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Prohibited Methods of Obtaining and Presenting Evidence
New Zealand National Report

by

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Introduction

New Zealand is a member of the Commonwealth. As such, it inherited its substantive and procedural law from England. As recently as 30 years ago, the case law used in Zealand courts consisted in roughly equal parts of New Zealand and English authorities with a small number of Australian authorities, fewer Canadian, and even fewer from United States of America. Since then, the scene has changed radically with the vast majority of authorities cited now being New Zealand ones with Australian, Canadian and English authorities in roughly equal measure but still comparatively few United States authorities.

In 2004, New Zealand passed the Supreme Court Act which abolished the right of appeal to the Privy Council in London and substituted a final court of appeal based in Wellington, New Zealand. In making this move, New Zealand followed almost 40 years behind Australia and 70 behind Canada. The creation of the Supreme Court of New Zealand completes the move towards a truly indigenous New Zealand law. Nevertheless, the debt owed to the common law of England and the learning of other common law countries binds New Zealand into a common tradition with those countries.

Both procedural law and the law of evidence in New Zealand follow those trends but with two significant differences so far as this topic is concerned. In procedure, English procedure has been very influential subject to the early modification required for a colony with a small population spread over an area the size of Great Britain. More recently, the rules adopted by the Federal Court of Australia had been influential. A 2009 reform of civil procedure in the District Courts struck out in a different direction but the result is perceived by practising lawyers as unsatisfactory and a retrograde step.[3] In the High Court, practising lawyers visiting from England, Canada, or Australia would find themselves largely at home although, obviously, having to take care about the particular differences from the procedure they have been used to.

In terms of evidence, New Zealand law has been more eclectic than it has been in procedural law. For purposes of this subject, there have been two developments it is appropriate to note at the outset. The first was the passing of the New Zealand Bill of Rights Act 1990. In a typically New Zealand move,[4] this Act (known locally as "NZBORA" or

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[3] See, e.g., New Zealand Law Society, Wellington Branch Courts and Tribunals Committee report November 2010.

[4] New Zealand's official information act 1982 alone of common law freedom of information acts, eschewed decision-making powers in favour of the ombudsmen's recommendatory power. The legislation has been particularly successful. The Privacy Act 1993, on the other hand includes decision-making powers and jurisdiction has been given to a Privacy Commissioner.

simply "BORA") is not higher law, and a subtle process of interpretation by courts and "dialogue" with the legislature[5] has emerged to give the law a degree of effectiveness that many had not expected.[6] The second was the passing of a comprehensive Evidence Act 2006 which is made some significant changes to the preceding mixture of common law and statute law[7] on the subject. At the time of writing, there is a Search and Surveillance Bill before the Parliament. This Bill would make significant changes to the law and its impact will be noted at appropriate points of this report.

Obtaining Evidence

The fundamental rule of evidence in the Evidence Act 2006 is that with

> All relevant evidence is admissible in a proceeding except evidence that is
> (a) inadmissible under this Act or any other Act; or
> (b) excluded under this Act or any other Act."[8]

Two other provisions complement with this fundamental rule as follows,

> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will
> (a) have an unfairly prejudicial effect on the proceeding; or
> (b) needlessly prolong the proceeding;
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.[9]

and

> In any proceeding, the Judge may,
> (a) with the written or oral agreement of all parties, admit evidence that is not otherwise admissible; and
> (b) admit evidence offered in any form or way agreed by all parties.[10]

In criminal proceedings, there is a specific provision in the Evidence Act governing improperly obtained evidence, s 30. Its comprehensive character and importance to this report means that it should be set out in full:

> (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if —

[5] Dubas, "Rights without realities? Parliament and human rights remedies in New Zealand and Canada", Paper for Conference "Canada and New Zealand: Connections, Comparisons and Challenges" (Victoria University of Wellington, New Zealand, 9-10 February 2010). www. victoria.ac.nz/nzcpl/events/e10-01.aspx

[6] See, e.g., Ip, ""what a Difference a Bill of Rights Makes? A case of the Right to Protest in New Zealand" (2010) 24 NZULR 239, especially 254-258; Dubas, n 5 above.

[7] See "Cross on Evidence" (New Zealand edition; LexisNexis, Wellington, D.L. Mathieson (ed), 2006) for the law immediately preceding the Act.

[8] Section 7.

[9] Section 8.

[10] Section 9(1).

(a) the defendant or, if applicable, a co-defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or

(b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.

(2) The Judge must —

(a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and

(b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

(3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:

(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:

(b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

(4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

(5) For the purposes of this section, evidence is improperly obtained if it is obtained —

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or

(b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or

(c) unfairly.

(6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

However, the Act also provides that, "If there is an inconsistency between the provisions of this Act and any other enactment, the provisions of that other enactment prevail, unless this Act provides otherwise."[11] The Act is to be interpreted in accordance with that six purposes:

[11] Section 5(1).

> The purpose of this Act is to help secure the just determination of proceedings by—
> (a) providing for facts to be established by the application of logical rules; and
> (b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and
> (c) promoting fairness to parties and witnesses; and
> (d) protecting rights of confidentiality and other important public interests; and
> (e) avoiding unjustifiable expense and delay; and
> (f) enhancing access to the law of evidence.[12]

Accordingly, the primary place to look for legal rules that restrain persons from obtaining evidence in breach of fundamental rights is in the Evidence Act itself and secondarily in the NZBORA. Because this report is concentrating on evidence in the courts, it is not considered appropriate to undertake a review of the law making various actions unlawful where those actions might be undertaken in order to obtain evidence. Rather, the concentration is on what is admissible in the courts.

