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The Third Review of the Evidence Act
Law Commission | Te Aka Matua o te Ture
Wellington

By email: evidence@lawcom.govt.nz

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

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Law Commission's *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006 Issues Paper 50* (**Issues Paper**).

1.2 This submission has been prepared with the assistance of the Law Society's Civil Litigation & Tribunals Committee, Criminal Law Committee, and Family Law Section.

2 Te ao Māori and the Evidence Act (chapter 2)

Question 2: admissibility of tikanga and mātauranga in proceedings to which the Act applies

Exception to the hearsay rule

2.1 We support a complete exception to the application of the hearsay rule, rather than a modification of the existing exception in section 18 of the Evidence Act 2006 (**Act**). To this end, we agree with the statement of Chief Justice Black of the Federal Court of Australia (referred to by the Australian Law Reform Commission (**ALRC**), in a paper which led to the introduction of the uniform Evidence Acts):[1]

> "[there remains]… a serious question as to whether it is appropriate for the legal system to treat evidence of this nature as prima facie inadmissible and to only admit it by way of an exception to an exclusionary rule when such evidence is in precisely the form by which law and custom are maintained under indigenous traditions."

2.2 We also support extending the proposed hearsay exception to cover mātauranga Māori. The following comment, made in relation to the Australian (Cth) amendment, illustrates why such an extension is needed:[2]

> "Moreover, while courts sometimes apply the hearsay rule flexibly with respect to evidence of traditional laws and customs, it has been observed that 'the ghost of

1 Australian Law Reform Commission *Uniform Evidence Law* (ALRC Report 102, December 2005) at 19.72.

2 Australian Law Reform Commission *Uniform Evidence Law* (ALRC Report 102, December 2005) at [19.73].

> hearsay—the preference of the written over the spoken word—still impacts negatively on the assessment of Aboriginal oral historical evidence'."

Exception to the opinion rule

2.3 In Australia, the exception to the opinion rule only applies to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander (**ATSI**) group, about the existence or non-existence, or the content, of the traditional laws and customs of that group.[3] We support adopting a similar exception for opinion evidence of mātauranga Māori and tikanga Māori, so long as it is consistent with the New Zealand Bill of Rights Act 1990.

2.4 The ALRC has considered whether such an exception would allow a witness who is technically a member of an ATSI group, but has little to no contact with that group, to circumvent the opinion rule, and concluded such concerns would be addressed by the relevance requirement.[4] Our preliminary view on this point is that it would be preferable for the witness to be a member of the relevant whānau, hapū or iwi, and be able to demonstrate a connection to that whānau, hapū and iwi (noting the same points that would need to be established if the witness' evidence was challenged on relevance grounds due to an alleged lack of connection). In saying that, however, we encourage the Commission to seek feedback from, for example, members of Te Hunga Rōia Māori o Aotearoa, who may be better placed to comment on this point.

A broader exception to accommodate oral traditions in other cultures

2.5 The Law Commission has also sought views on whether it is appropriate to adopt a broader exception which accommodates other cultures where traditional knowledge systems and methods of storing knowledge are oral in nature. A broader exception may be appropriate in future. However, at this stage, it would be difficult to define the criteria for determining whether *"such knowledge systems employ sophisticated techniques for recording history or knowledge orally… so that concerns about reliability and verification…have less or no relevance"*,[5] as those knowledge systems are not as prominent a part of New Zealand's fabric. If a broader exception is to be introduced, we encourage the Commission to provide guidance, or a set of criteria, for assessing whether the knowledge systems in other cultures employ sophisticated techniques for recording history or knowledge orally.

2.6 The reason an amendment for tikanga and mātauranga Māori is preferred is because it avoids substituting existing restrictions with a new gate-keeping system – the evidence needed to satisfy the court that the proposed exception applies would be very similar to the evidence required to satisfy the existing hearsay and opinion exceptions.

2.7 It will also be necessary to consider whether an amendment which applies only to the members of a particular group are inconsistent with anti-discrimination legislation (noting

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3 Evidence Act 1995 (Cth), s 78A.

4 Australian Law Reform Commission *Uniform Evidence Law* (ALRC Report 102, December 2005) at [19.80].

5 Issues Paper at [2.38].

this was considered by the ALRC, which concluded the Australian amendment was not discriminatory).[6]

Prescribing interpretative guidance

2.8 The Law Society's preference is not to introduce statutory guidance as to the need to interpret and apply the provisions of the Act having regard to te ao Māori. We agree with the Commission's observations that the application of more general guidance can be uncertain, and may result in unintended consequences for the application of other specific provisions in the Act.[7] However, we once again encourage the Commission to seek the views of other parties, including Te Hunga Rōia Māori o Aotearoa, who may be better placed to comment on the need for such guidance.

<u>Question 3: other provisions which fail to adequately provide for te ao Māori in practice</u>

Giving evidence in court

2.9 In its second review of the Act, the Commission recommended amending the Act to clarify that the courts can regulate the procedures for giving evidence in a manner that recognises tikanga. If implemented, the Commission believes this recommendation could address several concerns with courtroom procedures and their disconnect with tikanga Māori, including:

(a) the way in which counsel and judges deal with challenges to pūkenga evidence;

(b) the availability of support people to witnesses giving evidence in court; and

(c) procedures for relying on written briefs of evidence (e.g., not allowing kaumātua to speak to their affidavit evidence at a hearing).

2.10 Our preliminary view is that such a specific provision is not necessary. However, this is not an issue we have encountered in practice.

3 <u>Hearsay (chapter 3)</u>

<u>Questions 4, 5 and 6: amendments to clarify application of hearsay provisions for reluctant witnesses</u>

3.1 In our view, this is a finely balanced issue that pits the defendant's fair trial rights against the need for a credible justice system. We also consider a witness has a right to present their evidence in court free from fear of pressure, threats or violence, either directly or indirectly, from a defendant. Some may argue that a defendant's fair trial rights have been afforded greater weight by Parliament due to their inclusion in the New Zealand Bill of Rights Act 1990 (the **Bill of Rights**); however, this more likely reflects the Bill of Rights' focus on protections against actions by public bodies.

3.2 The ability for a court to admit a key witness' evidence without the defendant being able to challenge it in cross-examination has the potential to cause significant prejudice. However,

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[6] Australian Law Reform Commission *Uniform Evidence Law* (ALRC Report 102, December 2005) at [19.81-19.83].

[7] Issues Paper at [2.45].

arguments raised by the Grand Chamber cited in the Issues Paper also carry weight – a defendant should not be able to complain of prejudice to their fair trial rights when they are the cause of a witness' failure to give evidence.[8]

3.3 We consider the option presented to expand the hearsay provisions to allow the admission of a statement in situations where a witness has failed or refused to give evidence due to fear of threats or violence warrants further consideration.[9]

3.4 However, there are a number of potential practical issues with how a fear or intimidation-based ground for admitting propensity evidence would work:

(a) Sufficient evidence should be put before the court to establish that the witness is afraid of giving evidence, and that they have been subjected to threats and/or intimidation by or on behalf of a defendant.

(b) The witness' emotional state may be able to be put before the court indirectly via Police – this would be comparable to the approach regularly used to put a witness' perspective before the court in support of an application under section 105 of the Act, where this is done via a jobsheet by the officer-in-charge of an investigation.

