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Second review of the Evidence Act 2006
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Second review of the Evidence Act 2006 – Issues Paper

Introduction

The New Zealand Law Society welcomes the opportunity to comment on the Law Commission's *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006 Issues Paper 42* NZLC IP42, March 2018 (Issues Paper).

The Law Society has drawn on the expertise of highly experienced practitioners on its Criminal Law and Civil Litigation and Tribunals Committees, and records its gratitude for the extensive input and assistance it has received from the committees in preparing this submission.

The Law Society agrees with the Commission's preliminary view that, broadly speaking, the transformation of the law of evidence into a single Act is a success, and that the Evidence Act 2006 (Act) is still working well. The Law Society also agrees that legislative amendment would improve the application of the Act in some areas, and addresses these matters in more detail in the body of this submission.

The Law Society's responses to the Issues Paper questions are set out below. If the Commission would like to discuss any aspect of the submission, we would be very pleased to arrange a meeting with Law Society representatives.

CHAPTER 1 – INTRODUCTION

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

The Law Society supports retention of the section 202 review provision, for the reasons set out at [1.42] – [1.43] of the Issues Paper. A regular review by the Commission is very useful and allows for developments in caselaw to be monitored.

Given that in general the new legislative scheme for the law of evidence has been considered a success (at [1.5]), the Law Society considers that the factors set out at [1.44] support the extension of the current five-yearly review period to every 10 years.

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 Issues Paper appears to be comprehensive and the Law Society has not identified any issues that have not been addressed.

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 Law Society notes that the Law Commission is specifically required to take into account te ao Māori in making recommendations for the reform and development of laws in New Zealand. It is well known that Māori are disproportionately represented within the criminal justice system, both as victims and offenders. The Law Society suggests that the Commission consult Te Hunga Rōia Māori o Aotearoa, the Māori Law Society, as it will have in-depth knowledge of the impact of specific provisions of the Act on Māori.

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?

There is an unsatisfactory lacuna in the Act in this respect, as outlined at [3.9] – [3.10] of the Issues Paper. The Law Society considers that sexual disposition evidence should not be subject to a blanket ban against admissibility, given that it could conceivably be relevant and probative in some circumstances. However, given this type of evidence engages the same policy concerns with which section 44 is concerned, the Law Society considers that the admissibility of the evidence should be subject to the heightened relevance test in section 44(3). The most straightforward way of achieving this is an amendment to section 44(1).

Complainant's sexual experience with the defendant

Q5: Should the admissibility 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 Law Society does not consider that any heightened restrictions on evidence of this nature are appropriate. Given the factors involved in most sexual offending (the act that occurred, the mental state of the complainant and the mental state of the defendant), previous sexual interactions between the two are often relevant to one or more of these three matters. Although no heightened relevance test is engaged, the Law Society notes that evidence about the complainant's previous sexual experience with the defendant is still subject to the overriding requirements of relevance in section 7 and the general exclusion in section 8.

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?

Yes. The starting point is that a complaint which is admittedly false on the complainant's own admission is of a different evidential value than a complaint which is allegedly false. The existence of an admittedly false complaint can be determined without the need for the prior evidential hearing, and addressed either on a veracity or propensity basis, or both.

By contrast, the allegation of a false complaint is of no evidential value until there is material upon which the tribunal of fact can reach a conclusion that the prior complaint was actually false. Consequently, the issue of an allegedly false complaint must be dealt with at an evidential hearing in order to determine whether there is sufficient basis to the allegation of previous false complaint. However, as William Young J observed in *Best v R*, neither propensity evidence nor veracity evidence needs to be proven to be true in order to become admissible. Rather, it is simply that the more plausible and more likely to be true veracity or propensity evidence is, the more willing judges will be to admit it.in this regard.[1] The more uncertain as to the truth of the matter, the less substantially helpful the evidence will be. If the evidence is substantially helpful, section 44 would be engaged.

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?

The answer depends on the particular circumstances of the case. A false complaint is not evidence of sexual experience, if it is a false allegation and nothing in fact happened. If something did happen, but was falsely described, it is likely to be properly characterised as sexual experience. In the latter scenario, the Law Society considers that the evidence is generally probative as veracity evidence but, depending on the circumstances, it may reveal a propensity to say particular things for particular reasons. This is an area which could be simplified or clarified by amending the Act.

Extension of section 44 to civil proceedings

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

The Law Society considers it would be sensible to have an equivalent heightened relevance test applicable in civil proceedings.

Notice requirement in section 44A

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

An amendment is unnecessary. Rule 2.13 of the Criminal Procedure Rules 2012 requires an applicant to set out the grounds of an application of this sort. Although there is technically an oversight in section 44A, the Criminal Procedure Rules cover this issue in any event.

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1 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 at [126] to [129].

CHAPTER 4 – CONVICTION EVIDENCE

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

The Law Society considers that section 49 and section 8 should operate sequentially, with evidence admissible under section 49 needing also to pass the additional admissibility test in section 8. In light of suggestions that have arisen to the contrary,[2] the Law Society submits that the Act should be amended to clarify the position.

The Law Society's view is that the sequential operation of section 49 and section 8 is in fact the position under the current law. The argument that section 49 excludes section 8's application is unpersuasive. It runs that, since section 49 specifically refers to evidence of a conviction and provides for its admissibility save in exceptional circumstances, Parliament has adjudged that such evidence is unfairly prejudicial only in those 'exceptional circumstances'. On this view, there is no room for a finding of unfair prejudice if the exceptional circumstances test is not met and therefore no room for section 8 to operate.

The Law Society considers this approach is flawed for two reasons:

1. This interpretation of section 49's relationship with section 8 is contrary to the role section 8 plays with other specific admissibility provisions. The Court of Appeal has repeatedly stressed that the 'general' nature of section 8 entails its universal application. Section 8 is entitled "General Exclusion" and its first three words are "In any proceeding". In *Hudson*, the Court said that "the general exclusion in section 8 applies generally to all evidence".[3] In *MacKenzie*, the Court opined that "s 8 provides the ultimate filter to admissibility".[4] And in *Marsich*, the Court held that "under s 8 of the Evidence Act, the judge retains a residuary discretion to decline to admit evidence".[5] In these cases, the Court of Appeal has not suggested that the Act's specific admissibility provisions displaced the general admissibility provisions. Rather, the Court has held that such provisions apply in addition to section 8, not instead of it.[6]

2. The interpretation rests poorly with the wording of section 49(1). Section 49(1) qualifies its operation to where "not excluded by any other provision of this Act". The provision accordingly explicitly contemplates that there are situations where another provision does exclude its operation. It might be argued that some provisions can exclude section 49 — say as to hearsay evidence — but others cannot — say sections 7 and 8. However, if section 49 were meant to operate subject to some, but not all other provisions, such provisions would be expected to have been expressly identified by Parliament. If section 49 were subject to some, but not all, other admissibility rules, there are no criteria by which the applicable rules are able to be discerned.

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2 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1, at [14] per William Young and O'Regan JJ, and *R v O'Carroll* [2015] NZHC 2152, at [17] and *B v R* [2017] NZCA 575, at [18]. The issue was left open in *V v R* [2017] NZSC 142, at [16].

3 *Hudson v R* [2010] NZCA 417, at [43].

4 *MacKenzie v R* [2013] NZCA 378, at [43].

5 *Marsich v R* [2012] NZCA 470, at [20].

6 This is also the view expressed in *The Evidence Act 2006: Act & Analysis*, Mahoney, McDonald, Optican and Tinsley eds., (Thomson Reuters) (2013) (3rd ed), especially at 52 and 60.