Restraint of Obtaining Evidence in Breach of Fundamental Rights

The discretionary character of s 30 of the Evidence Act 2006 with its test of proportionality, in effect converts to statute law the approach to evidence obtained in breach of NZBORA settled on by a seven judge bench of the Court of Appeal in *R v Shaheed*.[13] The approach of proportionality necessarily recognises the conflict between public policies in protecting fundamental rights and ensuring that the guilty are convicted and the innocent acquitted.[14] Like the United States Supreme Court,[15] New Zealand Courts moved from a rule of exclusion[16] to one of balancing interests. This is considered further in a section on "Consequences of Breach" below.[17]

Starting therefore with the NZBORA, the paper considers the freedom from unreasonable search and seizure, and the rights to consult a lawyer promptly on detention, arrest, or being charged, and to be treated with humanity on being detained or arrested. The right to consult a lawyer has been one of the underpinnings for the exclusion of confessional statements. The right to be treated with humanity has also had some influence on that exclusion as well. One might also add the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment, but the narrow approach to the right[18] makes it of peripheral value for the topic under discussion. Having discussed these rights found in the NZBORA, the limits on disclosure of information in breach of privacy and their relationship with the Evidence Act will be considered.

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[12] Section 6.

[13] [2002] 2 NZLR 377 (CA).

[14] See Optican, "The new exclusionary rule: interpretation and application of *R v Shaheed*" [2004] NZ Law Rev 451 and, after the Act, "Criminal procedure", Chapter 7 of "Tolmie and Brookbanks Criminal Justice in New Zealand" (LexisNexis, 2007) at para 7.3.3.

[15] *Mapp v Ohio* 367 US 656 (1961) to *United States v. Leon*, 468 U.S. 897 (1984).

[16] *R v Butcher* [1992] 2 NZLR 257 (CA) to *R v Shaheed*.

[17] See pp 18-20 below..

[18] See *Attorney-General v Taunoa* [2008] 1 NZLR 429 (SC).

***Search and seizure*—**Section 21 of the NZ Bill of Rights Act 1990 protects against unreasonable search and seizure.

> Everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, or correspondence or otherwise.

This is substantially more focused than the International Convention on Civil and Political Rights though the difference is lessened once one looks at the principles developed by the courts which centre on expectations of privacy and the extent and context of the official action. The statutory phrasing of "unreasonable" may, however, give the New Zealand law a significantly narrower role. Although most powers of search and seizure available to a Police officer in New Zealand are conferred and regulated by statute,[19] there are a few remaining common law powers.[20] Common law has also provided a number of grounds on which to challenge the lawfulness of a search and seizure and provides protection of persons and remedies. These include the tradition that such powers should be construed strictly, the possible application of the law of tort, judicial review of the lawfulness of the search or seizure, and most relevant to this paper, the exclusion of unlawfully obtained evidence when a court is of the view that it would be "unfair" to allow its admission.[21]

The exercise of the common law discretion to exclude evidence on grounds of unfairness requires a balancing of relevant interests, including the public interest in the effective investigation and prosecution of crime. It is an exceptional jurisdiction, not to be invoked without good reason.[22]

The changed approach to the effects on admissibility of evidence is considered below.[23] At this point, it is noted that the development has been undertaken by reference to s 21 cases. This is not surprising given that by far the most common NZBORA right argued in the higher courts has been s 21.

A study of search and surveillance powers was undertaken by the New Zealand Law Commission earlier this century, resulting in a report[24] that made 300 recommendations for clarifying, rationalising and codifying the law. The result was the Search and Surveillance Bill introduced into the New Zealand Parliament on 2 July 2009. The Bill was reported back by the Justice and Electoral Select Committee on 4 November 2010.[25] Previously, search and surveillance powers were found in 69 different statutes with conflicting provisions and procedures. Many statutes were rather old and did not take account of modern technology. The Bill provides a comprehensive statute overcoming those deficiencies. As introduced, the Bill contained a number of new limitations on the exercise of these powers, but the Select Committee considered that the powers needed to be further restricted in order to "protect civil liberties and human rights". This was considered to be particularly needed where powers of search and surveillance were conferred on state bodies other than the Police. Substantial changes were proposed in the area of surveillance, and a graduated regulation has been

[19] See pp 4-5 below

[20] See p 5 below.

[21] See pp 2-4 above.

[22] *R v Convery* [1968] NZLR 426 (CA).

[23] See pp 18-20 below.

[24] NZLC R97 "Search and Surveillance Powers" (http://www.lawcom.govt.nz/project/search-and-surveillance-powers?quicktabs_23=report).

[25] The Bill in its current form can be found at http://www.parliament.nz/NR/rdonlyres/54DE7129-9946-4F51-8F18-7EFEC1948311/164942/DBSCH_SCR_4903_SearchandSurveillanceBill452_7917_1.pdf.

introduced depending on how intrusive are the surveillance methods. One significant change has been to reduce the period in which surveillance can be undertaken without a warrant from a judicial officer from 72 to 48 hours. Rather more contentious is the extension of powers to require persons to answer questions to the Police for 'very serious offending" in the business area.[26] At present only the Serious Fraud Office has this power.[27] Outside the business context, the power is limited to offences committed wholly or partly by 'organised criminal groups".[28] The power is expressly subject to the protection from self-incrimination.[29] New provision for "production orders" has been restricted by the Committee to material stored in the ordinary course of business, so avoiding suggestions that internet providers and mobile telephone networks could be required to establish means of retrieving and providing material.[30]

Right to a lawyer— The right to a lawyer is one of a number of rights in s 23 of NZBORA. It needs to be seen in the context of s 22. The two sections are:

> *22 Liberty of the person*
> Everyone has the right not to be arbitrarily arrested or detained.
>
> *23 Rights of persons arrested or detained*
> (1) Everyone who is arrested or who is detained under any enactment—
> (a) Shall be informed at the time of the arrest or detention of the reason for it; and
> (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
> (c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.
> (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.
> (3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.
> (4) Everyone who is—
> (a) Arrested; or
> (b) Detained under any enactment—
> for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.
> (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

Section 22 provides that arrest or detention can only be according to law. Whether or not a person has been arrested or detained according to law, s 23 confers a number of rights on persons arrested or detained. Some are limited to situations where the arrest or detention is under an enactment as distinct from the common law. These rights include the right to

[26] This means offences with a maximum term of imprisonment of 5 years or more – cl 32.

[27] Serious Fraud Office Act 1990, s 9.

[28] Defined in s 98A(2) of the Crimes Act 1961.

[29] See pp 8-10 below.

[30] Clause 68.

consult and instruct a lawyer without delay and to be informed of that right.[31] The right of a detained person in New Zealand to consult and instruct a lawyer was an important innovation in the NZBORA in 1990. This is despite the existing right under common law for a person in custody to have access to a lawyer. That right, even prior to 1990, was described as fundamental.[32] However, under common law, non-compliance with it did not result in automatic exclusion of any confession or other evidence obtained as a result. Nor was the detaining officer required to inform a detainee of the right of access to legal advice. Implementation of the right in s 23(1)(b) is by the Police Detention Legal Aid Scheme under the Legal Services Act 2000[33]

The right conferred under NZBORA is triggered by the phrases "arrested" and "detained under any enactment". Under s 22 the NZ Court of Appeal has held that a person is detained if :

(1) There is physical deprivation of a person's liberty;
(2) There is statutory restraint on a person's movement (with penalties for non compliance); or
(3) Though not formally arrested or detained a person can show (based on a mixed objective and subjective test) that he or she had a reasonable belief induced by the conduct of police or an official that he or she was not free to go.

These criteria cover a wide range of situations. Apart from formal arrest on an alleged offence, s23(1)(b) has been held to be triggered when

- .a person has been detained for the purpose of accompanying an enforcement officer to a testing station in relation to suspected drink driving[34] but not when stopped at the roadside for an initial test.
- detention for a drugs search under the Misuse of Drugs Act 1975.[35]
- when a person has been detained under the compulsory committal procedure in the Alcoholism and Drug Addiction Act 1966.[36]

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[31] Section 23(1)(b).

[32] *R v Webster* [1989] 2 NZLR 129 (CA).

[33] Section 51.

> Who PDLA scheme applies to, and their rights
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> (1) The PDLA scheme applies to every unrepresented person who—
>
> (a) is being questioned by the police, or who the police want to question, in relation to the commission or possible commission of an offence by that person, and who is advised by the police, before or in the course of questioning, that he or she may consult a lawyer; or
>
> (b) is being detained by the police, with or without arrest, and is entitled, under section 23(1)(b) of the New Zealand Bill of Rights Act 1990, to consult and instruct a lawyer without delay.
>
> (2) Every person to whom the PDLA scheme applies is entitled (subject to this Act and any regulations made under it) to the services of 1 lawyer during the period for which the person is being questioned or is detained.

Police reluctance in to give ready access to lawyers was overcome in *R v Alo* [2007] NZCA 172

decided in relation to s 51.

[34] *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260 (CA).

[35] *R v Elliot* (1997) 4 HRNZ 648 (CA).

The purpose of the right was explored by Richardson J (as he then was) in *Noort*.[37] He noted that the purposes of the right to consult and instruct a lawyer include allowing the detained person to be informed of his rights and obligations, which allows him or her to claim such rights as the right to question the validity of the detention, the right to bail, the right to silence, and the ability to complain about abuse of power by state officials. In particular access to a lawyer allows the interests of the detainee to be independently represented.

The right to consult and instruct a lawyer may have legitimate restrictions imposed by some statutory schemes. For example in the context of the drink driving legislation in New Zealand, a detainee is entitled to make telephone contact with a lawyer, explain the circumstances, and receive advice as to his or her rights, obligations and options before advising the enforcement officer how he or she wishes to proceed. This contact and any later contact is necessarily brief because of the operational requirements of the legislation.[38] In contrast, where a person is arrested for a serious offence such as robbery or murder, in New Zealand a lawyer will normally attend at the police station, discuss the matter with the detainee and provide answers to questions so that the detained person does not have to do so personally.

The Court of Appeal has held that the right to consult and instruct a lawyer includes the right to do so in private.[39] An important requirement is that the detainee does not have to request privacy, but once he or she has decided to exercise the right to consult, the detainer must provide it. The right to privacy is subject to reasonable limits which could include concern that the detainee cannot be safely left alone, or an apprehension (based on particular facts pertaining to the parties) that there is collusion between the lawyer and detainee. Visual monitoring may also take place as long as the conversation cannot be heard. In *Kohler*,[40] the person detained to undergo an evidential breath alcohol test exercised his right to consult a lawyer by telephone, and a police officer for no good reason remained in the room while the consultation took place. The police officer had not indicated that the consultation could be in private, and the detainee had not requested privacy. The Court of Appeal found that s 23(1)(b) of NZBORA had been breached and the conviction for driving with excess breath alcohol was accordingly overturned.