(c) In contrast, the evidence to support the existence of threats or intimidation will often be reliant on evidence from the witness. There may be some circumstances where independently-verifiable evidence is available (for example, where a threat is communicated by text, or carried out in the presence of another person), but this will often not be the case. A witness who is unwilling to attend court due to safety fears is likely to be similarly unwilling to give evidence in support of the existence of threats or intimidation. Accordingly, an application to admit hearsay evidence is likely to itself rely on hearsay, which would limit the ability of a party (usually a defendant) to challenge or oppose it.

(d) Fear of retaliation raises additional concerns, in that it is inherently speculative. We agree with the views expressed in the Issues Paper that a high threshold should be necessary.

(e) In the case of a multi-defendant trial, admitting hearsay on these grounds has the potential to cause prejudice to a defendant who has not been involved in any efforts to threaten or intimidate the witness.

3.5 Given the potential prejudicial effect on the ability to mount a defence, it is preferable that this would only be available in limited circumstances. Accordingly, we do not agree with the addition of a general discretion to admit hearsay evidence where there is 'good reason' or 'just excuse' for the witness' non-attendance.

3.6 In relation to additional safeguards, many of the factors that could go against admissibility of a hearsay statement (for example, whether an inability to cross-examine the witness will prevent the defendant from offering an effective defence) can already be taken into account via the assessment in section 8 of the Act (probative value versus prejudicial effect).

[8] Issues Paper at [3.33].
[9] Issues Paper at [3.28].

3.7 We note that given the competing interests in play, any amendment of this nature is likely to be divisive. We consider that further consideration and assessment would be needed on if and how these practical difficulties could be appropriately addressed.

Question 7: when a person 'cannot with reasonable diligence' be found

3.8 We agree with the views expressed by the Court of Appeal in *Huritu v New Zealand Police*.[10] Whether reasonable diligence has been applied is a fact-specific assessment. Further guidance in the Act about what would be considered 'reasonable diligence' risks making this less flexible, and therefore less able to accommodate the various circumstances in which the hearsay provisions are likely to be engaged.

Question 8: amendments to address inconsistencies between the hearsay provisions in the Act and the High Court Rules

Limiting the operation of section 17

3.9 The Commission has proposed limiting the operation of section 17 in civil proceedings so it only applies where a party challenges the admissibility of a hearsay statement in accordance with the relevant rules of court (Option 1).

3.10 We acknowledge there is a lack of clarity as to the admissibility of evidence, even where challenges are raised in accordance with the High Court Rules 2016. Practitioners have observed that admissibility challenges raised in accordance with the High Court Rules are often not dealt with until trial. As a result, counsel do not know whether a failure to raise an admissibility challenge will be fatal to the challenge itself, and they make tactical decisions to reserve challenges until trial.

3.11 Therefore, we support the objective of ensuring any inconsistencies between the Act and the High Court Rules are removed, so there is more certainty for litigants and practitioners. We do not have any concerns with taking divergent approaches to hearsay in civil and criminal proceedings, for the reasons set out in the Issues Paper.[11] In addition to the reasons given by the Commission, there are grounds for distinguishing the two approaches because of the reliance, in civil proceedings, on documentary evidence, rather than witness testimony.

3.12 We consider that any changes to the Act should not be made in isolation, given ongoing recommendations for the wholesale amendment of the High Court Rules.[12] We express this view for a number of reasons:

(a) The larger suite of changes recommended by the Rules Committee seek to limit the volume of evidence in civil litigation, and therefore, the cost to the parties. These reforms were designed to address the lack of discipline in witness briefs, due to the reliance on documentary evidence rather than witness recollection.

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10 *Huritu v New Zealand Police* [2021] NZCA 15.

11 At [3.82].

12 See the Rules Committee's *Improving Access to Civil Justice* (November 2022) report.

(b) The Rules Committee also recommended there should be a focus on initial disclosure rather than discovery, and witness briefs should be exchanged before discovery. Each party is required to provide a chronology of events, and refer to documents in that chronology. Only the documents referred to in a party's chronology are included in the common bundle. This is designed to focus attention only on the documents each party expressly wishes to rely on and to refer to (rather than allowing for any document to be included in the common bundle). The intention is for those documents to then be admissible for the truth of their contents. However, the truth of this evidence can still be challenged, as well as the weight to be attributed to it. The party wishing to challenge the documentary record then has the burden of establishing why it should not be accepted. This approach seeks to ensure admissibility challenges are more targeted, and removes the need for documents to be referred to in a witness brief (or opening) in order to be considered by judge.

(c) Extending the limitation of section 17 to oral evidence and briefs, as well as the documentary record,[13] also risks frustrating the purpose of the Rules Committee's proposed reforms to the High Court Rules, as it will remove any incentive for discipline in the preparation and leading of evidence. The Commission's proposal could lead to undisciplined practices around evidence, so volumes become even larger, with the burden of costs falling on the party wishing to challenge admissibility. This could place well-resourced litigants in a better position to challenge the evidence of other parties, creating further barriers to accessing justice for some litigants.

3.13 For these reasons, it is not preferable to simply pick up and extend the Rules Committee's recommendation relating to the common bundle[14] in isolation of the wider reforms. The Law Society supports the proposal to limit the hearsay rule as it applies to documentary evidence, but only in a way that ensures there is no proliferation of evidence. A measure such as a chronology should be required to justify the inclusion of any hearsay statements.

3.14 In any event, if there are to be changes to the hearsay rule, we agree there must be a discretion to hear late challenges to admissibility, particularly in circumstances where it is not clear whether certain evidence is hearsay until trial. These might be better addressed in the applicable procedural rules rather than the Act, so long as no new tensions or inconsistencies arise as a result.

Requirement to give notice

3.15 The Commission has proposed introducing a requirement for parties to give notice of their intention to offer a hearsay statement in evidence (Option 2).

3.16 This option is preferred while the High Court Rules remain as they are, as it is more consistent with the obligation on parties to ensure their evidence is admissible when it is being prepared. If a party wishes to tender evidence that would usually be inadmissible, they should do so on notice, and with reasons. This would mean the evidence is more concise,

13 Issues Paper at [3.81].

14 Rules Committee *Improving Access to Civil Justice* (November 2022), recommendation 22(b).

and limited to what is admissible. As a result, this option is also likely to reduce the overall costs of litigation.

3.17 However, this requirement needs further thought. As the Commission sets out,[15] this requirement would not in itself resolve the position of unchallenged hearsay statements – what if no notice was provided, but hearsay evidence was tendered? Is an objection still required? What happens if an objection is late?

3.18 The resolution of evidential disputes in advance of trial is preferable, so there is clarity as to the status of as much evidence as possible. Evidence should be considered admissible if a notice procedure were put in place, and a party sought to introduce hearsay evidence with proper notice, and no challenge was brought within the required time (unless it was not clear until trial that it was hearsay).

3.19 Late challenges should not generally be permitted where proper notice is given. However, if hearsay evidence is tendered without giving notice, then the evidence can be included until challenged. If challenged – even if that challenge is late – the evidence should be presumptively excluded unless there is good reason for it to be retained, and there is an explanation as to why notice was not given.

3.20 A hybrid solution might be for hearsay in witness briefs to be regulated by way of notice procedure, but with the common bundle being subject to a different regime such as that suggested under Option 1.

3.21 However, we reiterate that we would only support any changes which introduce a notice requirement being made in conjunction with the broader changes proposed to the High Court Rules, to avoid creating unforeseen inconsistencies.

Question 9: other problems arising from the inconsistencies between the Act and the High Court Rules

3.22 We are not aware of any specific problems arising. However, we support, in principle, any changes to remove or clarify any inconsistencies, as that is in the interests of litigants and their representatives particularly where any changes are made in conjunction with the wider reform of the High Court Rules).

