(1) Expert evidence, whether or not opinion evidence, is not admissible in a criminal proceeding unless

(a) the party who proposes to offer the expert evidence gives notice in writing of that proposal to every other party to the proceeding except any party who has waived the requirement to give notice; or

(b) under subsection (3), the judge dispenses with the requirement to give the notice referred to in paragraph (a).

(2) A notice under subsection (1) must

(a) include the name, address and qualifications of the proposed witness and the contents of the proposed evidence; and

(b) be given

(i) a sufficient time before the hearing to provide all the other parties to the proceeding with a fair opportunity to prepare to meet the evidence; or

(ii) within such time, whether before or after the commencement of the hearing, as the judge may allow and subject to any conditions that the judge may impose.

(3) The judge may dispense with the requirement to give notice under subsection (1)

(a) if no party is substantially prejudiced by the failure to give notice; or

(b) if giving notice is not reasonably practicable in the circumstances; or

(c) if at the time notice should have been given in compliance with subsection (2)(b)(i), the necessity to offer expert evidence was not reasonably foreseeable by the party concerned; or

(d) in the interests of justice.

Definitions: **expert**, **expert evidence**, **judge**, **opinion evidence**, **party**, **proceeding**, **witness**, s 4.

Section 25 Admissibility, notice and disclosure of expert evidence

C114 *Section 25(1)* introduces a notice and disclosure regime that governs all expert evidence in criminal proceedings, including expert evidence offered by the defence. Expert evidence (whether of fact or opinion) is not admissible unless a party gives written notice of the evidence to every other party to the proceeding. Exceptions are where another party waives the requirement to give notice under *s 25(1)(a)*, or the judge excuses a party from having to give notice under *s 25(3)*.

C115 *Section 25(2)(a)* It is expected that parties will normally comply with this provision by exchanging copies of the reports of expert witnesses. If there is no written report, then the party should provide a brief of the evidence. If a party proposes to use diagrams, graphs, or other visual aids, these too should be exchanged. Since one reason for requiring pre-trial disclosure is to enable each party to fully investigate and test the expert evidence to be offered by the other parties, the disclosure must be sufficient to achieve this objective.

C116 *Section 25(2)(b)* No particular time period is prescribed but notice must be given in sufficient time before the hearing to provide all the parties with a fair opportunity to prepare to meet the evidence. As an alternative, parties may apply to the judge for directions under *s 25(2)(b)(ii)*, which could include setting a timetable, imposing conditions, directions about the form in which the evidence should be disclosed, and directions for identifying and narrowing the issues. An application for directions will be appropriate if, for example, a prosecution expert called to rebut a defence of insanity wishes to hear the evidence of the defence expert before committing to a brief.

C117 Since the Code makes no provision for notice of expert evidence in civil proceedings, the notice provisions in the High Court Rules and District Courts Rules will continue to apply by virtue of *s 5(1)*. See the discussion in C45.

Subpart 3 – Defendants' statements, improperly obtained evidence, silence of parties in proceedings and admissions in civil proceedings

Subpart 3
Defendants' statements, improperly obtained evidence, silence of parties in proceedings and admissions in civil proceedings

C118 This Subpart sets up a self-contained regime that reforms the law on the admissibility of defendants' statements offered in evidence by the *prosecution*. At common law, one defendant's statement cannot be used to implicate another defendant. Under New Zealand case law, a defendant has no standing to challenge evidence obtained from a co-defendant in breach of the Bill of Rights. In such cases, juries are directed that the evidence can be used for one purpose but not another. The Code seeks to avoid the necessity for such directions as much as possible. In the context of this Subpart, evidence offered by the prosecution is admissible or inadmissible against all defendants.

C119 The general rule is that the prosecution may use evidence (including a statement) obtained from one defendant against that defendant or another defendant, unless the evidence is excluded by the operation of the reliability rule (*s 27*), the oppression rule (*s 28*) or the improperly obtained evidence rule (*s 29*). The hearsay rule (*s 17*), opinion rule (*s 21*) and previous consistent statements rule (*s 37*) do not apply to such evidence. If the evidence is excluded by *s 27*, *28* or *29*, the prosecution may not use it against the defendant from whom the evidence was obtained or any other defendant. Evidence (including a statement) that the prosecution cannot use against the defendant from whom it was obtained because of the operation of *s 27*, *28* or *29* will remain inadmissible against that defendant even if another defendant puts it in evidence.

C120 This Subpart also reforms the law on a defendant's right of silence before and at trial. It seeks to protect that right by prohibiting the drawing of adverse inferences from the fact that a defendant has exercised the right of silence before or at trial, rather than by limiting the situations when evidence about it may be given.

Subpart 3 commentary continues overleaf

Subpart 3 commentary continued

C121 The definition of "statement" in *s 4* applies to confessions and admissions as well as statements the maker intends to be exculpatory, which the prosecution may want to put in evidence to show a consciousness of guilt (for example, lies). Such statements will be subject to the reliability and oppression rules. The definition includes non-verbal conduct intended as an assertion of any matter (eg, a nod or shake of the head), but it does not include assertions that may be implied from conduct of a defendant. Such "implied assertions" are not subject to the reliability and oppression rules. They are, however, subject to the improperly obtained evidence rule and the general principles in Part 2.

C122 The reliability rule (*s 27*) and the oppression rule (*s 28*) are rules of automatic exclusion; that is, once the conditions in either of those rules exist, the evidence is excluded and there is no available discretion to admit the statement. This position can be compared to the improperly obtained evidence rule (*s 29*), under which the judge has a discretion to admit improperly obtained evidence if exclusion would be contrary to the interests of justice.

C123 Apart from *s 30* (prosecution may not rely on certain evidence offered by other parties), the rules in this Subpart do not apply to a statement made by a defendant and offered in evidence by that defendant or another defendant.

26 Defendants' statements offered by the prosecution

(1) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible unless the statement is inadmissible because of section 27 (the reliability rule), section 28 (the oppression rule), or section 29 (the improperly obtained evidence rule).

(2) Subpart 1 (hearsay evidence), Subpart 2 (opinion evidence and expert evidence) and section 37 (previous consistent statements rule) do not apply to evidence offered under subsection (1).

Definitions: **expert evidence**, **hearsay**, **opinion evidence**, **previous statement**, **statement**, **proceeding**, s 4.

Section 26 Defendants' statements offered by the prosecution

C124 *Section 26(1)* The general rule is that evidence of a statement made by a defendant that the prosecution in a criminal proceeding offers, is admissible against that or another defendant unless excluded by one or more of the rules in *ss 27*, *28* and *29*. Once a statement is excluded under one of these rules, it is inadmissible to prove the truth of its contents against any defendant for all prosecution purposes.

C125 *Section 26(2)* removes the operation of the hearsay rule, the opinion rule, and the previous consistent statements rule from evidence of a defendant's statement offered by the prosecution. While the prosecution is unlikely to want to offer in evidence a statement by a defendant that is consistent with that defendant's testimony, the prosecution is unlikely to know, at the stage it may want to offer the statement in evidence, whether the defendant is going to testify. Excluding the application of the previous consistent statements rule eliminates unnecessary argument on the point.

27 Reliability rule

(1) The reliability rule in subsection (2) applies to evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant only if

(a) the defendant or a co-defendant against whom the statement is offered raises the issue of the reliability of the statement and informs the judge and the prosecution of the grounds for raising the issue; or

(b) the judge raises the issue of the reliability of the statement and informs the prosecution of the grounds for raising the issue.

(2) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is inadmissible unless the prosecution satisfies the judge beyond reasonable doubt that the circumstances in which the statement was made were not likely to have adversely affected its reliability.

Section 27 continues overleaf

Section 27 Reliability rule

C126 *Sections 27*, *28* and *29* change the law in a number of important respects. Under existing law, a defendant's pre-trial admission cannot implicate a co-defendant; and a defendant has no standing to challenge evidence obtained from a co-defendant in breach of the Bill of Rights. Under the Code, the prosecution can use a defendant's pre-trial statement that is not excluded by the operation of *ss 27*, *28* and *29* against that defendant and any co-defendant. However, if the statement is inadmissible because of *ss 27*, *28* and *29*, the prosecution cannot use it against any defendant.

C127 Both this rule and the oppression rule in *s 28* apply to all statements made by defendants and offered in evidence by the prosecution. *Sections 27* and *29* replace the common law voluntariness rule and its limited exception in s 20 of the Evidence Act 1908. They are not intended to abandon values protected by the voluntariness rule but rather to protect those values more effectively by simplifying and clarifying the rules.

C128 There is no requirement that the person who obtained the statement be a person in authority. Although statements are very often made to police officers, this will not always be so. The rules apply to statements made to anyone, including parents, acquaintances or employers.

C129 *Section 27(1)* A reliability issue may be raised by the defendant, a co-defendant against whom the statement is intended to be used, or the judge. If none of them does so, the rule does not apply and the statement will be admissible. The requirement to inform the prosecution of the grounds for raising a reliability issue enables the prosecution to know of the contentions it must meet and the witnesses it should call. There is no evidential burden on a defendant or co-defendant and a high degree of disclosure is not required. A simple statement informing the judge and the prosecution of the grounds will be sufficient. This aspect of the reliability rule is not intended to change the present law.

C130 *Section 27(2)* states the reliability rule. The phrase "circumstances in which the statement was made" will enable the judge to take into account a broad range of matters that may affect the reliability of the statement, including matters other than the conduct of the person in whose presence the statement was made.

C131 The words "not likely to have adversely affected its reliability" apply to exculpatory statements as well as to admissions of guilt. They directly highlight the central issue for this rule – reliability.

Section 27 commentary continues overleaf

(3) Without limiting the matters that a judge may take into account for the purpose of applying the reliability rule, the judge must take into account

(a) any pertinent physical, mental or psychological condition of the defendant when the statement was made (whether apparent or not); and

(b) any pertinent characteristics of the defendant including any mental, intellectual or physical disability to which the defendant is subject (whether apparent or not); and

(c) the nature of any questions put to the defendant and the manner and circumstances in which they were put; and

(d) the nature of any threat, promise or representation made to the defendant or any other person.

(4) Subsection (2) does not have effect to exclude a statement made by a defendant if the statement is offered in evidence by the prosecution only as evidence of the physical, mental or psychological condition of the defendant at the time the statement was made or as evidence of whether the statement was made.

Definitions: **judge**, **proceeding**, **statement**, s 4.

C132 *Section 27(3)* identifies factors that the judge is obliged to take into account when applying the reliability rule. The list is not exhaustive. The judge is required to take these matters into account only if there is some evidential foundation for their existence.

C133 The central issue in relation to reliability is the actual state of the defendant's mind at the time he or she made the statement, rather than the source of any influence on the defendant's mind.

C134 *Section 27(3)(a)* requires the judge to consider the defendant's condition at the time the statement was made. The condition may be a transient one – for example, intoxication.

C135 *Section 27(3)(b)* requires the judge to consider the characteristics of the defendant. The judge is not limited to the matters listed in *para (b)*. Other matters such as age, sex, ethnic or national origin, sexual orientation or health status may also be relevant in a particular case.

C136 *Section 27(3)(c)* requires the judge to take into account any questions put to the defendant and the manner in which they were put. This is not limited to police or official questioning. *Section 27(3)(d)* requires account to be taken of any threat, promise or representation made to the defendant or any other person.

C137 *Section 27(4)* contains a limited exception to the reliability rule. It allows the prosecution to tender a statement in evidence for a purpose other than to prove the truth of the facts stated or a consciousness of guilt. If the prosecution offers a statement as evidence of the defendant's condition and the jury could use it for other purposes, the judge will need to consider whether to exclude the statement on the ground that its probative value is outweighed by the danger that it will have an unfairly prejudicial effect (*s* 8) and, if the evidence is admitted, whether a special direction to the jury is required.

28 Oppression rule

(1) The oppression rule in subsection (2) applies to evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant only if

(a) the defendant or a co-defendant against whom the statement is offered raises the issue of the influence on the statement of conduct, treatment, or a threat described in subsection (2)(a) and (b) and informs the judge and the prosecution of the grounds for raising the issue; or

(b) the judge raises the issue of the influence on the statement of conduct, treatment, or a threat described in subsection (2)(a) and (b) and informs the prosecution of the grounds for raising the issue.

(2) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is inadmissible unless the prosecution satisfies the judge beyond reasonable doubt that the statement was not influenced by

(a) oppressive, violent, inhuman, or degrading conduct towards, or treatment of, the defendant or another person; or

(b) a threat of conduct or treatment of that kind.

(3) Without limiting the matters that a judge may take into account for the purpose of applying the oppression rule, the judge must take into account

(a) any pertinent physical, mental, or psychological condition of the defendant when the statement was made (whether apparent or not); and

(b) any pertinent characteristics of the defendant including any mental, intellectual, or physical disability to which the defendant is subject (whether apparent or not); and

(c) the nature of any questions put to the defendant and the manner and circumstances in which they were put; and

(d) the nature of any threat, promise, or representation made to the defendant or any other person.

Definitions: **judge**, **proceeding**, **statement**, s 4.

Section 28 The oppression rule

C138 Under *s 28* it is irrelevant whether or not the statement is reliable. While the rule will promote reliability (since there is always potential for a statement to be unreliable if oppression or violence is used to obtain it), the primary purposes of the rule are to protect people from coerced self-incrimination and to deter police and other state officials from engaging in unacceptable conduct.

C139 The oppression rule is triggered by the defendant, a co-defendant against whom the prosecution proposes to use the statement, or the judge raising the issue of oppression in accordance with *s 28(1)*.

C140 *Section 28(2)* states the rule. If the issue is raised, the prosecution must satisfy the judge beyond reasonable doubt that the statement was not influenced by the matters listed in the rule. The rule is concerned with the unacceptable conduct of any person, not just a person in authority, in obtaining a statement from a defendant. The rule requires the exclusion of statements influenced by oppression or violence towards the defendant or another person.

C141 The rule protects the right not to be subjected to torture or to cruel, degrading, or inhuman treatment or punishment (Article 15 of the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; Article 7 of the International Covenant on Civil and Political Rights; s 9 of the New Zealand Bill of Rights Act 1990). The oppression rule meets the requirements of Article 15 and indeed goes further than the minimum obligations under the Convention.

C142 The rule does not attempt to define oppression because the scope of oppressive conduct is best left for the courts to determine on a case-by-case basis. The words used to describe other conduct or treatment governed by the rule – "violent, inhuman or degrading" – are also not defined, though the conduct and treatment they cover is probably more readily specified.

C143 *Section 28(3)* lists the non-exclusive factors the judge must consider. They are the same as those in *s 27(3)*.

29 Improperly obtained evidence rule

(1) The improperly obtained evidence rule in subsection (3) applies to evidence offered by the prosecution in a criminal proceeding only if

(a) the defendant, or a co-defendant against whom the evidence is offered, raises an issue of whether the evidence was improperly obtained and informs the judge and the prosecution of the grounds for raising the issue; or

(b) the judge raises an issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.

(2) If the defendant, a co-defendant or the judge raises the issue of whether the evidence was improperly obtained, the improperly obtained evidence rule applies unless the prosecution satisfies the judge on the balance of probabilities that the evidence was not improperly obtained.

(3) Improperly obtained evidence offered by the prosecution in a criminal proceeding is inadmissible unless the judge considers that the exclusion of the evidence would be contrary to the interests of justice.

Section 29 continues overleaf

Section 29 Improperly obtained evidence rule

C144 In contrast to the reliability and oppression rules, which apply only to statements, the improperly obtained evidence rule applies to all kinds of evidence that the prosecution may offer. This rule replaces the fairness discretion and the exclusionary rule developed by the courts for evidence obtained in breach of the New Zealand Bill of Rights Act 1990. A statement that has not been influenced by oppressive conduct or treatment, and is reliable, will nevertheless be excluded from evidence if it is improperly obtained within the meaning of *s 29(4)* and is not admitted by the judge in exercising the discretion under *s 29(3)*.

C145 The rule applies to evidence offered by the prosecution only if a defendant, a co-defendant against whom the evidence is offered, or the judge raises the issue in the manner prescribed in *s 29(1)*. The procedure is the same as that under the reliability and oppression rules.

C146 Once the issue is raised, the rule stated in *s 29(3)* applies unless the prosecution satisfies the judge on the balance of probabilities that the evidence was not obtained improperly.

C147 *Section 29(3)* calls for a factual and policy judgment and no standard or onus of proof is specified. A decision to admit the evidence requires the judge to balance various public interests. They extend beyond the interests involved in the particular case to broader interests concerning the general administration of the law. Such interests include the long-term consequences for the integrity of the criminal justice system of admitting or excluding the particular type of improperly obtained evidence. The rule allows the judge to take into account all the competing considerations and does not require the judge to take a rigid or technical approach.

C148 If the evidence is ruled admissible, it is admissible against the defendant from whom it was obtained, as well as any co-defendant.

Section 29 commentary continues overleaf

(4) Evidence is improperly obtained if it is obtained
  (a) in consequence of a breach of the *New Zealand Bill of Rights Act 1990*; or
  (b) in consequence of a breach of any enactment or rule of law; or
  (c) 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
  (d) unfairly.

(5) In exercising the power to admit evidence under subsection (3), the judge must consider, among other relevant matters
  (a) the significance of the *New Zealand Bill of Rights Act 1990* as an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
  (b) the nature and gravity of any impropriety; and
  (c) whether any impropriety was the result of bad faith; and
  (d) the likelihood that the evidence would have been discovered or otherwise obtained regardless of any impropriety.

(6) A statement made by a defendant that is inadmissible because of section 27 (the reliability rule) or section 28 (the oppression rule) cannot be admitted as evidence under subsection (3) of this section.

Definitions: **Act**, **judge**, **statement**, **proceeding**, s 4.

C149 *Section 29(4)* defines when evidence is improperly obtained. Under this rule, unfairness is simply a threshold test making the evidence prima facie inadmissible, whereas under the current law unfairness is the basis upon which a final decision to exclude the evidence rests. Until the proposals in *Police Questioning* (NZLC R31, 1994) are adopted, the Judges' Rules remain a guide for determining whether evidence has been unfairly obtained for the purposes of *s 29(4)(d)*.

C150 *Section 29(5)* provides some guidance by specifying matters a judge must take into account in deciding whether excluding the improperly obtained evidence would be contrary to the interests of justice. The existence of one factor will not automatically dictate exclusion or admission. All the factors are interdependent and the importance given to each will depend on the particular circumstances. It is open to the judge to take into account other relevant matters.

C151 *Section 29(6)* makes it clear that if a statement is inadmissible under the reliability rule or the oppression rule, it cannot be admitted under the improperly obtained evidence rule. For example, an over-zealous interrogator may tell a defendant, quite untruthfully: "We've got your friend Jack. He has admitted that you were both at that address in Newtown. You might as well come clean and admit it yourself." Any admission following such a statement may be excluded as unreliable (induced by a misrepresentation: *s 27(3)(d)*) or as improperly (unfairly) obtained under *s 29(4)(d)*. If the admission is excluded as unreliable, the prosecution may not seek to have it admitted under *s 29(2)* on the ground that it was not improperly obtained, or under *s 29(3)* on the ground that exclusion would be contrary to the interests of justice.

C152 Improperly obtained evidence is admissible in civil proceedings, subject to relevance and the general exclusion in *s 8*.

30 Prosecution may not rely on certain evidence offered by other parties

Evidence that would be inadmissible if offered by the prosecution in a criminal proceeding because of section 27 (the reliability rule), section 28 (the oppression rule), or section 29 (the improperly obtained evidence rule) may not be relied on by the prosecution if that evidence is offered by any other party.

31 Irrelevance of truth to admissibility of defendants' statements

In determining whether a defendant's statement should be admitted under section 27, 28, or 29 as evidence in a criminal proceeding (whether in the exercise of a discretion or not), the issue of the statement's truth or falsity is to be disregarded.

Definitions: **statement**, **proceeding**, s 4.

Section 30 Prosecution may not rely on certain evidence offered by other parties

C153 If the prosecution is prevented from offering an item of evidence against a defendant because of the operation of *s 27*, *28* or *29*, the prosecution will not be able to use the evidence against that defendant even if another party puts it in evidence. Thus, if the prosecution obtained, in breach of *s 27*, *28* or *29*, a statement from a defendant that is exculpatory of a co-defendant, under the Code the co-defendant can offer the statement in evidence without thereby enabling the prosecution to use it against the defendant who made the statement. It will be necessary to direct the jury about the limited use they can make of such evidence. In other words, the evidence may be used for the benefit of the co-defendant who puts the statement in evidence, but not to the detriment of the defendant from whom the statement was improperly obtained.

C154 It should be noted that *ss 26*, *27*, *28* and *29* – and more particularly *s 26(2)* – do not apply to a defendant's statement offered in evidence by that or another defendant. Such evidence must comply with the hearsay rules if the defendant whose statement is offered is not a witness, or with the previous consistent statements rule (*s 37*) if he or she is a witness.

Section 31 Irrelevance of truth to admissibility of defendants' statements

C155 The focus of the rules in *ss 27*, *28* and *29* is on the circumstances surrounding the making of a defendant's statement. Truth is not relevant to the tests. As a result, subsequently discovered real evidence may not be offered at a hearing to determine the admissibility of a defendant's statement, if the only purpose of that evidence is to confirm the truth of the statement.

32 Defendants' right of silence before trial

(1) In a criminal proceeding, the fact-finder must not draw an inference that is unfavourable to a defendant from the fact that the defendant did not answer a question put or respond to a statement made to that defendant in the course of official questioning before the trial, or the defendant's failure to disclose a defence before trial; and if the trial is before a jury, the judge must direct the jury accordingly.

(2) In this section, an inference that is unfavourable to a defendant includes an inference of guilt or an inference about a defendant's truthfulness.

(3) In a criminal proceeding, the prosecution must not cross-examine a defendant on the fact that the defendant did not answer a question put or respond to a statement made to that defendant in the course of official questioning before the trial, or on the fact that the defendant failed to disclose a defence before trial.

(4) This section does not apply if the fact that the defendant did not answer a question put or respond to a statement made before the trial is a fact required to be proved in the proceeding.

Definitions: **official questioning**, **proceeding**, **statement**, **truthfulness**, s 4.

Section 32 Defendants' right of silence before trial

C156 *Section 32* follows the existing law in allowing evidence to be given of the fact that a defendant in a criminal proceeding did not respond to official questioning in exercising the right of silence before trial, or did not disclose a defence before trial. This section seeks to protect defendants by prohibiting cross-examination by the prosecution on that fact, and by prohibiting adverse inferences from being drawn from that fact.

C157 *Section 32* only applies to "official questioning" before trial. The term "official questioning" is defined in *s 4* and is limited to questioning in connection with investigating an offence or possible offence, conducted by or in the presence of a police officer or a person whose functions include investigating offences. The latter category will include officials conducting investigations in order to enforce an enactment, such as customs officers or fisheries officers, as well as persons such as insurance investigators or store security staff. The prohibition in *s 32* applies in relation to all defences, including the defence of alibi. Failure to give notice of alibi, as required by s 367A of the Crimes Act 1961, means the defence may not offer evidence of an alibi without the permission of the judge, but does not open a defendant to adverse inference or comment.

C158 The effect of *s 32(1)* and *(2)* is to prohibit the fact-finder from inferring either that the defendant is guilty or that he or she is not telling the truth because the defendant declined to answer official questioning or failed to disclose a defence before trial. It requires a judge sitting with a jury to give a direction to that effect. These provisions change the law in extending the traditional prohibition of inferences of guilt to adverse inferences about credibility.

C159 In prohibiting the prosecution from cross-examining a defendant on the defendant's exercise of the right of silence before trial, *s 32(3)* clarifies the law on the side of rights. If a defendant falsely asserts that he or she has not been given an opportunity to answer the charge against him or her, *s 32(3)* does not prevent the prosecution from cross-examining the defendant on the assertion. The reason is that the subject of such cross-examination is not the defendant's exercise of the right not to answer questions, but the lie that was told about it.

C160 *Section 32(4)* An example is where a defendant is charged with failing to answer questions under s 185 of the Customs and Excise Act 1996.

33 Comment on defendants' exercise of right of silence before trial

(1) In a criminal proceeding, no person may invite the fact-finder to draw an inference that is unfavourable to a defendant from the fact that the defendant did not answer a question put or respond to a statement made to that defendant in the course of official questioning before the trial or from the defendant's failure to disclose a defence before trial.

(2) In this section, an inference that is unfavourable to a defendant includes an inference of guilt or an inference about a defendant's truthfulness.

Definitions: **official questioning**, **proceeding**, **statement**, **truthfulness**, s 4.

Section 33 Comment on defendants' exercise of right of silence before trial

C161 *Section 33(1)* forbids anyone to invite the fact-finder to draw inferences adverse to a defendant simply because the defendant has exercised the right to remain silent in the face of official questioning or by not disclosing a defence before the trial.

C162 The effect of *s 33* is to change the law allowing adverse comment on a belated explanation. It also reforms the so-called "doctrine of recent possession", which allows the fact-finder to infer guilt from a defendant's failure to offer an explanation when confronted with possession of recently stolen property. In both situations, *s 33* precludes adverse comment on the lack of an explanation in the face of official questioning. However, *s 33* does not preclude an invitation to the fact-finder to draw an adverse inference from the fact that the defendant was found in possession of recently stolen goods. *Section 33* also does not preclude adverse comment about any explanation that is offered and rejected.

34 Defendants' right of silence at trial

In a criminal proceeding, the fact that a defendant did not give evidence at his or her trial must not be used to help establish the defendant's guilt.