Under s 23(1)(b) the right to consult a lawyer must be given "without delay". The purpose obviously is to allow a detainee to exercise the right before his or her legitimate interests are jeopardised. As a corollary the detainer is required to refrain from attempting to gain evidence from the detainee until the detainee has had a reasonable opportunity to consult and instruct a lawyer. The Court of Appeal has held that the words "without delay" do not mean immediately, but refer to an unreasonable delay.[41] Legitimate grounds for delay include the need to transport the detainee to a secure location, or the detainee being in a distressed or intoxicated state. However, a legitimate reason for delay may not be a legitimate reason to delay informing the detainee of his or her rights.

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[36] *Hall v Snell* (1999) 5 HRNZ 103 (HC).

[37] N 34 above.

[38] A breath or blood alcohol test to be used as evidence must be taken within a certain time. If a lawyer is not able to be contacted, an enforcement officer may, after a reasonable period, insist on proceeding with the breath alcohol testing procedures.

[39] *R v Kohler* [1993] 3 NZLR 129, 132 (CA).

[40] N 39 above.

[41] *R v Mallinson* [1993] 1 NZLR 528 (CA).

Following *Noort*,[42] Parliament introduced the Police Detention Legal Assistance Scheme which allows a detainee to make contact with a lawyer by providing in police stations a list of local lawyers willing to be contacted. As has already been said, private access to a telephone should also be provided. Like the Duty Lawyer scheme in District Courts, this is a totally state funded service.[43] In *R v Schriek*,[44] it was held that the detainer has an obligation to facilitate contact with a lawyer once the detainee has indicated a desire to consult one. As well as being the leading case of delay in notifying a detainee of his rights, *Mallinson*[45] includes observations that s 23 was breached if a person is left with the impression that access to a lawyer was not available until after questioning had been completed, or the person had not understood what his or her rights were. Once compliance with s 23(1)(b) is directrly put in issue, a court must be satisfied that the detainee did subjectively understand his or her rights. Statements made by Mr Mallinson were excluded at trial, and on appeal a new trial was ordered.

***Right to Silence*—**Section 23(4) of BORA gives a person arrested or detained under any enactment "for any offence or suspected offence" the right to refrain from making any statement and the further right to be informed of that right. A number of issues arise.

(1) Whether the word "statement" refers to oral statements only or to oral and written statements.
(2) Whether it refers to statements yet to be created or to pre-existing statements and documents.
(3) How is the information component of the right to be satisfied?
(4) At which point police efforts to elicit a statement from a detained person notwithstanding that person's indication that he or she does not intend to provide one, becomes a breach of s 23(4).

The right to silence existed at common law for both oral and written statements, both pre-existing and yet to be created and could be invoked to refuse to provide bodily or other samples such as handwriting and finger prints which might help to identify a person. It is not clear how far these aspects of the right to silence are protected by s 23(4).

In *R v Taumata (Ruling No 4)*,[46] the High Court excluded a voice recording obtained by police from an unrepresented arrestee who had explicitly declined to make a statement following a caution for breach of NZBORA. Statements were also excluded in other cases[47] but there are many cases in which no breach was held to have occurred in this situation.[48] Similarly the courts' response has been mixed when the assertion of silence is made through a lawyer and the police subsequently seek to interview the detainee without the presence of the lawyer (it being a matter of fact and degree).[49]

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[42] N 34 above.

[43] It is accepted that cost, even a small cost, should not be allowed to get in the way of access to this right.

[44] [1997] 2 NZLR 139 (CA).

[45] N 41 above.

[46] (1997) 4 HRNZ 297.

[47] *R v Kokiri* (2003) CRNZ 1016 (CA) and *R v Kai Ji*, [2004] 1 NZLR 59 (CA).

[48] See, e.g., *R v Neho* (CA 84/03, 26 March 2003) and *R v Bennett* (CA 32/04, 23 March 2004).

[49] *R v Wallace* [2007] NZCA 265.

As to the information component of the right there are no superior court cases in New Zealand which explicitly consider this aspect as a facet of s 23(4). There is, however, a District Court case where the accused had been convicted of sexual offending and while in prison awaiting sentencing was interviewed by a probation officer. When his conviction was later overturned and on retrial, the statement was admitted.[50] It is considered that this right should be treated in the same way as the right to a lawyer under s 23(1)(b). That is that the substance of the right must be conveyed, and it must be shown, whenever the matter is put in issue that the detainee understood the right. The burden of proof is on the prosecution.

The right to refrain from making a statement is regularly overridden by Parliament, even in the case of those under detention or arrest in relation to suspected offending. Many regulatory statutes, for example, require detainees to answer questions put to them by, or provide documents requested by, an official. In most such cases however, the statute goes on to either permit the detainee to decline to answer any question the answer to which might tend to incriminate him or her, or prevent the answer to any compelled question being used in proceedings against the detainee.[51]

The common law right referred to above which could be invoked to refuse bodily samples has been eliminated by the Criminal Investigations Bodily Samples Act 1995 as amended in 2003. There is now a very wide range of offences[52] on the suspicion of which a person is required to provide a bodily sample.[53] A common law right which has survived prevents adverse comment on the exercise of the right to silence. Evidence that an accused remained silent when confronted by police with accusations of wrong doing (or when confronted by a third party with accusations of wrong doing in the presence of the police), is inadmissible at trial.[54] When however, the accused has remained silent during police questioning in relation to suspected offences, then the fact that the accused remained silent is admissible evidence, so long as a direction is given to the effect that all persons have the right to remain silent in the face of police questioning and that the fact of silence is not itself probative of guilt.[55] Delay before the making of a statement may also be taken into account by the court

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[50] *R v G [Admissibility of evidence] (No 2)* [2010] DCR 540.