However, given the lack of clarity that appears to have arisen on this matter and the seriousness of the issue, the Law Society considers the Act should be amended to clarify the sequential operation of section 49 and section 8.

The starting point is that if section 8 does not apply to convictions, it seems likely that convictions will always be admitted into evidence, and the only question will be the weight given to them. That is because section 49 does not provide any power to exclude a conviction — section 49(1) renders it admissible, section 49(2)(a) permits evidence inconsistent with the conviction to be given, and section 49(2)(b) empowers a judge to direct that the convicted person's guilt be determined without reference to the conclusive effect of section 49(1). Section 49 does not empower the court to exclude the conviction altogether.[7]

The consequences of this are severe and undesirable. In all but the exceptional case, the admission of a conviction entails its conclusive effect. The effect of admission is therefore stark. And without section 8, all convictions will be admitted and almost all will be conclusive proof of the offence. The following hypotheticals illustrate the effects:

- Defendants 1, 2 and 3 are charged with conspiracy to import ecstasy. D1 pleads guilty. Her conviction is tendered by the Crown under section 49(3) to prove that a conspiracy existed and that it related to the importation of ecstasy. D2 alleges they had discussed importing legal drugs, but not ecstasy, and that D1 must have misunderstood. D2 also alleges that no conspiracy existed, and that D1 was therefore wrongly convicted. Is D2 precluded from running these arguments? It seems likely she is.[8] It is a fairly ordinary conspiracy case and unexceptional. These sorts of allegations are routinely made by alleged co-conspirators, and it is unclear how the fact of the allegation renders her case exceptional.
- Suppose D1 was convicted at trial, on the same facts as above. Does D2's position change? The issues on which D1's conviction is based have been litigated before a trier of fact. But suppose the trial judge in D1's case has misdirected the jury. D1's conviction is tendered in evidence at D2's trial. How can she raise the alleged misdirection that led to D1's conviction? Is this just bad luck for D2? Does the mere fact she alleges a misdirection constitute exceptional circumstances? Presumably not — because all defendants would make such allegations. Yet if a misdirection allegation is not an exceptional circumstance, a material legal error may infect D2's trial, and the trial of all other parties charged.
- Suppose the facts disclose not a conspiracy, but an ordinary party liability case. Ds 1 and 2 threaten X with violence. X flees and disappears. He is later found dead. D1 is charged as principal and D2 as a party to manslaughter under section 160(2)(d) of the Crimes Act. D1 pleads guilty. Her conviction is used at D2's trial. D2 says X's death wasn't a homicide — that X's own actions caused it. For that reason D2 alleges D1's conviction must have been

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7 But see *R v Bouavong (No 7)* [2012] NZHC 524, at [56]. The issue did not arise in *V v R*, above n 2, at [14], as the appellant conceded the admissibility of his earlier convictions.

8 *B v R,* above n2, at [26]. In *B v R* the court removed any reference to *B* in the conviction certificate accepting that if it was to remain it would cause unfair prejudice. Thus *B* was only allowed to argue he was not part of the conspiracy, not that that there was no conspiracy at all. *Flavell v R* [2016] NZCA 58. Both *R v Bouavong (No 7)* [2012] NZHC 524 and *R v Tanginoa* [2012] NZHC 3121 took markedly different approaches, but both were doubted, if not overruled, by the Court of Appeal in *B v R*, at [24], which found them inconsistent with *R v Taniwha* [2012] NZSC 605 and *McNaughton v R* [2011] NZCA 588.

"wrongly entered". Can she do so? How is this exceptional? Defendants routinely question the convictions to which they are allegedly parties. In this routine case, it seems that D2 cannot question D1's conviction. Yet the effect is to insulate key elements of the Crown case from challenge.

- Suppose D2 was charged as the principal and D1 the party? D1 pleads guilty as a party and her conviction is tendered in D2's trial as a principal. The jury will ask: to whose offence was D1 a party? Further suppose D1 pleaded guilty because she adjudged her chances of acquittal low, and that the Crown offered an inviting discount in sentence for a guilty plea and cooperation. Does the fact that her plea reflects her want of convenience rather than admission of culpability matter for D2? As Hughes LJ (as he then was) said in *R v Smith*: "Defendants do sometimes admit what is not true".[9]
- Suppose D1 was convicted of manslaughter at trial. Her conviction is used at D2's trial as a party. D2 alleges that D1's counsel was incompetent and refused to call key witnesses or failed to realise that police disclosure cast doubt on time of death and thereby cause of death. Is this exceptional? If D1 has a valid appeal because of incompetent counsel — but has not lodged it — can D2 raise it to cast doubt on D1's conviction?

In such cases, there is a danger that admitting a conviction effectively reverses the burden of proof and requires the defendant to prove why the earlier conviction was wrong.[10] If two accused are charged with jointly perpetrating an offence, one pleads guilty and her conviction is conclusive evidence of the offence at the other's trial, the burden is effectively on the second defendant to prove her innocence.[11] In *R v Smith*, Hughes LJ observed:[12]

> … evidence that a now absent co-accused has pleaded guilty may carry in the minds of the jury enormous weight, but it is nevertheless evidence which cannot properly be tested in the trial of the remaining defendant. That is particularly so where the issue is such that the absent co-defendant who has pleaded guilty could not, or scarcely could, be guilty of the offence unless the present defendant were also. In both those situations the court needs to consider with considerable care whether the evidence of the conviction would have a disproportionate and unfair effect upon the trial.

The difficulty with section 49 is that all convictions carry the same probative weight, without any consideration of the circumstances in which they were entered. In particular, section 49 fails to recognise the fundamental truth articulated by Hughes LJ in *R v Smith* above in relation to guilty pleas – defendants can plead guilty for all sorts of reasons and it cannot always be properly assumed that a defendant who has pleaded guilty did, in fact, commit the specific offence charged by the Crown.

Moreover, in the example where a convicted person cannot be guilty unless the second defendant is also guilty, then the second defendant's trial is essentially a foregone conclusion. Unless section 49(2)(b) is engaged, the jury could not but return a guilty verdict. Even if a direction is given, the accused effectively shoulders the burden of proving his innocence. The accused must prove the earlier conviction is wrong. Otherwise, the accused must be guilty.

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9 *R v Smith (Derk Nathan)* [2007] EWCA Crim 2105, at [22].

10 See *R v Miell (Richard)* [2007] EWCA Crim 3130, at [52].

11 The judgment of Glazebrook and Arnold JJ in *Morton v R* distills this worry. See *Morton v R*, above n 2, at [136].

12 At [16].

These manifold troubles precipitated by the equivalent English rule led the Court of Appeal of England and Wales to remark in *R v Hillier and Farrar*:[13]

> It is the widely held view, which we share, that Parliament cannot have appreciated how wild an animal it was prepared to let loose upon the field of evidence when it enacted section 74.

In New Zealand, the Law Society submits that section 49 should not be the sole filter of convictions in evidence. At the very least, section 8 should provide an additional control as to their admissibility.

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?

The Law Society considers that the issues that have been raised in the response to Q10 need to be resolved before "exceptional circumstances" are defined.

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

The Law Society agrees with the Supreme Court in *V v R* and Elias CJ in *Morton* that the effect of section 49(2)(b) is that the conviction remains in evidence, but with a direction that the jury can determine afresh whether the person committed the offence.[14] Given that the conviction remains in evidence, this reinforces the Law Society's view that some external source (ie, section 8) must permit judges to exclude it in appropriate circumstances.

