

Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006

SUMMARY OF ISSUES PAPER

1. Te Aka Matua o te Ture | Law Commission is conducting its third and final statutory review of the operation of the provisions of the Evidence Act 2006 (the Act).
2. This is a summary of the Commission's [Issues Paper](#) on this review. It lists the potential issues we have identified with the operation of the Act, indicates where these issues are discussed in the Issues Paper and sets out the consultation questions we ask in the Issues Paper.
3. We want to hear your views. We encourage you to read the more detailed discussion in the Issues Paper on any of the topics that interest you. You can answer any or all of the questions below.
4. You can make a submission by completing a submission form, emailing us at evidence@lawcom.govt.nz or writing to us at The Third Review of the Evidence Act, Law Commission, PO Box 2590, Wellington 6140.
5. Submissions must be received by 5pm on **30 June 2023**. For information on how the Commission will use your submission, see the "Have your say" section of the Issues Paper.

INTRODUCTION (CHAPTER 1)

6. This review considers the operation of the provisions of the Act since the Commission's last operational review (completed in 2019) and whether repeal or amendment of any provisions of the Act is "necessary or desirable".¹
7. The Issues Paper outlines potential issues with the operation of the Act, which we have identified through research and preliminary feedback. It also presents some options for reform. We seek submissions on whether these potential issues are causing problems in practice and, if they are, whether and how the Act should be amended to address them.
8. The feedback we receive will inform our recommendations to the Government in our final report, which must be provided to the Minister of Justice by 23 February 2024.

¹ Evidence Act 2006, s 202 (now repealed).

9. The Issues Paper is organised into 15 chapters. We ask questions throughout the Issues Paper to seek your views. The consultation questions are also included in this summary document. You can respond to any or all questions and raise any additional issues with the operation of the Act that we have not discussed.

QUESTION

Q1

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

TE AO MĀORI AND THE EVIDENCE ACT (CHAPTER 2)

Admissibility of mātauranga Māori and tikanga Māori

10. It has long been recognised that some rules of evidence can create challenges for the admission of relevant evidence relating to mātauranga Māori and tikanga Māori due to the oral tradition in te ao Māori. It is important that the Act be able to admit such evidence, particularly in light of the changing legal, political and social landscape in which the courts are increasingly being called upon to consider and recognise Māori rights and interests. We discuss the admissibility of mātauranga Māori and tikanga Māori with particular reference to the hearsay and opinion evidence provisions in the Act. We seek feedback on whether further clarity is required as to the appropriate approach to such evidence and outline two options for reform.

QUESTION

Q2

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

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

Other potential issues with how the Act recognises and provides for te ao Māori

11. We invite feedback from submitters on whether there have been any developments in recent years suggesting it is desirable to consider:
- (a) the application of section 30 (improperly obtained evidence) in cases of potential racial bias;
 - (b) the adequacy of section 69 (overriding discretion as to confidential information) to protect marae discussions and communications with kaumātua, tohunga and rongoā practitioners; and
 - (c) judicial directions on cross-cultural identifications and/or credibility assessments.

12. Finally, we note the Commission’s Second Review of the Act recommended that the Act be amended to make it clear that courts can regulate procedures for giving evidence in a manner that recognises tikanga.² This recommendation has been accepted in principle but not yet implemented. We invite feedback on whether this amendment could facilitate the giving of evidence (including cross-examination) and the appointment of support persons in a way that is consistent with tikanga.

QUESTION

Q3

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

HEARSAY (CHAPTER 3)

When a person is “unavailable as a witness”

13. Case law suggests it is unclear whether a person who has a “just excuse” for not giving evidence under the Criminal Procedure Act 2011 is “unavailable as a witness” for the purposes of the hearsay provisions. Our preliminary view is that it may be desirable to clarify the position. We discuss the underlying policy considerations and seek submissions on two alternative options for reform.

QUESTIONS

Q4

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

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

Q5

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

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

Q6

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

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

When a person “cannot with reasonable diligence” be found

14. Under section 16(2)(d), a person is “unavailable as a witness” for the purposes of the hearsay provisions if they “cannot with reasonable diligence be identified or found”. Preliminary feedback identified concern about the lack of guidance in the Act or case law as to what is required to satisfy the “reasonable diligence” requirement. This may be resulting in inconsistency in approach or uncertainty as to what steps police should take to locate an intended witness. Case law has treated “reasonable diligence” as a question of fact. We seek submissions on whether the current approach is causing problems in practice and discuss two options for reform.

QUESTION

Q7

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

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

Hearsay in civil proceedings

15. Our review of the operation of the hearsay provisions in civil proceedings has identified apparent inconsistencies between the Act and the High Court Rules (HCRs) in relation to:
- (a) the process for challenging the admissibility of hearsay statements in civil proceedings; and
 - (b) the admissibility of hearsay statements that are not challenged by any party.
16. The inconsistencies may create uncertainty and increase cost and delay in civil proceedings when objections are not made in accordance with the HCRs or when hearsay statements remain unchallenged. We seek submissions on whether the Act should be amended to clarify the relationship between the Act and the HCRs and/or promote greater compliance with the hearsay rules in civil proceedings. We discuss two options for reform.

