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LAW·COMMISSION  
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# Evidence

*Report 55 – Volume 1*

Reform of the Law

*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.

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# 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

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24 August 1999

Dear Minister

I am pleased to submit to you Report 55 of the Law Commission, *Evidence Law Reform*, in response to terms of reference given to the Law Commission by your predecessor, the Rt. Hon Sir Geoffrey Palmer, in August 1989.

The Report is in two volumes. Volume 1 contains a discussion of the problems in the current law and the Commission's recommendations for reform. Volume II contains the Evidence Code and Commentary. The Code sets out the Commission's recommendations in the form of a draft statute. The Commentary explains how the Code provisions are intended to operate and is an integral part of the Code. The Report is accompanied by a miscellaneous paper which gathers together much of the current research on human memory. This research is the basis for a number of provisions in the Code.

The Report is the culmination of a decade of research and consultation with special interest groups and individuals. The process is described in the preface.

Yours sincerely

*The Hon Justice Baragwanath*  
President

*The Hon Tony Ryall*  
Minister of Justice  
Parliament Buildings  
Wellington





## Preface

THE LAW OF EVIDENCE is the set of rules by which judges determine what testimony and exhibits may be accepted and how they may be used. It is central to the day-to-day operation of New Zealand's administration of justice; it affects every piece of evidence given by every witness in every court. Its rules must be clear, principled and readily accessible.

Yet in its present form the law of evidence is a patchwork of disparate elements that have never been co-ordinated and whose effect is frequently disputed by experts. Problems resulting from ancient rules of the judge-made common law, themselves often neither precise nor readily accessible, have been met by ad hoc statutory reforms which have in turn presented difficulties of construction and of scope. An example is the Evidence Amendment Act (No 2) 1980, which responded to an over-narrow expression of the law of hearsay in *Myers v Director of Public Prosecutions* [1965] AC 1001.

The pressing need for reform of the entire law of evidence is illustrated by remarks made by Turner J about two of its facets. In *Jorgensen v News Media Limited* [1969] NZLR 961, 990–1, he referred to *Myers* and to another decision, both of which declined to treat a criminal conviction as evidence of guilt in a later proceeding:

. . . the law of evidence is Judge-made law, directed to the control of the processes by which Judges daily endeavour to do justice; . . . if it requires modification, that modification is particularly a matter with which the Judges should be entrusted. In this country there were many who when *Myers v Director of Public Prosecutions* was decided found it in their hearts to regret that the views of the majority had prevailed, and that the great days of judicial legislation in the field of evidence seemed to have come to an end. I was one of those who . . . were less than content with that decision, and for these reasons am of opinion that neither the long time during which the Courts have consistently rejected convictions as evidence of guilt, nor any reluctance to modify existing rules in a proper case should deter this Court from taking what I conceive to be the proper course, *viz* the rejection of *Hollington v Hewthorn* as a decision to govern the admissibility of such evidence in the future of this country. . . .

It became apparent that the law is an ass. The lawyers became impatient; the laymen wondered that such things could be. Lord

Denning MR and his fellow Lords Justices in the Court of Appeal uttered strong words. Lord Pearson's Committee reported. In England the law was changed. It is apparent, in a word, that if convenience once seemed to favour exclusion of a certificate of conviction as proof of guilt, that same consideration is now seen to work powerfully in the opposite direction. For these reasons I have concluded, with the President, that there is now no consideration of convenience which should deter the Court from doing what I have thought it right in principle that it should now do.

But judges can deal only with cases that come before them; they do not have the opportunity to carry out the thorough overhaul of the law of evidence that was so badly required.

Accordingly, in August 1989, the then Minister of Justice (Sir Geoffrey Palmer) gave the Law Commission the evidence reference, as follows:

Purpose: To make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.

With this purpose in mind the Law Commission is asked to examine the statutory and common law governing evidence in proceedings before courts and tribunals and make recommendations for its reform with a view to codification.

The evidence reference needs to be read together with the criminal procedure reference, which the Minister gave the Law Commission at the same time:

To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

In April 1991 the Law Commission published the first of a series of discussion papers on aspects of evidence law. They dealt with principles for reform, codification and hearsay. In the first of these papers, the Law Commission reached the provisional conclusion that codification was the only way to achieve truly comprehensive reform. It has since been confirmed in that view. Between 1991 and 1997 the Law Commission published a number of further discussion papers on major aspects of evidence law: expert evidence and opinion evidence, privilege, documentary evidence, character and credibility, the evidence of children and other vulnerable witnesses. In addition, the Commission published discussion papers on the privilege against self-incrimination and police questioning as part of the criminal procedure reference, with the intention

that the proposals would be incorporated in the Evidence Code. From 1996 to 1998, a number of unpublished research papers were written and disseminated for discussion. The discussion papers drew a wide response from community groups, academics, members of the profession and the judiciary. This participation greatly influenced the final content of the Evidence Code.

The Law Commission work on witness anonymity was nearing completion when, on 15 August 1997, the Court of Appeal delivered its decision in *R v Hines* [1997] 3 NZLR 529. When the Government declared its intention to address the issues raised in that judgment, the Law Commission decided it could best assist the process by expediting publication of a discussion paper on the topic and calling for submissions: the result was *Witness Anonymity* (NZLC PP29, 1997). It published *Evidence Law: Witness Anonymity* (NZLC R42, 1997), a report with final recommendations in time for the select committee that was considering a new Bill on the matter. The bulk of those recommendations now appear as ss 13B to 13J of the Evidence Act 1908 (inserted by the Evidence (Witness Anonymity) Amendment Act 1997). The Law Commission recommends that when the Code is promulgated, those provisions, together with s 13A of the Evidence Act 1908 (which provides for anonymity for undercover Police officers), should be reproduced in Part 5 of the Code.

In responding to the evidence reference, the Law Commission undertook considerable work reviewing the application of evidence law to the work of tribunals. The Commission considered a number of options, taking into account the fact that tribunals serve a wide variety of purposes, with a corresponding range in the formality of their proceedings. All may choose to apply the rules of evidence; almost none are currently bound to do so. The Commission considers that it would be undesirable to reduce the flexibility tribunals now enjoy. It therefore makes no recommendations in relation to tribunals, preferring to leave the choice of whether to be bound by any or all of the provisions of the Evidence Code to each tribunal or the agency administering its constituting statute.

The Law Commission also consulted a number of judges, lawyers and government officials on how changes to the Evidence Code should be made. We were greatly assisted in this process by Mr Chris Finlayson who provided us with two papers discussing the principles and options. At one end of the range is the usual process of legislative amendment through Parliament, with its attendant delays; at the other end is amendment by regulation or by a rule-making body akin to the Rules Committee (which has power to

amend the High Court Rules). Each option had its advantages but none was without problems. After a systematic review of the Code provisions, the Law Commission concluded that none of them can be classified as purely procedural – not involving any matter of substance. It decided that changes to the Code should proceed through the usual legislative channels.

We have listed our contributors, consultants, and commentators in Appendix A, where we also express our thanks. But the Law Commission wishes to acknowledge in particular the outstanding leadership of the Hon Sir John Wallace QC who, as the Commissioner in charge of the evidence project until May 1996, established its shape and direction. The Commission and the evidence law reform project benefited enormously from his knowledge, experience, intellect and vision.

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# 1

## Introduction

### THE FUNCTION OF THE LAW OF EVIDENCE

- 1 UNDER AN ADVERSARIAL SYSTEM, parties present evidence to a judge (if the judge is sitting alone) or jury (if the judge is sitting with a jury) who make a decision after applying the relevant law to the facts. The fact-finder must first decide what the facts are by assessing the evidence offered by the parties. According to one scholarly evidence text, “evidence of a fact is information that tends to prove it”.<sup>1</sup> The rules of evidence govern who may say what and how in court proceedings. They should assist the fact-finder in the task of assessing the evidence. Section 6 of the Code refers to this function or purpose of evidence law as “facilitating 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.

- 2 The law of evidence, in “facilitating the just determination of proceedings”, may operate to prevent evidence being presented to the fact-finder, or restrict how the fact-finder may use a particular item of evidence. In doing this, the law of evidence reflects certain policy positions, including existing rules that protect the rights and interests of defendants in criminal proceedings. These rights, recognised in the New Zealand Bill of Rights Act 1990, affect the operation of the law of evidence and the Law Commission’s proposals for reform.

### THE NEED FOR REFORM

- 3 The rules of evidence are mainly facilitative, because they are aimed at assisting the application of substantive law. This traditional view of the nature of the law of evidence has contributed to the way it has developed. Evidence law is largely judge-made, with occasional amendments by legislation to meet specific concerns.

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<sup>1</sup> Paciocco and Stuesser, *The Law of Evidence* (Irwin Law, Ontario, 1996) 1.

- 4 Much of evidence law is to be found in reported cases (ie, judges' decisions); they are supplemented by statutory provisions, the majority of which are not found in the Evidence Act 1908. As a consequence, the law of evidence is difficult to access, at times uncertain and lacking consistency. The law of evidence frequently fails to fulfil its function of helping the fact-finder make factual determinations by, for example, denying the fact-finder access to relevant and reliable evidence; instead, it results in unnecessary complexity, uncertainty, cost and delay.
- 5 The Law Commission's first consideration of the rule against hearsay in 1989 (NZLC PP10) led to its view that systematic reform and codification (NZLC PP14, 1991) was desirable. Codification provided the opportunity for rationalisation and clarification of the law.<sup>2</sup>

## THE AIMS AND RESULT OF THE REFORM PROCESS

- 6 The evidence reference, given to the Law Commission by the Minister of Justice in 1989, succinctly states the main aim of the reform project:

To make the law of evidence as clear, simple and accessible as practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.

The evidence reference needs to be read together with the criminal procedure reference, the purpose of which is

[t]o devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

- 7 The Law Commission has at all times been influenced by its desire for clarity, simplicity and accessibility. The Evidence Code, a comprehensive scheme that addresses all aspects of evidence law, is a clear and concise draft statute, which together with its Commentary is one of three publications produced by the Commission on completing the evidence reform project. The other two publications are this volume and a miscellaneous paper on memory.

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<sup>2</sup> Létourneau and Cohen, "Codification and Reform: Some Lessons from the Canadian Experience" (1989) 10 *Statute Law Review* 183, 186; Salken, "To Codify or Not to Codify – That is the Question: A Story of New York's Efforts to Enact an Evidence Code" (1992) 58 *Brooklyn LR* 641, 643.

## **The purpose of the Code**

- 8 The Evidence Code is intended to replace most of the existing common law and statutory provisions on the admissibility and use of evidence in court proceedings. The significant reform proposed by the Code will not achieve its purpose unless it is accompanied by a change in approach by practitioners and the judiciary. The Code's purpose and principles are fundamental to the operation of the Code, and judges should look to the Code's purpose for guidance on interpreting or applying the Code, rather than to the common law. The emphasis the Code places on facilitating the admission of relevant and reliable evidence cannot be overstated. A significant consequence of this emphasis is that the Code contains very few rules that limit the use of particular kinds or items of evidence. The Code relies on the common sense of the triers of fact and the wisdom of the judiciary who will give them guidance on how to approach the evidence in a given case. The Code does not therefore prohibit the admission of relevant evidence except when such exclusion is warranted on policy grounds; nor does the Code limit the use of admissible evidence, except where not to do so would be contrary to the purpose of the Code.
- 9 The Law Commission considers, however, that the Code should be subject to other Acts. Existing statutory provisions need to be reassessed by their administering agencies in order to determine whether the relevant Code provisions should replace them. For example, there are a large number of provisions that facilitate the admission of hearsay evidence. In general, the Code's hearsay rule could replace most of these provisions if it is thought desirable. The Commission is of the view that the administering agencies are best placed to make such decisions and accordingly s 5 of the Code provides that existing statutory rules will prevail.
- 10 Enacting the Evidence Code will result in the repeal of most of the Evidence Act 1908 (and its amendments). Schedules 1 and 2 of the Code deal with transitional provisions and consequential repeals. The Report includes a Comparative Table that sets out the particular Code provisions against the statutory rules the Code provisions replace. This forms part of Appendix B which also outlines the current sections that will be repealed without replacement.

## **The purpose of the Commentary**

- 11 The Commentary discusses the way each Code provision is intended to apply, giving examples. The Commission has provided

the Commentary as an authoritative guide to interpreting the Code and as such it should be published alongside the Code provisions, similar to the manner of the Federal Rules of Evidence.

- 12 The Commentary states whether a Code provision re-enacts an existing section or common law rule, or whether it has reformed the law and in what way. It also records whether the Code introduces a new rule.

## **The purpose of the Report**

- 13 The Report outlines the reasons for the Law Commission's policy decisions. It discusses the problems in the current law that the reform measures are intended to remedy, the concerns raised by commentators, and how the Code addresses those concerns. In a number of important areas the contributions of commentators have resulted in significant revision of proposed rules.
  - 14 The submissions referred to in the Report have been the result of a substantial consultation process over ten years. This process, and the participants in it, are set out in Appendix A of the Report.
  - 15 The structure of the Report follows the structure of the Code. Chapter 2 of the Report corresponds to Part 2 of the Code. Chapter 3 relates to Part 3, Subpart 1 of the Code, and so on. The Report is therefore intended to be read with the Code and Commentary and does not repeat the substance of the Code rules, except where it is necessary for the sake of clarity.
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## 2 Purpose

16 **T**HE CODE ADOPTS AS ITS PARAMOUNT PURPOSE “the just determination of proceedings”. The Law Commission considers it desirable to focus the Code and the attention of those who will use it on the reason people go to court in the first place: to seek a just resolution of their disputes. The goal of the “just determination of proceedings” is to be achieved through four policy objectives. The goal and objectives are set out in s 6, which is intended to serve as a guide to interpreting the Code provisions.

### **(a) Promoting the rational ascertainment of facts**

17 A primary objective of the trial is the rational ascertainment of facts. The Law Commission considers that it is desirable to enhance rationality in the process of fact-finding at trial – ensuring that relevant and useful material can be brought before the court, filtering out irrelevant material, making use of logical methods of reasoning and avoiding obvious prejudices. The law of evidence should assist in this.

### **(b) Promoting fairness to parties and witnesses**

18 The public interest in promoting fairness requires certain rights to be protected by the law of evidence. Already acknowledged in the present law, and reflected in the New Zealand Bill of Rights Act 1990, are the right of silence and the privilege against self-incrimination, the presumption of innocence, and the right to confront one’s accusers. Such rights inevitably influence the law of evidence in criminal cases. To a lesser degree there may be analogous rights in civil proceedings – for instance, the right not to be subjected to an adverse judgment unless a case has been made out, and the right to call and cross-examine witnesses.

### **(c) Protecting rights of confidentiality and other important public interests**

- 19 There are other objectives besides truth-finding and fairness underlying the adjudicative process. Even within the rationalist tradition, it is accepted that the goal of truth-finding must at times give way to other important public interests. An example is the whole body of evidence law known as privilege. These rules reflect important social values and are a legitimate constraint on the truth-finding function of the trial.

### **(d) Avoiding unjustifiable expense and delay**

- 20 Efficiency and finality are important in the trial process and our evidence reference specifically refers to them. The Law Commission does not see efficiency, finality, and the avoidance of delay as subsidiary considerations. They are important policy objectives and must play a substantive role in evidence law. In particular, efficiency requires that unnecessary complications in the exclusionary rules of evidence be minimised to save the time and effort involved in arguing about them. Considerations of efficiency and finality are also grounds for excluding evidence if its probative value cannot justify the time and effort involved in obtaining it, or if the evidence might complicate the proceedings unnecessarily.

### **Balancing competing interests**

- 21 Some commentators pointed out that the Code provides no guidance on the degree of weight to be attributed to a particular objective. For example, one practitioner asked, “[t]o what extent should economic concerns . . . be subordinated to the truth-seeking aims?” The Law Commission remains of the view that the primary goal of the Code is to facilitate “the just determination of [the particular] proceedings”. The weight or relevance of any particular factor will vary with the context, and it is a function of the judge to accord the importance necessary to reach a just result.
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# 3

## Principles and matters of general application

### INTRODUCTION

- 22 **T**HE GENERAL PRINCIPLES articulated in Subpart 2 of Part 1 of the Code form the basis of the admissibility rules and so are of great significance to the operation of the Code. The provisions should be considered in every admissibility decision.

### GENERAL PRINCIPLES

#### **Relevance**

- 23 The Code's principles derive from the general purpose set out in s 6. Since a primary function of evidence law is to promote the rational ascertainment of facts, a basic tenet of an evidence code must be that all logically relevant evidence is admissible unless there is some policy reason to exclude it. Indeed, all the modern evidence codes and draft codes begin with a rule of relevance expressed in similar terms. The Code's definition of relevance is found in s 7(3).
- 24 With very few exceptions, the Code does not confine the uses to which evidence may be put. In most cases, evidence is admissible for any purpose for which it is relevant. This general approach allows the fact-finder to take into account all admissible evidence (with very few exceptions). This approach is consistent with the purpose of the Code.

#### **General exclusion**

- 25 All the modern evidence codes impose some limits on the general principle that logically relevant evidence is admissible, expressed

in terms of unfair prejudice, misleading or confusing effect and time-wasting. The formulation in r 403 of the Federal Rules of Evidence is one example:<sup>3</sup>

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

- 26 Such provisions articulate the underlying policy grounds for excluding logically relevant evidence at common law, often subsumed in the broad concept of “sufficient relevance”. The Law Commission, like other law reform bodies, has preferred to state the specific policy considerations explicitly.
- 27 Section 8 of the Code therefore expresses substantive principles about the circumstances in which evidence should be excluded. The use of the word “must” makes it clear that if evidence offends against the principles there is no residual discretion to refuse to exclude it.
- 28 Section 8 is contrary to a line of authority that culminated in the Privy Council’s decision in *Lobban v R* [1995] 1 WLR 877. That case states that a defendant’s right to present all the evidence relevant to his or her defence is not subject to discretionary control.
- 29 Under s 8 a defendant’s right to present evidence relevant to his or her defence is not absolute but it will be a factor for the judge to consider when balancing probative value against unfairly prejudicial effect on the outcome of the particular proceeding. The Law Commission considers that s 8 is appropriately drafted and will not operate to defeat a defendant’s right to present an effective defence.<sup>4</sup>

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<sup>3</sup> See also § 352 of the California Evidence Code and s 135 of the Evidence Act 1995 (Aust) which provides:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

<sup>4</sup> Rule 403 of the United States Federal Rules of Evidence does not prevent the exclusion of defence evidence, yet there are no indications that it operates unfairly. Current New Zealand case law does allow editing of defendants’ statements in certain situations, see for example, *R v McCallum and Woodhouse* (1988) 3 CRNZ 376 (CA), indicating that judges are able to appropriately balance the rights of defendants against the desirability of fair process.

- 30 Section 8 also requires consideration of the time taken to present relevant evidence. Commentators agreed that considering whether the admission of evidence will needlessly prolong the proceedings may be important when deciding on the admissibility of previous consistent statements and follows the recent move toward more rigorous case management.

## OTHER MATTERS OF GENERAL APPLICATION

### **Admission by consent**

- 31 In line with the objective of avoiding unjustifiable expense and delay, the Commission recommends codifying the convenient practice of admitting by consent evidence that is not otherwise admissible. The content of s 369 Crimes Act 1961 has also been brought into s 9, and has been extended to allow the prosecution as well as the defence to admit facts so as to dispense with proof.

### **Code to be liberally construed**

- 32 In its discussion paper, *Evidence Law: Codification* (NZLC PP14, 1989), the Law Commission expressed the view that a provision such as s 10 was unnecessary (para 29). However, the Commission's consultations indicated that a lifetime of training has ingrained into both bench and bar an almost automatic reaction of referring to case law to resolve evidential issues. Accordingly, the Law Commission views s 10 as a necessary reminder that the Code should be construed by reference to its purpose and principles, rather than by relying on the common law.

### **Inherent powers not affected**

- 33 To avoid doubt, the Law Commission considers it desirable to clarify the relationship between the provisions of the Code and the courts' inherent jurisdiction or powers. The word "powers" is used for three reasons. First, the two terms probably have the same meaning: "Jurisdiction' means power or sources of powers".<sup>5</sup> Second, the nature and scope of a superior court's inherent jurisdiction has never been clearly defined. So far as an evidence code is concerned, it is the court's power to regulate and prevent

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<sup>5</sup> Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 LQR 120, 124, citing *Darling Downs Investments Pty Ltd v Ellwood* (1988) 80 ALR 203, 218.

abuse of its procedures that is relevant. Third, “inherent jurisdiction” has traditionally been used in connection with superior courts. Since it is now recognised that inferior courts also have inherent powers to regulate and prevent abuse of their procedures, the Commission prefers to use one term that will be understood clearly to apply to all courts.

- 34 It is impossible to foresee all the ways the courts will need to use their powers to regulate procedure and prevent abuse of process. Any attempt to set out those powers will merely create undesirable fetters. At the same time, an evidence code will become meaningless and ineffectual if the courts use their inherent powers in ways that contradict the Code’s express provisions. The Law Commission therefore recommends including s 11, which preserves a court’s freedom of action so long as it is not exercised contrary to the Code’s express provisions, and requires a court to exercise its inherent powers in accordance with the Code’s purpose and principles.

### **Evidential matters not provided for**

- 35 One of the major features of a code is that it supersedes existing law and makes a fresh start. References to earlier judicial decisions can obstruct that objective.
- 36 In the Law Commission’s view, any ambiguity in the meaning of a provision of the Code must be resolved by reference to the purpose and principles of the Code rather than to the pre-existing common law. That is not to say that previous cases will never be of value. Though the object of an evidence code is substantially to reform the law, decisions under the Code will, where appropriate, embody the wisdom and experience of the common law. There will, therefore, be a significant number of instances where the Code’s purpose and principles will be the same as those underlying the common law. In those instances reference to earlier cases may well be helpful in elucidating the application of the principles contained in the Code.
- 37 A code will also not necessarily deal with every specific point and it is sometimes suggested that “gaps” in a code will be a source of difficulty. Some developments, especially of a technological nature, may not be contemplated or fully evolved when the code is being drafted. Indeed, in the context of an ordinary statute, such developments spring to mind as the typical “unprovided-for case”. Alternatively, a gap may be said to arise because the topic by its nature is outside the scope of the code.

38 The Law Commission considers that the general Code principles and purposes will be applicable and should govern in all cases within the scope of the Code. In any unprovided-for case, therefore, the courts should look to the purpose and principles of the Code to resolve the matter (s 12).

### **Establishment of relevance of document**

39 Section 13 of the Code provides that when a judge is considering the relevance (and hence admissibility) of a document, the judge may draw reasonable inferences about its authenticity and identity from the document itself.

40 In chapter 2 of *Documentary Evidence* (NZLC PP22, 1994) the Commission discussed authenticity as an aspect of relevance and a requirement of admissibility. The Law Commission expressed the view that the common law rule requiring the authenticity of a document to be established by evidence extrinsic to the document no longer served any useful purpose. Commentators supported this view. Under the Code, if a document contains information that demonstrates on its face the authenticity aspects of its relevance (such as a signature), that should be sufficient to allow the document to be admitted. Admitting the document does not preclude a dispute over authenticity during the trial. It will then be for the fact-finder to determine what weight (if any) should be given to the document.

### **Provisional admission of evidence**

41 Questions of admissibility that arise in the course of a hearing are often dealt with pragmatically, by admitting the evidence provisionally, subject to other evidence later being adduced to establish admissibility.<sup>6</sup> If such other evidence is not forthcoming, or proves to be unsatisfactory, the evidence is excluded from consideration. Such a procedure is particularly convenient if the relevance of a particular item of evidence is not immediately obvious. For example, the contents of a document may be relevant to the issues in the case, but only if a particular person wrote it; and it may be impossible to identify the writer at the same time as the document is introduced. The judge must therefore have the power to admit the document subject to later evidence demonstrating its relevance (s 14).

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<sup>6</sup> The presence of a jury may be material to exercising discretion if the evidence is significantly prejudicial.

## Admissibility of evidence given to establish admissibility

- 42 The Law Commission recommends a rule that reforms and extends the current law on the use that may be made of evidence offered in a voir dire.
- 43 Under the current law, a defendant may be cross-examined on his or her testimony in a voir dire if that testimony is inconsistent with his or her testimony in the trial. However, according to *Wong Kam-Ming v R* [1980] AC 247 (which is generally, although not universally, accepted as representing the law in New Zealand),<sup>7</sup> this is so only if the defendant's statement that is the subject of the voir dire is ruled admissible. A defendant cannot be cross-examined on any inconsistencies between the voir dire testimony and the trial testimony if the statement is ruled inadmissible. In the Commission's view, the twin aims of the current law – to bring inconsistencies in the defendant's evidence to the fact-finder's notice, and to prevent the defendant from committing perjury with impunity – do not justify the distinction drawn in *Wong Kam-Ming*.
- 44 The Law Commission considers that *all* evidence offered to establish the facts necessary for deciding the admissibility of other evidence in a proceeding should be treated in the same way. Section 15 sets out the general rule that evidence of a witness offered at any time for the purpose of deciding whether evidence should be admitted, is not admissible as evidence at the trial. However, such evidence can be admitted should that person's testimony in the proceeding be inconsistent with the evidence offered earlier.
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<sup>7</sup> For example, it is argued in the latest edition of Garrow and Casey's *Principles of the Law of Evidence* (Butterworths, Wellington, 1996) 55 that this rule was altered by the House of Lords in *R v Brophy* [1982] AC 476 to the extent that the defendant's voir dire testimony can never be referred to at the trial proper.



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## 4

# Hearsay evidence

## INTRODUCTION

45 **O**VER THE LAST TEN YEARS, most common law jurisdictions have proposed reforming the rule against hearsay. The reasons for such a uniform call for amendment are succinctly stated by Professor R D Friedman:

The [rule against hearsay] excludes much evidence that is helpful to the truth determining process; it fails to identify that hearsay which should be excluded to protect fundamental rights of a criminal defendant; it creates unnecessary costs, as parties must arrange for the testimony of witnesses in situations where secondary evidence would suffice; it confuses judges, lawyers, and students; and it creates contempt for evidentiary law, because it fails to reflect values for which most people have respect, and so often it is ignored in practice . . . [H]earsay law, where it exists, should be radically transformed and liberalised . . .<sup>8</sup>

46 The Law Commission has published two discussion papers on the rule against hearsay. The first, published in 1989, posed options for reform. The second, published in 1991, proposed a complete statutory scheme and sought comment from the profession.

## THE NEED FOR REFORM

47 In the Law Commission's second discussion paper on the rule against hearsay, *Evidence Law: Hearsay* (NZLC PP15, 1991), the Commission argued that the rule was in need of fundamental reform. It considered that the rule should operate to exclude evidence only if there are sound policy reasons for so doing. This view received strong support from both the profession and interested community groups.

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<sup>8</sup> Friedman, "Confrontation Rights of Criminal Defendants" in Nijboer and Reintjes (eds), *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence* (Open University of the Netherlands, 1997) 533.

48 Consistent with the aims of reforming the law so as to increase the admissibility of relevant and reliable evidence, the Law Commission recommends rules that will provide a principled and much simplified approach to hearsay evidence.

## THE CODE PROVISIONS

49 The Code rule is based on the dual safeguards of necessity (an inquiry into the unavailability of the maker of the statement) and reliability (an inquiry into the circumstances in which the hearsay statement was made), which have developed at common law in a number of jurisdictions including New Zealand.<sup>9</sup> These two admissibility inquiries are also favoured by academic commentators in most jurisdictions.<sup>10</sup>

### Hearsay defined

50 The Code's definition of hearsay (s 4) is important as it operates to reform the law in a number of ways. It catches only statements made by non-witnesses. A witness is defined in the Code as a person who "gives evidence" (which may be orally, in an alternative way or in a written form; for example, under the High Court Rules) *and* is able to be cross-examined on this evidence (s 4). Previous statements of witnesses are therefore not hearsay under the Code (their admissibility is governed by s 37). This approach, which places considerable importance on the possibility of cross-examination, reflects the Law Commission's view that the lack of opportunity to test a witness's evidence in cross-examination is the most compelling reason for limiting the admissibility of hearsay evidence.

51 What is treated as hearsay under the Code is determined by the definition of "statement" (s 4). The Code's definition excludes what are known as "implied" or "unintended" assertions from the operation of the hearsay rule. In the view of the Commission, it should be left to the fact-finder to draw inferences from evidence of reported conduct. There is therefore no specific rule in the Code dealing with implied assertions. Submissions received by the Law Commission strongly supported this approach, which is also

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<sup>9</sup> *R v Khan* [1990] 2 SCR 531; *R v Smith* (1992) 15 CR (4th) 133 (Canada); *R v Baker* [1989] 1 NZLR 738 (CA); *R v Bain* [1996] 1 NZLR 129 (CA).

<sup>10</sup> Carter, "Hearsay: Whether and Whither?" (1993) 109 LQR 573; Palmer, "The Reliability-Based Approach to Hearsay" (1995) 17 Sydney LR 322; Zuckerman, "The Futility of Hearsay" [1996] Crim LR 1.

consistent with overseas developments since the Commission's discussion paper (NZLC PP15, 1991) was published.<sup>11</sup> Under the Code, therefore, implied assertions may be admissible without a reliability or necessity inquiry, although such evidence may still be excluded under s 8 on the grounds of unfairly prejudicial effect.

## The reliability inquiry

52 The Law Commission's admissibility rules for hearsay evidence in both civil and criminal proceedings are based first on an assessment of reliability. Current jurisprudence confirms the appropriateness of a reliability inquiry for determining admissibility. The following statement of Chief Justice Lamer in *R v Smith* (1992) 15 CR (4th) 133 (SCC) is consistent with the Law Commission's approach to hearsay evidence:

[H]earsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability . . . and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might extend to the accused. Properly cautioned by the trial judge, juries are perfectly capable of determining what weight ought to be attached to such evidence, and of drawing reasonable inferences therefrom. (152)

53 In the Code, reliability is assessed in terms of an inquiry into the "circumstances relating to the statement" (s 16(1)). In both civil and criminal proceedings these circumstances must give rise to a reasonable assurance of reliability before hearsay can be admitted, unless it is admitted by the consent of both parties under s 9.

54 The codification of a reliability test was very well supported in the submissions. One commentator, however, suggested adding consideration of the "importance of the issue to which the statement is relevant". The Law Commission is of the view that such an inquiry is inherent in considering the circumstances relating to the statement, more particularly its nature and contents – s 16(1)(a). The Commission saw a number of difficulties with the suggestion. First, the amendment may require the judge to consider the relative importance of the evidence pre-trial before

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<sup>11</sup> The Law Commission (England and Wales), *Evidence in Criminal Proceedings: Hearsay and Related Topics: A Consultation Paper* (CP 138, HMSO, London, 1995) para 7.72; Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (No 149, HMSO, Edinburgh, 1995) para 5.13; s 59(1) of the Evidence Act 1995 (Aust).

he or she has heard all the evidence in the case. Further, the relative importance of evidence will often depend on assessing the truthfulness (credibility) of witnesses, which cannot be properly determined pre-trial. Alternatively, it may require the judge to hear the whole of the evidence in order to make a pre-trial ruling.<sup>12</sup> Finally, how would an “importance of the evidence” factor be used? Would it support admission or exclusion? A different approach would also need to be adopted for a crucial item of evidence, depending on whether it forms part of the prosecution or the defence case.

- 55 Another commentator suggested that the matters referred to in ss 16, 17 and 18 of the Evidence Amendment Act (No 2) 1980 about the admission of hearsay be included in the Evidence Code. These sections require consideration of the circumstances in which the statement was made, the time when the statement was made, and the extent to which the maker may have a motive to misrepresent any fact or opinion about the subject matter of the statement. The Law Commission is of the view that these considerations are either expressly included or are implicit in the Code’s treatment of hearsay (see in particular s 16(1)). Section 18 of the Evidence Amendment Act (No 2) 1980 has also been enacted more broadly in the Code as s 8 (the general exclusion) which may be used to exclude otherwise admissible hearsay evidence.

### **The necessity or “unavailability” inquiry**

- 56 The second admissibility inquiry under the Code reflects the approach under the common law and in the Evidence Amendment Act (No 2) 1980. Both recognise exceptions to the traditional exclusion of hearsay based on necessity which provide for various circumstances in which a statement is admitted because the statement maker is not “available” to give evidence as a witness. Under the Code, reliable hearsay evidence will also be admitted if the maker of the statement is “unavailable” as a witness.
- 57 The Code’s definition of “unavailability” is based on the new definition of “witness” (s 4) – someone who can be cross-examined in a proceeding. Those who are able to give evidence and be cross-examined, albeit by way of video-link, will not be considered “unavailable”. Physical attendance will however normally be

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<sup>12</sup> See also the discussion in *Evidence Law: Hearsay* (NZLC PP15, 1991) paras 34 and 35.

required from people inside New Zealand and in good health unless they cannot be found or are not compellable.<sup>13</sup>

- 58 Commentators pointed out that in some jurisdictions witnesses may be considered to be “unavailable” when they are either too frightened or traumatised to give evidence or when they refuse to give evidence although physically present in court. The Law Commission is of the view that “trauma” is sufficiently covered by the other grounds (ie, unfitness to attend), and that a further appropriate response is to protect frightened witnesses by allowing anonymity or the use of screens or closed-circuit television.<sup>14</sup> Such approaches will supplement the witness protection scheme offered by the Police.
- 59 The Law Commission originally considered that a witness who refuses to give evidence should be considered unavailable for the purpose of the hearsay rule. However, the practitioners who attended the consultative seminar series<sup>15</sup> were uneasy about admitting the hearsay statements of someone physically present in court who simply refuses to testify and be subjected to cross-examination. The Commission accepts that such an extension to the grounds of unavailability would tend to encourage witnesses to opt out of testifying for any reason at all, which is clearly undesirable.

## The hearsay rule

- 60 Sections 18 and 19 provide that in both civil and criminal proceedings hearsay evidence should be admitted if the hearsay is sufficiently reliable and the maker of the statement is unavailable as a witness. A number of commentators were of the view that in addition to the primary requirement of reliability, conditions for admitting the hearsay statement of an available witness should be narrowly and specifically prescribed. In both civil and criminal proceedings the Commission therefore recommends an exception

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<sup>13</sup> This position is consistent with the current definition of “unavailable” in s 2(2) of the Evidence Amendment Act (No 2) 1980.

