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SUBMISSIONS ON BEHALF OF THE NEW ZEALAND BAR ASSOCIATION

ON THE LAW COMMISSION ISSUES PAPER 42

SECOND REVIEW OF THE EVIDENCE ACT 2006

Dated 15 June 2018

MGP Chambers | Level 26, 151 Queen Street | Auckland Central, AUCKLAND

CONTENTS

INTRODUCTORY COMMENT

The New Zealand Bar Association ("the Association") is grateful for the opportunity to present a written submission to the New Zealand Law Commission ("Law Commission") in response to the Issues Paper 42 "Second Review of the Evidence Act 2006". The Association represents the independent bar. Our members practice in all the general and specialists courts of New Zealand. A number of our members but primarily members of our Criminal Law Committee have contributed to this submission.

The rules of evidence are of fundamental importance and as observed by the Chief Justice in *Wichman*:

> [190] Rules of proof and evidence, originally developed through judicial decisions, guard against the risk of wrongful conviction and abuse of criminal process. They protect foundational principles of the criminal justice system such as the presumption of innocence and the privilege against self-incrimination, affirmed as fundamental by the New Zealand Bill of Rights Act.
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> [191] …
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> [192] The principled way in which observance of fundamental principles of criminal justice and fairness in criminal process is protected is through the exclusionary rules of evidence developed to protect against unreliability and unfairness or to prevent impropriety in the use of public powers of investigation of crime and prosecution of offenders. These rules of evidence are addressed in New Zealand under the framework of the Evidence Act".[1]

The review raises important questions. We welcome the opportunity to discuss these issues further with the Law Commission.

[1] *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at paragraphs [190] & [192] per Elias CJ.

CHAPTER 1 – INTRODUCTION

Q1 Should section 202 be retained, and if so, what form should future reviews take?

The Association supports retention of s 202. We propose that the review period be extended beyond 5 years to allow any amendments to 'bed in'. Bearing in mind the ability to include specific terms of reference to permit an examination of wider policy issues, we support timetabling of the scope of review to the operation of the Act.

Q2 Are there any issues associated with the Evidence Act 2006 that are not addressed in this Issues Paper? If so, please let us know.

The Association is satisfied that the Issues Paper deals with the operational issues associated with the Evidence Act.

CHAPTER 2 – TE AO MĀORI AND THE EVIDENCE ACT

Q3 Are any of the Act's provisions creating particular difficulties for Māori? If so, how should the Act be amended to better recognise Māori interests?

The Association observed that the Law Commission's tendency has been to conclude that te ao Māori can be accommodated by various discretions in the Act and has not recommended greater prescription. Examples are the admissibility of evidence on tikanga, evidence from kaumatua and guidance to juries on dangers inherent in cross-cultural identifications.

The absence of case law noted by the Law Commission might in part be down to this lack of prescription in the Act. The Law Commission has written about the issues in a number of papers over time, and it could be said that this analysis suffices to support greater consideration of te ao Māori in the application of the Act. But it might be said, also, that the absence of case law suggests otherwise.

There is a case to say that the approach should be reversed — generally provisions where te ao Māori might be relevant might be the subject of express reference, with discretion to depart. Typically, decision-makers rely on counsel to bring niche matters to their attention. Alternatively, in areas such as this, express references in legislation are needed to guide discretion where counsel are not helpful. Greater use of express reference should support counsel to argue for consideration of te ao Māori (which is, as the Law Commission notes, already possible) and provide prompts for decision-makers where counsel do not themselves raise the matter.

In addition, or as an alternative, inclusion of express reference to te ao Māori in the purpose provision could have the same effect of supporting counsel and decision-makers to consider the relevance of te ao Māori to decisions under the Act.

CHAPTER 3 – EVIDENCE OF SEXUAL EXPERIENCE

Sexual disposition evidence

Q4 What admissibility rule should apply to sexual disposition evidence: should it always be inadmissible, or admissible subject to meeting the heightened relevance test in section 44(3)? How should the Act be amended to achieve this?

In our view sexual disposition is a distinct concept from sexual experience or sexual reputation and there remains a reasonable argument that sexual disposition evidence is therefore not captured by s 44. We agree with the majority of the Supreme Court in *B (SC12/2013) v R*[2] that the concept of "sexual disposition" is distinct from "sexual experience" and "sexual reputation". However, we agree with the Law Commission's preliminary view that all evidence relating to a complainant's propensity in sexual matters should be captured by s 44 and that amendment is therefore desirable.

To restrict the application of s 44 to evidence only of the complainant's interactions with "another person", with the result that she could be questioned on matters relating to her own private "sexual disposition" (and contrary to the policies underpinning s 44), is arbitrary. From the perspective of the jury, a complainant could be unjustifiably discredited by questions relating to sexual disposition just as much as by questions relating to sexual experience and reputation.

In the Association's view sexual disposition evidence should not always be inadmissible. It should be admissible subject to the heightened relevance test in s 44(3). The Association would distinguish disposition from reputation evidence and hence would not support a blanket prohibition on the admissibility of sexual disposition evidence.

We agree with the majority in *Best*[3] that sexual disposition evidence is propensity evidence unlike evidence of reputation which in our view is properly categorised as the way in which a complainant is regarded by others. Disposition evidence is inherently more reliable than reputation evidence.

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[2] *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261.
[3] *Best v R* [2016} NZSC 122, [2017] 1 NZLR 186.

If sexual disposition evidence should be admissible subject to meeting the heightened relevance test in s 44(3), the Association would support extending the application of s 44(1) to evidence relating to a complainant's disposition in sexual matters. We think it preferable that s 44(1) be amended so as to include evidence of sexual matters or behaviour not involving other persons. Evidence as to a person's sexual disposition may arise more commonly via social media, messaging apps and dating apps. Examples include a complainant telling a defendant about her sexual fantasies/shows him sex toys or the like, or a defendant reading one of these fantasies on a complainant's phone. Such evidence might be relevant to the issue of consent and reasonable belief in consent. What if a complainant says she was waiting for marriage before engaging in sexual activity? That might be seen as disposition evidence if the complainant's evidence is that she explained as much to the defendant. If the Crown sought to rely on this evidence to bolster the credibility of the complainant, it should also be subject to an application to the judge and the heightened relevance test.[4]

We support amendment to the Act to define "reputation" as proposed.

If sexual disposition evidence should never be admissible the Association would support amending s 44(2) to replace "reputation" with "reputation or disposition".

Complainant's sexual experience with the defendant

Q5 Should the admissilbity of evidence about the complainant's previous sexual experience with the defendant be subject to greater controls in the Act? If so, what controls or restrictions should there be?

The Association supports the status quo with admissibility governed by ss 7 and 8. Whilst acknowledging that the relevance of a previous sexual relationship or experience between the defendant and the complainant to the issue of consent might still be a matter of debate,

[4] *R v Gallagher* [2017] NZDC 19788 Hobbs DCJ allowed the complainant's evidence that she told the defendant she was waiting for marriage before engaging in any sexual activity. She went on in her evidence to say that she was not actually waiting for marriage, this was just something she said in order to dissuade him from sexual activity. That passage evidence in its entirety was held to be admissible, with Hobbs DCJ placing emphasis at [12] on including her evidence that she was not actually waiting for marriage – "it would be wrong for the jury to be left with the impression that she was in fact waiting for marriage which might, therefore, bolster her credibility. It is admissible simply to confirm and illustrate how she tried to dissuade the defendant on that occasion from engaging in the alleged sexual conduct."

we see the safeguards within ss 7 and 8 as being adequate and appropriate to deal with the risk of illogical reasoning about a complainant's behaviour based on their previous relationship or experience with the defendant.

Amendment to s 44(1) to embrace *all* evidence of previous sexual experience would trigger the mandatory judicial permission s 44(1) process in most cases alleging sexual assault with consequential resource draining pre-trial argument that might well be advanced upon the quite "clear split of opinion among the commentators" referred to within the Law Commission's second review.[5]

On balance it is our view that the likelihood that the existence of a prior sexual relationship between the complainant and the defendant will be relevant is such that the proposed controls are unnecessary.

False or allegedly false prior complaints

Q6 Should the admissibility of a false complaint of previous sexual offending be treated differently from an allegedly false complaint?

Q7 Should false and/or allegedly false complaints be treated as evidence of veracity, sexual experience or as both? If both, could the approach in *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 be simplified or clarified by amending the Act?

There is a basis to distinguish an admittedly or proven false complaint (clean case) and an allegedly false complaint in considering admissibility. A false complaint is of a different evidential value than an allegedly false complaint. The first inquiry must address whether the complaint is false. If it is a clean case the evidence will fall to be considered under s 37 (veracity) and will not engage s 44.

An allegedly false complaint may or may not engage s 44. The alleged falsity may be an allegation that there was no sexual activity at all. In that case s 44 would not be engaged. However, the alleged falsity may turn on the issue of consent. In that case the evidence would potentially engage s 44. As observed by the majority in *Best* at [76]:

[5] Paragraph 3.34

> "Where s 44 is potentially engaged, the judge's permission will always be required and there must be some evidential foundation that the prior complaint was in fact false before it can be even raised with the judge".

An alleged false complaint might therefore more appropriately be considered at a pre-trial evidential hearing in order to determine sufficiency of evidence to support the allegation of falsity.

As observed by William Young J in *Best v R*[6] at [126] and [127] neither propensity evidence nor veracity needs to be proven to be true before becoming admissible. His Honour noted at [129]:

> "More generally, the more plausible and thus the more likely to be true veracity or propensity evidence is, the more willing judges will be to admit it".

The reasonable evidential foundation inquiry would determine whether s 37 is triggered or more particularly whether the evidence is substantially helpful. If following the initial inquiry s 37 was triggered and the alleged falsity turned on for example a consent issue then, if the judge was satisfied that the evidence was substantially helpful under s 37 a further inquiry would need to be conducted under s 44 to determine admissibility.

The Association is not persuaded that statutory intervention will simplify or clarify the approach in *Best*. That approach has been described as a "multi-functional balancing exercise".[7] The Supreme Court decision should be allowed to settle in and reviewed as part of the Law Commission's next review.

Extension of section 44 to civil proceedings

Q8 Should section 44, or an equivalent rape shield provision, apply in civil proceedings?

Yes. The view expressed by Christina Laing in her dissertation (as cited by the Law Commission) is compelling. There is an even stronger justification for subjecting this kind of evidence to the direct relevance test in civil proceedings given that there is a weaker justification for the questioning (i.e. what is at issue is not the liberty of a person but

[6] *Best v R* [2016] NZSC 122
[7] *Hohua v R* [2017] NZCA 89 at [14]

adjudication of a civil right/remedy). The strong counterweight of a defendant's right to a fair trial and to present an effective defence does not apply.

Notice requirement in section 44A

Q9 Should s 44A be amended to require a written application to include the grounds relied on for admission under s 44(3)?

The Association supports amendment to require the written application to include the grounds relied upon for admission under s 44(3).

CHAPTER 4 – CONVICTION EVIDENCE

Q10 Should the relationship between sections 8 and 49 be clarified in the Act? If so, how?

Q11 Should section 49 be amended to clarify when the "exceptional circumstances" test will be met? If so, in what circumstances should the test be met?

Q12 Should section 49 be amended to clarify the evidential effect of convictions when the "exceptional circumstances" test is satisfied? If so, how?

Q13 Should section 49 be amended to adopt a presumptive proof rule?

The drafting of s 49 has posed difficulties. The Supreme Court decisions in *Morton v R* [8] and *Va'afuti v R* [9] have further muddied the interpretative waters of this provision.

What emerges from *Morton* and *Va'afuti* is that considerable care ought to be taken by the Crown in seeking to rely on conviction evidence pursuant to s 49. It would appear that in practice there are now likely to be a limited category[10] of cases where s 49 could be relied on (propensity, veracity and accessory after the fact). It is thought that reliance on s 49 is likely to be unavailable in conspiracy cases, in retrials following mixed verdicts unless convictions are not proximate to offence, and in "parties" cases at least where the secondary party's defence is inextricably linked to the principal(s).