Definition: **proceeding**, s 4.

35 Silence of parties in civil proceedings

A fact-finder may draw an unfavourable inference concerning a matter in issue in a civil proceeding from the failure of a party in that proceeding to give evidence if it appears to the fact-finder that the party might reasonably have been expected to give evidence concerning that matter.

Definitions: **party**, **proceeding**, s 4.

Section 34 Defendants' right of silence at trial

C163 This section overturns *Trompert v Police* [1985] 1 NZLR 357 (CA). The effect of *s 34* is that a defendant's silence at trial may indicate that there is no evidence to support speculative explanations by defence counsel of the Crown's evidence, or that the accused has not put forward any evidence that would require the Crown to negative an affirmative defence. However, silence can never be used to bolster prosecution evidence that would otherwise be insufficient to prove guilt beyond reasonable doubt. Even where the onus is on a defendant – for example, to establish a defence of insanity or absence of fault in a "public welfare" offence – the defendant's silence at trial should only affect the weight of the defence evidence. Lack of defence evidence may mean there is nothing to tip the balance against prosecution evidence that is sufficient to prove a defendant's guilt beyond reasonable doubt. Lack of defence evidence can never add weight to an insufficient prosecution case to help prove a defendant's guilt beyond reasonable doubt.

Section 35 Silence of parties in civil proceedings

C164 This section is inserted to make it clear that *s 34* does not apply in civil proceedings.

36 Admissions in civil proceedings

(1) Subpart 1 (hearsay evidence), Subpart 2 (opinion evidence and expert evidence) and section 37 (the previous consistent statements rule) do not apply to evidence of an admission offered in a civil proceeding that is

(a) given orally by a person who saw, heard, or otherwise perceived the admission being made; or

(b) contained in a document.

(2) Evidence of an admission that is a hearsay statement may not be used in respect of the case of a third party unless

(a) the circumstances relating to the making of the admission provide reasonable assurance that the admission is reliable; or

(b) the third party consents.

(3) In this section, **third party** means a party to the proceeding concerned, other than the party who

(a) made the admission; or

(b) offered the evidence.

Definitions: **admission**, **document**, **hearsay**, **proceeding**, s 4.

Section 36 Admissions in civil proceedings

C165 Under the common law, a statement against interest (defined as an "admission" in the Code) is admissible against the party who made it. Under the Code, an admission is admissible because it is relevant and generally reliable, since a party is unlikely to make an admission that is untrue. The restrictions of the hearsay rule are therefore unnecessary if a witness offers evidence of a party's admission made in writing or an admission the witness personally heard or saw the party making. The witness who offers the evidence can be cross-examined on any motive he or she may have to lie, or on the accuracy of his or her observation. However, a reasonable assurance of reliability is expressly required before an admission may be used to implicate a third party, unless there is consent.

Subpart 4 – Previous consistent statements made by a witness

37 Previous consistent statements rule

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

(a) to the extent necessary to meet a challenge to that witness's truthfulness or accuracy; or

Section 37 continues overleaf

Subpart 4 – Previous consistent statements made by a witness

Section 37 Previous consistent statements rule

C166 The definition of "hearsay" does not include the previous statements of witnesses. Being a witness in the proceeding, the maker of a previous statement – unlike the maker of a hearsay statement – can be cross-examined on it. Previous statements are admissible if relevant and not excluded under *s 37* or any other Code provision.

C167 The only kind of previous statements excluded by *s 37* are those that are consistent with a witness's testimony. "Consistent" does not simply mean the lack of inconsistency: there must be something in the witness's testimony with which the previous statement is consistent. The intention of *s 37* is to prevent the parties from inundating the courts with voluminous amounts of repetitive material in order to shore up a witness's consistency. So if the witness's testimony is silent on a matter that is the subject of a previous statement, or if the witness's testimony is different from the content of a previous statement, *s 37* will not exclude evidence of the previous statement.

C168 *Section 37(a)* replaces the law on recent complaints in sexual cases: such complaints will now be admissible under this subsection, but only to meet a challenge to truthfulness – for example, an allegation of recent invention. However, the complaints need not be "recent", and can be admitted to prove the truth of the contents. *Paragraph (a)* also replaces s 22A of the Evidence Act 1908 (which allows evidence to be admitted of a description the identifying witness gives to the prosecution before he or she identifies the accused as the offender), which has not been re-enacted. Under *para (a)*, evidence of the description may be given to meet a challenge to truthfulness or accuracy. If there is no such challenge, the evidence will not be necessary.

Section 37 commentary continues overleaf

(b) if the statement will provide the court with information which that witness is unable to recall.

Definitions: **party**, **previous statement**, **proceeding**, **statement**, **witness**, s 4.

Note: As to cross-examination on previous statements, see s 96.

C169 *Section 37(b)* is intended to cover the situation where a witness may wish to consult a previous statement containing details the witness cannot recall. Such a statement is not, strictly speaking, a previous consistent statement because the witness's evidence will not contain the details recorded in the statement. *Paragraph (b)* has been inserted to avoid unnecessary argument that such a statement is inadmissible and therefore cannot be used for the purpose of questioning a witness or cannot be consulted by a witness while giving evidence – *s 90(1)* (use of written statements in questioning witnesses). For example, *para (b)* will enable a law enforcement officer to read directly from a contemporaneous note recording details of events about which the officer is giving evidence.

C170 One effect of *s 37*, in combination with the definitions of "witness" and "give evidence", is that one witness may give evidence of a previous statement made by another witness even if the latter's evidence is given in an alternative way (such as in a pre-recorded video or by videolink), provided that the other witness is available for cross-examination. If the maker of the statement is not available for cross-examination, the statement is hearsay and must comply with the hearsay rules.

C171 In most cases, the truthfulness rules will not apply to evidence of previous statements because such statements will not be solely or mainly about truthfulness – *s 4(2)(a)*. This may be the case even if a previous consistent statement is admitted to answer a challenge to truthfulness. By way of an example, a witness testifies that the defendant hit her friend. Suppose it is put to her that this is a recent fabrication, and evidence is given that immediately after the incident, she had told a police officer that the defendant had hit her friend. Her previous statement is capable of supporting the truth of her testimony because the contents of the two are the same. That content is not about her truthfulness as such (that is, whether she habitually tells the truth or lies). Likewise, a previous inconsistent statement is used to cross-examine a witness to suggest that his testimony is untrue because the content of his testimony is different from the content of his previous statement. In this situation also, the previous statement, although capable of showing that the witness's testimony is untrue, is not about the witness's truthfulness as such.

C172 If a previous consistent statement is solely or mainly about truthfulness and is admitted to meet a challenge to truthfulness, it will almost always be substantially helpful in assessing truthfulness and therefore admissible under the truthfulness rules.

Subpart 5 – Truthfulness and propensity

38 Application of Subpart to evidence of truthfulness and propensity

(1) This Subpart does not apply to evidence about a person's truthfulness if that truthfulness is an ingredient of the claim in a civil proceeding or one of the elements of the offence for which a person is being tried in a criminal proceeding.

(2) This Subpart, except for section 46, does not apply so far as a proceeding relates to bail or sentencing.

Definitions: **proceeding**, **truthfulness**, s 4.

Subpart 5 – Truthfulness and propensity

C173 This Subpart reforms and replaces the common law rules on evidence about character and credibility of persons involved in proceedings. It contains provisions on evidence about the truthfulness and propensity of witnesses, including defendants, and those whose hearsay statements are admitted as evidence. It also includes provisions on the questions that may be asked and the evidence that may be offered about complainants in sexual cases. The rules in this division apply to both criminal and civil proceedings, unless the contrary is stated.

C174 *Section 4(2)* sets out what truthfulness means for the purposes of this Subpart.

Section 38 Application of Subpart to evidence of truthfulness and propensity

C175 *Section 38(1)* makes it clear that the rules in this Subpart do not apply when evidence of a person's truthfulness is an ingredient of a claim in a civil proceeding (which would occur only rarely; for example, in cases of malicious falsehood) or an ingredient of an offence in a criminal proceeding, an example being perjury. Nor, as *s 38(2)* states, do the rules in Subpart 5 apply in bail or sentencing proceedings, since neither raises the possibility of unfair prejudice to the defendant in relation to an ultimate finding of guilt. The exception is in sexual cases, because in bail and sentencing proceedings it may still be necessary to protect complainants by controlling questions and evidence about their sexual experience and reputation in sexual matters.

Evidence of truthfulness

Evidence of truthfulness

C176 *Sections 39* to *41* comprise the rules on evidence of truthfulness. The Code distinguishes between two concepts that contribute to assessing credibility: reliability and truthfulness. The first is a function of the witness's ability to perceive and recall, and the second of the witness's intention to tell the truth. The concern in Subpart 5 is not with evidence of reliability or error, the admissibility of which is limited only by relevance and the general exclusionary rule. The concern is with evidence of truthfulness – or, more usually, a lack of truthfulness.

C177 The effect of *ss 39* to *41* is to abolish the collateral issues rule. That rule prohibited a party from offering evidence intended to challenge a witness's answers to questions asked in cross-examination about his or her truthfulness. A party will now be able to offer evidence challenging a witness's answers to questions about his or her truthfulness, provided that the evidence is relevant, is not excluded on any of the grounds set out in *s 8*, and is likely to be substantially helpful in assessing that witness's truthfulness.

C178 All evidence that is solely or mainly about a person's truthfulness must comply with the requirement of *substantial helpfulness*: in all cases the evidence must be substantially helpful in assessing the truthfulness of the person about whom it is offered. The purpose of the substantial helpfulness test is to avoid a volume of evidence that may only be marginally relevant in deciding what is itself a side issue.

C179 When deciding whether evidence about a person's truthfulness is likely to be substantially helpful, a judge may appropriately consider whether the evidence tends to show that:

- the person has been untruthful when under a legal obligation to tell the truth, such as in an earlier court proceeding or a signed declaration;
- the person has been convicted of one or more offences, and the nature and number of the offences (convictions for some offences, such as perjury or fraud, may be more relevant to truthfulness than others, but the relevance of a previous conviction will also depend on the circumstances of the particular case);
- the person has made a previous inconsistent statement;
- the person is biased;
- the person has a motive to be untruthful.

Commentary continues overleaf

Commentary continued

C180 By way of an example, evidence that a witness has a conviction for drinking and driving is unlikely to be substantially helpful in assessing the truthfulness of a witness's denial of participation in an armed robbery – as opposed to evidence that the witness is known to have lied on oath on a number of occasions.

C181 It may also be appropriate for the judge to consider the time that has elapsed since the occurrence of the events to which the evidence of truthfulness relates. Thus, evidence of "ancient" convictions or lies is unlikely to be substantially helpful in assessing the truthfulness of a witness's testimony.

39 Truthfulness rules

(1) A party may offer evidence in a civil or criminal proceeding about a person's truthfulness only if the evidence is substantially helpful in assessing that person's truthfulness.

(2) A party may offer evidence in a criminal proceeding about a defendant's truthfulness only if, in addition to being substantially helpful in assessing that defendant's truthfulness, the evidence is offered in accordance with section 40 or 41.

(3) A party who calls a witness may not offer evidence to challenge that witness's truthfulness unless the judge determines the witness to be hostile.

(4) Subpart 1 (hearsay evidence) and Subpart 2 (opinion evidence and expert evidence) do not apply to exclude evidence about reputation that relates to truthfulness.

(5) Section 42 (the propensity rule) does not apply to evidence that is solely or mainly relevant to truthfulness.

Definitions: **hearsay**, **hostile**, **judge**, **opinion rule**, **party**, **proceeding**, **truthfulness**, s 4.

Note: Section 4(2) provides that evidence about a person's truthfulness means evidence that is solely or mainly about a person's truthfulness.

Section 39 Truthfulness rules

C182 *Section 39(1)* The requirement of substantial helpfulness applies to evidence about the truthfulness of any person. This includes any witness who gives evidence, as well as a person whose evidence is a statement admitted under the hearsay rule.

C183 *Section 39(2)* preserves the protection the common law traditionally gives to defendants in criminal proceedings in relation to evidence of their bad character. Evidence about a defendant's truthfulness must not only be substantially helpful in assessing the defendant's truthfulness, but must also comply with the restrictions contained in *ss 40* and *41*.

C184 *Section 39(3)* replaces s 9 of the Evidence Act 1908, which prevents a party from impeaching the credit of its own witness.

C185 *Section 39(4)* suspends the operation of the hearsay and opinion rules in connection with evidence of a person's reputation (which would normally comprise both hearsay and opinion evidence) relating to truthfulness.

C186 *Section 39(5)* Since evidence of a person's propensity to tell the truth or propensity not to tell the truth is evidence solely or mainly about truthfulness, it is subject to the truthfulness rules, and not the propensity rules.

40 Evidence of defendants' truthfulness

(1) A defendant in a criminal proceeding may offer evidence about that defendant's truthfulness.

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

(a) the defendant has offered evidence about the defendant's truthfulness or challenging the truthfulness of a prosecution witness; and

(b) the judge gives permission.

Definitions: **judge**, **proceeding**, **truthfulness**, **witness**, s 4.

Section 40 Evidence of defendants' truthfulness

C187 Under *s 40(1)* a defendant may offer evidence about his or her own truthfulness either personally or through another defence witness.

C188 *Section 40(2)* allows the prosecution to challenge a defendant's truthfulness by cross-examining that defendant or by offering evidence through another witness. However, it protects defendants in criminal proceedings from evidence that they have committed, been charged with or been convicted of an offence concerning truthfulness, unless they themselves put truthfulness in issue. The section thus retains certain of the retaliatory features of the former common law rules governing the admissibility of prosecution evidence about a defendant's bad character. A judge would be expected to warn unrepresented defendants of the consequences of offering evidence about their own truthfulness or of challenging the truthfulness of a prosecution witness.

C189 The requirement on the prosecution to obtain the permission of the judge provides a further measure of protection for the defendant. A judge is not likely to give permission if prosecuting counsel leads the defendant or a defence witness under cross-examination to impugn the truthfulness of a prosecution witness.

41 Evidence of co-defendants' truthfulness

(1) A defendant in a criminal proceeding may offer evidence challenging the truthfulness of a co-defendant only if the evidence is relevant to the defence presented by the defendant.

(2) A defendant in a criminal proceeding who proposes to offer evidence challenging the truthfulness of a co-defendant must give notice in writing to that co-defendant and every other co-defendant of the proposal to offer that evidence unless the requirement to give notice is waived by all the co-defendants or by the judge in the interests of justice.

(3) A notice must
   (a) include the contents of the proposed evidence; and
   (b) be given a sufficient time before the hearing to provide all the co-defendants with a fair opportunity to prepare to meet that evidence.

Definitions: **judge**, **proceeding**, **truthfulness**, s 4.

Section 41 Evidence of co-defendants' truthfulness

C190 *Section 41(1)* For example, if A and B are jointly charged with the same incident of assault, and each accepts having been present at the scene at the relevant time but claims the other carried out the assault, then the truthfulness of each is relevant to the other's defence. In this situation, A does not have to wait until B puts her own truthfulness in issue by offering favourable evidence about herself or by attacking A, but the evidence A offers must be solely or mainly about B's truthfulness and must be substantially helpful in assessing B's truthfulness.

C191 *Section 41(2)* The notice requirement seeks to strike a balance between the right of a defendant to conduct an effective defence, and the right of a co-defendant to be protected from prejudicial evidence of little relevance or probative value. One situation where the interests of justice may incline a judge to waive the notice requirement is where the evidence was not known to counsel and a witness unexpectedly discloses it in the course of giving evidence at trial.

C192 *Section 41(3)* The notice should allow sufficient time to consider whether to apply for severance.

Evidence of propensity

42 Propensity rule

(1) A party may offer propensity evidence in a civil or criminal proceeding about any person, but such evidence may be offered about

(a) a defendant in a criminal proceeding, only in accordance with sections 43, 44, and 45; and

(b) a complainant in a sexual case in relation to the complainant's sexual experience, only in accordance with section 46.

(2) Subpart 1 (hearsay evidence) and Subpart 2 (opinion evidence and expert evidence) do not apply to evidence of a person's reputation that relates to propensity.

Definitions: **party**, **proceeding**, **propensity evidence**, **sexual case**, s 4.

Section 42 Propensity rule

C193 *Section 4* defines propensity evidence as evidence of a person's disposition or behaviour that tends to show a propensity to act in a particular way or to have a particular state of mind. The definition does not differentiate between propensity evidence offered to prove guilt in a criminal proceeding and propensity evidence offered for some other purpose. Thus propensity evidence can be used to show that a person was at a cricket match on a particular Saturday by proving that he or she had been regularly attending cricket matches at that venue on each Saturday for a number of years. Another common form of propensity evidence is "good character" evidence. In both cases, admissibility will be governed by relevance and the other matters set out in *s 8* (general exclusion).

C194 The Code reflects the law's traditional concern with the prejudice associated with propensity evidence that reflects badly on the character of a defendant in a criminal case. *Sections 43* to *45* impose special controls on the admissibility of such evidence in the various circumstances in which it may be offered at a trial. Likewise, the law has come to recognise the unfairness and lack of probative value of propensity evidence about the sexual experience of a complainant in a sexual case. This sort of evidence is now controlled by *s 46*. Finally, *s 39(5)* makes it clear that when evidence fits the definition of propensity evidence but is solely or mainly relevant to a person's truthfulness, the truthfulness rules (*s 39*), and not the propensity rules, govern admissibility.

C195 *Section 42(2)* removes the operation of the hearsay and opinion rules in connection with evidence of a person's reputation (which would normally comprise both hearsay and opinion evidence) relating to propensity.

43 Propensity evidence about defendants

(1) A defendant in a criminal proceeding may offer propensity evidence about himself or herself.

(2) If a defendant offers propensity evidence about himself or herself, the prosecution or another party may, with the permission of the judge, offer propensity evidence about that defendant.

(3) Section 45 does not apply to propensity evidence offered by the prosecution under subsection (2).

Definitions: **judge**, **proceeding**, **propensity evidence**, s 4.

Section 43 Propensity evidence about defendants

C196 Under *s 43(1)* a defendant may offer propensity evidence about himself or herself either personally or through another witness.

C197 Under *s 43(2)*, once the defendant has put his or her own propensity in issue by offering evidence of it, the prosecution may cross-examine the defendant on his or her propensity or offer evidence of the defendant's propensity through another witness. A judge would be expected to warn an unrepresented defendant of the consequences of offering propensity evidence about himself or herself. By virtue of *s 43(3)*, the restrictions of *s 45* do not apply to evidence of a defendant's propensity offered by the prosecution under *s 43(2)*. However, the requirement for permission enables the judge to prevent unfairness to the defendant. For example, if a defendant offers evidence about his or her regular attendance at cricket matches to show that he or she was there on a particular occasion and therefore could not have been at the crime scene, the judge is unlikely to allow the prosecution to retaliate by offering totally unrelated propensity evidence consisting of the defendant's previous convictions.

C198 A defendant should be able to assert, as part of his or her defence, that a prosecution witness is more likely to have committed the offence for which he or she is being tried, without opening himself or herself to a general attack on propensity. Therefore if a defendant offers evidence about the propensity of a prosecution witness, the prosecution's retaliatory evidence about the defendant's propensity must comply with *s 45*.

44 Propensity evidence about co-defendants

(1) A defendant in a criminal proceeding may offer propensity evidence about a co-defendant only if that evidence is relevant to the defence presented by the defendant.

(2) A defendant in a criminal proceeding who proposes to offer propensity evidence about a co-defendant must give notice in writing to that co-defendant and every other co-defendant of the proposal to offer that evidence unless the requirement to give notice is waived by all the co-defendants or by the judge in the interests of justice.

(3) A notice must
  (a) include the contents of the proposed evidence; and
  (b) be given a sufficient time before the hearing to provide all the co-defendants with a fair opportunity to prepare to meet that evidence.

Definition: **judge**, **proceeding**, **propensity evidence**, s 4.

Section 44 Propensity evidence about co-defendants

C199 *Section 44* allows a defendant to offer propensity evidence about a co-defendant in the same proceeding provided that the evidence is relevant to the defendant's defence and notice is given. It operates whether or not the defendant gives evidence in person. The purpose of *s 44* is not to fetter the defendant's right to present a defence, but to ensure that in exercising that right the defendant does not engage in irrelevant attacks on co-defendants.

C200 *Section 44(3)* The notice should allow sufficient time to consider whether to apply for severance.

45 Propensity evidence offered by prosecution about defendants

(1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence

(a) is of acts or omissions of which there is sufficient evidence for a fact-finder acting reasonably to find that the defendant was the person involved; and

(b) has a probative value in relation to an issue in dispute in the proceeding which clearly outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.

(2) When assessing the probative value of propensity evidence, the judge must take into account the nature of the issue in dispute.

(3) When assessing the probative value of propensity evidence, the judge may consider, among other matters, the following:

(a) the frequency with which the acts or omissions which are the subject of the evidence have occurred;

(b) the connection in time between the acts or omissions which are the subject of the evidence and the acts or omissions which constitute the offence for which the defendant is being tried;

(c) the extent of the similarity between the acts or omissions which are the subject of the evidence and the acts or omissions which constitute the offence for which the defendant is being tried;

(d) the number of persons making allegations against the defendant that are the same as or similar to that which is the subject of the offence for which the defendant is being tried and whether those allegations may be the result of collusion or suggestibility;

(e) the extent to which the acts or omissions which are the subject of the evidence and the acts or omissions which constitute the offence for which the defendant is being tried are unusual.

Section 45 continues overleaf

Section 45 Propensity evidence offered by prosecution about defendants

C201 *Section 45(1)*, in largely codifying the common law, recognises the prejudicial nature of propensity evidence for defendants in criminal proceedings by providing added protection. Propensity evidence offered by the prosecution about a defendant in a criminal proceeding must

- be about acts or omissions that are prima facie those of the defendant;
- relate to an issue in dispute in the proceeding; and
- have a probative value that clearly outweighs the risk of being unfairly prejudicial to the defendant.

C202 Since evidence of a person's propensity to tell the truth or propensity not to tell the truth is evidence solely or mainly about truthfulness, it is subject to the truthfulness rules, and not the propensity rules.

C203 *Section 45(2)* makes it mandatory for the judge to take into account the nature of the issue in dispute when deciding whether or not to admit propensity evidence. For example, the threshold for admitting propensity evidence tending to prove guilty knowledge in a case where the possession of stolen property is not disputed, is likely to be lower than for admitting propensity evidence tending to identify the defendant as the perpetrator of a crime. The reason is that the former is likely to be less unfairly prejudicial to the defendant than the latter. The overriding factor will always be the test in *s 45(1)*.

C204 *Section 45* does not apply to propensity evidence about a defendant offered by the prosecution under *s 43(2)* – that is, after the defendant has offered propensity evidence about himself or herself. But *s 45* does apply to propensity evidence about a defendant offered by the prosecution in response to propensity evidence offered by a defendant about a prosecution witness: see the discussion in C198.

C205 The matters listed in *s 45(3)* on the probative value side of the balance follow the case law on admissibility of similar fact evidence.

Section 45 commentary continues overleaf

(4) When assessing the prejudicial effect of evidence on the defendant, the judge must consider, among other matters,
   (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
   (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

Definitions: **judge**, **proceeding**, **propensity evidence**, s 4.

C206 When assessing prejudicial effect under *s 45(4)*, a judge is likely to take into account the extent to which the matters set out in *paras (a)* and *(b)* can be mitigated by an appropriate direction to the jury.

Complainants in sexual cases

46 Evidence of the sexual experience of complainants in sexual cases

(1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the judge.

(2) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the defendant unless the evidence or question relates directly to the acts, events, or circumstances which constitute the offence for which the defendant is being tried or is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interests of justice to exclude it.

(3) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters

(a) for the purpose of supporting or challenging the truthfulness of the complainant; or

(b) for the purpose of establishing the complainant's consent; or

(c) for any other purpose except with the permission of the judge.

Section 46 continues overleaf

Section 46 Evidence of the sexual experience of complainants in sexual cases

C207 *Section 46* modifies the current New Zealand rape shield provision, s 23A of the Evidence Act 1908.

C208 The amendments reinforce the purpose of rape shield law, which is to exclude evidence of the complainant's sexual experience or reputation in sexual matters if such evidence is not probative.

C209 *Section 46(1)* largely re-enacts the general rule in s 23A(2)(a) of the Evidence Act 1908 that permission must be granted before any evidence may be offered or any question may be put about the complainant's sexual experience with people other than the defendant.

C210 *Section 46(2)* is new in extending the test of direct relevance to evidence about the complainant's sexual experience with the defendant. The intention is to signal a point that may be overlooked – that the fact a complainant has had a sexual encounter with a defendant does not necessarily indicate the complainant's consent, or the defendant's reasonable belief in the complainant's consent, on the occasion in question. The reference to the offence for which the defendant is being prosecuted is intended to avoid any argument that the complainant's sexual experience with the defendant includes the incident that is the subject matter of the trial.

C211 *Section 46(3)* amends the existing provision (s 23A(2)(b)) by prohibiting questions or evidence about the complainant's reputation in sexual matters if the purpose of such questions or evidence is merely to challenge the complainant's truthfulness or to establish the complainant's consent – *s 46(3)(a)* and *(b)* – and by requiring the permission of the judge for any other purpose – *s 46(3)(c)*.

Section 46 commentary continues overleaf

(4) In an application for permission under subsection (1) or (3)(c), the judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interests of justice to exclude it.

(5) The permission of the judge is not required to rebut or contradict evidence given under subsection (1) or (3)(c).

(6) Subsection (1) does not apply where the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant.