[51] See, e.g., Fisheries Act 1996, s 216; Health and Safety in Employment Act 1992, s 31(6); and Insolvency Act 1967, s 70(2).

[52] Set out in Schedules 1 to 3.

[53] Section 72 provides that:

> Nothing in this Act—
>
> (a) limits or affects any other enactment relating to the taking of a bodily sample, or any other specimen from a person's body; or
>
> (b) limits section 57 of the Police Act 1958 (which relates to the taking of fingerprints and other particulars from a person in custody); or
>
> (c) shall be taken to limit or affect the circumstances in which any specimen from a person's body (other than a bodily sample), or any other particulars of a person (including (without limitation) fingerprints and dental impressions) may be taken from any person with that person's consent.

"Bodily sample" means a blood sample or a buccal sample.

[54] *Duffy v Police* [1979] 2 NZLR 432 (CA).

[55] *R v Coombs [1983] NZLR 748 (CA); R* v McCarthy [1992] 2 NZLR 550 (CA); *R v Fulton* (CA 280/96, 7 April 1998).

Treatment with humanity—Two overlapping sections of the NZBORA are relevant to this topic: ss 9 and 23(5). Section 9 states that "Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment" and s 23(5) that " Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person". The leading case on the differences between these sections of NZBORA is *Taunoa v Attorney-General*.[56] The case was brought by prison inmates who had been subjected to a special behaviour management regime with no statutory authorisation. Breach of both s 9 and s 23(5) were alleged. The inmates were deprived of privileges that they should only have been deprived of following a prison discipline conviction; some were subject to unacceptably low levels of hygiene, clothing and bedding; there was insufficient monitoring of mental health; exercise conditions were inadequate; routine strip searching occurred which was not authorised by the Penal Institutions Act 1954 and often lacked privacy and the preservation of dignity; and outside monitoring by the superintendant did not occur. The High Court found that s 23(5) had been breached but that the treatment did not breach s 9. It was held that s 23(5) imposed a positive duty to ensure treatment "as befits a human being with compassion".[57] The Supreme Court took the same view,[58] holding that there were degrees of reprehensibility within and between ss 9 and 23(5). Breaches of regulatory requirements for the treatment of prisoners did not necessarily of themselves signal breaches of s 23(5), or of s 9. Section 9, the Supreme Court held, was concerned with conduct on the part of the state and officials which was to be condemned as unacceptable in any circumstances. The prohibition of "disproportionately severe" treatment or punishment in s 9 had to take its colour from the rest of that section. Section 23(5), which imposed a positive obligation upon the state confined in application to persons deprived of liberty, was concerned with conduct unacceptable in New Zealand, but of a lesser order than that prohibited by s 9. In *Udompun*,[59] concerning a passenger arriving at Auckland Airport from Thailand, the Court of Appeal found a breach by police of respondent's rights under s 23(5), arising out of failure at the police station, where Udompun was being held pending being "turned around", to provide sanitary products to Udompun, who was menstruating, a breach that was exacerbated by the failure to provide a shower, a change of clothes, and a means for respondent to communicate her need for sanitary products and by the failure to provide food. It has also been held that use of excess force by a police officer in dealing with an arrested person was a breach of s23(5).[60] However the use of reasonable force to remove the footwear of a drunk person in police cells who police officers feared would self-harm using the laces of her shoes,[61] and the use of reasonable force to prevent a detainee from swallowing a package of drugs which he had placed in his mouth and to induce him to spit the package out[62] were found not to breach s 23(5).
Remedies for breaches of s 23(5) include exclusion of evidence and compensation.

Restraint of Obtaining Evidence in Breach of Other Rights

[56] [2007] NZSC 70 [2008] 1 NZLR 429. Lower Court judgments in the case are reported at [2006] 2 NZLR 457 (CA) and (2004) 7 HRNZ 379 (HC).

[57] (2004) 7 HRNZ 379, 443 (HC).

[58] Though Blanchard J thought that s 9 had been breached in respect of the longest serving inmate.

[59] [2005] 3 NZLR 204 (CA).

[60] *Archbold v Attorney-General* [2003] NZAR 563.

[61] *Scott v Police* (1994) 12 CRNZ 207.

[62] *R v Roulston* [1998] 2 NZLR 468 (CA).

Privacy—For this present topic, breach of privacy has most commonly arisen in the context for issues of unreasonable search and seizure. The role of privacy in that area has been discussed earlier in the section. Beyond that, privacy interests might be breached in matters leading to the introduction of evidence where information has been obtained or disclosed in breach of the information privacy principles stated in s 6 of the Privacy Act 1993. There is also the possibility of information being obtained in a way that constitutes the tort of breach of privacy.

The information privacy principles that might be engaged in this area are principles 3, 10 and 11. By principle 3, a person collecting information must, amongst other things, tell the person whose information is being collected both the purpose of keeping the information and the persons to whom the information will be disclosed. This links directly with principle 10, which provides that the use made of the information must be one authorised by the person whose information is to be used. The apparent strength of this is taken away by the further provisions in principle 10 that the principle is not breached if disclosure of the information is necessary for a variety of purposes, the most relevant to this topic being: (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or (ii) For the enforcement of a law imposing a pecuniary penalty; or (iii) For the protection of the public revenue; or (iv) For the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation). The same set of exceptions applies to principle 11. In these circumstances, one would not expect to find breach of the information privacy principles providing any basis for excluding evidence, and in no example of such exclusion had been found by the authors.