<sup>14</sup> Protection of witnesses by granting anonymity is possible under ss 13A–13J of the Evidence Act 1908. It is intended that these sections will be re-enacted unamended as part of the Evidence Code. Sections 102–106 of the Code govern the use of alternative ways of giving evidence.

<sup>15</sup> This seminar series was funded by the New Zealand Law Foundation, administered by the New Zealand Law Society and was held in Auckland, Hamilton, Wellington, Christchurch and Dunedin in March 1998.

to the requirement of unavailability – reliable hearsay may still be admitted if requiring the maker of the statement to be called would cause undue expense and delay.

- 61 One commentator expressed concern that hearsay evidence that may currently be admissible under the “co-conspirator’s rule” would probably be inadmissible under the Code in one particular situation. Under the Code, an “associated defendant”<sup>16</sup> who has pleaded guilty and been sentenced will be compellable for the prosecution at the defendant’s trial (s 75). The compellable associated defendant may, however, refuse to take the oath or give evidence. Such a person’s pre-trial statement will not be admissible as the statement of a testifying witness, nor will the statement be admissible as hearsay because the witness is not “unavailable”. Under the Code, the “co-conspirator’s rule” will no longer be needed as an exception to the rule that a defendant’s out-of-court statement is inadmissible against a co-defendant’s (because this will no longer be the case – see chapter 6). However, a wider issue remains: to allow a person who is available and compellable as a witness to influence the outcome of a case simply by refusing to take the oath or to give evidence can be contrary to the interests of justice. The issue involves fundamental and competing public interests. The Law Commission decided that it should not further extend the circumstances in which a defendant can be implicated by evidence they have no opportunity to challenge in cross-examination. This is consistent with the presumption of innocence.
- 62 In criminal cases, as in civil, hearsay that is otherwise inadmissible may be admitted with the consent of the parties under s 9.
- 63 One commentator argued that the hearsay rule should be abolished for both civil and criminal cases, subject to a general discretion to exclude certain evidence depending upon its evidential value and reliability.<sup>17</sup> He challenged the grounds for retaining hearsay in criminal proceedings, arguing that there is no empirical proof of lack of jury ability to assess hearsay evidence and juries are trusted to make other important decisions. He was of the view that the essential distinction between civil and criminal proceedings is the need to protect the rights of the defendant, including the “right of confrontation” (ability to cross-examine).

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<sup>16</sup> See the discussion at paras 340–341.

<sup>17</sup> This commentator’s submission was also published: Stevens and Olsen, “Law Commission Preliminary Papers 13–15 – A commentary on the proposed reform of the Law of Evidence” [1992] NZLJ 30.

64 A clear majority of commentators, however, strongly supported the Commission's proposals to liberalise the hearsay rule, rather than abolish it. Judges in particular considered that hearsay evidence can be of concern in jury trials. The Law Commission agrees and is of the view that there is still a need for judicial control over the admission of hearsay, especially in criminal proceedings.

### *The notice requirement*

65 The Code provides that parties wishing to offer hearsay evidence in a criminal proceeding must give prior notice, and that any party wishing to object to such evidence being offered must also give prior notice (s 20). The notice requirements attracted criticism from some commentators, although the majority supported the introduction of such a safeguard. The main difficulties identified were:

- There is an inherent conflict between a defendant's right to silence and a requirement that the defence be made to show its hand before the trial.
- There is a limited understanding of the hearsay rule now. A change of rules plus a notice provision could lead to a situation where many counsel would be unable to assess the extent of the obligation cast upon them to notify.
- Difficulties will arise when it is discovered that the obligation to notify has not been observed. It was submitted that, in practice, it would be very difficult to obtain an adjournment in criminal trials to permit a response – especially from the prosecution – to the introduction of the proposed hearsay.

66 The Law Commission acknowledges that there is weight in all these arguments. After considering the options (including a proposal to require only the prosecution to give notice) the Commission remains of the view that a notice requirement is desirable in criminal cases for the following reasons:

- Pre-trial disclosure by the defence already occurs (for example, the obligation to serve notice of alibi); the defence will need to show its hand before trial only if it wants to take advantage of the liberalised regime for admitting hearsay.
- The proposed definition of hearsay will make it easier for counsel to recognise hearsay.
- The requirement of prior notice has been enacted as an important safeguard into comparable legislation in a number of

common law jurisdictions.<sup>18</sup> Sufficient flexibility is built in, by way of a judicial discretion to dispense with notice, to ensure that the requirement does not lead to injustice. For example, a defendant's right to present his or her defence need not be prejudiced by being unable to give notice when new evidence is discovered.

- 67 The Law Commission expects that all matters relating to the notice and counter-notice provisions (for example, a decision on a witness's availability) will be dealt with pre-trial whenever possible and, if not, in the absence of the jury.
- 68 Some commentators also expressed a preference for a notice requirement in civil as well as in criminal proceedings. After evaluating the experience in other jurisdictions, the Commission remains of the view that an informal notice procedure will evolve as part of the discovery process in civil proceedings and there is no need for legislative intervention. It will be in the parties' best interest to give notice of their intention to call hearsay evidence so that any objections may be dealt with pre-trial. Cost sanctions would be likely to follow if a proceeding has to be adjourned to allow rebuttal evidence to be called, or abandoned and recommenced.

## Treatment of multiple hearsay

- 69 One commentator was in favour of including a distinction between first-hand and multiple hearsay, which has been recognised in a number of common law jurisdictions.<sup>19</sup> The Law Commission's view is that the number of times a statement is repeated is sometimes, but by no means always, indicative of its reliability and each case should be treated on its merits. It considers that the proposed admissibility rule will allow such flexibility.

## Use of judicial warnings

- 70 The Law Commission discussed in *Evidence Law: Hearsay* (NZLC PP15, 1991), the desirability of a judicial warning about hearsay

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<sup>18</sup> For notice provisions in civil proceedings, see s 2 of the Civil Evidence Act 1995 (UK). In criminal proceedings, see s 67 of the Evidence Act 1995 (Aust); Rules 803(24) and 804(b)(5) of the United States Federal Rules of Evidence; ss 28 and 30(7) of the Canada Evidence Act RSC 1985, Chap C-5.

<sup>19</sup> The Law Commission (England and Wales), above n 11, paras 4.4, 6.15, 11.8; Scottish Law Commission, above n 11, para 5.23 (in criminal proceedings); ss 62–64 of the Evidence Act 1995 (Aust).



evidence (para 57). The Commission considered this matter further as part of its work on judicial warnings, in response to submissions from practitioners that stressed the importance of a warning about the weight to be attached to hearsay evidence. The Code provides that whenever there is hearsay evidence, a judge must consider whether to warn the jury (see s 108(2)(a)). The Commentary also gives some guidance to judges on the content of such a warning.

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## Opinion and expert evidence

### INTRODUCTION

71 **A**T COMMON LAW the general rule is that witnesses may not offer their opinion as evidence. A witness must only give evidence of facts and it is up to the fact-finder to draw inferences from those facts. There are two exceptions. The first permits a non-expert to give opinion evidence if it is a concise way of describing facts that the witness personally perceived, *and* if the facts cannot conveniently be stated other than in the form of an opinion. The second allows properly qualified *expert* witnesses to give opinion evidence on matters within their field of expertise. The second exception is circumscribed by a number of ancillary rules: the common knowledge rule,<sup>20</sup> the ultimate issue rule,<sup>21</sup> and the factual basis rule.<sup>22</sup>

72 The law on opinion evidence and expert evidence was discussed in *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18), a discussion paper published in 1991. The Law Commission stated its view that the general exclusionary rule served a useful function by preventing the admission of unreliable, misleading or superfluous evidence. There was strong support from commentators for such an approach. The Law Commission also recommended abolishing the common knowledge and ultimate issue rules, which had been the subject of disparate application in case law.

<sup>20</sup> The common knowledge rule states that an expert cannot give evidence on a matter within the knowledge and experience of the fact-finder: *R v B (an accused)* [1987] 1 NZLR 362.

<sup>21</sup> The ultimate issue rule states that an opinion should not be offered on an issue if it is an ultimate issue that the fact-finder has to decide: Mathieson (ed), *Cross on Evidence* (CD-ROM ed, Butterworths, Wellington, 1998) para 15.5.

<sup>22</sup> The factual basis rule states that the facts upon which the expert's opinion are based must be proved by admissible evidence: *Cross on Evidence*, above n 21, para 15.7.

## THE CODE PROVISIONS

### **Admissibility of non-expert opinion evidence**

- 73 The common law approach is followed under the Code: non-expert opinion evidence is admissible whenever it is necessary for the witness to communicate or the fact-finder to understand the evidence of the witness (s 22). Commentators supported this approach.

### **Admissibility of expert opinion evidence**

- 74 The Code abolishes the common knowledge and ultimate issue rules, replacing them with a substantial helpfulness test.

#### *Substantial helpfulness requirement*

- 75 Under the Code expert opinion evidence is admissible if the opinion is likely to “substantially help” the court or jury to understand other evidence or ascertain any material fact (s 23(1)). The substantial helpfulness test was criticised by some commentators who believe it will encourage the greater use of expert opinion evidence, particularly in criminal cases, and this will have the effect of lengthening trials and confusing juries with “junk science”. Concern was also expressed that the substantial helpfulness test would not be sufficient to prevent the admission of evidence that is currently inadmissible under the common knowledge or ultimate issue rules.
- 76 The substantial helpfulness standard is not intended to change fundamentally the admissibility inquiry that a judge undertakes. There are many indications in case law that judges are already applying a substantial helpfulness test.<sup>23</sup> The Law Commission investigated other proposed admissibility standards (such as “necessity”), but concluded that the test of substantial helpfulness will operate consistently with the Code’s aim of facilitating the admission of relevant and reliable evidence to promote the just determination of proceedings.

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<sup>23</sup> *R v Decha-Iamsukun* [1993] 1 NZLR 141, 147–8 (CA); *R v Hohana* (1993) 10 CRNZ 92, 95–6; *Attorney-General v Equiticorp Industries Group Ltd (in statutory management)* [1995] 2 NZLR 135, 139–140 (CA).

## *Abolition of the common knowledge and ultimate issue rules*

- 77 The Law Commission's consideration of the case law indicated that these two rules often operate in an inflexible manner or are ignored. The Commission remains of the view that the substantial helpfulness test can more consistently and predictably fulfil the function performed by these rules (to prevent usurping the function of the fact-finder and time-wasting). A number of commentators were concerned that abolishing the common knowledge rule (s 23(2)) would see experts giving evidence on matters that are within the common experience of jurors. In the Commission's view, evidence that adds nothing to what is within the common experience of jurors would not be substantially helpful and therefore would be inadmissible under the Code.

### *The requirement of a factual basis*

- 78 Section 23(3) of the Code provides that to the extent expert opinion evidence is based on facts, those facts must be established by admissible evidence or be judicially noticed. This provision was strongly supported in submissions, although some commentators were concerned that such a requirement would preclude expert evidence in the form of a hypothesis or theory. The Law Commission considers that the wording "*to the extent that expert evidence that is opinion evidence is based on fact*" will not preclude expressions of opinion on, or the formulation of, hypotheses or theories that do not depend on a factual basis for their validity.
- 79 Under the current law, psychiatrists testifying about the insanity or state of mind of a defendant in criminal cases may rely on an out-of-court statement of that defendant in coming to their opinion.<sup>24</sup> Under the Code, such statements would be admissible as hearsay if the defendant does not testify. A defendant who chooses to testify will be able to give evidence of his or her state of mind at the relevant time, and if unable to do so because of failure of recall, his or her out-of-court statements will be admissible under s 37(b). Commentators pointed out, however, that the hearsay statements of a potentially insane defendant may not pass the reliability test (if they are offered as truth of their content) and therefore will not be available to provide the factual basis for the expert's opinion.

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<sup>24</sup> *R v Smith* [1989] 3 NZLR 405 (CA); *R v McCarthy* [1992] 2 NZLR 550 (CA).

80 The Law Commission accepts the validity of this concern and now recommends the inclusion of s 23(4), which allows a statement made to an expert by a person about that person's state of mind to be admitted in evidence to establish the facts on which the expert's opinion is based. Statements offered under this subsection will not be subject to the hearsay rule, or the previous statements rule.

## **Evidence about child complainants**

81 A substantial helpfulness test will continue to govern the admissibility of expert opinion evidence about child and mentally disabled complainants in sexual cases, which is currently admitted under s 23G of the Evidence Act 1908. This evidence relates to the intellectual attainment, mental capability, and emotional maturity of the complainant and the general developmental level of children of the same age group as the complainant.

82 Section 23G also permits the expert to express an opinion on whether the complainant's behaviour was consistent or inconsistent with the behaviour of sexually abused children of the same age group.<sup>25</sup> Many commentators were concerned that some judges may exclude such evidence under the proposed Code rule (s 24). While the Law Commission considers that such evidence will generally satisfy the "substantial helpfulness" test, it is desirable to retain an explicit provision admitting the evidence, in order to prevent arguments that a change in the law was intended.

83 The Law Commission is of the view that consistency evidence should be admitted, if kept within strict limits. As under the current law, consistency evidence will be admissible under the Code to assist the fact-finder in evaluating the behaviour of a sexually abused child. Section 24(2) also allows experts to offer an opinion about the behaviour of a child complainant in a sexual case even if the child is not a witness (if, for example, the child has died before the hearing). A similar provision has not been enacted for adults with an intellectual disability (who were formerly included in s 23G(2)(c)) because there is no research to indicate that they react to sexual abuse any differently from other adults.

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<sup>25</sup> Section 24(1) of the Code also applies when the complainant is an adult at the time of the proceeding. This change to the current position is recommended because expert evidence about the complainant's behaviour at the time of the alleged offence can be of significant value and, in the Commission's view, should not be excluded merely because the complainant is no longer a child at the time of the trial.

84 The Code requires an expert to offer the reasons for his or her opinion, including any evidence necessary for a fair and balanced explanation of the research and experience on which the opinion is based. In the Law Commission's view, this is necessary to enable the jury to correctly evaluate the expert's opinion and will add to the helpfulness of the evidence.

### **Notice requirement**

85 The Code's notice provision requires any party who proposes to offer expert evidence (whether in criminal or civil proceedings) to give notice in writing to every other party (s 25). The notice must disclose the expert's name, address, qualifications and the contents of the proposed evidence. The court may dispense with the requirement to give notice in specified circumstances (s 25(3)).

86 Commentators strongly supported the requirement to disclose expert evidence pre-trial. Submissions to the Commission noted that pre-trial disclosure would expedite proceedings and may often facilitate an early settlement.

87 One commentator argued that pre-trial disclosure would destroy the element of surprise in cross-examination that often enables counsel to expose partisan testimony. The purpose of the new rules is to encourage co-operation with expert testimony in order to make trials more efficient. Surprise tactics are based on the premise that the search for truth is advanced by a "trial by ambush". But, in the Commission's view, the fate of such battles often depends on the experts' ability to remain undaunted by cross-examination, rather than on the soundness of the expert evidence.

### **Court-appointed experts**

88 In its preliminary paper, the Law Commission proposed a rule for court-appointed experts in both civil and criminal proceedings (paras 90–97). The rule was in keeping with a trend throughout the common law world for greater judicial control of proceedings and was largely an extension of the current position under the High Court Rules. The most significant proposal would have enabled the court to appoint expert witnesses in criminal cases, with defence approval, rather than require the prosecution to call such a witness under s 368(2) of the Crimes Act 1961 (para 97).

89 Submissions divided along professional lines: there was strong support from non-legal professionals, while legal practitioners treated the proposal with distrust and saw it as a judicial "descent into the arena".

90 For the reasons which concerned members of the legal profession, the Law Commission has withdrawn the recommendation. Court-appointed experts in civil proceedings will continue under the High Court Rules and the District Courts Rules.

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## 6

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

## DEFENDANTS' STATEMENTS: INTRODUCTION

91 **T**HERE IS NOTHING IN THE LAW that prevents a person from making a voluntary, informed decision to admit having committed an offence. However, there are limits on how law enforcement officers may investigate crimes and take statements from suspects. The law of confessions is aimed at ensuring the reliability of incriminating admissions, as well as controlling the methods used to obtain such admissions. When the standards imposed by the law are breached, the resulting confession may be inadmissible to support the prosecution's case.

92 The current law and the policy behind admissibility rules concerning confessions and improperly obtained evidence were discussed in some detail in the Law Commission's discussion paper *Criminal Evidence: Police Questioning* (NZLC PP21, 1992). On one view, confessions are admitted in evidence as an exception to the hearsay rule. This exception is based on the belief that admissions (ie, statements that are adverse to the interests of the maker) are likely to be true. On another view, they fall outside the rule. Confessions are admissions made to a person in authority, typically a police officer. Under current law, confessions may be excluded if there are doubts about voluntariness (with an exception provided by s 20 of the Evidence Act 1908), or if there is a possibility of oppression or unfairness, or for breaches of the New Zealand Bill of Rights Act 1990.

93 The current rules governing the admissibility of improperly obtained evidence are mainly concerned with evidence obtained



in breach of the New Zealand Bill of Rights Act 1990 or evidence “unfairly” obtained in terms of the Judges’ Rules.

## THE CODE PROVISIONS

- 94 The Code’s rules on the admissibility of a defendant’s statement offered by the prosecution to a large extent codify the existing law on confessions and improperly obtained evidence. The current inquiry into “voluntariness” is covered by the s 27 rule on reliability. The inquiry into the existence of oppressive conduct is codified in s 28. General unfairness and breaches of the Bill of Rights are covered by a broader rule governing the admissibility of improperly obtained evidence (s 29). The most significant reform in this area results from applying the rules to *all statements* made by the defendants, not just admissions and confessions. These rules also reform the law on the use of co-defendant’s statements in establishing the guilt (or innocence) of a defendant (see further paras 111-118 below).

### **Reliability and oppression rules**

- 95 The reliability rule (s 27) and the oppression rule (s 28) govern the admissibility of a defendant’s statements offered by the prosecution in a criminal proceeding. They have common features, namely, the standard of proof and the factors to be considered when determining admissibility. Both rules apply as exceptions to the general rule in s 26, which provides that all defendants’ statements are admissible unless they contravene s 27, 28 or 29. These sections require the defendant (or co-defendant) or the judge to make admissibility a live issue.

### *Raising the issue of admissibility (reliability or oppression)*

- 96 Some commentators considered that the defendant should meet an evidential burden in order to put admissibility in issue. This would usually require actual evidence calling into question the reliability of the statement or the propriety of the methods used in the questioning process.
- 97 Under current law, the prosecution must establish the admissibility of a confession once the defendant puts the matter in issue. No evidence is required from the defendant. There is no indication that this is causing any problems in practice. The Law Commission considers that the current law protects a defendant’s rights

appropriately, and should therefore be codified (ss 27(1)(a) and 28(1)(a)).

### *The standard of proof*

- 98 Once the admissibility issue is raised, the Code provides that a defendant's statement is inadmissible unless the prosecution satisfies the judge beyond reasonable doubt that the statement is reliable (s 27(2)) or there was no oppressive conduct (s 28(2)).
- 99 Some commentators questioned the appropriateness of this standard. They argued that as the jury may eventually have to decide, beyond reasonable doubt, whether the statement was true, the judge need not be satisfied to the same standard on the closely related issue of reliability when determining admissibility. Commentators also pointed out that under the Code the standard of proof when the prosecution seeks to satisfy the court that evidence has not been improperly obtained, is only on the balance of probabilities (s 29(2)).
- 100 The Law Commission considers that the difference in the standard of proof is justified. Reliability is at the heart of the search for truth. It is crucial that before admitting potentially damning evidence, the evidence should be subjected to rigorous testing to exclude the possibility that its reliability might have been adversely affected by the circumstances in which a statement was made or the evidence was obtained.
- 101 Unlike the reliability rule, the aim of the oppression rule and the improperly obtained evidence rule is to discourage law enforcers from using unacceptable ways of obtaining evidence: they are tools of discipline. An appropriate admissibility inquiry involves balancing competing public interests in the integrity of the criminal justice system: the public interest in bringing offenders to justice against the public interest in the honesty of law enforcers. The Law Commission considers that its proposals strike the appropriate balance: an allegation of opprobrious conduct going to reliability or oppression requires a high standard of disproof. While the possibility of such conduct should be excluded beyond reasonable doubt, a lower standard (on the balance of probabilities) is acceptable for conduct which, while objectionable, is not outrageous to the same degree.

*Factors relating to reliability and oppression –  
“internal factors”*

- 102 When considering whether to exclude evidence under the reliability or oppression rules, the Code requires the judge to take into account any pertinent physical, mental and psychological condition or characteristics of the defendant, as well as the nature and circumstances of the questioning and the nature of any threats or promises made to the defendant (ss 27(3) and 28(3)). Some commentators were concerned that including such “internal factors” would operate as an open invitation to defence counsel to launch challenges even if the Police have acted with all due propriety.
- 103 Under current law, courts have a discretion to exclude a confession on the ground of unfairness, even though no person in authority was involved in obtaining the confession, and even though the relevant factor was “internal” to the defendant (*R v Cooney* [1994] 1 NZLR 38 (CA)). In the Law Commission’s view, codifying this approach is unlikely to result in a host of unjustified admissibility challenges. It also considers that an inquiry into a defendant’s particular characteristics gives proper meaning to the rights the rules seek to protect.

*Exceptions to the operation of the reliability rule*

- 104 Section 27(4) provides that if evidence of a defendant’s statement is offered only as evidence of the defendant’s condition (ie, state of mind) at the time the statement was made, the prosecution need not prove that the contents of the statement are reliable (s 27(2)). Evidence admitted for this purpose may still, however, be excluded under the general exclusion (s 8), or a limited use direction may need to be given.

**Improperly obtained evidence rule**

- 105 The improperly obtained evidence rule, as it appears in s 29 of the Code, formed part of the Law Commission’s final recommendations in its report on *Police Questioning* (NZLC R31, 1994, paras 33–34 and 98–103). The improperly obtained evidence rule replaces the rules governing the exclusion of evidence on grounds of unfairness as well as the prima facie exclusionary rule developed by the courts for evidence obtained in breach of the New Zealand Bill of Rights Act 1990. It includes provisions similar to those in the reliability and oppression rules for raising the issue (in s 29(1)) and onus of proof (in s 29(2)), but differs in three important respects.

- 106 First, the improperly obtained evidence rule applies not just to defendants' statements, but also to evidence (including real evidence) obtained as a result of the statements. Second, the standard of proof on the prosecution to establish that evidence has not been improperly obtained is on the balance of probabilities (s 29(2)). Third, even if the prosecution fails to prove that the evidence has not been improperly obtained, the judge can still admit it if exclusion is contrary to the interests of justice (s 29(3)).
- 107 Other notable features of the section are the definition of when evidence is improperly obtained in s 29(4), and the list of factors a judge must consider when determining admissibility – s 29(5). Finally, the rule provides that evidence that is inadmissible under the reliability rule or the oppression rule cannot be admitted under the improperly obtained evidence rule – s 29(6).

### **Irrelevance of truth to admissibility of defendants' statements**

- 108 Some commentators considered that evidence about the truth of a defendant's statement ought to be considered in determining whether the statement should be admitted as evidence. Most, however, agreed with the Law Commission's view that evidence about the truth or falsity of a statement is irrelevant.
- 109 The rules are concerned with admissibility. So far as reliability is concerned, therefore, the focus should be on whether the circumstances surrounding the making of the statement "were likely to have adversely affected its reliability". To require truth to be established at this preliminary stage would usurp the function of the jury. The position is essentially the same under s 20 of the Evidence Act 1908, which requires the prosecution to prove that the means by which a confession was obtained "were not in fact likely to cause an untrue admission of guilt to be made". The actual truth of the admission is not part of this enquiry (*R v Fatu* [1989] 3 NZLR 419, 429-430).
- 110 The aim of the oppression and improperly obtained rules is to control the conduct of law enforcers in obtaining evidence. The truth of the evidence can never – and should never – justify unacceptable conduct. This approach is codified in s 31 of the Code.

## **The impact of the Code rules on the position of co-defendants**

- 111 At common law, one defendant's statement cannot be used to implicate another defendant. In such cases, juries are directed that the defendant's statement can be used for one purpose (ie, to implicate the defendant who made the statement) but it cannot be used for another purpose (ie, to implicate the co-defendant).
- 112 The recommendations on the admissibility of defendant's statements, as well as other provisions of the Code, reform the law in a number of ways.

### *Admissibility of defendants' statements*

- 113 Under the Code, the rules governing admissibility of defendants' statements differ according to who is seeking to offer the statements in evidence. If the prosecution offers the statement in evidence, its admissibility is subject to the reliability, oppression and improperly obtained evidence rules (s 26). If a co-defendant offers the defendant's statement in evidence, admissibility will be governed by other Code provisions – for example, the hearsay rule (if the defendant does not give evidence) or the previous statement rule (if the defendant is a witness). Under the hearsay rule, a defendant is an "unavailable" witness because a defendant is not compellable (s 16(2)); the primary inquiry will therefore concern reliability.

### *Use of defendants' statements once admitted*

- 114 If a defendant's statement offered by the prosecution is admissible, then under the Code the defendant's statement is admissible against that defendant and any co-defendant. If a statement is excluded by s 27, 28 or 29, the statement is inadmissible against the defendant who made the statement as well as any co-defendant. If a co-defendant offers a defendant's statement, however, the prosecution cannot use it to implicate the defendant (s 30). A jury direction on limited use will be required or, in some cases, severance will be an option.

### *Co-defendants' standing to challenge the admissibility of defendants' statements*

- 115 Under the common law, a co-defendant has no standing to challenge the admissibility of evidence obtained from a defendant in breach of the defendant's rights. This rule applies only to real

evidence because at common law a defendant's statements cannot be used to implicate the co-defendant. The Code does not differentiate between statements or real evidence for this purpose. Evidence obtained from a defendant, whether in the form of a statement or in some other form, is admissible for the prosecution against all defendants in a joint trial or against none. Therefore, both the co-defendant against whom the evidence is sought to be used and the defendant from whom the evidence was obtained will have a right to challenge admissibility.

### *Arguments in support of reform*

- 116 Commentators were concerned about the danger of allowing a defendant's statement, which may be untested by cross-examination, to be used to implicate a co-defendant.
- 117 The Law Commission continues to support the proposed reform for the following reasons:
- Under both the current law and the Code, the jury will hear evidence of a defendant's statement that implicates a co-defendant. Under the current law, the jury is directed that they may consider the statement to the extent it implicates the defendant, but must ignore the statement to the extent it implicates a co-defendant. Because of this direction, juries are given no assistance with information which they are told they must, but probably cannot, put out of their minds. Under the Code, however, juries will not need to engage in mental gymnastics but will instead receive guidance on how they should approach such evidence – for example, with an appropriate warning under s 108(1) or (2)(c).
  - It offends common sense to exclude from the jury's consideration the evidence of accomplices, who are often the only witnesses to the crime.
  - There is no compelling reason not to rely on evidence that the prosecution has obtained fairly, in establishing the case against all of the defendants.
- 118 The Commission acknowledges that the Code's approach will require a shift in emphasis: from one that almost invariably calls for the exclusion of evidence harmful to the defence to one that, consistent with the purpose of the Code, allows the fact-finder to have access to as much relevant and reliable evidence as possible. In doing this, the Code enables juries to fulfil what every judge tells them is their function: to bring to bear their collective

common sense and knowledge of human nature to analyse the evidence.

## SILENCE OF PARTIES IN PROCEEDINGS: INTRODUCTION

- 119 Sections 32 to 34 of the Code are concerned with a defendant's "right of silence" pre-trial and at trial: whether evidence of pre-trial silence should be admitted; the use that can be made of it if admitted; and the use that can be made of the fact that the defendant elects not to testify at trial.
- 120 The Law Commission's discussion paper, *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) contained an extensive discussion of the policies relevant to reforming this area of law. They include the presumption of innocence in an accusatorial system; the deterrence of improper police practices; the integrity of the criminal justice system; and unfairness to the defendant. These considerations must be balanced against the public interest in convicting people who are guilty of criminal conduct.
- 121 The Law Commission's view expressed in the discussion paper was that this area of law is in need of clarification "because there are uncertainties which reflect a less than coherent foundation for the existing rules" (para 5). It made its initial recommendations in the context of a developing debate about the appropriate effect of a defendant's right of silence. The Commission considered there was a need for clear recommendations based on principle.
- 122 After considering a number of options, including developments in overseas jurisdictions, the Law Commission proposed to strengthen the defendant's right of silence before trial by including a provision in the Evidence Code that prevented all comment – other than by the defendant or his or her counsel – on the defendant's exercise of the right of silence before trial.
- 123 The majority of those who commented on the *Criminal Evidence: Police Questioning* discussion paper favoured either strengthening the right of silence or preserving the status quo. No one suggested that the sort of reforms recently enacted in England<sup>26</sup> should be adopted in New Zealand. The Law Commission therefore confirms its earlier view – that it does not favour the policy behind the

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<sup>26</sup> Schedule 1 to the Criminal Procedure and Investigations Act 1996 (UK). For some discussion of this reform see Branston, "The Drawing of an Adverse Committal from Silence" [1998] Crim LR 189.

provisions of the Criminal Justice and Public Order Act 1994 (UK) and Schedule 1 of the Criminal Procedure and Investigations Act 1996 (UK). In particular, the Commission considers such reform would be contrary to the New Zealand Bill of Rights Act 1990 – indeed, the English provisions may well be contrary to the European Convention on Human Rights.<sup>27</sup> The provisions are also causing difficulties in application that the Commission is anxious to avoid.<sup>28</sup>

## THE CODE PROVISIONS

### Silence before trial

- 124 The Code rules are aimed at controlling the uses that may be made of evidence of a defendant's pre-trial silence, rather than at regulating the admission of such evidence. The Commission is of the view that the admission of evidence of a defendant's silence before trial should be treated like any other evidence: that is, subject to any applicable Code provisions.

#### *Inferences from a defendant's pre-trial silence*

- 125 The Code prohibits the fact-finder from drawing unfavourable inferences from a defendant's silence in the face of official questioning before trial (s 32) and from non-disclosure of a defence before trial. If the trial is before a jury, the judge must direct the jury accordingly. "Official questioning" is defined (s 4) widely to include not just police officers, but also anyone whose functions include investigating offences – for example, insurance investigators and store security staff. "Unfavourable inference" includes inferences about truthfulness as well as guilt – s 32(2). Both definitions widen protection of the defendant's rights.<sup>29</sup>
- 126 To preclude a back-door attack, the Code also prohibits the prosecution from cross-examining a defendant on the fact that he or she remained silent to official questioning before trial or failed to disclose a defence before trial – s 32(3). Further, s 33 prohibits

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<sup>27</sup> Munday, "Inferences from Silence and European Human Rights Law" [1996] Crim LR 370.

<sup>28</sup> Colvin and Akester, "Directions for Silence" (1995) 145 New Law Journal 1621.

<sup>29</sup> This approach is consistent with that favoured by the New South Wales Law Reform Commission in Discussion Paper 41, *The Right to Silence* (Sydney, 1998) para 3.80.



any comments inviting the fact-finder to draw the sorts of inferences forbidden by s 32(1).

- 127 One effect of these provisions is to reform the doctrine of recent possession, which allows guilt to be inferred from the fact that a defendant remained silent when found in possession of recently stolen goods. The Law Commission is of the view that the current law is inconsistent with a defendant's right not to respond to official questioning. Nothing in the Code precludes drawing an inference of guilt from the fact that a defendant was found in possession of recently stolen goods, but no adverse inference should be drawn from the defendant's silence when questioned about that possession.

### *Lack of early disclosure of defences*

- 128 Current New Zealand law does not prevent adverse comment on the defendant's pre-trial failure to disclose a defence, even though the defendant may have been cautioned that he or she need not say anything. The justification given is that the pre-trial silence is not being relied upon as evidence of guilt, but is "an answer to the defence [later offered] – a test applied in order to determine its truth or falsity" (*R v Foster* [1955] NZLR 1194, 1200). As the Commission noted in para 59 of its discussion paper, the distinction is not free from difficulty. The Commission identified two reform options: either to change the words of the caution given to the defendant or to limit the ability of a judge or a prosecutor to comment on the lateness of the explanation.
- 129 The Law Commission recommends the latter course – that no adverse comment should be made of a defendant's failure to give notice of defence relied on at trial (s 32(1) and s 33(1)).

### **Silence at trial**

- 130 The dynamics of a trial necessarily mean that as the prosecution's case mounts, so will the tactical pressure on the defendant to offer evidence, including his or her own testimony, in an attempt to remove the growing likelihood of a conviction. This is an inevitable result of the defendant's silence at trial, but the decision whether or not to offer evidence must remain with the defendant. However, two related issues need to be addressed. First, to what extent can the defendant's lack of testimony assist the prosecution's case? In particular, should it be allowed to add weight to establish a case beyond reasonable doubt, which, without it, would not reach that standard? Second, in what circumstances is it appropriate for the

parties and the judge to comment on the fact that the defendant has not testified, and what are the appropriate terms of such a comment?

### *Inferences from a defendant's failure to testify*

- 131 In the *Criminal Evidence: Police Questioning* discussion paper, the Law Commission commented that it was probably fair to say that both New Zealand and overseas case law show reluctance to clarify finally the evidential effect of a defendant's decision not to testify (para 109). The Commission, however, also originally proposed no change to the existing law which "permits the trial judge, in particular circumstances, to tell the jury that in assessing the weight or credibility of other evidence, they may have regard to the fact that the defendant has not testified. This direction allows the jury in appropriate circumstances to draw an adverse inference from the defendant's silence at trial" (para 114).
- 132 The Commission is of the view that the current case law is unclear because it fails to specify the use that can be made of silence. Consequently, juries are not told whether they may draw an adverse inference about a defendant's guilt or whether silence is only a factor relevant to credibility. The Commission's initial proposal did not resolve this issue.
- 133 The Commission now recommends a clear approach that is consistent with the Bill of Rights. Section 34 states categorically that a defendant's silence at trial cannot be used to help establish the defendant's guilt. The section is intended to overrule the decision in *Trompert v Police* [1985] 1 NZLR 357 (CA) and subsequent cases. Silence at trial may not be used to add weight to the prosecution's case or, more particularly, to convert a prima facie case into one proved beyond reasonable doubt.