(7) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

Definitions: **judge**, **party**, **proceeding**, **sexual case**, **truthfulness**, **witness**, s 4.

C212 *Section 46(3)* does not preclude evidence of a complainant's reputation to lie about sexual matters; for example, a reputation for making false allegations of sexual assault. Such evidence is about reputation for truthfulness (or lack of it), not about reputation in sexual matters, and is admissible provided that it complies with the truthfulness rules.

C213 *Section 46(4)* re-enacts the substance of s 23A(3) of the Evidence Act 1908.

C214 *Section 46(5)* re-enacts the substance of s 23A(4)(a) of the Evidence Act 1908.

C215 *Section 46(6)* re-enacts the substance of s 23A(4)(b) of the Evidence Act 1908.

C216 *Section 46(7)* re-enacts the substance of s 23A(6) of the Evidence Act 1908.

Subpart 6 – Identification evidence

47 Admissibility of visual identification evidence

(1) If a formal procedure is observed by officers of an enforcement agency in obtaining visual identification evidence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.

Section 47 continues overleaf

Subpart 6
Identification evidence

Section 47 Admissibility of visual identification evidence

C217 The Code does not give preference to any particular modes of visual identification, such as live parades. Instead there is an underlying presumption, based on recent research, that visual identification evidence obtained by following a procedure that incorporates certain specified elements (called a "formal procedure") will generally be reliable and therefore should be admissible; and conversely, that visual identification evidence obtained without following such a procedure will generally not be reliable and therefore should be inadmissible.

C218 The formal procedure is not intended to apply if the identification witness is the enforcement officer who arrested or participated in arresting a defendant. The ordinary and natural meaning of the words of *s 47(1)*, read together with the definition of "visual identification evidence" ("a formal procedure . . . observed by [an enforcement officer] in obtaining . . . an assertion by a person to the effect that a defendant . . . was present at a place") clearly does not apply to such a situation. Section 47 does not preclude the admissibility of such identification evidence, and the issue is one of weight for the fact-finder.

C219 This Subpart applies to the identification of defendants as well as of persons other than defendants whose identification is crucial in proving the case against the defendant, an example being the identification of one of the victims in *R v Tamihere* [1991] 1 NZLR 195 (CA).

C220 The provisions of this section apply to all enforcement officers, not just members of the Police Force. The Code recognises that it will not always be possible or necessary to follow a formal procedure. Thus, the presumption of admissibility also applies if there is good reason for not following a formal procedure. An example is the police practice of driving around in the vicinity of the crime scene with the victim or other identifier in the police vehicle shortly after a crime is reported, to see if he or she can spot the alleged offender – *s 47(4)(e)*. Similarly, there is no intention to impose the requirements of a formal procedure if the person to be identified is so well known to the identifier that the risk of a mistaken identification is virtually non-existent; for example, where they are members of the same family – *s 47(4)(d)*.

Section 47 commentary continues overleaf

(2) If a formal procedure is not observed by officers of an enforcement agency in obtaining visual identification evidence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made were likely to have produced a reliable identification.

(3) For the purposes of this section, a **formal procedure** is a procedure for obtaining visual identification evidence

(a) that is observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency; and

(b) in which the person to be identified is compared to no fewer than 8 other persons who are similar in appearance to the person to be identified; and

(c) in which no indication is given to the witness as to which of the persons in the procedure is the person to be identified; and

(d) in which the witness is informed that the offender or other person to be identified may or may not be one of the persons being compared; and

(e) that is the subject of a written record of the procedure actually followed that is sworn to be true and complete by the officer who conducted the procedure and provided to the judge and the defendant (but not the jury) at the hearing; and

(f) that is the subject of a pictorial record of what the witness looked at that is prepared and certified to be true and complete by the officer who conducted the procedure and provided to the judge and the defendant (but not the jury) at the hearing.

Section 47 continues overleaf

C221 The provisions of ss 344B and 344C of the Crimes Act 1961 have not been altered by this Subpart.

C222 *Section 47(1)* The standard of proof on the defendant to show that visual identification evidence is unreliable, notwithstanding compliance with a formal procedure or the existence of good reason, is on the balance of probabilities.

C223 *Section 47(2)* If, for no good reason, a formal procedure has not been followed, the visual identification evidence is inadmissible unless the prosecution proves beyond reasonable doubt that the circumstances surrounding the identification were likely to have produced a reliable identification. One important factor the judge is likely to take into account in assessing reliability under this subsection is how many of the requirements of the formal procedure have been met.

C224 *Section 47(3)* This subsection sets out the features of a **formal procedure** for obtaining visual identification evidence. These features are applicable to all modes of visual identification – live parade, photograph montage, computerised photographic image montage, or video parade. All the features must be present. They are intended to promote reliability and to eliminate opportunities for prompting the identification witness, either intentionally or unintentionally. Additionally, *paras (e)* and *(f)* will provide the judge and the defendant with a record of the process.

C225 The intended effect of *ss 47(2)* and *(3)* is to preclude visual identification evidence consisting of a witness identifying a defendant for the first and only time by pointing to the defendant in the dock. It would be hard to convince the judge beyond reasonable doubt that such evidence would be reliable.

Section 47 commentary continues overleaf

(4) The circumstances referred to in the following paragraphs, and no others, are **good reasons** for not following a formal procedure:

(a) a refusal of the person to be identified to take part in the procedure (that is, by refusing to take part in a parade or other procedure, or to permit a photograph or video record to be taken, where the enforcement agency does not already have a photo or video record of that person); or

(b) the singular appearance of the person to be identified (being of a nature that cannot be disguised so that the person is similar in appearance to those with whom the person is to be compared); or

(c) a substantial change in the appearance of the person to be identified after the alleged offence occurred and before it was practical to hold a formal procedure; or

(d) no officer of the enforcement agency could reasonably anticipate that identification would be an issue at the trial of the defendant; or

(e) where an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence was reported and in the course of that officer's initial investigation; or

(f) where an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency after a fortuitous meeting between the person who made the identification and the person alleged to have committed the offence.

Definitions: **enforcement agency**, **judge**, **proceeding**, **video record**, **visual identification evidence**, **witness**, s 4.

C226 *Section 47(4)* Since identification evidence is prima facie admissible if there was good reason for not following a formal procedure in obtaining it, the situations listed in *s 47(4)* are intended to be exhaustive. Even if none of these factors exists, it will still be open to the prosecution to seek to prove beyond reasonable doubt that the circumstances in which the identification was made were likely to have produced a reliable identification – *s 47(2)*.

C227 An example of a situation to which *para (d)* is intended to apply is where a group of people who witnessed an incident are subsequently called to give evidence, and in the course of doing so each names the others as having been present.

C228 An example of *para (f)* is a chance encounter, for example in a dairy, when a witness recognises the alleged offender.

48 Admissibility of voice identification evidence

Voice identification evidence offered by the prosecution in a criminal proceeding is inadmissible unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made were likely to have produced a reliable identification.

Definitions: **voice identification evidence**, **proceeding**, s 4.

Section 48 Admissibility of voice identification evidence

C229 Recent research suggests that voice identification is generally even less reliable than visual identification. There is therefore a presumption that voice identification is unreliable, requiring the prosecution to prove beyond reasonable doubt the likelihood that the particular identification was reliable.

Subpart 7 – Evidence of convictions and civil judgments

49 Conviction as evidence in civil proceedings

(1) When the fact that a person has committed an offence is relevant to an issue in a civil proceeding, evidence of that person's conviction of that offence is admissible and, on proof of that conviction, it will be presumed, in the absence of proof to the contrary, that the person committed that offence.

(2) This section applies
  (a) whether or not the person convicted is a party to the proceeding; and
  (b) whether or not the person was convicted on a guilty plea.

(3) Any party to a civil proceeding in which evidence of a conviction is admitted under this section may offer evidence tending to prove that the person convicted did not commit the offence of which that person was convicted.

(4) This section does not affect a provision in any other enactment to the effect that a conviction or a finding of fact in a criminal proceeding is to constitute conclusive evidence for the purposes of any other proceeding.

Definitions: **conviction**, **party**, **proceeding**, s 4.

Subpart 7
Evidence of convictions and civil judgments

C230 This Subpart extends the abolition of the rule in *Hollington v F Hewthorn & Co* [1943] KB 587 CA, effected by ss 23 and 24 of the Evidence Amendment Act (No 2) 1980. It makes evidence of a person's conviction presumptive proof in a subsequent criminal or civil proceeding, and conclusive proof in a defamation proceeding, that the person committed the offence. "Conviction" is defined in *s 4*. Note the convenient way of proving convictions provided by *s 123*. The definition of "proceeding" (also in *s 4*) means that the rules in this Subpart only apply to court proceedings.

C231 The Code has no express provisions covering evidence of acquittals. Under the Code, evidence of an acquittal is admissible for the purposes of autrefois acquit, issue estoppel and in a claim of malicious prosecution, being relevant in terms of *s 7*: "having a tendency to prove or disprove anything that is of consequence to the determination of the proceeding".

Section 49 Conviction as evidence in civil proceedings

C232 This section replaces and extends s 23 of the Evidence Amendment Act (No 2) 1980, which allows evidence of a person's conviction of an offence to be given in a civil proceeding as proof that the person committed that offence. Under this section, the person is presumed to have committed the offence for which he or she was convicted. The presumption may be rebutted by proof to the contrary on the balance of probabilities. Any party to the civil proceeding may offer evidence to rebut the presumption.

50 Conviction as evidence in defamation proceedings

In a proceeding for defamation based on a statement made by a person to the effect that some other person has committed an offence, the conviction of that person of that offence is admissible in evidence in the proceeding and is conclusive proof that that person committed that offence if the conviction subsisted when the statement was made or the conviction occurs after the statement was made.

Definitions: **conviction**, **proceeding**, **statement**, s 4.

Section 50 Conviction as evidence in defamation proceedings

C233 This section replaces and extends s 24 of the Evidence Amendment Act (No 2) 1980. Under s 24, in a defamation proceeding based on a statement by one person (A) that another person (B) has committed an offence, evidence of B's conviction is "sufficient evidence in the absence of proof to the contrary" that B committed the offence. Under *s 50*, evidence of B's conviction is conclusive proof that B committed the offence for which he was convicted. In other words, proof of B's conviction will give A a complete defence of truth under s 8 of the Defamation Act 1992. *Section 50* applies irrespective of whether B is convicted before or after A makes the statement: a subsequent conviction equally justifies A's allegation.

51 Conviction as evidence in criminal proceedings

(1) Evidence of the fact that a person has been convicted of an offence is, if not excluded by any other provision of this Code, admissible in a criminal proceeding and, on proof of the conviction, it will be presumed, in the absence of proof to the contrary, that the convicted person committed that offence.

(2) A party to a criminal proceeding who wishes to offer evidence of the fact that a person has been convicted of an offence must first inform the judge of the purpose of offering that evidence.

Definitions: **conviction**, **judge**, **party**, **proceeding**, s 4.

52 Civil judgment as evidence in civil or criminal proceedings

(1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.

(2) This section does not affect the operation of
(a) a judgment in rem; or
(b) the law relating to res judicata or issue estoppel.

Definition: **proceeding**, s 4.

Section 51 Conviction as evidence in criminal proceedings

C234 Under this section, evidence of a person's conviction is admissible in a criminal proceeding. That person is presumed, in the absence of proof to the contrary, to have committed the offence for which he or she was convicted. Any party may offer the evidence of the convictions; equally, any party, not just the convicted person, may offer evidence in rebuttal. The evidence is only admissible if it is not excluded by any other provision in the Code.

C235 The prior requirement in *s 51(2)* to inform the judge of the purpose of offering the evidence enables the judge to consider whether the evidence is excluded by the operation of any other rule in the Code. For example, if evidence of a person's convictions is offered for the purpose of attacking that person's truthfulness, that evidence must be substantially helpful in assessing his or her truthfulness; and if that person is a defendant in the proceeding, either *s 40* or *s 41* of this Code will apply, depending on who is offering that evidence. Similarly, if the evidence is offered for the purpose of proving propensity, the relevant propensity rule will apply (*ss 43*, *44* and *45*). If the evidence is offered by one defendant against a co-defendant, notice must be given under *s 41* or *s 44*.

C236 Examples of where evidence of a conviction may be relevant to an issue in the case are: evidence of a conviction of a third party for theft to support a charge of being an accessory after the fact; or evidence of a defendant's conviction for assault in a later murder trial where the victim dies of the injuries.

Section 52 Civil judgment as evidence in civil or criminal proceedings

C237 This section codifies the existing law, including the law relating to judgments in rem and res judicata or issue estoppel.

PART 4
PRIVILEGE AND CONFIDENTIALITY

53 Interpretation

(1) In this Part

employed legal adviser means a person who holds a current practising certificate issued under the *Law Practitioners Act 1982* and is a partner or employee of a person who does not hold a current practising certificate issued under that Act, but does not include a person who is employed by the Crown Law Office.

legal adviser means a person who holds a current practising certificate issued under the *Law Practitioners Act 1982* and

(a) practises on his or her own account as a barrister, a barrister and solicitor, or a solicitor as

(i) a sole practitioner; or

(ii) a partner of a partnership which consists only of persons who hold current practising certificates issued under that Act; or

(b) is employed by such a sole practitioner or partnership as is referred to in paragraph (a); or

(c) is employed by the Crown Law Office; or

(d) is a registered patent attorney; or

(e) is an employed legal adviser.

(2) A reference in this Part to a communication made or received by a person or an act carried out by a person includes a reference to a communication made or received or an act carried out by an authorised representative of that person on that person's behalf.

(3) Subsection (2) does not apply to

(a) section 59 (Privilege for communications with ministers of religion);

(b) section 60 (Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists);

(c) section 65 (Informers).

Definitions: **clinical psychologist**, s 60; **informer**, s 65; **minister of religion**, s 59.

PART 4
PRIVILEGE AND CONFIDENTIALITY

Section 53 Interpretation

C238 The definition of "proceeding" in *s 4* does not include an arbitration. However, witnesses appearing before an arbitral tribunal have the same privileges and immunities as witnesses in court proceedings – see the discussion in C33.

C239 In *s 53(1)*, the separate definition of **employed legal adviser** (ie, an in-house lawyer employed by a commercial firm or by a government department other than the Crown Law Office) is needed for the purposes of *s 55(3)*, which is intended to ensure that the privilege of such employers is confined to communications made with employed legal advisers when the latter are acting in the capacity and doing the work of lawyers. The definition of **legal adviser** embraces all holders of current practising certificates. It includes patent attorneys, who were given a privilege analogous to legal professional privilege by s 34 of the Evidence Amendment Act (No 2) 1980.

C240 *Section 53(2)* extends privilege to communications by and to agents of the persons concerned. Because of *s 53(3)*, this extension does not apply to the privilege for communications with ministers of religion or by informers, since it is considered that, in their cases, the privilege should be confined to direct communications. Nor does it apply to medical practitioners and clinical psychologists in the circumstances defined by *s 60*, since *s 60(5)* provides more specific coverage.

54 Effect and protection of privilege

(1) A person who has a privilege conferred by this Part in respect of a communication has the right to refuse to disclose in a proceeding
  (a) the communication; and
  (b) any information contained in that communication; and
  (c) any opinion formed by a person which is based upon that communication or information.

(2) A person who has a privilege conferred by this Part in respect of information or a document has the right to refuse to disclose in a proceeding that information or document and any opinion formed by a person which is based upon that information or document.

(3) A person who has a privilege conferred by this Part in respect of a communication, information, opinion, or document may require that the communication, information, opinion, or document must not be disclosed in a proceeding
  (a) by the person to whom the communication is made or the information given, or by whom the opinion is given or the information or document prepared or compiled; or
  (b) by any other person who has come into possession of it with the authority of the person who has the privilege, in confidence and for purposes related to the circumstances that have given rise to the privilege.

(4) Where a communication, information, opinion, or document, in respect of which a person has a privilege conferred by this Part, is in the possession of a person other than a person referred to in subsection (3), a judge may, of the judge's own initiative or on the application of the person who has the privilege, order that the communication, information, opinion, or document must not be disclosed in a proceeding.

Definitions: **document**, **judge**, **proceeding**, s 4.

Section 54 Effect and protection of privilege

C241 *Section 54(1)* gives an extended meaning to references to a communication in this Part. *Sections 54(2)* and *(3)* set out the basic effect of privilege, namely that the person entitled to the privilege has a right to refuse to disclose the privileged information and to forbid those properly in possession of such information to disclose it.

C242 *Section 54(4)* deals with the situations of others who may have acquired the information; for example, by accident or dishonestly.

C243 *Section 54* does not apply to material that is protected through the exercise of a judicial discretion to protect confidential information. The judge determines the extent to which this material is protected. *Section 54* also does not apply to *s 66*, which does not create a privilege but merely protects the identity of journalists' sources by granting limited non-compellability to journalists and their employers. Nor does it apply to *s 61* because the privilege against self-incrimination is not in fact a true privilege but a right not to be compelled to give self-incriminating testimony.

55 Privilege for communications with legal advisers

(1) A person who requests professional legal services from a legal adviser has a privilege in respect of any communication between that person and that legal adviser if the communication was

(a) intended to be confidential; and

(b) made in the course of and for the purpose of obtaining professional legal services from or giving such services to the person by the legal adviser.

(2) In this section, **professional legal services** means, in the case of a registered patent attorney, obtaining or giving information or advice relating to any patent, design, or trademark, or to any application in respect of a patent, design, or trademark, whether or not the information or advice relates to a matter of law.

(3) In the case of professional legal services obtained from an employed legal adviser, this section confers a privilege only in respect of professional legal services provided by an employed legal adviser solely in the capacity of a legal adviser.

Definitions: **employed legal adviser**, **legal adviser**, s 53(1).

Section 55 Privilege for communication with legal advisers

C244 *Section 55(1)* spells out what is essentially the present law on privilege for legal advice. *Section 55(2)(a)* reproduces the special provisions for patent attorneys now to be found in s 34(4) of the Evidence Amendment Act (No 2) 1980. Because employed legal advisers are often required to perform duties that do not come within the professional functions of a legal adviser, and to avoid misusing the privilege by extending it beyond activities usually done by a lawyer, *s 55(3)* makes it clear that the privilege exists only when an employed legal adviser is acting in the capacity of a legal adviser.

56 Privilege and solicitors' trust accounts

(1) This section applies to books of account and accounting records kept by a solicitor in relation to

(a) any trust account money that is subject to section 89 of the *Law Practitioners Act 1982*; or

(b) any solicitors' nominee company operated by a solicitor with the consent of the relevant District Law Society as a nominee in respect of securities and documents of title held for clients.

(2) Section 55 does not prevent, limit, or affect

(a) the issue of a search warrant under section 198 of the *Summary Proceedings Act 1957*, or the execution of any such warrant issued by a District Court Judge, in respect of any document to which this section applies; or

(b) the offering of any evidence relating to the contents of any such document obtained under such a warrant in any criminal proceeding for any offence described in the warrant, where the warrant was issued by a District Court Judge.

Definitions: **document**, **proceeding**, s 4.

Section 56 Privilege and solicitors' trust accounts

C245 This section re-enacts the substance of s 35A of the Evidence Amendment Act (No 2) 1980 and excludes the operation of the privilege for communications with legal advisers, to allow a solicitor's records of trust accounts and nominee company accounts to be seized under a search warrant and later used in evidence.

57 Privilege for preparatory materials for proceedings

(1) A person who is a party to, or contemplates on reasonable grounds becoming a party to, a proceeding (referred to in this section as the "party") has a privilege in respect of

(a) any communication between the party, or that party's legal adviser, and any other person,

(b) any information compiled or prepared by the party or that party's legal adviser,

(c) any information compiled or prepared at the request of the party, or that party's legal adviser, by any other person,

if the dominant purpose of making or receiving the communication or compiling or preparing the information was to prepare for the proceeding.

(2) Subsection (1) does not apply in respect of a communication or information if the proceeding in question is under, or to be under, the *Guardianship Act 1968* unless the proceeding is a criminal proceeding for an offence under that Act.

Definitions: **party**, **proceeding**, s 4; **legal adviser**, s 53(1).

Section 57 Privilege for preparatory materials for proceedings

C246 *Section 57(1)* is intended to state the existing law as laid down by the Court of Appeal in *Guardian Royal Exchange Assurance Ltd v Stuart* [1985] 1 NZLR 596. The exception in *s 57(2)* reflects the view of the House of Lords expressed in *In Re L* [1997] AC 16 that a distinction is to be drawn between the litigation privilege appropriate to adversarial processes and proceedings where the welfare of a child is paramount.

58 Privilege for settlement negotiations

(1) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was intended to be confidential and was made in connection with an attempt to settle the dispute between the persons.

(2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document which that person has prepared, or caused to be prepared, in connection with an attempt to negotiate a settlement of the dispute.

(3) This section does not apply

(a) where an agreement settling the dispute has been concluded; or

(b) in a proceeding where the conclusion of such an agreement is in issue.

Definitions: **document**, **judge**, **party**, **proceeding**, s 4.

Section 58 Privilege for settlement negotiations

C247 This section is intended to state the existing law. The usual but not the only way of indicating the intention referred to in *s 58(1)* will be to employ the expression "without prejudice". The privilege created by this subsection belongs to both parties, not just the party who makes the communication. *Section 58(2)* applies the privilege to documents prepared by or at the instigation of one party in connection with attempts at settlement but not communicated to the other party. Examples would be preparatory notes about possible points of agreement, or information compiled at the request of the other party as a pre-condition for negotiation. Here the privilege would belong only to the party who prepared the document.

C248 *Section 58(3)* is inserted to remove doubt. If the parties reach agreement, there is then a contract on which either party may sue. In that litigation, it must of course be possible to refer not only to the agreement made, but also – if, for example, one party alleges that the agreement was induced by mistake or misrepresentation – to the communications relied on to support that allegation.

59 Privilege for communications with ministers of religion

(1) A person has a privilege in respect of any communication between that person and a minister of religion if the communication was

(a) made in confidence to or by the minister in the minister's capacity as a minister of religion; and

(b) made for the purpose of the person obtaining or receiving from the minister religious or spiritual advice, benefit or comfort.

(2) A person is a **minister of religion** for the purposes of this section if the person has a status within a church or other religious or spiritual community which requires or calls for that person to receive confidential communications of the kind referred to in subsection (1) and to respond with religious or spiritual advice, benefit, or comfort.

Section 59 Privilege for communications with ministers of religion

C249 The corresponding provision in the present law (s 31 of the Evidence Amendment Act (No 2) 1980) protects sacramental confessions. The Code provision is concerned with religious or spiritual advice, a wider term but not extending to all counselling that a clergyman may give (for example, budget advice from a City Missioner). Advice not within the term "religious or spiritual advice" may of course still be protected by *s 67* (overriding discretion as to confidential information). The definition of **minister of religion** in *s 59(2)* is intended to extend beyond persons ordained under a traditional organisational structure.

60 Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists

(1) This section applies to a person who consults or is examined by a medical practitioner or a clinical psychologist for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct, but does not apply in the case of a person who has been required by an order of a judge, or by other lawful authority, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or other purpose.

(2) A person has a privilege in a criminal proceeding in respect of any communication made by the person to a medical practitioner or clinical psychologist which the person believes is necessary to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.

(3) A person has a privilege in a criminal proceeding in respect of information obtained by a medical practitioner or clinical psychologist as a result of consulting with or examining the person to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.

(4) A person has a privilege in a criminal proceeding in respect of information consisting of a prescription, or notes of a prescription, for treatment prescribed by a medical practitioner or clinical psychologist as a result of consulting with or examining the person to enable the medical practitioner or clinical psychologist to treat or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.

(5) A reference in this section to a communication to or information obtained by a medical practitioner or a clinical psychologist is to be taken to include a reference to a communication to or information obtained by a person acting in a professional capacity on behalf of a medical practitioner or clinical psychologist in the course of the examination or treatment of, or care for, the person by that medical practitioner or clinical psychologist.

Section 60 continues overleaf

Section 60 Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists

C250 The precursor of this section is s 33 of the Evidence Amendment Act (No 2) 1980. This section applies only to criminal proceedings. It protects communications between patient and medical practitioner or a clinical psychologist in circumstances where the patient has consulted the medical practitioner or clinical psychologist for assistance relating to drug dependency or any other condition or behaviour (a paedophiliac propensity, for example) that may manifest itself in criminal conduct. Its purpose is to encourage such persons to obtain assistance and to enable them to communicate candidly with those from whom they seek help. The protection extends (*s 60(3)*) to communications from the patient and also to information the practitioner obtains by examining the patient, as well as (*s 60(4)*) to prescriptions for treatment and (*s 60(5)*) to communications to people such as practice nurses acting in a professional capacity on behalf of the practitioner.

C251 Communications between patient and other health professionals such as physiotherapists or occupational therapists are protected under *s 67* (overriding discretion as to confidential information).

(6) In this section

clinical psychologist means a psychologist registered under the *Psychologists Act 1981* who is engaged in the diagnosis and treatment of persons suffering from mental and emotional problems.

drug dependency means the state of periodic or chronic intoxication produced by the repeated consumption, smoking, or other use of a controlled drug (as defined in section 2(1) of the *Misuse of Drugs Act 1975*) detrimental to the user, and involving a compulsive desire to continue consuming, smoking or otherwise using the drug or a tendency to increase the dose of the drug.

Definitions: **judge**, **proceeding**, s 4.