QUESTION

Q8

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

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

QUESTION

Q9

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

DEFENDANTS' AND CO-DEFENDANTS' STATEMENTS (CHAPTER 4)

Defendants' exculpatory statements

17. Where a defendant elects not to give evidence at trial, section 21 prevents them from offering their own hearsay statement. The Act permits but does not require the prosecution to offer a defendant's exculpatory statement. The courts have, however, held the prosecution may be required to offer the entirety of a "mixed" exculpatory and inculpatory statement where they wish to rely on part of it. Our initial research and preliminary feedback identified some concern about inconsistent prosecution practices and that section 21 may be causing unfairness to defendants. We seek submissions on whether the current approach is causing problems in practice and discuss some possible alternatives if reform is considered desirable.

QUESTION

Q10

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

Defendants' statements contained in hearsay

18. Section 27(3) states that the hearsay rules do not apply to defendants' statements offered by the prosecution. It is unclear how this was intended to operate when a defendant's statement is contained within a hearsay statement (that is, where both the defendant and the person they allegedly made the statement to are unavailable as witnesses). The Kōti Pira | Court of Appeal in *R v Hoggart* found that section 27 does not apply to a defendant's statement contained in a statement that is itself hearsay and that, in such cases, admissibility should be determined under the general exception to the rule against hearsay in section 18.³ We seek submissions on whether section 27 should be amended to make this clear.

QUESTION

Q11

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

³ *R v Hoggart* [2019] NZCA 89 at [50].

Admissibility of co-defendants' non-hearsay statements

19. Section 27(1) states that a defendant's statement offered by the prosecution is admissible against a co-defendant only if it is admitted under section 22A. Section 22A preserves the common law "co-conspirators' rule", which provides an exception to the rule against hearsay for statements made in furtherance of a conspiracy or joint criminal enterprise. It only applies to hearsay statements. In its Second Review, the Commission identified that the combined effect of sections 27(1) and 22A is to impose greater restrictions on the admissibility of co-defendants' statements than existed under the common law.⁴ They arguably mean a defendant's non-hearsay statement is not admissible against a co-defendant at all. The Commission recommended replacing section 22A with a new section 27AA, which would apply the requirements of the co-conspirators' rule to both hearsay and non-hearsay statements.
20. Since then, the Kōti Mana Nui | Supreme Court has observed that the Commission's proposal still would not be consistent with the common law position.⁵ This is because, at common law, a defendant's non-hearsay statement was admissible against a co-defendant without having to meet the requirements of the co-conspirators' rule. We seek submissions on whether it would be preferable to retain section 22A in its current form and to make a defendant's non-hearsay statement admissible under section 27 without meeting the requirements of section 22A.

QUESTION

Q12

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

UNRELIABLE STATEMENTS (CHAPTER 5)

The purpose and effect of section 28

21. Section 28 provides for exclusion of defendants' statements that may be unreliable. In *R v Wichman*, the majority of the Supreme Court held that indications of actual reliability (that is, indications that the statement is true) are relevant to the section 28 assessment.⁶ However, the wording of section 28 arguably reflects the common law approach under the voluntariness rule, where the truth of the statement was treated as irrelevant. It may also be unclear in other respects. We invite submissions on whether amendment is desirable to clarify the purpose and effect of section 28. We discuss three options for reform, which could be implemented together or separately. These options could clarify that, while the primary focus is on the circumstances in which the statement is made, indications of actual reliability or unreliability can also be considered.

⁴ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [15.11].

⁵ *Winter v R* [2019] NZSC 98 at [63].

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

QUESTION

Q13

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

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

The standard of proof for admissibility

22. Preliminary feedback identified concerns that section 28 may provide inadequate protection against the risk of false confessions being admitted in evidence. Currently, section 28(2) requires the judge to exclude the evidence unless satisfied on the “balance of probabilities” that the circumstances in which the statement was made were not likely to have adversely affected its reliability. We seek submissions on whether it may be appropriate to revisit this standard of proof in light of developments since the Act was enacted. These include increasing recognition of the reliability risks associated with confessions, the use of new investigatory techniques that may make it more difficult to accurately assess the reliability of confessions, and the fact that the courts now consider indications of actual reliability under section 28.

QUESTION

Q14

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

INVESTIGATORY TECHNIQUES AND RISKS OF UNRELIABILITY (CHAPTER 6)

23. Preliminary feedback expressed concern there are currently inadequate controls on the use of certain investigatory techniques to obtain statements from defendants – in particular, Mr Big undercover operations and the Complex Investigation Phased Engagement Model for questioning suspects. This raises a question about the relationship between sections 28 (unreliable statements), 29 (statements influenced by oppression) and 30 (improperly obtained evidence). As a scheme, these sections were designed to ensure defendants’ statements are sufficiently reliable to be considered by the fact-finder and to control the techniques used to obtain evidence against defendants.

24. We discuss a potential gap in the operation of these provisions, compared to the common law rules they were intended to replace, that may have arisen from the majority of the Supreme Court's decision in *R v Wichman*.⁷ There may now be circumstances where the courts cannot exclude evidence despite considering that the investigatory techniques used to obtain it carried an unacceptable risk of producing unreliable evidence. Our preliminary view is that the risk that an investigatory technique could produce unreliable evidence should be relevant when determining whether evidence is unfairly obtained under section 30 and when applying the balancing test. We seek submissions on whether the approach in *Wichman* is causing concern or problems in practice and whether legislative reform is desirable.