The Law Society considers that section 49(2)(a) is redundant and should be repealed. The comments of William Young and O'Regan JJ in *Morton* are endorsed in this regard:[15]

> One of our concerns is that in the absence of a s 49(2)(b) direction there is the possibility that the Judge would feel obliged to direct the jury that s 49(1) has the consequence that they must reject the narratives of the appellant and co-defendant. Another and related concern is that in the absence of s 49(2)(b) direction, evidence of the appellant and co-defendants indicative of consent on the part of the complainant would be inadmissible as inconsistent with the convictions.

In other words, there seems no point in granting permission to lead evidence inconsistent with the conviction if the jury is then told to disregard that evidence by operation of section 49(1). The Supreme Court rightly recognised the futility of such permission without a section 49(2)(b) direction in *V v R.* The Law Society therefore recommends consolidating section 49(2)(a) and (b) into one provision.

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

Yes. The Law Society observes that the Issues Paper separates the section 49 issues into questions 10 to 13, but the question of the proper evidential effect of a conviction underlies all of them. There is a conspicuous lack of a justifying theory for section 49. Exceptional circumstances have eluded definition[16] and the sections 8/49 relationship is unclear because no guiding theory has been

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13 *R v Hillier and Farrar* (1992) 97 Cr App R 349 (CA). The English rule mandates that convictions are only presumptive proof of an offence's commission: s 74 of the Police and Criminal Evidence Act 1984.

14 *Morton v R*, above n 2, at [96] and *V v R* above n 2, at [29].

15 *Morton v R,* above n 2 at [79].

16 In *B v R* the Court of Appeal said the test for exceptional circumstances is a high one, above n 2, at [35].

proffered to regulate section 49's operation. The problem is made more difficult because no comparable jurisdiction to New Zealand has a conclusive proof rule.

It would be undesirable to go to the other extreme and adopt the rule in *Hollington v Hewthorn*.[17] For instance, in the trial of an accessory after the fact, there seems no reason to exclude the principal's murder conviction. Similarly, in most cases of a guilty plea, evidence of that conviction should at least be presumptive proof of its commission. The accused is well placed to attest to her mental state and her movements. To rule out such convictions as inadmissible against a third party would be a wrong turn.

However, the picture becomes complicated when the accused pleads guilty to offences with both peculiarly legal and peculiarly factual elements. For example, manslaughter under section 160(2)(d) of the Crimes Act requires a defendant to consider her actions ('did I threaten or occasion violence, intending to do so?'), the actions of the deceased ('did she act fatally in response?') and the legal issues ('was her death reasonably foreseeable? Was it caused by my threats?'). Plainly, the accused is well positioned to comment on the first of these issues, and perhaps the second. But if she concedes the third – clearly legal rather than factual issues – it is less clear that her concession should burden subsequent defendants.

The Law Society considers that subsequent defendants should not be prejudiced by such concessions. If D1 wishes to concede an issue of causation in her case, D2 should not be bound by it. Even if a trial judge in D1's case rules on a point, D2 should still be able to challenge the same point. If D1's conviction is conclusive proof at D2's trial, D2 cannot challenge a legal predicate of that conviction. The ruling and D1's conviction remains determinative, potentially prejudicing multiple defendants. Unless D1 appeals the matter, the remaining defendants are without a remedy.

Ultimately, consistency of verdicts between D1 and D2 is far less important than a fair trial for D2. On the contrary, in the Law Society's view, conferring on D2 a right to challenge matters underlying D1's conviction is much more desirable than the alternative.[18] Even if D2 is then acquitted in circumstances indicating that the jury doubted D1's guilt, that is preferable to where D2 is convicted despite a material error underlying D1's conviction.[19]

So far as the pursuit of consistency in verdicts underlies the rationale for a conclusive rule in section 49, the Law Society considers this to be a violation of section 25 of the New Zealand Bill of Rights Act 1990 (minimum standards of criminal procedure: fair trial rights). A qualification of section 25 is justifiable only in furtherance of a pressing and legitimate aim. The Law Society doubts whether consistency of verdicts (assuming it is discernible) is a sufficiently important aim, given the draconian curtailment to a defendant's section 25 rights effected by a conclusive proof rule.

CHAPTER 5 – THE RIGHT TO SILENCE

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;

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17 *Hollington v F Hewthorn & Co* [1943] KB 587 (CA), discussed at [4.37] of the Issues Paper.

18 *McNaughton v R,* above n 8, at [62] and *Morton v R*, above n 2, at [48].

19 Moreover, whether the jury in D2's case doubted D1's guilt will be ultimately unknowable.

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 Issues Paper observes that the distinctions drawn by the current statutory provisions are so fine that they can be difficult to manage in a trial situation. The Law Society agrees, and considers that a jury is often unlikely to truly understand the distinction between permissible adverse inferences about credibility and inferences of guilt. As such, the current provisions risk that a jury may draw adverse inferences of guilt even from a properly worded judicial direction. The status quo is unnecessarily difficult for all participants in the court system (judges, counsel, jurors and defendants) to grapple with. The Law Society therefore does not support retaining the status quo. However, views within the Law Society's contributors otherwise diverge in respect of the remaining options, (a) and (b).

There is a consensus that the right to silence is especially important at the particularly sensitive point where a defendant is first confronted by investigators. At that point, defendants often do not have the benefit of legal advice or, if legal advice is available, it is in circumstances where full disclosure is not available, and defendants do not know the case against them. Lawyers advising defendants in these circumstances are not in a position to advise them as to the consequences of a potential adverse inference at trial. Section 23(4) of the New Zealand Bill of Rights Act 1990 provides the right to refrain from making a statement.

It is also generally accepted that there are some situations where it is proper to make adverse comments in relation to silence at trial. Amending sections 32 and 33 to prevent any adverse interference to be drawn would reverse this position and unfairly restrict the prosecution, and option (a) was not supported by any contributor in respect of silence *at trial*.

Otherwise, the Law Society's contributors differed as to where the balance is to be struck and the situations in which adverse comment may be made. The Law Society anticipates that there will be divergence within the profession generally on these issues.

Where a preference for option (a) was indicated in relation to *pre-trial* silence, practitioners supported a statutory provision similar to that in section 89 of the Australian Uniform Evidence Acts. For those who preferred option (b), they nonetheless regarded option (a) in respect of pre-trial silence as better than the status quo.

For those who preferred option (b), an approach based on the Criminal Justice and Public Order Act 1994 (UK) was supported.[20] Those in favour of this approach note the guidance provided by that legislation would facilitate fairness and predictability in trial proceedings. However, the UK position in relation to police cautions (which refers to the possibility of silence being taken into account in some circumstances) was not supported.

[20] Issues Paper at [5.34].

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?

Yes, the Act should be amended to clarify this point. The Law Society considers that judges sitting alone should be treated in the same way as juries (that is to say, judges should not be permitted to infer guilt from 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?

The Law Society does not consider that the existing caution should be extended. Many suspects are significantly stressed when being spoken to by Police (or other investigators). There is an evident power imbalance, and a significant (and disproportionate) number of suspects who fall nearer the lower range in terms of education and aptitude to deal with information under pressure.

A caution that warned of the 'risks' of staying silent could unfairly add to this pressure. A lawyer (available for free through the Police Detention Legal Assistance (PDLA) scheme) can advise more properly on the nuances of providing a statement or staying silent. It is almost always in the suspect's best interests to stay silent at least initially, until they have at least some preliminary advice and some time to come to terms with making a statement. At a practical level, the existing caution tends toward that conservative approach and should not be undermined.

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

The Law Society's contributors differ on whether the Act should be amended to provide legislative clarification on this matter.

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

No, not in the experience of the contributors to the Law Society's submissions on this topic.

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?