61 Privilege against self-incrimination

(1) A person who is required to provide specific information

(a) in the course of a proceeding, or

(b) by a person exercising a statutory power or duty, or

(c) by a police officer or other person holding a public office in the course of an investigation into a criminal offence or a possible criminal offence,

has a privilege in respect of that information and cannot be required to provide that information if to do so would be likely to incriminate that person in such a manner that the person is liable to be prosecuted under New Zealand law for an offence of a kind for which a sentence of imprisonment can be imposed.

(2) A person who has a privilege against self-incrimination in respect of specific information cannot be prosecuted or penalised for refusing or failing to provide that information whether or not the person claimed the privilege when the person refused or failed to provide the information.

Section 61 continues overleaf

Section 61 Privilege against self-incrimination

C252 *Section 61(1)* indicates the situations in which the privilege may apply, in the absence of legislation to the contrary. These reflect the common law in that the privilege is against compelled, rather than voluntary, self-incrimination. Compulsion is present in the following situations:

- a person is required by law to make self-incriminating disclosures (eg, under a subpoena, judicial order, or an official's exercise of statutory powers); or
- a person is under pressure to make self-incriminating disclosures in response to questioning by the police or other officials exercising criminal investigatory powers.

C253 A person may only claim the privilege for information that, if disclosed, would expose him or her to the risk of prosecution *for an offence punishable by imprisonment*. This is a significant change to the common law privilege. "Incriminate" and "self-incrimination" are defined in *s 4* to exclude the privilege being claimed when the only potential detriment arising from disclosure is a civil penalty or a fine.

C254 Section 61 covers information-gathering at the investigative stage as well as testimony in proceedings. This broader approach is consistent with the importance of the privilege as a fundamental right affirmed in ss 23(4), 25(d) and 27(1) of the New Zealand Bill of Rights Act 1990. It also avoids the artificiality of treating separately what are stages in a continuous process and recognises the reality that the way investigations are carried out often emerges as an admissibility issue at the hearing.

C255 The references to "specific information" in *s 61(1)* and *(2)* preclude blanket claims of privilege. The privilege can only be claimed for particularised items of information.

C256 *Section 61(2)* reflects the common law in precluding prosecutions for refusing to supply required information arising from a person's claim of privilege, even though no claim of privilege was made at the time the person refused to supply the information.

Section 61 commentary continues overleaf

(3) Subsections (1) and (2) apply
  (a) unless an enactment explicitly removes the privilege against self-incrimination; and
  (b) to the extent that an enactment does not explicitly remove the privilege against self-incrimination.

(4) Subsections (1) and (2) do not enable a claim of privilege to be made
  (a) on behalf of a body corporate; or
  (b) on behalf of any person other than the person required to provide the information (except by a legal adviser on behalf of a client who is so required); or
  (c) by a defendant in a criminal proceeding in relation to information about a matter for which the defendant is being tried.

Definitions: **incriminate**, **information**, **proceeding**, **self-incrimination**, s 4; **legal adviser**, s 53(1).

C257 *Section 61(3)* reflects the principle that a fundamental right should only be removed or limited by explicit legislation.

C258 *Section 61(4)(a)* does not preclude corporate employees or officers claiming the privilege on their own behalf when they are personally liable to self-incrimination.

C259 The effect of *s 61(4)(b)* is that a person cannot, by relying on the privilege against self-incrimination, refuse to meet a requirement for information on the ground that someone else may be incriminated – for example, a spouse. The privilege cannot be invoked by one person on behalf of another, the only exception being a legal adviser who can claim the privilege on behalf a client who is required to provide the information.

C260 *Section 61(4)(c)* does not prevent a criminal suspect from claiming the privilege at an investigative stage, or about information that may incriminate him or her in relation to some other offence than the offence for which he or she is being tried.

62 Discretion as to incrimination under foreign law

(1) Subsection (2) applies to a person who is required to provide specific information

(a) in the course of a proceeding; or

(b) by a person exercising a statutory power or duty; or

(c) by a police officer or other person holding a public office in the course of an investigation into a criminal offence or a possible criminal offence.

(2) A judge may direct that such a person need not and cannot be required to provide that information if

(a) to do so would be likely to incriminate that person in such a manner that the person would be liable to be prosecuted under a foreign law for an offence of a kind for which a sentence of imprisonment, capital punishment, or corporal punishment can be imposed; and

(b) the judge is of the opinion, having regard to the likelihood of extradition and other relevant matters, that it would be unreasonable to require the person to incriminate himself or herself by providing that information.

(3) Subsection (1) does not enable the judge to issue a direction to

(a) a body corporate; or

(b) any person other than the person required to provide the information (except a legal adviser on behalf of a client who is required to provide information); or

(c) a defendant in a criminal proceeding in relation to information about a matter for which the defendant is being tried.

Definitions: **incriminate**, **information**, **judge**, **proceeding**, s 4; **legal adviser**, s 53(1).

Section 62 Discretion as to incrimination under foreign law

C261 *Section 62* essentially enacts the suggestion of Lord Nicholls in *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140, 147 (PC) that judges ought to have a discretion to provide protection where it would be harsh to force a person to incriminate himself or herself under foreign law. The discretionary protection is similar in scope to the privilege under *s 61*. *Section 62* recognises the reality that incrimination under foreign law could expose a person to the risk of corporal or capital punishment.

63 Privilege against self-incrimination in court proceedings

(1) This section does not

(a) limit the application of section 61; or

(b) apply in respect of the evidence of a defendant in a criminal proceeding in relation to information about a matter for which the defendant is being tried.

(2) If in a court proceeding it appears to the judge that a party or witness may have grounds to claim a privilege against self-incrimination in respect of specific information required to be provided by that person, the judge must satisfy himself or herself that the person is aware of the privilege and its effect.

Section 63 continues overleaf

Section 63 Privilege against self-incrimination in court proceedings

C262 This section provides a certification procedure in court proceedings, whereby a person who voluntarily gives self-incriminating evidence is given a certificate in return which effectively guarantees that the information, and any evidence obtained as a result of the person giving that information, cannot be used against him or her in any other proceeding in New Zealand.

C263 *Section 63(1)(b)* is consistent with *s 61(4)(c)*. The effect of these provisions is that defendants in criminal proceedings who choose to testify cannot claim the privilege under *s 61*, nor be given a certificate under *s 63*.

C264 *Section 63(2)* is modelled on s 132 of the Evidence Act 1995 (Aust), but unlike that provision, which extends to all privileges, the obligation on the judge under *subs (2)* arises only in relation to a privilege against self-incrimination.

Section 63 commentary continues overleaf

(3) A person who claims a privilege against self-incrimination in a court proceeding must offer sufficient evidence to enable the judge to assess whether self-incrimination is reasonably likely if the person provides the required information.

(4) If the judge is satisfied that self-incrimination is reasonably likely if the person provides the required information, the judge must inform the person
  (a) that the person need not provide the information; and
  (b) that, if the witness does provide the information, the judge will cause a certificate to be given under this section; and
  (c) of the effect of a certificate under this section.

(5) If a person does provide information after being informed in accordance with subsection (4), the judge must cause to be given to the person a certificate in the prescribed form.

(6) Information given by a person for which a certificate has been given under this section and evidence of any information, document, or thing obtained directly or indirectly as a result of the person having given that information cannot be used against the person in any other proceeding in New Zealand except in a criminal proceeding concerning the falsity of the information given.

Definitions: **document**, **information**, **judge**, **party**, **proceeding**, **self-incrimination**, **witness**, s 4.

C265 To comply with *s 63(4)*, the judge must ensure that the person is given all the relevant information to make a decision, with or without the assistance of counsel. The following is offered by way of guideline:

> You have what is called a privilege against self-incrimination for the specific information that you have been required to provide. The effect of that privilege is that you cannot be forced to provide the information in this Court. You cannot be prosecuted if you refuse to provide it.
>
> If you do provide the information, the Court will give you a certificate that is issued under s 63 of the Evidence Code. The effect of the certificate is that the information you provide cannot be used against you in any other civil or criminal proceeding in the High Court or a District Court in New Zealand. It could be used though if you were to be prosecuted because the information is false.
>
> In deciding whether to provide the information in return for a certificate of the kind I have described, you should take into account that its effect is limited to other proceedings in the High Court or a District Court in New Zealand. It does not extend to the use of the information by officials exercising statutory investigative powers or to tribunals.
>
> If you do provide the information, people who become aware of it could possibly use it for making further inquiries and investigations. People could also perhaps use the information against you in some way not involving the High Court or a District Court. You should consider those possibilities.
>
> If you do not understand what I have said, you should say so now and I will explain further.

C266 If the person chooses to "waive" the privilege and accept the certificate, the judge is required to issue the certificate. It is not a matter of discretion.

C267 The immunity of a certificate does not extend beyond court proceedings (for example, they do not apply in tribunal hearings) in New Zealand. However, by virtue of article 19(3) of the First Schedule of the Arbitration Act 1996, witnesses appearing before an arbitral tribunal have the same privileges and immunities as witnesses in proceedings before a court. A person who knowingly gives false information cannot rely on any certificate issued under this section.

64 Replacement of privilege with respect to Anton Piller orders

(1) This section applies if a party to a civil proceeding objects to giving particular information in compliance with an Anton Piller order on the grounds that the information may tend to incriminate that person in such a manner that the person is liable to be prosecuted under New Zealand law for an offence of a kind for which a sentence of imprisonment can be imposed.

(2) A party who is required to provide particular information in a civil proceeding in compliance with an Anton Piller order does not have the privilege provided for by section 61 and must comply with the terms of the order, but if the judge is satisfied that self-incrimination is reasonably likely if the party provides the particular information, the judge is to cause to be given to the party a certificate under this section in the prescribed form.

(3) A party who objects to giving particular information in the circumstances and on the grounds set out in subsection (1) must offer sufficient evidence to enable the judge to assess whether self-incrimination is reasonably likely if the person provides the required information.

(4) Information given by a person for which a certificate has been given under this section, and evidence of any information, document, or thing obtained directly or indirectly as a result of the person having given that information, cannot be used against the person in any criminal proceeding in New Zealand, except in a criminal proceeding concerning the falsity of the information.

Definitions: **document**, **incriminate**, **information**, **judge**, **party**, **proceeding**, **self-incrimination**, s 4.

Section 64 Replacement of privilege with respect to Anton Piller orders

C268 *Section 64* codifies the common law prohibiting a party from claiming the privilege against self-incrimination in order to resist an Anton Piller order.

C269 An Anton Piller order, named after the English Court of Appeal decision in *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55 (CA), is made by a judge in a civil proceeding and directs the defendant to permit the plaintiff to enter its premises in order to establish the presence of certain items and, if warranted, to remove them for safekeeping. It is used when the plaintiff fears the defendant will, if alerted, conceal, remove or destroy incriminating evidence. The order developed as a way of countering piracy in intellectual property by enabling copyright owners to catch infringers and to prevent them from continuing to act in breach of the copyright. In New Zealand the jurisdiction to grant an Anton Piller order rests on High Court Rules 9, 322 and 331, as well as the court's inherent jurisdiction and equitable jurisdiction to order interrogatories. See further McGechan *on Procedure* (Brooker's, Wellington, 1988) App 7.

65 Informers

(1) An informer has a privilege in respect of information that would disclose or is likely to disclose the informer's identity.

(2) A person is an **informer** for the purposes of this section if the person
  (a) has supplied, gratuitously or for reward, information to an enforcement agency, or to a representative of an enforcement agency, concerning the possible or actual commission of an offence in circumstances in which the person has a reasonable expectation that his or her identity will not be disclosed; and
  (b) is not called as a witness by the prosecution to give evidence relating to that information.

(3) An informer may be a member of the Police working undercover.

Definitions: **enforcement agency**, **witness**, s 4.

Section 65 Informers

C270 This section codifies the existing law (previously categorised as an aspect of the law protecting state secrets) on protecting those who supply information to assist in law enforcement, on the basis that their identity will be kept secret. As well as police informers, it would include those who tip off the Inland Revenue Department or the Customs Department, for example. The protection extends to undercover police officers who are, however, more comprehensively protected by s 13A of the Evidence Act 1908, which will be re-enacted unamended as part of the Code (see the Comparative Table in Appendix B of the Report).

66 Protection of journalists' sources

(1) A journalist who has promised an informant not to disclose that informant's identity and the employer of such a journalist are not, unless an order is made under subsection (2), compellable in a civil or criminal proceeding to answer any question or produce any document that the journalist or employer would, but for this section, be compellable to answer or produce if that answer or production would disclose the identity of the informant or make possible the discovery of that identity.

(2) The High Court may order that subsection (1) is not to apply if a Judge of the High Court is satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs

(a) any likely adverse effect of such disclosure on the informant or any other person; and

(b) the public interest in the communication of facts and opinion by the news media to the public and the corresponding need of the news media for access to the sources of facts.

(3) The High Court may attach such terms and conditions as it thinks appropriate to an order under subsection (2), including

(a) an order limiting the publication of the informant's identity or of information making possible the discovery of that identity;

(b) a condition that the applicant or any other person cannot bring an action for defamation against the informant or any other person or exercise any powers as an employer adversely to the informant or any other person.

(4) This section does not affect the power or authority of the House of Representatives.

Section 66 continues overleaf

Section 66 Protection of journalists' sources

C271 In recognition of the public interest in press freedom, this section protects the identity of a journalist's informant from disclosure if the journalist has promised the informant that his or her identity will not be disclosed. The High Court may override such a privilege if satisfied that the public interest in disclosure outweighs the need for secrecy. Any order under this section may be made on terms that include restrictions on publication and a disentitlement to seek redress by way of a defamation action. The definition of **news medium** in *s 66(5)* is adapted from the definition of "news medium" in the Defamation Act 1992.

C272 There is Australian precedent for Parliamentary assertion of a select committee's entitlement to ascertain a journalist's sources – the case of the journalists Fitzpatrick and Browne (the right of the courts to go behind the warrant in that case is reported as *R v Richards ex parte Fitzpatrick and Browne* (1955) 192 CLR 157). The purpose of *s 66(4)* is simply to make it clear that *s 66* does not affect whatever entitlement the House of Representatives may have in this regard.

(5) In this section

informant means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that such information may be published in a news medium.

journalist means a person who in the normal course of that person's work may be given information by an informant in the expectation that such information may be published in a news medium.

news medium means a medium for the dissemination to the public or a section of the public of news and observations on news.

Definitions: **document**, **party**, **proceeding**, s 4.

67 Overriding discretion as to confidential information

(1) A judge may, in the circumstances described in subsection (2), direct that a confidential communication, or confidential information, or information which would or might reveal a confidential source of information, must not be disclosed in a proceeding.

(2) A judge may give a direction under this section if the judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in

(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or

(b) preventing harm to

(i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or

(ii) relationships which are of a similar kind to the relationship referred to in subparagraph (i); or

(c) maintaining activities which contribute to or rely on the free flow of information.

Section 67 continues overleaf

Section 67 Overriding discretion as to confidential information

C273 This section is concerned with protecting confidences not protected by the more specific provisions of the Code. The Code does not repeat the specific protection of medical confidences in civil proceedings to be found in s 32 of the Evidence Amendment Act (No 2) 1980, the intention being that there should be reliance on *s 67*. Judges have always exercised the right to exclude evidence on the basis that it would be a breach of confidence to give that evidence. The forerunner of the present section is s 35 of the Evidence Amendment Act (No 2) 1980; but whereas the emphasis in that provision is on the "special relationship" existing between the witness and the person who confided in the witness, the present section is not confined to such a relationship.

C274 *Section 67(2)* provides that a judge may direct non-disclosure if the normal public interest in putting all relevant facts before a fact-finder is outweighed by the public interest in preserving the confidence, measured in terms of the harm brought about by disclosing the confidences.

Section 67 commentary continues overleaf

(3) When considering whether to give a direction under this section, the judge must have regard to

(a) the likely extent of harm which may result from the disclosure of the communication or information; and

(b) the nature of the communication or information and its likely importance in the proceeding; and

(c) the nature of the proceeding; and

(d) whether other means of obtaining evidence of the communication or information are or may be available; and

(e) whether means of preventing or restricting public disclosure of the evidence are available if the evidence is given; and

(f) the sensitivity of the evidence having regard to the time which has elapsed since the communication was made or the information was compiled or prepared and the extent to which the information has already been disclosed to other persons; and

(g) society's interest in protecting the privacy of victims of sexual offences;

and the judge may have regard to any other matters which the judge considers relevant.

(4) A judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by this Part.

Definitions: **judge**, **proceeding**, s 4.

C275 *Section 67(3)* provides a list of factors relevant when determining whether to order non-disclosure.

C276 *Section 67(4)* is a fall-back provision enabling a judge to order non-disclosure of information whether or not it is specifically protected by the other provisions in this Part, or of information that is excluded from any specific protection because the provision expressly limits it.

C277 The power of a judge to disallow privilege under *s 71* does not apply to matters covered by *ss 67* and 68. Protection under these sections arises on the exercise of a discretion, and not as the result of a privilege. Logically, *s 67* or *s 68* and *s 71* are mutually exclusive: a judge cannot exercise a discretion to order non-disclosure under *s 67* or *s 68*, and in relation to the same matter, also exercise the power to order disclosure.

68 Discretion as to matters of state

(1) A judge may direct that a communication or information relating to matters of state must not be disclosed in a proceeding if the judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.

(2) A communication or information relating to matters of state includes a communication or information

(a) in respect of which the reason advanced in support of an application for a direction under this section is one of those set out in sections 6 and 7 of the *Official Information Act 1982*; or

(b) which is official information as defined in section 2 of the *Official Information Act 1982* and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in paragraphs (b) to (k) of section 9(2) of that Act.

(3) A judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by this Part.

Definitions: **judge**, **proceeding**, s 4.

Section 68 Discretion as to matters of state

C278 *Section 68* allows the Government, and those affected by government actions, to have communications withheld in the wider public interest. The section puts the present doctrine of public interest immunity into statutory form. It is the counterpart to *s 67*. Whereas *s 67* applies to private confidential information, *s 68* applies to information whose confidentiality is important to the state or to the effective conduct of public affairs. The basic principle set out in *s 68(1)* is the same. When in any particular case it appears to the judge that the public interest in preserving the confidentiality of information relating to the state or public affairs is more important than the public interest in disclosing it, the judge may direct that the information not be disclosed.

C279 Under *s 68(2)*, the term "matters of state" is defined to include any information in cases where the reason advanced for protecting it corresponds with one of the reasons for protection recognised in the Official Information Act 1982.

C280 Although it will usually be the Government that applies for a direction under this section, the judge may act of his or her own initiative or on the application of an interested person if there appears to be a wider public interest involved. This could occur, for example, in a situation where the information is not in the Government's possession. It could also occur where a person affected by the disclosure believes there is a public interest in maintaining secrecy, but the Government has declined to oppose the application for disclosure.

C281 Unlike *s 67*, this section does not include lists of relevant types of interest or relevant factors. Ample general guidance on the circumstances in which official information should and should not be made available, will be found in the Official Information Act 1982.

C282 The power of a judge under *s 71* to disallow privilege does not apply to matters covered by this section.

69 Waiver

(1) A person who has a privilege conferred by this Part may waive that privilege either expressly or impliedly.

(2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.

(3) A person who has a privilege waives the privilege if that person
  (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
  (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.

(4) A person who has a privilege in respect of a communication, information, opinion, or document which has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.

(5) A privilege conferred by section 58 (which relates to settlement negotiations) may be waived only by all the persons who have that privilege.

Definitions: **document**, **proceeding**, s 4.

Section 69 Waiver

C283 Waiver of a privilege occurs if privilege holders do something that shows they no longer wish to rely on the confidentiality of information.

C284 *Section 69(2)* states the general rule that applies if the privilege holder voluntarily discloses or publishes the privileged information. In general, if that happens, privilege will be lost. But where there has been a limited disclosure, the judge will have to determine whether the disclosure is inconsistent with the intention to preserve confidentiality. As an example, if X obtains a prescription for a prohibited drug from a doctor and then sells the prescription to someone else, at X's trial the Crown should not be precluded by *s 60(4)* from calling the doctor to give evidence of the prescription. X's sale of the prescription would amount to a voluntary disclosure of the privileged information inconsistent with a claim of confidentiality.

C285 *Section 69(3)* As an example, people who sue their lawyer for malpractice cannot rely on legal professional privilege to prevent disclosure of communications between them that are relevant to defending the claim.

C286 *Section 69(4)* deals with the case where a privilege holder has involuntarily disclosed or parted with privileged information. Where there is no intention to disclose, privilege is not waived. The person in possession of the information may be ordered not to disclose it in court proceedings – see *s 54(4)* (effect and protection of privilege).

70 Joint and successive interests in privileged material

(1) A person who jointly with some other person or persons has a privilege conferred by this Part in respect of a communication, information, opinion, or document

(a) is entitled to assert the privilege against third parties; and

(b) is not restricted by this Part from having access or seeking access to the privileged matter; and

(c) may, on the application of another holder of the privilege who wishes the privilege to be maintained, be ordered by a judge not to disclose the privileged matter in a proceeding.

(2) A personal representative of a deceased person who has a privilege conferred by this Part in respect of a communication, information, opinion or document and any other successor in title to property of a person who has such a privilege

(a) is entitled to assert the privilege against third parties; and

(b) is not restricted by this Part from having access or seeking access to the privileged matter

to the extent that a judge is satisfied that the personal representative or other successor in title to property has a justifiable interest in the communication, information, opinion, or document.

(3) A personal representative of a deceased person who has a privilege conferred by this Part in respect of a communication, information, opinion or document and any other successor in title to property of a person who has such a privilege, may, on the application of another holder of the privilege who wishes the privilege to be maintained, be ordered by a judge not to disclose the privileged matter in a proceeding.

Definitions: **document**, **judge**, **proceeding**, s 4.

Section 70 Joint and successive interests in privileged material

C287 *Section 70(1)* sets out the rights of joint privilege holders – for example, if two clients who are interested in a legal matter employ the same solicitor to deal with it on their behalf. A joint privilege holder may have access to all privileged material (*para (b)*), and may assert the privilege against third parties (*para (a)*). This is so even though the material has been provided by the other privilege holder. Further, the other privilege holder may if necessary be ordered not to disclose the material in court proceedings (*para (c)*).

C288 *Section 70(2)* and *70(3)* apply the same principles to cases where there are successive privilege holders; for example,

- a privilege holder who has died, and the privilege holder's personal representative;
- a privilege holder who formerly owned property, and the privilege holder's successor in title (the communications or information relating to some matter of title).

However, the two privilege holders may not have precisely the same interests. For example, the Official Assignee, as successor in title to a bankrupt's property, has a right of access to the bankrupt's legal file about an earlier dispute over that property. But the Official Assignee ought not to have access to files relating to the defence of the bankruptcy proceeding itself. The final words of *s 70(2)* are designed to allow the judge to make appropriate decisions in such matters.

71 Powers of judge to disallow privilege

(1) A judge must disallow a claim of privilege conferred by this Part in respect of a communication or information if the judge is satisfied there is a strong prima facie case that the communication was made or received or the information was compiled or prepared for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.

(2) A judge may disallow a claim of privilege conferred by this Part in respect of a communication or information if the judge is of the opinion that evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence.

(3) Any communication or information disclosed as the result of the disallowance of a claim of privilege under subsection (2) and any information derived from that disclosure cannot be used against the holder of the privilege in a proceeding in New Zealand.

(4) This section does not apply to section 61 (Privilege against self-incrimination).

Definition: **judge**, **proceeding**, s 4.

Section 71 Powers of judge to disallow privilege

C289 The power to disallow under *s 71* applies to all types of privilege. Once the preconditions are satisfied, *s 71(1)* imposes on the judge a *requirement* to disallow a claim of privilege. One of the preconditions is that the holder of the privilege must have actual or constructive knowledge that communication was made for a dishonest purpose or to further an offence.

C290 *Section 71(2)* gives the judge a discretion to disallow a claim of privilege if the information is necessary to present an effective defence in a criminal proceeding. *Section 71(2)* departs from the decision of the House of Lords in *Reg v Derby Magistrates' Court* [1996] AC 487 and that of the Australian High Court in *Carter v Northmore Hale Daly and Leake* (1995) 183 CLR 121. In return, however, it absolutely prohibits using the disclosed information against any person in any later proceeding.

C291 The power to disallow a claim of privilege does not apply to *s 61*, *62*, 66, *67* or 68. This is because in the case of *ss 62*, *67* and 68 the power to allow or disallow is already discretionary, and *s 66(2)* already provides a special procedure so that in the situations covered by all four of these sections the additional power in *s 71* is not needed. In the case of *s 61*, the intention is that the privilege against self-incrimination should be absolute.

72 Orders for protection of privileged material

(1) A judge may order that evidence must not be given in a proceeding of a communication, information, opinion, or document in respect of which a person has a privilege conferred by this Part and may make an order under this subsection

(a) on the judge's own initiative; or

(b) on the application of the person who has the privilege; or

(c) on the application of an interested person other than the person who has the privilege.

(2) A judge may give a direction under section 67 (confidential information) or section 68 (matters of state) on the judge's own initiative or on the application of an interested person.

(3) An application under subsections (1) or (2) may be made at any time either before or after any relevant proceeding is commenced.

(4) A judge may give such directions as are necessary to protect the confidentiality of, or limit the use which may be made of,

(a) any privileged communication, information, opinion or document which is disclosed to a judge or other body or person in compliance with a judicial or administrative order;

(b) any communication or information which is the subject of a direction under section 67 (confidential information) or section 68 (matters of state) but is disclosed to a judge or other body or person in compliance with a judicial or administrative order.

Definitions: **document**, **judge**, **proceeding**, s 4.