4 Defendants' and co-defendants' statements (chapter 4)

Question 10: approach to defendants' mixed or exculpatory statements

4.1 We have received feedback from defence counsel that the current approach to playing exculpatory statements in court is causing unfairness. Consistent with what is noted in the Issues Paper, we have also heard feedback that there is regional variation in whether prosecutors will regularly lead evidence of a defendant's statement. At times this has expressly been a tactical decision in order to force a defendant to give evidence.

4.2 This approach risks creating unfairness by withholding relevant evidence from the decision-maker. In addition, a defendant's statement, even one that is entirely exculpatory, is likely

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15 At [3.68– 3.72].

to provide some benefit to the prosecution as it provides an insight into possible defences that can lead to further investigation.

4.3 We understand Judges are often reluctant to require a prosecutor to play a statement. This outcome is unsurprising in light of the long line of cases that refer to the Crown's discretion in regard to how it presents its case.[16]

4.4 We also consider it is not ideal that section 113(3) be relied upon in order to adduce a defendant's statement (as was left open in *R v King*, in relation to section 113(3)'s predecessor),[17] given it requires a relatively strained interpretation in order to apply this section to specific evidence, rather than the calling of a witness that would not otherwise be part of the prosecution case.

4.5 In contrast, the feedback we have received suggests the approach to mixed statements is more settled, with these generally being played in full (as opposed to only the incriminating parts being adduced).

4.6 Therefore, we consider that including a provision to allow the Court to admit a defendant's statement where this is necessary to avoid unfairness strikes an appropriate balance between the prosecution's discretion and the defendant's fair trial rights.

Question 11: should a defendant's statement contained within a hearsay statement be subject to the Act's hearsay provisions

4.7 We agree there is a tension between the current wording of section 27 and the position reached in *R v Hoggart*, and consider the Commission's proposed amendment is appropriate to rectify this issue.[18]

Question 12: Admissibility of defendant's hearsay and non-hearsay statements against co-defendants

4.8 We agree legislative reform is necessary in light of the issues canvassed in the Issues Paper, and support the option set out in question 12.

5 Unreliable statements (chapter 5)

Question 13: should s 28 be amended to clarify its purpose and the relevance of actual reliability

5.1 In our view, section 28 should be focused on the circumstances in which a defendant's statement is made, rather than considering whether the content of the statement is true. This accords with our position expressed as part of the Commission's second review of the Act.

5.2 Accordingly, we agree that section 28(1) should be amended to refer to the circumstances in which a statement was made (option 1). We consider this would be consistent with the

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16 See for example *R v Fuller* [1966] NZLR 865, where the court refers to a prosecutorial discretion not to call a witness who gave evidence in depositions that was not accepted, which was decscribed as the "established position in New Zealand since 1902".

17 *R v King* [2009] NZCA 607.

18 *R v Hoggart* [2019] NZCA 89.

wording of subsections (2) and (4). It would also ensure the section is engaged where the circumstances of a statement give rise to concerns, rather than just the content.

5.3 However, once section 28(1) is engaged, we consider actual reliability can be a relevant consideration in determining whether the evidence should be admitted. Option 2 places additional focus on the actual impact the circumstances of a statement has had on its reliability (rather than its *likely* impact). Inconsistency with other evidence can be a good indicator that a defendant's statement is unreliable. Similarly, a statement that was made in circumstances that raise reliability concerns could be found to be sufficiently reliable if it is consistent with other evidence (particularly evidence that would not otherwise be known by a defendant if their account was not true). Accordingly, we also support the changes proposed in options 2 and 3.

5.4 Given the risks associated with false confessions and consequential miscarriages of justice, the section should provide that clear and independent evidence of reliability is required to recognise the dangers noted by Glazebrook J in *R v Wichman*.[19] In order to prevent a section 28 determination from becoming a mini-trial, the force of corroborative evidence which allays unreliability concerns would have to be evident without much further inquiry.

5.5 While these changes may mean that evidence is unlikely to be excluded as a deterrent to poor police practises, we consider these issues are better dealt with under section 30 (or section 29, for the most serious cases of impropriety).

5.6 This may leave a gap in relation to situations where an interview is carried out 'by the books' and the defendant does not have any personal characteristics that may impact reliability (for example, psychological or mental issues), but nevertheless makes admissions that are inconsistent with other evidence. However, in our view it would be appropriate for this to be left for the jury or fact-finder to balance the confession against any other evidence that is inconsistent with it.

Question 14: standard of proof for s 28 assessment

5.7 In our view, the current standard of proof should be retained. Requiring the prosecution to prove a statement is reliable beyond reasonable doubt may be setting the standard too high, particularly given the section 28 assessment is often focussed on circumstances that can have large 'grey areas' (for example, the impact a defendant's mental or psychological issues are likely to have had on an interview). We also consider that keeping the standard of proof as on the balance of probabilities is more consistent with section 28's focus on admissibility, and the court's role as a gate-keeper of what evidence can properly be put before the jury.

5.8 The admissibility of visual identification evidence under section 45 appears to be operating without issue while using the standard of beyond reasonable doubt. However, the use of this higher standard at the admissibility stage raises some concerns around inconsistent findings (at least in theory) arising from a judge admitting evidence on the basis that they are satisfied of its reliability beyond reasonable doubt, only for the evidence to be rejected by a jury applying the same standard.

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19 *R v Wichman* [2015] NZSC 198 at [436]-[438].

6 Investigatory techniques and risks of unreliability (chapter 6)

Question 15: should risks that an investigatory technique produces unreliable evidence be considered under s 30

6.1 In our view, section 30 is the appropriate section to determine the admissibility of evidence that has been obtained through use of investigatory techniques that are known to carry a risk of producing unreliable evidence.

6.2 There have been several high-profile cases where particular techniques have resulted in unreliable confessions (for example, Mr Big operations or interviews using the Complex Investigation Phased Engagement Model). In some of these cases, those techniques have been carried out in ways that could be deemed unfair. However, we stress that this requires a case-by-case assessment – the use of these techniques may not inherently result in unfairness, and should not automatically engage the admissibility test.

6.3 This would leave section 29 to deal with the most significant breaches of police standards, with a higher standard needed to admit any evidence obtained via such breaches.

6.4 Our preference would be for section 30(6) to be amended to allow a judge to take into account a known risk that the investigatory techniques used would produce unreliable evidence when determining whether the evidence has been obtained unfairly.

6.5 We do not consider the section should import the factors set out in sections 28(4) and 29(4). For the reasons set out above, section 28 should be the main provision to deal with any reliability concerns arising from the personal characteristics of a defendant. Importing these factors could also potentially lead to an outcome where evidence is deemed to be unfairly obtained solely due to the personal characteristics of a defendant without any objectionable action by Police (though situations where Police question a defendant that is known to have mental or psychological issues without adequate protections and mitigations could still rightfully be considered unfair).

6.6 We also do not consider that section 30(3) needs to be amended to include a factor specifically focussed on the risk of unreliability. If the scope of 'unfairness' is widened as proposed, then we consider this risk could already be taken into account under section 30(3)(b). We note the concepts of deliberateness and recklessness are likely to be relevant to an assessment of the use of investigative techniques that are known to have reliability risks.