The Law Society's contributors on this submission differ on whether section 33 should be amended to provide legislative clarification on this matter. Those who support amending the section in the manner proposed in the Issues Paper at [5.60] recognise that first instance courts often struggle with applying the section, and conclude that statutory, but non-exhaustive, guidance would be of assistance.

Those who do not think that section 33 should be amended consider the question of guidance falls to individualised assessment of all the facts of the particular case. Any guidance would not be exhaustive, and would not therefore give certainty about whether an inference was appropriate.

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?

No. The Law Society's view is that the truth of a defendant's statement should not be considered when determining its admissibility under section 28.

The Issues Paper records that the Law Commission initially envisaged that an unquestionably true confession might be excluded under section 28, and this was the clearly held view of the select committee, but an explicit provision to this effect curiously did not find its way into the Act. The truth of a confession was in any event considered to be irrelevant up until the decision of the Supreme Court in *R v Wichman.*[21] In that case:

- Elias CJ took the view that the focus should be on whether the circumstances would be likely to have affected the statement's reliability, and not on whether a given statement is true.[22]
- William Young J said for the majority 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*", then it would be unsound to regard his statement as unreliable.[23] According to Glazebrook J, to do so would risk jeopardising faith in the criminal justice system.[24]

At first blush, the majority's reasoning might seem attractive. However, the example given by William Young J will be a rare occurrence. The majority of section 28 cases will involve Police questioning of mentally or psychologically vulnerable defendants with an inherent risk that this characteristic is such that the circumstances in which the statement were made render the statement unreliable. The risk of a miscarriage of justice if an unreliable confession is admitted is high.[25] One need only consider Teina Pora's case to accept that proposition.[26]

If it were to be decided as a matter of policy that the truth of the statement may be considered in a section 28 admissibility inquiry, then the Law Society considers that section 28 should be amended to make this clear because (notwithstanding the operation of the decision in *Wichman*) the actual wording of section 28 points to a consideration of the circumstances in which the statement was made, and not actual truth.

Any such amendment should provide guidance as to how one determines whether the statement is true, and what amounts to consistency with other evidence. As noted by Glazebrook J in *Wichman*, an allegation that the statement is true should not suffice for its admissibility. Particular care needs to be taken when the Police interview a suspect who is vulnerable because of their physical, mental or psychological condition.[27] The fact the confession may appear to be true should not overwhelm the admissibility inquiry.

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21 *R v Wichman* [2015] NZSC 158, [2016] 1 NZLR 753.

22 Ibid, at [280].

23 At [81]. It would also be contrary to common understandings of unreliability.

24 At [433].

25 At [282] per Elias CJ. See also *Pora v R* [2015] UKPC 9 at [56].

26 *Pora v R* [2015] UKPC 9.

27 Section 28(4)(a) Evidence Act 2006. This is despite comments by Glazebrook J in *R v Wichman* that section 28 "is not concerned with proper police conduct and the person in authority requirement has been removed", at [429].

Accordingly, the Law Society considers that it needs to be clear that the first step in assessing reliability is to assess the circumstances in which the statement was made, and assess the extent to which the circumstances call into question the reliability of the statement, rather than starting the inquiry with the proposition "it's true and therefore it is admissible".[28] The Law Society regards this as essential if it is accepted that section 28 sets up a "precautionary approach to presumptively unreliable statements".[29]

The inquiry should then turn to find markers of reliability in the confession itself or the surrounding evidence. Given the risks associated with false confessions and a consequent miscarriage of justice, the section should provide that clear and independent evidence of reliability is required to recognise the dangers noted by Glazebrook J.[30]

In order to prevent a section 28 determination from becoming a mini-trial, the force of corroborative evidence which allayed unreliability concerns would have to be evident without much further inquiry. Otherwise the Crown's allegedly corroborative evidence would be scrutinised at length, and the judge would assume an inappropriate fact-finding role, usurping the jury's functions.

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?

No. Cross-examination of the defendant should not be permitted on a voir dire or pre-trial hearing. Notably, in *Wichman*, Glazebrook J disagreed with the ruling in *Patten*[31] that had allowed cross-examination of the defendant as to the truth of his statement.[32]

If cross-examination is permitted, the risk is that such hearings will become mini-trials. The prosecutor will endeavor to show that the confession is admissible because of extraneous markers of actual reliability (the suspect's DNA found at the scene, etc). Defence counsel may necessarily have to obtain an explanation from their client as to how she knew certain facts that might only be known by the perpetrator (eg, the defendant was told it by the Police or someone else). The prosecution will then have to challenge such evidence by cross-examination.

The defendant would then be placed in the jeopardy of her answers being used at trial against her, because the effect of section 15 of the Act is that evidence given in a *voir dire* is admissible at the subsequent trial if the defendant gives evidence that is inconsistent with what was said at the *voir dire*.[33] Because of these factors, cross-examination as to the truth of the statement is likely to have a significant chilling effect on the defendant's ability to challenge the admissibility of a statement.

CHAPTER 7 – IMPROPERLY OBTAINED EVIDENCE

Chapter 7 discusses important issues about the admissibility of improperly obtained evidence, in light of recent appellate decisions concerning the interpretation and application of section 30. The chapter 7 questions raise significant issues for all criminal practitioners, but we note that the

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28 *R v Wichman* at [433].

29 At [144] per Elias CJ.

30 At [436] – [438].

31 *R v Patten* HC Auckland CRI-2006-004-3200, 8 April 2008 at [14] and [22] allowing for the cross-examination of the defendant as to the truth of a statement.

32 At [439].

33 *R v Ram* [2007] 3 NZLR 322, (2007) 23 CRNZ 444 at [62] – [63].

responses below primarily reflect a defence bar perspective and criminal prosecutors may take a different view.

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?

The Law Society considers that an amendment to section 30 is not required and that the status quo should be maintained. As the Commission recognises, the appellate courts since *Hamed v R*[34] appear to have considered that the centrality of the evidence to the prosecution case is a relevant factor favouring admission. The lack of specific reference to this factor in section 30(3) does not appear to be causing any particular practical difficulties. Trial judges appear well able to articulate this factor in conducting the balancing exercise in the particular circumstances before them.

Further, the Law Society considers that the concern expressed by Tipping J in *Hamed v R*[35] (referring to the reasoning of the select committee considering the Evidence Bill), namely that inclusion of this factor creates a potential temptation for investigating agencies to breach rights in order to obtain evidence and to then claim that the evidence is central to the prosecution case and so should be admitted, remains valid. The Law Society considers that an express reference to the centrality of the improperly obtained evidence in section 30 may potentially be seen as legislative endorsement of an "ends justifies the means" argument which, in practice, will trump other relevant considerations.

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"?

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

The Law Society considers that the "seriousness of the offence" assessment is sufficiently comprehensible in light of the guidance provided in *Underwood v R*[36] (and other prior appellate decisions). The Law Society considers that there is no need to codify such guidance further in the Act. The Law Commission has previously acknowledged that the balancing exercise under section 30 is fact-specific and intrinsically inexact.[37] The Court in *Underwood* endorsed that observation.[38] It is submitted that continual and on-going attempts to codify guidance provided by the courts in fact-specific cases is unnecessary and should be avoided. Such codification risks setting such fact-specific assessments in concrete and may restrict the courts' ability to further interpret the Act as appropriate.

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

35 *Hamed v R* [2011] NZSC 101, at [237].

36 *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433.

37 2013 Review of the Evidence Act 2006 (NZLC R127, 2013) at [4.11].

38 Above n 36, at [15].

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

The Law Society considers that the availability of alternative techniques should generally favour exclusion. If the investigating authority has other lawful investigative methods available to it, but instead engages in improper methods to obtain evidence, that must generally be a factor pointing against admission.