Section 49 issues tend to arise regularly in circumstances where the conviction relates to the same set of facts as the current offending (for example where there is a purported reliance on co-defendants' convictions or where there is a retrial of the single defendant following a mixed verdict, with there have been convictions on some counts but a hung jury on other counts). The test of "exceptional circumstances" does not therefore reflect the practicalities of criminal practice where, retrials in mixed verdict and co-defendants are not exceptional but rather common place.

[8] *Morton v R* [2016] NZSC 51
[9] *Va'afuti v R* [2017] NZSC 142
[10] See for example NZBA Webinar Criminal Law Update 12 April 2018

It is therefore difficult to see how s 49 can continue to operate in its current form – it certainly does not appear to be operating how the legislature intended and it has created significant difficulties in practice for the Crown and defence counsel. It is submitted that tinkering of the wording in s 49 in the ways proposed is not going to be sufficient to overcome the difficulties that have arisen in practice.

Section 49 in its current form with the conclusive proof rule is something of an outlier in comparable jurisdictions and needs addressing.

The Law Commission had suggested a rebuttable presumptive proof rule however, that was jettisoned by parliament in the adoption of the current incarnation of s 49 – there is little background material available to shed some insight into why the legislature departed from the Law Commission's recommendation.

As noted by the Law Commission, a presumptive proof rule would give effect to the same policy reasons behind the need for the admissibility of convictions whilst removing the problematic "exceptional circumstances" proviso (and the need to clarify the evidential effect of a conviction once that test is met).

In light of the suggested adoption of a presumptive proof rule then questions 10, 11 and 12 become largely redundant.

There may not be a need for recourse to s 49 at all. There is a developing practice in the trial jurisdiction whereby counsel are seeking to avoid the strictures of s 49 altogether through the simple adoption of an agreed fact of a conviction (either of a co-defendant or convictions in a retrial situation).

An agreed fact as to a conviction allows the prosecution to offer evidence of the conviction and the defence to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted without having to establish exceptional circumstances and without the judge having to direct the jury about the evidential effect of the conviction(s).

CHAPTER 5 – RIGHT TO SILENCE

Introduction

The right to silence is a fundamental precept of criminal justice in New Zealand. The issues raised cannot be sensibly addressed without a close examination of the basic principles in this area of law.

The first point is that all evidence rules should serve the aim of providing decision makers with relevant facts. Second, the practical reality of the New Zealand trial is that the bulk are held in Auckland with juries of various ethnic and other backgrounds and typically a significant number for whom English is a second language. Therefore, generalisations about cultural norms in answering questions when confronted by authority figures have to be seen against that new norm. Third, any rules need to be simple and plainly stated if they are going to be observed and applied.

The issue of the concept of "right to silence" rightly takes a central place in our criminal law. Whole books, seminars, and a huge amount of legal writing has dwarfed even the Law Commission's lengthy piece.

The Association strongly advocates that "right to silence" is a public good and a positive thing and opposes any erosion of this essential concept. The "fine-grained" distinction between permissible and impermissible uses of a defendant's silence before and during trial is too subtle and too important to leave to chance. The Association position is that ss 32 and 33 should be amended to prevent any adverse inference against a defendant being drawn.

The previous prohibition on comment at trial about a failure to give evidence at trial, then contained in the Crimes Act (s 366), was expressed in absolute terms. With the advent of the Bill of Rights Act, in respect of pre-trial silence, the preponderance of trial judges took the view that adverse comment undermined the right to silence confirmed therein.

Exercise of the right to silence is illustrated in our social/legal history long before the English common law. The most dramatic illustration is biblical where Jesus, accused of religious crimes in a time of great religious tension and foreign occupation by the Romans, is recorded as refusing/declining to speak in answer. The most obvious reason must be that anything he

said would be used against him and then as now, any words from the accused become the tool of the prosecution to twist and turn to meet their purpose.

Nothing has changed in that challenges to the right to silence have two current theories.

The first is the prosecutor's fallacy that if you could only just get that individual to speak, to say something, that the truth would be revealed. Simplistically it is asserted as an obvious truth that, if forced to speak the truth would come out. If not the truth in a factual sense, the suspects/defendant's nature would be revealed by lies or bad attitude or mannerisms or unsavoury private interests.

The second is that silence (when confronted, by the mother, the police or the trial) masks guilt, because an innocent person would always speak. Refusing to do so means or assists the decision you have something to hide and the hidden thing is guilt.

The idea that silence masks guilt is said to be common sense where it is suggested that the archetypical normal person and normal expectation is that if faced with a simple accusation and you didn't do it – then that is the time to enter your denial.

It is disputed that it is a modern New Zealand cultural norm that if an accusation is made then it should be confronted and answered immediately.

First, popular culture or family life does not demonstrate any such thing. Is it anyone's experience that making family members speak reveals who has done what to whom? It may or may not.

The most common experience in responding to accusations by power and authority is in the workplace. In that arena it is the accepted norm that you are entitled to have the whole position and accusation laid out, time given to marshal background and make a coherent answer, and only then is it 'fair' to require answers. But, with or without an explanation, the obligation on the fact finder is to fairly assess facts that are established, not guessed at.

The right at the time of questioning needs to be assessed against the reality of police interview. The modern police interview is not a fact gathering exercise. Police may make further inquiries based on what is said, but most commonly simply lay what they have before others to decide.

Then, and to some extent separately, there are the modern challenges of the sex trial. The theory goes that because a complainant in a sex allegation can be cross-examined, and that such cross-examination puts the complainant "on trial" and is a miserable experience that it is "fair" to have the accused subject themselves to the same process.

The reality is firstly, the police interview of a sex complainant, male or female, adult or child, is now discursive. They are allowed to say what they like and to give it in the order they choose. They are not challenged on improbabilities or inconsistencies. Secondly, there is no time limit. Accounts can be given 1 year, 10 years, 50 years later and are taken at face value.

Compare that with what is done and what is proposed. Proposed amendments to permit adverse inferences as to credibility are premised on the assumption that speaking up at the time of accusation is an important indicator of innocence. Delay, such as saving explanation until you know the full extent of the allegations or, worse, until trial, shows calculation and cunning, untruthfulness, and even guilt.

Delay used to be considered that way for complainants but is now positively disavowed. Delay is specifically excused in abstract terms by the trial judge. "There may be good reasons etc", even if none are offered, or even if the reasons offered are demonstrably not "good".

The police interview is an opportunity to surprise an accused with serious accusations and catch them off guard. This is in the hope of an admission (seldom ends in a trial) or a consistent admission that can be used; or mostly, simply a demonstration of bad attitude.

But it is also the opportunity to commence the future process of repetition of the prosecution case, which is important and powerful. The Crown case is stated in the opening before the jury; the (often pre-recorded) evidence-in-chief of the complainant; in cross-examination under the modern method of stating the prosecution case broken down into

one line propositions and being indifferent to answers, under the guise of "putting the case". The Crown case is then repeated in closing and by the trial judge.

Therefore, it is the Association's view that an absolute "no adverse comment" with zero tolerance is appropriate and clear and leads to the best trial practice.

We are constantly told in Courts that it is wrong to speculate. But that is exactly what adverse comment is in a vacuum (he didn't say anything so it is entirely speculative what he would have/could have/should have said).

Our concern is that "adverse inference" is code for silence masks guilt. As a back-up, that silence is the refuge of the uncredible – illogically, even if they have not said anything.

Q14 Which of the following options should be preferred, and why:

a. **amending sections 32 and 33 to prevent any adverse inference to be drawn from a defendant's pre-trial silence and/or silence at trial;**
b. **amending sections 32 and 33 to permit any appropriate adverse inferences to be drawn (and removing the prohibition on inviting inferences of guilt) from a defendant's pre-trial silence and/or silence at trial; or**
c. **retaining the status quo?**

The distinction between drawing adverse inferences from a defendant's exercise of the right to silence and drawing inferences of guilt is, as the Courts have observed, so subtle as to be impossible to draw. When judges and commentators use expressions such as "a distinction that would tax a philosopher", that is legal writing code for the proposition that it is either a distinction without a real-world difference; or that the concept is too subtle to be useful. Therefore, it is almost certainly ignored by juries in favour of the instinctive reasoning that if it was true it would have been said earlier. The simplicity and clarity of an absolute rule against any inference (guilt or credibility) is easy to explain and understand.

An additional difficulty which applies at present and will apply to any of the three options is ensuring that the appropriate direction is actually given. Our experience is that judges and

counsel appear to be unaware of s 32, as was the case in the recent Court of Appeal decision in *W v R*.[11]

Further, there would never have been a trial where a witness did not say something different or in addition to their initial statement. Complainants do this having been allowed the most discursive and "own story in own words" initial interview, often then played as evidence-in-chief. Defendants, by contrast, are often interviewed by the putting of allegations, with little expectation of concessions, but a hope of bad attitude. It would be extraordinary if something different or new did not emerge during evidence at trial. It always does.

If amendment permits an adverse inference to be drawn against a defendant, then the Crown is likely to stress at every opportunity that there was an inexplicable failure to provide this defence/explanation, and the result is that the defendant is not to be considered credible. This is unfair because there are likely to be many possible explanations for any silence, including legal advice, stress, or correct question not asked.

Q15 Should section 32 be amended to:

a. clarify whether a judge sitting alone is permitted to draw an adverse inference of guilt from a defendant's pre-trial silence?

b. make the drawing of adverse inferences about a defendant's credibility from their pre-trial silence conditional upon the defendant having been cautioned about that possibility?

c. clarify the circumstances in which an adverse inference about a defendant's credibility can be drawn from their pre-trial silence?

Q15 a: There is no principled basis for the situation being different depending on whether there is a jury or not.

[11] *W v R* (CA397/2017) [2018] NZCA 81

The high use of jury trials in New Zealand may be partly because clients and counsel see juries as likely to treat legal directions more generously than Judge Alone Trials. If there are legal differentials, that view, and the elections that follow, carry high financial loading for the criminal law system.

Q15 b reflects the English situation which many jurors will have heard often on UK television programmes. The difference between our s 32 and that situation is one of the reasons why a s 32 direction is important with the present law – ideally such a direction should emphasise that the situation here is not the same as in the UK.[12]

There is a vast amount of writing on the matter, but the prevailing view in England and Wales is that that the warning is cumbersome to administer, complicated as to its actual meaning and extent, and it is entirely uncertain what jurors make of it.

The UK caution essentially warns that (a) you do not have to say anything; but (b) if you do not say anything or do not give a full explanation but say something later, you will be criticised for lateness in terms that suggest guilt or general dishonesty.

The UK situation also often results in counsel who was present at the police interview not being counsel at the trial. As a matter of principle this is to be encouraged because it means that if there is some criticism to be made of the interview process then trial counsel is not conflicted. However, as a matter of practice in New Zealand senior counsel will often put in the effort of attending a police station for a lengthy period afterhours in the expectation of retaining the client. There are likely to be serious difficulties in finding senior counsel willing to take the time to obtain full instructions and give advice in serious situations if continued involvement in the case is going to be ruled out because of attendance at the initial interview.

[12] For an attempt at this see Judge Woolf's Summing Up in *Gurran v R* [2015] NZCA 34: "I need to remind you that he did not have to say anything to the police so the fact that he did not say anything should not count against him. The reason that that is complicated is because we all have televisions in our houses and the English caution to an accused, with which you are probably more familiar with, actually directs an accused person that if they rely on anything that is not said to the police officer it can be used against them [sic]. That is not the New Zealand caution. [64] The New Zealand caution simply says you have got a right to silence. So you cannot use it against him because he did not say it."

A corollary of the extended caution is that police are likely to want to ensure that even defendants who wish to say nothing in response to broad allegations, are required to sit through listening to the details of those allegations, so that it can be raised at trial that the defendant had the opportunity to respond to every detail and failed to do so.