On the other hand, the possibility of excluding evidence as a breach of the tort of privacy has received some consideration in the Supreme Court, albeit indirectly, in *Television New Zealand Ltd v Rogers*.[63] In *R v Rogers*,[64] a videotaped interview and reconstruction of a crime obtained from Rogers contrary to the express advice to the police by his lawyer that he was not to be interviewed without the lawyer being present was held to be inadmissible by the Court of Appeal. The police had, before the High Court trial provided a copy of the video tape to Television New Zealand. After the retrial, Rogers discovered that Television New Zealand intended to broadcast the videotape and applied for an injunction. The injunction was granted in the High Court, but overturned the Court of Appeal and the Court of Appeal's decision was upheld by the Supreme Court.[65] The issue in the Supreme Court was whether the broadcast would be in breach of Rogers' right to privacy and be a tort. However, the interrelationship between the tort of privacy and evidence received some indirect attention from the Supreme Court making it worthy of discussion here.

Elias CJ considered[66] that the time at which privacy should be assessed could either be the time at which the videotape was taken (in which case there would be no interest in privacy because it would be expected that the videotape would be adduced in evidence) or at the time the videotape was ruled inadmissible by the Court of Appeal (in which case there would be a privacy interest). The Chief Justice considered it was premature to make a definitive ruling on this. If the latter were the correct position, then the tort of privacy and

[63] [2008] 2 NZLR 277 (SC).

[64] [2006] 2 NZLR 156 (CA) overturning HC Auckland CRI 2004-004-13121, 2 August 2005.

[65] (2005) 22 CRNZ 668 (HC), [2007] 1 NZLR 156 (CA), [2008] 2 NZLR 277 (SC).

[66] At [23] ff.

admissibility would run hand-in-hand. If the former were the correct position, then the tort of privacy might have no role to play in connection with the admissibility of evidence.

Elias CJ was dissenting, but the point was also addressed by Tipping J in the majority. He took the view that if the point for judging privacy were that at the time the interview and reconstruction took place, then there was no privacy interest because it would be envisaged that they take would be played in court.[67] However, he considered that logically the position could not be different if one viewed the situation as at the date of the proposed broadcast.[68] In the next paragraph of his judgement, Tipping J noted that the material was ruled inadmissible at the murder trial because of breach of Rogers' rights to silence and to counsel. He then commented that

> The ruling of the Court of Appeal does not, however, of itself mean that the videotape became "inadmissible" for other purposes. The weight that should be given to the inadmissibility of the videotape for the purposes of the murder trial, when assessing the competing interests of TVNZ and Mr Rogers for present purposes, is one of the central issues before us. How far should the breach of the Bill of Rights Act which led to inadmissibility at the murder trial influence the use which should be permitted of the videotape for other purposes?

Tipping J held that there were two distinct rights in issue: the rights to silence and to counsel which were vindicated by inadmissibility, and the right to privacy and be free of defamation which related to the later broadcast of the videotape.[69] Tipping J's approach creates a disconnect between breach of privacy and admissibility. Blanchard J, also in the majority, said that, "Anyone who agrees to be interviewed for the purpose of a criminal investigation, and in that connection elects to make a statement to the police, cannot persuasively claim to have had a reasonable expectation of privacy concerning that occasion."[70] Anderson J, who shared the reservations of Elias CJ, said he did not go so far as Blanchard J had gone.

The most useful discussion is that of McGrath J.[71] His Honour considered the nature of a videotaped interview. He identified that things such as facial expressions occurring in the course of interview were of a private nature and their disclosure could found the tort of invasion of privacy. He then addressed the reasons for ruling the videotaped interview inadmissible. He noted that inadmissibility was not because of the private nature of the videotaped material, but then he added that:[72]

> The Court's judgment does not convert the public character of the events depicted into something that is private. The original purpose of making the videotape contemplated its prospective public use. The Court of Appeal's ruling on admissibility did not alter that. Accordingly, Mr Rogers could have no reasonable expectation of privacy at any time in relation to events shown on the videotape and the claim for breach of privacy must fail on that ground alone.

[67] At [63].

[68] ibid.

[69] At [65].

[70] At [48].

[71] At [99]-[105].

[72] At [105].

In summary, the discussion of the various judges in this case suggests that the time for judging privacy is the time at which the event took place. If, at that time event is private (and, it would seem, such that its disclosure would be a breach of privacy), the Judges appear to leave it open that the material is inadmissible.

It needs to be noted here that in the leading New Zealand case on the tort of privacy, *Hosking v Runting*,[73] the Court of Appeal considered that the tort of privacy overlapped with the tort of breach of confidence.[74] In this area of overlap, therefore, the Evidence Act provisions protecting information provided in confidence[75] may provide a basis for preventing evidence in breach of privacy being admitted.

Confidentiality

There is an overriding discretion in the court to direct that confidential information, a confidential communication, or information that might disclose a confidential source of information.[76] The discretion to make such a direction may be made if the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in preventing harm to (a) a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated, (b) the particular relationship, or relationships that are of the same kind as, or of a kind similar to the particular relationship ,in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared, or (c) maintaining activities that contribute to or rely on the free flow of information.[77] In assessing that balance, the court must have regard to eight factors:[78]

> (a) the likely extent of harm that may result from the disclosure of the communication or information; and
> (b) the nature of the communication or information and its likely importance in the proceeding; and
> (c) the nature of the proceeding; and
> (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
> (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
> (f) the sensitivity of the evidence, having regard to—
>
> > (i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
> > (ii) the extent to which the information has already been disclosed to other persons; and
>
> (g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

[73] [2005] 1 NZLR 1 (CA).

[74] At [148] per Gault P and Blanchard J.

[75] See the immediately following section of this paper..