However, it does not follow that the absence of alternative techniques should generally favour admission. In the context of criminal law, many evidence-gathering techniques involve state intrusion into what is generally considered to be private behavior. Evidence which has been improperly obtained, by definition, is evidence which has been obtained in breach of a person's rights or unfairly. The public are entitled to be protected from evidence-gathering methods that are not legislatively or judicially approved. To permit an investigative agency to argue that "there was no proper, lawful or fair way for us to gather this evidence, therefore the evidence we improperly, unlawfully or unfairly obtained should nevertheless be admitted" is not consistent with the protection of rights, and risks bringing the administration of justice into disrepute.

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?

As above. The absence of alternative techniques should not bear on the balancing exercise but, if it does, should favour exclusion rather than admission.

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

No. As the Commission has previously recognised, the balancing exercise necessarily involves difficult questions of judgment that are not amenable to scientific precision, is necessarily fact-specific, and is of an evaluative nature which means that different judges may sometimes come to different conclusions on similar evidence.[39]

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)?

The Law Society considers that exclusion in earlier, unrelated proceedings should not be a relevant factor favouring admission in the balancing exercise. With respect, the Law Society favours the approach adopted by the Chief Justice in *Marwood v Commissioner of Police*, namely 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.[40] The Law Society agrees with the tentative views expressed by the Commission at [7.56] of the Issues Paper.

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39 Issues Paper at [7.46].

40 *Marwood v Commissioner of Police* [2016] NZSC 139, at [67]

Extension to civil proceedings

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?

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?

The Law Society considers that a proportionality assessment (a balancing test) should be implemented regarding the admissibility of improperly obtained evidence, in civil proceedings.

The Law Society considers the current state of the law is unsatisfactory, and there is a lack of certainty for civil practitioners about the circumstances in which they might be entitled to raise a challenge to admissibility. In this regard:

a) For improperly obtained evidence involving an abuse of process or a serious offence, there is little doubt that the court could invoke its inherent jurisdiction to exclude the evidence.

b) For improperly obtained evidence involving the commission of a tort, a party may be able to seek a mandatory injunction compelling return of the material and restraint of its further use, before it is entered in evidence.

c) For other species of improperly obtained evidence, the position is less clear.

In his *New Zealand Criminal Law Review* commentary on the Supreme Court's decision in *Marwood v Commissioner of Police*,[41] Scott Optican noted that at common law there was no jurisdiction to exclude improperly obtained evidence in civil proceedings, and that the Supreme Court acknowledged it could locate no case where the jurisdiction had been exercised.[42] Mr Optican expressed the view that the Supreme Court erred in holding that such a jurisdiction existed.

While Mr Optican's criticisms may have some merit, the practical reality is that having been decided as it has, *Marwood* is currently the reflection of the development of New Zealand common law – its antecedents have been distinguished or overruled to the extent they are inconsistent.

In the Law Society's view, there are many types of impropriety that might be guarded against. While different considerations apply in relation to civil proceedings to those that arise in the criminal context, the Law Society considers there should be some mechanism for controlling impropriety in appropriate circumstances.

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?

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

42 Scott Optican *Case Note: Every Silver Lining has a Cloud – The Exclusion of Improperly Obtained Evidence in Civil Proceedings: Marwood v Commissioner of Police [2016] NZSC 139, [2017] 1 NZLR 260* [2017] New Zealand Criminal Law Review 228, at 236, citing *Marwood* at [22].

The Law Society favours the approach and reasoning of the minority in *R v Wichman*.[43] It is considered that such an approach upholds the fundamental values of the criminal justice system and the Law Society agrees that a distinction can be drawn between undercover operations generally and those which involve questioning of a suspect which amounts to the functional equivalent of a police interrogation, or where inducements are offered to a suspect to provide a confession (i.e. "Mr Big" undercover operations).

Where an undercover police officer's interactions with a suspect crosses the line into the functional equivalent of a police interrogation, it is considered that the Practice Note should apply.

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?

The Law Society considers that sections 28 and 8 do not adequately address concerns about reliability and unfair prejudice which may arise in relation to "Mr Big" undercover operations. In particular, it is considered that the fact that the burden of proof as to the potential for non-reliability is on the defendant (as opposed to the position adopted in Canada following *R v Hart*[44]) is significant. The Law Society considers that New Zealand law should appropriately reflect the position adopted by the majority of the Supreme Court of Canada in *Hart*.[45] A bespoke rule relating to such undercover operations, specifically placing the onus on the Crown to establish the reliability of any confession obtained and that its probative value outweighs its prejudicial effect, should be enacted.

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?

The Law Society considers that tentative identification evidence should be treated as visual identification evidence, thereby engaging section 45 admissibility rules. This type of evidence is led by the prosecution and, fundamentally, the prosecution will be intending to rely on it as evidence that the defendant was the person committing the offence. Identifying an individual from a montage, even if with some uncertainty, is different in nature to resemblance evidence and is likely to be given more weight by a jury. Accordingly, this evidence should be subject to the statutory balances and warnings set out in the visual identification regime. Although the words "to the effect that" should adequately deal with the issue of uncertainty identifications, the definition of "visual identification evidence" could be amended to provide clarity on this issue.

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?

The section 45 regime is designed to safeguard the defendant from mistaken identification, which has historically been a cause of miscarriages of justice. The section deals with specific problems that arise with identification evidence. If evidence qualifies as visual identification evidence but is

43 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753, discussed in the Issues Paper at [7.77]-[7.78].
44 *R v Hart* 2014 SCC 52.
45 Issues Paper at [7.86].

inadmissible under section 45, it should not be admitted on a parallel but less stringent test via sections 7 and 8. However, evidence that does not purport to identify a defendant need not be subject to the same safeguards. The key issue is to ensure that the definition of "visual identification evidence" properly captures evidence that engages the policy concerns with which section 45 is concerned.

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

Section 45 makes evidence admissible when the evidence is given directly by the identifier. If that identifying witness becomes unavailable and the prosecution wishes to adduce the evidence as hearsay, the Law Society considers that both the identification provisions and the hearsay provisions of the Act ought to be satisfied. It does not appear that this presents a particular problem in practice.

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 two 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?

Family violence complainants (like sexual violence complainants) face considerable challenges in giving evidence, as discussed at [9.39] – [9.53] of the Issues Paper. This has been recognised by the Family and Whānau Violence Bill, which will allow pre-recorded evidence-in-chief for family violence complainants provided the evidence is recorded within two weeks of the alleged incident.[46] However, the Law Society does not support the options suggested at Q32(a) and (b), and agrees with the concerns expressed by the Court of Appeal (as noted at [9.54]) about the impact of pre-recording on the defence case, if pre-recording occurs before full disclosure has been made. This is discussed in more detail at Qs 34 – 35 below.

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

Yes. As the judge currently has a discretion about this matter, the Law Society considers that prosecutors should consult complainants on the issue. Judges should continue to decide on a principled basis whether evidence in chief could be given by way of video interview and how cross-examination is to proceed. This discretion is already available pursuant to sections 103 and 105(1)(a)(iii) of the Act.

[46] Family and Whānau Violence Legislation Bill, currently awaiting second reading.

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 an order to the contrary:

a. propensity witnesses?

b. family members of the complainant?