QUESTION

Q15

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

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

IMPROPERLY OBTAINED EVIDENCE (CHAPTER 7)

25. Section 30 applies to evidence that is improperly obtained. It requires the court to undertake a balancing process to determine whether exclusion of the evidence is proportionate to the impropriety. Most of the issues raised in this chapter relate to the application of the balancing test. To facilitate feedback on the options for reform discussed, we have included an Appendix to Chapter 7 setting out a model provision. This illustrates how some of the options could be incorporated and is not intended to indicate our preference for a particular approach.

Operation of the balancing test

26. Preliminary feedback identified concern that the balancing test may be leading to admissibility decisions that are too unpredictable and inconsistent and/or that unduly favour admission of improperly obtained evidence. These concerns are long-standing. The Commission referred to commentary and submissions criticising the balancing test in its earlier reviews of the Act.

⁷ *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

27. We discuss recent case law and the policy underlying section 30 and seek submissions on whether the current balancing test should be retained. Should reform be considered necessary or desirable, we discuss the option of amending section 30 to provide that, although it involves a balancing exercise, the onus is on the prosecution to satisfy the judge that the public interest favours admission of the evidence. This is similar to approaches in Australia. We explain that we would not see this as a return to the prima facie exclusionary rule that applied before the balancing test was adopted. The courts could continue to take into account a broad range of public interest factors in deciding whether to admit improperly obtained evidence.

QUESTIONS

Q16

Is the section 30 balancing test operating in a manner that:

- a. usually leads to admission of improperly obtained evidence?
- b. results in inconsistent or unpredictable judicial decision-making?
- c. gives greater weight to some of the s 30(3) factors than others?

If so, is this problematic?

Q17

Should the section 30 test be amended to place an onus on the prosecution to satisfy the judge that the public interest favours admission of the evidence (for example, by requiring exclusion of improperly obtained evidence unless the public interest in its admission *outweighs* the public interest in its exclusion)?

Wording of the balancing test

28. Section 30(2)(b) sets out the balancing test for determining whether to exclude improperly obtained evidence. If the judge finds evidence has been improperly obtained, they must determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice. Despite amendments to the section to clarify that the “need for an effective and credible system of justice” is not a counterbalance to the impropriety, commentators have argued its meaning remains unclear. We seek submissions on the desirability of amending section 30(2)(b) to clarify the application of the test.

QUESTION

Q18

Should section 30(2)(b) be amended to clarify what is being “balanced” against what? If so, should section 30(2)(b) provide that the judge must determine whether exclusion is proportionate to the impropriety by balancing the public interest in recognising the seriousness of the impropriety against the public interest in having the evidence considered by the fact-finder at trial (or similar if an onus is placed on the prosecution to establish the case for admitting the evidence)?

QUESTION**Q19**

Should the current reference in section 30(2)(b) to the need for an effective and credible system of justice be removed? If so, should section 30 be amended to introduce a new subsection stating that the purpose of the section is to maintain an effective and credible system of justice?

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

29. Section 30(3) sets out a non-exhaustive list of factors the court may have regard to when applying the balancing test. We discuss the general approach to applying these factors, noting there remains significant confusion over the relevance of certain factors and inconsistency in how they are applied. We seek submissions on whether section 30(3) should be amended to specify which public interest each factor is relevant to (or, alternatively, whether particular factors may favour admission or exclusion). Because section 30(3) does not require consideration of any particular factor, they could continue to be treated as neutral/not relevant in appropriate cases.

30. We then discuss each individual factor listed in section 30(3). We note issues that have arisen with the application of these factors and seek submissions on options for reform. We also discuss how each factor should be classified if section 30(3) is amended to specify which factors favour admission or exclusion.

QUESTIONS**Q20**

Should section 30(3) be amended to clarify the relevance of each factor? If so, how should this be done? For example, should section 30(3) be amended to specify:

- a. which factors are relevant to the public interest in recognising the seriousness of the impropriety and which are relevant to the public interest in having the evidence considered by the fact-finder at trial; or
- b. which factors may favour admission of the evidence and which factors may favour exclusion of the evidence?

Q21

Should section 30(3)(a) be amended to refer to the importance of any right, statutory requirement, rule of law or procedural protection breached and the extent of that breach?

Q22

Should section 30(3)(a) be listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour exclusion of the evidence)?

Q23

Should section 30(3)(b) be amended to refer to “the extent to which the investigatory techniques used were known, or ought to have been known, to be improper”?

QUESTIONS

- Q24** Should section 30(3)(b) be listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour exclusion of the evidence)?
- Q25** Should section 30(3)(c) be amended to refer to the “probative value of the evidence, including its reliability” rather than “the nature and quality of the evidence”?
- Q26** Should section 30(3)(c) be listed as a factor relevant to the public interest in having the evidence considered by the fact-finder at trial (or as a factor that may favour admission of the evidence)?
- Q27** Should section 30(3)(d) be listed as a factor relevant to the public interest in having the evidence considered by the fact-finder at trial (or as a factor that may favour admission of the evidence)?
- Q28** Should section 30(3)(e) be repealed, leaving knowledge about the extent of lawful authority and other investigatory techniques to be examined as part of the section 30(3)(b) assessment of whether the impropriety was deliberate?
- Q29** If section 30(3)(e) is retained, should it be:
- listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour exclusion of the evidence); and/or
 - amended to clarify that it applies to other techniques not involving any *impropriety* (as opposed to any breach of rights)?
- Q30** Should section 30(3)(f) be repealed?
- Q31** If section 30(3)(f) is retained, should it be listed as relevant to the public interest in having the evidence considered by the fact-finder at trial (or as a factor that may favour admission of the evidence)?
- Q32** Should sections 30(3)(g) and (h) be repealed?
- Q33** If sections 30(3)(g) and (h) are retained, should they be listed as relevant to the public interest in recognising the seriousness of the impropriety (or as a factor that may favour admission of the evidence)?
- Q34** Is any amendment to section 30 necessary or desirable to enable judges to take account of the practicalities of policing?
- Q35** Are any other amendments to the section 30(3) factors necessary or desirable?