### **Failure of a party in a civil case to give evidence**

- 134 Section 35 is proposed to avoid doubt: to make it clear that ss 32 to 34 do not apply in civil proceedings.

## ADMISSIONS IN CIVIL PROCEEDINGS

### **Admission against interest in civil proceedings**

- 135 At common law, an admission is admissible against the party who made it. Under the Code, such admissions in civil proceedings

will continue to be admissible when they are relevant. Evidence of an admission necessarily repeats what the witness heard a party say. The evidence will therefore either be hearsay or evidence of a previous statement (if the party is a witness). If the evidence is given by the witness who heard the admission being made, or is contained in a document, that expressly excludes the operation of the hearsay, opinion and previous statements rules – s 36(1). The Commission considers, however, that the situation is different if one party’s hearsay admission is being used to implicate a third party. In such a situation, to protect a third party from liability based on untested hearsay evidence, s 36(2) requires an assurance of reliability (which is a similar inquiry to that imposed by the hearsay rule) or the third party’s consent.

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## 7

# Previous statements made by a witness

## INTRODUCTION

- 136 **W**ITH CERTAIN EXCEPTIONS, the current law does not allow a witness's previous statement to be offered in evidence if it is consistent with the witness's testimony. Even if such a statement is admissible, it can only be used to bolster the witness's credibility (truthfulness) and may not be used to prove the truth of its contents. A witness's previous statement that is inconsistent with his or her testimony may be used in cross-examining the witness to challenge truthfulness, but it cannot also be used to prove the truth of its contents unless the witness adopts the statement as true.
- 137 A witness's previous consistent statements are sometimes used in a trial to refresh the witness's memory. This practice has given rise to its own body of law.
- 138 These and other aspects of the current law will be changed in significant respects by the Law Commission's recommendations.

## THE CODE PROVISIONS

### **Hearsay reforms and previous consistent statements**

- 139 The definition of hearsay (s 4) excludes the previous statement of a witness (that is, a person who may be cross-examined – s 4). Therefore, under the Law Commission's original proposals, if a witness gave evidence of a previous statement that was consistent with the witness's present testimony, that statement would not have been subject to the hearsay rules; it could have been used both to bolster the witness's truthfulness and accuracy, and to prove the truth of the matters contained in the statement.
- 140 Many commentators were concerned that as a result of the Code's definition of hearsay, nothing would limit the introduction of previous consistent statements. Their arguments against such a reform centred on the likelihood of witnesses fabricating statements and lengthening the trial process:

The idea of making self-serving statements admissible will lead inevitably to the accused and civil litigants “manufacturing” evidence for later use at the trial. A re-trial in a criminal case will become hopelessly clogged up with the record of the first trial if all prior statements are to come in automatically. In the High Court re-trials are about 10-15% of the total number.

Our concern is a practical one. The likely outcome of the reform is that the witness will produce what are essentially dossiers of their earlier statements. Counsel who is cross-examining will have to cross-examine not only on what is said in court but on what has been said on earlier occasions and the process is inevitably going to be drawn out.

- 141 The Law Commission agrees that such results are undesirable. It now recommends a specific previous statements rule (s 37(a)), which provides that previous *consistent* statements (that is, statements that repeat the witness’s evidence) are not admissible except to the extent necessary to meet a challenge to that witness’s truthfulness or accuracy. The number of previous statements that would be admissible to meet such a challenge can be limited under s 8 by balancing probative value against the consequence of needlessly prolonging the proceeding. To avoid doubt, s 37(b) expressly admits previous statements if they will provide the fact-finder with relevant evidence that the witness is unable to recall.
- 142 Section 37 does not preclude previous statements that are inconsistent with the witness’s testimony. Other Code provisions will regulate the admissibility of such statements. Previous inconsistent statements may also form the basis of cross-examination under s 96.

### *Recent complaint evidence*

- 143 Under existing law, the recent complaint of a complainant in a sexual case is admissible to bolster the complainant’s credibility. The complaint must be “recent” and cannot be used as proof of the truth of its contents. The Code treats recent complaints in the same way as the previous consistent statements of any witness. They will be admissible only if the credibility of the witness is challenged, and to the extent necessary to meet that challenge.<sup>30</sup> But once admitted, the statement can be used to support the truthfulness and accuracy of the witness *and* to prove the truth of the contents of the statement.

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<sup>30</sup> If defence counsel improperly challenges the complainant’s credibility (truthfulness) for the first time in the closing address, s 98(3)(b) will allow further evidence to be called; eg, evidence of a complaint.

- 144 Under the Code there need be no enquiry whether a sexual complainant made the pre-trial statement at “the first reasonable opportunity” after the alleged offence. Such a requirement has been applied with increasing flexibility of late, particularly in cases involving child victims of sexual assaults.<sup>31</sup> The Law Commission considers that the timing of a complainant’s (or any witness’s) pre-trial statement should be relevant only to the weight the fact-finder gives to it and should not affect admissibility.

### *Previous description*

- 145 If a witness identifies a defendant, s 22A of the Evidence Act 1908 admits the witness’s previous description of the defendant to show consistency. A previous consistent description will be admissible under the Code if the witness’s truthfulness or accuracy is challenged (s 37(a)), so no special rule is required.

## **Refreshing memory**

- 146 Long delays can occur between the events giving rise to a trial and the trial itself. As a result, memories fade and detail is lost. To deal with this problem, complex rules have been developed to allow witnesses to refresh their memory from documents both before testifying and while in the witness box. In most cases the document referred to will be the witness’s own record of the events, made at an earlier time.

### *Refreshing memory before court*

- 147 The Law Commission considers that there should be no change in the current law, which places no restriction on the material a witness may use to “refresh” his or her memory before testifying. There is no justification for restricting the process of a witness preparing him- or herself to testify, if for no other reason than that the process would be too difficult to control. If a witness refers to his or her previous statement outside the courtroom, the court will in most cases remain unaware of the fact.

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<sup>31</sup> *R v Accused* (CA 132/97) (1997) 15 CRNZ 26 (CA); *R v S* (1990) 5 CRNZ 668 (CA); *R v Duncan* [1992] 1 NZLR 528 (CA); *R v P* (23 March 1993, CA 342/92).

## *Refreshing memory while testifying*

- 148 In the existing law, there is some doubt whether witnesses must first exhaust their recollection before being permitted to refresh their memory.<sup>32</sup> There is also uncertainty whether a witness may read from the document used to refresh memory, as opposed to reviewing the document and then giving evidence in the ordinary way.
- 149 These issues are bound up with the traditional view that if oral testimony from a witness is available, it is preferable to relying on a previously prepared document.
- 150 The Law Commission accepts that the current practice of refreshing memory can facilitate confidence and accuracy on the part of a witness (although the Code assiduously avoids using the expression “refreshing memory” because of its accompanying baggage). Under the Code, therefore, if a witness cannot recall details recorded in a previous consistent statement, s 37(b) will allow the statement to be admitted in evidence or to be read as part of the evidence (for example, a police officer reading from a notebook). A previous statement must be admissible before it can be consulted. Once consulted, the statement must be shown to every other party in the proceeding – s 90(2). This is intended to discourage the current practice in which counsel hands the witness a document and, without disclosing the contents to anyone else, asks the witness to read it silently before continuing with the questioning.
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<sup>32</sup> Phillips, “Refreshing Memory in the Witness Box” (1984) 63 ALJ 113.

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## 8

# Evidence of truthfulness (credibility) and propensity (character)

## INTRODUCTION

Over the last 150 years the common law rules governing character evidence have grown incrementally, sometimes contradictorily, rarely with fully-articulated rhyme or reason. Suppose that we were, at last, to subject this convoluted construction to thoroughgoing reform, to discard old anomalies and to insist on a serious application of the basic relevance standard of admissibility.<sup>33</sup>

151 **T**HIS CHALLENGE from commentator Paul Roberts has largely been ignored in most common law jurisdictions, although many within the profession would agree with the sentiments expressed in *Cross on Evidence* – that the law on the admissibility of character evidence is beset by “confusion of terminology, by the disparity of contexts to which the terminology is applied, by the vicissitudes of history, and by the impact of piecemeal statutory change”.<sup>34</sup>

152 Evidence of character and evidence of credibility can both be of great assistance to the fact-finder, to the extent of being decisive. Character evidence is traditionally admitted for two reasons: to attack or support the credibility of a witness or to prove the witness acted in the way alleged. But such evidence can also be of little or no relevance with the result that its introduction may distract the fact-finder from the real issues in dispute. Moreover, for the defendant in criminal cases, evidence of character and credibility can be unfairly prejudicial. The challenge is to strike a balance between making evidence of character and credibility available to the fact-finder if it is useful, and excluding such evidence if it is unfairly prejudicial or of only marginal relevance.

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<sup>33</sup> Roberts, “All the Usual Suspects: A Critical Appraisal of Law Commission Consultation Paper No 141” [1997] Crim LR 75, 91.

<sup>34</sup> Tapper (ed), *Cross on Evidence* (7th ed, Butterworths, London, 1990) 312.



- 153 In its discussion paper on the topic, published in 1997, the Law Commission was concerned primarily with the task of consolidating the existing approach to evidence of character and credibility. The Commission's original conclusion was that courts should continue to approach evidence of character with considerable caution, admitting only such evidence that is likely to be substantially probative or helpful.
- 154 Commentators were concerned that the codification of the existing law did not clarify or improve the current position. The Law Commission's final recommendations for reform are clearer and simpler and rely more specifically on other admissibility rules in the Code.

## THE CODE PROVISIONS

### **Evidence of truthfulness and propensity**

- 155 The Code deals with the concept of "character" in two distinct but related parts: truthfulness and propensity. Rather than refer to "credibility", which for some people covers both honesty and reliability (or accuracy), the Code uses the term "truthfulness" to make it clear that the rules are not concerned with assessing reliability or accuracy (see s 4(2)). Instead of referring to good or bad "character", which currently encompasses credibility as well as propensity, the Code only uses the term "propensity" (s 4). The Law Commission considers that truthfulness and propensity are the only aspects of character that are relevant in civil or criminal proceedings. A direct question to our commentators asking whether they could identify any others has brought no affirmative reply.
- 156 It is important to establish a clear boundary between the two concepts because different admissibility rules apply. The truthfulness rules only apply when the evidence a party is seeking to admit is "solely or mainly" about truthfulness (s 4(2)(b)). This means that even evidence of a person's propensity to tell the truth (or to tell lies) – since it is evidence that is solely or mainly about that person's truthfulness – is governed by the truthfulness rules and not the propensity rules.

### **The truthfulness rules**

- 157 The general rule proposed by the Law Commission is that evidence challenging or supporting a person's truthfulness is admissible only if it is "substantially helpful" in assessing that person's truthfulness (s 39(1)). The Commission's desire is to propose a test of significant

or heightened relevance so as to prohibit truthfulness evidence that is of limited value.<sup>35</sup> The substantial helpfulness test is aimed at admitting only evidence that will offer real assistance to the fact-finder. Paragraph C179 of the commentary to s 39 contains a suggested list of the factors that may appropriately be considered in determining substantial helpfulness. (The list is not intended to be comprehensive and the factors will vary with the circumstances of each case.)

- 158 Some commentators did not support introducing the substantial helpfulness test, arguing that such a test would cause unnecessary uncertainty. The Commission considered other tests (such as “necessity” or “direct relevance” but concluded, with the support of other commentators, that those alternatives would not provide any greater certainty.
- 159 The hearsay and opinion rules are expressly stated not to apply to evidence of reputation relating to truthfulness (s 39(4)), so that evidence of a person’s reputation for truthfulness or lack of truthfulness may continue to be given, provided only that it satisfies the substantial helpfulness test.
- 160 The Code in effect abolishes the collateral issues rule by not enacting it. The collateral issues rule applies when cross-examination is directed to a matter that is not a fact in issue, typically questions about a witness’s truthfulness. It treats a witness’s answers to truthfulness (credibility) challenges as final and does not permit evidence intended to contradict those answers. The policy behind the rule is essentially one of efficiency – the court’s attention should not be needlessly diverted from the main issues.
- 161 Although the reason behind it is sound, the collateral issues rule can result in excluding helpful evidence if it is applied too rigidly. The Commission considers that other rules (such as the relevance requirement and the general exclusion rule) will operate as a restraint on offering truthfulness evidence of little value. The truthfulness rule will itself provide a significant check. Under the Code, therefore, there is no rule that prevents a party from offering evidence contradicting or challenging a witness’s answers given in response to cross-examination directed solely to truthfulness, as long as that evidence is substantially helpful. If this test is enacted, the Commission considers that there is no need to preserve the

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<sup>35</sup> The concept of “heightened” relevance can also be found in s 13 of the Evidence Act 1908. As such it is not an unfamiliar concept.

collateral issues rule. This proposal received virtually unanimous support from commentators, in part because there is an existing trend to liberalise the rule.<sup>36</sup>

- 162 The truthfulness rules do not apply in cases where truthfulness is an ingredient of a claim or an offence (s 38(1)). So the truthfulness rules will not apply to limit the admissibility of evidence in a perjury trial in which a major issue will be the defendant's truthfulness.

### **Evidence relevant to assessing the truthfulness of a defendant in criminal proceedings**

- 163 The Commission considers that different rules should apply when dealing with evidence that is solely or mainly relevant to the truthfulness of a defendant in a criminal proceeding (whether or not the defendant is a witness). Admissibility rules governing evidence of truthfulness (or propensity) should not admit unfairly prejudicial evidence that may undermine the protection the law traditionally gives defendants under the criminal justice system. Commentators fully supported the Code's special treatment of evidence of a defendant's truthfulness (s 40).
- 164 Both the prosecution and the defence may offer evidence about a defendant's truthfulness provided the evidence is substantially helpful in assessing the defendant's truthfulness. Under the Code's definition of "offering evidence" (s 4), this may be done by a party's own witness in examination in chief (or re-examination), or through cross-examination of a witness called by the opposing side. However, the prosecution cannot offer evidence of a defendant's convictions relevant to truthfulness unless the defendant has first put his or her own truthfulness in issue, either by offering evidence about it or by challenging the truthfulness of a prosecution witness. Requiring the prosecution to obtain the judge's permission before offering such evidence, enables the judge to prevent unfairness in cases where, for example, prosecuting counsel leads a defence witness under cross-examination to impugn the truthfulness of a prosecution witness.

### **The position of co-defendants**

- 165 The Code provides that defendants may offer evidence to challenge the truthfulness of co-defendants only if the evidence is relevant to the defendant's defence. In this rule (s 41) the Commission has

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<sup>36</sup> *Cross on Evidence*, above n 21, para 9.64.

attempted to preserve the defendant's right to present a full defence while giving a measure of protection to the co-defendant. If a defendant proposes to offer such evidence, then in the interest of fairness the Code requires prior notice to be given to all the affected co-defendants (s 41(2)). Such a notice must be timely because the proposed evidence may provide legitimate grounds for a severance application. The Code allows the judge to waive the notice requirement in some cases – for example, when counsel was unaware of the evidence challenging the truthfulness of a co-defendant and the witness unexpectedly gave the evidence in the course of testimony at trial.

## **Propensity evidence**

- 166 Propensity evidence is defined in s 4 of the Code as evidence of a person's tendency to act in a particular way, as shown by his or her reputation, disposition, acts and omissions.
- 167 The Commission considers that propensity evidence should be admitted when relevant, since it indicates that a person is likely to behave in a particular way. There are, however, special rules governing propensity evidence about defendants in criminal proceedings and complainants in sexual cases, because of the special circumstances in each of those situations.
- 168 The general rule governs the position for what would traditionally be viewed as "good character" and "bad character" evidence, but does not purport to deal with any evidence that is solely or mainly about truthfulness because this is the concern of the truthfulness rule (s 39(5)). The operation of the hearsay rules and opinion rules is expressly suspended to allow evidence of reputation relating to propensity (s 42(2)).

## **Evidence about a defendant's propensity**

- 169 Courts have always been – and in the Commission's view rightly – cautious about admitting propensity evidence about the defendant. The concern is that the jury might make unwarranted and dangerous assumptions along the lines of "once a thief, always a thief." The Law Commission has, for the most part, codified the common law on propensity evidence (both "bad character" and "similar fact" evidence). The proposed rules also clarify certain aspects of the common law (ss 43, 44, 45).
- 170 As with evidence about truthfulness, defendants in criminal proceedings may offer propensity evidence about themselves,

whether in evidence in chief, cross-examination of prosecution witnesses, or rebuttal (s 43). Such evidence will usually be to the effect that the defendant has a propensity to act in an upright fashion, or at least in a manner other than that exemplified by the charge he or she faces. The proposed rule also governs the consequences of offering such evidence: the prosecution may, with leave of the judge, offer propensity evidence about that defendant (s 43(2)).

- 171 The leave requirement (referred to in the Code as “granting permission”) is critical to the rule. The definition of “offering evidence” means that propensity evidence about the defendant that a prosecution witness gives under cross-examination conducted by the defence amounts to the defendant having offered this propensity evidence about him- or herself. Theoretically, this would then allow the prosecution to offer evidence about the propensity of the defendant. In some cases the result might be unfair. The rule is intended to cover the *deliberate* introduction of propensity evidence by the defendant and the consequences envisaged in s 43(2) are therefore not automatic. But in cases where the judge allows the prosecution to offer propensity evidence under this section, the more restrictive admissibility rules in s 45 do not apply. If a defendant puts his or her own propensity in issue, the prosecution should be allowed to respond by offering propensity evidence about the defendant.
- 172 The leave requirement is also critical because it allows the judge to make the distinction between propensity evidence about defendants offered to establish lack of propensity to commit the alleged offence and propensity evidence showing some other regular behaviour of the defendant. The Code rules, and the definition of propensity (s 4), do not make this distinction yet in particular cases it may be critical. For example, a defendant may wish to offer evidence of attending a particular sporting fixture every Saturday afternoon, and so show that he or she could not have been present at the time and place of the alleged offence. Offering this kind of evidence should not open the defendant to cross-examination about his or her previous criminal record, as propensity to commit the offence has not been put in issue by the defence. In such a case the judge should withhold permission in order to prevent unfairness.
- 173 The Commission considers that a defendant should be able to assert, as part of the defence, that a prosecution witness is more likely to have committed the offence, without exposing the defendant to prejudicial propensity evidence in response.

Section 43 therefore does not allow the prosecution to retaliate in that situation.

### **Propensity evidence about co-defendants**

- 174 The admissibility rule (s 44) on evidence about co-defendants' propensity repeats the approach to evidence about truthfulness.

### **Propensity evidence offered by the prosecution about a defendant: "similar fact" evidence**

- 175 Section 45 largely reflects the current treatment of propensity evidence the prosecution offers about the defendant: that is, it codifies the law on similar fact evidence that requires a balancing of probative value against unfairly prejudicial effect. The Commission is still of the view that the current law is operating well and provides the desired consistency and flexibility (*Evidence Law: Character and Credibility* (NZLC PP27, 1997) paras 268–271). This approach has received strong support from commentators, who also approved of including the factors the judge should consider when applying the test (s 45(3) and (4)).
- 176 While commentators agreed there was no need to retain s 23 of the Evidence Act 1908, the New Zealand Law Society Evidence Committee argued for the retention of s 258 of the Crimes Act 1961 (allowing evidence of previous possession of stolen goods or of previous convictions for receiving to prove guilty knowledge in receiving cases), on the grounds that s 258 operates successfully and repeal would result in having to make admissibility decisions on a case-by-case basis. The way in which s 258 regulates a particular category of propensity evidence is viewed as being of real value to judges and juries. The Law Commission accepts this position; no change to s 258 of the Crimes Act 1961 is warranted.

### **Evidence of the sexual experience of complainants**

- 177 The Code contains two substantive amendments to the current s 23A of the Evidence Act 1908. That section provides that evidence about the sexual experience of a complainant with any person other than the defendant is inadmissible unless it is of such direct relevance that to exclude it would be contrary to the interests of justice. In its discussion paper *Character and Credibility* (NZLC PP27), the Commission tentatively proposed extending the operation of the section to also limit evidence of a complainant's

sexual history with the defendant. This proposal gave rise to a clear split of opinion among the commentators, generally along gender lines. Many community groups and all the women lawyers' groups supported the extension, while a number of male practitioners were strongly against the proposal.

- 178 The most compelling argument in favour of the extension was that an express rule would require both judge and counsel to focus on the reasons for offering the evidence. Male practitioners, however, were mostly of the view that introducing such a rule would only create unnecessary complexity since the complainant's sexual history with the defendant will always be relevant.
- 179 The Code provision acknowledges the relevance of a prior relationship with the defendant in some cases but also to reinforce the desirability of making a conscious inquiry into that relevance. Section 46(2) requires that evidence of the complainant's sexual experience with the particular defendant must be of direct relevance in order to be admitted, but permission from the judge need not be sought.
- 180 Some commentators nevertheless expressed concern that a direct relevance test may have the effect of misleading the jury if the full story of a relationship is kept from them. The aim of the section is to encourage counsel to be clear about the purpose and relevance of sexual history evidence rather than to exclude such evidence altogether. Some evidence of a sexual history between the defendant and the complainant will not be of direct relevance – for example, the fact that they had consensual sex once a number of years ago. But evidence of a long-term relationship, including a particular pattern of sexual activity, or sexual activity of a particular nature, will probably meet the test in s 46(2) of the Code, especially if the issue is reasonable belief in consent.
- 181 The other amendment to the existing law that the Law Commission recommends is a change both in form and in substance. A redrafting of s 23A of the Evidence Act 1908 in the Code relocates the proviso to s 23A(3) into a separate subsection in order to emphasise the effect of the proviso: it makes clear that evidence of reputation in sexual matters should never be considered of direct relevance to truthfulness. The substantive change is that s 46(3)(b) of the Code also prevents such evidence being offered for the purpose of establishing consent. In the Law Commission's view, reputation in sexual matters can never be relevant to the issue of consent.
- 182 These two changes also received strong support from community groups. Women lawyers' groups stated:

We believe that the reputation of the complainant has limited relevance to the issue of consent. The rules of evidence should support the right of individuals to have control over their sexuality. Disallowing reputation evidence which is aimed at establishing consent operates to prevent any illegitimate connection between past and present sexual behaviours.

- 183 Other practitioners, however, argued that the proposed amendments would affect the rights of defendants, and they did not support them.
- 184 The Law Commission remains of the view that the Code's redraft of the proviso in s 23A(3) is consistent with existing legislation and clarifies the policy behind the proviso. Research indicates that introducing sexual history evidence may divert the attention of the fact-finder from the behaviour of the defendant at the time of the alleged offence, to the behaviour of the complainant on earlier, unrelated occasions. As a result, complainants in sexual cases often feel that they are on trial, not the defendant. The Law Commission considers that it is the evidence offered about the particular incident that should inform the outcome of the proceedings, not evidence related to earlier events in the complainant's life. As with unhelpful truthfulness evidence generally, such evidence is of low probative value and should not be admissible. The re-drafting of the proviso makes this clear.
- 185 As discussed in the preliminary paper, the Law Commission also does not consider that the proposed provision impinges on the right of defendants because sexual history evidence that is of direct relevance will still be admissible.
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## Identification evidence

### INTRODUCTION

- 186 **T**HE IDENTITY OF THE PERSON who committed an offence is often disputed in a criminal trial. When this happens, the admissibility of eyewitness evidence becomes crucial. The problem is that although such evidence may be compelling, it is not necessarily reliable.
- 187 The public interest in bringing wrongdoers to justice and the public interest in protecting the innocent from wrongful conviction both require that only reliable identification evidence be admitted and that unreliable identification evidence be excluded.
- 188 The Code rules are based on a growing body of scientific research in this area. The Law Commission has also been concerned to ensure that the recommendations are realistic in terms of practice, in particular Police practice.
- 189 There has been considerable consultation with the Police, the profession and the wider community; and a number of significant changes have been made to address their concerns.

### RELEVANT SCIENTIFIC RESEARCH

- 190 Recent psychological research indicates that identification evidence is not as reliable as is commonly believed. In part this is because of the processes that occur whenever human beings acquire, retain, and attempt to retrieve information.
- 191 The Law Commission is publishing, at the same time as the Evidence Report, a miscellaneous paper on human memory. This paper will collect and summarise psychological and scientific research about children's evidence, memory of traumatic childhood events, and identification evidence. It is intended to serve as an educational resource. This Report will therefore refer to the relevant research only to the extent necessary for understanding the recommendations.

## Three stages of memory

192 Research indicates that, like all mental processes, the process of identification, in which a witness compares a remembered image with a person or an image of a person physically before them, is complex and its accuracy can be influenced by a number of factors. The original image is not recalled like a recording, then systematically compared with the person or image before the witness:

Neither perception nor memory is a copying process. Perception and memory are decision-making processes affected by the totality of a person's abilities, motives and beliefs, by the environment and by the way his recollection is eventually tested. The observer is an active rather than a passive perceiver and recorder; he reaches conclusions on what he has seen by evaluating fragments of information and reconstructing them.<sup>37</sup>

193 There are three distinct phases in the memory process:

- acquisition (or encoding): ie, what happens when the original observation is made;
- retention (or storage): ie, what happens between the time of the observation and when the witness is asked to make an identification; and
- retrieval (or recall): ie, what happens when the witness is asked to make an identification.

### *Acquisition*

194 The process of identification begins when a witness sees another person in circumstances that suggest that an offence may have been committed. In the acquisition or encoding phase, there are many factors that will affect the accuracy of the initial perception. Some of these factors are inherent in the event itself – such as how much light there was; how far away the offender was; and how long the offender was visible for. Other factors – such as whether the witness has poor eyesight; how the stress of seeing the offence affected the witness; and whether the witness had any biases or prejudices that may have affected the reliability of the observation – are inherent in the witness. Others relate to the characteristics of the offender, such as the use of a disguise. Event,

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<sup>37</sup> Buckhout, "Eyewitness Testimony" (1974) 231 *Scientific American* 23, 23–24.

witness, and offender factors can all dramatically affect a witness's ability to perceive accurately.<sup>38</sup>

### *Retention*

- 195 The retention stage begins when the observed event is recorded in the witness's memory and ends when the witness attempts to remember the image. Psychological research indicates that stored information is highly malleable and subject to change and distortion during the retention stage. This may be because of subsequent events, external information, or a witness's own thoughts.
- 196 Many factors can distort the witness's original memory. Time can cause considerable memory loss during the weeks and months between first seeing or hearing the person and the identification.<sup>39</sup> Another cause of distortion to a witness's memory may be information about the observed event that is received subsequently: post-event information. The phenomenon of transference or displacement, in which a witness looks at a face seen at a different time in a different context and relates it incorrectly to another situation, is a further factor that may distort a witness's original memory.<sup>40</sup>

### *Retrieval*

- 197 The conditions prevailing at the time information is retrieved from memory are also critically important in determining the accuracy of an eyewitness account. Psychologists suggest, for example, that

[m]ost people, including eyewitnesses, are motivated by a desire to be correct, to be observant, and to avoid looking foolish. People want to give an answer, to be helpful, and many will do this at the risk of being incorrect. People want to see crimes solved and justice done, and this desire may motivate them to volunteer more than is warranted by their meagre memory. The line between valid retrieval and unconscious fabrication is easily crossed.<sup>41</sup>

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<sup>38</sup> Holdenson, "The Admission of Expert Evidence of Opinion as to the Potential Unreliability of Evidence of Visual Identification" (1988) 16 *Melb UL Rev* 521, 525–527.

<sup>39</sup> Woocher, "Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification" (1977) 29 *Stanford L Rev* 969, 982; Shepherd, Ellis and Davies, *Identification Evidence: A Psychological Evaluation* (Aberdeen University Press, Aberdeen, 1982) 38–39.

<sup>40</sup> Loftus, *Eyewitness Testimony* (Harvard University Press, Cambridge, 1979) 227.

<sup>41</sup> Loftus, above n 40, 109.

198 Some issues of retrieval relate to the procedures used by police when asking a witness to identify a suspect. Another significant issue at the retrieval stage is the relationship between a witness's confidence and the witness's reliability. Police investigators are often anxious to gauge an eyewitness's confidence in making a correct identification both during the crime scene interview, and after the identification has been made. There is substantial evidence that confidence in one's ability to make a correct identification is a poor predictor of identification accuracy.<sup>42</sup>

## **Identification evidence: over-reliance and wrongful reliance**

### *Jurors' response to the witness*

199 According to the research, there is reason to be concerned about how juries use eyewitness evidence. Studies suggest that many jurors appear to believe eyewitnesses too readily, while other jurors have difficulty differentiating accurate from inaccurate eyewitness evidence. Research also indicates that what jurors think of as indicative of reliable eyewitness evidence, such as witness confidence, memory for peripheral details, or the quality or consistency of the description given,<sup>43</sup> are in fact not so.

### *Effects of reliance on "common knowledge"*

200 Studies that have examined beliefs about the effects of stress, violence of the event and the presence of a weapon,<sup>44</sup> indicate that the actual effects on the reliability of the identification evidence are often very different from what people expect them to be. People also make assumptions about reliability based on the witness's memory of peripheral detail,<sup>45</sup> and the

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<sup>42</sup> Cutler and Penrod, "Forensically Relevant Moderators of the Relation Between Eyewitness Identification Accuracy and Confidence" (1989) 74 *Journal of Applied Psychology* 650–652; Bothwell, Deffenbacher and Brigham, "Correlation of Eyewitness Accuracy and Confidence: Optimality hypothesis revisited" (1987) 72 *Journal of Applied Psychology* 691–695.

<sup>43</sup> Cutler and Penrod, *Mistaken Identification: the Eyewitness, Psychology and the Law* (Cambridge University Press, New York, 1995) 93.

<sup>44</sup> Loftus, above n 40, 171–177.

<sup>45</sup> Cutler, Penrod and Martens, "The Reliability of Eyewitness Identification: the Role of System and Estimator Variables" (1987) 11 *Law and Human Behaviour*, 223, 223–258; Wells and Leippe, "How do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using memory for peripheral detail can be misleading" (1981) 66 *Journal of Applied Psychology* 285, 285–293.

quality<sup>46</sup> and consistency<sup>47</sup> of descriptions of the offender that are often erroneous.

## THE CODE PROVISIONS

### **Admissibility of identification evidence when a formal procedure is used**

- 201 Although the research on eyewitness evidence is still evolving, studies to date do not support the degree of faith that judges, jurors, lawyers and law enforcement officers seem to have in eyewitness evidence. Nor do studies support the courts' preference for live parades over other procedures for identification.<sup>48</sup> However, the scientific evidence suggests that a formalised procedure with specified standard features is more likely to produce a reliable identification. The Code therefore provides a hierarchy of identification procedures that favours formal methods over informal ones, whenever the Police have a suspect in mind. This approach received strong support from commentators.
- 202 The Code provides that identification evidence will be admissible if a formal procedure is used (that is, if all the elements specified in the Code are present) unless the defendant proves on the balance of probabilities that the evidence is unreliable (s 47(1)). If no formal procedure is used, the evidence will not be admissible unless there is good reason for not following a formal procedure – or if the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made were likely to have produced a reliable identification (s 47(2)). This will allow the admission of reliable identification evidence even when the formal procedure is not followed. The Police particularly favoured this aspect of the proposal.

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<sup>46</sup> Pigott, Brigham and Bothwell, "A Field Study of the Relationship between Quality of Eyewitnesses' Descriptions and Identification Accuracy" (1990) 17 *Journal of Police Science and Administration* 84, 84-88; Cutler, Penrod and Martens, "The Reliability of Eyewitness Identification: the Role of System and Estimator Variables" (1987) 11 *Law and Human Behaviour* 223, 223-258.

<sup>47</sup> Fisher and Cutler, "Relation between Consistency and Accuracy of Eyewitness Testimony" (in press), cited in Cutler and Penrod, above n 43, 94.

<sup>48</sup> Cutler, Berman, Penrod and Fisher, "Conceptual, Practical and Empirical Issues Associated with Eyewitness Identification Test Media" in Ross, Read and Togliani (eds), *Adult Eyewitness Testimony: Current trends and developments* (Cambridge University Press, New York, 1994).

- 203 A number of commentators expressed concern that requiring a formal procedure would be unworkable for the thousands of cases heard by a judge alone in the District Courts, where it is the arresting officer who identifies the defendant. The formal procedure is not intended to apply in such cases, and this is reflected in the definition of “visual identification evidence” (s 4) and the words of s 47(1): “If a formal procedure is observed by officers of an enforcement agency in obtaining [an assertion . . . to the effect that a defendant . . . was present at or near a place, etc].” These words are clearly inapplicable if the arresting officer is the person who makes the identification. The reliability of identification evidence in such cases will be a question of weight rather than admissibility.
- 204 Under the Code, the following elements constitute a formal procedure:
- (i) The procedure must be undertaken as soon as practicable after the alleged offence is reported. This reduces the effect of time and other influences on memory.
  - (ii) The witness must compare the person to be identified with at least eight other people of similar appearance. Research shows that the number and quality of foils in an array can influence its fairness.<sup>49</sup>
  - (iii) No indication should be given to the witness about who the person to be identified is.
  - (iv) The witness must be instructed that the person to be identified may or may not be one of the persons being compared. Some studies have examined the effect of instructions to a witness to identify “which one of these is the person you saw”, compared with instructions including the option that “the person you saw may not be present in the line-up”. They have indicated that suggestive instructions substantially increased the likelihood of false identifications, particularly in line-ups where the offender was not present.<sup>50</sup>
  - (v) A written and pictorial record must be made of the procedure, which the judge can look at. The record must be sworn to be true and complete by the enforcement officer who conducted the procedure.

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<sup>49</sup> Wells, Seelaw, Rydell and Luus, “Recommendations for Properly Conducted Line-up Identification Tasks” in Ross, Read and Togliola (eds), *Adult Eyewitness Testimony: Current Trends and Developments* (Cambridge University Press, New York, 1994) 229.

<sup>50</sup> Cutler and Penrod, above n 43, 122.