A member reports a recent case where the jury was instructed in relation to a rape complainant "sometimes a fully detailed account will only emerge after several tellings, particularly on a subject which might be embarrassing or distressing to the person giving the account, and the skill and persistence of the interviewer can often be affected too."

Contrast this direction with the prospect of the law permitting a defendant having their defence harmed because they did not mention at a police interview something they later rely upon in their defence.

Such a change to the law would be a significant step away from the right to silence, and therefore an encroachment on the burden of proof.

The Association does not support amendment to permit the drawing of adverse inference about a defendant's pre-trial silence. In the event of such amendment, the Association's position is that an appropriately tailored caution is essential. In our view, any attempt to draft an appropriate caution will only serve to highlight the illogicality of permitting the proposed inference. A caution would have to reflect the circumstances assessed as justifying an adverse inference as to credibility.

Q15 c: The Association does not support any amendment that might permit an adverse inference about a defendant's credibility being drawn from pre-trial silence but if a UK style warning was adopted in New Zealand it would be important to know *when* a failure to mention something would be capable of harming a defence. Presumably it would only be when there was a failure to mention the substance of a "defence" such as self-defence, accident, consent or belief and consent on reasonable grounds, alibi, or that another person was the perpetrator. It could not be the case that a failure to describe a detail such as what another party was wearing could be viewed as a failure capable of supporting an inference of guilt or weakening credibility.

Any attempt to prescribe the circumstances where an adverse inference might be permitted would pose an unenviable challenge.

Q16 Does the relationship between section 32 and the Act's veracity provisions create any difficulties in practice?

We are not aware of difficulties. As noted it is our experience that reference to s 32 is rare.

Q17 Should section 33 be amended to provide guidance on the circumstances in which it is appropriate to comment on the exercise of a defendant's silence at trial?

We do not consider there to be a need for such an amendment.

CHAPTER 6 – UNRELIABLE STATEMENTS

Q18 Should the truth of a defendant's statement be considered when determining its admissibility under section 28? Does section 28 need to be amended to clarify the position?

In response to this vexed question the Association acknowledges the strength of the competing arguments. On the one hand it is difficult to disagree with the majority in *Wichman*[13] that if a person prone to delusions confessed to a murder and identified the location of the victim's remains which had previously been unknown to police, that the truth of the statement ought to be relevant as to reliability. On the other, the dissent of the Chief Justice in *Wichman* and the historic approach to s 28 as summarised by the Law Commission supports a view that s 28 is concerned with circumstances in which a defendant's statement was made not the truth of that statement and that a truth inquiry at the admissibility stage is inappropriate.

Whether the Law Commission concludes that truth ought to be considered or not, the Association supports amendment to s 28 to clarify the position.

We address both sides of the argument.

Truth should be considered but should not determinative

We refer to "truth indicia" as meaning:

(i) corroborating evidence that is not a part of the defendant's statement but confirms or supports what he or she said;

(ii) contradictory evidence that is not a part of the defendant's statement but undermines or is inconsistent with what he or she said; and

(iii) the inherent plausibility of the things the defendant said in the statement.

Truth indicia should be relevant to the assessment of reliability in s 28. Truth should be a permissible, but not overriding consideration.[14] That is, where a statement is unreliable

[13] *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.
[14] cf. the recommendation contained in the Evidence Bill 2005 (256-1), cl 24(2).

because of, for example, the defendant's high suggestibility levels or mental health issues, a judge should be entitled to exclude that evidence whether or not it contains elements of objective truth.

The starting point is the policy aim of s 28. As observed by the Law Commission, the primary purpose of the rule is "to screen out statements that would be unsafe to place before a jury because of the risk of unreliability."[15] The section is not directed at the public policy rationales of excluding evidence obtained by improper, unfair or oppressive police conduct. Those concerns are dealt with under ss 29 and 30. The policy functions of s 28 should be demarcated from those of ss 29 and 30.

It follows from the policy aim of s 28 that the Court should be permitted to take into account truth indicia. One such indicium is the inherent plausibility of the statement. That is, when a judge reads or listens to a defendant's statement for the purposes of a s 28 inquiry, he or she will no doubt form a view as to whether the statement is inherently likely to be true.[16] For example, a defendant states that she was recovering from surgery and unable to run, but then confesses to a criminal behaviour that required a high level of athleticism. It is logical, and probably inevitable, that a judge will feed this assessment into his or her view of the reliability of the statement. The inherent plausibility assessment should be based on objective factors such as logic, chronology and internal consistency.

It is only a small step from considering inherent plausibility to considering other evidence that corroborates or contradicts the defendant's statement. It is logical to use such corroboratory or contradictory evidence to decide whether the risk of reliability has manifested to render the statement unreliable and unsafe to place before a jury.

The Law Commission has referred to the distinction in the case law between internal factors (physical, mental, psychological and intellectual conditions or disabilities of the defendant) and external factors (threats, promises and representations made to the defendant).[17] The Association considers there is a difference in quality between these factors but submits the distinction ought not affect whether truth indicia should be considered:

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15 Law Commission *Second Review of the Evidence Act 2006* (NZLC IP42, 2018) at para 6.38.

16 See *Lyttle v R* [2017] NZCA 245 at [84]–[85].

17 Law Commission *Second Review of the Evidence Act 2006* (NZLC IP42, 2018) at paras 6.8–6.9.

(i) For internal factors, the Supreme Court majority in *Wichman* considered the example referred to above.[18] We agree but note that just because one part of a delusional defendant's confession is corroborated by real evidence does not mean that the statement as a whole is reliable. Judges should be alert to the possibility that, again by way of example, a delusional defendant has by coincidence uttered a truth in one part of his or her statement. A statement should be excluded where the circumstances as a whole indicate that the statement is unreliable as a result of the defendant's mental state and the defendant may have simply stumbled upon the truth in some part of the statement.

(ii) Where external factors are present, such as a threat or promise by the police, the Association considers that, where those threats or promises are not sufficiently serious to meet the section 29 or 30 thresholds, the judge should be able to assess the reliability of statements made by weighing up the effect of those threats/promises against the truth indicia. Again, it should be noted that a defendant influenced by external factors may happen to utter truths in the course of his or her statement, and that should not necessarily lead to the conclusion that the statement as a whole is reliable. We note that s 28(4)(d) and, to a lesser extent (c) confirm that threats, promises or representations made to a defendant are relevant in assessing reliability.

One possible objection to using corroboratory or contradictory evidence as truth indicia is it might lead to unjustifiable expense and delay by increasing the complexity of the s 28 analysis. Judges would have a greater volume of material to consider.[19] This does not justify a legislative prohibition on considering truth indicia. It must be borne in mind that s 28(2) only requires the judge to assess threshold (balance of probability) reliability, not to reach a final view (beyond reasonable doubt) on the truth of the statement. It will vary from case to case how much corroboratory or contradictory evidence is put forward, and counsel and judges will need to make sensible decisions about what sort of material ought to be considered. As an example, in *Lyttle v R* it appears the High Court and Court of Appeal evaluated a number of pieces of corroboratory and contradictory evidence.[20] This does not seem to us to be out of

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18 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [81].

19 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.85].

20 *Lyttle v R* [2017] NZCA 245 at [73]–[83].

proportion in the context of the murder charge that Mr Lyttle was facing and the fact the statement was a confession.

Another possible objection to considering truth indicia is the risk of inconsistent findings between the Court's pre-trial assessment of the evidence and the jury's verdict. For example, a judge may reason that the defendant's confession is strongly corroborated in deciding to admit the statement, but the jury may then return a not guilty verdict. We do not consider this is a good reason to exclude reference to truth indicia at the pre-trial stage. This is because the pre-trial decision is only on threshold reliability and should not be a mini-trial. As we explain below, the corroboratory and contradictory evidence should not be subject to cross-examination at the pre-trial stage. So the Crown's corroboratory evidence may be undermined at trial, leaving the jury with doubt about the truth of the defendant's confession.

It is suggested that s 28(2) might be amended along the lines that "The Judge must exclude the statement unless satisfied on the balance of probabilities that the statement is reliable." This is simpler than the present wording, and confirms the majority's interpretation in *Wichman*. Section 28(4) makes it sufficiently clear to a judge that the circumstances in which the statement was made are a paramount consideration.

Truth should not be considered

There is a strong consensus of opinion amongst those who practice at the criminal bar that the truth is irrelevant to the s 28 inquiry.

The issue was closely considered by the Law Commission in 1999 when it was determined that the truth of a defendant's statement was irrelevant to consideration of reliability under what is now s 28. That position was ultimately adopted by the Select Committee who concluded that "…the truth of the statement should not be used to justify its admissibility, and that the truth of a statement should be determined when the guilt or innocence of the defendant, not the admissibility of evidence is considered". The Law Commission took the same position following the 2013 review.

The majority decision in *Wichman* has given rise to the reconsideration of this question with much reliance on the pivotal investigative breakthrough example given by Justice William Young for the majority. The example describes an extreme and necessarily rare situation and

not one that arose on the facts of *Wichman*. That case considered s 28 in the context of a confession. But many statements that trigger the s 28 inquiry will not amount to a confession but a statement against interest (perhaps offered only to discredit a defendant). How might the truth then be assessed? And if a statement contains multiple assertions of fact that are said to be true/untrue how might a judge determine the weight to be attached to such findings in determining admissibility? There are no simple or obvious answers.

The prospect of a mini-trial conducted to determine the threshold issue of admissibility is very real.

It is difficult to conceive how the truth of a defendant's statement could be reasonably taken into account in considering reliability without a form of mini-trial conducted at the pre-trial admissibility threshold stage. It would be unsatisfactory if a superficial inquiry as to the truth were to be conducted and seen as sufficient to determine admissibility. That is particularly important if the statement does amount to a confession. And a mini-trial to consider truth pre-trial might be seen as usurping the function of the jury and give the appearance of predetermination. If pre-trial, in a judge alone trial a judge has determined that the defendant's statement was truthful and therefore admissible, notwithstanding other reliability concerns, a defendant (or an impartial observer) would likely form the view that his or her guilt has been predetermined. The same concern would arise in a jury trial.

Analogy with s 45(1) and (2) supports the view that the reliability issue in s 28 is a threshold question and it is not for a judge to usurp the function of the jury by determining whether in fact the statement was truthful : *R v Edmond.* [21]

There is also a risk that a judicial determination as to truth will determine the s 28 admissibility issue. That is to say, the truth determination will inevitably overshadow any of the other reliability factors in s 28(4). It is unlikely a judge might find a statement was truthful but nevertheless inadmissible. A consequence is a real risk that consideration of the truth would act as an improper incentive on enforcement agencies, most likely the police, to secure evidence which will enable them to argue the truth of the statement. Conversely the police

[21] *R v Edmond* [2009] NZCA 303; [2010] 1 NZLR 762 at [105] – [106]

would be disinclined to be concerned of circumstances that might give rise to unreliability. Requiring enforcement agencies to ensure that the questioning is undertaken in circumstances positively affecting the reliability of those statements is a reasonable requirement and assists in the overall goals of the criminal justice system.

Finally, it is noted that whilst ss 29 and 30 are the proper avenues to challenge the admissibility of a defendant's statement based on oppression and unfairness, ss 28(4)(c) and (d) permit a judge to have regard to threats, promises, inducements and unfairness in questioning. Improper police practices might therefore properly be considered in the s 28 admissibility determination and in such a case would favour disregard of the truth.[22]

The use of word "reliability" in s 28 suggests that truth is a relevant consideration. Section 28 might be amended to make it clear that the truth of a statement is not relevant to the assessment of reliability.

Q19 If truth is relevant to the determination of admissibility under section 28, should cross-examination of the defendant in relation to the truth or falsity of their statement be permitted at a pre-trial hearing or voir dire?