The role of causation under section 30(5)

31. For evidence to be “improperly obtained” under section 30(5)(a) or (b), it must have been obtained “in consequence” of the breach. The courts have taken varying approaches to deciding whether a causal link is established. Some cases take a strict approach to causation, assessing what would have occurred “but for the breach”. In other cases, the courts effectively assume causation in the absence of clear evidence to the contrary. This difference in approach is significant because, if the court finds a lack of causation, the evidence will be admitted without further analysis under section 30. We seek submissions on whether it is desirable to clarify the role of causation and, if so, what approach is preferred.

QUESTION

Q36

Are any amendments to section 30 necessary or desirable to clarify the approach to causation?

PRISON INFORMANTS AND INCENTIVISED WITNESSES (CHAPTER 8)

32. Prison informant evidence is evidence in a criminal proceeding of a defendant’s statement purportedly made to another person while they were detained and offered by that other person (the prison informant). Prison informants often give their evidence in return for, or in the expectation or hope of, some advantage or benefit to them. This means there can be significant reliability issues with this type of evidence.

Admissibility of prison informant evidence

33. The Act does not specifically address the admissibility of prison informant evidence or evidence given by other incentivised witnesses. Instead, the general admissibility provisions in sections 7 and 8 apply. The Supreme Court in *W v R* confirmed that prison informant evidence requires “careful scrutiny” and considered how admissibility should be assessed under section 8.⁸ The majority and minority took different approaches to applying the section 8 test and reached different conclusions on admissibility as a result. Since this decision, the Solicitor-General has published guidelines for prosecutors on the use of prison informant evidence.⁹ We seek submissions on whether the current approach to admissibility of prison informant evidence (including the recent guidance from the Supreme Court and the Solicitor-General’s guidelines for prosecutors) is sufficient to address the risks posed by this type of evidence or whether statutory amendment is desirable.

QUESTION

Q37

Is the current approach to the admissibility of prison informant evidence adequate to address the risks associated with this type of evidence?

⁸ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [86]; minority agreement at [192].

⁹ Te Tari Ture o te Karauna | Crown Law *Solicitor-General’s Guidelines for Use of Inmate Admissions* (August 2021).

QUESTION

Q38

Should the Act be amended to include additional controls on the admissibility of prison informant evidence? If so, should the Act be amended to include:

- a. a reliability threshold; and/or
- b. a presumption of exclusion; and/or
- c. a statement of the factors to be taken into account by a judge when assessing reliability?

Use of judicial directions

34. Section 122(2)(d) requires a judge to consider whether to warn the jury of the need for caution in deciding whether to accept prison informant evidence and the weight to be given to it. The Court of Appeal in *Baillie v R* recently provided guidance on factors the judge should consider drawing to the jury's attention when making a direction on prison informant evidence.¹⁰ We seek submissions on whether section 122(2)(d) should be amended to enhance judicial directions to the jury, or whether the current law, including the guidance in *Baillie*, is sufficient.

QUESTIONS

Q39

Is section 122(2)(d) sufficient to address the risks associated with this type of evidence in practice?

Q40

Should section 122(2)(d) be amended to enhance judicial directions to juries on the reliability of prison informant evidence? If so, should it be amended to:

- a. require the trial judge to provide a warning to the jury on reliability in every case involving prison informants; and/or
- b. set out the factors that the judge should *or*, must include in their warning?

Additional safeguards

35. In *W v R*, the Court considered that additional safeguards for the use of prison informant evidence were “important and necessary”,¹¹ suggesting further guidance for prosecutors and a central register of prison informants. Recent commentary has also argued in favour of additional safeguards. Since *W v R*, the Solicitor-General has now produced guidance for prosecutors on the use of inmate admissions, and Police has established a central register for prison informants. We invite feedback on how these measures are operating in practice and whether additional safeguards are desirable. These could include, for example, further

¹⁰ *Baillie v R* [2021] NZCA 458 at [59].

¹¹ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [91]; minority agreement at [218].

changes to prosecutorial policies and guidance, oversight or approval of prosecutorial decisions to use prison informant evidence or additional record-keeping requirements.

QUESTION

Q41

Are other safeguards necessary or desirable to address the risks associated with prison informant evidence? If so, what should they be?

Other incentivised witnesses

36. Witnesses who are not prison informants may also be influenced by incentives operating within the criminal justice system. In recognition of this, the minority in *W v R* would have applied their approach to admissibility to a wider class of “incentivised secondary confession evidence”.¹² The majority confined their approach to prison informants and noted the need to recognise the value of informants in the criminal investigation process more generally.¹³ We seek submissions on whether any amendments should apply to a broader class of incentivised witnesses or be limited to prison informants.