The Law Society supports the approach taken by the Court of Appeal in *M v R.*[47] The pre-recording of cross-examination should be a matter for the discretion of the judge, and should only be used in very compelling cases. The Law Society does not see a compelling case for a presumption in favour of pre-recording of cross-examination for any witnesses, including a complainant. Although a propensity witness may in fact be a complainant in another case, various protections can be put in place for that propensity witness, such as screens etc.[48]

Q35: Should reforms in the area of pre-recording aim to provide an entitlement for all vulnerable witnesses to have their entire evidence pre-recorded in advance of a criminal trial? If so, which vulnerable witnesses should an entitlement extend to?

The Law Society acknowledges the issues that arise in respect of vulnerable witnesses but does not support an entitlement to have all evidence from vulnerable witnesses pre-recorded in advance of a criminal trial. The starting point for a criminal trial remains that the tribunal of fact sees a witness in real time and has an ability to assess that witness. A significant issue is the difficulty that arises with ongoing Police disclosure, which is very common and can even occur in serious trials only a matter of hours prior to the start of the hearing. If late disclosure occurs and the relevant witness has already been cross-examined, there does not appear to be any practical solution other than to recall the witness for further cross-examination. Any provisions which may force a defendant to disclose otherwise privileged aspects of their defence prior to trial and thereby give the prosecution time to alter its case to "answer" the defence case prior to trial, significantly impact on a defendant's right to a fair trial.

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 views of the Law Society's contributors diverged on this issue. For some, the dynamics of a retrial are seen as invariably different to the dynamics at the first trial. Both sides reconsider the case, how it will be cast, and there is often ongoing disclosure. Some of the evidence at the first trial may be regarded, in hindsight, as objectionable or able to be better phrased. Accordingly, replaying the evidence of the first trial was seen as neither feasible nor fair to either party.

47 *M v R* [2011] NZCA 303, [2012] 2 NZLR 485.

48 The Law Society notes the Commission's comments at [9.59] that the Evidence Act already allows such witnesses to give their evidence in an alternative way if the judge gives a direction to that effect.

For others, it would be sufficient if there was a judicial discretion regarding the subsequent use of the pre-recorded testimony at any re-trial, noting however that in many cases the subsequent use at retrial will not be possible for fair trial reasons.

Access to evidential video interviews

Q37: Have sections 106(4A) to (4C) 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?

The Law Society considers that the restrictions have created difficulties in practice. It can take time to make the necessary arrangements. Arrangements to meet the defendant at the police station to view the interview and take instructions can be problematic, and also raise issues of cost. Commonly, defence counsel may wish to pause the playing of a DVD for discussions with the client, or view them more than once for different reasons. Many of the DVDs can be lengthy, or there may be a number of DVDs to watch for any one trial.

The Law Society considers that counsel ought to be able to view the video interviews in their own time, with or without the defendant, so long as counsel retains the recording in their possession and is prohibited from making a copy. A separate regime would need to be in place in relation to self-represented defendants.

The Law Society has commented in more detail at Qs 56 – 57 below, regarding the use of evidential videos and transcripts.

Judicial control over witness questioning

Q38: Should there be greater judicial control over the 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?

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

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?

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 Law Society does not consider that there is a need to prescribe greater judicial control in this area. There is already wide discretion in section 85 of the Act for the court to intervene. An unduly prescriptive approach risks both requiring intervention when it is unnecessary and missing types of questions that are objectionable. Experienced trial judges who think they have a justifiable basis for intervening in questioning always do so. The Law Society does not consider there is any necessity for

a 'ground rule' hearing prior to the trial in all cases,[49] and that approach would risk requiring pre-trial disclosure of the defence.

CHAPTER 10 – CONDUCT OF EXPERTS

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

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

As noted in the Issues Paper,[50] experts in criminal cases are governed by the principles set out in cases such as *R v Carter*[51] and *R v Hutton*.[52] The Law Society is not aware of any specific or general concerns in relation to the operation of those principles in practice in criminal cases, such that there is a pressing need for legislative amendment. Notwithstanding that the Code of Conduct for civil cases does not apply to criminal cases, it also appears to be common practice in criminal cases for expert witnesses to refer to the civil Code and to agree to comply with the principles contained within it.

Moreover, in the Law Society's view, the creation of a specific code of conduct for experts in criminal cases, if coupled with an extension of section 26 (particularly subsection (2)) to criminal proceedings, could potentially lead to increased numbers of challenges to the admissibility of expert evidence. Additional judicial resources would then be taken up with pre-trial or *voir dire* examinations as to whether an expert has fully complied with the code and, therefore, whether the evidence should be given.

If a criminal code were to be adopted, the Law Society observes that with the exception of the duty to confer, the principles enunciated in *Carter* and *Hutton* essentially reflect the obligations contained in the civil Code. Subject to that qualification, should it be considered that legislative amendment is in fact necessary to cover criminal proceedings, it appears that the civil Code might appropriately be applied to experts in criminal proceedings.

In relation to the question of an obligation to confer, the experience of the Law Society's contributors to this submission is that, at present, prosecution and defence expert witnesses often do confer prior to trial, where appropriate and with the consent of the parties. Particular examples where this appears relatively common are in regulatory proceedings (e.g. Health & Safety, Maritime or Aviation safety prosecutions) and in proceedings under the Criminal Procedure (Mentally Impaired Persons) Act 2003.

However, the Law Society considers that a positive legislative requirement in criminal proceedings for prosecution and defence expert witnesses to confer (either of their own volition or at the

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49 Apart from sexual violence cases: we understand judges in the current Sexual Violence Court Pilot may already be holding 'ground rule' hearings in sexual violence cases, as discussed at [9.111] – [9.112].

50 Issues Paper at [10.6]-[10.7].

51 *R v Carter* (2005) 22 CRNZ 476 (CA).

52 *R v Hutton* [2008] NZCA 126.

direction of the court) would not be appropriate. While there may be positive benefits in experts conferring in appropriate cases, significant concerns also arise in relation to the potential for pre-trial disclosure of the defence. A positive duty to confer also imposes additional costs. These matters raise significant issues in relation to the Bill of Rights Act and equality of arms.

Presently, disclosure obligations on the part of a defendant in respect of expert evidence is regulated by section 23 of the Criminal Disclosure Act 2008. In the absence of any evidence that the current legal framework is causing practical difficulties, or that current practice and procedure is inappropriate, the Law Society sees no need for the imposition of a positive duty on experts in criminal cases to confer. Such an obligation potentially erodes a defendant's right not to make a statement, or be compelled to be a witness in her own defence, or to not 'show his hand' prior to trial, by a sidewind.

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 Law Society considers that amendment to section 26 to include guidance is unnecessary. As explained in the answer to the preceding question, the Law Society considers than an extension of section 26(2) to criminal proceedings may have significant practical consequences. The Law Society is not aware of any difficulties being encountered in criminal cases by reason of the non-applicability of section 26, or the absence of specific guidance in the Act as to when expert evidence which does not comply with the *Carter/Hutton* principles should, nevertheless, be admitted.

Similarly, in relation to civil proceedings, the Law Society is unaware of any specific concerns relating to the operation of the "substantial helpfulness" test under section 25, or the courts' application of the same test in relation to non-compliant expert evidence under section 26(2).

Given the wide variety of circumstances in which expert evidence may be sought to be introduced in criminal or civil proceedings, there may be significant difficulties in formulating an appropriate list of factors which judges should take into account when exercising their discretion to admit evidence under section 26(2). Any such formulation may simply serve to restrict the appropriate exercise of the judicial discretion.

CHAPTER 11 – COUNTERINTUITIVE 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 counterintuitive evidence to the jury?

The experience of the Law Society's contributors is that it occurs at times, but it is not at all common. Typically, defence counsel will wish to retain the right to question the Crown witness who proposes to give evidence on counter-intuitive issues.

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?