7 Improperly obtained evidence (chapter 7)

Question 16: tendencies in current s 30 balancing test

7.1 We do not consider the current balancing test is being applied in a way that inherently favours admission, or results in unacceptably inconsistent or unpredictable decisions. The current test requires the consideration of several competing principles, many of which carry significant importance. It is also by necessity an assessment driven by the specific circumstances of each case. Considering these competing factors, some variability can be expected.

7.2 However, we agree a cautious approach should be taken before drawing conclusions based on a review of appellate decisions in this area. In addition to the limitations in the available data noted in the Issues Paper, we consider that defence appeals against decisions to admit evidence are more likely than prosecution appeals against decisions to exclude. [20] Prosecuting bodies are required to obtain approval from the Crown Law Office before any appeal can be pursued, and for appeals on a question of law there must be sufficient public interest.[21] Admissibility issues are also regularly raised as part of appeals against conviction by defendants. Given this, appellate decisions may be more likely to have come from first-instance decisions to admit evidence.

Question 17: introducing an onus on the prosecution to the balancing test

7.3 In our view, it is not clear that the lack of onus expressed in the balancing test is affecting how it is applied. As is inherent in the concept of a balancing test, admissibility will be determined by the number and significance of factors for and against. Placing an onus on the prosecution would only affect those cases where the competing factors are evenly matched. We do not consider that these cases are occurring with such regularity that legislative change is required.

7.4 We consider that the comments from the Australian Law Reform Commission cited in the Issues Paper have weight – if an investigating agency has breached the law or rights of a defendant, it should be on that agency to explain the reasons for the breach and justify why the evidence obtained through this should be admitted.[22] However, this is arguably already happens under the balancing test. If the evidence is found to have been improperly obtained under section 30(2)(a) there will, by definition, be factors before the court that support exclusion, and the evidence will only be admitted if sufficient justification is put forward.

Questions 18 and 19: clarifying what is being balanced in s 30(2)(b)

7.5 We agree with the proposed wording set out at paragraph 7.60 as better encapsulating the ultimate focus of the section 30 analysis. However, we also consider that the need for an effective and credible system of justice must remain a relevant consideration. As recognised in *Hamed v R*, this factor can cut both ways.[23]

7.6 If reference to this is removed from section 30(2)(b), we consider it should be added as one of the section 30(3) factors. In our view, including this with the existing section 30(3) factors would be preferable to placing it in a separate, new subsection. Having this factor separate could create uncertainty as to how it is to be taken into account as part of the balancing exercise, and be interpreted as it having greater weight than the other factors included in section 30.

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[20] Issues Paper at [7.26].

[21] *Solicitor-General's Prosecution Guidelines*, [26.3] and [26.9]-[26.13].

[22] Issues Paper at [7.51].

[23] *Hamed v R* [2011] NZSC 101.

Question 20: Clarifying the relevance of each s 30(3) factor

7.7 We do not consider splitting the section 30(3) factors into whether they favour admission or favour exclusion of evidence would provide additional clarity. As noted elsewhere in our submission, we consider that some of the factors can cut both ways depending on the circumstances of the particular case.

Questions 21 and 22: the importance of any right breached by the impropriety and the seriousness of the intrusion on it

7.8 We agree that one of the section 30(3) factors should refer to the importance of any statutory requirement, rule of law or procedural protection that has been breached. Though section 30(3)(a) only refers to the importance of any right, in practice breaches of the Practice Note on Police Questioning and laws other than the Bill of Rights are regularly assessed under the balancing test. We agree it would be appropriate to recognise this, as it would be consistent with the definition of 'improperly obtained evidence', which goes beyond just evidence obtained due to breaches of the Bill of Rights.

7.9 Consideration could also be given to retaining a separate subsection relating to the importance of any rights breached (i.e, alongside a subsection that focuses on the importance of a statutory requirement, rule of law or procedural protection). This would highlight the increased importance of the Bill of Rights.

Questions 23 and 24: the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith

7.10 We are neutral regarding the proposed changes to the wording of s 30(3)(b) – while as currently drafted it is capable of being interpreted widely, we consider that it is still leading to an analysis of the knowledge and intent of the investigating agency.

7.11 Regarding the reference to bad faith, we agree with the reasoning in *Shaheed* and *Williams* that good faith on the part of an investigating agency should be seen as a neutral factor, as it is the standard we should expect of people in this position.[24] While findings of bad faith are rare, we consider this is likely attributable to it being relatively difficult to establish and an understandable reluctance on the part of the courts to make such a finding without a sufficient evidential foundation.

Questions 25, 26 and 27: the nature and quality of the improperly obtained evidence, and the seriousness of the offence

7.12 We are not aware of any issues with the current wording of section 30(3)(c). As it is currently applied, the subsection can allow the courts to take into account the probative value of the evidence along with the centrality of the evidence to the prosecution case. We do not consider the latter to be a flaw in the application of the balancing test – the potential impact of exclusion, and whether this will result in dismissal of a charge, should be a relevant consideration to the decision.

[24] *R v Shaheed* [2002] 2 NZLR 377 (CA); *R v Williams* [2007] NZCA 52,

Questions 28 and 29: availability of other investigatory techniques

7.13 We consider there is merit in retaining this factor, which is often interconnected with questions of whether any breach was deliberate, reckless, or done in bad faith, or there was urgency or safety concerns at play.

7.14 The availability of alternative techniques is a factor which generally would favour exclusion. In our view, intentional illegal or unfair Police actions where there was a legitimate way to obtain evidence should favour exclusion. However, in many cases it will not be clear at the time whether a search is illegal or unfair. In those situations, if there is no suggestion of bad faith and the evidence could or would have been obtained legitimately through some other means, there may be good reason why such evidence could be considered admissible.

7.15 We agree with the Commission's view that a lack of alternative investigatory techniques through which the evidence could be obtained legitimately should be regarded as a neutral factor at best. Many evidence-gathering techniques involve state intrusion into what is generally considered to be private behaviour. Evidence which has been improperly obtained, by definition, is evidence which has been obtained in breach of a person's rights or unfairly. The public are entitled to be protected from evidence-gathering methods that are not legislatively or judicially approved. To permit an investigative agency to argue that "there was no proper, lawful or fair way for us to gather this evidence, therefore the evidence we improperly, unlawfully or unfairly obtained should nevertheless be admitted" is not consistent with the protection of rights.

7.16 While we consider this factor should remain, we agree it would be appropriate for section 30(3)(e) to be clarified that it applies to other investigatory techniques that do not involve any impropriety, rather than focusing solely on breaches of rights.

Questions 30 and 31: availability of alternative remedies

7.17 We are neutral as to the need to retain this factor, given it is only likely to be engaged in very rare circumstances.

Questions 32 and 33: risk to safety or urgency

7.18 We consider that both these factors should remain in section 30(3). While the Search and Surveillance Act 2012 has codified the availability of warrantless search powers to address situations where there are safety risks or urgency, it is appropriate to have the fallback of the balancing test to determine admissibility where this has not been complied with. This can allow a court to take into account how significant the non-compliance was.

Question 34: should an additional factor be included regarding practicalities of policing

7.19 We do not consider it is necessary to add in a factor recognising the practicalities of policing. Some of these practicalities are likely to be covered by existing factors. In addition, this may unintentionally signal that convenience on the part of police can justify illegal or unfair activities. As section 30(3) is non-exhaustive, if there were a particular case where practical considerations had additional relevance, it would be open to the Court to take these into consideration in carrying out the balancing test.

Question 35: other amendments to s 30(3) factors

7.20 We do not consider any further amendments to the section 30(3) factors are necessary.

Question 36: role of causation

7.21 We consider the current flexible approach to finding a causative relationship between how the evidence was obtained and any impropriety that was involved is appropriate. As we have noted above, section 30 must be able to be applied to a broad range of circumstances.