QUESTION

Q42

Should any amendments to the Act or additional safeguards extend to a wider class of incentivised witnesses beyond prison informants? If so, who should this class of incentivised witness cover?

VERACITY EVIDENCE (CHAPTER 9)

Scope of the veracity provisions

The application of the veracity provisions to single lies

37. There is inconsistent case law on whether the veracity provisions (sections 37–39) apply to evidence of a single lie told on a previous occasion. Our preliminary view is that evidence of a single lie (which is not otherwise directly relevant to the facts in issue) should be treated as veracity evidence so that it will only be admitted if the heightened relevance test of substantial helpfulness is met. We seek submissions on whether the treatment of single lies under the veracity provisions is creating confusion or uncertainty in practice and whether it is desirable to clarify the operation of section 37.

QUESTION

Q43

Is there uncertainty as to the application of the veracity provisions to evidence of a single lie? If so, should the Act be amended to address that uncertainty?

¹² *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [201].

¹³ *W (SC38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at fn 139.

Relevance of the matters listed in section 37(3)(c)–(e)

38. Section 37(3) of the Act purports to provide a non-exhaustive list of relevant considerations in deciding whether proposed veracity evidence is substantially helpful. It is questionable, however, whether subsections 37(3)(c)–(e) are necessary. In its Second Review, the Commission recommended repealing section 37(3)(c), noting the Supreme Court in *Hannigan v R*¹⁴ had confirmed that a previous inconsistent statement will almost always have some relevance to the facts in issue (so will be admissible without having to satisfy the veracity provisions).¹⁵ This recommendation has been accepted but not yet implemented. Preliminary feedback in this review suggested sections 37(3)(d) and (e) (bias and motive to be untruthful) are also redundant and may be causing confusion in practice. We seek submissions on whether they should also be repealed.

QUESTION

Q44 Do subsections 37(3)(d) and (e) perform any useful role in practice? If not, should these subsections be repealed?

Should section 37(3) provide guidance on the factors relevant to assessing substantial helpfulness?

39. If the matters listed in section 37(3)(c)–(e) are repealed, that would only leave sections 37(3)(a) (lack of veracity when under a legal obligation to tell the truth) and (b) (conviction for one or more offences that indicate a propensity for a lack of veracity). These are examples of types of evidence that may constitute substantially helpful veracity evidence rather than evaluative matters the court should consider when assessing whether veracity evidence is substantially helpful in a particular case. The courts have provided guidance on matters that will be relevant when assessing substantial helpfulness, but these are not referred to in the Act. We seek submissions on whether it is desirable to amend section 37(3) to provide further statutory guidance on matters the court may consider when assessing substantial helpfulness.

QUESTION

Q45 Should the Act be amended to provide guidance on the factors relevant to assessing whether veracity evidence meets the threshold of substantial helpfulness? If so, what factors should be included in the Act?

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

40. Under section 38(2), the prosecution may only offer evidence about a defendant's veracity if the defendant gives oral evidence in court about their own veracity or challenging the

¹⁴ *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [119].

¹⁵ Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [14.9]–[14.17].

veracity of a prosecution witness by reference to matters other than the facts in issue. The Commission has previously considered issues with this provision, and it was amended in 2016. Preliminary feedback indicated there is continued dissatisfaction with its operation. The fact that section 38(2) only applies when the defendant gives evidence is arguably out of step with modern trial practices (for example, it is now common for the prosecution to play the defendant's evidential interview video in court, which may put veracity in issue). Additionally, the requirement for the defendant to put veracity in issue in oral evidence means section 28(2) does not apply where, for example, a prosecution witness's veracity is challenged by defence counsel in cross-examination. We seek submissions on whether the application of section 38(2) should be extended to better achieve its policy aims.

QUESTION

Q46

Should section 38(2) be amended to extend the circumstances in which the prosecution can offer evidence about a defendant's veracity? If so, should section 38(2) apply, whether or not the defendant gives evidence, when veracity is put in issue by:

- a. assertions made in the defendant's statement to Police (or other prosecuting agency); and/or
- b. the conduct of their defence?

The use of the term “veracity” in other parts of the Act

41. The term “veracity” is used in other sections outside the veracity provisions in the Act, including section 4(1) (definition of a hostile witness) and section 35 (previous consistent statements). “Veracity” is defined in section 37 as “the disposition of a person to refrain from lying”, and this meaning applies throughout the Act unless the context requires otherwise.¹⁶ Preliminary feedback suggested that, while the definition of “veracity” is concerned with the general disposition of the person to refrain from lying, the definition of hostile witness and section 35 are concerned with the veracity (or truthfulness) of a witness in the particular proceeding. We invite submissions on whether it is desirable to clarify the different meanings attached to the term “veracity” in the Act.

QUESTION

Q47

Is the different approach to veracity taken in sections outside of the veracity rules causing problems in practice? If so, should the Act be amended to clarify the different meaning of “veracity” in relation to the definition of hostile witness in section 4(1) and the rules governing previous consistent statements in section 35(2)(a)?

¹⁶ Section 4(1), introduction and definition of “veracity”.