- 205 The elements that constitute a “formal procedure” for obtaining identification evidence are applicable to all types of visual identification: live parades, photo montages, sequential video images.
- 206 The Commission originally proposed that the investigating officer must not be involved in the identification procedure. This was because some research indicates that an investigator who knows which line-up member is the suspect can inadvertently or advertently influence the eyewitness through non-verbal cues such as leaning forward, smiling, and nodding.<sup>51</sup> A number of commentators, including the Police, felt that such a requirement was undesirable and unenforceable because attending officers will need to know who the suspect is for security reasons. The Law Commission accepts this view.
- 207 Some commentators did not support requiring the witness to be told that the person to be identified may not be one of the persons in the line-up. They believed that an identification procedure would rarely take place without including the person to be identified. The Law Commission, however, remains of the view that there is an increased risk of false identification if the witness feels under pressure to select someone. Studies show such pressure is less likely to arise when the witness is told that the person to be identified may not be present.
- 208 The identification procedures provided in the Code (which are aimed at facilitating the assessment of identification evidence) also apply to identifying people other than alleged offenders. In some cases such identifications are as critical as identifying the offender.<sup>52</sup> Some commentators, including the Police, were concerned about this extension of the rule. They argued that such an extension would require the Police to follow an identification procedure for each witness identified as being present at the time of the alleged offending. It is not intended that the formal procedure will be used in identifying people other than the suspect, unless identifying another person is crucial to the prosecution case. Under s 47(4)(d), a formal procedure will not be necessary in cases where identification cannot reasonably be anticipated to be at issue.

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<sup>51</sup> There is no published data confirming that knowledge of the suspect influences subjects’ decisions. However, there is unpublished data and some writing to suggest that a good line-up test requires that the investigator conducting the test be blind to the identity of the suspect: Wells and Luus, “Police Line-ups as Experiments: Social methodology as a framework for properly conducted line-ups” (1990) 16 *Personality and Social Psychology Bulletin* 106, 117.

<sup>52</sup> For example, the identification of Heidi Paakkonen: *R v Tamihere* [1991] 1 NZLR 195, 196 (CA).

- 209 A clear majority of commentators supported the elements of the formal procedure that the Code now contains.
- 210 The Code provides that “good reasons” for not following a formal procedure exist only in the following circumstances:
- (i) the person to be identified does not consent to the formal procedure (and no photograph or video record of the person is available to the enforcement agency); or
  - (ii) the person to be identified is singular in appearance and it is impossible to disguise this; or
  - (iii) there has been a substantial change in the person’s appearance between the time of the offence and the identification procedure; or
  - (iv) identification could not reasonably be expected to be an issue at trial (for example, when the person identified is well known to the person making the identification); or
  - (v) the person has been identified soon after the offence occurred (for example, immediately after a crime is reported, a police officer drives around the vicinity with the victim in the police vehicle, to see if the victim can spot the alleged offender); or
  - (vi) the person has been identified as the result of a chance meeting.
- 211 The commentators assisted in developing this list of “good reasons”, and it reflects the view of the majority. A number of commentators were concerned about the fact that this list of “good reasons” is exhaustive. The Law Commission is of the view, however, that the list reflects sound policy considerations and that, because the existence of a “good reason” assures admission, the list should be exhaustive. In the absence of a good reason, the evidence may still be admissible, as long as the evidence is reliable (s 47(2)).
- 212 One commentator considered that to allow the suspect’s refusal to consent to a formal procedure to constitute “good reason” for not following the formal procedure would remove any incentive to participate in the process. If a suspect does not agree to participate in the formal procedure, the Police will have to rely on an informal procedure, with the result that the identification could be excluded as unreliable. In the commentator’s view, this would mean that most identification evidence would be admissible only under the exceptions to the general rule.



- 213 The Code avoids this undesirable result by providing that lack of consent will only be a good reason when no photograph or video record of the person to be identified is available to the enforcement agency. Since a formal identification procedure will usually only occur after an arrest has been made, a photograph will most likely be available.
- 214 The Code provides that even when it is not possible for the Police to follow all the requirements of a formal procedure, they should adhere to as many of the formal requirements as possible.

### **Voice identification evidence**

- 215 Although little is known about the factors that contribute to the reliability of voice identification, research indicates that voice identification is even more unreliable than visual identification. The Commission therefore has not attempted to formulate a rule equivalent to the one governing visual identification evidence, but is concerned to ensure that voice identification evidence is scrutinised carefully. The Code provides that voice identification evidence will not be admissible unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made were likely to have produced a reliable identification (s 48). Commentators strongly supported the Commission addressing the issue of voice identification.

### **Jury directions**

- 216 Section 112 of the Code substantially re-enacts the current s 344D of the Crimes Act 1961, which deals with judicial directions in the case of identification evidence. The Commission is of the view that even with a more detailed admissibility inquiry, juries still need to be cautioned about identification evidence.
- 217 The Commission originally drafted a detailed judicial direction that contained references to research on memory. Commentators did not support such an approach, arguing in favour of shorter and simpler jury directions. Commentators supported retaining the current provision, but noted the desirability of judges tailoring the direction to the circumstances of the particular case. The Law Commission agrees with this approach.

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## Evidence of convictions and civil judgments

### INTRODUCTION

- 218 **T**HE RULE in *Hollington v F Hewthorn & Co* [1943] KB 587 excludes convictions as evidence of the defendant's guilt in later civil proceedings, whether such evidence is tendered against third parties or against the defendant in person. The rule is generally treated as an evidential matter that stands alone, but because it is concerned with the use that may be made of prior convictions, it is related to the Law Commission's proposals about truthfulness and propensity evidence. The rule in *Hollington v Hewthorn* also raises issues of hearsay, opinion evidence, and estoppel.
- 219 In common with many other jurisdictions, New Zealand has abolished the rule to the extent that in defamation actions convictions are "sufficient evidence", and in all other civil actions they are "admissible as evidence", that an offence has been committed. These changes to the law were enacted in ss 23 and 24 of the Evidence Amendment Act (No 2) 1980, as a result of the recommendations of the Torts and General Law Reform Committee in *The Rule in Hollington v Hewthorn* (1972).
- 220 This reform of the rule was, however, somewhat limited. In the context of a codification exercise,<sup>53</sup> the Law Commission considered it timely to address other related issues. These included whether the scope of s 23 should be extended to make convictions admissible in criminal as well as in civil proceedings, and whether acquittals should be admissible in any later proceedings. The Commission also considered whether admitting a conviction should carry with it a presumption of guilt or be conclusive evidence of guilt.

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<sup>53</sup> Which was recommended by the Torts and General Law Reform Committee in its report on *Hearsay Evidence* (1969), para 6, and restated in its report on *Hollington v Hewthorn*, para 4.

## EXTENDING ABOLITION OF THE RULE IN HOLLINGTON V HEWTHORN: THE CODE PROVISIONS

### Conviction as evidence in civil proceedings

- 221 The Evidence Code preserves the abolition of the rule in civil proceedings and includes an admissibility provision similar in substance to s 23 of the Evidence Amendment Act (No 2) 1980. Section 23 introduced a rebuttable presumption that a person is guilty of an offence of which he or she is proved to have been convicted.
- 222 The Torts and General Law Reform Committee recommended against introducing a presumption of correctness of a conviction. They viewed it as unfair to the person challenging the conviction: such a person should only have to convince the trier of fact that “there is a substantial possibility that the facts did not support the conviction” (para 25), as it is up to the plaintiff to *prove* their case. The Committee also thought that a presumption would be unfair to third parties (insurance companies, employers) who wish to avoid the effect of the conviction and were not party to the criminal proceedings.
- 223 The Commission originally proposed that prior convictions of any person should be conclusive of guilt in any civil proceedings (including defamation proceedings). In the Commission’s view, giving prior convictions only presumptive weight would enable convicted persons to either recover damages or avoid liability by proving on the balance of probabilities that they did not do what has already been proved beyond reasonable doubt. Some commentators, however, pointed out that people may plead guilty, to careless driving for example, to resolve the case speedily but may well wish to contest a large civil claim arising out of the same incident. The Law Commission considers that this example has validity. The Code provides therefore that prior convictions will create a presumption but will not be conclusive evidence of guilt (s 49).
- 224 Placing an onus (rebuttable by contrary proof on the balance of probabilities) on the person seeking to disprove the validity of the conviction only limits and does not preclude the possibility of re-litigating the earlier proceedings. However, such litigation would be limited by the principles of abuse of process.<sup>54</sup> In this sense, a

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<sup>54</sup> *Cross on Evidence*, above n 21, para 12.3.

rebuttable presumption does not prevent third parties arguing against liability at a different time. Not to give convictions presumptive weight is also inconsistent with the serious consequences that flow from convictions.

## **Conviction as evidence in defamation proceedings**

- 225 For convictions in defamation proceedings, the Code simplifies and reforms the rule in s 24 of the Evidence Amendment Act (No 2) 1980. The significant change in the Code is that under s 50 a conviction will be conclusive proof of guilt in a later defamation proceeding.
- 226 The Torts and General Law Reform Committee made a similar recommendation.<sup>55</sup> The Statutes Revision Committee rejected this recommendation on the grounds that conclusiveness “might . . . oust the rights of a pardoned person”.<sup>56</sup> This concern was, however, addressed by the statutory requirement that convictions must be subsisting at the time the allegedly defamatory statement was made (s 24(2)(b)), and therefore, in the Commission’s view, it is not a reason for not treating a conviction as conclusive.
- 227 The Law Commission agrees with the Committee’s view, which was also strongly supported by the commentators on the Code. The Commission considers that in a defamation proceeding the defendant should be entitled to a complete defence when the publication sued on is based on the fact of a criminal conviction established to the highest standard of proof.

## *Acquittals in civil proceedings*

- 228 The admissibility of an acquittal to prove innocence cannot be equated with the admissibility of a conviction to prove guilt. All that an acquittal proves is that the prosecution has failed to establish guilt to the standard of beyond reasonable doubt.<sup>57</sup>

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<sup>55</sup> Report on *The Rule in Hollington v Hewthorn* (1972): “We consider that a civil court, in an action to which the Crown is not a party, should never be called to retry upon a different standard of proof the precise issue of guilt of a criminal offence which has already been tried and determined by a criminal court of competent jurisdiction.” (para 28).

<sup>56</sup> (1980) 429 *New Zealand Parliamentary Debates* 303.

<sup>57</sup> See the comments of North P in *Jorgensen v News Media (Auckland) Limited* [1969] NZLR 961, 978 (CA).

- 229 The Evidence Act 1995 (Aust) does not allow evidence of prior acquittals to be admitted in later civil proceedings. The Australian Law Reform Commission stated that an acquittal “is of such minimal probative value that there is very little to be gained by admitting evidence of it and the disadvantages flowing from its admission are considerable”.<sup>58</sup>
- 230 The Law Commission agrees that a prior acquittal is usually of low probative value. In some situations, however, evidence of an acquittal is clearly relevant and should for that reason be admissible. In a defamation proceeding, where the allegation under dispute is that the plaintiff was *convicted* of an offence, evidence of an acquittal should be admissible to rebut any defence of truth and possibly support a claim of malicious falsehood. An acquittal may also be relevant if an acquitted defendant wants to sue the Crown for malicious prosecution.
- 231 The Commission considers there is no need for a specific rule to allow the admission of relevant acquittals because of the fundamental principle in the Code that all relevant evidence is admissible. It follows from what is said above that acquittals should not be presumptive of innocence.

### **Conviction as evidence in criminal proceedings**

- 232 The New Zealand Torts and General Law Reform Committee was of the view that the rule in *Hollington v Hewthorn* did not apply in criminal proceedings (para 36). A more recent obiter statement by Cooke J suggests that, as a result of *Jorgensen v News Media (Auckland) Limited* [1969] NZLR 961 (CA), “if the person’s conduct on the earlier occasion is relevant, the limits of the doctrine of estoppel should not rule out the admissibility of the conviction in later criminal proceedings either.” (*R v Davis* [1980] 1 NZLR 257, 262 (CA)). There is no doubt that there are policy reasons for extending abolition of the rule in *Hollington v Hewthorn* in this context, if it applies at all.
- 233 The Law Commission considers that there are at least three policy reasons why convictions should be admissible in criminal proceedings:
- Time and expense will often be saved, since making convictions admissible would avoid forcing a party to litigate a matter that has already been resolved.

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<sup>58</sup> Australian Law Reform Commission, *Evidence Law* (Interim Report 26, Canberra, 1985) Vol 1, para 781.

- It makes available evidence that is not only relevant, but also highly probative, since guilt will already have been established to the criminal standard of beyond reasonable doubt.
- Not to admit such evidence would run contrary to the policy of the criminal justice system that a criminal conviction is sufficient basis to impose grave penalties.

234 The Law Commission's proposal, therefore, is that evidence of prior convictions be admissible in a criminal proceeding, but the use a party proposes to make of those convictions should govern the decision on admissibility. In particular, the Commission intends the Code provisions to control the admissibility of evidence directed at the truthfulness or propensity of a defendant in a criminal proceeding.

235 The party seeking to offer evidence of the prior conviction of any person will be required to identify the issue to which the conviction is relevant. If it is relevant to truthfulness or propensity, admissibility will be governed by those rules. The propensity rules operate to give the greatest measure of protection to defendants in criminal cases. By contrast, if a prior conviction is relevant to an issue in the case, for example the conviction of a third party for theft to support a charge of being an accessory after the fact, it is likely to be admissible.

236 Given the higher standard of proof in a criminal case, the Commission's view is that the conviction should operate to establish a presumption of guilt that is rebuttable on the balance of probabilities. Evidence offered to challenge the validity of a previous conviction may also be limited by abuse of process principles.<sup>59</sup>

237 The Commission's proposals in this area were fully supported by the commentators and are contained in s 51 of the Code.

### *Acquittals in criminal proceedings*

238 In later criminal proceedings, the rule against double jeopardy is clearly an important consideration in determining the admissibility of prior acquittals. If the defendant and the charge are the same in both proceedings, a previous acquittal is regarded as being conclusive, which means that unless it was obtained by fraud, it cannot be re-litigated.<sup>60</sup>

<sup>59</sup> *Cross on Evidence*, above n 21, para 12.3.

<sup>60</sup> *Cross on Evidence*, above n 21, paras 12.3, 12.15.

- 239 If the defendant in the later proceeding is different from the defendant in the earlier proceeding, and seeks to adduce evidence of the latter's acquittal, to exclude such evidence can arguably result in a serious anomaly, as the case of *Hui Chi-ming v R* [1992] 1 AC 34 shows. In that case the appellant had been convicted of murder as part of a joint enterprise, for which the principal offender, in an earlier trial, had been acquitted of murder and convicted of manslaughter. The appellant sought to tender evidence of the principal offender's acquittal of murder. But the House of Lords, applying the reasoning in *Hollington v Hewthorn*, held that the verdict reached in an earlier trial "amounted to no more than evidence of the opinion of that jury" and dismissed the appeal.
- 240 Such a rigid approach may operate to the defendant's extreme disadvantage. In the Commission's view, there is merit in making the acquittal admissible as evidence – though not as conclusive evidence. Admitting the acquittal may give the court the opportunity to hear argument on and take into account the facts leading to the acquittal if they are of significance.
- 241 As already stated, the Commission considers that there is no need for a specific rule to allow the admission of relevant acquittals because of the fundamental principle in the Code that all relevant evidence is admissible (s 7).

## **Civil judgments as evidence in civil or criminal proceedings**

### *Civil judgments in criminal proceedings*

- 242 The differing standards of proof create what the Commission sees as an insuperable barrier to admitting civil judgments in criminal proceedings. To admit a civil judgment in a criminal proceeding would allow a court, which must otherwise act only on proof beyond reasonable doubt, to accept findings arrived at on the balance of probabilities. This would have unfavourable repercussions on both the reliability and the fairness of the evidence. For this reason the Law Commission does not propose a rule making civil judgments admissible in criminal proceedings.

### *Civil judgments in civil proceedings*

- 243 Two areas in which civil judgments have been commonly admissible are findings of adultery in matrimonial proceedings and findings of paternity. Since New Zealand now has a "no-fault" policy in the former (s 39(1) of the Family Proceedings Act 1980), it is of

no further concern here. But evidence of previous findings of paternity is admitted under s 8(3) of the Status of Children Act 1969, for example, although not as conclusive evidence.

- 244 In civil proceedings in general, if both the parties and the issue are the same, the two limbs of the doctrine of *res judicata*, “cause of action estoppel” and “issue estoppel” will govern, with the result that neither the action nor the issue can be re-litigated. The Law Commission proposes to preserve the common law on these matters.
- 245 If the parties differ, however, the matter is not absolute. The 1967 Report of the Law Reform Committee of Great Britain pointed out that because “in civil proceedings the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court” (para 38), this can lead to one proceeding differing substantially from another even if the same issues are in dispute. For this reason, the Law Reform Committee did not favour making an earlier finding admissible in a later action.
- 246 While there are arguments against such a stance, the Law Commission considers that exclusion remains the best approach. This is also the approach taken under s 93(c) of the Evidence Act 1995 (Aust) and it was well supported by the Law Commission’s commentators.
- 247 The Code therefore provides that civil judgments or findings of fact should be inadmissible to prove the existence of a fact, but the Code preserves the operation and development of the common law on judgments *in rem* as well as the law on *res judicata* and issue estoppel (s 52).
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# Privilege and confidentiality

## INTRODUCTION

248 **A** PRIMARY OBJECTIVE of the law of evidence is that all relevant facts should be available to the decision-maker. This objective is enacted in s 7 of the Code, which states that, as a fundamental principle, relevant evidence is admissible. However, there is sometimes a cost in that disclosing information communicated in confidence may damage the relationship within which the communication was made, or conflict with some fundamental right. Where the law protects a class of relationships or a right by limiting disclosure of confidential information, a privilege is said to exist, entitling a person to withhold relevant evidence from a court. The courts may also exercise a discretionary power to protect confidential information that is not governed by a particular privilege.

249 The Law Commission's discussion paper *Evidence Law: Privilege* (NZLC PP23) was published in May 1994. It described at some length the existing law on privilege, the policy problems that arise and the Commission's recommendations for resolving those problems. A further discussion paper, *The Privilege Against Self-incrimination* (NZLC PP25), was published in September 1996. This paper put forward a number of proposals to reform the law on the privilege against self-incrimination. Each paper contained a draft set of provisions for inclusion in the Evidence Code. The Code departs in substantial respects from the proposals contained in the preliminary papers. These changes reflect the views expressed in submissions, the advice of peer reviewers and indeed changes in the constitution of the Law Commission itself.

## THE CODE PROVISIONS

### **Effect and protection of privilege**

250 In s 54, the Law Commission has defined the scope of a privilege conferred by this part of the Code in broad terms. In any proceeding, the privilege holder has the right to refuse to disclose

or, in certain circumstances, to permit the disclosure of privileged communications, information or documents, and any opinion based on them.

251 The submissions in general supported the draft provision.

## Legal professional privilege

252 The Law Commission's original proposal involved a radical revision of legal professional privilege. The Commission proposed extending legal professional privilege to communications with all persons conducting a case or giving legal advice about a case, regardless of whether they were legally qualified. The status of legal advisor was to be determined by function rather than by qualification. This would have extended the privilege to communications with McKenzie friends and accountants giving tax advice of a legal character. The broader application of the privilege was to be moderated by limiting absolute privilege to communications made in contemplation of litigation. Only a qualified privilege was proposed for general legal advice and preparatory material for a proceeding. In determining whether materials were prepared in contemplation of litigation, a substantial purpose test was considered appropriate.

253 These proposals proved controversial and the Law Commission reconsidered them. A particular concern was that the proposals ran counter to recent judgments of the House of Lords (*R v Derby Magistrates' Court, ex parte B* [1996] 1 AC 487), and the High Court of Australia (*Carter v Managing Partner, Northmore Hale & Leake* (1995) 129 ALR 593), which strongly supported the absolute nature of legal professional privilege.<sup>61</sup> The Law Commission was also persuaded by the argument that giving the courts power to override the privilege would be likely to result in interlocutory applications as a matter almost of routine in litigation of any size, with resulting delay and added expense.

### *Privilege for communications with legal advisers and employed legal advisers*

254 Consequently, the Code preserves an absolute privilege for communications with legal advisers and confining this privilege to dealings with professional lawyers who are subject to strong

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<sup>61</sup> These judgments actually go further in support of the absolute nature of the privilege than does the Law Commission. See the discussion at paras 323–324.

ethical and disciplinary codes. Section 55 essentially re-enacts the current law on privilege for communications with legal advisers, including the special provisions for professional advice from patent attorneys in s 34(4) of the Evidence Amendment Act (No 2) 1980.

- 255 Preserving the absolute nature of the privilege for communications with legal advisers required a resolution of conflicting judicial views on the position of corporate or in-house lawyers. There is concern about whether the duty of obedience and fidelity, which is a necessary element of the employer-employee relationship, is consistent with the independence said to be necessary for fulfilling the purpose of the privilege. The organisations of employed solicitors that the Law Commission consulted made clear that they resented the suggestion that employed solicitors were less independent than lawyers in private practice. It was put to us that a practitioner dependent on a single client for a substantial part of his or her income is no more independent than an employed lawyer.
- 256 The Law Commission prefers not to found its recommendation on issues of relative independence. Of more practical concern is the fact that an in-house lawyer is likely to be called upon to perform duties going beyond the usual functions of a lawyer. A company executive should not be able to shield activities from scrutiny that are not lawyer's activities, simply because the executive has qualified as a lawyer. This is so even though the advice of a competent lawyer in private practice is unlikely to be totally silent on the commercial and public relations consequences of that advice. Consequently, s 53, which deals with matters of interpretation, defines employed legal advisers as a subcategory of legal advisers, and subs 55(3) restricts the privilege in relation to the former to services provided solely in the capacity of legal adviser.

### *Privilege and solicitors' trust accounts*

- 257 Section 56 re-enacts the substance of s 35A of the Evidence Amendment Act (No 2) 1980, which limits legal professional privilege in connection with searching solicitors' trust accounts.

### *Privilege for preparatory materials for proceedings*

- 258 The objections to a qualified privilege for communications with legal advisers, referred to in para 253, apply equally to a qualified privilege for preparatory materials for proceedings. Commentators also suggested that advice given by "expert witnesses" should be protected by an absolute privilege because experts needed to be

entirely frank about all aspect of a client's case, including unfavourable aspects. Consequently, s 57 retains an absolute privilege for preparatory materials for a proceeding. The privilege only applies if preparing for a proceeding was the dominant purpose for creating the material. The substantial purpose test proposed in the preliminary paper was not considered sufficiently robust for the absolute privilege now recommended. The privilege will not apply to non-criminal proceedings under the Guardianship Act 1968, because the Commission believes that the interests of the child under the Act outweigh the interest of the parties in retaining control of the privileged material.

### *Legal professional privilege and tax*

- 259 The Commission of Inquiry, popularly known as the Davison Commission or Winebox Inquiry,<sup>62</sup> expressed the view that legal professional privilege in all tax matters should be abolished. On 31 March 1998 the Government announced the appointment of a Committee chaired by Sir Ian McKay to consider various issues of tax compliance. That Committee's report was published in late February 1999.<sup>63</sup> It recommends that a final determination of general issues relating to legal professional privilege for tax advice should await the Law Commission's report. The Commission has not endeavoured to deal with this aspect of legal professional privilege in the Evidence Report but will, as soon as possible, be issuing a supplementary report on the topic. It is expected that any statutory provision it recommends would be included in the Tax Administration Act 1994.

### **Privilege for settlement negotiations**

- 260 People who have a dispute about their rights and liabilities will often wish to negotiate with each other to see if the dispute can be settled or compromised. Statements made in the course of such negotiations are said to be made "without prejudice" to the speaker's legal position and are inadmissible in later court proceedings under the "without prejudice" rule.

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<sup>62</sup> Commission of Inquiry into Certain Matters Relating to Taxation, *Report of the Wine-Box Inquiry* (GP Publications, Wellington, 1997).

<sup>63</sup> Committee of Experts on Tax Compliance, *Tax Compliance: Report to the Treasurer and Minister of Revenue* (New Zealand Government, Wellington, 1998).

- 261 The Law Commission considered the evidential “without prejudice” rule to be a useful legal doctrine. It proposed a privilege, in civil proceedings, for communications between parties to a dispute, if the communication was intended to be confidential and was made in attempting to settle the dispute. The Commission originally proposed that the privilege be a qualified one that could be overridden in the interests of justice. However, the Commission now recommends an absolute privilege in keeping with its approach to legal professional privilege.
- 262 Some jurisdictions recognise a version of the “without prejudice” rule in criminal proceedings; for example, in the United States, parties may negotiate over a mutually acceptable plea in a practice known as “plea bargaining”. The practice is not formally recognised in New Zealand criminal procedure and, therefore, the Commission does not consider it appropriate to introduce such a provision in a New Zealand evidence code.
- 263 One commentator suggested that the provision expressly cover mediation. The Law Commission considers that the provision as it stands provides adequate protection for communications between parties involved in mediation. The presence of a third party as mediator is not a bar to invoking the privilege. Such communication would also be protected under the general discretion to protect confidential communications in s 67.

### **Privilege for communications with ministers of religion**

- 264 The courts have always been reluctant to compel disclosures of confessions made to ministers of religion. Although no common law privilege has ever existed in New Zealand, legislative protection has existed since 1885. The Evidence Amendment Act (No 2) 1980 s 31 currently prohibits a minister from disclosing any confession in any proceeding, except with the consent of the confessor. Communications made for any criminal purpose are excepted. The privilege is justified by considerations of privacy and the right to freedom of religion.
- 265 The Code retains an absolute, defined privilege rather than relying on the general discretion to protect confidential communications. Section 59 will apply more broadly than the current law, extending to any communication made in confidence to or by the minister in his or her capacity as a minister of religion, for the purpose of obtaining religious or spiritual advice, benefit or comfort. This will include religious and spiritual communications in a general

sense, but not communications for purely temporal purposes, such as advice on the control of a wayward child.

- 266 The definition of “minister of religion” is also broader than the current definition in s 2 of the Evidence Act 1908. Subsection 59(2) defines “minister of religion” as a person who “has a status within a church or other religious or spiritual community which requires or calls for that person to receive confidential communications . . . and to respond with religious or spiritual advice, benefit or comfort”. Thus, the privilege would not be confined to practices within traditional religions and churches. However, it would not extend to rationalist systems of ethical conduct that do not have a religious or spiritual basis.
- 267 The submissions clearly supported a privilege for ministers of religion. There was almost unanimous support for an absolute privilege. Some commentators were concerned that the definition of “minister of religion” might include many fringe groups for whom the privilege may not be appropriate. Nevertheless, the Commission considers that, given the difficulties of defining the term, it has struck the right balance. The provisional draft rule has been retained unchanged.

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

- 268 Communications made to medical practitioners have been granted a limited privilege against disclosure in New Zealand court proceedings since 1885. The privilege is justified by society’s interest in encouraging its citizens to seek medical attention and by considerations of privacy. However, the range of matters a consultation with a medical practitioner may cover is very wide. Not all will deal with deeply private matters and in very few instances will citizens not seek medical attention for fear of court proceedings.
- 269 Under s 32 of the Evidence Amendment Act (No 2) 1980, a registered medical practitioner or a clinical psychologist may not, in civil proceedings, disclose communications made by a patient, which the patient believes are necessary for examination, treatment or other action. The privilege is subject to a number of exceptions. The Law Commission did not consider that a specific privilege was necessary in civil proceedings. Both the need for protection and the need for the information will vary greatly from case to

case. These are best dealt with through applying the general discretion to protect confidential communications.

- 270 However, the Commission accepted that a very limited specific protection was useful in criminal proceedings. Section 33 of the Evidence Amendment Act (No 2) 1980 currently provides absolute protection for communications a patient makes to the practitioner if the patient believes they are necessary to enable the practitioner to examine, treat or act for the patient for drug dependency or any other condition or behaviour that manifests itself in criminal conduct. A proviso excludes from protection consultations that are ordered by a court or other lawful authority.
- 271 Section 60 of the Code retains the privilege contained in s 33. However, it has a wider scope, including all information acquired in confidence as a result of the examination or treatment of the condition. It also prevents the information from being disclosed in *any* criminal trial, not just the trial of the person being treated, as is the case with s 33.
- 272 In general, the submissions favoured the draft provision. However, several expressed concern that consultations outside the relatively narrow limits of s 60 would only be protected by the general discretion to protect confidential communications. It was feared that the lack of an express privilege would discourage patients from attending their doctor or at least discourage frank communication between doctor and patient. The Law Commission takes the view (supported in several submissions) that the main concern of patients is not the possibility of disclosure in court but disclosure in other social circumstances. That concern is sufficiently met by a duty of confidentiality rather than a privilege.
- 273 Two submissions, containing opposing views, were received specifically on s 60(2). One suggested an objective test that required the patient to believe on reasonable grounds that the communication was necessary for the treatment. The other suggested no test at all. The Commission considers that s 60(2) strikes the right balance.
- 274 The original draft only protected communications and information obtained by way of examination during a consultation. One commentator pointed out that the treatment prescribed may indicate the nature of the condition being treated and should also be protected from disclosure. The Law Commission agrees that this is a legitimate concern and has extended the privilege to treatment in s 60(4).

## Privilege against self-incrimination

275 The privilege against self-incrimination permits a person to remain silent when asked to provide information, on the ground that the information would incriminate the person claiming the privilege. The main justification for the privilege is that it is an essential feature of our accusatorial system of criminal justice. The privilege applies in its traditional context of a witness testifying in court. The privilege is also available as a justification to resist pre-trial discovery of documents and interrogatories in civil proceedings (*Taranaki Co-op Dairy Co Ltd v Rowe* [1970] NZLR 895 (CA)).

### *Extent of the privilege to be limited to offences punishable by imprisonment*

276 The privilege against self-incrimination is currently given a broad application by New Zealand courts. Generally, anyone may refuse to comply with a demand for information if the reply is reasonably likely to lead to or assist the criminal prosecution of the person from whom the information is demanded. Even the possibility of prosecution for a regulatory offence, not punishable by imprisonment, is sufficient to invoke the privilege (*Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA)). The privilege is also available if the reply may lead to liability for a civil penalty (other than punitive damages).

277 Section 61 limits the privilege to situations where the incrimination involved is for an offence carrying a potential punishment of imprisonment. The privilege against self-incrimination arose in a time when the consequences of incrimination were harsh. Many current applications of the privilege have moved far from the historical roots of the privilege. In the Commission's view, there is a strained artificiality in modern applications of the privilege in which the potential detrimental effect of the incrimination involved is minimal.

278 The Commission originally proposed retaining the privilege for liability to a civil penalty. However, a number of commentators questioned this. One commentator pointed out the difficulties of determining whether some of the existing legislative sanctions amounted to a penalty in law. The existence of the privilege is also difficult to justify when no protection exists for serious forms of civil liability, such as loss of custody of a child, injunctive orders or substantial damages. The Commission was persuaded by these arguments. The definitions of "incriminate" and "self-incriminate" in s 4 refer solely to criminal prosecutions.



## *Documentary and real evidence*

- 279 The privilege against self-incrimination, which protects against compelled testimonial disclosure, arises from the historical development of the privilege as a reaction to the inquisitorial oath. This oath required the witness to answer all questions put to him or her, even if there was no specific accusation. In New Zealand, the privilege has expanded to the point where it may justify a refusal to produce an object or a document that existed before the demand for information was made, if the act of production would itself amount to an incriminating “testimonial” disclosure.
- 280 In *The Privilege Against Self-Incrimination* preliminary paper (chapter 8), the Law Commission proposed that the privilege should not protect documents already in existence before the demand for information is made. Such documents should be treated on the same basis as real evidence, which is not normally within the scope of the privilege. The Commission suggested that the privilege should continue to be available to protect any testimonial disclosure that can be implied from the act of producing a previously existing document or an object (ie, a non-verbal assertion), and we requested submissions in this difficult area.
- 281 The bulk of submissions agreed with the Law Commission’s proposal to remove the privilege for pre-existing documents. There was also support for removing testimonial disclosures implied from producing an object from the scope of the privilege. One commentator pointed out that it was illogical to remove the privilege from pre-existing documents and then to allow them to be protected on the grounds that the act of producing the document was a testimonial disclosure coming within the scope of the privilege. The Commission accepts the force of this argument. Accordingly, the definition of “information” in s 4 is limited to statements made orally or in a document created after and in response to a request for the information (but not for the principal purpose of avoiding criminal prosecution under New Zealand law). This restores the privilege to its original form as a privilege against compelled testimony.

## *Corporate claims to privilege*

- 282 Under current law, the privilege against self-incrimination can be claimed by a corporation (*New Zealand Apple and Pear Marketing Board v Master and Sons Ltd* [1986] 1 NZLR 191 (CA)) acting through its directors and senior officers, who may decline to supply information tending to incriminate the corporation that they

represent. However, for the reasons discussed in the preliminary paper, the Law Commission considers the privilege should not extend to corporations. Therefore s 61(4)(a) expressly provides that the privilege may not be claimed on behalf of a body corporate.

- 283 The Law Commission received some careful submissions opposing the proposal to remove the ability of corporations to claim the privilege. The bulk of submissions, however, agreed with the Commission's view that New Zealand should join the growing number of jurisdictions refusing to grant the protection of the privilege to corporations.

### *Incrimination of spouses*

- 284 There is some authority to the effect that a person may claim the privilege on behalf of his or her spouse (*Hawkins v Sturt* [1992] 3 NZLR 602). There is also one legislative provision that allows the privilege to be claimed on the ground that disclosure would tend to incriminate the claimant's spouse (s 18 of the Petroleum Demand Restraint Act 1981). Section 61(4)(b) expressly limits the protection of the privilege against self-incrimination to the person claiming it. The majority of submissions supported this approach.

### *Statutory derogations of the privilege*

- 285 Section 61(3) provides that the privilege will be available unless a statutory provision expressly abrogates it, and to the extent that a statutory provision does not explicitly remove the privilege. Some commentators were concerned about the implications of this for statutory information-gathering powers. One commentator, for example, felt that the policy expressed in s 61(3) "would upset the present statutory balance" and suggested that such a section should not be enacted until a complete review of the relevant statutory provisions is undertaken.
- 286 The Commission considers that this provision appropriately puts the onus on government departments with statutory information-gathering powers to review their governing legislation to see whether removing or restricting the privilege can be justified.