Section 72 Orders for protection of privileged material

C292 *Section 72* is a procedural section designed to provide machinery for invoking privilege. *Section 72(4)* provides that if privilege is overridden, the judge may give ancillary directions to prevent the relevant material being disseminated beyond the extent necessary for the purposes of the trial.

PART 5
THE TRIAL PROCESS

Subpart 1 – Eligibility and compellability

73 Eligibility and compellability generally

Except as provided otherwise by this Code or any other Act,

(a) any person is eligible to give evidence; and

(b) a person who is eligible to give evidence is compellable to give that evidence.

Definition: **Act**, s 4.

74 Eligibility of judges, jurors and counsel

(1) Notwithstanding section 73,

(a) a person who is acting as a judge in a proceeding is not eligible to give evidence in that proceeding; and

(b) except with the permission of the judge, a person who is acting as a juror or counsel in a proceeding is not eligible to give evidence in that proceeding.

(2) In this section **counsel** includes an employment advocate.

Definitions: **judge**, **proceeding**, s 4.

PART 5
THE TRIAL PROCESS

Subpart 1 – Eligibility and compellability

Section 73 Eligibility and compellability generally

C293 This section states the broad principle that everyone is eligible to give evidence, and anyone who is eligible is compellable. Exceptions are set out in *ss 74* to *77*. The biggest change is that the exceptions do not extend to spouses.

C294 *Section 73* abolishes the common law rule that a person must be competent before he or she can give evidence as a witness. No person, whether on the grounds of age, intellectual disability, or mental disorder, or on any other ground, may be disbarred from giving evidence on the ground of incompetence. This section also abolishes the duty to test the competence of children under 12, and any existing formulations of the competence test are no longer to be considered good law. In the case of witnesses whose testimony is unhelpful – because of incoherence, for example – the judge may still exclude that evidence under the general exclusionary provisions in *s* 8.

Section 74 Eligibility of judges, jurors and counsel

C295 A judge, juror or counsel cannot give evidence in the proceeding in which they are acting as judge, juror or counsel, as the case may be. They will have to stop acting in those capacities if they wish to give evidence. **Counsel** is defined to include employment representatives (such as professional and lay advocates) who appear in the Employment Tribunal or Employment Court.

75 Compellability of defendants in criminal proceedings

(1) Except as provided otherwise by this Code or any other Act, a defendant in a criminal proceeding is not a compellable witness for the prosecution or the defence in that proceeding.

(2) An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding unless
  (a) the associated defendant is being tried separately from the defendant; or
  (b) the proceeding against the associated defendant has been determined.

(3) A proceeding has been determined for the purposes of subsection (2) if
  (a) the proceeding has been stayed or, in a summary proceeding, the information against the associated defendant has been withdrawn or dismissed; or
  (b) the associated defendant has been acquitted of the offence; or
  (c) the associated defendant, having pleaded guilty to or been found guilty of the offence, has been sentenced for that offence.

(4) In this section, **associated defendant**, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted for
  (a) an offence that arose in relation to the same events as did the offence for which the defendant is being prosecuted; or
  (b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted.

Definitions: **Act**, **proceeding**, **witness**, s 4.

Section 75 Compellability of defendants in criminal proceedings

C296 *Section 75(1)* codifies the existing law in making a defendant in a criminal proceeding non-compellable for the prosecution or the defence.

C297 Under *s 75(2)*, an associated defendant is not compellable for or against a defendant unless the two are being tried separately, or the proceeding against the associated defendant has been determined within the meaning of *subs (3)*. The definition of **associated defendant** is taken from the Evidence Act 1995 (Aust) with a slight change in wording. *Paragraph (a)* of the definition makes a person an "associated defendant" if he or she is charged with an offence that is the same as the one facing the defendant (whether jointly or separately charged), or with a different offence from that facing the defendant but arising in connection with the same events. *Paragraph (b)* covers related offences, an example being where a defendant is charged with the burglary of a building and the associated defendant is charged with receiving the goods stolen in that burglary.

76 Compellability of Sovereign and certain other persons

None of the following persons is compellable to give evidence:

(a) the Sovereign;

(b) the Governor-General;

(c) a foreign Sovereign or Head of State of a foreign country;

(d) a judge, in respect of the judge's conduct as a judge.

Definition: **foreign country**, **judge**, s 4.

77 Evidence of jury deliberations

A person cannot give evidence about the deliberations of a jury concerning the substance of a proceeding except in so far as that evidence tends to establish that a juror has acted in breach of the juror's duty.

Definitions: **judge**, **proceeding**, s 4.

Section 76 Compellability of Sovereign and certain other persons

C298 This section codifies the current law in making the persons listed non-compellable in any proceeding. *Paragraph (d)* is of limited application. In matters unrelated to the judge's conduct as a judge, he or she is compellable like any other citizen.

Section 77 Evidence of jury deliberations

C299 The intention of this section is to maintain the secrecy of jury deliberations, but at the same time allowing evidence to be given if a juror breaches his or her duty as a juror. Evidence about the substance of a jury's deliberation will be allowed if such evidence cannot be avoided in giving evidence about jury misbehaviour. This section does away with the distinction made in the common law that depends on whether the impropriety occurred within or outside the jury room.

Subpart 2 – Oaths and affirmations

78 Witnesses to give evidence on oath or affirmation

(1) A witness in a proceeding must take an oath or make an affirmation before giving evidence.

(2) Notwithstanding subsection (1), a witness who is under the age of 12 must not take an oath, make an affirmation or make a promise to tell the truth before giving evidence, but before giving evidence the witness must be informed by the judge of the importance of telling the truth and not telling lies; and evidence given by such a witness may be taken as if that evidence had been given on oath.

(3) Notwithstanding subsection (1), a witness may give evidence without taking an oath or making an affirmation with the permission of the judge, and that evidence may be taken as if that evidence had been given on oath, but before giving evidence the witness must be informed by the judge of the importance of telling the truth and not telling lies.

(4) A person who is called only to produce a document or thing to a court need not take an oath or make an affirmation before doing so.

Definitions: **document**, **judge**, **proceeding**, **witness**, s 4.

Section 78 Witnesses to give evidence on oath or affirmation

C300 This Subpart largely reflects the current law, found in the common law and in the Oaths and Declarations Act 1957, with some changes.

C301 *Section 78(1)* retains the current requirement that witnesses take an oath or make an affirmation before giving evidence.

C302 Section 13 of the Oaths and Declarations Act 1957 permits witnesses under the age of 12 to make a promise or declaration to tell the truth, rather than swear an oath or make an affirmation. *Section 78(2)* replaces s 13 and stipulates that a witness under 12 must not swear an oath, make an affirmation, or promise to tell the truth. Instead the judge must tell the witness that it is important to tell the truth or not to tell lies. Younger children will often understand the concept of not telling lies better than the concept of telling the truth. Such unsworn evidence is to be treated as if it had been given on oath.

C303 *Section 78(3)* is the discretionary equivalent of *subs (2)* that applies to adult witnesses. It is intended to be used exceptionally – for example, with intellectually disabled adult witnesses who do not understand the significance of taking an oath or making an affirmation. The judge should advise the jury that, even though the evidence was not given on oath, the witness is still capable of telling the truth.

C304 *Section 78(4)* generalises the practice in some courts of allowing a person who is called only to produce a document or an object to do so without taking an oath or making an affirmation. However, if the person is going to be cross-examined, then he or she is doing more than just producing a document or object and must take an oath or make an affirmation.

79 Interpreters to act on oath or affirmation

A person must either take an oath or make an affirmation before acting as an interpreter in a proceeding.

Definitions: **interpreter**, **proceeding**, s 4.

Section 79 Interpreters to act on oath or affirmation

C305 A court interpreter must currently take an oath or make an affirmation before acting in that capacity, although there is no present statutory provision to that effect. This section codifies that practice and envisages that the form of the oath or affirmation will be prescribed in regulations.

Subpart 3 – Support, communication assistance and views

80 Support persons

(1) A complainant in a criminal proceeding is entitled, while giving evidence, to have one person, and may apply to the judge for permission to have more than one person, near him or her to give support, but the judge may, in the interests of justice, direct that support may not be provided to a complainant by any person or by a particular person.

(2) Any other witness may apply to the judge to have one or more support persons near him or her while giving evidence.

(3) A complainant or other witness who is to have a support person near him or her while giving evidence must, unless the judge orders otherwise, disclose to all parties as soon as practicable the name of each person who is to provide such support.

(4) The judge may give directions regulating the conduct of a person providing or receiving support under this section.

Definitions: **judge**, **party**, **proceeding**, **witness**, s 4.

Subpart 3
Support, communication assistance and views

Section 80 Support persons

C306 This section gives statutory recognition to the current practice of allowing complainants in sexual cases to have a support person near them when they are giving evidence, and extends the entitlement to all complainants in criminal cases. It also enables other witnesses to apply to have a support person. The function of a support person is solely to help reduce stress or trauma for the witness and does not include giving advice or prompting. A support person cannot take the role of a McKenzie friend – that is, provide advice or assistance in court to an unrepresented litigant, as such assistance goes beyond mere support. A support person should not speak with the witness unless the judge gives permission.

C307 *Section 80(1)* gives complainants in criminal cases a statutory entitlement to have a support person near them while giving evidence, whether or not they are giving evidence in the ordinary way. Complainants may also apply to the judge to have more than one support person. The entitlement is not absolute, and may be withdrawn by the judge in the interests of justice. The judge may also rule that a complainant may not have a particular support person, or any support person. It is expected that a judge will give reasons for such a ruling.

C308 *Section 80(2)* allows other witnesses, including defendants in criminal cases who elect to give evidence, to apply to have one or more support persons near them while giving evidence. It is envisaged that when making a decision whether to allow witnesses other than complainants to have support persons, the judge would consider some of the factors relevant to alternative ways of giving evidence set out in *s 103(3)*.

C309 *Section 80(3)* is intended to allow the judge to give directions on such matters as the physical proximity of the support person to the witness. It may, for example, be appropriate for a young child giving evidence by close-circuit television to have a parent in the same room, provided that there is no prompting.

81 Communication assistance

(1) A defendant in a criminal proceeding is entitled to communication assistance in accordance with this section and the regulations to enable that defendant to understand the proceeding and to give evidence if the defendant elects to do so.

(2) Communication assistance may be provided to a defendant in a criminal proceeding on the application of the defendant in the proceeding or on the initiative of the judge.

(3) A witness in a civil or criminal proceeding is entitled to communication assistance in accordance with this section and the regulations to enable that witness to give evidence.

(4) Communication assistance may be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the judge.

(5) Communication assistance need not be provided to a defendant in a criminal proceeding if the judge considers that the defendant can sufficiently understand the proceeding and, if the defendant elects to give evidence, can sufficiently understand questions put orally and can adequately respond to them.

(6) Communication assistance need not be provided to a witness in a civil or a criminal proceeding if the judge considers that the witness can sufficiently understand questions put orally and can adequately respond to them.

(7) The judge may direct what kind of communication assistance is to be provided to a defendant or a witness.

(8) Subsections (5), (6) and (7) are subject to section 4 of the *Māori Language Act 1987*.

(9) A person who, while providing communication assistance to a witness, wilfully makes any false or misleading statement to the witness or to the court, commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 years.

Definitions: **communication assistance**, **judge**, **party**, **proceeding**, **statement**, **witness**, s 4.

Section 81 Communication assistance

C310 This section codifies and extends the law. It applies to defendants in criminal cases who do not give evidence as well as to those who do. Under the common law and s 24(g) of the New Zealand Bill of Rights Act 1990, a defendant has an absolute right to assistance in having their evidence communicated to the court and also to understand court proceedings. Witnesses who are not defendants may have communication assistance only at the discretion of the judge.

C311 The section draws a distinction between defendants in criminal cases and other witnesses: both are entitled to communication assistance to enable them to give evidence, but only defendants are entitled to communication assistance to enable them to understand the court proceedings.

C312 *Sections 81(5)* and *(6)* make it clear that communication assistance should be provided only if it is needed. What amounts to "sufficient" understanding of the proceeding and questions will depend on the circumstances of the particular case. These subsections will allow a judge to determine, for instance, that a witness understands English sufficiently not to warrant the high cost of obtaining the services of an interpreter of a relatively obscure language. *Subsections (5)* and *(6)* do not diminish the effect of the Māori Language Act 1987, as *s 81(8)* makes clear. However, the Māori Language Act 1987 does not specifically entitle defendants to communication assistance to enable them to *understand* proceedings, so in this respect *s 81* is wider. A Māori defendant who does not understand English will be entitled to communication assistance under *s 81*. But where the Māori Language Act 1987 gives a Māori speaker an unqualified right to speak Māori, s 4 of that Act takes precedence.

C313 "Wilfully" in *s 81(9)* means intentionally and with knowledge that the statement is false or misleading.

82 Views

(1) The judge may hold a view or, if there is a jury, order a view if the judge considers a view is in the interests of justice, and may do so on the application of any party or on the judge's own initiative.

(2) If there is a jury, a view may be ordered to be held at any time before the jury retires, and the judge may order a further view of the same place or thing during the jury's deliberations.

(3) If there is not a jury, the judge may hold a view at any time before judgment is delivered.

(4) Information obtained at a view may be used as though evidence had been given of that information.

(5) Every party, including the defendant in a criminal proceeding, and lawyers for the parties, are entitled to attend a view, but any party, or that party's lawyer, may waive that entitlement.

(6) In this section, **view** means an inspection by the judge and jury (if there is a jury), of a place or thing which is not in the courtroom.

Definitions: **judge**, **party**, **proceeding**, s 4.

Section 82 Views

C314 This section replaces and amends s 28 of the Juries Act 1981. It sets out the circumstances when the judge may order a view and the persons who are entitled to be present at a view. *Section 82(6)* defines a **view** for the purposes of this section.

C315 The Code does not contain separate rules for demonstrations, reconstructions and experiments. These will be permissible when they are relevant and are not excluded by *s 8*.

C316 It is not intended that this section will diminish the effect of Rule 322 of the High Court Rules and Rule 340 of the District Courts Rules, which provide for orders for inspection, observation and experimentation in civil proceedings.

Subpart 4 – Questioning of witnesses

83 Ordinary way of giving evidence

The ordinary way for a witness to give evidence is orally in a courtroom in the presence of

(a) the judge, or in a jury trial the judge and jury; and

(b) the parties to the proceeding and their counsel; and

(c) any member of the public who wishes to be present, unless excluded by order of the judge.

Definitions: **judge**, **party**, **proceeding**, **witness**, s 4.

Subpart 4
Questioning of witnesses

Section 83 Ordinary way of giving evidence

C317 The rule on the "ordinary way of giving evidence" contrasts with those set out in Subpart 5 on alternative ways of giving evidence. Evidence given "orally" includes evidence given by a witness who reads a prepared brief, or who has it read to him or her. In providing that a witness gives evidence "orally", it is not intended to preclude or discourage the convenient practice, particularly in civil proceedings, of accepting evidence in written form with the parties' consent.

C318 An example of where the judge may order the public to be excluded under *s 83(c)* is when a complainant in a sexual case is giving evidence.

84 Examination of witnesses

Unless this Code or any other Act provides otherwise, or the judge directs to the contrary,

(a) a witness first gives evidence in chief; and

(b) after giving evidence in chief, the witness may be cross-examined by all parties, other than the party calling the witness, who wish to do so; and

(c) after all parties who wish to do so have cross-examined the witness, the witness may be re-examined.

Definitions: **Act**, **judge**, **party**, **witness**, s 4.

Section 84 Examination of witnesses

C319 This rule codifies the usual order in which a witness gives evidence, subject to the court's inherent powers to regulate its own procedure and any contrary statutory provisions. In multi-party cases, it is expected that the practice will continue of counsel agreeing on the order in which they cross-examine witnesses, and failing agreement, of counsel cross-examining in the order in which the parties appear on the indictment or on the entituling in a civil proceeding.

85 Unacceptable questions

(1) The judge may disallow, or direct that a witness is not obliged to answer, any question that the judge considers intimidating, improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.

(2) Without limiting the matters that the judge may take into account for the purposes of subsection (1), the judge may have regard to

(a) the age or maturity of the witness; and

(b) any physical, intellectual, or psychiatric disability of the witness; and

(c) the linguistic or cultural background of the witness; and

(d) the nature of the proceeding; and

(e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

Definitions: **judge**, **proceeding**, **witness**, s 4.

Section 85 Unacceptable questions

C320 This rule applies to all questioning of witnesses. It will probably be used most often to control cross-examination. It gives the judge a wide discretion to control the nature of the questions and the manner in which they are put.

C321 This rule replaces s 14(a) of the Evidence Act 1908, which prohibits scandalous or indecent questions. It is expected that such questions will continue to be disallowed as improper. The operation of the proposed rule is not limited to the effect of the questioning on the particular witness: for example, the rule would control questions that are improper in a general sense.

C322 The matters set out in *s 85(2)* are intended to give some guidance on situations where particular care may be necessary. They are expressly stated to be non-exclusive. They are also sufficiently wide to enable the judge to ensure that no party or witness is unfairly disadvantaged by the way he or she is questioned.

C323 The question-and-answer format is not the way Māori traditionally resolve disputes or discuss issues. Thus cross-examination of kaumatua can amount to an insult to their mana, especially when questioning is directed at impeaching their credibility or exposing them to ridicule. While no sensible exceptions can be made for Māori or other cultural groups under the adversarial system, *s 85(2)(c)* will allow judges to exert some control over cross-examination that may be culturally offensive. One way is to encourage counsel to state a possible position to which the kaumātua is invited to respond, instead of directly questioning a kaumātua.

86 Restriction of publication

A person commits a contempt of court who prints or publishes

(a) without the express permission of the judge, any question that is disallowed by the judge, or any evidence given in response to such a question; or

(b) any question, or any evidence given in response to a question, that the judge has informed a witness he or she is not obliged to answer and has ordered must not be published.

Definitions: **judge**, **witness**, s 4.

87 Privacy as to witness's precise address

(1) Except with permission of the judge,

(a) no question can be put to any witness and no evidence can be given; and

(b) no statement or remark can be made in court by a witness, lawyer, officer of the court or any other person involved in the proceeding

as to the precise particulars of a witness's address (for example, by asking or referring to details of the street and number).

(2) The judge must not grant permission unless satisfied that the question to be put, the evidence to be given, or the statement or remark to be made, is of such direct relevance to the facts in issue that to exclude it would be contrary to the interests of justice.

(3) An application for permission may be made before or after the commencement of any hearing, and is, where practicable, to be made and dealt with in chambers.

Definition: **judge**, **statement**, **witness**, s 4.

Section 86 Restriction of publication

C324 This provision replaces s 15 of the Evidence Act 1908. This section is not intended to limit the operation of other statutory provisions that allow a judge to order that evidence not be published.

Section 87 Privacy as to witness's precise address

C325 The intention of this section is to protect the safety and privacy of witnesses when they give evidence in open court, by not allowing evidence of or statements and questions about the particulars of a witness's address, except with the judge's permission. Unlike s 23AA of the Evidence Act 1908, which only applies to complainants in sexual cases, this section applies to all witnesses.

88 Restriction on disclosure of complainants' occupations in sexual cases

(1) In a sexual case, except with the permission of the judge,

(a) no question can be put to the complainant or any other witness and no evidence can be given; and

(b) no statement or remark can be made in court by a witness, lawyer, officer of the court or any other person involved in the proceeding

as to the complainant's occupation.

(2) The judge must not grant permission unless satisfied that the evidence to be given or the question to be put is of such direct relevance to the facts in issue that to exclude it would be contrary to the interests of justice.

(3) An application for permission may be made before or after the commencement of any hearing, and is, where practicable, to be made and dealt with in chambers.

Definitions: **judge**, **sexual case**, **proceeding**, **statement**, **witness**, s 4.

89 Leading questions in examination in chief and re-examination

A leading question must not be put to a witness in examination in chief or re-examination unless

(a) the question relates to introductory or undisputed matters; or

(b) the question is put with the consent of all other parties; or

(c) the judge, in exercise of the judge's discretion, allows the question.

Definitions: **judge**, **leading question**, **party**, **proceeding**, **witness**, s 4.

Section 88 Restriction on disclosure of complainants' occupations in sexual cases

C326 This section and *s 87* replace s 23AA of the Evidence Act 1908 (which prohibits anyone stating in open court the addresses and occupations of complainants in sexual cases). *Section 88* only applies in relation to occupation, since the *s 87* prohibition in relation to full street addresses applies to any witness, including a complainant.

Section 89 Leading questions in examination in chief and re-examination

C327 This rule codifies the existing law, which generally does not allow leading questions to be asked in examination in chief or re-examination.

C328 The exceptions in *s 89(a)* and *(b)* allow counsel to lead on uncontroversial matters.

C329 It is anticipated that the general discretion in *s 89(c)* will be used sparingly. The problems associated with examining witnesses who are very young, frightened, or intellectually disabled, or who are not fluent in English, are best addressed by allowing them to give evidence in an alternative way (Subpart 5), to have a support person close by for emotional support (*s 80*), or by providing them with communication assistance (*s 81*).

90 Use of written statements in questioning witness

(1) A party cannot, for the purpose of questioning a witness in a proceeding, use a written statement that is inadmissible, and a witness cannot consult a written statement that is inadmissible while giving evidence.

(2) If when questioning a witness a party shows a written statement to the witness or a witness consults a written statement while giving evidence, that written statement must be shown to every other party to the proceeding.

Definitions: **judge**, **party**, **proceeding**, **statement**, **witness**, s 4.

91 Editing of inadmissible statements

If a statement is determined by the judge to be inadmissible in part in a proceeding, a party who wishes to use an admissible part of the statement may, subject to the direction of the judge, edit the statement by excluding any part of it which is inadmissible if, in the opinion of the judge, the inadmissible parts of the statement can be excluded without obscuring or confusing the meaning of the admissible part of the statement.

Definitions: **judge**, **party**, **proceeding**, **statement**, s 4.

Section 90 Use of written statements in questioning witness

C330 *Section 90(1)* This provision prevents the use of inadmissible statements during the examination of a witness. The rule also applies to witnesses who may wish to consult a document while testifying. If the document is inadmissible, they may not consult it.

C331 *Section 90(2)* is new. It is intended to discourage the practice of the "silent read" whereby, without disclosing the contents to anyone else in court, counsel hands a witness a written statement and asks the witness to read it silently. Under *s 90(2)*, if counsel shows a written statement to a witness under examination, or the witness consults a written statement while giving evidence, the statement must be shown to every other party. This enables other counsel to raise objection if the statement is inadmissible. For example, if the statement was made by someone who is a witness in the proceeding, it must comply with *s 37(a)* (previous consistent statements rule). If the statement was made by a person who is not a witness, admissibility under the hearsay rule must first be established.

C332 *Section 96* (cross-examination on previous statements of witnesses) sets out when a prior inconsistent statement must be shown to a witness who is being cross-examined on it. *Section 90(2)* requires a statement that must be shown to the witness under *s 96(2)* to be shown to every other party to the proceeding.

Section 91 Editing of inadmissible statements

C333 This section allows the inadmissible portions of a statement to be removed, so that the remaining parts may be used in examining a witness. However, this is conditional on the judge agreeing that the inadmissible portions can be removed without making what is left confusing or ambiguous.

92 Cross-examination duties

(1) A party must cross-examine a witness on substantial matters of the party's case that contradict the evidence of the witness if

(a) the witness is, or might be, in a position to give admissible evidence on such matters; and

(b) the witness or the party who called the witness may be unaware that they are a part of the cross-examining party's case.

(2) If a party fails to comply with this section, the judge may

(a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or

(b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or

(c) exclude the contradictory evidence; or

(d) make any other order which the judge considers just.

Definitions: **judge**, **party**, **witness**, s 4.

Section 92 Cross-examination duties

C334 This rule largely codifies existing law and practice. *Section 92(1)* clarifies one aspect of the law: that the duty is limited to questioning the witness about those parts of the cross-examiner's case, including points made or to be made in counsel's submissions, which contradict the evidence of the witness. Challenges to the witness's credibility (truthfulness and accuracy) should be put to the witness if the challenging party intends to call evidence on the witness's credibility subsequently. Cross-examining counsel need not put every aspect of his or her case in robotic fashion to the witness, if it is clear from the pleadings or the prior conduct of the proceeding which of the witness's assertions are under challenge.

C335 *Section 92(2)* sets out a number of discretionary measures a judge can take in the interests of justice if a party fails to comply, and it is not intended to limit the court's inherent power to control its own proceedings.

93 Cross-examination in civil proceeding

If a party in a civil proceeding cross-examines a witness who has the same, or substantially the same, interest in the proceeding as the cross-examining party, the judge may, in the interests of justice, limit the extent to which leading questions may be asked in that cross-examination.

Definitions: **judge**, **party**, **proceeding**, **witness**, s 4.

94 Cross-examination by party of own witness

The party who called a witness may, if the judge determines the witness to be hostile and gives permission, cross-examine the witness to the extent authorised by the judge.

Definitions: **hostile**, **judge**, **party**, **witness**, s 4.

Section 93 Cross-examination in civil proceeding

C336 This section applies in civil proceedings only. It provides a useful judicial discretion to limit the extent leading questions may be asked of a compliant and willing witness who has substantially the same interests as the cross-examining party. This discretion is not intended to derogate from the judge's general power to exclude evidence under s 8.

Section 94 Cross-examination by party of own witness

C337 *Section 94(1)* codifies the common law rule that allows a party to cross-examine a witness whom the party has called if the witness is declared hostile and the judge gives permission. This includes the situation where a party is called by the cross-examiner. The cross-examination may not range wider than the judge authorises. "Hostile" is defined in *s 4*.