PROPENSITY EVIDENCE (CHAPTER 10)

The general operation of section 43(1)

42. Section 43(1) allows the prosecution to offer propensity evidence about a defendant in a criminal proceeding if it has probative value in relation to an issue in dispute that outweighs the risk it will have an unfairly prejudicial effect on the defendant. Defence lawyers provided preliminary feedback that the threshold for admission under section 43(1) is too low, resulting in too much propensity evidence being admitted. We discuss how section 43(1) is operating in practice and the policy intent underlying the section. We seek submissions on whether section 43(1) is causing problems in practice and whether reform is necessary or desirable. We also discuss two possible options for reform.

QUESTION

Q48

Is the current threshold for admitting propensity evidence about the defendant under section 43(1) causing problems in practice? If so, should section 43(1) be amended to:

- a. require probative value to “substantially” outweigh the risk of unfair prejudice; and/or
- b. require the propensity evidence to have “significant” probative value?

Prior acquittal evidence

43. The Act does not specifically address the status of evidence that has previously been led at a trial against the defendant and resulted in an acquittal (prior acquittal evidence). Earlier case law acknowledged that the fact propensity evidence is prior acquittal evidence may affect the court’s assessment of its prejudicial effect (for example, where the passage of time or incomplete records affect the defendant’s ability to respond to the evidence). More recent case law has, however, suggested that this will rarely lead to exclusion of evidence that would otherwise be admissible under section 43(1). We seek feedback on whether section 43 should be amended to include specific guidance on assessing the prejudicial effect of prior acquittal evidence.

QUESTION

Q49

Is the approach to prior acquittal evidence under section 43 causing problems in practice? If so, should it be amended to provide guidance on the factors that should be considered when assessing the prejudicial effect of prior acquittal evidence?

The unusualness factor in section 43(3)

44. Section 43(3) lists factors the judge may consider when assessing the probative value of propensity evidence. Section 43(3)(f) refers to the extent to which the acts, omissions, events or circumstances that are the subject of the propensity evidence and the alleged offending are “unusual”. Case law suggests there are different approaches to assessing unusualness.

For example, some cases have identified certain types of offending as inherently unusual (such as child sexual offending), while others focus on whether there are distinctive characteristics common to the propensity evidence and alleged offending. We seek submissions on whether the availability of different ways to assess unusualness is causing problems in practice and whether reform is necessary or desirable.

QUESTION

Q50

Is section 43(3)(f) causing problems in practice? If so, should it be:

- a. amended to clarify how unusualness should be assessed; or
- b. repealed altogether?

Relevance of reliability

45. It is unclear whether the reliability of propensity evidence should be taken into account when determining its admissibility under section 43. Section 43(3)(e) of the Act permits judges to consider whether the allegations made by a propensity witness “may be the result of collusion or suggestibility”, but the Act is silent on the relevance of reliability more broadly. Case law has suggested that challenges to the credibility and reliability of propensity witnesses should generally be resolved at trial. However, the Supreme Court has recently found that reliability is relevant when assessing probative value under section 8 (general exclusion).¹⁷ The Court previously observed that there is “little or no practical difference” between the section 43 and section 8 balancing tests.¹⁸ We seek submissions on whether reform is necessary or desirable to clarify the relevance of reliability under section 43.

QUESTION

Q51

Should section 43(3)(e) be amended to clarify that, when assessing the probative value of propensity evidence, the judge may consider the reliability of the proposed propensity evidence?

IDENTIFICATION EVIDENCE (CHAPTER 11)

Definition of visual identification evidence

46. Section 4(1) defines “visual identification evidence” as an assertion that a defendant “was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done”. There is conflicting case law on whether the identification evidence provisions apply if a defendant admits to being present at the scene of an offence but denies being the person seen committing the offence. We suggest reform may be desirable to clarify the position. Our

¹⁷ *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [48]; *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] NZCCLR 17 at n 60.

¹⁸ *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [66]–[67] per William Young J.

preliminary view is that the identification provisions should apply in this situation, because there is still a risk of mistaken identification. We seek submissions on this approach.

QUESTION

Q52

Should the definition of “visual identification evidence” be amended to more explicitly include evidence of a person asserting that they observed the defendant act in the commission of an offence?

Requirements for formal visual identification procedures

47. Visual identification evidence is admissible if a “formal procedure” is followed unless the defendant proves on the balance of probabilities that the evidence is unreliable (section 45(1)). Section 45(3) lists the requirements of a formal procedure. Preliminary feedback identified concern that the formal procedure requirements no longer reflect best practice. In particular, the Act does not require the procedure to be video recorded (which would provide evidence of the degree of confidence with which an identification is made). Te Kāhui Tātari Ture | the Criminal Cases Review Commission is undertaking targeted consultation concerning best practice in this area. For this reason we are not seeking feedback on specific questions relating to these procedures.

MEDICAL PRIVILEGE (CHAPTER 12)

48. Section 59 creates a privilege in criminal proceedings for communications made to, and information obtained by, medical practitioners and clinical psychologists in the course of the examination, treatment or care of a person. It only applies in relation to drug dependency or other conditions or behaviour that may manifest itself in criminal conduct (medical privilege).