7.22 In relation to the options presented, we consider rewording section 30(5) to refer to "in connection with" runs the risk of including evidence that is too distinct from the impropriety. We also do not consider it is necessary to include the level of causation in the section 30(3) test. While this may be taken account as part of the balancing test (given section 30(3) is a non-exhaustive list of factors), causation is likely to be most relevant at the first step in the process in determining whether the evidence has been improperly obtained.

8 Prison informants and incentivised witnesses (chapter 8)

Question 37: is the current approach to admissibility of prison informant evidence adequate

8.1 In our view, it is likely too early to assess whether the *Solicitor-General's Guidelines for Use of Inmate Admissions* is sufficient, given the length of time the guidelines have been in force and the fact that prison informant evidence is relatively uncommon. However, we acknowledge that the guidelines appear to address the most significant concerns with this type of evidence.

Question 38: potential additional controls on the admissibility of prison informant evidence

8.2 Some practitioners have noted with concern how impactful evidence of this nature can be, suggesting that it is given disproportionate weight for what is evidence from someone who does not have direct knowledge of the offending. This may also be reflected in the well-publicised cases involving wrongful convictions referred to in the Issues Paper where prison informant evidence has been adduced. Given the risks involved and the potential disproportionate weight, there may be a good case for such evidence being subject to greater scrutiny before it is admitted.

8.3 Of the options presented, we consider that a reliability threshold that takes into account the majority of the factors identified by the minority in *W (SC 38/2019) v R* has merit (being options 1 and 3). These factors are generally well targeted, and could be applied in a way that avoids making the test for admissibility into a mini-trial.

8.4 However, given concerns raised by this type of evidence relates to its reliability, we question whether the significance of the evidence should be included as a factor. We consider that relevance is already sufficiently dealt with under section 7 of the Act.

Questions 39 and 40: should the judicial directions be enhanced

8.5 We do not consider it is necessary for the Act to require a warning be given to the jury. As the existing caselaw provides, such a direction is likely to be given in almost all cases. Counsel and Judges are sufficiently alive to the risks posed by this type of evidence that there is little utility in including this as a requirement.

8.6 In our view, it is appropriate to leave the form and timing of the direction up to the trial judge, rather than prescribing this in greater detail in legislation. To some extent, the jury trial system operates in reliance on a trust the jury will listen to and comply with any directions given to them. Given this, it is appropriate these directions remain as one of the tools available to mitigate the risks of miscarriages of justice. While we do not consider including a list of potential issues (along the lines of those identified in *Baillie v R*) in section 122 is likely to cause any practical issues, it is preferable for these issues to be included as matters the trial judge should consider, rather than requiring that each be included in the section itself.[25] This would allow Judges to tailor the direction to the specific circumstances of the case.

Question 41: the need for additional safeguards

8.7 As noted above, the Solicitor-General Guidelines have only been in place since August 2021. The use of prison informant evidence is also relatively uncommon. Given this, it is too early to say whether these safeguards are sufficient.

Question 42: wider application to other incentivised witnesses

8.8 We consider that any potential reform focussed on widening of the approach under the Act to other kinds of incentivised witnesses should be underpinned by sufficient evidence and research. The general mechanisms in the Act that control the admissibility and appropriate use of potentially unreliable evidence are likely sufficient to address many of the issues that can arise in relation to this type of evidence. Given this, we do not consider reform is necessary at this stage.

9 Veracity evidence (chapter 9)

Question 43: application of veracity provisions to evidence of a single lie

9.1 We do not consider this aspect of the Act requires amendment. In our view, existing caselaw has likely reached the correct interpretation of this section, where a single instance of lying can potentially be enough to engage the veracity provisions but in most cases will not be sufficient to engage the admissibility threshold of being 'substantially helpful'.

Question 44: utility of ss 37(3)(d) and (e)

9.2 We consider these factors are unlikely to be regularly engaged, but could in some cases. Accordingly, it may be worthwhile retaining these factors in the Act. By way of example, these may be relevant in a situation where a witness has previous convictions for dishonesty offending that would raise questions about their veracity, but the evidence they are being called to give is minor or administrative in nature (e.g, to provide chain of custody of CCTV footage) and for which there would be no benefit in lying about. In such a situation, there may be good evidence of a disposition to lie, but leading this as veracity evidence may not be substantially helpful because of the nature of their evidence.

9.3 There may also be situations where, for example, known issues between a witness and a defendant that amounts to bias and a motive to lie could bolster the strength of evidence of

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[25] *R v Baillie* [2021] NZCA 458.

a disposition to lie on the part of the witness. While we note the comments in the issue paper that this involves merging a general disposition to lie with a motivation to lie in the specific proceedings, in some ways this is engaged any time veracity evidence is being used – ultimately, the purpose of leading veracity evidence is to support a submission that the witness is lying in the particular proceedings.

9.4 Further, an available alternative interpretation of the previous inconsistent statement factor set out in section 37(3)(c) could be considered. As the Supreme Court in *Hannigan* noted, a previous statement by a witness that is inconsistent with their evidence at trial will almost always be relevant, and its admissibility will not fall to be determined under the veracity provisions.[26] The Commission recommended in light of this that subsection (3)(c) be repealed, which was accepted but has not been actioned. However, we consider that previous inconsistent statements that are not directly relevant to the evidence at trial could still have relevance to a witness' disposition to lie. A (perhaps stereotypical) example of this could be a political figure who has made public comments on something, and then subsequently changed their position. An argument could be made that the intentional 'walking back' of previous comments can provide stronger support for finding a lack of veracity, as this inherently involves an acceptance that the person has previously been untruthful. This can be contrasted with a witness who has previously made a false statement, but maintains that they were telling the truth.

Question 45: Should the Act provide guidance on factors relevant to assessing whether substantially helpful test is met

9.5 We agree the veracity provisions could be improved by including guidance as to how the substantially helpful test is to be applied, and agree this is not currently provided by section 37(3). This would be consistent with the approach taken to propensity evidence about defendants in section 43. We note the factors at section 43(3)(a) to (c) could be adapted for this purpose.

9.6 However, there is also merit in retaining the factors in section 37(3)(a) and (b). While the Issues Paper is correct that these are effectively two types of veracity evidence, they can also potentially give additional weight to the presence of a disposition to lie. Lying in the face of a legal obligation to tell the truth can be seen as more serious than lying in other circumstances. We also consider the presence of one or more convictions for dishonesty offences may provide greater certainty that the witness has been dishonest (albeit certainty that is based on a rebuttable presumption under section 49 of the Act).

Question 46: expanding circumstances where veracity evidence can be offered against defendant

9.7 This is a complex issue, with good arguments on either side. As set out in the Issues Paper, the current provisions that govern the admissibility of veracity evidence against a defendant do not completely reflect the common law position that preceded the Act. They create significant loopholes that allow challenges to a witness' veracity to be put before the fact-

[26] *Hannigan v R* [2013] NZSC 41.

finder without engaging section 38(2) and allowing the prosecution to seek to offer veracity evidence about the defendant.

9.8 However, expanding section 38 to include challenges to a witness' veracity made by a defendant outside of court (for example, during a police interview) raises concerns. Defendants could potentially open themselves up to veracity challenges without realising the significance of their statements, potentially making what is effectively a tactical decision without the benefit of fully informed legal advice. Even if a defendant has counsel with them during the interview, at that stage the lawyer is unlikely to be aware of any potential veracity issues about a witness or the defendant, and in any event may not be able to pre-empt every answer their client gives. We note that these concerns are not engaged by attacks on a witness' character during the course of cross-examination.