Not all family violence cases raise issues of counter-intuitive evidence or myths and misconceptions. Counsel's duty to the court is to ensure that only relevant evidence is called, and that the evidence is given as expeditiously as possible, taking into account the competing interests of the parties. Consequently, the Law Society would hope that agreed expert evidence on myths and misconceptions already occurs in appropriate cases.

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

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

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

No. In *DH v R*,[53] the Supreme Court set out in general terms the type of direction which is appropriate in jury trials, and trial courts are following this direction. However, directions are also dependent on the particular facts of the case which, in turn, depend on the evidence led by the Crown and the contentions raised on behalf of the defendant. The case may not raise any myths or misconceptions, or it may raise a number. The matter of direction, or not, in any particular case is a matter for judicial discretion, and the categories or examples of 'myths and misconceptions' are not necessarily closed, nor agreed.

Consequently, the Law Society does not consider that it is appropriate to seek to list in legislation the misconceptions that should be the subject of direction. The Law Society's view is that the decision in *DH v R* is a sufficient non-legislative guideline for the present, and any directions could be contained in judicial jury trial bench books.

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?

The Law Society supports the concerns raised by the majority of the Supreme Court in *CT v R*.[54] It is important that, in appropriate cases, directions be given both as to the potential unreliability of evidence in cases concerning conduct over 10 years prior and as to the potential impact of delay on a defendant's ability to defend themselves.

The Law Society considers, however, that directions about forensic disadvantage would more appropriately be the subject of a new and separate section rather than being addressed under section 122, with its focus on evidence that may be unreliable. The Law Society sees these as two separate concepts.

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?

Yes. The Law Society considers that there is a need for judicial directions about disadvantage arising from delay. This should be dealt with by the introduction of a separate section in the Act, which reflects the approach taken in some states in Australia.

The Law Society does not agree that the judicial approach to stays of proceedings renders a direction about forensic disadvantage caused by delay unnecessary. This is because there will be cases where the disadvantage is not considered so great as to justify a stay, but where there is still disadvantage to the defence which ought to be explained to the jury

53 *DH v R* [2015] NZSC 35.

54 *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465; discussed in the Issues Paper at [12.9].

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 inclusion of the provisions does not appear to cause any problems in practice, given they have been authoritatively dealt with in a convincing manner by the majority in *Hannigan v R*.[55] Without any practical issue to overcome, there seems little need for change. But there are redundant parts, so there also appears little at stake from amending them to remove the redundant portions. On this basis, the Law Society is neutral on the amendments suggested in the Issues Paper.[56]

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 Law Society regards the amendment as striking a reasonable and pragmatic balance.

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?

"Veracity" and "disposition" are not commonly used words and can therefore be challenging for all parties in the context of jury trials. Given the case law that has followed the enactment of the Act, the Law Society is in favour of retaining the term "veracity", but altering the definition to replace the term "disposition" and make the double-sided nature of the concept clear. The proposal at [13.35] of the Issues Paper appears to be a good one: veracity could be defined as a person's tendency to lie, or to refrain from lying, about subject matter that does not include the facts in issue in the proceedings.

The Law Society does not support use of the term "truthfulness" because of the risk of the term being conflated with factual correctness in the context of the particular case before the court.

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?

The Law Society agrees with the preliminary view of the Commission outlined at [14.22] of the Issues Paper. There is no good reason why section 22A, in its current form, provides for the admissibility of a statement made by the defendant against a co-defendant (if in furtherance of a conspiracy or joint enterprise) only when the defendant's statement is hearsay.

Section 22A as currently drafted has the effect of rendering inadmissible a statement of the same nature that is not hearsay. The current distinction between hearsay (admissible) and non-hearsay (inadmissible) statements should be removed, and the section should simply provide that statements of this nature are admissible, subject to the overriding 'gateway' provisions of sections 7 and 8.

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

56 Issues Paper at [13.22] – [13.26].

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?

There appears to be a lack of understanding by practitioners (both litigators and transactional lawyers) as to when communications with third parties will be protected. To some extent, this merely reflects a lack of knowledge on behalf of practitioners, rather than the scope of privilege causing problems. However, the lack of understanding also reflects a lack of clarity in the law, and a degree of artificiality in the distinction between who will and will not be an agent. This leads to further artificiality, where lawyers will structure advice carefully to maximise the prospects of privilege being maintained.

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

The Law Society's view on this issue remains the same as it was in 2012, when submitting on the previous review of the Act. The Law Society essentially repeats its earlier submissions here.

Section 54 should extend privilege to third party documents prepared for the dominant purpose of obtaining legal advice. The privilege should also cover communications related to the third party documents and having the same dominant purpose of obtaining legal advice.

The current section 54 extends to communications between a client, or their lawyer, and third parties only if the third party was acting as an agent of the client or lawyer. Section 54 therefore does not extend privilege to third party documents or communications that are created outside the scope of apprehended legal proceedings (litigation privilege), but which are nevertheless tied to the giving or receiving of legal advice. Such a situation can arise in complex commercial matters where, for example, an accountant or consultant may prepare documents for the dominant purpose of the lawyer providing legal advice to the client. Section 54 should be amended to respond to the nature of the function performed by the third party, rather than whether the third party's relationship with the client or lawyer is one of agency.

The Australian Evidence Act 1995 was amended on 1 January 2008 through the Evidence Amendment Act 2008 (Cth), to reflect the decision of the Full Federal Court of Australia in *Pratt Holdings v Commissioner of Taxation*.[57] The amendment extended legal advice privilege to confidential documents which may have been prepared by a person other than the client or lawyer for the dominant purpose of the lawyer providing legal advice to the client. This amendment was supported by the Australian Law Reform Commission and numerous other legal groups.

The Australian approach reflects the realities of modern day legal practice on both sides of the Tasman (particularly in complex cases). It is desirable that rules on privilege are broadly aligned between Australia and New Zealand, given the proliferation of Trans-Tasman businesses and in light of recent efforts to create a coherent framework for Trans-Tasman legal cooperation.

[57] *Pratt Holdings v Commissioner of Taxation* [2004] FCAFC 122.

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?

The Law Society considers that the Act should not be amended to clarify whether litigation privilege terminates at the end of the litigation with which it is associated, and the issue should be left to the courts to develop.

The Law Society considers that the interests which are protected by the privilege are not necessarily fully met by the end of litigation. There are two key areas of risk that need to be considered: first, the value of the information to the holder of the information for future cases; and second, the risk of the information being used to re-open issues or for collateral attack on judgments.

The first issue is likely to be primarily an issue for entities that are regularly involved in litigation, such as liability insurers, local bodies and some government agencies. For such entities, and some other litigants, there remains value in retaining the privilege well beyond the end of any proceedings, as an insight into the strategic or tactical approach to the type of dispute or proceedings could assist other litigants in their own adversarial process against the entity.

The approach of the Supreme Court of Canada in *Blank v Canada (Minister of Justice)*[58] does not appear to adequately deal with this issue. The Supreme Court's "enlarged definition of 'litigation'" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). However, proceedings that raise issues common to the initial action and share its essential purpose ought to qualify as well.

This interest has been recognised by the United States Supreme Court in *Federal Trade Commissioner v Grolier Inc*, a decision concerning the attorney work product immunity, which provides similar protection to litigation privilege.[59] Justice Brennan stated:[60]

> The Court of Appeals is doubtless correct in its view that the need to protect attorney work product is at its greatest when the litigation with regard to which the work product was prepared is still in progress; but it does not follow that the need for protection disappears once that litigation (and any "related" litigation) is over. The invasion of "[a]n attorney's thoughts, heretofore inviolate," and the resulting demoralizing effect on the profession, are as great when the invasion takes place later, rather than sooner. More concretely, disclosure of work product connected to prior litigation can cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved. Many Government agencies, for example, deal with hundreds or thousands of essentially similar cases in which they must decide whether and how to conduct enforcement litigation. Few of these cases will be "related" to each other in the sense of involving the same private parties or arising out of the same set of historical facts; yet large classes of them may present

58 *Blank v Minister of Justice* [2006] SCC 39, 2006 2 SCR 319, at [39].