Cross-examination of the defendant on his or her statement pre-trial is inappropriate because it may require the defendant to indicate aspects of his or her defence in advance. That would be inconsistent with the well-established principle that a defendant need not disclose his or her defence until trial.

Cross-examination would also convert the pre-trial hearing or voir dire into a mini-trial, which unduly lengthens the proceeding and is unnecessary for assessing threshold reliability.

Glazebrook J in *Wichman* suggests the defendant should be subject to limited cross-examination:[23]

> Where an accused gives evidence in a pre-trial hearing or voir dire the Crown should, however, in fairness put to the accused for comment the matters that will be relied on to indicate that the statement is reliable. In this case Mr Wichman chose to testify in the pre-trial hearing that his statement to Scott was false.

[22] Consistent with s 29(3) Evidence Act 2006.
[23] *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [439].

> Where that occurs, given that there should not be a mini trial, the Crown should not extensively challenge that assertion. The cross-examination at the pre-trial hearing in this case remained within proper bounds.

We do not agree that even this limited cross-examination is necessary or desirable. The defendant is able to make submissions on the significance of the corroborating evidence through counsel for the purposes of a challenge to threshold reliability. A defendant would have the right to give evidence at the pre-trial truth inquiry if he or she elected to do so.

The Law Commission has not invited submissions on the related issue of whether there should be cross-examination at a pre-trial hearing of other witnesses (such as police officers) who give evidence that corroborates or contradicts the defendant's statement. An example is a forensic expert in *Lyttle v R* who gave evidence that the water table at Himatangi beach at the relevant time made it impossible for Mr Lyttle to have dug a six foot deep hole to bury body parts. This was said to contradict Mr Lyttle's statement.[24]

We submit that these sorts of witnesses should also not be subject to cross-examination at the pre-trial hearing. Again, that would create a mini-trial on the truth of the statement, and is unnecessary for establishing threshold reliability.

This then begs the question - how might a defendant respond to a pre-trial inquiry as to the truth of his or her statement in order to determine admissibility? Does the process effectively compel a defendant to put all of his or her cards on the table pre-trial? Could doing so lead to further pre-trial police investigations giving rise to a reconsideration of the truthfulness of the statement?

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24 *Lyttle v R* [2017] NZCA 245 at [75].

CHAPTER 7 – IMPROPERLY OBTAINED EVIDENCE

Section 30(3) factors

Q20 Should the centrality of the improperly obtained evidence to the prosecution's case be considered under section 30? If so, should it be considered as part of the assessment in section 30(3)(c) or as an independent factor in section 30(3)? Does section 30 need to be amended to clarify the position?

In practice this is a factor that the Court is taking into consideration in conducting the s 30 balancing exercise – usually under the guise of s 30(3)(c) (i.e. the nature and quality of the improperly obtined evidence) but not exclusively so. For example, the Court of Appeal in the post-*Underwood* decision of *W v R* [25] considered the centrality of the evidence as an independent factor favouring admission of the evidence. The case involved an unlawful search in the context of a prosecution on multiple charges of making an intimate visual recording.

The s 30(3)(c) factors are said to be non-exhaustive so there is no difficulty with this approach but the time has reaslitically come to recognise this as an independent factor pursuant to s 30(3) – this is consistent with the approach that is routinely adopted in the higher Courts.

The Association therefore supports amendment to s 30(3) to include the centrality of the evidence as an independent factor. Whether this factor favours exclusion or admission depends on the context of the case and must remain a matter of evaluation for the Court undertaking the balancing exercise.

The risk of identifying the centrality of the evidence as a factor favouring admission (particularly on serious charges – where these types of issues typically arise) is that it risks being a fallback or crutch for sloppy, incompetent or dishonest police work. The end justifies the means. If police have acted in bad faith or even recklessly and the evidence is central to the Crown case, there is a good argument for it to be excluded to ensure the proper administration of justice.

[25] *W v R* [2017] NZCA 522

In a legal environment where the approach focuses on the "overall interests of justice" (to the Crown, the defence and the community) it cannot be appropriate to have key evidence being presumptively admissible.

The s 30(3)(c) factor (nature and quality of the evidence) is a separate consideration.

Q21 Is the "seriousness of the offence" assessment in section 30(3)(d) sufficiently comprehensible in light of the guidance provided in *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433? Would the assessment be easier to undertake if the guidance in *Underwood* was reflected in the Act? If so, should the Act:

a. define what is meant by "seriousness"?

There is no need to define "seriousness" in the Evidence Act.

The decision in *Underwood v R* [26] now offers helpful guidance on the manner in which the Court is to assess the seriousness of the offending in the balancing exercise. In particular, it is important for the Court to continue to be able to undertake an evalutive exercise which is unconstrained by either an arbitrary starting point or the maximum penalty for the offending.

It is unecessary for the guidance in *Underwood* to be reflected in the legislation because again it risks constraining the exercise of a judicial evaluation. Having guidance in the Evidence Act around "seriousness of the offence" potentially removes discretion and it is very much a decision that turns on the facts of an individual case. It should remain an evaluative exercise that is weighed against the seriousness of the right breached.

The Court in *Underwood* has underlined the Supreme Court's view in *Wilson* [27] that seriousness of the offence cannot have "primacy" in the s 30 balancing exercise.

b. explain when section 30(3)(d) favours exclusion or admission?

[26] *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433
[27] *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.

Since the prima facie exclusion rule was replaced by the *Shaheed* balancing test and the s 30 balancing exercise, experience indicates that impugned evidence is admitted where serious offending is involved. It seems to be a factor that trumps other s 30 factors.

The question as to whether the seriousness of an offence favours exclusion or admission is not particularly ripe for legislative prescription. As the Court of Appeal in *Underwood* observed, it is a factor that often favours admission however, in the context of a serious breach of rights, then exclusion of the evidence, even for serious offending, may well be the proportionate response – it is appropriate that it remains a matter for judicial evaluation.

The other point for consideration is that society's perception of what and when offending may be considered serious is susceptible to change over time and judicial evaluations must have the flexibility to "move with the times" so to speak.

The Association has strong reservations whether any of the factors under s 30 should be amended to presumptively weigh in favour or against admission. This amounts to a very loaded policy call which could have disproportionate effects in some cases. For example, in a case where the entirety of the police case depends upon improperly obtained evidence found in circumstances of bad faith, the Court should be able to exclude the evidence. Presumptively weighting this factor in favour of admission (or any of the other factors) creates a real risk of warping the careful s 30 balancing exercise.

Q22 Should the availability of alternative techniques favour admission or exclusion (or both)? Does section 30 need to be amended to clarify the position?

Q23 Should the absence of alternative techniques have any bearing on the section 30(2) balancing exercise? If so, should this favour admission or exclusion (or both)? Does section 30 need to be amended to clarify the position?

The availability of alternative techniques ought to be a factor that generally tends to favour exclusion. In the event that there are alternative (and lawful) techniques available to police but the police chose not to utilise them, then that is a factor that ought to favour exclusion.

This is consistent with the Chief Justice's position in *Hamed*,[28] consistent with the "overall interests of justice" approach and is consistent with the Law Commission's preliminary view.

The view expressed by McGrath J in *Hamed* that because there were no alternative investigatory techniques available to police, this favoured admission of evidence unlawfully obtained, is wrong.

At present s 30(3)(e) allows the Court to undertake an evaluative approach to this factor and like many of the s 30(3) factors it is appropriate that this is a fact dependent exercise. For example, the ease in which the available alternative techniques can be accessed will be important (i.e. will significant police resources be required) and it will be relevant to the weight attached to this factor and therefore whether it militates towards exclusion or admission.

If there are no other lawful alternative techniques that are known or available then this ought not be a factor that favours admission (as some of the jurists in *Hamed* suggest). If it is prescribed as a factor that favours admission then it encourages police to go ahead and use unlawful investigative techniques rather than for example, waiting for the investigation to progress. Therefore the unavailability of alternative techniques becomes a neutral factor, rather than one favouring admission of the evidence.

Section 30 might be amended as has been suggested below to clarify the position.

The Association does not support legislative weighting as to admission or exclusion. There could be an extreme circumstance where weighting either way could have unintended circumstances.

Q24 Is a more prescriptive approach required in section 30? If so, how could this be achieved?

There is potentially scope for more guidance in the Evidence Act however, there are negative consequences in being overly prescriptive (as outlined in response to the previous questions).

[28] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

Section s 30(3) might be amended to read:

> (3) For the purposes of subsection 2, the Court may, among any other matters, have regard to the following factors:
>
> *Factors favouring exclusion*
> (a) the importance of any right breach by the impropriety and the seriousness of the intrusion on it:
>
> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
>
> (c) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
>
> *Factors which could favour exclusion or inclusion – fact dependent*
> (d) the nature and quality of the improperly obtained evidence:
>
> (e) the seriousness of the offence with which the defendant is charged:
>
> (f) the centrality of the evidence to the prosecution case:
>
> *Factors which favour inclusion*
> (g) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:
>
> (h) whether the impropriety was necessary to avoid apprehended physical danger to the police or others:
>
> (i) whether there was any urgency in obtaining the improperly obtained evidence.

The Court's approach in *Williams*[29] was an attempt to introduce a more prescriptive approach to the s 30 balancing exercise. It was largely impliedly rejected by the Supreme Court's approach in *Hamed*, which is more evaluative and does not seek to place presumptive weight on any of the s 30 factors.

From a predictability and fairness perspective, there is a case to be made that certain factors ought to weigh one way or another. But that case should be premised on empirical evidence that certain factors should tip the scales one way or another. For example, if the seriousness of the offence charged is given presumptive weight in favour of admission, will that result

[29] *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207.

(as a matter of fact) in police being less respectful of human rights in the investigation of serious crime? If the answer to that question is yes, then that will significantly undermine the intention of s 30, being preservation of an effective and credible system of justice.

Use of previously excluded evidence in a different context

Q25 When courts determine the admissibility of evidence that has been previously excluded on the basis it was improperly obtained, should the earlier exclusion be treated as a relevant factor (favouring admission) in the section 30(2) balancing exercise? If so, should the earlier exclusion be viewed as an "alternative remedy" within the meaning of section 30(3)(f)?

No, the previous exclusion of improperly obtained evidence should not be treated as a relevant factor in any balancing exercise.

With respect to the majority view in *Marwood v Commissioner of Police* [30] it is the approach of the Chief Justice in that decision that best reflects the "overall interests of justice" ethos that underpins the s 30 balancing exercise.

Her Honour Elias CJ considered that the question of admissibility in subsequent proceedings should be considered on its merits, without any preconception derived from the outcome in the earlier proceedings, whether it was to admit or exclude evidence. This must be particularly so if the proceeding is a further criminal proceeding which is attempting to rely on the earlier excluded evidence.

It is submitted that the earlier exclusion of evidence ought not be viewed as an alternative remedy in the s 30(3)(f) context when being considered in subsequent proceedings. An alternate remedy must logically relate to the proceeding where the prosecution proposes to offer improperly obtained evidence and in that way the Court is invited to consider whether exclusion of the evidence (in that proceeding) is the appropriate remedy or whether there are alternative remedies (i.e. a declaration or potential subsequent reduction in sentence).

[30] *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260.

Q26 Should the Act be amended to contain an express provision dealing with the admissibility of improperly obtained evidence in:

a. civil proceedings taken by way of law enforcement with a public officer as plaintiff?

b. civil proceedings more generally?

Yes to both (a) and (b).

There are very different systemic concerns in civil proceedings compared to criminal proceedings. There are also very different remedial responses to the Crown improperly obtaining evidence in criminal proceedings compared to a party to a civil proceeding using improperly obtained evidence. For example, if a party obtains evidence in breach of confidence, the Court can injunct use of that evidence by the obtaining party against the other party. No such power exists in criminal cases.