### *Warnings*

- 287 *The Privilege Against Self-Incrimination* discussion paper proposed that when a government official acting under a statutory authority is seeking information from a person who may have a claim to the privilege, the official should be required to warn that person of his or her right to claim the privilege.

288 Commentators were concerned that this requirement would effectively stultify the information-gathering powers. Commentators also pointed to the difficulties facing officials who must assess the validity of claims for the privilege, and to the lack of any practical way of obtaining quick judicial rulings. The Law Commission is convinced by these arguments and does not now recommend imposing a duty on investigating officers to warn of the right to claim the privilege.

### **Discretion as to incrimination under foreign law**

289 The Law Commission was originally opposed to extending the privilege against self-incrimination to self-incrimination under foreign law. However, it has been persuaded by the reasoning of the Privy Council in *Brannigan v Davison* [1997] 1 NZLR 140, that a judicial discretion should be available to excuse a witness from testifying if it would be unreasonable to force the person to give evidence that may incriminate him or her under foreign law. Section 62 creates such a discretion, which applies when there is the possibility of imprisonment, or corporal or capital punishment under foreign law. As with s 61, spouses and corporations are excluded from the privilege. The discretion will be available in pre-trial situations, where the person concerned has not yet become a witness.

### **Privilege against self-incrimination in court proceedings**

290 Section 63 is a procedural reform intended to promote a witness's awareness of the availability of the privilege, and to provide an incentive for a witness to disclose relevant information rather than refuse to answer a potentially incriminating question. It follows the approach in s 128 of the Evidence Act 1995 (Aust), which requires the judge to give a witness who agrees to make self-incriminating disclosures in a proceeding a certificate of immunity. Such a certificate prevents any information obtained directly or indirectly as a result of the disclosure from being used against the witness in any other proceeding.

291 The section applies at a stage in a proceeding when it appears to the judge that a party or witness may have grounds to claim a privilege against self-incrimination. First, the section casts a duty on the judge to ensure that the witness or party is aware of the availability of this protection. Second, the judge must advise the witness or party that they need not provide the incriminating

information, but if they do, the witness will be given a certificate in the terms already mentioned. The section does not protect against prosecutions for perjury. Thus if the witness provides false information, it can form the basis of a perjury prosecution. Submissions supported the immunity certificate procedure.

## **Replacement of privilege with respect to Anton Piller orders**

- 292 It is recognised that the privilege against self-incrimination allows a defendant in civil proceedings to successfully resist disclosure on the basis that the defendant's civil wrong may also have been criminal. For the reasons set out in *The Privilege Against Self-Incrimination* discussion paper, the Law Commission is of the general view that the policies supporting the privilege outweigh the interests of the private litigant.
- 293 However, the Commission believes that an Anton Piller order warrants special consideration. An Anton Piller order 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. Such an order can only be granted if there is a legitimate fear that crucial evidence will be destroyed.
- 294 Anton Piller orders originally raised no self-incrimination issues because the party on whom the order was served was not required to actively disclose anything. Difficulties arise from widening the order to include a further direction that the party disclose information and documents that would not necessarily be found by the search alone. Under the Code, the privilege may not be claimed for pre-existing documents; however, it could be claimed if the party is required to answer potentially self-incriminating questions. The Commission believes that a claim of privilege should not defeat the need to obtain and preserve relevant evidence in these circumstances.
- 295 Section 64 provides that if a judge grants an Anton Piller order, the privilege will be replaced by protections for the defendant who makes the mandatory disclosures. Under current law, material disclosed in response to the Anton Piller order may not be used in any later criminal prosecution for an offence relating to the subject matter of the civil action in which the Anton Piller order was made. Section 64 extends that immunity to any other evidence obtained through the original disclosure. The current law also imposes an undertaking on the plaintiff not to make available to

the police information acquired under an Anton Piller order. The Law Commission does not believe this is desirable because the powers of the police in investigating crime should not be unnecessarily constrained. Although the information should not be used to incriminate the defendant, it may legitimately be used in the prosecution of others.

## Informers

- 296 The identities of police informers have customarily been protected from disclosure. The protection covers both identity and any information from which identity can readily be ascertained (*Tipene v Apperly* [1978] 1 NZLR 761, 767 (CA)). The Crown may withhold an informer's identity at trial and in any preliminary proceedings.
- 297 It is important to encourage people with information about the commission of crimes to offer that information to the authorities. Consequently, the Law Commission recommends an absolute privilege for the informer in s 65, subject only to the exceptions in s 71 (powers of judge to disallow privilege).
- 298 The Law Commission considered that the basic requirements for invoking the privilege should be:
- the informer must have provided information to an enforcement agency, defined as either the New Zealand Police or a body with statutory responsibility for enforcing an enactment;
  - the information must relate to the possible or actual commission of an offence; and
  - the circumstances must be such that the informer had a reasonable expectation that his or her identity would be kept secret.
- 299 The submissions were generally in favour of an absolute privilege for informers. Several government departments questioned the definition of "enforcement agency" in s 4 (the Police of New Zealand or a body or organisation with a statutory responsibility for enforcing an enactment). They suggested including specific departments in the definition or redefining the term to include bodies with powers of investigation or inquiry under any enactment. The Law Commission thought the definition sufficiently wide to include all such bodies.
- 300 The Evidence (Witness Anonymity) Amendment Act 1997 has since been enacted, allowing a prosecution witness to give evidence

anonymously in exceptional cases. The definition of “informer” in s 65(2)(b) excludes informers who give evidence for the prosecution, thus avoiding overlap between s 65 and the Evidence (Witness Anonymity) Amendment Act 1997.

### **Protection of journalists’ sources**

- 301 The protection of journalists’ confidential sources of information is justified by the need to promote the free flow of information, a vital component of any democracy. Some limited protection is currently provided by the common law. Section 35 of the Evidence Amendment Act (No 2) 1980, which protects confidential communications generally, is also available to protect journalists’ sources.
- 302 In its preliminary paper *Evidence Law: Privilege*, the Law Commission expressed the view that a general judicial discretion to protect confidential communications would be sufficient to protect journalists’ confidential sources (para 355). Commentators agreed that an absolute privilege was not justified. However, some suggested that an express qualified privilege for the identity of a source, which puts the onus on the person seeking to have the source revealed, was preferable to relying on a general discretion. This would give greater confidence to a source that his or her identity would not be revealed. Consequently, the Law Commission has revised its original recommendation. Section 66 creates a specific, qualified privilege for journalists’ confidential sources.

### **Overriding discretion as to confidential information**

- 303 There are many relationships of confidence that do not fit into a class covered by a specific privilege, but which, nonetheless, may deserve protection in certain circumstances. Currently, confidential communications are protected by s 35 of the Evidence Amendment Act (No 2) 1980, which gives the court a general discretion to excuse a witness from answering a question or producing a document if the public interest in having the evidence disclosed to the court is outweighed by the public interest in preserving the confidence. There is a similar common law rule (*M v L*, 15 October 1998, CA 248/97).
- 304 Section 67 would create a similar judicial discretion but with a broader application. To be excused under s 35, the information a witness seeks to withhold from the court must have been imparted to the witness within the relationship of confidence that the court

seeks to protect. The proposed s 67 would allow the judge to direct that confidential information must not be disclosed by *any* witness. Thus, the information may be protected even when, through breach of confidence or inadvertent disclosure, it has come into the hands of a person who is not in a relationship of confidence with the confider. Further, the judge may order the witness not to disclose the information even if the witness is willing to disclose it.

305 Section 67 provides a non-exclusive list of issues for the court to consider when deciding whether to exercise its discretion. These are:

- the extent of the harm that is likely to be caused by the disclosure;
- the nature of the information and its importance to the proceeding;
- the nature of the proceeding;
- whether other means of obtaining the information are available;
- whether it is possible to prevent or restrict public disclosure;
- the sensitivity of the evidence; and
- society's interest in protecting the privacy of victims of sexual offences.

306 The last factor has been added since the publication of the preliminary paper. The Law Commission recognises that compelling the production of personal information about victims of sexual offences – particularly if the victim sought counselling as a result of the assault – may deter the reporting of such offences to the police and, in some cases, may force victims to choose between seeking treatment and reporting the offence. By requiring the judge to take account of society's interest in protecting the privacy of victims of sexual offences, the section seeks to limit disclosure to those cases where the information concerned is of substantial probative value, and to prevent speculative “fishing expeditions”.<sup>64</sup>

307 This section will be available to protect confidential communications between spouses and those in similar relationships. The Commission has decided against creating a specific privilege for spouses or re-enacting those sections that

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<sup>64</sup> This issue has recently been the subject of Canadian legislation (Criminal Code RSC 1985 C-46, s 278.5) following a number of Supreme Court decisions, notably *R v O'Connor* [1995] 4 SCR 411.

currently protect spouses from being compelled to give evidence.<sup>65</sup> This issue is discussed further at paras 342–347.

- 308 The court may exercise its discretion to protect confidential information whether or not the information would also be eligible for protection by a specific privilege. This is necessary because sometimes such confidential information will not meet the precise criteria required for the privilege, and yet it may still be appropriate to protect the information.
- 309 The submissions showed general support for this proposal.

### **Discretion as to matters of state**

- 310 Section 68 codifies and clarifies the law on public interest immunity. It provides a general judicial discretion to protect matters of state if the public interest in disclosure is outweighed by the public interest in withholding the information. Like the general discretion to protect confidential information, it may be exercised regardless of whether the information is eligible for protection under a specific privilege.
- 311 The development of public interest immunity has been strongly influenced by the Official Information Act 1982, and the Code has maintained this link. “Matters of state” are defined to include all information that is sought to be protected for reasons corresponding with those set out in ss 6,7 and 9 of that Act (other than those involving personal privacy). However, the definition is not exhaustive and could include other claims outside the scope of the Act.
- 312 There was general support for this provision. However, several commentators thought the provision should include more explicit guidance for the court in exercising the discretion. The Law Commission expressed a preference for a wide discretion allowing the judge to take what guidance is considered relevant from the provisions of the Official Information Act 1982 or the more general public interest immunity considerations. The Commission’s view has not changed.
- 313 One commentator suggested that there was no need to distinguish between protection of private confidentiality and the discretion to protect matters of state. The preliminary paper dealt with this

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<sup>65</sup> Section 29 of the Evidence Amendment Act (No 2) 1980 protects spouses from being compelled to give evidence of communications made by their spouse during the marriage, while s 5 of the Evidence Act 1908 prevents the prosecution from compelling the spouse of an accused person to give evidence.



question at paras 359–363. The Law Commission took the view that the two protections were not sufficiently similar to allow amalgamation. There are interests of specific relevance to government that would require separate consideration if amalgamation were to occur. Further, public interest immunity must be seen in light of the provisions of the Official Information Act, which have no relevance to private confidences. The Commission has not been persuaded to change its view.

314 Section 27(3) of the Crown Proceedings Act 1950 protects the Crown from having to disclose the existence of a document if:

- either the Prime Minister certifies that disclosing its existence would be likely to prejudice the security or defence of New Zealand, the international relations of its government, or any interest protected by s 7 of the Official Information Act 1982; or
- the Attorney-General certifies that disclosing the existence of the document is likely to prejudice the prevention, investigation, or detection of offences.

The Commission does not consider that this special exemption from the ordinary requirements of discovery is justified. The provision is not consistent with the general principle that the court, not the Crown, is ultimately responsible for determining whether a claim to public interest immunity should be upheld.

315 The only commentator on this issue agreed that, in the discovery and challenge process, the Crown should behave as a normal litigant. The Commission continues to recommend repealing s 27(3) of the Crown Proceedings Act 1950.

## Waiver

316 Under the common law, a privilege is lost if it is voluntarily waived, either expressly or impliedly. Section 69 codifies the common law rule. The original draft of the section stated that a privilege was waived if the privilege holder disclosed the privileged information in circumstances inconsistent with a claim of confidentiality or in circumstances where it would be unfair for the privilege holder to take the benefits of disclosure while also seeking to retain the benefits of the privilege. The Law Commission has since decided that the latter circumstance is included in the former, and reference to it has been deleted from the final recommendation.

317 Section 69(4) codifies and extends to all privileges the principle that, if a third party obtains information subject to legal

professional privilege without the consent of the privilege holder, the privilege is not waived and the material is inadmissible (*R v Uljee* [1982] 1 NZLR 561 (CA)).

318 The proposal in s 69 was supported by the commentators.

### **Joint and successive interests in privileged material**

319 Section 70 codifies the common law rule that persons who have a joint interest in the subject matter of privileged information are entitled to have access to the privileged information, to assert the privilege against third parties and to prevent disclosure of the privileged information. The principle also applies if parties share interests in the same property successively. The courts are still developing this latter doctrine, and the section contains a discretion to enable the court to discriminate in deciding what information should be passed on to a successor in title. For example, it may be appropriate for the Official Assignee to acquire information that has passed between a bankrupt and the bankrupt's solicitor about protecting the bankrupt's property from potential law suits. However, it would not necessarily be appropriate for the Official Assignee to access advice given to the bankrupt on how to defend proceedings in bankruptcy.

320 One commentator suggested that s 70(1)(c) incorrectly placed the onus of establishing the privilege on the person who is asserting the privilege. However, s 70(1)(c) is concerned with procedure not onus. Another commentator suggested that the original use of the term "interested party" in subss 70(1)(c) and 70(3) was unclear. Consequently, we have substituted the term "another holder of the privilege". Otherwise, the submissions supported this proposal.

### **Power of judge to disallow privilege**

321 Section 71 sets out the circumstances in which the court must or may disallow a claim to privilege. Section 71(1) adopts the existing law, which excludes a claim of legal professional privilege for a communication intended to further the commission of a crime or fraud, and extends it to all privileges. Section 71 covers any communication made or any information prepared for a dishonest purpose or to enable anyone to commit what the person claiming the privilege knew, or reasonably ought to have known, is an offence. The requirement that the privilege holder must know of the offence departs from the position taken in *Reg v Central Criminal Court ex parte Francis & Francis* [1989] AC 346. The Law

Commission agrees with those commentators who have pointed out that the effect of *Francis* is that no person would know if the privilege was safe or not.

322 The original draft provision gave the judge a discretion to disallow a claim of privilege in the circumstances described in s 71(1). The Law Commission now considers mandatory disallowance more appropriate where dishonesty or the commission of an offence are concerned. The judge must be satisfied that a strong prima facie case has been made out.

323 Section 71(2) follows a line of common law cases<sup>66</sup> that acknowledge a judicial discretion to disallow a claim of privilege if the information is necessary to enable the defendant in criminal proceedings to present an effective defence. Both the High Court of Australia (in a 3-2 split judgment) and the House of Lords have recently either overruled or declined to follow these cases (see para 253). The reasoning of each court was similar. Legal professional privilege is absolute and does not allow any exceptions. Because the law's recognition of the privilege already encompasses a proper balancing of opposing public interests, there is no need for a further balancing exercise.

324 The Law Commission, however, agrees with the reasoning in the dissenting judgment of Toohey J in the High Court of Australia case: that legal professional privilege is not an end in itself but exists to promote the public interest by assisting the administration of justice. Toohey J considered it paradoxical that

“the perfect administration of justice” should accord priority to confidentiality of disclosures over the interests of a fair trial, particularly where the accused is in jeopardy in a criminal trial for a serious offence. (154)

Section 123 of the Evidence Act 1995 (Aust) codifies the minority judgment. The Canadian Supreme Court has also held that legal professional privilege may be breached in these circumstances (*Smith v Jones*, 25.3.99, File No 26500).

325 A further subs (3) has been added to protect the privilege holder. If privileged information is disclosed under subs (2), such information and any information derived from it may not be used against the privilege holder in any proceeding in New Zealand.

326 The submissions supported the Law Commission's proposals.

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<sup>66</sup> *R v Craig* [1975] 1 NZLR 597; *R v Taffs (No 1)* (1990) 6 CRNZ 262; *R v Ataou* [1988] QB 798 (CA); *R v Barton* [1973] 1 WLR 115.

## Orders for protection of privileged material

327 Section 72 provides the machinery for invoking a privilege or discretionary protection.

328 No submissions were received on this section.

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## Eligibility and compellability

### COMPETENCE

- 329 **U**NDER CURRENT LAW, all witnesses must be competent to give evidence. For children under 12, the court is obliged to test competence. The competence of any other witness may be challenged if it is at issue; for example, in the case of intellectual disability. The test for competence contains two limbs: a witness must have a sufficient level of understanding or intelligence to give a rational account of past events; and the witness must understand the nature and consequences of the oath or promise (for children, the duty to speak the truth).
- 330 Recent research indicates that even young children are able to give reliable evidence and that age alone cannot predict the quality of the evidence presented. Further, the current test of competence, in particular the requirement to understand the nature of a promise, does nothing to make the witness's evidence more accurate or truthful, and often has the effect of excluding reliable evidence. In line with the policy of the Code to increase the amount of relevant evidence available to the fact-finder, the Law Commission recommends abolishing the current competence requirement. Testimony that is unhelpful because of incoherence or because of communication difficulties that cannot be overcome, may be ruled inadmissible on one of the general exclusionary grounds (s 8). A decision to exclude evidence on these grounds may be made at any time, although a pre-trial inquiry will generally be preferable. This proposal has implications for administering oaths, affirmations or declarations.
- 331 The proposals to abolish both the competence requirement and the duty to test children under 12 were discussed in *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) and were strongly supported by a clear majority of commentators.
- 332 Some reviewers, however, suggested that the judge should retain some discretion to test for competence in appropriate cases and make such a decision pre-trial. This was the view of one group of practitioners:

[We] agree that the evidence of children should not be ruled inadmissible solely on the grounds of a failure to make and understand a promise as is required under the current competence text. [We] suggest that it be assumed that all witnesses, regardless of age or disability, are competent subject to the discretion of the Judge to test competence or for counsel to seek to have competence tested. If competence is potentially an issue, it should ideally be dealt with by way of pre-trial application under s 344A of the Crimes Act 1961. To make this possible, of course, defence counsel requires full discovery as early in the proceedings as possible.

333 The Law Commission considers that retaining a discretion to test for “competence” (in the sense of testing for understanding the meaning and implications of promising to tell the truth) will not result in any significant change from the current position. The Commission’s concern, as the above submission notes, is that a witness’s mere failure to articulate the nature of a promise may result in crucial evidence being unavailable to the court. Whether or not a test of this nature is performed as part of duty or in an exercise of discretion, the Law Commission remains of the view that the test is not appropriate or necessary. In situations where the witness gives incoherent evidence, that evidence may be excluded under s 8.

334 In order to avoid any future admissibility arguments based on “competence”, the Law Commission has avoided using the term in the Code. The Code uses the phrase “eligibility” and the general rule in s 73 deems all people eligible (including defendants in criminal cases) and all eligible people compellable (subject to some specific exceptions).

### **Eligibility of judges, juries and counsel**

335 There is limited case law dealing with the eligibility of judges or jurors to give evidence in a proceeding in which they are acting as either judge or juror. However, the Law Commission is of the view that existing practice and the principles of natural justice make it axiomatic that judges and jurors should not also give evidence in that proceeding.

336 The proposed rule in the Code (s 74) also provides that any person acting as counsel in a proceeding is ineligible to give evidence in that proceeding without leave. This addition to the rule was suggested during the consultative seminar programme and the Law Commission supports it.

## COMPELLABILITY

337 The Law Commission recommends only two provisions that deal with specific exceptions to the general rule that all witnesses are compellable. Section 75 provides that a defendant in criminal proceedings is not a compellable witness for either the prosecution or the defence, and is not compellable to give evidence for or against a co-associated defendant, unless the defendant has already been tried or is being tried separately. Section 76 lists a number of individuals (including the Sovereign, Heads of State and judges in their judicial capacity) who are not compellable.

### **Defendants in criminal proceedings**

338 The Law Commission does not propose to change the basic rule that a defendant is not a compellable witness.<sup>67</sup> This is in keeping with the conclusions reached in the Commission's discussion paper, *The Privilege Against Self-Incrimination*, and s 25(d) of the New Zealand Bill of Rights Act 1990, which confirms the right of everyone charged with an offence "not to be compelled to be a witness or to confess guilt".

339 Between co-defendants, the principle of non-compellability conflicts with both the principle of admissibility of relevant evidence as well as the principle that defendants not be unnecessarily hindered in presenting their defence.

340 The Code rule dealing with the compellability of co-defendants uses the term "associated defendant", a term also used in the Evidence Act 1995 (Aust). An "associated defendant" is a person who has been charged with an offence that is the same as or related to the offence for which a defendant in a criminal proceeding is being prosecuted. Associated defendants may be tried jointly or separately. The term "associated defendant" is therefore wider than the term "co-defendant".

341 The Code provides that an "associated defendant" who is tried separately is compellable for either an associated defendant or the prosecution, extending the approach under s 5(7) of the Evidence Act 1908. An associated defendant is also a compellable witness if

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<sup>67</sup> One example of a legislated inroad on the general rule of the non-compellability of the accused is contained in ss 16 and 17 of the Evidence Act 1908. After consulting with the New Zealand Customs Service, the Commission has concluded that there is no need for these obscure sections to continue to exist. They are rarely relied upon in practice and can safely be repealed.

the proceeding against that associated defendant has been determined (s 75(2)). The Code defines when a proceeding is determined (s 75(3)) and includes the situation where the associated defendant has been found guilty (currently not covered under s 5(7)) and sentenced.

## **Removal of the spousal non-compellability rule**

- 342 The effect of the general compellability rule is to abolish the existing law of spousal non-compellability. The Law Commission recommends abolition because it considers that the spousal non-compellability rule creates an anomalous exception. The Commission is of the view that any rule that offers greater protection to a particular group of people should also be extended to people in relationships of a similar kind. The Commission therefore initially proposed extending the existing rule to other de facto or family relationships. The boundaries of such an extension were, however, difficult to logically establish, and in the words of one submission this “[left] the [undesirable] impression that the giving of evidence is discretionary”. The other logical alternative was the complete abolition of the spousal non-compellability rule.
- 343 The recommendation to abolish the rule has met strong opposition from some practitioners but the majority of commentators supported the move and agreed with the Law Commission’s view that spousal non-compellability cannot be supported as a matter of logic or policy.<sup>68</sup>

## **Cases of domestic violence**

- 344 Some submissions expressed concern about the effect of abolishing the spousal non-compellability rule on victims of domestic violence. They argued that a woman should not have to testify against her violent partner if doing so would put her at risk of retaliatory violence. The Commission accepted the validity of this concern and sought to meet it by giving judges a discretion to excuse a witness if the judge was not satisfied that the witness could be protected from retaliation. Other commentators argued

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<sup>68</sup> See VIII Wigmore (McNaughton Rev, 1961) § 2228: “[T]his marital privilege is the merest anachronism in legal theory and an indefensible obstruction to truth in practice.”



that an abused victim should not be required to argue in front of the alleged abuser that giving evidence meant exposure to further violence.

- 345 The Law Commission's initial proposal of a judicial discretion to excuse women victims of domestic violence was criticised during the consultative seminar series. Many practitioners were of the view that the proper development of the law should allow admission of such witness's out-of-court statements. Other commentators were of the view that such a discretionary rule should in fairness be extended to all frightened witnesses, not just to female victims of domestic violence. This would, however, potentially allow a large number of crucial prosecution witnesses to be excused, which is clearly undesirable.
- 346 The issue of the compellability of victims of domestic violence, whether married to the defendant or not, has caused the Law Commission considerable difficulty. It involves a conflict between the public interest in prosecuting perpetrators of domestic violence and the desire to protect victims (who testify) from retaliatory violence stemming from a prosecution.
- 347 What seems clear is that the competing public interests inherent in prosecuting domestic violence require all those involved – the prosecution, the judiciary, community groups and government agencies – to understand the difficult policy considerations that arise, and to develop an agreed practice capable of meeting the exigencies of each case. The Law Commission is therefore of the view that it would be premature for the Code to include special rules dealing with the compellability of victims of domestic violence.

### **Admissibility of jury deliberations**

- 348 There are clearly sound reasons for limiting the admissibility of evidence of jury deliberations. Finality of verdicts, protecting jurors from pressure and encouraging full and frank discussion in the jury room all require that what goes on in the course of jury deliberation should be protected from disclosure. However, an overly strict application of such a rule may itself result in injustice.
- 349 Under the current law, the admissibility of evidence about juror impropriety hinges on whether the impropriety occurred within or outside the jury room. The Commission does not consider that such a distinction can sensibly be maintained. Some kinds of

intimidation during deliberation are unacceptable and would amount to breach of a juror's duty wherever they may occur; and evidence of this kind of misconduct should be admissible.

350 The general rule in the Code is therefore that evidence of jury deliberations *about the substance of the case* is inadmissible. The exception allows evidence of juror impropriety to be given that, for example, a juror was unqualified or incapable of serving as a juror, or was in breach of his or her duty as a juror – even if giving that evidence necessarily means disclosing some of the content of the jury's deliberations (s 77).

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## Oaths and affirmations

### CHILD WITNESSES

- 351 **T**HE LAW COMMISSION'S recommendation to abolish the competence requirement and the duty to test the competence of children under the age of 12 (a test that includes an assessment of their understanding of the nature of a promise) has consequential effects on the Oaths and Declarations Act 1957.
- 352 The Law Commission had concluded that an inquiry into a child's understanding of the nature of a promise does not assist in assessing reliability. It was therefore persuaded by a number of commentators that it makes little sense to allow a child to promise to tell the truth when no inquiry may be made into what that promise means for them. In its discussion paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996), the Commission had proposed an alternative approach of requiring all children under the age of 12 to give "unsworn" evidence (that is, without swearing an oath or making a promise to tell the truth). This alternative proposal received strong support in the submissions.
- 353 In response to the concern about the fact-finder's prejudice if no promise is made, one commentator suggested that only children under six should give unsworn evidence. The Law Commission was initially attracted to this idea, but concluded that introducing another age-related restriction in the Code unnecessarily complicated the scheme in other ways. The Commission now recommends that all children under the age of 12 will give unsworn evidence, but that evidence will be received as if given on oath (s 78(2)). This approach is also viewed as desirable for any other witness who, for whatever reason, may give unsworn evidence with the leave of the judge. This may be appropriate in the case of intellectually disabled witnesses (s 78(3)).
- 354 While a judge is not required to, and should not, make an inquiry into a child's understanding of what it means to tell the truth, the Code provides that the judge should still inform the child witness

(or any witness who does not take an oath or make an affirmation) of the importance of telling the truth (s 78(2) and (3)). This proposal responds to a concern that the solemnity of the occasion be recognised. One commentator stated his concern in this way:

The administration of an oath or the making of an affirmation does not guarantee the truth or accuracy of evidence, but they do bring home to witnesses the seriousness of the occasion, calling for more than a merely “social” regard for truth in their testimony.

- 355 A number of submissions noted that research indicates children may more easily understand the concept of not telling lies rather than the concept of telling the truth. The Law Commission accepts the validity of this research and has included a reference to “not telling lies”.
- 356 One amendment that results from introducing this provision will be the repeal of s 13 of the Oaths and Declarations Act 1957, which governs the current approach for children under 12.
- 357 It is intended that abolishing the duty to test the competence of children under 12 (as well as any other witness) will prevent counsel questioning the witness on whether he or she understands the nature or effect of a promise to tell the truth. To allow such questions would bring back the competence test by a side door. The Commission is of the view that a witness’s evidence may be tested in terms of truthfulness or accuracy without requiring the witness to explain the nature or effect of a promise.

## INTERPRETERS

- 358 The Code requires interpreters (defined in the Code as those people who offer “communication assistance”) to take an oath or make an affirmation (s 79). The form of such an oath or affirmation will be provided in regulations.

## A SECULAR PROMISE TO TELL THE TRUTH?

- 359 In a research paper, the Law Commission considered the arguments for abolishing the religious aspects of the oath. Many people, including a number of church groups, have called for an end to the religious connotation of the oath. The overriding theme of their arguments is that a matter as important and private as a person’s relationship with God should not be part of the secular process of litigation. Arguments in favour of abolishing the religious

oath have also found favour with several law reform bodies.<sup>69</sup> Earlier this decade there was a movement for reform along these lines in New Zealand, which, however, did not progress to the stage of amending legislation.<sup>70</sup>

360 The Law Commission's Māori Committee were, however, of the view that the alienation that Māori feel in the criminal justice system would be exacerbated by the failure to acknowledge the importance of spirituality in Māori life. The Māori Committee considered that this is of such significance to Māori that the religious oath should be retained as a general practice. Because the issue is contentious and resolving it is not necessary for the adoption of the Code as a whole, the Commission has preferred, for the time being, to recommend retaining the status quo.

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<sup>69</sup> Criminal Law Revision Committee (England and Wales), *Evidence* (11th report, HMSO, London, 1972); Canadian Law Reform Commission, *Report on Evidence* (Report 1, Ottawa, 1975); Ontario Law Reform Commission, *Report on the Law of Evidence* (Toronto, 1976); Law Reform Commission (Ireland), *Report on Oaths and Affirmations* (LRC 35, Dublin, 1990).

<sup>70</sup> See, for example, the Petition of Dame Barbara Goodman (1990/249) that the religious oath be replaced by a non-religious undertaking, which was recommended to the Government for favourable consideration by the Justice and Law Reform Select Committee.

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## Support, communication assistance and views

### SUPPORT FOR WITNESSES

- 361 **T**HE LAW COMMISSION considers that complainants in criminal proceedings should be entitled to have a person near them to provide support while they give evidence (s 80(1)). In many cases, especially when young children are involved, the closeness of a person they trust (whether the children give evidence in the ordinary way (s 83) or in an alternative way (s 105)), will help the complainant to give complete and therefore more helpful evidence. The Commission also recommends that any witness (including a defendant in a criminal proceeding who testifies) may apply to have a support person near them while giving evidence (s 80(2)). This proposal received strong approval from commentators.
- 362 A complainant should not, however, have an absolute right to a specific support person, and the judge should have a discretion to prevent a particular person giving support to a witness – for example, the very presence of a well-known person as a support person may influence the jury’s assessment of the witness’s truthfulness (s 80(1)).
- 363 Section 80(4) puts the conduct of a support person and that of the person receiving support under the judge’s control. It is expected that the support person will not speak to the witness while the witness is giving evidence. Any departures from normal conduct (such as a child wishing to sit on the knee of a support person) would require the leave of the judge.
- 364 In response to submissions, s 80(3) requires the name of the support person to be disclosed to all other parties to the proceedings. This should happen as soon as practicable after the witness chooses a support person; but in any particular case (for example, if there is a possibility of intimidation when the person is supporting an anonymous witness), the judge may rule against the need for such disclosure.
- 365 One submission stressed that in choosing a support person for children, the child’s wishes and the best interests of the child should

be taken into account. The Law Commission agrees but considers that legislative expression is unnecessary.

- 366 The Law Commission also recommends (in s 80(2)) that any witness may apply to the judge to have more than one support person near them while giving evidence (whether in the ordinary way or in an alternative way).
- 367 The possibility of a witness having more than one support person provoked a mixed response. A number of commentators did not favour the possibility. Many of those working with children, however, were strongly in favour of such a possibility, as were the Law Commission's Māori Committee and the te ao Māori consultation group. The Law Commission recommends that both complainants in criminal cases and any other witness may apply to have more than one support person.

## COMMUNICATION ASSISTANCE

- 368 Communication assistance in the form of interpretation to and from English is already available in New Zealand courts. Under s 25(g) of the New Zealand Bill of Rights Act 1990, such assistance is a right for defendants in criminal cases. The Law Commission considers that any criminal defendant who is unable to sufficiently understand the proceedings should be entitled to interpretation of the proceedings, including any relevant preliminary matters or documents, without charge (s 81(1)). In the case of other witnesses, an interpreter should be available to assist communication with the court, but the party calling the witness would normally meet the cost of this service. This will not affect the provisions of the Māori Language Act 1987, which entitle any witness to give evidence in Māori (s 81(8)).
- 369 Section 81, which incorporates a wide definition of “communication assistance” (s 4), received unanimous support from commentators. Many community groups, including the IHC, acknowledged the appropriateness of an approach that validates the use of changing technology while recognising individual needs:

Difficulties will be avoided if those involved are prepared to be flexible and accommodate the varying needs of the people concerned. This could mean accepting the use of a communication board, which has a variety of symbols allowing someone who is not able to speak or write to communicate, others will use computers, and others will use aids in combination with a support person. IHC would encourage officials to view this as a necessary means of communication, rather than a risk to court procedure.

## THE USE OF INTERMEDIARIES

370 In *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996), the Law Commission proposed that intermediaries could be appointed to help some witnesses to give evidence. The proposal provided that the court could, if necessary, appoint an intermediary to explain questions put to a witness. The proposal was in part a development of the existing provision in s 23E(4) of the Evidence Act 1908 and also drew on the legislation and reform proposals in other common law jurisdictions (paras 167–169).

371 There was overwhelming support for this proposal from community groups and relevant government agencies, with a number describing the proposal as “the best in the paper”. Some practitioners also supported the use of intermediaries in appropriate cases:

This is a concept new to me. Every judge has encountered situations where a witness has difficulty in understanding questions or in giving understandable answers. Usually, with patient handling, the matter can be resolved, but I accept there may well be more serious problems with some witnesses of limited intelligence, or with comprehension or communication difficulties, and I would support a discretion to appoint an intermediary for them and for young children if necessary.

372 Most of the practitioners who strongly disagreed with the proposal considered that proper training would enable lawyers and judges to communicate with any witness. Community groups, however, emphasised that in their opinion many lawyers do not have the necessary communication skills.

373 One commentator also referred us to the experience of “facilitated” communicators in the United States and Australia, arguing that:

[the] process has been found to be problematic, primarily because it relies so heavily on the “facilitating” intermediary and because it has not stood up to scientific scrutiny in terms of demonstrating that the source of the “facilitated” communication is the disabled person. . . . [I]ts use has been attempted in some courts in the United States but, as it has been found not to have the support of the mainstream scientific and professional community, some jurisdictions there have now outlawed it.<sup>71</sup>

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<sup>71</sup> The commentator cited: Green and Shane, “Science, Reason, and Facilitated Communication” (1994) 19 (3) *Journal of the Severely Handicapped* 151; Jacobson, Mulick and Schwartz, “A History of Facilitated Communication: Science, Pseudoscience, and Antiscience” (1995) 50 (9) *American Psychologist* 750; Montee, Miltenberger and Wittrock, “An Experimental Analysis of Facilitated Communication” (1995) 28 (2) *J of Applied Behaviour Analysis* 189.