[76] Evidence Act 2006, s 69(1).

[77] Subsection (2).

[78] Subsection (3).

This provision replaces both the previous statute law[79] and the common law.

The leading case, *R v X (CA553/2009)*[80] dealt with a soldier accused of attempting to murder a fellow soldier. He made admissions during a mental health assessment. The Court held unanimously that information provided during a mental health assessment is confidential information. This is determined not what the claimant in fact expected, but whether there is a "reasonable expectation of confidentiality".[81] There is no need to show a particular kind of relationship, or agreement, only a "reasonable expectation of confidentiality." The unanimous Court also held that the categories in subs (2) are exhaustive. By a majority, the admission was admitted: the importance of the information (disclosure of criminality) outweighed any submitted harm to the mental health system. A proportionality approach was taken. Other cases are consistent with this approach.

In a commercial context, s 69 has been applied to require specific undertakings of confidentiality when it ordered that confidential commercial information in discovered documents be disclosed.[82]

Before leaving this topic, the provisions of s 68 of the Evidence Act 2006 should be noted. This provides that:

> (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.
>
> (2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs—
>
> > (a) any likely adverse effect of the disclosure on the informant or any other person; and
> >
> > (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.
>
> (3) The Judge may make the order subject to any terms and conditions that the Judge thinks appropriate.

The protection is one of compellability rather than admissibility[83] and the balancing test is really a specific instance of the balancing test in s 68.

Privilege

[79] Evidence Amendment Act (No 2) 1980, s 35.

[80] [2009] NZCA 531, [2010] 2 NZLR 181.

[81] Ibid, at [46]-[48].

[82] *Whitehead (as trustees of the J and R Whitehead Trust) v Honey New Zealand (International) Ltd* HC Auckland CIV 2008-404-2149, 3 May 2010.

[83] *Police v Campbell* [2010] 1 NZLR 483.

***Public interest immunity*—**Public interest immunity, formerly called Crown privilege, is not strictly a privilege at all, since it cannot in principle be waived.[84] in New Zealand, the impact of the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987, and the Privacy Act 1993 appeared to have been such that public interest immunity was moribund in New Zealand save in the areas of security[85] and maintenance of the law.[86] Passage of s 70 of the Evidence Act 2006, subs (2) of which defines public interest immunity in terms of sections of the Official Information Act, creates a subtle link with the three Acts just mentioned, which is addressed in the next paragraph. Be that as it may, this section moves New Zealand so far away from the common law that it is now unnecessary to refer to the common law.

Section 70 of the Evidence Act 2006 provides that:

> (1) A Judge may direct that a communication or information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.
>
> (2) A communication or information that relates to matters of State includes a communication or information—
>
> > (a) in respect of which the reason advanced in support of an application for a direction under this section is one of those set out in sections 6 and 7 of the Official Information Act 1982; or
> >
> > (b) that is official information as defined in section 2(1) of the Official Information Act 1982 and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in section 9(2)(b) to (k) of that Act.
>
> (3) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

Sections 6 and 7 of the Official Information Act 1982 set out good reasons to withhold information which are not subject to a public interest balancing test. However, subs (1) of s.70 applies such a public interest balancing test. In subs (2)(b) all the other substantive reasons for withholding information other than privacy are included. In the Official Information Act 1982, these powers to withhold information are subject to a public interest balancing test which is phrased that there is good reason to withhold, "unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available." The public interest balancing test in subs (1) of s 70 is phrased the opposite way from the Official Information Act 1982 provision. The effect of s 70 is therefore to concentrate in the provisions of the Official Information Act, all the bases upon which official information can be withheld from the public or from the court. Information may still be withheld from the public but not from the court. Once made public in the court, it will then become available to the general public unless some suppression order was imposed by the

[84] *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394, [1983] 1 All ER 910 (HL) at 436 per Lord Fraser. Compare *Savage v Chief Constable of the Hampshire Constabulary* [1997] 2 All ER 631 (CA) (identification of informant — informant willing to waive immunity). The stated position might not be the same in Scotland: *Al Megrahi v Her Majesty's Advocate* [2008] SCCR 358 (Court of Session Appeal Court) where the position was left open.

[85] Crown Proceedings Act 1950, s 27(3).

[86] See *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA).

court. However, information that could be withheld from the public under the Official Information Act will only be made available to the court if, in a particular instance, the court makes the appropriate weighing of the public interest which is more generous towards disclosure then that under the Official Information Act. More problematic is the Crown Proceedings Act 1950 which was not brought into line with the Evidence Act 2006, s 70. Both s 27(3) of the New Zealand Bill of Rights Act 1990 and s 27(1) of the Crown Proceedings Act 1950 provide that the Crown is liable to discovery and to answer interrogatories in the same way as any private litigant. Section 27(1) adds that this principle is "subject to and in accordance with rules of Court". Crown Proceedings Act, s 27(3) expressly makes this subject to public interest immunity in the specific form that:

> ... any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if—
> (a) the Prime Minister certifies that the disclosure of the existence of that document would be likely to prejudice—
> (i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
> (ii) any interest protected by section 7 of the Official Information Act 1982; or
> (b) the Attorney-General certifies that the disclosure of the existence of that document would be likely to prejudice the prevention, investigation, or detection of offences.

This subsection encompasses some but only some of the good reasons to withhold information in s 6 of the Official Information Act 1982. It is not subject to the public interest balancing test contained in s 70 of the Evidence Act 2006. It has yet to be seen what the courts will make of this inconsistency.

This is not the place for a discussion about the Official Information Act, but ss 6, 7 and 9 of the Official Information Act are contained in an appendix to this report. Before departing from this topic, three points need to be noted.