Given the Law Commission's earlier expectation that s 30 would extend to civil proceedings and given the uncertainty surrounding whether a common law power to exclude (in such circumstances) survived the enactment of the Evidence Act, it is appropriate that an express provision be included in the Evidence Act dealing with the admissibility of improperly obtained evidence in civil proceedings.

It seems unlikely that an "ordinary civil litigant" will ever gain access to improperly obtained evidence in a criminal proceeding however, in the event that this situation does eventuate then, it is important that a Court considering the issue has the ability to consider whether the evidence ought to be excluded.

The Association's view is that there should be a power to exclude improperly obtained evidence in civil proceedings generally. But there would need to be a new section to provide for this with different balancing factors. The overriding test would need to recognise the fact that the determination of civil liability on the basis of improperly obtained evidence risks less damage to the integrity of our system of justice than adjudication of a person's guilt in a criminal trial on such evidence.

If so, should admissibility be determined by way of a balancing test, as in section 30(2)? Should any of the factors listed in section 30(3) apply by analogy?

It is appropriate that admissibility of evidence in the civil context also be determined by way of a balancing test similar to that which is outlined in s 30 – as the Law Commission observes, the Supreme Court in *Marwood* seems to have endorsed a balancing exercise with proportionality at its core. Most of the s 30(3) factors will be applicable in a civil context except the seriousness of the offence – this is unlikely to arise in a civil context.

Addressing concerns associated with evidence gathered during undercover operations

Q27 Should the Practice Note on Police Questioning (or aspects of it) apply to undercover police officers when they are engaged in the questioning of suspects? If so, how could the rules apply to them without unduly compromising the effectiveness of the undercover operation or the safety of the officers?

Yes, the Practice Note ought to apply to undercover police officers.

The Association's view is that it is difficult to fault the logic of Glazebrook J when Her Honour considered that a police officer remains a police officer (investigating an offence) even if they are undercover and thus the language of the Practice Note itself makes it clear that it applies to undercover police officers.

From a defence perspective, there is merit in the observations of the Chief Justice when Her Honour expressed that if an inability to comply with the Practice Note means that the scenario technique cannot be employed then, that may well be the price for the observance of fair process. As Her Honour notes, there is much in an undercover observation that is unexceptional and could properly be undertaken during the course of a police investigation.

The police can elect to continue with the scenario technique (knowing it remains subject to the Practice Note) however, the appellate jurisprudence that has developed around the Practice Note means that evidence obtained in breach of the Practice Note is not automatically excluded – it remains subject to the s 30 balancing test.

Q28 Do sections 28 and 8 adequately address concerns about reliability and unfair prejudice that can arise in relation to undercover operations designed to secure incriminating statements and/or involve recruiting the target into a fictitious criminal organisation? If not, should the Act be amended to address these concerns? How could this be achieved?

No. The narrow way in which ss 28 and 8 have been applied by the Courts to date do not adequately address the unique concerns that arise as a result of the use of the scenario technique in police investigations.

The use of the scenario technique necessarily gives rise to overlapping concerns as to the fairness, the reliability and the truth of any incriminating statements that have been made by the target.

The Evidence Act could be amended to reflect the approach taken in cases involving visual identification evidence (s 45). Firstly, in terms of the admissibility of the evidence the Evidence Act could impose a heightened reliability threshold. Thus in cases where the prosecution sought to rely on evidence obtained from the use of the scenario technique, the prosecution would be obliged to prove beyond reasonable doubt that incriminating statement is reliable – this would be different to the test under s 28 which tends to focus on the circumstances in which the statement was made.

Secondly, in the event that the evidence of an incriminating statement was admitted (post a pre-trial challenge), then express provision could be made in the Evidence Act to allow the judge to direct the jury on the special need for caution before finding the defendant guilty in reliance on such evidence (much like how s 126 provides for directions in cases involving visual identification evidence).

The observations of Glazebrook J in *R v Wichman* [31] (cited at paragraph 7.91 in the Law Commission report) are likely to be a useful starting point for a model direction for incorporation in the Bench Book.

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

CHAPTER 8 – IDENTIFICATION EVIDENCE

Q29 Should the definition of "visual identification evidence" in section 4 be amended to clarify whether identifications that are expressed with uncertainty are included? If so, how?

Yes. Section 4 should be amended to expressly include identifications expressed with uncertainty and identifications of more than one person. [32]

The rationale for ss 45 and 126 is that witness identifications are fallible, often unreliable and should therefore attract heightened scrutiny. [33] That fallibility is present regardless how certain a witness feels. [34] Sections 45 and 126 should therefore apply regardless of the witness's certainty.

First, the fallibility of the identification process does not depend on the witness's subjective feelings about it.[35] A certain witness may be wrong and an uncertain witness may be right.[36] Such feelings of certainty or uncertainty can arise for reasons unrelated to the accuracy of the identification. The rationale for s 45 does not address these self-assessments of accuracy. Rather, it is directed at the underlying identification process: where a witness measures the image in her memory against images in front of her. In both a qualified and an unqualified identification, the witness engages these same mental faculties. The well-documented unreliability of those faculties triggers the need for greater control of the resulting evidence. A feeling of certainty does not cure unreliability concerns - the concerns arise from the way she reaches her conclusion, not how steadfastly she now holds to it.

We suggest that this conclusion is implicit in the Supreme Court's decision in *Harney v Police*.[37] There, Blanchard J commented that "the defence may want to have the judge take note of

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[32] For instance, in *R v Young* [2009] NZCA 453, *H v R* [2017] NZCA 450, *Higgins v R* [2017] NZCA 486 and *Meaker v R* [2016] NZCA 236.

[33] *Evidence: Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999). Effective scrutiny should normally include a formal procedure. See *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999), at [201]. See also Criminal Law Revision Committee (UK), Cmnd 4991 (1972).

[34] *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999), at [198]. See also *R v Gayle* [1999] 2 Cr App R 130 (EWCA), p 135.

[35] See *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases,* 1976, (Devlin Report), generally and at 4.25.

[36] Devlin Report, above, at 8.1.

[37] *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725.

any hesitation by the witness concerning his or her identification of the defendant".[38] And that "equally an expression of some degree of confidence cannot simply be put to one side".[39] Accordingly, the Court held that the witness's confidence level was a relevant circumstance under s 45(1) and (2) to determine its reliability and admissibility. This entails that the Court treated less than certain identifications as "visual identifications" for the purposes of s 4.

Secondly, greater uncertainty should not render admission more likely. This would occur if tentative identifications are not covered by s 4. It is trite that evidence caught by s 45 faces a harder route to admission than other opinion evidence under ss 7, 8 and 24.[40] If it did not, there would be little point to s 45. So, if tentative identifications are not "visual identifications" and do not engage s 45, they are more likely to be admitted than unqualified identifications.

This is undesirable. As the Law Commission notes, such evidence still "tends to identify the defendant as the offender".[41] That is the very point it is tendered in evidence. Coupled with the risk that juries might ascribe disproportionate weight to such evidence, the risk of mistaken identifications causing miscarriages of justice would rise.[42] Moreover, if qualified identifications fall outside s 4, a warning under s 126 need not be given.[43] The result would be, a witness who testifies that she is "85% certain" that the defendant is the person she saw or thinks he "very probably" was that person, is giving a mere opinion, admissible under ss 24, 7 and 8.[44] No warning need issue as to her testimony. Contrariwise, a witness who declares herself certain will have made a visual identification, her evidence will be subject to s 45 and *prima facie* less likely to be admitted in evidence. It is unclear how such marginal differences in witness' feelings of certainty justify such different treatment.

Thirdly, a witness's self-assessment of certainty is a poor basis on which to determine s 45's application. Perhaps obviously, different people have different criteria for 'certainty'. A young zealot may feel certain about many things and likely to trust his impulses and intuitions. On the other hand, the older and wiser may have developed a more acute sense of their own fallibility and be cautious about trusting their initial perceptions. Most people are somewhere

[38] At [33].
[39] As above.
[40] *Harney v Police*, above n at [15], *K v Police* [2017] NZCA 430, at [40], *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788.
[41] *Second Review of the Evidence Act 2006: March 2018* (NZLC), Chapter 8, at 8.28, p 147.
[42] See Criminal Law Revision Committee (UK), Cmnd 4991 (1972), at [196].
[43] For the case would not depend on a "visual or voice identification" as in s 126(1).
[44] *Bassett v R* [2015] NZCA 319 illustrates the correct approach, especially at [29].

in between these extremes. The problem is that each person's criteria differ, and often for reasons unrelated to the accuracy of their sensory perceptions. For instance, a naturally tentative person can have excellent eyesight, while a brash person may have useless eyesight or a poor memory. That a witness's confidence does not correspond to her reliability means that confidence is an improper basis on which to determine whether s 45 should apply to her testimony.

Fourthly, the Association suggests that an amendment to s 4 should explicitly provide that a "visual identification" occurs when a witness nominates more than one person from a photomontage. There is no relevant difference between this scenario and a qualified identification of one person. As with qualified and unqualified identifications of one person, nominating the defendant and another/others from a photomontage requires the witness to use the same mental faculties that s 45 is designed to regulate. That she caveats her conclusion by indicating she might have seen a person other than the defendant does not alter the fallibility of the process which led to her conclusion. We therefore doubt whether the Court of Appeal was right in *R v Young* to hold that a situation like that sketched disclosed only "significant circumstantial" as opposed to identification evidence.[45]

The contrary position is unattractive. In *Meaker* the Court of Appeal held that a witness who eliminated five of eight photographs, but who could not further refine her identification, had not given identification evidence.[46] The reason given was that the witness did not make an "assertion… that *a* defendant was present", in terms of s 4. The Commission agrees, arguing that "the witness did not purport to identify a particular person at all".[47] The Association respectfully disagrees and returns to the rationale for s 45. It guards against the adverse effects of a mistaken identification. Whether a qualified identification is made of one defendant, or a qualified identification is made of the defendant and another, the effect is the same. The evidence tends to suggest that the defendant was the offender. What, after all, is the difference between the propositions 'I'm 85% sure the offender was X' and 'I'm 85% sure the offender was X, but it could have been Y'? In each example the jury's attention is duly focused and the Crown case strengthened. After all, that is why the Crown offers the

[45] *R v Young* [2009] NZCA 453, especially at [34].
[46] *Meaker v R* [2016] NZCA 236.
[47] March update, chapter 8, at 8.20.

testimony as evidence. Moreover, the evidence pointing to the defendant as the offender is based on exactly the same mental process as produces other identifications.

Other arguments given for the decisions in *Meaker, Higgins* and *Young* are unpersuasive. The Court's suggestion in *Meaker* that s 4 requires an assertion that "*a*" (as in 'a single') defendant was present is unsound. The Court omitted to mention that s 4 requires "an assertion…*to the effect* that a defendant was present".[48] The inclusion of those words illustrates that interpreting s 4 as requiring nomination of only one person was strictly unnecessary. To avoid redundancy, the phrase 'to the effect' must permit evidence approximating to, but not identical to a simple assertion that a particular defendant was present. The question then is whether the selection of more than one person in a photomontage sufficiently approximates to an assertion that one defendant was present. For the reasons given above, the two situations are essentially identical.

Finally, we deal with the proposition that where more than one person is nominated, no identification is made. In the Association's view, this rests on a circular interpretation of what constitutes an 'identification'. The question is whether nominating more than one person is an identification. The Law Commission's position is that it is not.[49] Yet that is what must be proven. There needs to be some reason given as to whether it is an identification. It cannot be assumed at the beginning.

Q30 Should evidence falling outside the scope of the definition of "visual identification evidence" remain admissible, subject to sections 7 and 8? Does the Act need to be amended to clarify the position?

Yes and no.