374 Given the divided views within the profession and the critical studies from the United States, the Law Commission considered that it is not currently appropriate to recommend the use of intermediaries.

## VIEWS

375 The Law Commission drafted a research paper dealing with the issue of demonstrations, inspections and visual aids, in which it concluded that the Code needed only to provide for the law relating to inspections (views). The manner of giving evidence, such as the use of visual aids, can be appropriately dealt with under the court's inherent powers. Demonstrations and reconstructions will be subject to the relevance rule and the general exclusion (s 8), allowing a principled yet flexible approach. However, the Commission considers that the current law on inspections (views) should be clarified and improved.

376 At present, s 28 of the Juries Act 1981, at least in part, governs the ordering of views. It provides:

**Court may order a view**

At any time during a trial, whether or not the evidence for any or all of the parties has been closed, the Court may, on the application of any party or of its own motion, order a view if the Court considers that that course is proper or necessary in the interests of justice.

377 There is conflicting case law on whether the fact-finder (judge or jury) needs to be accompanied by the parties when undertaking a view, and whether the judge needs to be present when the jury undertakes a view.<sup>72</sup>

378 Since views are part of the process of receiving evidence at trial, the Law Commission considers that all participants should be entitled to be present, including the judge, the jury, the parties and their counsel. All current exceptions to this principle should apply – for instance, it should be possible to exclude the defendant under s 376 of the Crimes Act 1961. The proposed section (s 82) clarifies when a view may be held, who is entitled to be present and the use to which information obtained from a view may be put.

379 The Law Commission recommends repealing s 28 of the Juries Act 1981 and replacing it with s 82 of the Code.

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<sup>72</sup> *Tameshwar v R* [1957] AC 476; contra *R v Hunter* [1985] 2 All ER 173.

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## Questioning of witnesses

### INTRODUCTION

- 380 **T**HE CENTRAL FOCUS of evidence law is a trial at which witnesses are questioned by the parties to the proceeding. Most issues about the admissibility of evidence arise in the context of questioning witnesses. The Law Commission considers that the Code should contain provisions that govern the most important aspects of the way in which witnesses are questioned at a proceeding.
- 381 A number of commentators have expressed the view that some of the provisions contained in this Subpart do not belong in an evidence code. They argued that many of the topics dealt with are not really matters of evidence law, and in any case could safely be left to the court in exercising its inherent power to regulate its procedure (s 11 of the Code). To codify practices that are currently unproblematic may invite unnecessary argument.
- 382 To an extent, the Law Commission accepts these arguments, and some of the original proposals no longer appear in the Code. Deciding the proper scope of an evidence code has been a constant concern for the Commission from the beginning of its reference.
- 383 In the Law Commission's view, the final recommendations in this Subpart are properly a part of the Code. From a general perspective, the rules governing the questioning of witnesses provide the framework in which the admissibility rules in the Code operate. But there are two more reasons, with both of which the majority of submissions agreed. First, the Subpart will be available as a guide to less experienced practitioners and persons who are not legally trained. While some of the subjects codified may seem obvious to experienced counsel, they may not be so to a more junior lawyer. Second, the Subpart contains provisions that clarify existing controversies in the law. The submissions received by the Commission, even from the commentators of the greatest experience, revealed some very real differences in their understanding of what the law is and what the law should be in this area.

384 While the provisions in this Subpart go beyond admissibility issues, they are directly concerned with the process of proof. The Law Commission's recommendations are also supported by the majority of commentators who agreed that the topics in this Subpart should be codified.

## THE CODE PROVISIONS

### **Ordinary way of giving evidence**

385 Most New Zealanders think of a trial in terms of witnesses testifying in the courtroom. This reflects the principle of "orality", which is codified in s 83.

386 Section 83 provides that, in the ordinary case, witnesses will give evidence in the presence of the judge, the jury, parties to the proceedings (including the defendant in a criminal proceeding) and members of the public. As with all Code provisions, s 5(1) of the Code means that s 83 is subject to the express provisions of any other Act (eg, s 376 Crimes Act 1961, which provides for the absence of the defendant in some circumstances).

387 The ordinary way of giving evidence set out in s 83 contrasts with the "alternative ways" of giving evidence that are governed by ss 102–106.

### **Examination of witnesses**

388 Section 84 confirms the parties' rights to examine, cross-examine, and re-examine the witnesses at a trial, and also sets out the usual order in which a witness gives evidence: evidence in chief, cross-examination and re-examination. The provision is expressly subject to a contrary direction by the judge to cater for unusual situations.

### **Unacceptable questions**

389 One justification for the adversary system is that a fair result will be achieved if the parties are given substantial freedom to choose the method of presenting their respective cases to the fact-finder. However, occasions will inevitably arise when the judge must exercise control over the way the parties present their evidence or question witnesses. Section 85 recognises this necessity. The section replaces and extends s 14 of the Evidence Act 1908.

390 There was general support for a provision such as s 85, although issue was taken with particular terms employed in the section as

originally proposed.<sup>73</sup> For instance, the concept of an “unfair” question was criticised as being too uncertain. In the Law Commission’s view, however, it is desirable to retain the flexibility inherent in the concept of unfairness. Indeed it is arguable that the other terms in the list appearing in s 85(1) are specific facets of the overall concept of unfairness. The Commission remains of the view that the proposed s 85(1) will offer guidance to trial participants without restricting the judge’s power to protect witnesses and screen out unacceptable questions.

391 Much of s 85(2) is new, although s 85(2)(e) reflects a practice note ([1985] 1 NZLR 386).<sup>74</sup> The considerations set out in s 85(2) acknowledge that what is an acceptable question for one witness may not be for another.

### **Restriction of publication**

392 Section 86 is essentially a re-enactment of s 15 of the Evidence Act 1908. The Law Commission considers that an express provision is preferable to leaving such matters to the court to deal with in exercising its inherent powers.

### **Privacy as to witness’s precise address**

393 Section 23AA of the Evidence Act 1908 (enacted in 1986) made disclosing the address and occupation of a complainant during the trial of a sexual offence case the exception rather than the rule. Section 23AA was a response to the concern expressed by some complainants that having to disclose their address in evidence was, in most instances, an unnecessary invasion of their privacy and compromised their safety.

394 The Law Commission considers that the same reasoning applies to all witnesses, and that in most cases a witness’s address will be irrelevant to the facts in issue. Under s 87, no question or statement about the particulars of a witness’s address will be permissible unless the judge grants leave on the ground that the information is of such direct relevance that to exclude it would be contrary to the interests of justice.

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<sup>73</sup> As originally framed, s 85 built on s 41 of the Evidence Act 1995 (Aust), as well as s 14 of the Evidence Act 1908.

<sup>74</sup> See also Rule 10.02 of *The Rules of Professional Conduct for Barristers and Solicitors* (5th ed, New Zealand Law Society, 1998).

395 Disclosure in the courtroom is, of course, a different matter from pre-trial disclosure to other parties to the proceeding. The effect of the definition of “witness” (s 4) is that s 87 only operates to prevent disclosure in the course of a hearing.

### **Restrictions on disclosure of complainants’ occupations in sexual cases**

396 With minor drafting changes, s 88 re-enacts s 23AA of the Evidence Act 1908, as it relates to non-disclosure of a complainant’s occupation in a sexual case. The issue of the complainant’s address, also dealt with by s 23AA, is subsumed in s 87.

### **Leading questions in examination in chief and re-examination**

397 It is generally considered that evidence is more reliable if witnesses testify in their own words, rather than agree with what counsel’s questions suggest. Restrictions on the use of leading questions in examination in chief are therefore a common feature of evidence codes, such as the Evidence Act 1995 (Aust) (s 37) and the United States Federal Rules of Evidence (Rule 611(c)). Section 89(a) and (b) codify the current law that prohibits leading questions in examination in chief except about undisputed matters or with consent. Paragraph (c), which gives the judge a discretion to allow a leading question, met with criticism owing to its vagueness. While accepting that the desire for certainty and predictability is an important justification for codification, the Commission considers that it is undesirable to attempt to list every possible occasion when the general prohibition should not apply. As the commentary to s 89 states, it is expected that the discretion will be used sparingly.

### **Use of inadmissible statements prohibited**

398 A few authorities have permitted inadmissible documents to be used in examining a witness, usually to refresh the witness’s memory.<sup>75</sup> Examining counsel hands a document to the witness, who is asked to read it silently before the question is repeated.

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<sup>75</sup> *Cross on Evidence*, above n 21, para 9.25. See, in particular, *Birchall v Bullough* [1896] 1 QB 325 (unstamped document). More recently, see *R v Markovina* (1997) 96 Aust Crim R 7, 11–18.

The witness's testimony is then permitted on the basis that the actual evidence is the witness's oral testimony, and the fact-finder never sees the inadmissible document. This practice is difficult to support. Most commentators therefore agreed with the Commission's proposal in s 90 that an inadmissible statement should never be used for the purpose of examining a witness.

- 399 Section 90(2) is intended to discourage the current practice of counsel handing a witness a document and asking the witness to read it silently without disclosing the contents to any other party. Under the Code, if a witness consults a document in the course of testifying, the document must be shown to all other parties.

### **Editing of inadmissible statements**

- 400 Section 91 permits the inadmissible portions of a statement to be edited out, a practice already recognised in particular contexts (eg, s 23E(2) Evidence Act 1908). The discretion contained in s 91 would retain the inherent power of a trial judge in a criminal case to edit out portions of a defendant's statement that unduly prejudice a co-defendant.<sup>76</sup>

### **Cross-examination duties**

- 401 A substantial body of law has grown up around the requirement of counsel to "put the case" to a witness under cross-examination. It has received acknowledgement in Rule 441(K) of the High Court Rules. The requirement is designed to give a witness fair opportunity to reply to contradictory evidence that the questioner intends to call later, and to do this in a way that avoids the unnecessary disruption or inconvenience of having to recall a witness after the witness has departed. The requirement also ensures that the court receives all the available evidence on a disputed issue.
- 402 In keeping with the general approach advocated by some commentators, s 92(1) imposes a wider duty than is expressed in the High Court Rule 441(K). That Rule imposes the duty only if the court is asked to *disbelieve* the witness. Section 92(1) imposes the duty whenever a matter of *contradiction* arises. This, of course, may occur even when a witness is doing his or her best to tell the truth.

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<sup>76</sup> *R v McCallum and Woodhouse* (1988) 3 CRNZ 376 (CA); contra *Lobban v R* [1995] 1 WLR 877 (PC).

- 403 There was concern that codifying the requirement in s 92 would unnecessarily lengthen cross-examinations, as counsel sought to comply with the duty to “put the case”. Limiting the duty to situations where “the witness or the party who called the witness may be unaware of the cross-examining party’s case” should allay such concerns. The modern expansion of pre-trial discovery in both civil and criminal cases and the practice of exchanging briefs in civil proceedings means that often the party who called the witness will be well aware of the contradictory evidence that the cross-examining party will later call as part of its case. The party who calls the witness should ensure that the witness deals with such evidence in examination in chief.
- 404 The Law Commission expects that s 92 will result in *fewer* instances of the sort of unnecessary, overcautious cross-examinations that occur at present to ensure compliance with a common law rule that is of uncertain scope and varying application.
- 405 Among the uncertainties existing at present is the extent of potential remedies for breach of the duty. Not all practitioners seem to be aware of the variety of powers some judges have invoked to deal with a failure by counsel to put the case. The list of available remedies in s 92(2) should meet the problem one group of commentators identified, namely that these remedies are at present rarely exercised against the defence. Once these remedies are codified, all parties will be aware of the potential consequences of failing to put one’s case when cross-examining witnesses called by the opposing side.
- 406 Subsection 92(2)(d) is purposefully broad, giving the judge power to make any order considered just. The Law Commission considers that this residual power is necessary – for instance, in the rare case where an order declaring a mistrial is justified. As with other discretions in the Code, this residual power should be exercised in a manner consistent with the purpose and principles of the Code (s 10).

### **Cross-examination in civil proceedings**

- 407 The ability to ask leading questions is a central feature of cross-examination. Unlike examination in chief, cross-examination usually involves questioning a witness who is not predisposed to assist the case of the cross-examining party. There is, therefore, less likelihood that the witness will give the answer suggested by the leading question.

- 408 However, there may be occasions when a witness is eager to assist the cross-examining party. In such a case it may be argued that the court should have power to limit the ability to obtain compliant answers by asking leading questions in cross-examination.
- 409 There are other examples supporting the proposition that a judge should possess a general power to limit the extent to which parties may ask leading questions of witnesses called by another party. In multiple-party proceedings, for example, little purpose is served by repetitive cross-examination on behalf of parties who share a common interest.
- 410 These considerations led the Law Commission to follow the example of some jurisdictions in proposing that judges in both civil and criminal proceedings should have the power to limit the extent to which leading questions may be asked of compliant witnesses in cross-examination.<sup>77</sup> The proposal met with criticism from commentators who argued that the right of co-defendants in a criminal proceeding to elicit favourable responses from one another should not be taken away. The final recommendation responds to that criticism by allowing the judge to limit leading questions in civil cases only – s 93.

### **Cross-examination by party of own witness**

- 411 Just as there will be occasions when a witness is predisposed to assist the party who is cross-examining that witness, a party may sometimes call as a witness someone who does not support that party's case. As long as the witness's testimony is not influenced by animosity, the law has traditionally required the examination in chief to be conducted without resorting to leading questions. When, however, the witness displays a reluctance or refuses to tell the truth, the law permits a party to cross-examine its own witness if the court determines that the witness is "hostile" to the case of the examining party. Section 94 codifies the law in this respect.
- 412 The definition of "hostile" in the Code (s 4) follows the common law in requiring hostility to be manifest in both the content of the evidence and the attitude of the person who gives it. The Code's definition also extends the common law approach in some respects. A number of commentators were of the view that inconsistencies in applying the rule have arisen. For example, some judges may not consider a witness to be hostile if he or she gives evidence

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<sup>77</sup> See ss 40 and 42 of the Evidence Act 1995 (Aust); Rule 611, United States Federal Rules of Evidence.



that is inconsistent with a previous statement, whereas others will. In defining “hostile”, the Commission has concluded that the latter approach better meets with the objective of making more evidence available to the fact-finder.

- 413 Current case law indicates that the prosecution should not call a witness known to be hostile for the sole purpose of introducing a previous inconsistent statement that is inadmissible as evidence of the truth of the facts stated, or for the purpose of introducing otherwise inadmissible hearsay.<sup>78</sup> Under the Code, previous statements of a testifying witness will be admissible to prove the truth of their contents and reliable hearsay evidence will usually be admissible. Thus one of the justifications for restricting the cross-examination of prosecution witnesses who are known to be hostile will no longer be valid. Section 94 does, however, preserve judicial control over the questioning of hostile witnesses – for example, to limit other forms of inappropriate questioning of witnesses who have shown hostility pre-trial.

### **Restrictions on cross-examination by unrepresented party**

- 414 At present, an unrepresented defendant in sexual cases may not personally cross-examine a child or mentally handicapped complainant (s 23F of the Evidence Act 1908). In such cases, the court appoints another person to put the defendant’s questions to the complainant. The Law Commission considered that in other cases also it would help reduce stress for the witness, and therefore improve the quality of the evidence, if the defendant or opposing party did not personally cross-examine the witness.
- 415 All of the submissions received supported the operation of the current section and favoured extending it to all sexual complainants regardless of age. Beyond that, views differed on how far the existing rule should be extended. In particular, some commentators were concerned with the practical difficulties of appointing another person to take on the role of cross-examiner. One commentator, for example, recommended appointing an amicus when there is an unrepresented defendant and a child complainant. Other practitioners favoured a discretionary rather than an absolute bar in the case of complainants.
- 416 Some practitioners argued, for example, that:

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<sup>78</sup> *Cross on Evidence*, above n 21, para 9.48. See also the discussion of *R v Honeyghon and Sayles* and *R v Dat* in [1999] Crim LR 221, 223.

The right to confrontation is fundamental to our system of justice. However, [we are] of the view that that right can be legitimately fettered where a defendant wishes to personally cross-examine a complainant. If a defendant is unrepresented and wishes to cross-examine a complainant, the presiding Judge should have the discretion to refuse to allow this and appoint counsel as *amicus curiae* to assist. There will be occasions when witnesses other than complainants may be reluctant to give evidence knowing the defendant may cross-examine them. Prosecutors will need to be alert to such matters in order to make the necessary application to the presiding Judge.

417 Most community groups supported extending the current bar in a number of other circumstances:

We would advocate that there should be a bar on personal cross-examination by an unrepresented party in more circumstances . . . . We do not understand the wisdom in distinguishing between physical abuse and sexual abuse cases of children. The issue is one of power over the complainant – this is equally problematic for children who have been physically abused by someone they know. We believe that children should not be cross-examined by the defendant in cases when they have been physically abused. The [current] cut-off of 17 years in sexual cases is inappropriate. Women who have been raped should not be cross-examined by their attacker.

418 The Law Commission recommends an absolute bar on personal cross-examination by unrepresented defendants in the case of:

- all complainants in sexual cases;
- all complainants in cases of domestic violence (as defined in the Domestic Violence Act 1995); or harassment (as defined in the Harassment Act 1997); and
- all child witnesses in sexual and domestic violence cases.

All other witnesses should be able to apply not to be personally cross-examined, or the court should be able to make an order of its own initiative. These proposals, contained in s 95, are consistent with developments overseas.<sup>79</sup>

419 While the Law Commission agrees that appointing an *amicus* to ask questions in the place of an unrepresented defendant is the most appropriate solution, it considers it essential that the rule remain flexible to deal with differing circumstances. Section 95(5)

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<sup>79</sup> Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable and Intimidated Witnesses in the Criminal Justice System* (1998) paras 9.39–9.45; see also the discussion in NZLC PP26, 1996, para 179.

therefore allows the judge to ask the questions on behalf of the unrepresented party, or to appoint an appropriate person for the purpose. It also empowers the judge to rephrase a question (for example, one that is unacceptable (under s 85)) or to refuse to ask (or to allow the person appointed to ask) a question (such as a question prohibited by s 46 of the Code).

## **Cross-examination on previous statements by witnesses**

- 420 Codifying the law governing cross-examination of a witness on his or her previous statement has been a difficult process. A major problem has been the variation in practice in different courts and different regions throughout New Zealand. In the consultative meetings held with practitioners in the five main centres, a host of widely differing views were expressed; proponents were usually adamant that their particular view reflected well-established law and correct practice.
- 421 Sections 10 and 11 of the Evidence Act 1908 currently govern this area. While their interpretation has given rise to some controversies, the Law Commission considers that the basic thrust of these provisions is sound. Section 10 of the 1908 Act enshrined a major exception to the common law “collateral issues rule”. That rule prohibited evidence that had the sole purpose of contradicting an answer given by a witness in response to a challenge to the witness’s credibility during cross-examination (see paras 160–161). If a witness has made a previous statement inconsistent with the witness’s testimony, but does not admit making it, s 10 of the 1908 Act permits the cross-examiner to prove that the witness had actually made the previous inconsistent statement.
- 422 Section 11 of the 1908 Act deals solely with written statements. It abrogates a common law rule (*Queen’s Case* (1820) 2 BROD & B 284; 129 ER 976) and permits cross-examination about *any* previous statement by the witness, whether or not it is inconsistent with the witness’s testimony. The statement need not be shown to the witness, unless it is used to contradict the witness.
- 423 Section 96 redrafts ss 10 and 11 of the 1908 Act in such a way as to incorporate the majority view of the legal profession and commentators on the best directions for reform.
- 424 Section 96(1) preserves the rule stated in the first part of s 11 of the 1908 Act, which allows a party to cross-examine a witness on a previous statement without showing it to the witness, but requires that sufficient information about the statement be given to allow

the witness to identify it. There was general support for this provision as being fair to the witness and in keeping with current practice.

- 425 Section 96(2) is the central restatement of the requirement imposed on a cross-examiner who seeks to use a witness's previous inconsistent statements to contradict the witness's testimony. It provides that if a party wishes to prove that the witness made a statement that the witness does not admit making, the party must disclose the statement to the witness; the party must also give the witness a chance to deny making it or to explain any inconsistencies with the witness's testimony.
- 426 Section 96(3) preserves a defendant's position with regard to a non-suit, a no-case application and the order of addressing the jury if the defendant uses a document in cross-examining a witness without offering it in evidence.

## **Re-examination**

- 427 Arguments can be given both for and against codifying the scope of re-examination. During the consultation process, it became apparent that New Zealand judges vary substantially in the scope of re-examination they permitted. Codification should promote a more uniform practice.
- 428 Section 97 aims to put a workable limit on the scope of re-examination. A party should normally see examination in chief as the principal means of placing before the court the relevant information that a witness can give. Matters arising out of cross-examination, including qualifications the witness has been led to make on his or her evidence in chief, are a valid focus for re-examination. But a party should be discouraged from intentionally leaving until re-examination evidence that should have been led in examination in chief. Section 97 requires a party to obtain leave to raise new matters in re-examination. Leave is likely to be granted if, for example, a question has not been asked in examination in chief because of counsel's oversight, provided that it does not prejudice another party.
- 429 The Law Commission was alerted during the consultation process to the fact that judges also vary in the extent to which they permit further cross-examination following re-examination, if they permit it at all. Section 97(2) gives a right to further cross-examination limited to any new matters raised in re-examination. Just as re-examination should not be treated as an opportunity to ask

questions which counsel may wish to have asked in examination in chief, so cross-examination following re-examination should not be seen as an opportunity to remedy inadequate cross-examination.

### **Further evidence after closure of case**

- 430 Normally, the plaintiff or prosecution is not permitted to call further evidence (“rebuttal evidence”) after closing their case. Although the same general rule applies to defendants, it is rarely a source of dispute in that context, because usually the close of the defendant’s case will mark the end of all the evidence in the proceeding.
- 431 The policies behind the general rule prohibiting rebuttal evidence are:
- (a) The rule avoids giving undue emphasis, because it is heard last, to evidence in rebuttal.
  - (b) Allowing rebuttal evidence prolongs trials and encourages “surprise” evidence.
  - (c) In criminal cases, the defendant is entitled to conduct the defence in reliance on the “case to meet” established by prosecution evidence. It would be unfair to allow the prosecution to alter the nature and scope of the case against a defendant mid-trial.
- 432 The Law Commission agrees with the general prohibition on a party offering further evidence after closing its case. Section 98(1) reflects this view. The section goes on, however, to permit rebuttal evidence with leave of the judge. This is an acknowledgement of the fact that there could be no absolute rule against rebuttal evidence.
- 433 It is clear that in civil cases a judge will usually exercise his or her discretion to permit a plaintiff to offer rebuttal evidence unless this would be in some way unfair to the defendant. Such unfairness might exist if the defendant could no longer call a previously available witness to meet the new evidence offered by the plaintiff. This thinking is embodied in s 98(2), which governs civil proceedings.
- 434 Although the circumstances in which the prosecution in a criminal proceeding may seek to adduce rebuttal evidence vary widely, s 98(3) codifies the most common situations where it would be

appropriate to allow the prosecution to call further evidence to meet matters raised by the defence, subject to the overriding requirement of the interests of justice. Section 98(3)(d) has been added to avoid injustice in exceptional circumstances that do not fit within paras (a)–(c).

- 435 The only requirement on the defence in s 98(4) is to show that it would be in the interests of justice to allow the defence to call further evidence after closing its case. It was thought further limitation would be undesirable. When defence evidence has been omitted because of counsel's oversight, it will normally be in the interests of justice to allow the evidence, but much may depend on the stage in the trial when the application is made.
- 436 Section 98(5) ends a previous controversy by imposing a time beyond which a party can no longer apply to call further evidence: until the jury retires to consider the verdict, or, if there is no jury, until judgment is delivered. No submissions were received that questioned the appropriateness of this limit. Usually, the later the application, the more compelling the reason would have to be, but the court should have the power to allow rebuttal evidence; for example, to meet a novel suggestion raised in a final address to the jury.

### **Witness recalled by the judge**

- 437 In an adversarial system, any power of the judge to call a witness is controversial. It is open to criticism on various grounds:<sup>80</sup>
- the judge should avoid “descending into the arena”;
  - the jury may be inclined to place more weight on the testimony of a witness called by the judge;
  - there may be good reason, unknown to the judge, why neither side has called a witness.
- 438 Thus there was a certain amount of unease with the Commission's original proposal to follow United States Federal Rule 614 in giving judges the power to call witnesses. In response, s 99 has been revised to allow a judge to *recall* a witness in the interests of justice. This is a lesser intrusion into party freedom.

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<sup>80</sup> Justice Sheppard (Fed Ct Aust), “Court Witnesses – a Desirable or Undesirable Encroachment on the Adversary System?” (1982) 56 ALJ 234.

## Questioning of witnesses by the judge

- 439 While the primary responsibility for examining witnesses falls to the parties, judges must be able to seek necessary clarification from witnesses to help them or the jury understand the evidence. Thus, it is not uncommon for judges to question witnesses, usually at the end of the examination conducted by the parties. This is in keeping with the purpose of promoting the rational ascertainment of facts, as set out in s 6(a) of the Code.
- 440 However, the role of an activist, interrogating judge is foreign to the adversary system. The Court of Appeal has been at pains to emphasise that questioning by the judge must not be so extensive as to give the appearance of bias or unfairness to one of the parties. Section 100(1) therefore limits the judge to asking questions that justice requires.
- 441 While a number of commentators agreed that a judge's power to question witnesses should be circumscribed, others queried whether it should be codified at all, fearing that codification may itself increase the frequency with which judges question witnesses.
- 442 On balance, the Law Commission considers that the benefit of stating an appropriate limit of the power outweighs the possible detriment of doing so, especially as the opportunity is taken to deal with an area of uncertainty. The uncertainty concerns the right of the parties to follow the judge's questions with questions of their own. Apparently, while some judges invariably ask the parties if they have any questions arising out of judicial questions, other judges do not permit follow-up questioning even if the parties seek it. The Commission believes that s 100(2) sets out the fairer practice of allowing follow-up questions. This has the support of a majority of commentators.

## Jury questions

- 443 One commentator suggested that the Code should deal with questions from the jury. Again it would seem that there is a considerable variation in judicial view and practice. As with questioning by the judge, there was concern that a Code rule allowing juries to ask questions could interfere with counsel's role and encourage jury takeover of the trial. Some commentators felt that the matter was best left to the court's inherent power to regulate its procedure (s 11).

444 In a judge-alone trial, the judge routinely puts questions to witnesses to clear up uncertainties in the judge's mind. The Law Commission sees no reason why this should be different when the fact-finder is the jury. Properly controlled, jury questions will promote the rational ascertainment of facts, one of the primary purposes of the Code (s 6(a)). Section 101 therefore requires the judge to decide whether and how a jury question is to be put to a witness and, if it is put, whether the parties may put questions about matters arising from a jury question.

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## Alternative ways of giving evidence

It would seem contrary to the judgments of our court to disallow evidence available through technological advances, such as videotaping, that may benefit the truth finding process (L'Heureux-Dube J in *R v L* [1993] 4 SCR 419).

### INTRODUCTION

445 **T**HE MAJORITY of the Law Commission's proposals in this area were published in *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996). The subject matter of the discussion paper generated a large number of submissions from many community groups as well as members of the profession. The Commission's work has also benefited from the work undertaken by the Courts Consultative Committee on the treatment of child witnesses in court proceedings.

446 The Law Commission has adopted the phrase "alternative ways" of giving evidence throughout the Code, in preference to the current term "other modes". The various "alternative ways" of giving evidence include closed-circuit television, videolink, the use of a one-way screen or pre-recorded video record. The definition of alternative ways (see s 105) is, however, wide enough to encompass future technological developments.

### THE CODE PROVISIONS

#### **Mandatory applications about child complainants**

447 The Code provides that in all cases where the complainant is a child (under the age of 17 at the commencement of the proceedings) the party calling the child must apply for directions on how the child should give evidence. This is an extension of the current statutory provision (s 23D of the Evidence Act 1908), which only applies to child complainants in sexual cases. This

extension received virtually unanimous support from commentators. The court may order that the child give evidence in any of the ways set out in s 105 or in the ordinary way (s 83). The court must consider the various matters set out in s 103(3), including the wishes of the complainant. Any direction on the use of alternative ways of giving evidence should not prevent a witness giving evidence in the ordinary way if he or she wishes. This is viewed as an important option for child witnesses.

448 One of the contentious aspects of this proposal was the removal of the current mandatory requirement to seek directions on intellectually disabled complainants. Although not all commentators were in favour, the Law Commission has been guided by the views of the IHC:

the withdrawal of the mandatory requirement . . . is in accordance with the principle of normalisation, and because decisions on how evidence should be given should be based on the needs of the witness, rather than the fact that the witness has an intellectual disability.

449 It was also suggested that the Law Commission follow the approach of the Courts Consultative Committee<sup>81</sup> and recommend mandatory applications for all child witnesses. In this matter the Commission was assisted by the views of the practitioners, particularly prosecutors, during the consultation seminars, the majority of whom argued that a mandatory requirement for all child witnesses would be too onerous and often unnecessary. Commentators referred, for example, to cases of 16-year-old witnesses to non-violent offending, who give evidence on peripheral issues. A party calling a child witness can still apply for directions under s 103.

### **Extended eligibility to give evidence in an alternative way**

450 The Code allows any witness (including a defendant in a criminal proceeding) to apply to give evidence in an alternative way on the grounds set out in s 103(3). The original proposals focused on the needs of “vulnerable” witnesses (for example, adult complainants in sexual cases) but the grounds have now been extended to include consideration of the requirements of efficiency or necessity (in the case, for example, of witnesses who are hospitalised or outside

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<sup>81</sup> *Child Witnesses in the Court Process: A Review of Practice and Recommendation for Change: Report to the Courts Consultative Committee from the Working Party on Child Witnesses* (Department for Courts, Wellington, 1996) Recommendation 23, page iv.

New Zealand). The court may also make an order of its own initiative.

- 451 A clear majority of submissions favoured extending eligibility. Those in favour of the extension noted that the Court of Appeal has upheld successful applications relying on the court's inherent jurisdiction.<sup>82</sup> The strongest support for reform came from groups working with children or victims of sexual abuse and domestic violence.
- 452 The major criticism of the Law Commission's proposal was that increasing the availability of alternative ways of giving evidence could lead to these alternatives becoming the norm and would undermine the adversarial system. Some commentators were concerned that using alternative ways prevents assessments of credibility based on demeanour. Other commentators considered that alternative ways of giving evidence should only be available in circumstances acceptable to the whole community.
- 453 The Law Commission's research in this area indicates that such concerns are largely unfounded (NZLC PP26, 1996, paras 101–112). Recent investigations into the extent to which these methods assist witnesses and increase the amount of reliable evidence available to fact-finders, have all resulted in recommendations for greater use of alternative ways of giving evidence, in particular closed-circuit television and videolinks. This move is consistent with recent jurisprudence and other law reform initiatives. Interested community groups are clearly in favour of increasing the availability of other means of testifying. Academic comment on the Law Commission's proposals has also been extremely favourable.<sup>83</sup>

### *Availability to defendants of alternative ways of giving evidence in criminal proceedings*

- 454 There was concern that allowing defendants in criminal proceedings to give evidence in alternative ways may invite abuse (especially in the case of evidential video records prepared by the defence). It was also pointed out that a defendant is in a different position from witnesses and will usually be present in court throughout the entire proceedings. One group was of the view that “there should be some truly exceptional feature present before a

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<sup>82</sup> For example, see *R v Moke and Lawrence* [1996] 1 NZLR 263.

<sup>83</sup> See a review of the discussion paper in McEwan, (1998) 2(1) *International Journal of Evidence and Proof* 32.

court should direct that a defendant give evidence otherwise than in the ordinary way". Others concluded that as the "rational ascertainment of facts" must include the defendant's evidence, they could not see any objection in principle to a vulnerable defendant being eligible to give evidence in an alternative way on the same basis as other witnesses.

- 455 The Law Commission agrees that defendants in a criminal cases should be permitted to give evidence in an alternative way in exceptional circumstances only; for example, if the safety of a defendant or other trial participants requires it. In this situation a videolink may be (and has been) used.
- 456 There may well be special considerations when dealing with child defendants. The difficulties facing child defendants will normally be adequately addressed by the current practice in the Youth Court and by the availability of a support person. But greater protection should be available if the need arises. Section 405DA of the Crimes Amendment (Children's Evidence) Act 1996 (NSW) has made similar provision.

*Relevant factors for the court to consider when giving a direction on the use of alternative ways*

- 457 There was general support for the grounds (s 103(3)) on which alternative ways of giving evidence may be permitted, as well as the matters the judge should take into account in giving directions. In particular, submissions emphasised the importance of taking account of the wishes of child complainants. Such an approach is viewed as consistent with New Zealand's obligation under the United Nations Convention on the Rights of the Child.
- 458 The requirement to consider cultural background was queried. The Law Commission remains of the view that in some cases cultural factors can significantly affect the amount and content of evidence. For example, a young Samoan woman (whether complainant or witness) may find it extremely difficult to give evidence against a Matai in his presence. The use of closed-circuit television or a screen may reduce this discomfort and increase the amount of relevant evidence available to the court.

**Pre-trial cross-examination**

- 459 The Law Commission's original proposals included allowing pre-trial cross-examination in the case of child complainants or elderly witnesses. This received strong support from a wide range of

community groups and some practitioners, but met with almost unanimous opposition from the defence bar. One submission stated:

[O]ne of the real problems with bringing in a regime requiring cross-examination prior to trial at an early stage is that full details of the contamination and influences are not available (if at all) until detailed enquiries have been carried out by Counsel and often only at trial. This problem is exacerbated by the tendency of the police and prosecutors only to tender the evidence of the complainant (often in videotaped form) and one or two other witnesses (sufficient to establish a prima facie case) at a depositions hearing. Often very detailed enquiry is necessary to establish the prior discussions and events which have shaped and influenced a child or young person's or other complainant's evidence. It is my experience that disclosure in this area is a continuing process and it is not until close before trial (usually some months after the initial videotaped interview) that effective cross-examination is possible.