9.9 On balance, we consider widening the application of section 38 to include challenges made to a witness' veracity made by a defendant in out of court statements, or by defence counsel in the course of cross-examination is appropriate. While as noted above this raises some concerns, the additional safeguards of requiring approval from the judge, and the substantially helpful test should ensure that veracity evidence can only be used against a defendant in appropriate cases.

Question 47: use of 'veracity' in other parts of the Act

9.10 As identified in the Issues Paper, the way 'veracity' is used in sections 37-39 differs from how the term is used in other parts of the Act. We are not aware of this causing any difficulties in practice. However, given this has the potential to cause confusion, it may be desirable to tidy up this issue.

10 Propensity evidence (chapter 10)

Question 48: is the current threshold for admitting propensity evidence causing problems in practice

10.1 We do not consider a case has been made that would justify adjusting the threshold for admitting propensity evidence, and are not aware of this causing any issues in practice. In the Law Society's view, the present test meets the public interest goal of having evidence that has probative value available to the fact-finder, unless it has an unfairly prejudicial effect. While the wording of the test reflects the general admissibility principle in section 8, in practice the factors in section 43(3) and (4) act to heighten the bar of what is regarded as having probative value to a matter in issue, and recognise the additional risks of unfair prejudice associated with this type of evidence.

10.2 While the Court's current approach to section 43 has been against setting out strong principles as to how the admissibility test should be applied, we do not consider this is a significant issue. As with the section 30 balancing test, this is a fact-specific exercise which may not lend itself well to being governed by prescriptive caselaw.

Question 49: is the approach to prior acquittal evidence causing problems in practice

10.3 We do not consider the approach to prior acquittal evidence is causing issues. As currently drafted, courts can take into account any unfair prejudice arising from the length of time since the alleged events that were the subject of the prior acquittal. While a challenge to

the admissibility of such evidence in *Brooks* was unsuccessful, as noted above the admissibility of propensity evidence is a fact-specific exercise.[27] We agree that prior acquittal evidence commonly raises its own specific considerations (for example, the effect of time on memory, the availability of records, and the ability to locate relevant witnesses), the current assessment of whether there is an unfair prejudicial effect to the evidence is sufficient to deal with these.

10.4 More broadly, we consider treating prior acquittal evidence differently to other types of propensity evidence has the potential to create inconsistent outcomes (for example, if historic prior acquittal evidence faced a higher threshold for admissibility than historic complaints that were not reported to Police or did not go to trial).

Question 50: clarifying 'unusualness'

10.5 In our view, it is appropriate this factor retains flexibility to account for the different purposes propensity evidence can be used for. Accordingly, we do not consider it should be removed or require further clarification.

Question 51: assessing reliability of propensity evidence

10.6 We agree the reliability of proposed propensity evidence should be capable of being considered as part of the admissibility assessment. However, care should be taken to avoid the admissibility pretrial hearing becoming a mini-trial. This could include limiting the reliability assessment to considering whether the proposed propensity evidence is inconsistent with readily available facts, or is otherwise inherently implausible. Like the consideration of whether the proposed evidence has been tainted by collusion or suggestibility on the part of the witnesses, exclusion due to reliability concerns should be a relatively high bar, and only be used to exclude evidence that is not reasonably capable of being placed before a jury.

11 Identification evidence (chapter 11)

Question 52: inclusion of 'observation evidence' within definition of visual identification evidence

11.1 As is apparent from the review of caselaw set out in the Issues Paper, this is a complex issue. For the reasons set out below, we consider there may be merit to separating out how visual identification evidence is dealt with under section 45 (which relates to admissibility) and section 126 (which relates to judicial warnings).

11.2 In relation to the admissibility test under section 45, in our view the appropriate starting point is to consider the purpose of a formal procedure. A formal procedure allows a witness to identify who they believe they have seen committing an offence, in circumstances where that offender is not otherwise known to them. The evidence goes to *who* the witness saw, rather than *what* the witness saw that person do. Where a defendant admits being present, in some cases there is little utility in a formal procedure – at best it confirms the witness saw the defendant, but the defendant's statement may mean that is not in dispute.

[27] *Brooks v R* [2019] NZCA 280.

11.3 However, in practice this can be a complicated assessment; for example, where there are multiple other people present who may have carried out the offending instead of the defendant, or a defendant's statement is insufficient to determine whether they are accepting that the witness' evidence is referring to them. The timing of the admission may also play a role – under section 45(3) a formal process must be observed as soon as practicable after the alleged offence is reported, so in some cases it may be required before the defendant has carried out an interview or provided a statement to Police.

11.4 On balance, we do not consider it is necessary to widen the scope of visual identification evidence under section 45 to make it consistent with the inclusive approach. We prefer an approach where a formal procedure should be followed where the evidence provided by the identification is likely to address a matter in dispute. This will require a judgment call by investigators. We consider the situations described in the Issues Paper where a defendant admits to being at the scene as being capable of amounting to a good reason not to follow a formal procedure under section 45(4)(d) (that the investigator or prosecutor could not reasonably anticipate that identification would be an issue).

11.5 Finally, there may be cases where there would be little utility in carrying out a formal procedure, but there is nevertheless a risk of misidentification (for example, the situation that faced the Court of Appeal in *Pink v R*).[28] In those cases, a judicial warning under section 126 may be appropriate. We consider this is potentially a readily available interpretation of section 126 (as the identification of the defendant as the offender comes in part from the witness' evidence, though supported by the defendant's statement); however, this could usefully be clarified in the Act.

12 Medical privilege (chapter 12)

Question 53: scope of medical privilege

12.1 Given the current wording of section 59(1) appears to go further than what was intended, we agree that reform may be justified, though this is difficult to assess in light of the lack of caselaw in this area. We consider that option 1 would be sufficient for these purposes.

Question 54: when a person is acting 'on behalf of' a medical practitioner or clinical psychologist

12.2 As with question 53, it is difficult to assess the necessity of reform in this area given there have been limited cases that raise this as an issue. We consider the points raised in the Issues Paper around the realities in how medical care is now provided are convincing. In our view, option 1 appears to be more closely related to the purpose of the section.

[28] *Pink v R* [2022] NZCA 306.

13 Other privilege issues (chapter 13)

Question 55: amending section 54 to clarify when legal advice privilege applies to documents which are prepared but not communicated

13.1 The Law Society supports an amendment to confirm that the scope of legal advice privilege is not limited to communications between solicitor and client, and also covers documents prepared for the purpose of obtaining legal advice.

13.2 The Law Society has submitted on the Commission's previous reviews of the Evidence Act that this should be the case.[29] The previous submissions emphasise the situation where third parties (for example, experts such as accountants) are asked to prepare material for the purposes of obtaining or providing legal advice. This issue commonly arises in-house, where non-legal employees in an organisation compile information for the purposes of seeking advice from either in-house or external lawyers.

13.3 The Commission has set out the case well for amending the law to resolve any uncertainty, including by reference to comment that limiting the privilege to solicitor/client communications is arguably inconsistent with the policy rationale for the privilege. Furthermore, clarification on the scope of the privilege would likely help parties avoid unnecessary interlocutory applications, and reduce the costs associated with making such applications.