C338 A party who has permission may cross-examine its own witness about the witness's truthfulness, but the evidence must be substantially helpful in assessing the witness's truthfulness and comply with other aspects of the truthfulness rules (*ss 39* to *41*).

C339 The effect of the definition of "witness" in *s 4* is that a person who is called as a witness but refuses to take the oath or make an affirmation, or having taken the oath or made an affirmation, refuses to give evidence, is not a witness and cannot be cross-examined as a hostile witness under *s 94*.

C340 The Code's treatment of hearsay and witnesses' previous statements will to a considerable extent eliminate the objection to the prosecution calling a witness known to be hostile, since under the Code both reliable hearsay and a witness's previous inconsistent statement will be admissible to prove the truth of the content.

95 Restrictions on cross-examination by unrepresented parties

(1) Notwithstanding section 354 of the *Crimes Act 1961*, a defendant in a criminal proceeding is not entitled to personally cross-examine
  (a) a complainant in a sexual case; or
  (b) a complainant in a proceeding involving domestic violence; or
  (c) a child who is a witness in a sexual case or a proceeding involving domestic violence.

(2) In a civil or criminal proceeding, a judge may
  (a) on the application of a witness, order that a party to the proceeding who is not represented by a lawyer must not personally cross-examine the witness; and
  (b) on the judge's own initiative, order that a party to the proceeding who is not represented by a lawyer must not personally cross-examine a witness.

(3) An order under subsection (2) may be made on one or more of the following grounds:
  (a) the age or maturity of the witness;
  (b) the physical, intellectual, or psychiatric disability of the witness;
  (c) the linguistic or cultural background of the witness;
  (d) the nature of the proceeding;

Section 95 continues overleaf

Section 95 Restrictions on cross-examination by unrepresented parties

C341 This section is a much broader version of the provision in s 23F of the Evidence Act 1908, which it replaces. Section 23F applies only to child complainants and mentally handicapped complainants in sexual cases. This new section enacts an absolute bar on cross-examination by unrepresented defendants of all complainants and child witnesses in sexual cases, and all complainants and child witnesses in domestic violence cases.

C342 Under *s 95(2)*, the judge has discretion to disallow personal cross-examination in all other cases, on grounds set out in *s 95(3)*.

C343 *Section 95(3)(a)* "Age of the witness" is intended to include the elderly as well as children.

C344 *Section 95(3)(b)* "Intellectual disability" is equivalent to the term "mentally handicapped" used in the Evidence Act 1908. It appears to be the term most frequently used in New Zealand. "Psychiatric disability" is intended to cover not only those people suffering from the long-term effects of mental illness, but also those in the acute phase of any mental illness.

C345 *Section 95(3)(c)* "Linguistic background" refers to anyone who speaks a language other than English – the language of the court system. The phrase "cultural background" is intended to capture those witnesses who because of their cultural background may be particularly ill-equipped to answer a defendant directly – for example, a young witness giving evidence against a person to whom, in the witness's culture, obedience is generally owed, such as a person of chiefly status in a Pacific Island community.

C346 *Section 95(3)(d)* As an example, an application is likely to be granted in relation to a criminal case involving a history of harassment.

Section 95 commentary continues overleaf

(e) the relationship of the witness to the unrepresented party;
(f) any other grounds likely to promote the purpose of the Code.

(4) When considering whether or not to make an order under subsection (2), the judge must
(a) ensure the fairness of the proceeding and, in a criminal proceeding, that the defendant has a fair trial; and
(b) have regard to
(i) the need to minimise the stress of the complainant or witness; and
(ii) any other factor that is relevant to the just determination of the proceeding.

(5) Subject to subsection (6), an unrepresented defendant or party to a proceeding who under this section is precluded from personally cross-examining a witness may have his or her questions put to the witness by the judge or a person appointed by the judge for the purpose.

(6) In respect of each question, the judge may
(a) put the question, or allow the question to be put, to the witness; or
(b) put the question, or require the question to be put, to the witness in a form rephrased by the judge; or
(c) refuse to put, or refuse to allow the question to be put, to the witness.

Definitions: **child**, **domestic violence**, **judge**, **party**, **proceeding**, **sexual case**, **witness**, s 4.

C347 *Section 95(3)(e)* The expression "the relationship of the witness to the unrepresented party" is intended to capture those situations where a prior relationship of some kind, especially one involving unequal power, existed between the witness and the unrepresented party (which would include the defendant in a criminal trial). For example, if a woman is required to give evidence against her partner in a sexual case, or in family proceedings, she may be unable to do so at all if personally confronted by someone who had subjected her to physical and emotional abuse.

C348 *Section 95(3)(f)* allows the judge to base a decision on grounds not precisely anticipated by the Code provisions, but justified by the purpose of the Code.

C349 *Section 95(4)* In identifying factors the judge must consider when deciding whether to make an order, this provision gives particular emphasis to ensuring fairness of the proceeding and, in a criminal proceeding, ensuring a fair trial for the defendant.

C350 *Section 95(5)* carries forward the provisions of s 23F(3) and (5) of the Evidence Act 1908 in allowing an unrepresented party who is precluded from personally cross-examining a witness to put questions to the witness through the judge or through a person appointed by the judge for this purpose. In considering whom to appoint, the judge should have regard to the factors in *s 95(3)* and *(4)*. It may not be appropriate, for example, for a friend or relative of the unrepresented party to ask the questions. Under *s 95(6)*, the judge is given express powers to rephrase a question or require that it be rephrased, or to refuse to allow the question to be put – for example, if it is unacceptable in terms of *s 85*.

96 Cross-examination on previous statements of witnesses

(1) A party who cross-examines a witness may question the witness about a previous statement made by that witness without showing it or disclosing its contents to the witness provided that the time, place, and other circumstances concerning the making of the statement are adequately identified to the witness.

(2) If a witness does not expressly admit making the statement and the party wishes to prove that the witness did make the statement

(a) the party must show the statement to the witness if it is in writing, or disclose its contents to the witness if the statement was not in writing; and

(b) the witness must be given an opportunity to deny making the statement or to explain any inconsistency between the statement and the witness's testimony.

(3) If a document is used by a defendant for the purpose of cross-examining a witness but is not offered as evidence by that defendant, the defendant's rights to a non suit or to make a no-case application and the defendant's rights in relation to the order of addressing the court are not affected by that use.

Definitions: **document**, **party**, **proceeding**, **previous statement**, **statement**, **witness**, s 4.

Section 96 Cross-examination on previous statements of witnesses

C351 This section replaces ss 10 and 11 of the Evidence Act 1908. It covers both oral and written prior statements of a witness and applies to civil as well as criminal proceedings. It is concerned with how a witness may be cross-examined on a previous statement. "Previous statement" is defined in *s 4*.

C352 A previous statement cannot be used in cross-examination if it is inadmissible – *s 90*. The previous consistent statements rule in *s 37* (which limits the admissibility of previous consistent statements) does not exclude previous inconsistent statements. If not otherwise excluded, previous inconsistent statements are admissible to prove the truth of their contents. However, if the purpose of offering such statements is solely or mainly to challenge the truthfulness of the maker, the truthfulness rules apply – *s 4(2)(b)*.

C353 The purpose of *s 96(1)* and *(2)* is to state clearly at what stage and in what circumstances a previous statement must be shown to a witness who is being cross-examined on it. Once it is shown to the witness being questioned, *s 90(2)* requires the statement to be shown to every other party to the proceeding.

C354 *Section 96(3)* preserves a defendant's position in relation to a non suit, a no-case application and the order of addressing the jury if the defendant uses a document to cross-examine a witness but does not offer it in evidence. However, *s 90(2)* requires the document to be shown to every other party to the proceeding.

97 Re-examination

(1) On re-examination, a witness may be questioned about matters arising out of evidence given by the witness in cross-examination, including any qualification in cross-examination of evidence given by the witness in examination in chief, but may not be questioned about any other matter except with the permission of the judge.

(2) If permission is given under subsection (1), the judge must allow other parties to cross-examine the witness on the additional evidence given and may allow further re-examination on matters arising out of that cross-examination.

Definition: **judge**, **party**, **witness**, s 4.

98 Further evidence after closure of case

(1) Except with the permission of the judge, a party may not offer further evidence after closing that party's case.

(2) In a civil proceeding, the judge may grant permission under subsection (1) unless any unfairness caused to any other party by the granting of permission cannot be remedied by an adjournment or an award of costs, or both.

(3) In a criminal proceeding, the judge may grant permission to the prosecution under subsection (1) in the interests of justice
- (a) if the further evidence relates to a purely formal matter; or
- (b) if the further evidence relates to a matter arising out of the conduct of the defence, the relevance of which could not reasonably have been foreseen; or
- (c) if the further evidence was not available or admissible before the prosecution's case was closed; or
- (d) in any other exceptional circumstance.

Section 98 continues overleaf

Section 97 Re-examination

C355 This rule largely codifies existing law and practice.

C356 *Section 97(1)* clarifies a possible ambiguity about the scope of questions that may be asked in re-examination. If a witness under cross-examination qualifies something said in examination in chief, *s 97(1)* treats the qualification as a matter arising out of the cross-examination on which the witness may be re-examined. A party calling a witness who is declared hostile may re-examine the witness on matters raised by the cross-examination of that witness by other parties.

C357 *Section 97(2)* seeks to encourage uniformity in a varying practice by requiring a judge who gives a party permission to re-examine a witness on matters other than those arising out of cross-examination, to allow the other parties to cross-examine that witness on the additional evidence.

Section 98 Further evidence after closure of case

C358 *Section 98(1)* codifies the general rule that a party must lead all evidence before closing its case. The judge has a discretion to allow further evidence, and is likely to do so if the Code specifically provides for it; for example, under *s 92(2)(a)*.

C359 *Section 98(2)* In a civil proceeding, the judge is likely to permit a party to call further evidence – especially if it is in rebuttal – unless any unfairness caused to any other party in doing so cannot be remedied by an adjournment or an award of costs.

C360 *Section 98(3)* sets out the circumstances in which a judge may allow the prosecution in a criminal case to offer further evidence in the interests of justice. *Paragraph (a)* would allow, for example, formal evidence that the Attorney-General has given the necessary consent to a prosecution under s 144A of the Crimes Act 1961 (sexual conduct with children outside New Zealand). *Paragraph (b)* confirms that it is no longer necessary for rebuttal evidence to deal with a matter no human ingenuity could have foreseen. As well as evidence that was not previously available, *para (c)* allows further evidence that would not have been admissible and therefore could not have been led in chief. An example would be evidence of a prosecution witness's previous consistent statement that is introduced to rebut an allegation of recent fabrication made by the defence after the prosecution has closed its case – *s 37(a)*.

Section 98 commentary continues overleaf

(4) In a criminal proceeding, the judge may grant permission to a defendant under subsection (1) if the interests of justice require the further evidence to be admitted.

(5) The judge may grant permission under subsections (2), (3), and (4) at any time until the jury retire to consider their verdict (if there is a jury) or until judgment is delivered in any other proceeding.

Definitions: **judge**, **party**, **proceeding**, s 4.

99 Witnesses recalled by the judge

(1) The judge may recall a witness who has given evidence in a proceeding if the judge considers that it is in the interests of justice to do so.

(2) The judge may recall a witness under this section at any time until the jury retire to consider their verdict (if there is a jury) or until judgment is delivered in any other proceeding.

Definitions: **judge**, **proceeding**, **witness**, s 4.

100 Questioning of witnesses by the judge

(1) The judge may ask a witness such questions as justice requires.

(2) If the judge questions a witness,

(a) every party, other than the party who called the witness, may cross-examine the witness on any matter raised by the judge's questions; and

(b) the party who called the witness may re-examine the witness.

Definitions: **judge**, **party**, **proceeding**, **witness**, s 4.

C361 In the case of a defendant in a criminal case, the judge's discretion may be exercised in the interests of justice without further qualification – *s 98(4)*.

Section 99 Witnesses recalled by the judge

C362 It is expected that a judge's discretion to recall a witness will be exercised sparingly.

C363 The time limit in *s 99(2)* for the judge to recall a witness coincides with the time limit for the admission of further evidence under *s 98*.

Section 100 Questioning of witnesses by the judge

C364 *Section 100(1)* is a reminder that a judge's questioning of a witness should be circumscribed by the requirements of justice. Case law discussing the scope of acceptable judicial questions can still be a useful guide; for example, *E H Cochrane v MOT* (1987) 3 CRNZ 38 (CA), *R v Loumoli* (1995) 13 CRNZ 7 (CA), and *R v Fotu* (1995) 13 CRNZ 177 (CA).

C365 Practice varies on whether parties are given an opportunity to question a witness on matters arising from answers given to the judge. *Section 100(2)* codifies the fairer practice.

101 Jury questions

(1) If a jury wishes to put a question to a witness in a proceeding, the jury must first inform the judge of the question and the judge must determine whether the question should be put to the witness and, if the question is to be put to the witness, whether the parties may question the witness about matters raised by the question.

(2) If a question from the jury is put to a witness,

(a) every party, other than the party who called the witness, may cross-examine the witness on any matter raised by the jury's question; and

(b) the party who called the witness may re-examine the witness.

Definitions: **judge**, **party**, **proceeding**, **witness**, s 4.

Section 101 Jury questions

C366 This section recognises the value of the jury, as judges of fact, being able to have its questions put to a witness, subject to the judge deciding whether the question should be put. The judge is likely to alert counsel, because in many cases it will be appropriate for counsel to put the question. If a jury question is put to a witness, the parties will be entitled to question the witness on matters arising from the jury's question.

Subpart 5 – Alternative ways of giving evidence

102 Directions about way child complainants are to give evidence

(1) In a criminal proceeding in which there is a child complainant, the prosecution must apply for directions about the way in which the complainant is to give evidence in chief and be cross-examined.

(2) An application for directions must be made to the court as early as practicable before the proceeding is to be heard; but the court may accept and hear an application for directions at a later time.

(3) When considering an application under this section, the judge must
- (a) ensure the fairness of the proceeding and that the defendant has a fair trial; and
- (b) have regard to the wishes of the complainant and
  - (i) the need to minimise the stress of the complainant; and
  - (ii) the need to promote the recovery of the complainant from the alleged offence; and
  - (iii) take into account any other factor that is relevant to the just determination of the proceeding.

Definitions: **child**, **child complainant**, **judge**, **party**, **proceeding**, s 4.

Subpart 5
Alternative ways of giving evidence

C367 This Subpart provides ways of giving evidence that are alternative to the ordinary way of giving evidence provided for in *s 83*. This Subpart replaces and extends the provisions of sections 23D and 23E of the Evidence Act 1908.

Section 102 Directions about way child complainants are to give evidence

C368 This provision carries forward in an extended form s 23D of the Evidence Act 1908. It changes the current law in several ways:

- applications will not be mandatory for "mentally handicapped" witnesses;
- applications will be mandatory for all child complainants, not only in sexual cases;
- the provision applies to summary as well as indictable proceedings;
- the directions cover cross-examination as well as examination in chief.

C369 The phrase "as early as practicable" in *s 102(2)* is intended to ensure that the question of how a child complainant is to give evidence is dealt with as soon as possible. Timeliness is particularly important in the case of applications to offer videotaped evidence, where one of the purposes is to obtain fresh evidence from witnesses who may be more susceptible to memory loss. Applications may be made before a preliminary hearing in indictable proceedings where the witness has been required to testify in person.

C370 *Section 102(3)* sets out the factors which the judge must take into account in considering an application, including the wishes of the child complainant. This is in keeping with New Zealand's obligations under the United Nations Convention on the Rights of the Child, and is supported by research suggesting it is helpful for children to feel they have some control over the process.

103 Directions about alternative ways of giving evidence

(1) In any proceeding, the judge may, either on the application of a party or on the judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.

(2) An application for directions must be made as early as practicable before the proceeding is to be heard; but the judge may accept and hear an application at a later time.

(3) A direction that a witness is to give evidence in an alternative way may be made on the grounds of
- (a) the age or maturity of the witness;
- (b) the physical, intellectual, or psychiatric disability of the witness;
- (c) trauma suffered by the witness;
- (d) the witness's fear of intimidation;
- (e) the linguistic or cultural background of the witness;
- (f) the nature of the proceeding;
- (g) the nature of the evidence that the witness is expected to give;
- (h) the relationship of the witness to any party to the proceeding;
- (i) the absence of the witness from New Zealand;
- (j) any other ground likely to promote the purpose of the Code.

(4) In giving directions under subsection (1), the judge must
- (a) ensure the fairness of the proceeding and, in particular in a criminal proceeding, that the defendant has a fair trial; and
- (b) have regard to the wishes of the witness and
  - (i) the need to minimise the stress of the witness; and
  - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
  - (iii) any other factor that is relevant to the just determination of the proceeding.

Definitions: **judge**, **party**, **proceeding**, **witness**, s 4.

Section 103 Directions about alternative ways of giving evidence

C371 This section is new. It empowers a judge in a civil or criminal proceeding to give directions about how a witness should give evidence in chief and be cross-examined. The power may be exercised on the application of the party calling the witness or on the judge's own initiative. Although "witness" includes a defendant in a criminal case, it is expected that an application for a defendant to give evidence in an alternative way will only be granted in the most exceptional cases.

C372 *Section 103(2)* Applications must be made as early as practicable before the hearing commences, although the court is given a discretion to accept and deal with an application at a later time. If the witness is required to give evidence in person at a preliminary hearing, the application must be made as early as practicable before that hearing.

104 Chambers hearing before directions for alternative ways of giving evidence

Before giving any directions about the way in which a witness is to give evidence in chief and be cross-examined, the judge must give each party an opportunity to be heard in chambers; and the judge may call for and receive a report from any person considered by the judge to be qualified to advise on the effect on the witness of giving evidence in the ordinary way or any alternative way.

Definitions: **judge**, **party**, **witness**, s 4.

Note: The ordinary way of giving evidence is described in section 83.

105 Alternative ways of giving evidence

(1) A judge may direct under section 103 that the evidence of a witness is to be given in an alternative way so that

(a) the witness gives evidence

(i) while in the courtroom but unable to see the defendant or specified party or witness; or

(ii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or

(iii) by a video record made before the hearing of the proceeding; and

(b) any appropriate practical and technical means enable the judge, the jury (if any), and lawyers to see and hear the witness giving evidence as provided in the regulations; and

(c) in a criminal proceeding, the defendant is able to see and hear the witness, except where the judge directs otherwise; and

(d) in a proceeding in which a witness anonymity order has been made, effect is given to the terms of that order.

Section 105 continues overleaf

Section 104 Chambers hearing before directions for alternative ways of giving evidence

C373 This section carries forward the procedure set out in s 23D(2) and (3) of the Evidence Act 1908 for dealing with applications for directions on how witnesses may give evidence. The right of each party to be heard under *s 104(1)* relates to the decision on whether the application should be granted and if so, to the terms of the directions. A judge is not confined to calling for or receiving a report only from persons who qualify as experts as defined in *s 4*. The decision as to who is qualified to provide a report is one for the judge, who may or may not choose to hear submissions from counsel on the point. The parties will have a right to be heard on the substance of any report received by the judge, but not on the choice of who should be asked to provide it.

Section 105 Alternative ways of giving evidence

C374 This section sets out the various alternative ways in which evidence may be given.

C375 *Section 105(1)* recognises that alternative ways of giving evidence achieve their purpose by separating the witness, spatially or temporally, while allowing the judge, jury, counsel and the defendant in a criminal proceeding to see and hear the witness. Any witness anonymity order will have precedence over *s 105(1)*.

C376 The effect of *s 105(1)(a)(ii)*, *(b)* and *(c)* is to allow evidence to be given by videolink on any of the grounds listed in *s 103(3)*. The wide terms of *s 105(1)* are intended to cater for new ways of giving evidence that advancing technology may make possible.

C377 *Section 105(2)* carries forward the provisions of s 23E(3) of the Evidence Act 1908 in requiring a judge who has directed that the evidence of a witness may be given in the form of a video record, to also give directions about the way in which that witness is to be cross-examined and re-examined.

Section 105 commentary continues overleaf

(2) If a video record of the witness's evidence is to be shown at the hearing of the proceeding, the judge must give directions as to the manner in which cross-examination and re-examination of the witness is to be conducted.

(3) The judge may admit evidence that is given substantially in accordance with the terms of a direction under this section despite a failure to observe strictly all of those terms.

Definitions: **judge**, **party**, **proceeding**, **video record**, **witness**, s 4.

106 Video record evidence

(1) In a criminal proceeding tried on indictment, the video record evidence of a witness that is to be offered as an alternative way of giving evidence at the trial may be the same video record that was offered in evidence at the preliminary hearing.

(2) A video record offered as an alternative way of giving evidence must be recorded in compliance with the regulations.

(3) A video record that is to be offered as an alternative way of giving evidence in a proceeding must be viewed by the judge and offered for viewing by all parties or their lawyers before it is offered in evidence unless the judge directs otherwise; and all parties must be given the opportunity to make submissions with regard to the admissibility of all or any part of the video record.

(4) The judge may order to be excised from a video record offered as evidence any material that, if the evidence were given in the ordinary way, would or could be excluded in accordance with this Code.

(5) The judge may admit a video record that is recorded and offered as evidence substantially in accordance with the terms of a direction under this Subpart and the terms of regulations referred to in this section despite a failure to observe strictly all of those terms.

Definitions: **judge**, **party**, **proceeding**, **video record**, **witness**, s 4.

C378 Although counsel and other trial participants have a duty to comply with the judge's directions, *s 105(3)* gives the judge a discretion to admit evidence that does not strictly conform to those directions. This is discussed in more detail in relation to *s 106(5)*.

Section 106 Video record evidence

C379 *Section 106(1)* changes s 23E(1)(a) of the Evidence Act 1908, which it replaces. Under s 23E(1)(a), a video record offered as evidence in chief must have been shown at the preliminary hearing. Under *s 106(1)*, a video record is admissible whether it was made before or after the preliminary hearing. This will enable video-recorded evidence to be offered if initial expectations that a witness will be able to give evidence in the ordinary way are not subsequently borne out. If for any reason a witness whose evidence has been video-recorded later becomes unavailable for cross-examination, the evidence is hearsay and must comply with the hearsay rules.

C380 The provisions of s 23E(4) of the Evidence Act 1908 have not been re-enacted.

C381 *Section 106(5)* contains a provision similar to *s 105(3)*. Current case law requires "substantial but not slavish" compliance with the regulations. One breach considered to be substantial by the courts is the failure to establish the witness's competence. The abolition of the competence requirement by *s 73* means there is no longer any need to make this inquiry.

C382 Evidence given by way of a video record or in another alternative way must comply with any of the applicable rules in Subpart 4 on questioning of witnesses. Such evidence is also subject to the general exclusion provisions of *s 8*.

Subpart 6 – Corroboration, judicial warnings and judicial directions

107 Corroboration

(1) It is not necessary in a criminal proceeding for the evidence on which the prosecution relies to be corroborated, except with respect to offences of

(a) perjury; and
(b) false oaths; and
(c) false statements or declarations; and
(d) treason.

(2) Subject to subsection (1) and section 108, if there is a jury, it is not necessary for the judge to

(a) warn the jury that it is dangerous to act on uncorroborated evidence or to give a warning to the same or similar effect; or
(b) give a direction relating to the absence of corroboration.

Definition: **judge**, **proceeding**, s 4.

Subpart 6
Corroboration, judicial warnings and judicial directions

Section 107 Corroboration

C383 This section extends and replaces ss 12B and 23AB of the Evidence Act 1908. *Section 107(1)* abolishes the need for prosecution evidence in a criminal proceeding to be corroborated, except for the offences listed. *Section 107(2)* abolishes the need for the judge to give a jury warning or direction about uncorroborated evidence. This is not intended to limit the power to give a warning in a particular case, and is expressly subject to *s 108*, which requires the judge to warn the jury about potentially unreliable evidence.

108 Judicial warnings about unreliable evidence

(1) If the judge in a criminal proceeding tried with a jury is of the opinion that evidence may be unreliable, the judge must warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it.

(2) In a criminal proceeding tried with a jury, the judge must consider whether to warn the jury under subsection (1) whenever there is
- (a) hearsay evidence; or
- (b) evidence of a confession that is the only evidence of an offence; or
- (c) evidence offered by a witness who may have a motive to give false evidence that is prejudicial to a defendant.

Section 108 continues overleaf

Section 108 Judicial warnings about unreliable evidence

C384 This section contains a general requirement for the judge to warn the jury about any evidence that in the judge's opinion may be unreliable; it also replaces the statutory and common law rules requiring judicial warnings about specific classes of evidence.

C385 The three categories mentioned in *s 108(2)* are to be treated as potentially unreliable evidence requiring the judge to consider in every case whether to give a warning. A warning is necessary only if the judge forms the opinion that the evidence in the particular case is potentially unreliable. *Paragraph (c)* re-enacts the substance of s 12C of the Evidence Act 1908. If in a joint trial the judge gives a warning under *para (c)* about one defendant's evidence that is prejudicial to a co-defendant, it would be appropriate for the judge to also give the jury a warning about lies (*s 110*).

C386 With regard to hearsay, the following is an adaptation of a suggested warning issued by the Judicial Studies Board of Great Britain that may be appropriate:

> As you know, the general rule in the courts is that unless evidence is agreed it has to be given orally from the witness box. However, there are certain circumstances where a witness is unavailable and the statement of that witness is read out. That has happened here in the case of the witness X. That statement is evidence in the case which you can consider, but as he/she did not come to court, his/her evidence has not been tested under cross-examination, and therefore you have not had the opportunity of seeing how the evidence survived this form of challenge. You must therefore consider the evidence of X in the light of this limitation. You should only act upon it, if having taken this [and other matters I will shortly mention] into account, you are nevertheless sure that it is reliable.