- 460 Until more is known about the experiences of other jurisdictions with pre-trial cross-examination, the Law Commission does not recommend it.

### **Video record evidence**

- 461 Section 106 of the Code covers a number of procedural rules and reforms of the law on the use of video records.
- 462 Section 23E(1)(a) of the Evidence Act 1908 currently allows videotaped evidence to be admitted at trial only if it has been shown at the preliminary hearing. The section effectively precludes the use of videotaped evidence in chief if the need for it arises or becomes apparent after the preliminary hearing. Other jurisdictions do not impose this limit, and the Law Commission sees no advantage in retaining it. Section 106(1) is in line with the recommendations of the Courts Consultative Committee.<sup>84</sup>

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<sup>84</sup> Above n 81, Recommendation 18, page iii.

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# Corroboration, judicial warnings and judicial directions

## INTRODUCTION

463 **C**ORROBORATION REQUIREMENTS and judicial warnings are common law tools that deal with the problem of potentially unreliable evidence. The Commission has prepared research papers that discussed reform of these two areas.

## CORROBORATION

464 In making its final recommendations, the Law Commission supports those of the 1984 *Report on Corroboration* (Evidence Law Reform Committee, 1984). The Committee recommended that corroboration requirements should be restricted to cases of treason and perjury. The reasons put forward by the Committee in their report included:

- a corroboration requirement in most cases added nothing to the fact-finder's task of evaluating the weight to be attached to evidence;
- aspects of corroboration rules (particularly on discretionary warnings) were uncertain and made the law unnecessarily complex;
- the required warning for complainants in sexual cases (apart from encouraging juries to view all complainants with suspicion, regardless of the strength of the other evidence) was contradictory and added little to the existing rules on the burden and standard of proof;
- the technical distinction between evidence that did and evidence that did not amount to corroboration was difficult for judges to apply and even more difficult for a jury to understand.

- 465 The legislative reforms based on the Committee's report of the late 1980s closely followed the reforms of other Commonwealth jurisdictions.
- 466 Despite more recent calls to reinstate the corroboration requirement for sexual offences alleged to have occurred in the distant past,<sup>85</sup> the Law Commission is of the view that a case has not been made out to reverse the past reforms or go against the almost uniform trend of abolition in other jurisdictions.<sup>86</sup>
- 467 The Code therefore includes a general repeal provision, retaining the need for corroboration only for perjury and treason (and related offences) (s 107).
- 468 The justification for the corroboration requirement in the case of perjury is to protect witnesses from vexatious accusations of lying on oath. It is thought that making it too easy to prosecute someone for perjury might discourage people from giving evidence, which is undesirable. In the case of treason, the 1984 Report adopted Wigmore's reasoning that corroboration is necessary because of the risk that dominant political parties could too easily obtain false testimony of treason in order to get rid of troublesome opponents (paras 48–52).
- 469 Most commentators have strongly supported the Law Commission's proposals in this area.

## JUDICIAL WARNINGS AND JUDICIAL DIRECTIONS

- 470 The general provision in s 108(1) requires the judge to warn the jury of the need for caution about accepting and giving weight to evidence the judge thinks may be unreliable. A judge sitting alone as the trier of fact should also be aware of the need for caution when considering a particular piece of evidence – s 108(6).
- 471 The Commission considers that certain kinds of evidence are potentially unreliable. Section 108(2) therefore imposes on the judge a duty to consider whether to give a warning in every case where there is hearsay evidence, evidence of a confession that is the only evidence of an offence, or evidence offered by a witness

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<sup>85</sup> Hampton, "Recovered Memory Syndrome v False Memory Syndrome" [1995] NZLJ 154.

<sup>86</sup> For example, see s 32(1) of the Criminal Justice and Public Order Act 1994 (UK); s 164 of the Evidence Act 1995 (Aust); Paciocco and Stuesser, above n 1, 280.

who may have a motive to give false evidence prejudicial to the defendant.

## **Hearsay evidence**

- 472 In *Evidence Law: Hearsay* (NZLC PP15, 1991) the Law Commission stated, with regard to the weight to be given to hearsay evidence, that “directions from the judge on the issue will often be essential in a jury trial” (para 57). In *R v Bain* [1996] 1 NZLR 129, 133, the Court of Appeal repeated the need for the trial judge to alert the jury to the dangers inherent in accepting hearsay. This approach is in keeping with s 165(1)(a) of the Evidence Act 1995 (Aust). The recent liberalisation of the hearsay rule in Canada has also been associated with an emphasis on the importance of proper directions to the jury.<sup>87</sup>
- 473 In general, a warning should point out that hearsay evidence may be unreliable because the maker of the statement had not given a solemn promise to tell the truth, and the jury has not seen how the evidence stood up to cross-examination. Such matters will not necessarily be obvious to the jury. A suggested warning issued by the Judicial Studies Board of Great Britain is included in para C386 of the Commentary as a guide.

## **Confessions as the only evidence of an offence**

- 474 The possibility that defendants may confess to crimes they did not commit is now accepted and there would be obvious risks in convicting on the basis of such evidence alone. The Law Commission therefore considers that the Code should specifically address this possibility (s 108(2)(b)).

## **Witnesses who may have a motive to give false evidence prejudicial to a defendant**

- 475 The requirement in s 108(2)(c) to consider giving a warning about evidence from a witness who may have a motive to give false evidence prejudicial to a defendant re-enacts the substance of s 12C of the Evidence Act 1908.

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<sup>87</sup> For example, in *R v Khan* (1990) 59 CCC (3d) 92 (SCC) the judgment concludes by referring to the need for the judge to consider safeguards to deal with considerations affecting the weight of hearsay evidence. *R v U (F)* (1995) 101 CCC (3d) 97 (SCC) gives detailed guidance for the judge who instructs the jury on the use of a witness’s prior inconsistent statements admitted to prove the truth of their contents.



## Other classes of unreliable evidence

### *Historical offences*

- 476 In response to a question from the Law Commission, a number of commentators supported a specific reference in the Code's warning provision to testimony given many years after an alleged offence. These commentators were particularly concerned about convictions based on events that took place in the distant past. While the Commission agrees that lengthy delays may raise issues of fairness, it considers that the mere fact of delay does not make particular pieces of evidence unsafe or unreliable. Evidence offered by the prosecution or defence based on historical events may well be reliable and supported by other evidence. The Commission is therefore of the view that no specific mention should be made of evidence in "historical" cases, and that any particular concerns may be dealt with by the general warnings provision, which is sufficiently broad to respond to the circumstances of each case (s 108(1) and (5)).

### *Evidence based on recovered memory*

- 477 The Law Commission undertook extensive research and consultation on the topic of recovered memory. A miscellaneous paper outlining the current research on memory processes has been published with the Report and Evidence Code and provides the background to the Commission's recommendations (*Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999)).
- 478 The Commission's survey of the current psychological literature suggests that people may recover or recall memories of traumatic childhood events, such as sexual abuse, after a long period of time during which they have partially or completely lost access to those memories. Such memories can be just as reliable, or just as fallible, as continuous memories of a past event. The same factors can influence the reliability of both continuous memories and recovered memories. In addition, there is a wide range of possible circumstances in which a person may recover or recall a memory of a traumatic childhood event such as sexual abuse. The current state of knowledge does not allow the Law Commission to recommend with confidence that as a general rule evidence based on recovered memories should be excluded.
- 479 The Law Commission also does not recommend that recovered memory evidence be included in the specified warnings list. The subject of recovered memories of traumatic childhood events is

currently a very active area of research, the results of which are as yet inconclusive. The Commission therefore recommends that in cases where there is evidence based on recovered or recalled memories of traumatic childhood events, any warning should be tailored to suit the facts of the particular case and any expert evidence that may have been called to assist the jury.

### **Evidence offered in certain ways**

- 480 The recommendation embodied in s 109 is a more general version of the existing s 23H(a) of the Evidence Act 1908. Section 109 requires the judge to direct the jury not to draw adverse inferences against a defendant in a criminal proceeding if any witness offers evidence in an alternative way or pursuant to a witness anonymity order, or if unrepresented defendants are prohibited by s 95 from personally cross-examining a witness.

### **Judicial warnings about lies**

- 481 The Law Commission considers that the law governing how judges should direct juries about lies told by a defendant in a criminal proceeding has become needlessly complex and, to a certain extent, illogical. The state of the law is such that a judge will almost certainly be successfully challenged on appeal if he or she directs the jury that lies may be used to determine guilt. By default, the common law has been reformed so that in effect lies can only be relevant to credibility and never indicative of guilt. The fact that people who lie are not necessarily guilty does not mean that guilty people never lie. In the Law Commission's view, a proved lie is simply an item of circumstantial evidence, akin to evidence that the defendant was seen fleeing the scene of the crime, and should be treated as such. Like any item of circumstantial evidence, the inference to be drawn from it is a matter for the jury, and the Commission considers there is no reason to treat evidence of lies in a special way. The recommendations contained in s 110 reflect this approach.
- 482 The Law Commission proposes that whenever the prosecution alleges that a defendant has lied, if the defendant so requests, or the judge considers a jury may place undue weight on the lie, the judge should continue to warn the jury:
- that the jury must be satisfied, before using the evidence, that the defendant did lie; and
  - that people lie for a variety of reasons; and

- that the jury should not conclude that just because the defendant lied he or she is guilty (s 110(3)).

483 It should then be left to the jury how they use the evidence of the lie – in assessing truthfulness or as part of the circumstantial evidence to prove the defendant’s guilt. Thus, s 110(2) states specifically that a judge is not obliged to direct the jury on what inferences the jury may draw from evidence of a defendant’s lie.

484 There was strong support for this proposal, particularly from some judges.

485 A number of senior practitioners also supported the proposal. One commentator noted:

I agree that the present law, that the court or jury must believe the defendant guilty before a lie can be used to strengthen the prosecution case, is unsatisfactory. It is based on the untenable proposition that persons who lie when faced with an accusation should be regarded as doing so for innocent reasons, until the contrary is established. In effect, the lying defendant is afforded the same protection against self-incrimination as the one who exercises a right to silence. . . . However, it should still be open to judges to warn juries that people can lie for reasons other than concealment of guilt and that they should not jump to the conclusion that the defendant is guilty just because he lied. With these reservations I would accept that a proved lie by a defendant about some matter material to the offence may be taken into account as a circumstance indicative of guilt. Accordingly, I am in general agreement with the Commission’s approach to this topic and with its view that the assessment of the effect of lying can properly be left to juries.

## **Judicial directions about children’s evidence**

486 The provisions contained in ss 23H(b) and (c) of the Evidence Act 1908 will no longer be strictly necessary with the virtual abolition of the need for corroboration proposed in s 107. However, the majority of commentators wanted the existing provisions on child witnesses re-enacted to prevent any argument from their omission that abolition was intended.

487 Section 111 re-enacts much of the substance of the existing provisions. No warning about the lack of corroboration of a child complainant’s evidence should be given (s 111(1)). A judge should also not in general instruct the jury to scrutinise the evidence of children with special care, nor suggest to the jury that children tend to invent or distort. The Code does, however, add a qualification to the existing provision: judicial comment will be

permissible if expert evidence to the contrary has been offered (s 111(2)).

- 488 There is currently no evidence to support the proposition that children spontaneously and without prompting fabricate claims of sexual abuse. Researchers agree that young children can often recall events flawlessly.<sup>88</sup> A number of studies indicate that children's recall is at times highly accurate and quite detailed about a large range of events. Juries should not therefore be routinely instructed to scrutinise the evidence of young children with special care; rather they should be instructed to scrutinise the way young children have been questioned. Research emphasises the need for unbiased neutral interviewers, the minimal use of leading questions and an absence of threats, bribes and peer pressure. The studies that demonstrate children's ability to recall accurately used interviews conducted in this way, that is, "non-suggestive" interviews.
- 489 As a result of the Law Commission's research, and in consultation with child psychologists and academics with relevant clinical experience, the Code contains a judicial direction that incorporates the most recent research on the reliability of very young children's evidence. Commentators strongly supported this standardised direction which gives positive assistance to judges in directing juries about the way to approach the evidence of very young children and allows juries to focus on how young children are questioned (s 111(3)): research indicates this is a better predictor of reliability than age alone. The opening words of s 111(3) make it clear that this provision complements the general prohibition in s 111(2).
- 490 The proposal was criticised by some members of the judiciary who consider that in giving such a direction judges would in effect be giving expert evidence. However, judges would no more be giving expert evidence than formerly, when they were required to warn juries to treat children's evidence with caution because of their tendency to fantasise and fabricate. Judges are also authorised by legislation to direct juries to evaluate evidence in particular ways. Such authorisations, for example s 344D of the Crimes Act 1961, are based on well accepted research and consensus among experts. Section 111(3) of the Code follows this model.

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<sup>88</sup> Bruck, Ceci and Hembrooke, "Reliability and Credibility of Young Children's Reports: From Research to Policy and Practice" (1998) 53(2) *American Psychologist* 136, 146.

491 Section 111(4) provides that the enactment of particular kinds of instructions does not prevent the judge from informing or warning the jury about matters of relevance to the specific case.

### **Judicial warnings about identification evidence**

492 The Law Commission recommends that s 344D of the Crimes Act 1961 be re-enacted in the Evidence Code. Section 112 achieves this purpose and extends the provisions to voice identifications as well as visual identifications, and to other persons whose identification is material in the case against the defendant (see discussion at para 208).

### **Timeliness of complaints in sexual cases**

493 The Code contains a provision similar in application to s 23AC of the Evidence Act 1908 (s 113).

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## Judicial notice and reference to reliable public documents

### JUDICIAL NOTICE

494 **T**HE DOCTRINE OF JUDICIAL NOTICE is one of some theoretical complexity. In its discussion paper on *Documentary Evidence and Judicial Notice*, the Law Commission considered various aspects of the doctrine, including judicial notice of adjudicative and legislative facts and judicial notice of the law. The Commission concluded that the doctrine of judicial notice has a wider range than the law of evidence. It accordingly proposes to include in the Code a single provision on judicial notice to allow fact-finders to take judicial notice of adjudicative facts that cannot reasonably be disputed. The remainder of the law on judicial notice is not considered properly part of an evidence code. The Code therefore does not contain provisions on judicial notice of the law or legislative facts. The Commission also does not propose to re-enact the provisions of the Evidence Act 1908 that provide for judicial notice of statutes and regulations: they are considered unnecessary because of the Code's treatment of hearsay and documentary evidence.

495 The Law Commission's original proposals, now contained in s 114, were well supported, provoking no major objections. Some District Court Judges were of the view that parties should give notice if they require the judge to take judicial notice. The Commission considers this approach is not desirable because such matters often arise spontaneously in the course of argument and a notice requirement would be unduly cumbersome.

496 One commentator suggested that judicial notice by the jury ought to be eliminated:

To allow the jurors to make up their own minds as to what "everybody knows" is to invite them to use their own knowledge of the facts, rather than evidence properly admitted by the court, as the basis for the verdict.

497 The Law Commission accepts that, in general, jury consideration should confine itself to the evidence, and it would not be prudent for judges to instruct juries that they may themselves take “judicial notice” of facts. However, legislating against judicial notice by the jury is unlikely to be effective. If during their deliberations juries decide to assume the existence of facts that have not been proved in evidence, little if anything can be done. If a jury asks a question about facts, then the judge may instruct them to take notice of a fact (or not). The Law Commission is therefore of the view that there is no need for the Code to specifically address the issue of judicial notice by the jury.

### **Admission of reliable published documents**

498 The Code contains a section that is similar in many respects to s 42 of the Evidence Act 1908. The aim of s 115 is to facilitate the admission of some types of hearsay and opinion evidence without the need to satisfy those rules. Section 115(1) allows published documents dealing with public history, literature, science or art to be admitted as evidence. The section focuses specifically on reliability, which the Commission views as the appropriate admissibility test. It is envisaged that s 115 will operate in a way similar to s 42 of the Evidence Act 1908 to enable, for example, certain findings and reports of the Waitangi Tribunal to be admitted (*Te Runanga O Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA)).

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## Evidence of foreign law

### THE CODE PROVISIONS

#### **Proof of foreign law**

- 499 **A**T COMMON LAW, foreign law is a question of fact. It must be proved by expert evidence. A qualified legal practitioner from a foreign country will be a competent expert, and in some cases a non-lawyer may also be able to give expert evidence about certain matters of foreign law. Section 19C of the Judicature Act 1908 provides that questions of foreign law that arise in a jury trial are to be decided by the judge, not the jury.
- 500 Questions about foreign law arise with some regularity in New Zealand proceedings. A substantive matter before the court may be governed by foreign law, in accordance with normal choice of law principles.<sup>89</sup> More frequently, issues of foreign law arise under New Zealand statutes, or in the course of enforcing a foreign judgment in New Zealand. For example, the Reciprocal Enforcement of Judgments Act 1934 provides for registering and enforcing judgments of certain foreign courts, if the judgment is final and conclusive as between the parties. Whether or not it is final and conclusive depends on the law of the foreign country. (The same issues arise when enforcing a foreign judgment at common law.)
- 501 So from time to time it is necessary to prove some aspect of foreign law in a New Zealand court. This law may be written law set out in a statute, regulation or by-law, or it may be unwritten or common law, or a combination of the two (for example, a decision of a court in a civil law jurisdiction explaining the effect of a provision of that country's code).

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<sup>89</sup> See generally, Dicey and Morris, *The Conflict of Laws* (12 ed, Sweet & Maxwell, 1993) Vol 1, Chapter 9.



## *Methods of proving foreign law – the possibilities*

502 There are currently a number of permissible methods of proving foreign law in a New Zealand court:

- Evidence can be called from an appropriately qualified expert witness. The expert may in giving evidence refer to materials which the court is entitled to examine and about which the court may in some circumstances form its own conclusions. This is the best way to prove foreign law, but it can be very expensive, especially if the question is of minor importance in the proceeding.
- The court may be referred to official copies of written laws of that country – for example, statutes printed by the government printer in that jurisdiction.
- The court may be referred to unofficial editions of the written laws of the country – for example, the court may be asked to look at the CCH version of the Australian Corporations Law, or of the Canada Business Corporations Act.
- The court may be referred to reports of judicial decisions on the relevant issue from that country. These reports may be official reports produced under some form of legislative authority, or unofficial reports prepared by a commercial publisher.
- The court may be referred to a textbook on the law of the foreign country.

Section 116 codifies all these methods of proving foreign law.

503 Although the Code rules on documentary evidence and hearsay evidence will, in most situations, allow official versions of legislation and official reports of judicial decisions to be admitted in evidence, the Law Commission is of the view that in the interests of clarity and efficiency a specific section dealing with proof of foreign law is desirable. Evidence of foreign law that is hearsay will not be subject to the hearsay rules as the section is intended to facilitate the admission of this type of evidence (s 116(6)).

## **Evidence taken overseas, or taken in New Zealand on behalf of an overseas court**

504 Scattered through a number of statutes are various provisions setting out the circumstances in which evidence may be obtained overseas for use in New Zealand, and in New Zealand for use

overseas. They include sections 48 to 48J of the Evidence Act 1908, Part IV of the Evidence Amendment Act (No 2) 1980, and the Evidence Amendment Act 1990. The Evidence Amendment Act 1994 deals with evidence taken in Australia for the purpose of New Zealand proceedings and in New Zealand for the purpose of Australian proceedings.

- 505 The Law Commission recommends that these provisions should be gathered in a single statute. Accession to The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970, to which a number of New Zealand's major trading partners (including the USA and the UK) are parties, may be another means of dealing with some of these matters.
- 506 The Law Commission considers that a review of these provisions, which are quite distinct from the issues addressed in the Code, should be a separate exercise. Until this occurs, the Commission recommends that when the Evidence Code is enacted, the relevant sections from the Evidence Act 1908 and its amendments that have not been repealed (see Schedule 2) should be gathered together in a separate statute.
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## Documentary evidence and evidence produced by machine, device or technical process

### INTRODUCTION

- 507 **D**OCUMENTARY EVIDENCE lies at the heart of much litigation and its importance cannot be overestimated. In both civil and criminal cases, parties often resort to documents to prove many issues. Sound rules on the admissibility and use of documentary evidence are needed so as to avoid inefficiency and injustice.
- 508 Much of the law in this area is found in ancient English cases or relatively obscure sections of the Evidence Act 1908 and other statutes, enacted to deal with specific problems as they arose rather than approaching the issues from a principled perspective. In the Law Commission's view, the rules are overly complex and technical. They are also out of date. The law has not always kept up with changes in technology, especially the increasing use of computer systems for producing and storing information. The consequence of these failings is that the rules are not well understood and can operate as a trap for the unwary. In civil cases the rules are also often bypassed by producing documents in an agreed bundle.
- 509 The Law Commission considers that reform should:
- facilitate the admission of relevant and reliable evidence;
  - prevent unsatisfactory evidence coming before the court;
  - be as simple as possible and easy to use in practice;
  - facilitate the determination of disputes about admissibility; and
  - accord with the general principles of evidence law.
- 510 The Law Commission has reviewed the original proposals in the preliminary paper on documentary evidence in light of its final recommendations on other admissibility issues, in particular those relating to hearsay evidence. As a result, many of the rules that

were first proposed are considered to be no longer necessary. The significant reduction in number has met with the approval of commentators, who agree that no important matters have been overlooked.

- 511 The Law Commission’s final recommendations on documentary evidence simplify and clarify the rules, reduce them in number, and place them within the framework of the principles of evidence law as a whole.

## Definition of document

- 512 The provisions in this Part rely on the definition of document in s 4 of the Code. This definition is deliberately wide and is intended to encompass the various ways of generating, recording and retrieving information that may be possible now and in the future.
- 513 In *Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC R50, 1998), the Commission considered that the recommendations proposed for documentary evidence in the final Evidence Report would “meet the needs of electronic commerce by facilitating the production of electronically generated evidence” (para 193). In response to the Electronic Commerce Report, two submissions questioned the proposed definition of “document” in the Code because the definition appeared to include not only the information stored in a computer, but the computer itself.
- 514 The Code defines “document” as a “record of information”. Thus a computer would be a document only if, for example, its surface contains writing that is relevant evidence in a proceeding. Ordinarily the “document” would be that part of the computer that contains the relevant electronic data; ie, a particular portion of the hard disk. The problems identified by the commentators on the Electronic Commerce Report relate not so much to the definition of “document”, as to the process of discovery. The concern is that the existence of relevant information stored on a computer would make the computer itself discoverable. That, however, is not an evidential issue, but one of procedure that has to be left to the exercise of common sense by counsel and the judiciary.<sup>90</sup>

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<sup>90</sup> For further clarification on the distinction between “discovering” information contained in a computer and “discovering” information contained on paper, see *Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC R50, 1998) paras 217 and 218 .

## THE CODE PROVISIONS

### **Offering documents in evidence without calling a witness**

- 515 The usual way of putting a document in evidence is to call a witness who identifies the document, the signatory (usually the witness) and the addressee, confirms the date and contents, and produces the document. The procedure proposed in s 117 will enable documents to be produced without a witness.
- 516 A party wishing to make use of the procedure must give notice in writing to every other party of their intention to put a document in evidence without calling a witness to produce it. A copy of the document must be attached to the notice (s 117(1)). Any party who wishes to object to the document being produced in this way or to dispute its authenticity, must also give notice in writing (s 117(2)).
- 517 If there is no objection, or if the objection is dismissed, the document may be admitted without calling a witness, and it will be presumed that the nature, origin, and contents of the document are as shown on its face (s 117(3)). Otherwise, a witness will have to be called to produce it in the usual way, or, if the objection is about authenticity, then evidence will need to be led on the point. Unwarranted objections may have cost implications for the party that raised them.
- 518 A number of commentators preferred a specific time limit for giving notice. The Law Commission remains of the view that the Code should not specify periods of time for notice. Reference to “sufficient time” to enable other parties to respond will enable a judge to set a timetable in any particular case. It will also avoid conflict with time limits in other legislation such as the High Court Rules and District Courts Rules.
- 519 The notice requirement would entail pre-trial disclosure on the part of the defence if it wishes to take advantage of the procedure. The hearsay rules will apply to documents produced under s 117, including the requirement to give notice of intention to offer hearsay evidence in a criminal proceeding; but it is envisaged that the one notice can be made to serve both purposes.
- 520 This section is different from the Commission’s original proposals in that the final recommendation includes both a presumption of authenticity as well as matters of procedure. Commentators have strongly supported these recommendations.

## Summary of voluminous documents

- 521 Section 118 will encourage the continuation of an efficient practice that already occurs by consent, and was strongly supported by commentators.

## Translations and transcripts

- 522 In its preliminary paper, the Law Commission recommended that transcripts of writing in code (such as shorthand) and of sound or video records should be admissible in evidence. In the case of sound recordings, the court may require the recording to be played. This proposal was supported but a number of commentators considered that the Code should also deal with the admissibility of translated documents. Given that the issues raised are identical to those relating to transcripts of coded language, s 119 now covers both transcripts and translations. It also contains a presumption of accuracy of translations (s 119(2)) and a notice requirement (s 119(1)).

## Proof of signatures on attested documents

- 523 At common law, when a document was attested, it was necessary to call a subscribing witness to testify that a proper person executed the document. This rule applied regardless of whether it was legally necessary for the document to be attested. Section 18 of the Evidence Act 1908 abolished this requirement, but only for those documents that do not need attestation.
- 524 Section 18 of the Evidence Act 1908 was made redundant by s 5 of the Evidence Amendment Act 1945. Section 5 removed the requirement to call attesting witnesses for all documents – except wills or other testamentary documents – and in all proceedings. Section 120 of the Code completes the abolition by re-enacting s 5 of the Evidence Amendment Act 1945 without making any exception for testamentary documents. This means that under the Code it will not be necessary to call an attesting witness to prove the attestation of any document: attestation can be proved by any satisfactory means.
- 525 In *Succession Law: Wills Reforms* (NZLC MP 2, 1996) para 79, the Law Commission supported in principle the introduction of a general power to dispense with the formal rules for executing wills. Section 120 avoids a potential anomaly with wills that are held (under the power to dispense with the formal rules of execution)

to be valid despite the absence of witnesses attesting to their execution. If courts may dispense with attestation completely, there is every reason to relax the rules when the formalities are complied with.

- 526 Commentators strongly supported the recommendations contained in s 120. The only change made in the final recommendation is to add a specific reference to digital signatures.

### **Evidence produced by machine, device or technical process**

- 527 In *Documentary Evidence and Judicial Notice* (NZLC PP22, 1994), the Law Commission proposed to allow information stored in such a way as to require a machine, device or technical process to display or retrieve it, to be adduced by way of a document produced by the appropriate machine (draft rule 4(2)). This rule (now s 121(2)) covered sound and video recordings, as well as information stored on a computer disk that can only be accessed by being printed out or displayed on a screen. The proposal was intended in part to clarify the legal position of various forms of computer-stored documents (for instance, documents stored on optical disks) and to ensure that the form of the document is not a barrier to its reception by the court.
- 528 The original proposals also contained a separate rule addressing the issue of the performance of computers or technical processes, in order to clarify authenticity and therefore admissibility inquiries (draft rule 18). The Law Commission received a number of submissions on these proposals and those outlined in the Electronic Commerce Report. The commentators' response has led to some minor revisions of the original rules.
- 529 The majority of commentators supported the policy behind both original proposals. They also agreed with the presumption in draft rule 18 that the machine or technical process did what the party asserts it ordinarily does.

### **Authenticity of public documents**

- 530 Section 122 is aimed at facilitating the admission of public documents (defined in s 4 of the Code) or copies of public documents, without the need to resort to the hearsay rules (s 122(2)). It also provides for a presumption of authenticity of public documents.

## **Evidence of convictions, acquittals and other judicial proceedings**

- 531 Section 123 allows the results of legal proceedings, or the existence and particulars of legal proceedings, to be proved by way of a certificate signed by specified persons. But the evidence must first be admissible under the Code: that is, s 123 is not itself an admissibility rule except insofar as s 123(5) excludes the operation of the hearsay rules. Evidence of a conviction, for example, must first be admissible by reference to the rules in Part 3 Subpart 7, or by reference to any other applicable rules such as the truthfulness and propensity rules.

## **Proof of conviction by fingerprints**

- 532 Section 124 re-enacts the substance of the existing s 12A of the Evidence Act 1908. It provides an alternative way of proving a previous conviction if such evidence is admissible.

## **New Zealand and foreign official documents; notification of acts in official documents; presumptions on New Zealand and foreign official seals and signatures**

- 533 These three sections (ss 125, 126 and 127) are modified versions of ss 29–37 of the Evidence Act 1908. They create a presumption of the authenticity of official documents and presumptions of the performance of official acts. Sections 125 and 126 also facilitate the admission of this type of hearsay evidence without recourse to the hearsay rules.

## **Verification of private documents executed outside New Zealand**

- 534 Section 9 of the Evidence Amendment Act 1945 and s 6 of the Evidence Amendment Act 1952 are concerned with verifying documents executed outside New Zealand.
- 535 These provisions address the question of proof that a particular person has executed a document. They identify certain forms of verification raising a presumption that the person who appears to have executed the document actually executed it, without the need to call evidence on that point.
- 536 The Law Commission's general approach to documentary evidence addresses the concern motivating those provisions, namely that



calling the maker to give evidence would be unduly costly if that person is overseas, since documents that are self-authenticating will be admissible without the need for further evidence. If the documents are treated as self-authenticating – in the sense that they are presumed to be signed by the person by whom they purport to be signed, unless that is challenged (ss 117 and 120) – there is no need for special provisions.

537 The Law Commission therefore recommends that neither section be re-enacted in the Code, as the provisions for admitting documents are considered sufficient to deal with the issues.

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## Appendix A: The law reform process

- A1 **T**HE LAW COMMISSION'S RECOMMENDATIONS for reform are developed through a process of thorough research and extensive consultation. Submissions received from commentators are considered and result in final recommendations, which are often subject to further peer review. The Commission followed this process throughout the evidence project.
- A2 The Law Commission sought comments from the legal profession and interested community groups by publishing and disseminating a number of preliminary papers and reports. The Commission also approached selected members of the legal profession with particular expertise to assist with research or to comment on a wide range of unpublished research papers. A large component of their work was pro bono. Abbreviated consultation papers summarising the Law Commission's policy and proposals in a number of areas were also distributed to all members of the judiciary. With the assistance of the Law Foundation and the New Zealand Law Society, the Commissioner in charge of the project, Judge Margaret Lee, along with members of the project team, presented a seminar on a draft Evidence Code in the five main centres in March of 1997. On matters relating to te ao Māori, the Law Commission was assisted by the Māori Committee and by a number of Māori practitioners.
- A3 A list of the relevant Commission documents, prepared as part of the evidence project or the criminal procedure reference, appears below. A number of recommendations from the Commission's work in the criminal procedure area are also included in the Evidence Code and Report (for example, the privilege against self-incrimination, and rules about defendants' statements, improperly obtained evidence and the right of silence).
- A4 The Law Commission's work would not have been possible without the assistance of members of the profession (including those who attended the New Zealand Law Society seminar series) and a number of government agencies and community groups. A full list of those individuals and groups who assisted us, usually on a voluntary basis, follows. Without detracting from the value of the contributions of all who provided us with peer review, the

Commission particularly wishes to thank the following individuals: The Hon Sir John Wallace QC (former Commissioner in Charge of the Evidence Project); the Rt Hon Sir Maurice Casey and the Rt Hon Sir Ian McKay, formerly of the Court of Appeal; Justices McGechan and Gallen; Judges Kerr, Moran and Rae; Dr Donald Mathieson QC; Members of the New Zealand Law Society Evidence Project Sub-Committee; Mr Grant Burston, Crown Prosecutor, Wellington; Professor Gerry Orchard of the University of Canterbury; Mr Scott Optican, Senior Lecturer in Law, University of Auckland; Mr Bernard Robertson, Editor, *New Zealand Law Journal*; Mr David Goddard, Barrister, Wellington; and Mr Chris Finlayson, Barrister and Solicitor and Honorary Lecturer, Victoria University, Wellington. The Law Commission also acknowledges the work of past and present Commissioners and members of the research staff whose contributions provided the essential foundation for the final version of the Evidence Code, Commentary and Report.

- A5 The quality of the final publications is in large measure due to the invaluable and continuing assistance of Associate-Professor Richard Mahoney of the University of Otago, who brought to the project team the depth of knowledge and critical analysis of an academic as well as the pragmatism of a practitioner at the criminal bar. The Code provisions were drafted by Garth Thornton QC, Legislative Counsel, who provided the project team with a product of conciseness and clarity of expression. He never tired of testing and probing the Commission's instructions in order to ensure they achieved the desired result. For this the Commission is grateful.
- A6 The Commentary and Final Report were prepared by Judge Margaret Lee, Commissioner in Charge of the Evidence Project; Elisabeth McDonald, Senior Lecturer in Law, Victoria University; and Karen Belt, Researcher.