If evidence does not trigger the protections for visual identification evidence, it should be treated like any other piece of evidence. That is, subject to ss 7 and 8 and 24. The Association share the Law Commission's view that if evidence engages s 45 but fails to satisfy its

[48] Section 4 Evidence Act 2006, emphasis added. We note that a similar view is expressed in *The Evidence Act 2006: Act & Analysis*, Mahoney, McDonald, Optican and Tinsley eds., (Thomson Reuters) (2013) (3rd ed), at 4.44.01, albeit in relation to qualified identifications generally, not identifications of more than one person specifically.
[49] At 8.20

requirements, it is inadmissible and cannot be saved by ss 7 and 8.[50] The Association further agrees that s 45 exercises no force over evidence which does not amount to visual identification evidence.[51] We consider that ss 7 and 8 operate as additional admissibility tests, engaged after evidence has satisfied a specific admissibility provision. We note that this is consonant with the widely-held conception of s 8 as the "ultimate filter to admissibility", applicable "generally to all evidence".[52] We see no reason to consider that s 45 displaced the judge's "residuary discretion" under such sections.[53]

While some confusion appears to have been engendered by the Court of Appeal's decision in *Meaker*, on balance we suggest that its subsequent decisions of *Kingi* and *K v Police* have adequately settled the matter. Both reaffirmed that s 45 does not exclude s 8. For this reason the Association does not think s 45 requires amendment.

Q31 Should the Act be amended to clarify the relationship between the identification evidence and hearsay provisions? If so, how?

Yes, to clarify that s 45 is subject to the hearsay provisions, where applicable.

On the best interpretation of s 17, the hearsay rules apply in addition to s 45. Section 17 provides:

17 Hearsay rule

(1) A hearsay statement is not admissible except—

(a) as provided by this subpart or by the provisions of any other Act; or

(b) in cases where—

(i) this Act provides that this subpart does not apply; and

(ii) the hearsay statement is relevant and not otherwise inadmissible under this Act.

[50] *R v Kingi* [2017] NZCA 449, at [25] and *K v Police* [2017] NZCA 430, at [24].
[51] See March Update, Chapter 8 at 8.20
[52] *MacKenzie v R* [2013] NZCA 378, at [43], and *Hudson v R* [2010] NZCA 417, at [43] respectively. See also *The Evidence Act 2006: Act & Analysis*, Mahoney, McDonald, Optican and Tinsley eds., (Thomson Reuters) (2013) (3rd ed), especially at 52 and 60.
[53] *Marsich v R* [2012] NZCA 470, at [20].

First, s 17(1)(a) does not render the hearsay rules inapplicable, as no provision is made in part 2 subpart 1 to exclude s 45 from those rules. Secondly, it is doubtful that in terms of s 17(2)(b)(i) "this Act provides that this subpart does not apply" as regards s 45. We agree with the authors of *The Evidence Act 2006: Act and Analysis*, that this phrase requires express exclusion of the hearsay rules. It is insufficient that another provision might operate inconsistently with the rules. Parliament could easily have provided that the hearsay rules operate 'unless inconsistent with any other provision'. Instead, it declared that hearsay is not admissible except in the enumerated circumstances of s 17. It is therefore unlikely that s 17(1)(b)(i) tacitly provides that the general application of the hearsay rules is in fact displaced any time it conflicts with another provision.

The authors of *Cross on Evidence* counter that where the hearsay rules and the more specific identification rules conflict, the more specific rule should prevail.[54] The problem with this argument is that if the specific rule always prevailed to the exclusion of the more general provision, ss 7 and 8 seem liable to exclusion by the specific admissibility rules of the Act. Since the latter conclusion is wrong, the former conclusion seems doubtful.

Secondly, we consider it reasonable that the Crown faces a harder admission task if the witness cannot give evidence herself. If the witness gives evidence at trial, her evidence will have passed the hurdles of ss 45 and 8 and she will likely be cross-examined on her identification. If however, she is absent, it seems reasonable that in addition to s 45 the Crown must satisfy s 18. If a formal procedure was followed under s 45, the Crown will shoulder the burden of proving reliability under s 18, although it is admittedly unclear how readily a court would exclude the identification by another as inadmissible hearsay if the formal procedure was followed.

We express these views tentatively, as there is little appellate discussion of the matter.[55] It would be valuable to know whether formal identification procedures in satisfaction of s 45 could be an insufficient reassurance of reliability (s 18(1)) to warrant exclusion under s 17.[56] In any event, doubts as to the reliability of evidence admitted under s 45 will inform the ultimate admission exercise under s 8.

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[54] *Cross on Evidence,* Matthew Downs (eds) (online loose-leaf ed, LexisNexis) at 45.9.
[55] *R v R* [2017] NZCA 61.
[56] Or if good reason to dispense with it existed: s 45(1).

In sum, the statutory language in s 17 indicates that hearsay rules apply to reports of identifications made by others. However, it is unclear what practical ramifications this will have. If the s 45 procedures are always a 'reasonable assurance' for purposes of s 18(1) then what use is s 18? On the other hand, if s 45 procedures do not automatically satisfy s 18, in what instances could evidence which passes s 45 be excluded by s 18? The answer is not clear.

CHAPTER 9 – GIVING EVIDENCE IN SEXUAL AND FAMILY VIOLENCE CASES

Pre-recording evidence

Q32 Should a family violence complainant automatically be entitled to:

a. give their evidence in chief by way of a pre-recorded video, regardless of whether the video is recorded within 2 weeks of the alleged incident?

b. offer pre-recorded cross-examination evidence?

If so, how could the Act mitigate the possibility that additional disclosure may occur after the pre-recording hearing takes place?

Much turns on the passage of the Family and Whanau Violence Legislation Bill 2017. Assuming it is passed into law the Association's position is that some time frame, whether it be two weeks or otherwise must be specified and applied in order to achieve the stated benefits of promptly recorded disclosures. We see no policy reason to have different rules or regulations that might apply to family violence matters from those that might apply to either child or sexual complainants in regulating pre-recorded evidence.

The Association does not support entitlement to offer pre-recorded cross-examination evidence. Essentially, for the reasons outlined by the Court of Appeal in *M v R,*[57] the experience of our members is that it is very common place for there to be disclosure issues. We are not confident the significant ongoing issues regarding disclosure could be addressed so as to ensure that the policy objectives of pre-recording cross-examination could be achieved. Realistically, the only mechanism to mitigate the possibility of additional disclosure being made post pre-recording is to review the Criminal Disclosure Act and impose more stringent obligations on the prosecution alongside sanctions for non-compliance. That raises issues far beyond the ambit of the current review.

[57] *M v R* [2012] 2 NZLR 485

Q33 Should prosecutors be required to consult with complainants in family violence cases about their preferred mode of giving evidence?

Yes. We agree that there is little point in having the entitlement to give evidence in a particular manner if there is not an obligation on a prosecutor to consult with the complainant on that issue.

Q34 Should the Act entitle the following witnesses in sexual and/or family violence cases to pre-record their evidence (including cross-examination) unless a Judge makes and order to the contrary:

a. propensity witnesses?

b. family members of the complainant?

No. The Association supports a cautious approach and prefers to await the Government response to the Law Commission's 2015 recommendations and to the Family and Whanau Legislation Bill 2017 in order that there is a greater body of cases upon which a review can be undertaken. We are particularly concerned that the issues around disclosure are understated. We generally support the concerns expressed by the Court of Appeal in *M v R*[58] and the proposition that pre-recorded cross-examination should only be available in a very compelling case.

Q35 Should reforms in the area of pre-recording aim to provide an entitlement for all vulnerable witnesses to have their evidence pre-recorded in advance of a criminal trial?

As noted above, the Association urges a cautious approach with the proposed reforms in the area of pre-recording evidence. We agree that having regard to the stated benefits, there is no policy reason why reform ought not extend to all vulnerable witnesses. However, the Association remains concerned that absent a cautious approach, the proposed reform could effectively end the "live witness" trial. That gives rise to issues far beyond the scope of the current review.

[58] *M v R* [2012] 2 NZLR 485

The Association anticipates significant technical and resourcing issues in the event that there was scope for the pre-recording of evidence-in-chief and cross-examination of any "vulnerable" witness.

We are also concerned that the proposed reform might create imbalance between prosecution witnesses and defence witnesses. The Law Commission Review does not consider whether the defence might initiate the pre-recording of the evidence of defence witnesses. Defendants have very limited obligations of disclosure and might therefore appropriately be disinclined to embark on any pre-recording of defence evidence. However, the policy rationale behind the proposed reform (better quality evidence) might lead to non-pre-recorded evidence as being treated by fact finders as second class evidence.

Recording evidence for use at re-trial

Q36 – Should the Act be amended to allow:

a. the evidence of sexual and/or family violence complainants to be recorded by video at trial for use at any re-trial?

b. the prosecution to tender any evidence recorded pre-trial in any re-trial?

The Association has no particular objection to an amendment to the Act to allow for the evidence of sexual and/or family violence complainants to be recorded by video at trial or pre-trial for use at a re-trial. However, experience suggests that it would be highly unlikely the trial record would require significant editing and that further questioning would be inevitable due to either new disclosure and/or a strategic rethink. A re-trial (for whatever reason) ought not be simply a different jury considering the very same evidence but rather a jury considering the evidence that the parties elect to offer at the re-trial.

Access to evidential video interviews

Q37 – Have sections 106(4A) to s 4(C) and regulation 20B, which restrict access by defence Counsel to video interviews in sexual or violent cases, created any difficulties in practice? If so, how could access to video records be improved while still mitigating the risk that they may be inappropriately used?

It has created difficulties. It can take time to make arrangements with the Officer in Charge who may well be on leave or otherwise difficult to make arrangements with. Arrangements to meet the defendant at the police station to view the interview can be problematic and also raises issues of costs. Commonly defence counsel may wish to stop DVDs for discussions with the client while viewing them and/or view them more than once for different reasons. Many of these DVDs can be lengthy or there may be a number of DVDs to watch for any one trial.

In the Association's view, counsel should be able to view the video interviews in their own time, with or without the defendant, provided counsel retains the recording in their possession. We are not aware of any evidence suggesting that providing a copy of the video interview of complainants to counsel has caused any problems.

A separate regime could be in place in relation to self-represented defendants. One possibility in such a case is that an Amicus be appointed for the purpose of assisting the viewing of the interviews.

Judicial control over witness questioning

Q38 – Should there be greater judicial control of questioning of witnesses? For example:

a. should the Act be amended to include a provision that the judge may disallow a question if it is asked in a manner that the judge considers unduly intimidating or overbearing?

Section 85 as both drafted and interpreted permits a judge to disallow a question that is considered unduly intimidating or overbearing.

b. should the Act be amended to allow a judge to exclude particular types of questioning (for example, tag questions)?

In the Association's view s 85 is used appropriately and the Act does not require amendment to allow a judge to exclude particular types of questioning.

c. should there be a statutory duty on judges to intervene when the manner of questioning, or the structure or content of questioning is unacceptable? If so, in what kind of proceedings or in relation to whom should the duty apply?

We do not see a need for a statutory duty on a judge to intervene. The discretion prescribed in s 85 ought to, and in our view, is adequate and appropriate to ensure acceptable questioning. Further, if there is to be reform that will permit pre-recorded cross-examination, a judge might be more likely to intervene with the knowledge that the intervention could be edited out of any evidence played before a jury. In the Association's view, this provides further justification for the position that s 85 is both adequate and appropriate to control the questioning of witnesses.

d. do submitters support the approach of addressing the scope and nature of questioning of vulnerable witnesses at a pre-trial "ground rules" hearing? If so, in what kind of proceedings or in relation to whom would such a hearing be appropriate?

The Association does not support a pre-trial "ground rules" hearing. It is acknowledged that there may be particular cases where "communication assistance" is a live issue, for example, in cases where English is a second language or where the witness has a hearing impediment. Otherwise, s 85 provides a proper basis for control at trial.

CHAPTER 10 - CONDUCT OF EXPERTS

Q39 Should expert witnesses in criminal proceedings be required to adhere to a code of conduct?

Yes.

If so:

a. should a separate code be developed or should the current Code of Conduct in the High Court Rules 2016 apply to them (either in whole or in part)?