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

49. Section 59(1)(b) creates an exception to medical privilege “in the case of a person who has been required by an order of a judge, or by other lawful authority, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or for any other purpose”. Preliminary feedback suggests it is unclear whether court-ordered treatment (as opposed to an examination or test) is captured by this exception. We discuss the legislative history of the exception and the policy underlying medical privilege and suggest it is unlikely the exception was intended to include court-ordered treatment. We also note a concern that the exception may allow information obtained for one purpose to be used for another, which may be inconsistent with the objectives of the privilege. Our preliminary view is that it is desirable to amend section 59(1)(b) to clarify the circumstances in which the exception applies. We seek submissions on two options for reform.

QUESTION

Q53

Should section 59(1)(b) be amended to clarify the scope of its application? If so, should it be amended to:

- a. remove the words “or for any other purpose”; or
- b. remove the words “or for any other purpose” *and* limit the exception by reference to the purpose for which the information or communication is obtained?

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

50. Section 59(5) extends medical privilege to people “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”. The courts have interpreted this provision narrowly, holding that medical privilege can only be claimed by someone acting on behalf of a medical practitioner or clinical psychologist if the practitioner or psychologist had already initiated an examination, treatment or care regime.¹⁹ The Supreme Court has acknowledged the interpretation of section 59 in this context may be an issue of public importance but has not yet had the occasion to address it.²⁰

51. Our preliminary view is that reform may be desirable to clarify the status of disclosures to professionals other than medical practitioners and clinical psychologists and to reflect the reality of modern healthcare provision and systems (including the use of multi-disciplinary teams, telehealth and digital technologies). We seek views on whether this is the case and, if so, how section 59 should be amended.

QUESTION

Q54

Should section 59 be amended to clarify when communications to, or information obtained by, healthcare professionals other than a medical practitioner or clinical psychologist are privileged? If so, should it be amended to:

- a. clarify when someone is acting “on behalf of” a medical practitioner or clinical psychologist under section 59(5); or
- b. extend the privilege to attach to a wider range of healthcare professionals?

¹⁹ *R v Hodgson* HC Timaru CRI-2008-076-1397, 30 March 2009 at [46]. This point was not challenged on appeal to the Court of Appeal (as *R v X* (CA553/2009) [2009] NZCA 531).

²⁰ *D* (SC26/2019) v *R* [2019] NZSC 72 at [7].

OTHER PRIVILEGE ISSUES (CHAPTER 13)

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

52. Under section 54, communications with legal advisers are privileged if they are intended to be confidential and are made in the course of, and for the purpose of, obtaining or providing professional legal services (legal advice privilege). At common law, material brought into existence for the purpose of obtaining or providing legal services was privileged even if it was not in fact communicated. It is unclear whether this remains the position under section 54, which only refers to “communications”. We seek submissions on whether section 54 should be amended to clarify that legal advice privilege applies to documents prepared but not communicated for the purpose of obtaining or providing legal advice.

QUESTION

Q55

Should section 54 be amended to clarify that the privilege applies to related documents that meet the conditions described in subsections 54(1)(a) and (b) but are not communicated between the person requesting or obtaining professional legal services and the legal adviser?

Termination of litigation privilege

53. Section 56 establishes a privilege in relation to preparatory materials for proceedings (litigation privilege). The Act does not specify whether and, if so, when litigation privilege terminates, and case law has not reached a settled view on this. We seek submissions on whether this lack of certainty is causing problems in practice that ought to be addressed through statutory amendment. We discuss two options for reform.

QUESTION

Q56

Is the uncertainty as to whether and/or when litigation privilege terminates causing any problems in practice? If so, should the Act be amended to clarify:

- that litigation privilege terminates at the conclusion of the relevant proceeding and any connected litigation; or
- that litigation privilege, along with legal advice privilege and settlement privilege, does not terminate except as provided for in the Act?

Litigation privilege and confidentiality

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

a communication or information, it must have been intended to be confidential.²¹ We seek submissions on whether the absence of a reference to confidentiality in section 56 is creating confusion or causing problems in practice and whether reform is desirable to clarify the position.

QUESTION

Q57

Is the lack of reference to a requirement for confidentiality in section 56 creating confusion or otherwise causing problems in practice? If so, should section 56(1) be amended to clarify that litigation privilege only applies to a communication or information that is intended to be confidential?

Settlement privilege and the interests of justice exception

55. Section 57 protects from disclosure communications between parties in civil proceedings that are intended to be confidential and are made in connection with an attempt to settle or mediate the dispute (settlement privilege). It is based on the common law “without prejudice” rule, which was subject to a number of exceptions. Only some of these exceptions were included in section 57 when it was enacted. This led to conflicting case law on whether the common law exceptions continued to apply.
56. To address this, section 57(3)(d) was inserted in 2016 to create an additional exception where “the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege”. Some case law suggests this exception may apply in a broader range of circumstances than the common law exceptions. Commentators have expressed concern that this approach may inappropriately erode the protections of the privilege. We seek submissions on how section 57(3)(d) is operating in practice and whether amendment is necessary or desirable to clarify the scope of the exception.

QUESTION

Q58

Is section 53(3)(d) causing problems in practice? If so, should the Act be amended to clarify the scope of the exception?

Successive interests in privileged material

57. Subsections 66(2)–(4) of the Act govern successive interests in material that attracts privilege under sections 54–57. Section 66(2) was amended in 2016 to remedy a drafting error, clarifying that privilege can be asserted only by the personal representative of a *deceased* person. However, the word “deceased” was also added to the phrase “other successor in title to property of a *deceased* person”. This suggests a successor in title can no longer claim privilege while the prior owner of the property survives – a result that does not appear to have been intended. We seek submissions on whether section 66(2) should be amended to

²¹ *Beckham v R* [2015] NZSC 98 at [93]–[94].

remove the word “deceased” from the phrase “successor in title to property of the deceased person”.