13.4 However, adding "related documents" to subsection (1) may not be the best way to address the issue. Subsection (1) is currently drafted in the context of confidential communications. Adding "related documents" begs the question "related to what?" The obvious textual answer would be "related" to the qualifying communication, but the conceptual link should be back to the legal advice itself (rather than the communication).

13.5 A further issue with expanding subsection (1) in this way is that subsection (1) only relates to communications between the person seeking legal services, and the lawyer, whereas documents appropriately caught by the broader scope may include those prepared by others.

13.6 In our view, a model which reflects the Australian approach would be more appropriate. The Evidence Act 1995 (Cth) separates legal advice privilege into three categories:[30]

(a) confidential solicitor-client communications;

(b) confidential communications between two or more lawyers acting for the client; and

(c) the contents of confidential documents (whether delivered or not) prepared by the client, lawyer or another person for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

13.7 A similar approach could be taken here by splitting section 54(1) into the categories of documents to which the privilege applies (i.e., communications and other documents), and

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[29] Copies of these submissions are available on the Law Society's website, here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0003-123447-l-LC-Evidence-Act-Review-21-6-18.pdf.

[30] See Evidence Act 1995 (Cth), s 118.

carrying over existing subsections (1)(a) and (b) to a new subsection confirming the documents are privileged if those conditions are met.

<u>Question 56: problems caused by the uncertainty as to whether and/or when litigation privilege terminates</u>

13.8 The fact that there is apparently divergent and inconclusive authority on this issue is itself concerning, and the uncertainty seems likely to lead to further dispute. It is also likely most practitioners would be surprised to find there is uncertainty over whether litigation privilege lives on after the litigation ends.

13.9 On the Law Commission's second review of the Act, the Law Society submitted this issue should be left for development by the courts. However, the recent cases cited by the Commission demonstrate the issue remains unresolved.

13.10 Therefore, we now support an amendment confirming litigation privilege does not terminate at the end of the relevant litigation, for the following reasons:

(a) If litigation privilege were to be temporal, or come to an end, it would undermine the very purpose of the privilege, which is to enable parties and their counsel to prepare for litigation to their best advantage and without fear of disclosure. Termination may also lead to the re-litigation of settled or resolved disputes, for example, through arguments about the approaches taken at trial, rather than the content of preparatory materials.

(b) There is no good reason to distinguish between legal advice privilege and litigation privilege. The main reason for the privilege is the same for each: to create a "zone of privacy",[31] so the client can properly assess downside legal risk without fear of documents created for that purpose seeing the light of day, absent a waiver.

(c) The "zone of privacy" envisaged by the Supreme Court of Canada, in relation to apprehended or actual litigation, is too narrow as it does not respond to the point that parties may create enduringly unhelpful documents in the course of preparing their case. Enduring litigation privilege avoids the potential chilling effect of a fear that such documents prepared for the purposes of the proceeding may not remain privileged. Such a chilling effect would undermine the underlying policy rationale for privilege in the first place.

(d) Any concern that enduring litigation privilege might prevent the detection of abuses of process could potentially be met by a limited exception similar to the "interests of justice" exception (appropriately adapted) for settlement privilege.[32] This is consistent with the position the Law Society advocated for in its submission on the second review of the Act.

13.11 Before any amendments are progressed, however, it may be worth examining the impact of the *Blank* decision in Canada,[33] and any relevant issues which may have since come to light

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31 *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319 at [34].
32 Evidence Act, s 57(3)(d).
33 *Blank v Minister of Justice* [2006] SCC 39, [2006] 2 SCR 319.

as a result of that decision, to determine whether this amendment is in fact necessary and appropriate.

13.12 Finally the Commission asks whether, if the Act is amended to confirm litigation privilege does not end, a more general provision should be introduced confirming that to be the case for legal advice and settlement privileges. We agree this would be appropriate to avoid the risk that specific provision for litigation privilege creates uncertainty in relation to the other categories of privilege.

Question 57: problems caused by the lack of reference to a requirement for confidentiality in section 56

13.13 Given there is Supreme Court authority confirming the requirement for confidentiality, and no evidence of confusion in practice, such an amendment is probably unnecessary. However, if there is to be a general tidy up of these provisions, then it would make sense at the same time to codify what the Supreme Court has already confirmed.

Question 58: problems caused by section 53(3)(d)

13.14 Section 57(3)(d) weighs 'the need for the privilege' against the need for a communication or document to be disclosed in the proceeding, and also in the context of the "particular nature and benefit of the settlement negotiations or mediation". The potential issue with the "interests of justice" test as drafted is that it may encourage an assessment that is limited to the relative interests of the parties in the specific litigation, without due regard to the broader policy reasons for the privilege. This appears to have been the approach taken in *Smith v Claims Resolution Service Ltd*.[34]

13.15 It is not an issue per se that the courts may develop new exceptions to settlement privilege under the interests of justice test, as would have been open to the courts at common law in any event. However, any development should be incremental, and care should be taken not to erode the reason for the privilege. The Court's approach to section 57(3)(d) in *Smith v Shaw*,[35] as cited by the Commission, supports this approach.

13.16 In our view, this issue could be left to development by the appellate courts, on the basis that they are likely to consider the scope of the exception in light of the interests in disclosure in the particular case, and against the broader policy rationale for the privilege.

Question 59: should section 66(2) be amended to remove the word "deceased" from the phrase "successor in title to property of the deceased person"?

13.17 Yes. We agree this seems to be an instance of drafting error, for the reasons given by the Commission.[36]

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34 *Smith v Claims Resolution Service Ltd* [2021] NZHC 3424 at [39].
35 *Smith v Shaw* [2020] NZHC 1229 at [17]
36 Issues Paper at [13.47].

14 Trial process (chapter 14)

Question 60: restrictions on disclosure of complainant's occupation in sexual cases

14.1 We agree that the reported lack of compliance with section 88 is concerning, but do not consider an amendment to the Act is necessary. Rather, we consider this would be better dealt with via additional training for prosecutors and judges, potentially alongside a reference to this requirement in the *Solicitor-General's Guidelines for Prosecuting Sexual Offending*. We are aware that training has already been held at some Crown Solicitor's offices. The recent amendments to section 85 brought about through the Sexual Violence Legislation Act 2021 may also assist – while section 88 is not directly affected, that section may mean that judges are more watchful for unacceptable questions.

Question 61: should s 88 protect a wider range of information

14.2 The Law Society would support a wider range of information being included in section 88. As noted in Professor McDonald's report, this could include:

(a) The complainant's occupation at the time of the offending;

(b) The complainant's employment status at the time of the offending or time of trial, including whether they were unemployed or studying; and

(c) The complainant's education or qualifications held.

We do not consider this would cause any prejudice to a defendant. In most cases this information will not be relevant, and could equally be excluded under section 7(2). In cases where this information is material to the offending, section 88 provides for such questions to be allowed with the approval of the trial judge.

14.3 In addition to this, the Commission may also wish to consider whether section 88 should also be expanded to include witnesses who give propensity evidence related to their personal experience of a sexual nature with a defendant. Such witnesses are similarly at risk of traumatisation and intimidation based on their evidence. We also note that the recent changes made by the Sexual Violence Legislation Act 2021 have expanded some of the protections offered under the Act to sexual violence complainants to include propensity witnesses of this kind.

Question 62: amending section 92 to clarify the extent of a party's cross-examination duties

14.4 The Issues Paper accurately summarises the issues with section 92 in the civil jurisdiction. Non-compliance with the section 92 obligations can have serious consequences for parties to litigation. It is perhaps not surprising then that at least some lawyers may be exercising a cautious approach in the context of uncertainty about the obligation, the risks of non-compliance, and the potential for judicial criticism.