Separate.

b. should they be subject to an obligation to confer with another expert witness if directed to do so?

Yes.

In circumstances where the Courts have developed a body of common law principles that set out how expert witnesses are to conduct themselves in criminal cases, there is merit in codifying those principles in a Code of Conduct. That will assist to make the principles clear and accessible to experts and counsel alike and promote consistency.

Recognising that there are constitutionally very important differences between civil and criminal law (most obviously in relation to burden of proof) and that there are significantly different obligations of disclosure on the defence.[59] The Association believes there is a strong case for a separate Code of Conduct for experts in criminal cases.

As to subjecting expert witnesses in criminal cases to an obligation to confer with another witness if directed to do so, this seems appropriate in principle, provided that sufficient safeguards exist in practice. The Victorian and UK safeguards referred to in para 10.15[60] would seem to provide minimum relevant safeguards. The existence of the discretion to (not) order expert conferral in the circumstances is another relevant safeguard.

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[59] Note the helpful references provided in this regard in the UK guidance at https://www.cps.gov.uk/legal-guidance/disclosure-experts-evidence-case-management-and-unused-material-may-2010-guidance),

[60] Supreme Court of Victoria Practice Note SC CR3 Expert Evidence in Criminal Trials r 2.1. and The Criminal Procedure Rules 2015 (UK), r 19.6(3).

Q40 Should section 26 be amended to include guidance on how the discretion in section 26(2) should be exercised? If so, what guidance should be provided?

The discretion conferred by s 26(2) is inherently very fact and context sensitive. The uncertainty that currently results from the open-ended nature of the discretion could be addressed, at least in part, by stipulating mandatory or permissive considerations that are relevant to the exercise of that discretion but that seems unnecessary in circumstances where the case-law does not appear to be problematic in practice. As the discretion is judicial, and its exercise foremost lies with judges, there is less need to stipulate mandatory or permissive considerations. There may even be a danger in doing so, given the inherent nature of this discretion. For all of these reasons, the case for stipulating statutory guidance on how s 26(2) is exercised does not seem strong.

CHAPTER 11 – COUNTER-INTUITIVE EVIDENCE IN SEXUAL AND FAMILY VIOLENCE CASES

Q41 How common is it for parties in sexual or family violence trials to present an agreed statement under section 9 on counter-intuitive evidence to the jury?

The Association is aware that s 9 is used to deal with counter-intuitive evidence. However, more commonly defence counsel will not agree, in order to retain the right to question the Crown witness who proposes to give the counter-intuitive evidence. It is relevant to observe in this discussion that there are very few experts available to give evidence relevant to these issues in New Zealand. Indeed we think that the counter-intuitive evidence referred to by the Supreme Court in *DH v R*[61] was almost exclusively evidence given by one particular expert. Consequently defence counsel have been confronted with major practical difficulties in challenging expert counter-intuitive evidence. This is not an area of law free from contention.[62] The use of s 9 agreements is very much dependent on both the availability of expert opinion and there being agreement amongst experts.

Whilst it is not uncommon for counter-intuitive evidence to be adduced in a sexual violence trial, we understand it is uncommon for there to be counter-intuitive family violence trials.

Q42 Should parties in family violence cases be encouraged to agree upon expert evidence dealing with myths and misconceptions around family violence and admit the evidence by way of an agreed statement under section 9?

If the facts of a particular case give rise to a risk that myths and misconceptions around family violence might arise then, the parties should be encouraged to agree upon expert evidence to deal with the issue. That of course presupposes that there are suitably qualified experts available to guide the parties and that there is agreement amongst the experts.

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[61] *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [2].

[62] Misconceptions about childhood sexual abuse and child witnesses: Implications for psychological experts in the courtroom, by Rajac Zajac, Maryanne Garry, Kamala London, Felicity Goodyear-Smith and Harlene Hayne, Routledge & Taylor online, 2013 Vol.21, No.5, 608-617.

Q43 Is there a need for new judicial directions addressing specific areas of counter-intuitive evidence in New Zealand? If so:

The Association's position is that the current directions commonly given in jury trials address most of the specific areas of counter-intuitive evidence noted by the Law Commission.

a. what particular myths and misconceptions should be the subject of judicial directions?

The issue as to what specific areas might properly be the subject of judicial direction really ought to be addressed by suitably qualified experts. The Association would inevitably support the consensus of expert opinion.

One area of contention that arises in many sexual trials and that is not specifically raised in the review, is the misconception around memory. But again this is an area where there might not be consensus amongst experts.

b. should these judicial directions be contained in the Evidence Act 2006 or in non-legislative guidelines?

The Association supports non-legislative guidelines. In our view, that is preferable in that it allows a degree of flexibility and development.

CHAPTER 12 – JUDICIAL DIRECTIONS ON THE IMPACT OF SIGNIFICANT DELAY

Q44 Should section 122(2)(e) be amended to expressly confine its scope to the effect of delay on the reliability of the evidence?

No, s 122(2)(e) should not be amended to exclude forensic disadvantage from any reliability direction.

The starting point for consideration of this issue remains the Supreme Court decision in *CT v R*. [63] The Supreme Court considered that s 122(2)(e) constituted "legislative recognition that evidence about the conduct of a defendant may be unreliable where the conduct in issue occurred more than 10 years before trial." The introductory comments of the majority about the problems with prosecutions involving historical allegations remain apposite and seem to have escaped the Law Commission in its consideration of the limiting of the scope of s 122:

> [13] The present case has a number of features which are common to many prosecutions for historical sexual abuse: a complainant who at the time of the offending was comparatively young, an alleged offender who was older, a broader relationship between them (in this case familial) providing the context for the alleged offending and a delay of decades between the alleged offending and prosecution. Cases of this sort pose significant problems for the courts. The rules and procedures which have grown up around criminal trials, particularly as to reliance on oral evidence based on memory, were developed in the context of cases in which the delay between offending and trial is usually comparatively short and where at least some aspects of the narratives of prosecution witnesses can be checked by reference to independent evidence. Compared to that norm, prosecutions for historical sexual abuse give rise to particular forensic problems which were identified in an Australian case as involving:
>
> - the reliability or the accuracy of the complainant's recollections … so many years after the events;
>
> - the difficulty confronting a trier of fact when assessing the veracity and reliability of a person, not by hearing and observing their evidence given when young, soon after the events are said to have taken place and with the child's contemporary language and understanding but after hearing and observing evidence given in the language of an experienced adult with all of the possibilities of reconstruction and re-interpretation that this entails;

[63] *CT v R* [2014] NZSC 155 at [41]

- the difficulty confronting the [defendant in] having to go well back in time to recall, check and verify the accuracy of events about which evidence is given; and

- the difficulty confronting the [defendant] in endeavouring to obtain and produce documentary evidence or oral evidence from other witnesses which might put in question the evidence of a complainant as to events, times and places.

As well, those facing prosecution may be well-advanced in years and sometimes subject to age-related cognitive impairment or other serious health issues.

[14] Loss of evidence arguments can cut both ways. For instance, a defendant facing charges of historical sexual abuse may be better placed than if prosecuted soon after the offending, as evidence which might have supported the prosecution may have been lost. But, given that juries can – and often do – convict on the basis of only the evidence of a complainant, it is realistic to accept that delay will almost always carry some risk of prejudice to a defendant resulting from the loss or diminution of what would, in the case of a prompt prosecution, be the opportunity to come up with evidence which contradicts aspects of the Crown case or provides some support for the defence case.

[15] Delay and prejudice arguments engage s 25 of the New Zealand Bill of Rights Act which provides:

> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) the right to a fair and public hearing by an independent and impartial court:
> …
>
> (e) the right to be present at the trial and to present a defence:
>
> …

If delay and prejudice arguments are in play, judges can give effect to the s 25 rights in two ways: (a) where a fair trial is impossible, by staying the prosecution, and (b) where a fair trial is possible, by taking appropriate measures to mitigate, as far as possible, the risk of prejudice to the defendant. In deciding whether a fair trial is impossible, the assumption should be that all such measures will in fact be taken.

[16] There is strong public interest in the courts facilitating and not frustrating prosecutions for historical sexual abuse. As well, there is no general limitation period for prosecutions for sexual offending. When prosecutions for historical sexual abuse became common, the response of Parliament (albeit not very

> prompt) was to legislate away the time limit for prosecution in respect of offending against girls between the ages of 12 and 16. The corollary of these two interconnected considerations is that prejudice of a kind which is commonplace in cases of historical sexual abuse does not warrant a stay. This is reconcilable with the fair trial guarantees in s 25 of the New Zealand Bill of Rights Act if, but only if, such prejudice is appropriately mitigated. Such mitigation is largely achieved by the general rules of criminal procedure (particularly as to the onus and standard of proof) and careful evaluation by the trier of fact of the evidence which is adduced. But it also usually requires the judge to take particular measures to reduce, as far as possible, the risk of delay-related prejudice.

The Supreme Court in *CT* therefore recognised the matters subsequently referred to David Harmer about delay being a problem for the prosecution – these matters have been raised by the Law Commission as justifying a restriction of the interpretation of s 122 to exclude forensic prejudice.

The majority rejected the approach taken in earlier Court of Appeal judgments that a warning under s 122(2)(e) is not necessary in:

> (i) cases where the defence case is that the complainant is lying (because the lapse of time is irrelevant to fabrication); or
>
> (ii) cases where a challenge to credibility and reliability is clearly before the jury (through the address of counsel).

The majority said that these Court of Appeal decisions were based on the view that, for the purposes of ss 122(1) and 122(2)(e), reliability concerns arise only where, by reason of delay, the evidence of a complainant can be said to be inherently unreliable because of the effect on memory. However the majority rejected this approach and observed:

> [49] … [W]e are of the view that in a case which is within s 122(2)(e), a judge may conclude that the ability or otherwise of a defendant to check and challenge the evidence of a complainant is material to the judge's assessment whether that evidence may be 'unreliable'. In other words, a judge may conclude that evidence may be unreliable for the purposes of s 122(2)(e) for reasons other than the effect of delay on the memory of the complainant.
>
> [50] Judges should also bear in mind that the whole premise of the section is that it is not always appropriate to leave it to counsel to point out the risks associated with particular types of evidence. For instance, in a case which is subject to s 122(2)(d), it could hardly be suggested that it is appropriate for the judge to simply leave it to counsel to point out the risks associated with such evidence. In such circumstances, the warning should have the imprimatur of the judge. As well,

> although s 122 does not mandate the giving of a warning, the language of s 122(3) also warrants careful attention. Section 122(3)(a) has no application to cases of the present kind (because the evidence in question is so central to the case) and s 122(3)(b) shows that in the absence of good reason to the contrary such a warning should be given. A general view that such warnings are generally unnecessary or inappropriate is thus inconsistent with the premise of the section and cannot constitute a good reason not to give a warning for the purposes of s 122(3)(b).
>
> [51] The reality, as recognised in *R v O*, is that in cases of long-delayed prosecution there will almost always be a risk of prejudice. That this is so will be more apparent to the trial judge than to the jury. Unless the judge takes personal responsibility for pointing out that risk and adds the imprimatur of the bench to the need for caution, the jury will be left with competing contentions from counsel and without any real assistance in addressing them.

The majority decision in *CT* identifies the practical reality for the defendant in any historical prosecution (particularly where a stay has been declined) and provides the trial judge with guidance on how they might act to preserve a fair trial through appropriate directions.

The Law Commission's concerns about the introduction of a near mandatory requirement for a caution about potentially unreliable evidence (including forensic disadvantage) is misplaced and is not borne out by the instances of successful appeals.

The Law Commission's rationale for limiting the scope of the s 122(2)(e) direction to exclude forensic disadvantage is summarised below however, it is submitted that a close analysis of those factors does not really support the preliminary view:

(i) Such a direction is unnecessary because of the approach to stays.[64]

The reality is that there is a high threshold before the Court will intervene to stay a prosecution (usually in the context of historical sexual allegations) and a prosecution can only be stayed where a fair trial is no longer possible.