C387 The jury may also find it helpful to be told that in estimating the weight they should give to hearsay evidence, they must consider all the circumstances from which any inference can reasonably be drawn about the reliability or otherwise of the hearsay evidence. The jury may be assisted by having their attention directed to the circumstances that are relevant in the particular case. These may include the following (the list is not intended to be exhaustive):

(a) whether the hearsay statement was made at the same time as the occurrence or existence of the matters to which it refers;
(b) whether the evidence involves multiple hearsay;
(c) whether any person involved had any motive to conceal or misrepresent matters;

Section 108 commentary continues overleaf

(3) In a criminal proceeding tried with a jury, a party may request the judge to warn the jury in accordance with subsection (1), but the judge need not comply with such a request if the judge is of the opinion that to do so might unnecessarily emphasise evidence or for any other good reason.

(4) It is not necessary for a judge to use a particular form of words in giving the warning.

(5) This section does not affect any other power of the judge to warn or inform the jury.

(6) If there is no jury, the judge must bear in mind the need for caution before convicting a defendant in reliance on evidence of a kind that may be unreliable.

Definitions: **hearsay**, **judge**, **party**, **proceeding**, **witness**, s 4.

(d) whether the hearsay statement was an edited account, or was made in collaboration with another person for a particular purpose;
(e) whether the circumstances in which the hearsay is offered suggest an attempt to prevent proper evaluation of its weight.

C388 *Section 108(3)* enables a judge's common sense and judgment to override a request for a warning that may be ill-advised.

C389 This section is expressly stated not to limit or otherwise affect the power of the judge to warn or inform the jury – *s 108(5)*.

C390 *Section 108(6)* is a reminder to a judge sitting without a jury to be mindful of the need for caution before entering a conviction on the basis of potentially unreliable evidence.

109 Judicial directions about certain ways of offering evidence

If in a criminal proceeding tried with a jury

(a) a witness offers evidence in an alternative way under Subpart 5; or

(b) the defendant is not permitted to personally cross-examine a witness; or

(c) a witness offers evidence in accordance with a witness anonymity order,

the judge must direct the jury that the law makes special provision for the manner in which evidence is to be given or questions are to be asked in certain circumstances and the jury must not draw any adverse inference against the defendant because of such manner of giving evidence or questioning.

Definitions: **judge**, **proceeding**, **witness**, s 4.

110 Judicial warnings about lies

(1) This section applies to evidence offered in a criminal proceeding that a defendant has lied either before or during the proceeding.

(2) Where evidence of a defendant's lie is offered in a criminal proceeding tried with a jury, the judge is not obliged to give a specific direction as to what inference the jury may draw from that evidence except as required by subsection (3).

(3) If, in a criminal proceeding tried with a jury, a defendant so requests or the judge is of the opinion that the jury may place undue weight on evidence of a defendant's lie, the judge must warn the jury that

(a) the jury must be satisfied before using the evidence that the defendant did lie; and

(b) people lie for various reasons; and

(c) the jury should not necessarily conclude that just because the defendant lied, the defendant is guilty of the offence for which the defendant is being tried.

(4) In a criminal proceeding tried without a jury, the judge must bear in mind the matters set out in subsection (3) before placing any weight on evidence of a defendant's lie.

Definitions: **judge**, **proceeding**, s 4.

Section 109 Judicial directions about certain ways of offering evidence

C391 This section follows and extends s 23H(a) of the Evidence Act 1908. Its purpose is to counteract as much as possible any adverse effect on the defendant arising from the fact that a witness has given evidence in an alternative way under *s 105*, or anonymously under a witness anonymity order, or if a defendant has been precluded by *s 95* from personally cross-examining a witness. In each case, a direction is mandatory. It would be appropriate for the judge to tell the jury that these ways of giving evidence or questioning are options available under the law.

Section 110 Judicial warnings about lies

C392 This section applies to lies alleged to have been told by a defendant before a proceeding or in the defendant's testimony at a proceeding.

C393 *Section 110(2)* changes the law by allowing evidence of a defendant's lies to be left to the jury without any further or specific direction about how the jury should use that evidence. Under *subs (2)*, if the prosecution alleges that the defendant lied because he or she had a guilty mind, the issue becomes a matter of inference for the fact-finder. The judge will no longer be required to explain to the jury just *how and why* the lie could point to guilt.

C394 Under *s 110(3)* a warning is mandatory if a defendant requests it or if the judge considers that there is a risk the jury may draw unwarranted inferences against the defendant.

C395 *Section 110(4)* is a reminder to a judge sitting without a jury of the matters set out in *subs (3)*.

111 Judicial directions about children's evidence

(1) In a proceeding tried with a jury in which the complainant is a child at the time the proceeding commences, the judge must not give any warning to the jury about the absence of corroboration of the evidence of the complainant if the judge would not have given such a warning had the complainant been an adult.

(2) In a proceeding tried with a jury in which a witness is a child, the judge must not, in the absence of expert evidence to the contrary, instruct the jury that there is a need to scrutinise the evidence of children generally with special care nor suggest to the jury that children generally have tendencies to invention or distortion.

(3) Despite subsection (2), if in a proceeding tried with a jury in which a witness is a child under the age of 6 the judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess such evidence, the judge may give the jury a direction to the following effect:

- even very young children can accurately remember and report things that have happened to them in the past, but because of development differences, children may not report their memories in the same manner or to the same extent as an adult would; this does not mean that a child witness is any more or less reliable than an adult witness;
- one difference is that very young children typically say very little without some help to focus on the events in question;
- another difference is that, depending on how they are questioned, very young children can be more open to suggestion than older children or adults;
- thus the reliability of the evidence of very young children depends crucially on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish open questions aimed at obtaining information from leading questions which put words into their mouths.

(4) This section does not affect any other power of the judge to warn or inform the jury.

Definitions: **child**, **judge**, **proceeding**, **witness**, s 4.

Section 111 Judicial directions about children's evidence

C396 *Section 111(1)* and *(2)* extend s 23H(b) and (c) of the Evidence Act 1908 to all proceedings tried with a jury. *Section 111(2)* preserves the prohibition on the judge telling the jury that children as a class have a tendency to invent or distort, but contains an added qualification allowing judicial comment if there is expert evidence to the contrary. The general prohibition in *s 111(2)* applies to all children and is about an assumed tendency to invent or distort spontaneously and without prompting, whereas *s 111(3)* applies to very young children and is about the possible contamination of their evidence by suggestive questioning. The two are therefore complementary.

C397 *Section 111(3)* contains a direction intended to be of assistance to a jury in assessing evidence from very young children. The direction was formulated with the assistance of experts in child psychology and contains what appears to be common ground in the considerable volume of research on the subject. It is intended to be used in its totality, because omitting any aspect of it will have the effect of making the direction unbalanced and misleading. The intention of *s 111(3)* is to direct attention away from discussions about the inherent reliability of very young children's evidence relative to that of older children or adults, and to focus instead on the way information has been obtained from them at all stages of the investigation and at trial. Since the reliability of very young children's evidence depends crucially on the way they are questioned, full disclosure of all questioning is essential. The Law Commission is working on a statutory regime for criminal discovery that will include an obligation on the prosecution to disclose relevant information that the prosecution knows exists or is in the possession of third parties.

112 Judicial warnings about identification evidence

(1) Where in a criminal proceeding with a jury the case against the defendant depends wholly or substantially on the correctness of one or more visual or voice identifications of the defendant or any other person, the judge must warn the jury of the special need for caution before finding the defendant guilty in reliance on the correctness of any such identification.

(2) The warning need not be in any particular words but must
  (a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and
  (b) alert the jury to the possibility that a mistaken witness may be convincing; and
  (c) where there is more than one identification witness, refer to the possibility that all of them may be mistaken.

Definitions: **judge**, **proceeding**, **visual identification evidence**, **voice identification evidence**, **witness**, s 4.

Section 112 Judicial warnings about identification evidence

C398 This section re-enacts and extends s 344D of the Crimes Act 1961 and applies to both visual and voice identification. In addition to the matters set out in *s 112(2)*, or in elaborating one or more of those matters, a warning could include, if relevant, the following:

- the difficulty of assessing the reliability of identification evidence, particularly as a witness's confidence, or lack of confidence, does not necessarily indicate how reliable their identification evidence is;
- the ways in which events surrounding the witness's observation of the defendant may have influenced the quality of the identification evidence (eg, time of observation, lighting, distance of witness from offender, weather conditions, the stress inherent in the situation, whether violence was used, or whether a weapon was involved);
- the ways in which any factors particular to the individual witness may have influenced the quality of the identification evidence (eg, poor eyesight or hearing, or bias);
- the ways in which any factors relating to the defendant may have influenced the quality of the identification evidence (eg, the use of a disguise);
- the fact that if the witness and defendant are of a different race/ethnicity, the identification may be less reliable;
- the greater the period of time between the sighting and the identification, the greater the likely deterioration of memory;
- the fact that memory of peripheral detail, and the quality or consistency of descriptions given by the witness, may not be indicators of reliability.

113 Delayed complaints or failure to complain in sexual cases

If in a sexual case evidence is given or a question is asked or a comment is made that tends to suggest that the person upon whom the offence is alleged to have been committed delayed making or failed to make a complaint in respect of the offence, the judge may tell the jury that there may be good reasons for the victim of such an offence to delay making or fail to make such a complaint.

Definition: **judge**, **sexual case**, s 4.

Section 113 Delayed complaints or failure to complain in sexual cases

C399 This section re-enacts the substance of s 23AC of the Evidence Act 1908. Under the Code, evidence of recent complaint may only be given within the terms of *s 37(a)*: that is, as a previous consistent statement to meet a challenge to credibility.

Subpart 7 – Judicial notice and reference to reliable public documents

114 Judicial notice

Judicial notice may be taken of the following:

(a) facts so known and accepted generally or in the locality in which the proceeding is being held that they cannot reasonably be questioned; and

(b) facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Definition: **proceeding**, s 4.

115 Admission of reliable published documents

(1) A judge may, in matters of public history, literature, science, or art, admit as evidence such published documents as the judge considers to be reliable sources of information on the subjects to which they respectively relate.

(2) Subpart 1 of Part 3 (hearsay evidence) and Subpart 2 of Part 3 (opinion evidence and expert evidence) do not apply to evidence referred to under subsection (1).

Definition: **document**, s 4.

Subpart 7
Judicial notice and reference to reliable public documents

Section 114 Judicial notice

C400 This section sets out the facts of which judicial notice may be taken. The judge may accept those facts without requiring them to be proved, and if there is a jury, the judge may direct the jury to treat those facts as if they have been proved.

Section 115 Admission of reliable published documents

C401 This section replaces s 42 of the Evidence Act 1908. It codifies a common law exception to the hearsay rule which admitted accredited public histories, scientific works and maps to prove facts of a public nature. In New Zealand, reports of the Waitangi Tribunal have been admitted under s 42 as evidence on matters of historical fact and Māori custom – *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641, 653 (CA).

Subpart 8 – Evidence of foreign law

116 Evidence of foreign law

(1) A party may offer as evidence of a statute or other written law, proclamation, treaty, or act of state, of a foreign country

(a) evidence given by an expert; or

(b) a copy of the statute or other written law, proclamation, treaty, or act of state that is certified as a true copy by a person who might reasonably be supposed to have the custody of the statute or other written law, proclamation, treaty, or act of state; or

(c) any document containing the statute or other written law, proclamation, treaty, or act of state that purports to have been issued by the government or official printer of the country or by authority of the government or administration of the country; or

(d) any document containing the statute or other written law, proclamation, treaty, or act of state that appears to the judge to be a reliable source of information.

(2) In addition, or as an alternative, to the evidence of an expert, a party may offer as evidence of the unwritten or common law of a foreign country or as evidence of the interpretation of a statute or other written law or a proclamation of a foreign country a document containing reports of judgments of the courts of the country if the document appears to the judge to be a reliable source of information about the law of that country.

(3) A party may offer as evidence of a statute or other written law of a foreign country or of the unwritten or common law of a foreign country any publication which describes or explains the law of that country, if it appears to the judge to be a reliable source of information about the law of that country.

(4) A judge is not bound to accept or act on a statement in any document as evidence of the law of a foreign country.

(5) A reference in this section to a statute of a foreign country includes a reference to a regulation, rule, by-law or other instrument of subordinate legislation of the country.

(6) Subpart 1 of Part 3 (hearsay evidence) does not apply to evidence offered under this section.

Definitions: **document**, **expert**, **foreign country**, **offer evidence**, **party**, **statement**, s 4.

Subpart 8
Evidence of foreign law

Section 116 Evidence of foreign law

C402 *Paragraph (a)* of *s 116(1)* codifies the common law and *paras (b)* to *(d)* carry forward the provisions of ss 39 to 41 of the Evidence Act 1908 on the methods of proving foreign law. Without the assistance of an expert, a judge is likely to be cautious in seeking to understand and interpret foreign legal material, or in trying to establish how authoritative and up-to-date an apparently reliable source may be. However, these are issues of weight rather than admissibility.

C403 In the absence of evidence about the foreign law, a judge will apply the New Zealand law on the relevant matter. If the foreign law is the same or substantially the same as New Zealand law, no need to prove the foreign law will arise.

C404 A judge is not bound to accept a book or other publication as conclusive of any matter stated in the book or publication – *s 116(4)*. The judge's acceptance or otherwise is likely to depend, among other things, on how familiar the judge is with the legal system of the jurisdiction and thus whether the judge is able to understand the statements in their context and to assess how authoritative the publication may be.

C405 The hearsay rules are expressly excluded, but the opinion rule applies to evidence of foreign law.

PART 6
DOCUMENTARY EVIDENCE AND EVIDENCE PRODUCED BY MACHINE, DEVICE OR TECHNICAL PROCESS

117 Offering documents in evidence without calling a witness

(1) A party may give notice in writing to every other party that the party proposes to offer a document, including a public document, as evidence in the proceeding without calling a witness to produce the document. A copy of the document must be attached to the notice.

(2) A party who on receiving a notice wishes to object to the authenticity of the document to which the notice refers or to the fact that it is to be offered in evidence without being produced by a witness must give a notice of objection in writing to every other party.

(3) If no party objects to a proposal to offer a document as evidence without calling a witness to produce it or if the judge dismisses an objection to the proposal, the document, if otherwise admissible, may be admitted in evidence and it will be presumed, in the absence of evidence to the contrary, that the nature, origin, and contents of the document are as shown on its face.

(4) A party must give notice of a proposal to offer a document without calling a witness to produce it

(a) a sufficient time before the hearing to provide all the other parties with a fair opportunity to consider the proposal; or

(b) within such time, whether before or after the commencement of the hearing, as the judge may allow and subject to any conditions that the judge may impose.

(5) A party must give notice of objection to a proposal to offer a document without calling a witness to produce it

(a) a sufficient time before the hearing to provide all the other parties with a fair opportunity to consider the notice; or

(b) within such time, whether before or after the commencement of the hearing, as the judge may allow and subject to any conditions that the judge may impose.

Section 117 continues overleaf

PART 6
DOCUMENTARY EVIDENCE AND EVIDENCE PRODUCED BY MACHINE, DEVICE OR TECHNICAL PROCESS

C406 This Part of the Code contains provisions on the admissibility and authenticity of documentary evidence. It also contains a provision about evidence produced by a machine, device or technical process.

C407 Part 6 aims to simplify, shorten and clarify the existing rules. Current technology can assure accuracy in many instances without the need to produce the original, and indeed, it is often impossible to distinguish a copy from the original. It will, of course, always remain open to a party to dispute the accuracy of secondary evidence.

C408 If the authenticity of documents is not in dispute, as is often the case – especially in civil proceedings – the Code allows the documents to be admitted without the need to produce them through a witness – *s 117*. This follows logically from *s 13*, which allows a judge to look at a document and draw inferences about authenticity from the document itself.

C409 The provisions contained in this Part have no bearing on the application of the hearsay rule. The two rules are complementary. Unless the operation of the hearsay rules is expressly excluded, any document that contains hearsay must also comply with the hearsay rule in the Code.

Section 117 Offering documents in evidence without calling a witness

C410 *Section 117* is intended to simplify the process of producing documents in evidence, including public documents (defined in *s 4*). This section introduces a new procedure whereby a party who wishes to offer a document in evidence without calling a witness to produce the document, gives notice of its intention to do so and annexes a copy of the document to the notice. It is expected that in the case of a paper document (as opposed to an audiotape or video record) the copy will be a photocopy. If no other party objects, or if the judge dismisses the objection, the document will be admitted and will be presumed to be what it purports to be and to contain what it purports to contain on its face.

Section 117 commentary continues overleaf

6) The judge may dispense with the requirement to give notice under subsection (1) or (2) on such conditions as the judge may impose.

Definitions: **copy**, **document**, **judge**, **party**, **proceeding**, **public document**, **witness**, s 4.

118 Summary of voluminous documents

(1) A party may, with the permission of the judge, give evidence of the contents of a voluminous document or a voluminous compilation of documents by means of a summary or chart.

(2) A party offering evidence by means of a summary or chart must, if the judge so directs on the request of another party or on the judge's own initiative, either produce the voluminous document or compilation of documents for examination in court during the hearing or make it available for examination and copying by other parties at a reasonable time and place.

Definitions: **document**, **judge**, **offer evidence**, **party**, s 4.

C411 The notice requirement is in addition to any disclosure that occurred during discovery. Its purpose is to indicate to other parties which documents will be produced in evidence without calling a witness to produce them. Compliance should be a simple matter. For instance, parties may indicate by reference to the list of documents provided at discovery which documents will be produced in this way.

C412 Both notice and counter-notice must be given in sufficient time before a hearing to enable other parties to consider the issues, or within the time the judge allows. This is to promote efficiency and economy by ensuring that problems are dealt with before the hearing. However, the judge has a discretion to allow notice to be given even after the hearing has commenced.

C413 Under *s 117(6)*, the judge may dispense with notice altogether, subject to any conditions thought necessary. *Subsection (6)* also enables the judge to develop a specific regime for a particular case – for example, a complex case with a large volume of documents. This may be done in the context of a system of case management or an application for directions under Rules 438 or 446H of the High Court Rules or Rule 434 of the District Courts Rules.

C414 The procedural requirements in *s 117* are additional to the admissibility requirements elsewhere in the Code; for example, the hearsay rules.

Section 118 Summary of voluminous documents

C415 *Section 118* allows a party, with the permission of the judge, to produce the contents of a voluminous document or compilation of documents in the form of a summary or chart. The section is modelled on Rule 1006 of the United States Federal Rules of Evidence and is designed to meet a practical need. *Section 118(2)* obliges a party who has given evidence in this way to produce (if the judge so directs) the voluminous document in court or elsewhere at a reasonable time and place for examination by other parties.

119 Translations and transcripts

(1) A party may offer a document which purports to be a translation into English of a document in a language other than English if notice is given to all other parties a sufficient time before the hearing to provide those other parties with a fair opportunity to scrutinise the translation.

(2) The translation will be presumed to be an accurate translation unless evidence sufficient to raise doubt about the presumption is offered.

(3) A party may offer a document which purports to be a transcript of information or other matter that is recorded

(a) in a code (including shorthand writing or programming code); or

(b) in such a way as to be capable of being reproduced as sound or script,

if notice is given to all other parties a sufficient time before the hearing to provide those other parties with a fair opportunity to scrutinise the transcript.

(4) A party who offers a transcript of information or other matter in a sound recording under subsection (3) must play all or part of the sound recording in court during the hearing if the sound recording is available and the judge so directs, either on the application of another party or on the judge's own initiative.

Definitions: **document**, **judge**, **party**, s 4.

120 Proof of signatures on attested documents

The signature, execution or attestation of a document (including a testamentary document) that is required by law to be attested may be proved by any satisfactory means and an attesting witness need not be called to prove that the document was signed, executed or attested (whether by handwriting, digital means or otherwise) as it purports to have been signed, executed or attested.

Definitions: **document**, **witness**, s 4.

Section 119 Translations and transcripts

C416 *Section 119(1)* and *(2)* introduce a presumption that a translation into English of a document in another language is an accurate translation if notice is given in sufficient time before the hearing to enable other parties to examine the translation. For the presumption to apply, however, the contents of the original document must be admissible under the Code.

C417 *Section 119(3)* enables a party to offer evidence of information recorded in a code, sound recording or script (such as a microfiche) in the form of a transcript. The words "information or other matter" are deliberately wide in order to include matter not consisting of words – for example, figures, symbols, music and other sounds, such as radar blips. However, the transcript will be admissible only if the information it transcribes is admissible. The notice requirement will enable opposing parties to apply to have the sound recording played in whole or in part if the accuracy of the transcript is in doubt.

Section 120 Proof of signatures on attested documents

C418 *Section 120* is based on s 18 of the Evidence Act 1908. It abrogates the old rule that one of the subscribing witnesses to an attested document must be called unless all such witnesses are unavailable. *Section 120* allows any relevant evidence of due execution or attestation to be given to prove these issues, whether or not the attesting witness is available. Unlike s 18 of the Evidence Act 1908, *s 120* applies to wills.

121 Evidence produced by machine, device or technical process

(1) If a party offers evidence that was produced wholly or partly by a machine, device, or technical process and the machine, device, or technical process is of a kind that ordinarily does what a party asserts it to have done, it is presumed that on a particular occasion the machine, device, or technical process did what that party asserts it to have done, unless another party offers evidence sufficient to raise a doubt about the presumption.

(2) If information or other matter is stored in such a way that it cannot be used by the court unless a machine, device, or technical process is used to display, retrieve, produce or collate it, a party may offer a document that was or purports to have been displayed, retrieved, or collated by use of the machine, device, or technical process.

Definitions: **document**, **offer evidence**, **party**, s 4.

Section 121 Evidence produced by machine, device or technical process

C419 The general words "machine, device or technical process" are intended to encompass technological developments, both current and future. A "machine" or a "device" will include, for example, a photocopier, a computer, word processor or a fax machine. "Technical process" is intended to cover a chemical or other process that might not aptly be described as carried out by a machine or device.

C420 In outline, *s 121* provides that if the proponent of machine-produced evidence adduces evidence of the operation that a machine of that kind ordinarily performs (or if the fact-finder is able to take judicial notice of the machine's operation), it is presumed that on the particular occasion the machine did what it ordinarily does. The presumption is rebuttable by evidence sufficient to raise a doubt about it, a lower standard than the formula "evidence to the contrary".

C421 The objective of the presumption is to facilitate the proof of documents and other things by reducing the need for complex and expensive technical evidence about the workings of a machine when those matters are not seriously in issue. When the presumption is successfully challenged, in addition to evidence on the workings of the class of machines to which the particular machine belongs, the proponent will also have to offer evidence that the particular machine was reliable and was properly operated on the occasion in question. This will enable the fact-finder to infer what would otherwise be presumed: ie, that on the occasion in question, the machine did what it ordinarily does.

C422 *Section 121(2)* offers a practical solution to the obvious problem that information stored in a computer or on microfiche, for example, or on sound and video recordings, cannot be accessed without display on a screen or conversion to paper form. The subsection provides that a party may offer a document that purports to display, retrieve or collate such information. "Document" is widely defined in *s 4*.

C423 The hearsay and other rules apply to evidence produced by machines. The effect of *s 5* is that *s 121* will be overridden by other legislative provisions on evidence produced by machines.

122 Authenticity of public documents

(1) A document that purports to be a public document, or a copy of or an extract from or a summary of a public document, and to have been

(a) sealed with the seal of a person or a body that might reasonably be supposed to have the custody of that public document; or

(b) certified to be such a copy, extract or summary by a person who might reasonably be supposed to have the custody of that public document,

is presumed, unless the contrary is proved, to be a public document or a copy of the public document or an extract from or summary of the public document, and may be offered in evidence to prove the truth of its contents.

(2) Subpart 1 of Part 3 (hearsay evidence) does not apply to evidence offered under this section.

Definitions: **copy**, **document**, **public document**, **seal**, s 4.

Section 122 Authenticity of public documents

C424 *Section 122(1)* contains a rebuttable presumption that a sealed public document ("public document" is defined in *s 4*) or a certified copy ("copy" is also defined in *s 4*), extract or summary of a public document is presumed to be what it purports to be. The seal must be the seal of a person or body that might reasonably be supposed to have the custody of the public document – for example the Clerk of the House of Representatives may reasonably be supposed to have the custody of Acts of Parliament. Similarly, the certification must be by such a person.

C425 The effect of *s 122(2)* is that a sealed public document or a certified copy of a public document is admissible to prove the truth of its contents without the restrictions of the hearsay rule.

123 Evidence of convictions, acquittals, and other judicial proceedings

(1) Evidence of the following facts, where admissible, may be given by a certificate purporting to be signed by a judge, a registrar or other officer having custody of the court records:

(a) the conviction or acquittal of a person charged with an offence and the particulars of the offence and of the person, including the name and date of birth of a natural person and the name and date and place of incorporation of a body corporate;

(b) the sentencing by a court of a person to any penalty and the particulars of the offence for which that person was sentenced and of the person, including the name and date of birth of a natural person and the name and date and place of incorporation of a body corporate;

(c) an order or judgment of a court and the nature, parties and particulars of the proceeding to which the order or judgment relates;

(d) the existence of a criminal or civil proceeding, whether or not the proceeding has been concluded and the nature of the proceeding.

(2) A certificate under this section is sufficient evidence of the facts stated in it without proof of the signature or office of the person appearing to have signed the certificate.