59 *Federal Trade Commissioner v Grolier Inc* 462 US 19 (1983).

60 At 30-31.

> recurring, parallel factual settings and identical legal and policy considerations. It would be of substantial benefit to an opposing party (and of corresponding detriment to an agency) if the party could obtain work product generated by the agency in connection with earlier, similar litigation against other persons. He would get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate "on wits borrowed from the adversary."

However, in the United States, the work product immunity is not absolute, and disclosure may be ordered where the party seeking disclosure can establish a "substantial need" for it.

In terms of the second issue, the concern is that litigants will trawl through information and try to reopen issues or attempt to attack the original judgment. A protection that only extended to closely related proceedings would not meet this concern. Accordingly, there is a risk of information being used to undermine the finality of litigation.

For the foregoing reasons, the policy considerations underlying litigation privilege extend beyond protection of the adversarial process for which the information was created, and subsequent closely related litigation. The Law Society considers that a blanket rule for the termination of litigation privilege risks undermining the important policy considerations underpinning the privilege and this would not be outweighed by any benefits of certainty. As there is a risk that in some cases the interests of justice will be met by disclosure, the issues of when the privilege terminates in any particular case should be left to the courts.

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 Law Society is not aware of any problems in practice arising from issues around the termination or otherwise of settlement negotiation privilege.

CHAPTER 16 – REGULATIONS

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.

No. The Law Society is not aware of any issues (other than those addressed below).

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

The Law Society considers that the Commission has identified the relevant difficulties in the Issues Paper, particularly in relation to the assumption contained in the Regulations that there will be a physical storage device upon which a recording of (for example) an evidential interview will be stored.

The Law Society supports a further, fuller, review of the Regulations in order that these matters may be properly assessed and considered. The Law Society considers that any proposed amendments to the Regulations providing for electronic storage of evidence (of any kind) must ensure, as a minimum:

a) The security and integrity of the evidence in its original form (i.e. the need for adequate protection against subsequent alteration and/or editing of the evidence as originally provided). If there is no longer a requirement for a physical master copy, properly secured

for later use in proceedings, there must be a mechanism to properly secure the original electronic data or recording (i.e. a "virtual" master copy);

b) Proper chain of evidence / evidence register mechanisms, in terms of the keeping of records and information relating to the persons who have obtained or provided the original evidence and who have subsequent access to the electronic recording/data, together with information as to when the recording/data is accessed and for what purposes;

c) Preservation of the ability of the defendant and counsel to access and review the recording/data in an appropriate and meaningful way, consistent with the rights of the defendant to have proper access to the evidence against him or her.

The Law Society also queries whether approval of any appropriate storage system or facility for the storage of evidential recordings/data should appropriately be a matter solely for the Commissioner of Police to determine (as is currently the position in relation to the storage of mobile video records under regulation 55). The granting of such approval by the Commissioner effectively means that the prosecuting agency solely determines the suitability (and associated security) of such storage systems or facilities.

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 Law Society considers that any pre-recording of evidence (including cross-examination) of witnesses should be a process supervised by the court, given that the recording will form part of the court record of trial. Accordingly, the court should also appropriately supervise and regulate access to, and the use of, such recordings, both prior to and after the proceedings are concluded.

The Law Society considers that prior to trial, access to recordings should be limited to the court and the parties to the proceedings, with use limited to that necessary for the purposes of the proceedings, but subject to the ability of the parties and non-parties to apply to the court for access for other good reasons.

As such, it would ordinarily be inappropriate to permit media access to, or publication of, recordings until such time as the recording is played at trial. After that, access to, or publication of, this type of evidence should be controlled by the court in the same way as the court presently controls access to or the publication of evidence given at trial.

The Law Society recognises that, as with current legislation, there are likely to be certain categories of pre-recorded evidence which it will be inappropriate for the defendant in person to retain, such as a video recording of a complainant's evidence and cross-examination in a sexual case. In such cases, the defendant should be provided with a full transcript of the evidence (as discussed at Q57 below), subject to appropriate safeguards to minimise potential misuse of the transcript, such as photocopying or circulation on social media.

As a safeguard, regulations could be enacted, preventing counsel from providing a copy of the original recorded evidence to the defendant. Defence counsel should however remain entitled to be provided with a copy of the recorded evidence. This is evidence given in the proceedings and counsel are entitled to full access to it, in order to obtain instructions and prepare the defence case.

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?

It is a fundamental right of defendants to have proper disclosure of and access to the evidence against them, and to be afforded proper facilities and time to adequately prepare their defence. Where the defendant does not have access to the evidential video record (for the reasons discussed at Q56), access to the transcript of the video becomes essential – otherwise the defendant will be unable to assess the allegations and instruct counsel in the preparation of the defence case.

For these reasons any amendment that would prevent the defendant having full access to such transcripts is opposed. A provision preventing a defendant from having access to a transcript except when in the presence of counsel would be impractical and unworkable, as well as a significant encroachment of the defendant's rights.

The Law Society is not aware of any substantive evidence that defendants' access to transcripts of video records is subject to widespread abuse. The particular sensitivity of evidential video records in sexual cases is recognised and acknowledged. However, many other categories of evidence (such as post-mortem photographs, photographs of injuries, or witness statements that disclose sensitive personal information) that are routinely disclosed and copied to defendants in person may also be sensitive. Defendants in criminal proceedings are nonetheless properly entitled to access to the evidence against them, notwithstanding the potential risk of misuse or distribution.

In the Law Society's view, the appropriate response to any concern about the potential for improper use of sensitive evidence is to provide for legislative sanctions for such misuse.

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 Society considers that the restrictions on defence access to such video records is unduly burdensome and impractical.

In many cases, video records may run to several hours' viewing time. In order to properly prepare for trial, counsel may be required to view and re-view the recording many times. Much of that viewing may need to take place in the presence of the defendant, and involve the briefing of the defendant or the imparting and receiving of privileged communications. It is often completely impractical for this to be done in the confines of a police station.

The Law Society is aware of occasions in which a police officer has been stationed at the door of a viewing room when counsel and the defendant have been engaged in the viewing of a video record, purportedly "in order to ensure that nothing untoward happens" (such as a secondary recording of the video on a handheld device or phone).

The appropriate legislative response to the misuse of a copy of a video record is for the imposition of appropriate sanctions. A knowing or intentional breach of the law in relation to the security of video records by any lawyer would also likely constitute serious misconduct and expose the offending lawyer to appropriate disciplinary sanctions.

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

The Law Society notes that Regulation 3A provides that where the provisions of the Act relating to video record evidence are applied in proceedings under either the Armed Forces Discipline Act 1971 or the Court Martial Act 2007, the Regulations (apart from Reg 4(b) and Part 4) will apply to those proceedings.

The Law Society is unaware of any particular problems, or anticipated problems in the application of the regulations to military proceedings and accepts that, as far as practicable, law and procedures in military proceedings should be aligned with general criminal law and procedure.

We hope this submission is helpful to the Commission in its review of the Evidence Act. Please do not hesitate to get in touch if further discussion would assist.

Yours faithfully,

Andrew Logan
Vice President