QUESTION

Q59

Should section 66(2) be amended to remove the word “deceased” from the phrase “successor in title to property of the deceased person”?

TRIAL PROCESS (CHAPTER 14)

Restriction on disclosure of complainant’s occupation in sexual cases

58. Section 88 prevents questioning about or comment on the complainant’s occupation in a sexual case except with the permission of the judge. A report published in 2020 indicated that compliance with this section was low, with complainants routinely being asked to state their occupation.²² The report also suggested the scope of the section may be too narrow – for example, it does not apply to evidence about the complainant’s status as a student, mother or beneficiary, or evidence about their education or qualifications. Our preliminary view is that statutory amendment is unlikely to improve compliance with the provision as its wording is already clear. However, we seek feedback on other measures that may help to increase awareness and proper application of the section. We also seek submissions on whether section 88 should cover a wider range of information.

QUESTIONS

Q60

Is there an issue with low compliance with section 88? If so, how should this be addressed?

Q61

Should section 88 be amended to protect a wider range of information? If so, what should it include?

Cross-examination duties

59. Section 92 establishes a duty to cross-examine a witness “on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters”. Our review of case law and commentary identified some uncertainty as to the purpose of section 92 and what it requires of cross-examining counsel. There is concern that this may be resulting in mechanical and overcautious cross-examination in civil proceedings and improper or repetitive cross-examination in some criminal proceedings. We are interested in

²² Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020).

views on whether section 92 should be amended to clarify the scope of the cross-examination duty.

QUESTION

Q62

Should section 92 be amended to clarify the extent of a party's cross-examination duties? If so, should section 92 be amended to state that the obligation to cross-examine only arises if the witness or the party who called the witness may be unaware of the basis on which their evidence is challenged?

Cross-examination on behalf of another

60. Section 95 provides that, in cases involving sexual offending, family violence or harassment, the defendant is not entitled to personally cross-examine the complainant and certain witnesses. The judge may also order that a party must not personally cross-examine a witness. When a party is precluded from personally cross-examining a witness, they may have their questions put to the witness by a person appointed by the judge. The courts have taken differing views on whether a person appointed under section 95 is simply a "mouthpiece" for the party or whether they have broader duties (including cross-examination duties under section 92). We seek feedback on whether reform is desirable to clarify the position.

QUESTION

Q63

Should section 95 be amended to clarify that:

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

OTHER ISSUES (CHAPTER 15)

Section 9 and the role of the judge

61. Section 9(1)(a) permits a judge to admit evidence that is not otherwise admissible with the written or oral agreement of all parties. We received preliminary feedback suggesting that section 9 is inconsistently applied and greater guidance is needed. Case law suggests there is uncertainty about the extent to which section 9 permits admission by agreement of evidence that would otherwise be inadmissible under a specific provision in the Act or subject to exclusion under section 8 (general exclusion). We seek submissions on whether reform is desirable to clarify the position. We discuss two options for reform.

QUESTION

Q64

Should section 9 be amended to clarify when the court should admit evidence by agreement? If so, should section 9 be amended to:

- a. require the judge to have regard to certain factors when deciding whether to admit evidence under section 9(1)(a) (such as the desirability of ensuring fairness to parties and witnesses and/or avoiding unjustifiable expense and delay); and/or
- b. provide that evidence may not be admitted by agreement if exclusion is required by section 8(1)(a)?

Novel scientific evidence

62. Expert opinion evidence is admissible under section 25 if it is likely to be of substantial help to the fact-finder. Preliminary feedback suggested additional guidance may be needed in the Act on the admissibility of scientific evidence based on methodologies that are novel or argued to lack scientific validity (novel scientific evidence). In *Lundy v R*, the Court of Appeal provided guidance on the process for determining whether novel scientific evidence is substantially helpful.²³ We have not identified evidence of a problem with the application of *Lundy*, although it is not yet clear what impact it will have in practice. At this stage, we suggest it may be preferable to observe how case law develops. However, we invite feedback on whether problems have been observed in practice since *Lundy* that may indicate legislative reform is needed.

QUESTION

Q65

Are there problems in practice determining the admissibility of novel scientific evidence since the decision in *Lundy v R*? If so, what amendments to the Act, if any, are appropriate to address this?

Undercover police officer evidence

63. Sections 108–109 of the Act permit undercover police officers to give evidence without disclosing their identity in cases involving any offence punishable by at least seven years' imprisonment or certain other offences. The Minister of Justice's letter referring this review to the Commission suggested we may wish to consider whether the provisions governing anonymous evidence of undercover police officers require amendment. Our review of case law and commentary did not identify any issues with sections 108–109 that may justify reform. The nature of the protections for undercover officers may, however, make any issues difficult to identify through such a review. We therefore seek submissions on whether sections 108–109 are causing problems in practice and, if so, what amendments may be appropriate.

²³ *Lundy v R* [2018] NZCA 410 at [237]–[248].

QUESTION**Q66**

Are sections 108–109 causing problems in practice? If so, how should they be amended?