In our experience the Court is routinely faced with cases in which there is specific or particular forensic disadvantage however, that prejudice does not rise to a level where a fair trial is no longer possible. Accordingly, simply because a stay has not

[64] See paragraph 12.42 Law Commission *Second Review of the Evidence Act 2006* (NZLS IP42, 2018).

been granted does not mean there will not be issues for the defence that arise due to delay.

It is important for cases involving delay of more than 10 years that the discretion remains with a trial judge to give directions as to reliability in relation to the impact of time on memory but also in the sense of forensic disadvantage.

The appellate jurisprudence in respect of s 122(2)(e) directions reveals that trial judges are exercising the discretion appropriately and it is only where there is some evidential foundation for forensic disadvantage that the wider reliability directions are being given. The Court of Appeal is only intervening on s 122(2)(e) appeals where the direction was both inadequate and a miscarriage of justice ensued (hence the number of unsuccessful appeals referred to by the Law Commission).

(ii) The mere fact of delay does not necessarily render evidence unreliable.[65]

The decision in *CT* recognises this fact as does the language in s 122 which vests a discretion in a trial judge to give such a direction (or not). Section 122(3) makes it very clear that a judge does not need to accede to a request by either party to give such a warning "…if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or if the Judge is of the opinion that there is any other good reason not to comply with the request."

The determination of the reliability of any evidence is the province of the fact finder and so Glazebrook and Arnold JJ's characterisation of evidence being either reliable or not, is not a particularly helpful description of the position.

The majority in *CT* was at pains to emphasise that the passage of time may cause forensic disadvantage to such an extent that the defendant is impaired in his ability to challenge the evidence (i.e. have some input on the jury's determination of reliability or otherwise). If there is no such disadvantage to the defendant then the trial judge is not obliged to give such a warning.

[65] See paragraphs 12.43 and 12.44 Law Commission *Second Review of the Evidence Act 2006* (NZLS IP42, 2018).

The s 122 direction remains as something of a corollary of dealing with the equality of arms issues.

(iii) The ratio in CT may be seen as requiring a direction on forensic disadvantage at trial even in the absence of any specific prejudice.[66]

As indicated above, the language of s 122 is such that it is mandatory for a judge to consider whether to give a warning however, it is equally clear that the judge has a discretion over the particular form and content of any warning.

The appellate experience reveals that trial judges are not giving forensic disadvantage directions for the sake of it, and it is only where there is an evidential foundation for the same that warnings include directions on forensic disadvantage.

(iv) The CT approach to s 122(2)(e) amounts to a suggestion that it is dangerous to convict without corroboration (particularly in cases of historical sexual offending).[67]

Trial experience reveals that this is not the case and that the Crown continues to secure convictions in cases of uncorroborated allegations of historical sexual offending.

The s 122 directions do not go anywhere near as far as the *Longman*[68] directions and simply direct a jury to exercise caution in deciding whether to accept evidence or the weight to be given that evidence. Such a direction will only be appropriate if there is a foundation for delay related-reliability, whether memory induced or as a consequence of forensic disadvantage.

The concerns now identified in respect of s 122 directions do not appear to be shared by the Commission in respect of s 126 directions about the need for caution in assessing visual identification evidence.

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[66] See paragraph 12.45 Law Commission *Second Review of the Evidence Act 2006* (NZLS IP42, 2018).
[67] See paragraph 12.46 Law Commission *Second Review of the Evidence Act 2006* (NZLS IP42, 2018).
[68] *Longman v R* (1989) 168 CLR 79.

> The reality is that a jury is not told that there needs to be corroboration, that there may be good reasons for the delay in making a complaint and that the facts are a matter for the jury to determine with recourse to a healthy dose of common sense.

It is important therefore that s 122(2)(e) continues to be interpreted broadly to allow a trial judge (in the exercise of a judicial discretion) to direct a jury on issues of reliability as a consequence of the lapse of time on memory but also on the issue of forensic disadvantage.

Q45 **Is there a need for judicial directions about disadvantage arising from delay? If so, should these directions be contained in the Evidence Act 2006 or in non-legislative guidelines?**

In the event that the Law Commission determines that the s 122(2)(e) direction ought to exclude forensic disadvantage, then there is absolutely a need for judicial directions about forensic disadvantage.

The Australian approach outlined in the Law Commission's report could perhaps be adopted whereby there is a legislative provision providing for a direction on forensic prejudice and thereafter the principles can be developed in case law and incorporated into the Bench Book.[69] This would be consistent with how the directions in respect of s 45 of the Evidence Act have developed.

Given the wide variety of circumstances in which delay can impact on a case and in which forensic disadvantage may arise, it is important to avoid an overly prescriptive approach in any legislative provision.

[69] Section 165B has been adopted in Australia to address forensic disadvantage by way of a specific direction.

CHAPTER 13 – VERACITY EVIDENCE

Q46 Does the inclusion of sections 36(1), 37(3)(c) and/or 38(2) in the Act cause any confusion or difficulties in practice? If so, should any or all of these provisions be removed or amended?

The Association is not aware of any confusion or difficulties in practice.

Q47 Are there any concerns about the amendment made by the Evidence Amendment Act 2016 to section 38(2)(a)? In particular, does the amendment reflect a logical and fair approach to determining whether the defendant has put their veracity in issue?

The amendment is both logical and fair.

A practical reason for supporting the amendment is the difficulty that counsel advising a person before interview would have in assessing whether what that person would say if questioned would trigger a possibility of previous convictions for dishonesty becoming admissible. In some cases a detailed knowledge of the circumstances of previous convictions would be required. Persons seeking advice on a new matter, with Police waiting outside the door to begin an interview, are not always going to be able to assist with the detail needed, and so may not always receive proper advice.

The cumulative effect of any changes to ss 32 and 33 will be relevant in this context. The Association believes the right to silence is reduced by including an omission caution, and if there is any expansion of the circumstances in which a judge can comment on a failure to give evidence, a person with a minor theft conviction interviewed about (for example) sexual offending would have a complicated series of issues to consider before deciding to tell police that the complainant was lying because no sexual activity occurred.

Q48 Is the Act's use of the term "veracity" or its definition causing any confusion or difficulties in practice? If so, how could the Act be amended to eliminate this confusion or difficulty?

The definition is indubitably clumsy. But it is also readily amenable to clarification, such as in paragraph 13.1 of the Issues Paper. No judge would leave a jury without that clarification, and so there is no need to amend the Act.

CHAPTER 14 – CO-DEFENDANTS' STATEMENTS

Q49 Should a defendant's out-of-court statement made in furtherance of a conspiracy or joint enterprise be able to be used in the prosecution's case against a co-defendant, irrespective of whether it is hearsay?

Yes, there is no principled basis for the hearsay part of the exception. The issue only arises because the definition of hearsay statement is narrowed by the requirement of being made by a person who is not a witness.

If the "hearsay" requirement remains, the "hearsay statement" definition means a statement is only hearsay if it is offered in evidence at the proceeding to prove the truth of its contents. This could be troublesome in cases where a statement is able to be offered in evidence by the Crown as not hearsay (in terms of *Goffe*[70]), but a jury is then able to consider the statement for all purposes (the *Goffe* facts are not an example of where this could be a problem).

[70] *Goffe v R* [2011] 2 NZLR 771.

CHAPTER 15 – PRIVILEGE

Extension of legal advice privilege to third party communications

Q50 Is the current scope of legal advice privilege creating any problems in practice?

No.

Q51 Should section 54 be amended so that legal advice privilege attaches to third party communications and documents provided to a client or legal advisor, where the dominant purpose of the communication or document is to enable legal advice to be provided to the client?

The Association's position is that the status quo is not presenting any significant problems in practice. To extend the cloak of legal advice privilege in the manner suggested should be based on strong necessity, from a business or commerce perspective, given the impact that such a step would have on the subsequent discoverability of a potentially very large category of documents. It should also not be overlooked that litigation might be apprehended at the time when transactional advice is being sought and received, in which case litigation privilege may provide a broader cloak of confidentiality.

Termination of privilege

Q52 Should the Act be amended to clarify whether (and if so, when) litigation privilege terminates? If so, which of the following options should be preferred, and why:

a. amending the Act to provide that litigation privilege does not terminate; or

b. amending the Act to provide that litigation privilege ends when the litigation it is associated with ends (with an exception for ongoing, related litigation). If this option is preferred, how should the exception be framed?

This is a matter that is best left to courts to determine, on a case by case basis, and in light of concrete fact situations. That will best ensure justice can be done in a matter that is likely to involve fine judgment whenever it arises and, as such, to pose difficulties for ex ante stipulations of when litigation privilege might terminate. For example, if the law provides an exception for "related litigation" to an otherwise general rule that litigation privilege terminates with the conclusion of the litigation, how is "related litigation" to be defined; for

instance, does it require privity of parties, of subject-matter, and/or other matters? The difficulties in drafting principled exceptions to any general rule of termination will be compounded by the fact that any judgment as to whether litigation privilege should terminate necessarily will be informed not only by the context to the assertion of litigation privilege but by the nature and motivations of the party who seeks to lift the cloak of litigation privilege.

Q53 Is the question of whether (and if so, when) settlement negotiation privilege terminates causing any problems in practice? If so, should the Act be amended to clarify the position?

The Association is unaware of any significant problems in practice. In circumstances where the newly inserted discretion in s 57(3)(d) permits a judge to order the production of material that would otherwise be protected by this privilege, to the extent that any problems do exist, this provides a safety valve through which the problems can be addressed. Unless and until this discretion has bedded in in practice, further law reform in this area would seem to be unnecessary.

CHAPTER 16 - REGULATIONS

The Association supports the Law Commission's suggestions about how the Evidence Regulations 2007 (the Regulations) might be improved and supports the notion that the Regulations might best be the subject of a separate review. It goes on to offer views on the questions raised by the Law Commission.

Q54 Are there any issues associated with the application of the Evidence Regulations 2007 that are not addressed in this paper? If so, please let us know.

The Regulations are prolix and repetitive, creating substantially similar use and custody obligations on a whole range of recipients. They might be better drafted, were they being reviewed, by creating a generic set of use obligations (e.g. use of the record only for the purposes for which it was provided; not giving the record to other persons; destroying copies in accordance with the Regulations) and modifying their application where necessary.

Q55 Are there any difficulties in the application of the Regulations in light of recent developments in recording technology?

The Regulations are plainly dated in terms of references to technology. The distinctions between circumstances in which mobile recordings may be used, and video recordings generally, is generally arbitrary. The language needs to be updated to be technology neutral.

Q56 If the Act was amended to entitle certain witnesses to pre-record their evidence (including cross-examination), what restrictions would need to be placed around the storage and use of the video records of that evidence?

The Association sees no basis for departing from the Regulations' general approach to storage and use of such evidence, were they to be amended.

Q57 Do the Regulations governing transcripts of video records in criminal proceedings sufficiently preserve the privacy of those people they relate to? If not, how could the Regulations be improved?

The Association sees no basis for treating a video record and a transcript any differently in terms of restrictions on use and distribution. As the Law Commission notes, a video record is more sensitive. But not in any way which justifies the current divergence in obligations.

Q58 Is the recent restriction on defence access to certain video records in regulation 20B unduly burdensome? If so, how could the Regulations be amended to ameliorate the practical difficulties?

The Law Commission's suggestion of an obligation on the prosecution to facilitate defence access to these videos is a sensible middle-ground between reverting to the prior position of open availability and maintaining a provision which defence counsel report is causing practical difficulties.

Q59 Are there any problems, or anticipated problems, in the application of the Regulations to military proceedings?

In principle, the Association does not believe there to be a rational basis for taking a different approach to military proceedings in relation to the matters dealt with in the Regulations. It is not understood that there is something different about military proceedings which requires a different approach to the regulation of video recorded evidence.