## LIST OF RELEVANT COMMISSION PAPERS

### Reports

- NZLC R14 Criminal Procedure: Part One: Disclosure and Committal (1990)  
NZLC R31 Police Questioning (1994)  
NZLC R42 Evidence Law: Witness Anonymity (1997)

### Preliminary Papers

- NZLC PP10 Hearsay Evidence (options paper) (1989)  
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 PP18 Evidence Law: Expert Evidence and Opinion Evidence (discussion paper) (1991)
- 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 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 PP29 Witness Anonymity (discussion paper) (1997)

### **Miscellaneous Papers**

- NZLC MP5 The Law of Parliamentary Privilege in New Zealand (reference paper) (1996)
- NZLC MP13 Total Recall? The Reliability of Witness Testimony (1999)

### **Unpublished Research Papers**

- The Admissibility in Criminal Proceedings of Evidence of a Third Person's Earlier Criminal Convictions (1995)
- Admissions in Civil Cases (1992)
- Alternative Means of Giving Evidence (1993)
- Burden and Standard of Proof (1997)
- Compellability (1997)
- Confessions (1997)
- The Course of Evidence (1994)
- The Court's Power to Call Witnesses (1996)
- Cross-examination (1995)
- Cross-examination on Documents (1995)
- Demonstrations, Inspections and Visual Aids (1997)
- The Duty to Put the Case (1995)
- Ethnic Perspectives in Relation to Rules of Evidence: Character and Credibility (1995)

Evidence of Acquittals (1995)  
Evidence of Foreign Law (1997)  
Evidence of Judge and Jury (1996)  
Examining Witnesses (1997)  
Expert Opinion Evidence and *Daubert v Merrell Dow Pharmaceuticals* (1995)  
Hearsay Evidence: Notice provisions (a comparison) (1997)  
The Hearsay Rule in Scotland (1997)  
The Rule in *Hollington v Hewthorn* (1997)  
*Idaho v Wright* (hearsay) (1992)  
Identification Evidence (1995)  
Impounding Documents and Stamp Duty (1997)  
Improperly Obtained Evidence (1997)  
Inherent Jurisdiction (1996)  
Judicial Warnings, Corroboration and Lies (1997)  
Leading Questions (1995)  
Lies (1997)  
Non-publication Orders (1997)  
Oaths (1997)  
The Prior Statements of a Witness (1997)  
Proof of Previous Convictions, Acquittals and Civil Proceedings (1997)  
Psychological Syndrome Evidence (1997)  
Questioning by the Judge (1996)  
Rebuttal Evidence (1995)  
Recovered Memories (1997)  
Re-examination (1995)  
Refreshing Memory (1995)  
Res Judicata (1995)  
The Right of Silence draft report (1997)  
Section 23B of the Evidence Act 1908 (1997)  
Should the Evidence Code Apply to Tribunals? (1995)  
Similar Fact: Poisoning and Receiving (1995)  
The Trial Process (1996)  
Voi Dire (1997)  
Witnesses Identifying Themselves When Giving Evidence (1996)

## Consultation Papers

Evidence Law Reform: Te ao Māori Consultation (1997)

Draft Evidence Code (prepared for the consultative workshop) (1997)

## LIST OF COMMENTATORS

(Commentators are referred to by the title they held when making their submission.)

### Individuals

David Abbott	Janice Brabyn
Judge Adams	David Brown
J G Adlam	Judge Brown
William Akel	Stephen Bryers
Mark Alderdice	Robert Buchanan
Claire Allan	Donna Buckingham
Professor Ronald J Allen	Judge Buckton
James Armour	K I Bullock
Brian Ashwell	Nicola Burkitt
Wendy Ball	David Burns
Peter Barker	Judge Cadenhead
Hon Sir Ian Barker	Judge Callaghan
Joan Barnes	Professor Alistair V Campbell
Maureen Barnes	Judge Carruthers
David L Bates	Richard Cathie
Judge Bathgate	John Chadwick
Judge Becroft	Louise Chandler
G I Bellamy	Hon Sir Muir Chilwell
Rt Rev Bishop Manuhūia Bennett	Kiran Chhaganlal
Tom Bennion	Judge Christiansen
Senior Sergeant P Berry	Ken Coates
Warren Berryman	Rt Hon Justice Sir Robin Cooke
Louis Bidois	B Corkill
John Billington QC	J C Corry
Rt Hon Sir Gordon Bisson	Judge Costigan
J Black	Noel Cox
Judge Bollard	Amanda Cropp
Judge Bouchier	Sergeant Ned Cruickshank
Geoffrey Bowes	Catherine Cull

Helen Cull QC	S Gaze
Judge von Dadelszen	Dr G D Geddis
Judge Dalmer	Dr Rosland Gellatly
Nick Davidson QC	John Gibson QC
Emma Davies	Michael Gibson
Mike Davies	Judge Gilbert
John Dawson	E P Giddens
Maria Deligiannis	Hon Justice Giles
Professor Ian Dennis	Janet Girvan
Judge Deobhakta	Lowell Goddard QC
David Dixon	Chief Labour Court Judge Goddard
Robert Dobson	Gary Gotlieb
Hon Justice Doogue	Bruce Gray
Dr Glenys Dore	James Green
Chief Judge Durie	Judge Green
Professor Mason Durie	Bevan Greenslade
Richard Earwaker	B Grierson
Brian Easton	Stephen Guest
D Elder	John C Hagen
Hon Justice Elias	Victoria Hair
Hon Justice Ellis	John Haigh
Stuart Ennor	Nigel Hampton QC
Judge Erber	John Hannan
Kathy Ertel	Hon Justice Hansen
R W Edgley QC	Rt Hon Justice Hardie Boys
John Faire	Jeff Harley
P Faulkner	Michael Harte
Brigid Feehan	Judge Harvey
Chris Finlayson	Mark Henaghan
Hon Justice Fisher	Emily Henderson
Chris Foot	Rt Hon Justice Henry
K M France	Hon Justice Heron
Simon France	Janet Hesketh
Judge Frater	John Hickey
Ian Freckleton	Charl Hirschfeld
Professor Richard Friedman	Hugo Hoffman
Hon Justice Gallen	Judge Hole
Rt Hon Justice Gault	Hon Justice Holland
Dr Maryanne Garry	Greg Hollister-Jones

Judge Hubble	D McColl
Grant Illingworth	Kirsty P McDonald
Gail Irwin	Judith McDougall
Judge Jackson	Judge McElrea
Judge Jamieson	D G McGee
Judge Jaine	Gerard McGreevy
Sir John Jeffries	Deputy Chief Judge A G McHugh
Peter Jenkin QC	P G McHugh
Russell Johnson	Peter McKenzie
Judge Johnson	Hon J McLay
James Johnston	J K McLay
Anna de Jonge	R McLeod
Judge Joyce	Duncan McMullin
Garry Judd QC	Chris McVeigh
Stefan Kaminski	David Miller
Pru Kapua	Sally Miller
Linda Kaye	Phil Mitchell
Judge Keane	Judge Moore
Judge Kendall	S Moore
David Kerr	Judge Moran
Judge Kerr	Hon Justice Morris
Howard C Keyte QC	Dr Allison Morris
M J Knowles	Barbara Morris
J Stephan Kos	Judge Moss
Judge Laing	Brendan Mullan
Geoffrey Lamb	James Mullineux
Michael Lamont	Hon Justice Neazor
Jim Large	Judge Neems
Rick Lempert	Chris Ng
Grant G Liddell	Chris Nicoll
R Lithgow	Judge Nicholson
Judge MacCormick	M A Norder
Judge MacLean	Judge O'Donovan
Suzanne Mahon	Michael Okkerse
Judge Mather	Greg Olsen
Dr G Maxwell	David O'Neil
Judge P McAloon	Judge Ongley
Judge McAuslan	Philip O'Reilly
Rt Hon Sir Thaddeus McCarthy	Jeff Owens



Judge Palmer  
Carli Pamplin  
Graham Pankhurst  
Dr Barry S Parsonson  
Kylie Pascoe  
J A Paterson  
C M Paul  
Brian Pauling  
Hon Justice Penlington  
Paul Perniskie  
Dennis Pezaro  
Anne Phillips  
Colin Pidgeon QC  
Dr Mel Pipe  
Dr John Podd  
John Pohl  
Judge Price  
Hon Justice Rabone  
Hon Justice Randerson  
M R Radford  
Dr Gail Ratcliffe  
John D Rangitauira  
Judge Rea  
Colin Reed  
Henderson Reeves  
Hugh Rennie QC  
Professor Jim Richardson  
Judy Riddell  
Alan Ritchie  
Hon Justice Robertson  
Judge Robinson  
Trevor Robinson  
Judge Roderick  
Judge Rota  
John Rowan QC  
Gina Rudland  
Judge Rushton  
Anthony Russell  
D Ryan

Dr Erihana Ryan  
Hon Justice Salmon  
J C S Sandston  
Judge Saunders  
Amelia Schaaf  
Hart Schwartz  
A Scott  
Dr Fred Seymour  
Judge Shaw  
William S Shires QC  
Judge Sheppard  
Sarah J Simmonds  
M Singh  
Judge Simpson  
Bruce Slane  
Hon Justice Smellie  
Chief Inspector Dave C Smith  
Judge N F Smith  
Judge Smith  
Maui Solomon  
Judge Somerville  
Judge Spear  
Megan Spense  
R J Stapleton  
Anne Stevens  
Lyn L Stevens  
C Stevenson-Wright  
B Stewart  
K Stone  
Annette Sykes  
Te Atawhai Taiaroa  
Professor Colin Tait  
Professor Colin Tapper  
Dr G D S Taylor  
N Taylor  
Georgina Te Heu Heu  
Judge Thomas  
Judge Thompson  
Hon Sir Thomas Thorp

Gregory J Thwaite  
Yvette Tinsley  
Rt Hon Justice Tipping  
Edwin A Tollefson  
Judge Tompkins  
Judge Toomey  
Jim Tucker  
Garry Turkington  
Stephen Turner  
Judge Twaddle  
Frith Tweedie  
Jeff Tyler  
Judge Unwin  
B D Vanderkolk  
Noel Vautier  
David Venables  
Freda Walker  
Tony Walker  
Judge Walsh  
Judge Watson  
Hon W A N Wells  
Whetumarama Wereta  
Reverend Stan J West

Tom Weston  
Judge Whitehead  
Peter Whiteside  
Leah Whiu  
Helen Wild  
Michele Wilkinson  
Professor Glanville Williams QC  
Karina Williams  
P A Williams QC  
Cardinal T Williams  
Hon Justice Williamson  
Judge Willy  
Bill Wilson  
David Wilson QC  
T Wilton  
Judge Wolff  
Victor Wu  
G J Wyatt  
Chief District Court Judge Young  
Hon Justice Young  
Professor Warren Young  
Dr Karen Zelas  
Stephen Zindel

## Groups

Accident Rehabilitation and  
Compensation Insurance Corporation  
Aotearoa Network of Psychiatric  
Survivors  
Arbitrators' Institute of New Zealand  
Association of Consulting Engineers  
Auckland Counsel for Civil Liberties  
Inc  
Auckland Healthcare, Medical  
Advisory Committee  
Auckland Institute of Technology  
Journalism School  
Auckland Lesbian & Gay Lawyers  
Group Inc  
Auckland Unemployed Workers' Rights  
Centre

Auckland Women Lawyers Association  
Awhina Wahine Wellington Inc  
Baptist Union of New Zealand  
BDO Hogg Young Cathie  
Bible Society in New Zealand  
Births Deaths and Marriages  
(Department of Internal Affairs)  
Brooker and Friend  
Canterbury District Law Society  
Canterbury University – School of  
Journalism  
Capital Coast Health  
Catholic Communications  
Children Young Persons and their  
Families Service

Children's Rights Campaign	Institute of Directors in New Zealand Inc
Commerce Commission	Interprofessional Committee on Liability
Commissioner for Children	Legal Services Board
Commonwealth Press Union	Mangere Law Centre
Corporate Lawyers Association	Māori Land Court
Corporate Security	Marriage Guidance of New Zealand
Criminal Bar Association of New Zealand	Methodist Church of New Zealand
Crown Law Office	Ministry of Agriculture and Fisheries
Deaf Association of Aotearoa	Ministry of Consumer Affairs
Deloitte Touche Tohmatsu	Ministry of Health
Department for Courts	Ministry of Justice
Department of Corrections	Ministry of Pacific Island Affairs
Department of Education	Ministry of Women's Affairs
Department of Internal Affairs	Ministry of Youth Affairs
Department of Justice	Morley Security Group
Department of Social Welfare	National Collective of Independent Women's Refuges
District Court Judges Committee	National Collective of Rape Crisis and Related Groups of Aotearoa Inc
District Court Judges Working Party	National Council of Women/ Te Kaunihira Wahine O Aotearoa
Doctors for Sexual Abuse Care	National Spiritual Assembly of the Baha'is of New Zealand
Dunedin Community Law Centre	New Zealand Broadcasting School
Forum of Chief Legal Advisers	New Zealand College of Clinical Psychologists
Gay Auckland Business Association	New Zealand Council for Civil Liberties
Gaze Burt Barristers & Solicitors	New Zealand Council of Victim Support Groups
General Practitioners Association	New Zealand Customs Department
Glaistor Ennor Barristers & Solicitors	New Zealand Defence Force
Grey Lynn Neighbourhood Law Office	New Zealand Law Society
Hamilton Abuse Intervention Pilot Project	New Zealand Law Society (Civil Litigation and Tribunals Committee)
Hamilton Community Group	New Zealand Law Society (Commercial and Business Law Committee)
Health & Disability Commissioner	New Zealand Law Society (Criminal Law Committee)
Healthcare Otago	New Zealand Law Society (Evidence Law Committee)
High Court Judges Committee (Hearsay)	
High Court Judges Working Party	
Human Rights Commission	
Hunter Ralfe	
IHC New Zealand Inc	
Inland Revenue Department	
Institute of Chartered Accountants	

New Zealand Law Society (Evidence Project Committee)	Reserve Bank of New Zealand
New Zealand Medical Association	Royal New Zealand College of General Practitioners
New Zealand Police	Royal New Zealand Plunket Society
New Zealand Police Association	Scottish Law Commission
New Zealand Private Physiotherapists' Association	Securities Commission
New Zealand Psychological Society	Simpson Grierson Butler White
New Zealand Society of Accountants	Te Puni Kokiri
New Zealand Society of Physiotherapists Inc	Telecom Risk Security Group
Nga Whiitiki Whānau Ahuru Mōwai O Aotearoa/ National Collective of Rape Crisis and Related Groups of Aotearoa Inc	TVNZ Group
Office of the Ombudsman	Wellington Chamber of Commerce
Office of the Privacy Commission	Wellington Community Law Centre
Otago University School of Law	Wellington District Law Society
Otago Women Lawyers Society	Wellington District Law Society - Women in the Law Committee
Paediatric Society of New Zealand (Child Abuse and Neglect Sub-Committee)	Wellington Polytechnic - School of Journalism
Patients Rights Advocacy	Wellington Women Lawyers Association
Plunket Society	Women's Community Law Reform Network
Rape Crisis	Women's Electoral Lobby
	Youth Law Project

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## Appendix B: Consequential repeals and re-enactments: the rationale

### REPEALS

- B1 **S**CHEDULE 2 OF THE EVIDENCE CODE lists the enactments that will be repealed when the Evidence Code is enacted. The majority of the enactments listed are evidence law provisions that for the most part have been replaced by provisions in the Evidence Code (see the Comparative Table at the end of this Appendix). Provisions from other Acts that will be repealed and replaced by Code provisions are:
- section 344D of the Crimes Act 1961, replaced by s 112 of the Code (see para 490 of the Report);
  - section 369 of the Crimes Act 1961, replaced by s 9 of the Code (see para 31 of the Report);
  - section 28 of the Juries Act 1981, replaced by s 82 of the Code (see paras 376–379 of the Report); and
  - section 13 of the Oaths and Declarations Act 1957 (see para 356 of the Report).
- B2 A number of existing Evidence Act provisions will not be replaced by specific sections in the Code. As the Comparative Table indicates, a number of these will be addressed more generally by the scheme of the relevant Part or Subpart of the Code. For example, the documentary evidence provisions of the Evidence Act 1908 (ss 27–47), Evidence Amendment Act 1945, Evidence Amendment Act 1952 and Evidence Amendment Act 1990 have been replaced by a much simplified approach to documentary evidence and evidence of foreign law (see the discussion in chapters 19 and 20 of this Report).
- B3 Leaving aside the area of documentary evidence, the Evidence Code does not specifically address the subject matter of a number of other existing provisions, although the Code rules are flexible enough to accommodate the issues addressed by these existing

provisions. The sections that will be repealed without a specific replacement are:

### *Sections 3, 4 and 16 of the Evidence Act 1908*

- B4 These provisions, which address specific issues of compellability, are no longer necessary because of the Code's general rule that all people are eligible and compellable, with very few exceptions (see the discussion in chapter 12 of the Report). The Commission's consultation with the New Zealand Customs Service indicated that s 16 of the Evidence Act 1908 in particular is not relied on in practice and can safely be repealed.

### *Section 19 of the Evidence Act 1908*

- B5 This section deals with the method of establishing the genuineness of handwriting. The Commission sees no particular need for such a provision, which is really a matter of expert evidence, and considers it should be repealed.

### *Section 23B of the Evidence Act 1908*

- B6 This section was enacted by s 3 of the Crimes Amendment Act 1979. Its purpose is to allow the admission of evidence obtained by the police under s 216B(3) of the Crimes Act 1961, which was enacted under s 2 of the same Act. Section 216B(3) creates an exception to the offence of intercepting private communications by means of listening devices.
- B7 The scope of s 216B(3) is quite narrow. The exception relates to police use of listening devices such as directional microphones or bugs, when an emergency arises in which a person is threatening to kill or seriously injure others in his or her immediate vicinity. The paradigm situation s 216B(3) was intended to cover is a hostage crisis.<sup>91</sup> The use of listening devices must be authorised by a commissioned police officer who believes on reasonable grounds that the listening device will help protect the hostage. Section 216B(3) does not allow the police to intercept telephone calls, and does not apply to participant surveillance, which is dealt with separately under s 216B(2)(a). Evidence gathered by means of participant surveillance is in any case admissible under s 25(4) of the Misuse of Drugs Amendment Act 1978 and s 312M(4) of the Crimes Act 1961.

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<sup>91</sup> (1979) 422 *New Zealand Parliamentary Debates* 136 and 609.

- B8 Section 23B of the Evidence Act 1908 was enacted because Parliament considered that evidence gathered under s 216B(3) would be inadmissible under s 25(1) of the Misuse of Drugs Amendment Act 1978. Section 25(1) of the Misuse of Drugs Amendment Act 1978 provides that private communications intercepted by listening devices are inadmissible unless the interception has been authorised under that or any other Act. The same prohibition appears under s 312M(1) of the Crimes Act 1961.
- B9 There seem to have been no cases in which the police have invoked the power to use listening devices conferred by s 216B(3) of the Crimes Act 1961. The Court of Appeal discussed the provision in *R v Menzies* [1982] 1 NZLR 40, 45–46 and *R v Stack* [1986] 1 NZLR 257, 260–261, but the discussion in each case was obiter.
- B10 In considering whether it is necessary to re-enact s 23B of the Evidence Act 1908, two issues arise. First, it is by no means clear that evidence the police obtain under s 216B(3) would be inadmissible but for s 23B. Both s 312M(1) of the Crimes Act 1961 and s 25(1) of the Misuse of Drugs Amendment Act 1978 provide that evidence acquired by means of listening devices is only inadmissible if the interception is not authorised under those Acts, or any other enactment. Technically, s 216B(3) of the Crimes Act 1961 is not positive authorisation for the use of listening devices; rather, it is an exception to the offence created under s 216B(1). Permitting the police to engage in conduct that would otherwise be illegal does, however, create a presumption of statutory authority for the use of listening devices, and any evidence obtained by this means would be admissible under s 25 of the Misuse of Drugs Amendment Act 1978 or s 312M(1) of the Crimes Act 1961.
- B11 The second issue is the effect of s 23B(2). Section 23B(2) provides that evidence obtained in accordance with s 216B(3) of the Crimes Act 1961 cannot be admitted if it is inadmissible under any enactment apart from s 25 of the Misuse of Drugs Amendment Act 1978. This means that although the general rule on the inadmissibility of evidence obtained by listening devices under s 25(1) of the Misuse of Drugs Amendment Act 1978 has no effect, the same general rule under s 312M(1) of the Crimes Act 1961 *does* apply. The evidence must therefore be admissible under s 312M(1), or it cannot be admitted at all.
- B12 In light of these observations, s 23B of the Evidence Act 1908 is at best unnecessary and at worst completely ineffective. If s 216B(3) of the Crimes Act 1961 confers an authority to intercept private communications in terms of s 25(1) of the Misuse of Drugs

Amendment Act 1978 and s 312M(1) of the Crimes Act 1961, then s 23B is unnecessary. The evidence is admissible regardless. If, however, s 216B(3) does not confer such an authority, then the evidence is inadmissible under the same sections. In this case s 23B is ineffective because it does not prevent the evidence being excluded by operation of s 312M(1) of the Crimes Act 1961.

- B13 The Commission therefore considers that in its current form s 23B of the Evidence Act 1908 is effectively redundant. It should not be re-enacted as part of the Evidence Code. Any doubts about the admissibility of evidence gathered under s 216B of the Crimes Act 1961 should be resolved by amending that Act.

### *Section 47 of the Evidence Act 1908*

- B14 This section deals with the ability of the court to impound documents. The Law Commission's research into the current operation of this section indicated that it is rarely relied on, and the court is able to impound documents appropriately by exercising its inherent powers. The Commission concluded that there is no need to retain the specific provision.

### *Sections 47A–47C of the Evidence Act 1908 (as inserted by the Evidence Amendment Act (No 2) 1995)*

- B15 These sections deal with the production of bank records and the compellability of bank officers to produce bank records. The Law Commission proposed repealing these sections in *Evidence Law: Privilege* (NZLC PP23, 1994), paras 389–390. The Commission confirms this view. The matters dealt with in ss 47A to 47C are covered by the Commission's hearsay proposals and s 117, which facilitates the production of documents without the need to call a witness. The Commission also considers that the reasons for repeal given in the discussion paper remain relevant:

Section [47C] may have been desirable when proof of such matters by producing bank statements was much less common than it is now, and production of the original bank books could have inconvenienced the bank through temporary loss of its records and the demands upon its staff time. But these considerations now apply to a much lesser extent, and there is no reason why a bank should be treated differently from other commercial institutions whose business records are relevant in court proceedings.



*Section 19 of the Evidence Amendment Act (No 2)*  
1980

- B16 This section deals with the power of a court or judge in hearing an appeal from a decision to admit hearsay evidence. The Commission is of the view that such a section, enacted as part of a particular approach to hearsay evidence, will no longer be necessary because of the Code's treatment of hearsay, and recommends its repeal without replacement.

*Section 30 of the Evidence Amendment Act (No 2)*  
1980

- B17 This section, dealing with evidence introduced to prove the absence of sexual relations between a husband and wife during a certain period, was enacted to address a particular historical circumstance. The Commission considers that the section is of no contemporary value and recommends its repeal.

## RE-ENACTMENTS

### *Evidence taken overseas*

- B18 Chapter 19 of the Report outlines the Commission's approach to matters of foreign law. The Commission recommends that the current provisions in the Evidence Act that deal with evidence obtained in overseas jurisdictions should be re-enacted into a separate statute when the Evidence Code is enacted. These provisions are:
- Sections 48–48J of the Evidence Act 1908;
  - Sections 37–49 of the Evidence Amendment Act (No 2) 1980.

### *Evidence obtained in Australia*

- B19 A number of existing provisions deal with gathering evidence in Australia for use in New Zealand and vice versa (Evidence Amendment Acts 1994 and 1995). The Commission recommends that these provisions also be re-enacted into one Act specifically related to the legal position between Australia and New Zealand. Sections 9 and 10 of the Evidence Amendment Act 1990 should also be included in this new Act, which may appropriately be entitled the Evidence and Procedure (Australia) Act.

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## Comparative Table: Current Evidence Acts and Code provisions

THE FOLLOWING TABLE lists provisions of the Evidence Act 1908 and subsequent amendment Acts and the comparable rules in the Evidence Code.

### *Evidence Act 1908*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
1	short title, etc	1 5	title application
2	interpretation	4	definitions and interpretation
3–5A	<b>competency of witnesses</b>		
3	witness interested, or convicted of offence	73	to be repealed without replacement but see eligibility and compellability generally
4	evidence of party or of spouse of party, in civil cases	73	to be repealed without replacement but see eligibility and compellability generally
5	evidence of party or of spouse of party, in criminal cases	73 75	eligibility and compellability generally compellability of defendants in criminal proceedings
6–8A	<b>privilege of witness</b>		
6–8	repealed		
8A	questions tending to establish a debt or civil liability	61	privilege against self-incrimination

*continued*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
9–12C	<b>impeaching credit of witnesses</b>		
9	how far a witness may be discredited by the party producing him	39 94	truthfulness rules cross-examination by party of own witness
10	proof of contradictory statements of witnesses	37 96	previous consistent statements rule cross-examination on previous statements of witnesses
11	cross-examination as to previous statements in writing	37 96	previous consistent statements rule cross-examination on previous statements of witnesses
12	proof of previous convictions of witness	39 42	truthfulness rules propensity rule
12A	proof of convictions by fingerprints	124	proof of conviction by fingerprints
12B	corroboration of evidence of accomplice not required	107	corroboration
12C	witnesses having some purpose of their own to serve	108	judicial warnings about unreliable evidence
13–17	<b>protection of witnesses</b>		
13	cross-examination as to credit	39	truthfulness rules
13A	undercover police officers		to be added without amendment when Code is enacted
13B–J	witness anonymity		to be added without amendment when Code is enacted
14	indecent or scandalous questions	85	unacceptable questions
15	prohibited questions not to be published	86	restriction of publication

*continued*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
16	witnesses in certain cases may be compelled to give evidence	73	to be repealed without replacement but see eligibility and compellability generally
17	witness making true discovery to be free from all penalties	63	privilege against self-incrimination in court proceedings
	<b>general rules of evidence</b>		
18	proof by attesting witnesses	120	proof of signatures on attested documents
19	comparison of disputed handwriting	23	to be repealed without replacement but see admissibility of expert opinion evidence
20	confession after promise, threat or other inducement	27 28 29	the reliability rule the oppression rule improperly obtained evidence rule
	<b>rules in particular cases</b>		
21, 22	repealed		
22A	admissibility of previous description by identification witness	37	previous consistent statements rule
23	poisoning cases	45	propensity evidence offered by prosecution about defendants
23A	evidence of complainant in cases involving sexual violation	46	evidence of the sexual experience of complainants in sexual cases
23AA	address and occupation of complainant not to be disclosed in open court	87 88	privacy as to witness's precise address restriction on disclosure of complainants' occupations in sexual cases
23AB	corroboration in sexual cases	107	corroboration

*continued*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
23AC	delay in making complaint in sexual cases	113	delayed complaints or failure to complain in sexual cases
23B	admissibility of evidence obtained by means of listening device in certain emergencies  <b>rules in cases involving child complainants</b>		to be repealed without replacement: adequately covered by other Acts
23C	application of section 23D to 23I	4	definition of child, child complainant and sexual case
23D	directions as to mode by which complainant's evidence to be given	102	directions about way child complainants are to give evidence
		103	directions about alternative ways of giving evidence
		104	chambers hearing before directions about alternative ways of giving evidence
23E	modes in which complainant's evidence may be given	105	alternative ways of giving evidence
		106	video record evidence
23F	cross-examination and questioning of [by] accused	85	unacceptable questions
		95	restrictions on cross-examination by un-represented parties
23G	expert witnesses	23	admissibility of expert opinion evidence
		24	expert witnesses in cases involving certain complainants in sexual cases
23H	directions to jury	109	judicial directions about certain ways of offering evidence
		111	judicial directions about children's evidence
23I	regulations	128	regulations

*continued*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
	<b>evidence of witnesses in prison</b>		
24, 25	repealed		
	<b>documentary evidence in criminal proceedings</b>		
25A	repealed		
	<b>proof of official documents etc</b>		
26	repealed		
27	judicial notice of official seals etc	127	presumptions as to New Zealand and foreign official seals and signatures
28	judicial notice of Acts of Parliament	125	to be repealed without replacement but see New Zealand and foreign official documents
28A	judicial notice of regulations		
29	copy of Act of Parliament, Imperial Legislation, and regulations printed as prescribed to be evidence	125	New Zealand and foreign official documents
29A	copy of reprint of Act or regulations to be evidence		
30	copies of Parliamentary Journals to be evidence		
31	provincial ordinance etc		
32	proclamations, orders in Council etc	122	authenticity of public documents
		125	New Zealand and foreign official documents
33	proof of signature etc not required	127	presumptions as to New Zealand and foreign official seals and signatures

*continued*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
34	private Acts etc of Imperial Parliament	125	New Zealand and foreign official documents
35	Royal proclamations, orders of the Privy Council, etc		
36	repealed		
37	manner of proving Acts of state etc of any country	127	to be repealed without replacement but see presumptions as to New Zealand and foreign official seals and signatures
38	proclamations, etc, receivable, although not proved by sealed copies	13	to be repealed without replacement but see establishment of relevance of document
39	statutes of any country published by authority	116	evidence of foreign law
40	certain law books may be referred to as evidence of laws		
41	“country” defined	4	definition of country
42	standard works in general literature	115	admission of reliable published documents
43	public documents made evidence by Act, how provable	127	presumptions as to New Zealand and foreign official seals and signatures
44	other public documents, how provable	122	authenticity of public documents
44A	proof of public registers of other countries	122	authenticity of public documents
		127	presumptions as to New Zealand and foreign official seals and signatures
44B, 45	repealed		
46	Gazette notice to be evidence of Act of State	126	notification of acts in official documents

*continued*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
47	documents may be impounded	11	to be repealed without replacement but see inherent powers not affected
	<b>evidence of banking records</b>		
47A	interpretation	17	to be repealed without replacement but see the hearsay rule, eligibility and compellability generally, and offering documents in evidence without calling a witness
47B	proof of entries in banking records of banks	73	
47C	officer not compellable to produce banking records	117	
48–48F	<b>evidence for use in overseas proceedings</b>		to be re-enacted in a separate statute
48G–48J	<b>restrictions on production of evidence for use in or by foreign authorities</b>		

### *Evidence Amendment Act 1945*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
1	short title and commencement	1 2	title commencement
2–6	<b>documentary evidence</b>		
3–4	repealed		
5	proof of instrument to validity of which attestation is necessary	120	proof of signatures on attested documents
6	presumption as to documents 20 years old		to be repealed without replacement
7–10	<b>affidavits and documents of servicemen overseas</b>		
7	interpretation		to be repealed without replacement
8	repealed		

*continued*



<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
9	verification of documents executed by servicemen outside NZ	117 120	to be repealed without replacement but see offering documents in evidence without calling a witness and proof of signatures on attested documents
10	revocation of Evidence Emergency Regulations 1941		to be repealed without replacement
11–12	<b>proof of official documents etc</b>		
11	judicial notice of signatures of G-G, ministers, judges etc	127	presumptions as to New Zealand and foreign official seals and signatures
11A	judicial notice of signature of Speaker		
12	evidence of official documents	122 125	authenticity of public documents New Zealand and foreign official documents

*Evidence Amendment Act 1952*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
3–5	<b>photographic copies</b>		
3	interpretation		to be repealed without replacement
4	photographic copies of public records to be evidence	122	authenticity of public documents
5	proof of photographic copies of documents of government and authorised persons	117	to be repealed without replacement but see offering documents in evidence without calling a witness

*continued*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
6–7	<b>verification of documents etc</b>		
6	verification of documents issued out of NZ	117 120	to be repealed without replacement but see offering documents in evidence without calling a witness and proof of signatures on attested documents
7	evidence of registered instruments	122 127	authenticity of public documents presumptions as to New Zealand and foreign official seals and signatures

*Evidence Amendment Act (No 2) 1980*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
1	short title, commencement, and application	1 2 5	title commencement application
3–16	<b>hearsay</b>	Part 3 Sub-part 1	hearsay evidence
17	weight to be attached to hearsay evidence	108	judicial warnings about unreliable evidence
18	court may reject unduly prejudicial evidence	8	general exclusion
19	power of Court hearing appeal		to be repealed without replacement
22	interpretation	4	definition of conviction
23	conviction as evidence in civil proceeding	49	conviction as evidence in civil proceedings
24	conviction as evidence in defamation proceeding	50	conviction as evidence in defamation proceedings
25	finding of paternity as evidence in civil proceeding		to be repealed without replacement

*continued*

<i>Act</i>	<i>Section heading</i>	<i>Code</i>	<i>Section heading</i>
26	copy of document admissible in cases under this part	122	authenticity of public documents
27	proof of conviction	123	evidence of convictions, acquittals and other judicial proceedings
29–36	<b>privilege of witnesses</b>	Part 4	
29	communication during marriage	67 73	to be repealed without replacement but see overriding discretion as to confidential information and eligibility and compellability generally
30	evidence of non-access		to be repealed without replacement
31	communication to minister	59	privilege for communications with ministers of religion
32	disclosure in civil proceeding of communication to medical practitioner or clinical psychologist	67	to be repealed without replacement but see overriding discretion as to confidential information
33	disclosure in criminal proceeding of communication to medical practitioner or clinical psychologist	60	privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists
34	communication to or by patent attorney etc	53 55	interpretation privilege for communications with legal advisers
35	discretion of court to excuse any witness from giving any particular evidence	67	overriding discretion as to confidential information
35A	limitation on professional privilege in respect of searches of solicitors' trust accounts	56	privilege and solicitors' trust accounts
37–49	<b>taking of evidence overseas or on behalf of overseas court</b>		to be re-enacted in a separate statute

## *Evidence Amendment Act 1990*

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<b>Act</b>	<b>Section heading</b>	<b>Code</b>	<b>Section heading</b>
2	interpretation		
3	repealed		
4	judicial notice of Australian Acts and Regulations	125	to be repealed without replacement but see New Zealand and foreign official documents
5	facsimiles	117	to be repealed without replacement but see offering documents in evidence without calling a witness
6	judicial notice of certain signatures, seals and stamps	127	presumptions as to New Zealand and foreign official seals and signatures
7	copies of Australian Acts and regulations to be evidence	125	New Zealand and foreign official documents
8	evidence of official Australian documents	122	authenticity of public documents
9	evidence of public documents by reference to Australian law	125	New Zealand and foreign official documents
10	evidence of other public documents	122	to be enacted in a separate statute but see authenticity of public documents
10A	evidence of certain Acts under Australian law	126	notification of acts in official documents

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## *Evidence Amendment Acts 1994 and 1995*

These Acts concern the circumstances in which evidence may be obtained in Australia for use in New Zealand and vice versa. These Acts will be re-enacted along with ss 9 and 10 of the Evidence Amendment Act 1990 as a separate statute that may appropriately be entitled the Evidence and Procedure (Australia) Act.

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## Select bibliography

This bibliography only includes publications referred to in this Report. A much more extensive bibliography, which reproduces the bibliographies to the evidence preliminary papers and also material consulted subsequent to the publishing of the preliminary papers, is available on the Law Commission's web site at <http://www.lawcom.govt.nz>.

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