(3) The manner of proving the facts referred to in subsection (1) authorised by this section is in addition to any other manner of proving any of those facts authorised by law.

(4) If a certificate under this section is offered in evidence in a proceeding for the purpose of proving the conviction or acquittal of a person, or the sentence by a court of a person to a penalty, or an order made by a court concerning a person, and the name of the person stated in the certificate is substantially similar to the name of the person concerning whom the evidence is offered, it is presumed, in the absence of evidence to the contrary, that the person whose name is stated in the certificate is the person concerning whom the evidence is offered.

(5) Subpart 1 of Part 3 (hearsay evidence) does not apply to evidence offered under this section.

Definitions: **conviction**, **judge**, **party**, **proceeding**, s 4.

Section 123 Evidence of convictions, acquittals, and other judicial proceedings

C426 This provision sets out the means by which convictions, acquittals, sentences, judgments, orders or pending proceedings may be proved, once it has been determined that evidence of the conviction, acquittal, sentence, judgment, order or pending proceeding is admissible.

C427 When a fact described in any of the paragraphs in *s 123(1)* is admissible, that fact may be proved by means of a certificate signed by the person with custody of court records. The certificate will in itself be sufficient to prove the existence of that fact. It will not be necessary to prove the signature or office of the signatory.

C428 *Section 123(4)* provides a convenient way of proving the identity of the person about whom the facts referred to in *subs (1)* are sought to be proved. If the name in a certificate given under *subs (1)* is substantially similar to the name of the person about whom such a fact is sought to be proved, it is presumed that that person was the person named in the certificate. The presumption can be rebutted by evidence to the contrary.

C429 Since the hearsay rule does not apply, a certificate issued under *subs (1)* is admissible to prove the truth of its contents, unless the evidence is precluded by any other provision in the Code.

124 Proof of conviction by fingerprints

(1) A certificate is admissible in evidence to prove the identity of a person alleged to have been convicted in a country of an offence if

(a) the certificate purports to be signed by a fingerprint examiner; and

(b) copies of the fingerprints of the person are exhibited to or shown on the certificate; and

(c) the certificate certifies that those copies are copies of the fingerprints of a person who was convicted in the fingerprint examiner's country of the offence of which particulars are given.

(2) A certificate that

(a) purports to be signed by a fingerprint examiner; and

(b) certifies that the copies of the fingerprints which are exhibited to or shown on the certificate made under subsection (1) and the fingerprints of the person in respect of whom a conviction is sought to be proved (a copy of which fingerprints is exhibited to or shown on the certificate made under this subsection) are the fingerprints of the same person

is evidence that the person in respect of whom the conviction is sought to be proved was convicted of the offence of which particulars were given in the certificate made under subsection (1).

(3) The manner of proving a conviction authorised by this section is in addition to any other manner of proving the conviction authorised by law.

(4) The Governor-General may by Order in Council declare that certificates purporting to be made by specified persons or classes of persons in any country other than New Zealand, Australia, United Kingdom, or Canada in respect of convictions for offences committed in that country and to the same effect as certificates under subsection (1) are evidence as if they had been made under subsection (1).

(5) In this section

fingerprint examiner means a fingerprint examiner who is

(a) a member or employee of the Police; or

(b) a member or employee of a police force in the United Kingdom; or

(c) a member or employee of a police force of Australia or the police force of a State or Territory of Australia; or

(d) a member or employee of a police force of Canada or the police force of a Province or Territory of Canada.

(6) Subparts 1 (hearsay evidence) and 2 (opinion evidence) of Part 3 do not apply to evidence offered under this section.

Definitions: **conviction**, **country**, **hearsay**, **opinion evidence**, **proceeding**, s 4.

Section 124 Proof of conviction by fingerprints

C430 This section largely re-enacts s 12A of the Evidence Act 1908. It uses the term **fingerprint examiner** instead of "fingerprint expert". The definition of "fingerprint examiner" is the same as the definition of "fingerprint expert" in s 12A, except that the definition of "fingerprint examiner" includes civilian police employees as well as police officers.

C431 *Section 124(6)* expressly excludes the operation of the hearsay and opinion rules.

125 New Zealand and foreign official documents

(1) A document that purports

(a) to be the Gazette; or

(b) to have been printed or published by authority of the New Zealand Government; or

(c) to have been printed or published by the Government Printer; or

(d) to have been printed or published by order of or under the authority of the House of Representatives,

is presumed, unless the contrary is proved, to be what it purports to be and to have been so printed and published and to have been published on the date on which it purports to have been published.

(2) A document that purports

(a) to be a government or official gazette (by whatever name called) of a foreign country; or

(b) to have been printed or published by the government or official printer of a foreign country; or

(c) to have been printed or published by the authority of the legislative, executive, or judicial branch of the government of a foreign country; or

(d) to have been printed or published by an international organisation;

is presumed, unless the contrary is proved, to be what it purports to be and to have been so printed or published and to have been published on the date on which it purports to have been published.

(3) Subpart 1 of Part 3 (hearsay evidence) does not apply to evidence offered under this section.

Definitions: **document**, **foreign country**, **international organisation**, **New Zealand**, s 4.

Sections 125 to 127

C432 *Sections 125* to *127* contain various presumptions about documentary evidence. They replace some 29 sections of the Evidence Act 1908 (and its amendments), which are complicated and difficult to relate to each other. The presumptions must be distinguished from the admissibility rules in the Code. The presumptions simply assist or facilitate the admission of documentary evidence or the proof of particular facts. *Sections 125* to *127* are concerned with official and public documents and impose a burden of proof (not merely an evidential burden) on parties seeking to controvert them.

C433 The Code does not include a presumption about ancient documents produced from proper custody. *Section 13* (about self-authenticating documents) makes such a presumption unnecessary.

Section 125 New Zealand and foreign official documents

C434 In *s 125(2)(c)* the words "legislative, executive or judicial branch of the government of a foreign country" are intended to be sufficiently wide to embrace all kinds of executive and legislative bodies. The wide definition of "country" in *s 4* means that states, provinces and territories are regarded as a country for the purposes of *s 125*.

126 Notification of acts in official documents

(1) If the doing of an act by the Governor-General or the House of Representatives or by a person authorised to do the act by the law of New Zealand is notified or published in

(a) the Gazette; or

(b) a document that was printed or published by authority of the New Zealand Government; or

(c) a document that was printed or published by the Government Printer; or

(d) a document that was printed or published by order of or under the authority of the House of Representatives

it is presumed, unless the contrary is proved, that the act was done and that it was done on the date (if any) that appears in the Gazette or document.

(2) If the doing of an act by a foreign legislature or a person authorised to do the act by the law of a foreign country is notified or published in

(a) a government or official gazette (by whatever name called) of a foreign country; or

(b) a document that was printed or published by the government or official printer of a foreign country; or

(c) a document that was printed or published by the authority of the legislative, executive, or judicial branch of the government of a foreign country,

it is presumed, unless the contrary is proved, that the act was done and that it was done on the date (if any) that appears in the gazette or document.

(3) If the doing of an act by an international organisation is notified or published in a document that was printed or published by the international organisation, it is presumed, unless the contrary is proved, that the act was done and that it was done on the date (if any) that appears in the document.

(4) Subpart 1 of Part 3 (hearsay evidence) does not apply to evidence offered under this section.

Definitions: **document**, **foreign country**, **international organisation**, s 4.

Section 126 Notification of acts in official documents

C435 *Section 126(1)* is an adaptation of s 46 of the Evidence Act 1908. The presumption relates to an *act* notified in an official document and is not, strictly speaking, a presumption about a document. It is placed in this Subpart for convenience, because the presumption has a direct relationship to documents offered in evidence.

C436 *Section 126(2)* and *(3)* extend the provisions of *subs (1)* to the notified acts of foreign governments and parliaments, and international organisations.

C437 *Section 126* covers a wide variety of publications but it does not presume the accuracy of all the facts mentioned in those publications. For example, although *s 126* covers the published reports of Royal Commissions and annual reports of departments printed in the Appendix to the Journals of the House of Representatives, it does not operate to presume that the Royal Commissions' findings or the departmental accounts are correct. These are not acts "notified or published" in the publication. On the other hand, *s 126* does operate to presume that an Order in Council notified in the *Gazette* was made, and, if the Audit Office has certified the accounts of a government department, that they were certified.

C438 Unlike s 46 of the Evidence Act 1908, *s 126* does not explicitly presume the lawfulness of the action notified or published in the official publication. The Law Commission considers that a presumption of lawfulness, as opposed to a presumption that the act was in fact done, is unnecessary. It does not add anything to the common law presumption of the regularity of official acts and is best considered as a matter of substantive administrative law.

127 Presumptions as to New Zealand and foreign official seals and signatures

(1) The imprint of a seal that appears on a document and purports to be the imprint of the Seal of New Zealand, or the former Public Seal of New Zealand, or one of the seals of the United Kingdom on a document relating to New Zealand, or the seal of a foreign country, is presumed, unless the contrary is proved, to be the imprint of that seal and the document is presumed, unless the contrary is proved, to have been sealed as it purports to have been sealed.

(2) The imprint of a seal that appears on a document and purports to be the imprint of the seal of a body (including a court or tribunal) exercising a function of a public nature under the law of New Zealand or the law of a foreign country is presumed, unless the contrary is proved, to be the imprint of that seal and the document is presumed, unless the contrary is proved, to have been sealed as it purports to have been sealed.

(3) The imprint of a seal that appears on a document and purports to be the imprint of the seal of a person holding a public office or exercising a function of a public nature under the law of New Zealand or the law of a foreign country is presumed, unless the contrary is proved, to be the imprint of that seal and the document is presumed, unless the contrary is proved, to have been sealed as it purports to have been sealed.

(4) A document that purports to have been signed by a person as the holder of a public office or in the exercise of a function of a public nature under the law of New Zealand or the law of a foreign country is presumed, unless the contrary is proved, to have been signed by that person acting in an official capacity.

Definitions: **document**, **foreign country**, **seal**, s 4.

Section 127 Presumptions as to New Zealand and foreign official seals and signatures

C439 *Section 127* contains presumptions about the authenticity of various seals and signatures. These presumptions depart from the approach of existing statutory provisions that provide for certain seals, stamps and signatures to be judicially noticed.

C440 Examples of holders of public office to whom the presumption in *s 127(4)* apply are:

- the Sovereign;
- the Governor-General;
- a Minister of the Crown;
- a member of the Executive Council;
- a Judge of a New Zealand or foreign court;
- the Solicitor-General;
- a Justice of the Peace or Community Magistrate;
- the Speaker of the House of Representatives;
- the Clerk of the House of Representatives;
- the Clerk of the Executive Council.

PART 7
MISCELLANEOUS

128 Regulations

The Governor-General may make regulations by Order in Council prescribing all matters that are required or permitted by this Code to be prescribed or are necessary or convenient to be prescribed for giving effect to the purposes of this Code and in particular

(a) prescribing the procedure to be followed, the type of equipment to be used, and the arrangements to be made, where a person's evidence is to be video recorded;

(b) providing for the approval of interviewers, or classes of interviewers, for child complainants in sexual cases, and providing for such approvals to be proved by production of certificates in the prescribed form;

(c) prescribing the form of certificate by which an interviewer is to formally identify a video record;

(d) providing for the consent of persons to be video recorded and specifying who may give consent on behalf of children who are to be video recorded;

(e) prescribing the uses to which any video records may be put and prohibiting their use for other purposes;

(f) providing for the safe custody of video records intended to be offered as evidence;

(g) providing for the preparation of transcripts of video records and for their uses and safe custody;

(h) prescribing the form of certificates to be given under sections 63 and 64 by judges to certain witnesses claiming a privilege against self-incrimination;

(i) regulating the provision of communication assistance to defendants and witnesses.

Definitions: **child complainant**, **self-incrimination**, **sexual case**, **video record**, **witness**, s 4.

129 Transitional provisions
The transitional provisions in Schedule 1 have effect on the commencement of this Code.

130 Repeals
The enactments specified in Schedule 2 are repealed.

SCHEDULE 1

Transitional Provisions

1 Notice of hearsay in criminal proceedings

(1) The reference in subsection (1) of section 20 to giving notice of a proposal to offer a hearsay statement as evidence a sufficient time before the hearing is taken to include a reference to giving notice of the kind referred to in that subsection before the commencement of that section.

(2) The reference in subsection (2) of section 20 to giving a notice of objection as soon as practicable is taken to include a reference to giving notice of the kind referred to in that subsection before the commencement of that section.

2 Admissibility, notice and disclosure of expert evidence
The reference in subsection (2) of section 25 to giving a notice under subsection (1) of that section in sufficient time before the hearing is taken to include a reference to giving notice of the kind referred to in subsection (2) before the commencement of that section.

3 Evidence of co-defendants' truthfulness
The reference in subsection (3) of section 41 to giving a notice under subsection (2) of that section in sufficient time before the hearing is taken to include a reference to giving notice of the kind referred to in subsection (3) before the commencement of that section.

Schedule 1 continues overleaf

SCHEDULE 1

Transitional Provisions

C441 By virtue of *s 5(3)*, the Code applies to all hearings commenced on or after the date of commencement of the Code. The transitional provisions enable parties, ahead of the Code's date of commencement, to give any notices and to make any applications the Code requires. Such notices or applications will be treated as if they were made under the relevant sections of the Code. This means parties do not have to wait until the Code starts to operate before taking any procedural steps that are preconditions to getting certain types of evidence admitted at hearings to which the Code applies.

C442 *Section 5* expressly excludes the operation of *ss 47* and *48* in relation to identifications made before the day the Code starts to operate.

4 Propensity evidence about co-defendants
The reference in subsection (3) of section 44 to giving a notice under subsection (2) of that section in sufficient time before the hearing is taken to include a reference to giving notice of the kind referred to in subsection (3) before the commencement of that section.

5 Identifications already carried out
Subpart 6 of Part 3 (identification evidence) does not apply in relation to an identification made before the commencement of that section.

6 Support persons
(1) The references in subsection (1) and (2) of section 80 to the application of a complainant or a witness are taken to include references to an application of the kind referred to in those subsections before the commencement of that section.

(2) The reference in subsection (3) of section 80 to disclosing the name of each person who is to provide support to a complainant or witness under that section as soon as practicable is taken to include a reference to disclosing such a name before the commencement of that section.

7 Restrictions on cross-examination by unrepresented parties
The reference in subsection (2) of section 95 to the application of a witness is taken to include a reference to an application of the kind referred to in that subsection before the commencement of that section.

8 Directions about way child complainants are to give evidence
The reference in subsection (2) of section 102 to making an application for directions under subsection (1) of that section as early as practicable is taken to include a reference to making such an application before the commencement of that section.

9 Directions about alternative ways of giving evidence
The reference in subsection (2) of section 103 to making an application for directions under subsection (1) of that section as early as practicable is taken to include a reference to making such an application before the commencement of that section.

Schedule 1 continues overleaf

10 Offering documents in evidence without calling a witness

(1) The reference in subsection (4) of section 117 to giving notice of a proposal to offer a document without calling a witness to produce it a sufficient time before the hearing is taken to include a reference to giving notice of the kind referred to in that subsection before the commencement of that section.

(2) The reference in subsection (5) of section 117 to giving a notice of objection to a proposal to offer a document without calling a witness to produce it a sufficient time before the hearing is taken to include a reference to giving notice of the kind referred to in that subsection before the commencement of that section.

11 Summary of voluminous documents

A party is taken, for the purpose of section 118(2), to have made a summary or chart available for examination and copying if the summary or chart was made so available before the commencement of that section.

12 Translations and transcripts

(1) The reference in subsection (1) of section 119 to giving notice of a proposal to offer a translation of a document in a language other than English a sufficient time before the hearing is taken to include a reference to giving notice of the kind referred to in that subsection before the commencement of that section.

(2) The reference in subsection (3) of section 119 to giving notice of a proposal to offer a transcript of information or other matter a sufficient time before the hearing is taken to include a reference to giving notice of the kind referred to in that subsection before the commencement of that section.

SCHEDULE 2

Enactments Repealed

1908, No.56 – The Evidence Act 1908. (R.S. Vol. 28, p 455) except for sections 13A to 13J, and 48 to 48J.

1945, No.16 – The Evidence Amendment Act 1945. (R.S. Vol. 28, p 493)

1950, No.29 – The Evidence Amendment Act 1950. (R.S. Vol. 28, p 496)

1952, No.50 – The Evidence Amendment Act 1952. (R.S. Vol. 28, p 497)

1957, No.88 – The Oaths and Declarations Act 1957: Section 13 (R.S. Vol. 28, p 821)

1958, No.17 – The Evidence Amendment Act 1958. (R.S. Vol. 28, p 501)

1961, No.43 – The Crimes Act 1961: Sections 344D and 369. (R.S. Vol. 1, p 635)

1962, No.34 – The Evidence Amendment Act 1962. (R.S. Vol. 28, p 502)

1963, No.87 – The Evidence Amendment Act 1963. (R.S. Vol. 28, p 503)

1966, No.24 – The Evidence Amendment Act 1966. (R.S. Vol. 28, p 503)

1972, No.57 – The Evidence Amendment Act 1972. (R.S. Vol. 28, p 503)

1974, No.84 – The Evidence Amendment Act 1974. (R.S. Vol. 28, p 504)

1976, No.89 – The Evidence Amendment Act 1976. (R.S. Vol. 28, p 504)

1977, No.13 – The Evidence Amendment Act 1977. (R.S. Vol. 28, p 504)

1980, No.6 – The Evidence Amendment Act 1980. (R.S. Vol. 28, p 505)

1980, No.27 – The Evidence Amendment Act (No. 2) 1980. (R.S. Vol. 28, p 505) except for sections 25 and 37 to 49

1981, No.23 – The Juries Act 1981: Section 28

1982, No.48 – The Evidence Amendment Act 1982. (R.S. Vol. 28, p 527)

1985, No.54 – The Evidence Amendment Act 1985. (R.S. Vol. 28, p 527)

1985, No.161 – The Evidence Amendment Act (No. 2) 1982. (R.S. Vol. 28, p 527)

1986, No.74 – The Evidence Amendment Act 1986. (R.S. Vol. 28, p 528)

1986, No.87 – The Evidence Amendment Act (No. 2) 1986. (R.S. Vol. 28, p 529)

1987, No.138 – The Evidence Amendment Act 1987. (R.S. Vol. 28, p 529)

1988, No.116 – The Evidence Amendment Act 1988. (R.S. Vol. 28, p 530)

1988, No.222 – The Evidence Amendment Act (No. 2) 1988. (R.S. Vol. 28, p 530)

1989, No.104 – The Evidence Amendment Act 1989. (R.S. Vol. 28, p 530)

1990, No.46 – The Evidence Amendment Act 1990. (R.S. Vol. 28, p 532) except for section 10A.

Other Law Commission publications:

Report series

NZLC R1	Imperial Legislation in Force in New Zealand (1987)
NZLC R2	Annual Reports for the years ended 31 March 1986 and 31 March 1987 (1987)
NZLC R3	The Accident Compensation Scheme (Interim Report on Aspects of Funding) (1987)
NZLC R4	Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme) (1988)
NZLC R5	Annual Report 1988 (1988)
NZLC R6	Limitation Defences in Civil Proceedings (1988)
NZLC R7	The Structure of the Courts (1989)
NZLC R8	A Personal Property Securities Act for New Zealand (1989)
NZLC R9	Company Law: Reform and Restatement (1989)
NZLC R10	Annual Report 1989 (1989)
NZLC R11	Legislation and its Interpretation: Statutory Publications Bill (1989)
NZLC R12	First Report on Emergencies: Use of the Armed Forces (1990)
NZLC R13	Intellectual Property: The Context for Reform (1990)
NZLC R14	Criminal Procedure: Part One: Disclosure and Committal (1990)
NZLC R15	Annual Report 1990 (1990)
NZLC R16	Company Law Reform: Transition and Revision (1990)
NZLC R17(S)	A New Interpretation Act: To Avoid "Prolixity and Tautology" (1990) (and Summary Version)
NZLC R18	Aspects of Damages: Employment Contracts and the Rule in *Addis v Gramophone Co* (1991)
NZLC R19	Aspects of Damages: The Rules in *Bain v Fothergill* and *Joyner v Weeks* (1991)
NZLC R20	Arbitration (1991)
NZLC R21	Annual Report 1991 (1991)
NZLC R22	Final Report on Emergencies (1991)
NZLC R23	The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance (1992)
NZLC R24	Report for the period l April 1991 to 30 June 1992 (1992)
NZLC R25	Contract Statutes Review (1993)
NZLC R26	Report for the year ended 30 June 1993 (1993)
NZLC R27	The Format of Legislation (1993)
NZLC R28	Aspects of Damages: The Award of Interest on Money Claims (1994)
NZLC R29	A New Property Law Act (1994)
NZLC R30	Community Safety: Mental Health and Criminal Justice Issues (1994)
NZLC R31	Police Questioning (1994)
NZLC R32	Annual Report 1994 (1994)
NZLC R33	Annual Report 1995 (1995)
NZLC R34	A New Zealand Guide to International Law and its Sources (1996)
NZLC R35	Legislation Manual: Structure and Style (1996)
NZLC R36	Annual Report 1996 (1996)
NZLC R37	Crown Liability and Judicial Immunity: A response to *Baigent's* case and *Harvey v Derrick* (1997)
NZLC R38	Succession Law: Homicidal Heirs (1997)
NZLC R39	Succession Law: A Succession (Adjustment) Act (1997)
NZLC R40	Review of the Official Information Act 1982 (1997)

NZLC R41	Succession Law: A Succession (Wills) Act (1997)
NZLC R42	Evidence Law: Witness Anonymity (1997)
NZLC R43	Annual Report 1997 (1997)
NZLC R44	Habeas Corpus: Procedure (1997)
NZLC R45	The Treaty Making Process: Reform and the Role of Parliament (1997)
NZLC R46	Some Insurance Law Problems (1998)
NZLC R47	Apportionment of Civil Liability (1998)
NZLC R48	Annual Report 1998 (1998)
NZLC R49	Compensating the Wrongly Convicted (1998)
NZLC R50	Electronic Commerce Part One: A Guide for the Legal and Business Community (1998)
NZLC R51	Dishonestly Procuring Valuable Benefits (1998)
NZLC R52	Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency? (1999)
NZLC R53	Justice: The Experiences of Māori Women : Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei
NZLC R54	Computer Misuse (1999)

Study Paper series

NZLC SP1	Women's Access to Legal Services

Preliminary Paper series

NZLC PP1	Legislation and its Interpretation: The Acts Interpretation Act 1924 and Related Legislation (discussion paper and questionnaire) (1987)
NZLC PP2	The Accident Compensation Scheme (discussion paper) (1987)
NZLC PP3	The Limitation Act 1950 (discussion paper) (1987)
NZLC PP4	The Structure of the Courts (discussion paper) (1987)
NZLC PP5	Company Law (discussion paper) (1987)
NZLC PP6	Reform of Personal Property Security Law (report by Prof J H Farrar and M A O'Regan) (1988)
NZLC PP7	Arbitration (discussion paper) (1988)
NZLC PP8	Legislation and its Interpretation (discussion and seminar papers) (1988)
NZLC PP9	The Treaty of Waitangi and Māori Fisheries – Mataitai: Nga Tikanga Māori me te Tiriti o Waitangi (background paper) (1989)
NZLC PP10	Hearsay Evidence (options paper) (1989)
NZLC PP11	"Unfair" Contracts (discussion paper) (1990)
NZLC PP12	The Prosecution of Offences (issues paper) (1990)
NZLC PP13	Evidence Law: Principles for Reform (discussion paper) (1991)
NZLC PP14	Evidence Law: Codification (discussion paper) (1991)
NZLC PP15	Evidence Law: Hearsay (discussion paper) (1991)
NZLC PP16	The Property Law Act 1952 (discussion paper) (1991)
NZLC PP17	Aspects of Damages: Interest on Debt and Damages (discussion paper) (1991)
NZLC PP18	Evidence Law: Expert Evidence and Opinion Evidence (discussion paper) (1991)
NZLC PP19	Apportionment of Civil Liability (discussion paper) (1992)

NZLC PP20	Tenure and Estates in Land (discussion paper) (1992)
NZLC PP21	Criminal Evidence: Police Questioning (discussion paper) (1992)
NZLC PP22	Evidence Law: Documentary Evidence and Judicial Notice (discussion paper) (1994)
NZLC PP23	Evidence Law: Privilege (discussion paper) (1994)
NZLC PP24	Succession Law: Testamentary Claims (discussion paper) (1996)
NZLC PP25	The Privilege Against Self-Incrimination (discussion paper) (1996)
NZLC PP26	The Evidence of Children and Other Vulnerable Witnesses (discussion paper) (1996)
NZLC PP27	Evidence Law: Character and Credibility (discussion paper) (1997)
NZLC PP28	Criminal Prosecution (discussion paper) (1997)
NZLC PP29	Witness Anonymity (discussion paper) (1997)
NZLC PP30	Repeal of the Contracts Enforcement Act 1956 (discussion paper) (1997)
NZLC PP31	Compensation for Wrongful Conviction or Prosecution (discussion paper) (1998)
NZLC PP32	Juries in Criminal Trials: Part One (discussion paper) (1998)
NZLC PP33	Defaming Politicians: A Response to *Lange v Atkinson* (discussion paper) (1998)
NZLC PP34	Retirement Villages (discussion paper) (1998)
NZLC PP35	Shared Ownership of Land (discussion paper) (1999)
NZLC PP36	Coroners: A Review (discussion paper) (1999)