14.5 In the civil jurisdiction, pleadings and written briefs (or affidavits) are exchanged in advance of the hearing. With the exception of fresh or updating evidence, each party should be well aware of the evidence the other shall give. The exchange of evidence therefore already achieves the purpose of section 92 to provide a witness with an opportunity to respond, and to give the fact finder the opportunity to assess conflicting evidence from all perspectives.

14.6 While the Court will not have the opportunity to observe a witnesses' demeanour when the case is put to them, the relevance of demeanour to assessing truthfulness has been questioned in recent times.[37] In any case, the Court will still have the opportunity generally to observe a witness' demeanour when giving evidence, and if cross-examining counsel consider demeanour to be important, they will still be in a position to cross-examine accordingly.

14.7 Requiring a party to "put its case" in cross-examination where pleadings and briefs have been exchanged therefore provides little additional benefit (if any). We therefore support an amendment of section 92 to clarify the scope of the duty. We also note such an amendment would be consistent with the Rules Committee's proposal to place more emphasis on documents in civil proceedings, rather than factual witness evidence.[38]

14.8 Limiting the scope of the duty also removes the need for protracted cross-examination, the purpose of which is merely to comply with section 92, or to avoid an allegation that the section 92 duty has not been met. This efficiency:

(a) Should reduce hearing time;

(b) Is consistent with the purpose of the Act to help secure the just determination of proceedings by avoiding unjustifiable expense and delay;[39]

(c) Is consistent with the objectives of both the High and District Court Rules, to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application;[40] and

(d) Recognises the need to improve the affordability of litigation, which is a current focus of the Rules Committee in its reform proposals for the Disputes Tribunal, District Courts and High Court.[41]

14.9 We anticipate parties may incur some time and cost following the amendments, when ensuring material matters in the briefs of evidence/affidavits are properly responded to in the exchange of evidence process. However, this is something that should already be happening, and any increase in cost at this juncture will likely be nominal.

14.10 The section 92 obligation should remain unchanged for evidence led at trial (for example, updating evidence) or where a submission contradicts a witness' evidence (see, for example, *E v R*,[42] where the prosecution had an obligation under section 92 to cross examine a defendant on his delay in raising a particular explanation, before inviting the jury to reject the explanation because of the defendant's delay in raising it).

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[37] See, for example, Lord Leggatt's keynote address "Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony" for the *At a Glance Conference* on 12 October 2022.

[38] See the Rules Committee's *Improving Access to Civil Justice* (November 2022) report.

[39] Issues Paper at [14.15], and Evidence Act, s 6(e).

[40] High Court Rules 2006, r 1.2 and District Court Rules 2014, r 1.3.

[41] See the Rules Committee's *Improving Access to Civil Justice* (November 2022) report.

[42] *E v R* [2010] NZCA 202.

14.11 We also propose an additional corresponding amendment to expressly provide that, in a civil proceeding, a witness for a party is deemed to be aware of contradictory evidence contained in a brief of evidence or affidavit served on that party by another party to the proceeding. This will place an ancillary obligation on lawyers to ensure the opposition briefs of evidence are circulated to their client's witnesses for any responses to challenges.

14.12 While the proposed changes may have benefits in civil proceedings, we are more sceptical as to whether this would translate to the criminal context. In criminal matters, it is not uncommon for witnesses to fail to come up to brief, and for material that is not included in a prosecution witness' formal written statement to be adduced (potentially unexpectedly). Because of this, counsel can get unexpected benefits from questioning a witness in detail.

14.13 Trial judges will also often be reluctant to intervene in questioning (outside of situations where impermissible questions are asked). This is likely in part because the defendant is not required to file formal statements with the court, so it is less clear what is in dispute. However, there may also be an aspect of not wanting to be seen to favour one side over another in front of the jury.

14.14 We do not expect the proposed changes would lead to a significant difference in how criminal trials are run, as many practitioners would likely continue with their current practice in case they receive an advantageous response in cross-examination.

Question 63: amending section 95 to clarify the role of a person appointed under section 95(5)(b)

14.15 In our view, this is a complex issue. Any uncertainty in the role of counsel who are appointed under section 95 is concerning, and should be clarified out of fairness for all individuals involved.

14.16 However, this has the potential to raise issues of fair trial rights. If the role of counsel appointed under section 95 is limited to putting an unrepresented party's questions, then there is an increased reliance on the unrepresented party (most of whom have no legal experience) understanding their cross-examination duties. While a judge can provide guidance on what this means, in practice it will depend on factors such as the nature of the defence being run, and what other witnesses the unrepresented party is intending to call (as it can be expected that these may not be briefed as competently as they would be if counsel had been engaged).

14.17 On balance, we support an amendment to section 95 to clarify both that:

(a) The role of a person appointed under section 95(5)(b) is limited to putting the unrepresented party's questions to the witness; and

(b) A lawyer appointed under section 95(5)(b) to put the defendant's or party's question to the witness is not acting as counsel for the defendant or party.

If there is potential for the lawyer appointed to have a wider involvement (for example, questioning other witnesses, or making submissions), it is appropriate for the Court to instead appoint an amicus or standby counsel, depending on the circumstances.

14.18 For completeness, we also note that the application of section 95 appears, in practice, to have broadened from what may have initially been envisaged. Practitioners have observed that the Family Courts in certain regions have also developed a practice of appointing a lawyer or a lay person who will put the unrepresented *complainant's* questions to the defendant or a witness (relying on sections 95(2) and 95(3) of the Act). This is intended to prevent a situation where an unrepresented victim of violence is required to personally cross-examine his or her perpetrator by having to put questions to that perpetrator, thus creating a risk of the type of revictimisation that section 95(1) seeks to preclude.

14.19 We therefore recommend further amendments to section 95, to explicitly recognise that:

(a) A judge may appoint a person to put an unrepresented complainant's questions to the defendant, or to another witness; and

(b) The appointed person's role is limited to putting the unrepresented complainant's questions to the defendant, or to another witness (even where the appointed person is a lawyer).

15 Other issues (chapter 15)

Question 64: amending s 9 to clarify when the court should admit evidence by agreement

15.1 We question whether the significance of this issue warrants any amendment. We do not expect adding in a requirement that any evidence intended to be admitted under section 9 should have probative value that outweighs any unfair prejudicial effect would cause issues – indeed, we would hope that no counsel are agreeing to the admission of evidence that would fail this test. However, it may be that some judges may feel uneasy interfering in what is effectively a tactical decision on how a defence is run at trial. If this were added, we would expect that any appeals on decisions like this would simply be reframed from being about trial counsel competence to whether the trial judge should have exercised a discretion to step in.

15.2 Regarding whether section 9 should require a judge to consider the desirability of avoiding unjustifiable expense and delay, we do not consider this is necessary. In our view, shortening the length of trial is the predominant motivation for agreeing evidence under section 9.

Questions 65 and 66: novel scientific evidence and undercover officers

15.3 We are not aware that either of these topics are causing issues in practice, and as such do not consider that any reform is necessary at this time.

16 Conclusion

16.1 We hope this submission is helpful to the Commission in its review of the Act. We would be happy to discuss this feedback further, if that would be helpful. Please feel free to contact me via the Law Society's Law Reform & Advocacy Advisor, Dan Moore (dan.moore@lawsociety.org.nz).

Nāku noa, nā

David Campbell
Vice-President