The first is that there is one good reason to withhold available in the Official Information Act which cannot be used to withhold information under s 70 of the Evidence Act. This is the ability under s 10 neither to confirm nor deny that information exists. It is considered that the use of the word "includes" in subs (2) of s 70 would accommodate an interest of State which would be recognised under the Official Information Act as warranting an s 10 answer.

The second is related to the first. This is the use of the word "includes" in subs (2) of s 70 might be argued to include matters which, under the common law, would have been regarded as covered by public interest immunity but which would not enable withholding under the Official Information Act. It is considered that this is not so. In the first place, it would be inconsistent with the reform represented by s 70 which is to link public interest immunity to the Official Information Act grounds. The grounds to withhold information in the Official Information Act are exhaustive[87] and public interest immunity is not one of those grounds.

[87] Official Information Act 1982, s 5.

The third is that the jaundiced view of public interest immunity taken by the New Zealand Court of Appeal in the 1980s[88] is such that reverting to the common law is highly likely to be fruitless.

Legal professional privilege—Legal professional privilege and litigation privilege has been codified in the Evidence Act 2006, ss 54 – 57. The Act contains separate provisions for communications between lawyer and client (s 54), litigation privilege (s 56), and "without prejudice" privilege (s 57). Section 54(1) defines the scope of communications between lawyer and client thus:

> A person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—
>
> (a) intended to be confidential; and
>
> (b) made in the course of and for the purpose of—
>
> (i) the person obtaining professional legal services from the legal adviser; or
>
> (ii) the legal adviser giving such services to the person.

There is an extension in subs (2) for patent attorneys and intellectual property lawyers overseas. Section 54 confirms the previous common law that legal professional privilege is a privilege in respect of communications between lawyer and client not "attorney work product". The inclusion of para (a) confirms the previous common law about overheard conversations.[89] Section 55 makes special provision for solicitors' trust accounts. This section expressly allows for the issue in execution of a search warrant in respect of trust accounts and makes documents seized admissible in subsequent proceedings.

Litigation privilege in s 56 confirms the position of the common law had reached before the Act limiting privilege to material obtained or produced for the "dominant" purpose of litigation: it "applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding." Subsection (2) states exhaustively what is covered: communications between the party and any other person, communications between the party's legal adviser and any other person, information compiled or prepared by the party or the party's legal adviser, and information compiled or prepared at the request of the party, or the party's legal adviser, by any other person. By subs (3), subs (2) is subject to the overriding decision of the judge on the best interests of a child in certain proceedings where powers are governed by the requirement that all decisions are made in the best interests of the child. It has recently been confirmed by the Supreme Court that this privilege extends to unsolicited information received by a lawyer.[90]

"Without prejudice" privilege in s 57 was intended by the New Zealand Law Commission, whose report on evidence contained a draft of the Act, to reproduce the common law on "without prejudice" negotiations. While some changes were made in its

[88] See *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153 (CA), *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 (CA), *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 (CA).

[89] *R v Uljee* [1982] 1 NZLR 561 (CA).

[90] *Jeffries v Privacy Commissioner* [2010] NZSC 99.

passage through Parliament, none of them[91] affects the proposition that the common law is enacted.[92] The suggestion that only admissions in negotiations are privileged is rejected by s 57(1):

> ...any communication between that person and any other person who is a party to the dispute if the communication - (a) was intended to be confidential; and (b) was made in connection with an attempt to settle or mediate the dispute between the persons.[93]

Subsection (2) extends privilege to "a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute."

Subsection (3) provides the common law exclusions from privilege for proving the terms of a settlement agreement, that an agreement was entered into, and for admission on issues of costs where the proposal to settle is made "without prejudice save as to costs".[94] In practice, proposals for settlement are all or almost all made using this formulation. The consequence of such a proposal is specified in r 4.11 of the High Court Rules. The starting position is that is such an offer is refused and the refusing party fails to obtain an equivalent or better result in the subsequent trial, the offeror is entitled to receive its actual and reasonable costs for the further stages of the proceeding after the offer lapsed. This starting position is subject to the overall discretion of the court in awarding costs. The approach to the exercise of this discretion turns on the reasonableness of refusing the offer. Only if refusal is considered to be unreasonable will the starting position be applied.[95]

Other Evidence Act Limitations on Admissibility

Criminal Proceedings—Sections 27-29 and 31-33 of the Evidence Act 2006 contain a number or restrictions on prosecution evidence not considered elsewhere in this report. Section 30 on improperly obtained evidence has been considered earlier.[96] The other restrictions are: evidence of one defendant contrary to another defendant (s 27), statements by a defendant where the defendant argues they are unreliable (s 28), statements by a defendant obtained by oppressive conduct (s 29), evidence inadmissible under ss 28-30 presented by a party other than the prosecution (s 31), inferences from a defendant's silence during questioning before trial (s 32), and comment on a defendant's failure to give evidence or to answer questions under cross-examination (s 33).

Consequences of Breach

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[91] Including reference to mediation and mediators, and recognition of settlement proposals "without prejudice save as to costs".

[92] See *Van Heeren v Cooper* [2007] NZCA 207, [2007] 3 NZLR 783, at [41] and [], citing *Unilever plc v Procter & Gamble Co* [2001] 1 All ER 783 (CA) and *Bradford & Bingley plc v Rashid* [2006] 4 All ER 705 (HL).

[93] See *Van Heeren v Cooper*, n 40 above,

[94] See *Calderbank v Calderbank* [1976] Fam 93 (CA).

[95] See, e.g., High Court Rules r 14.6(3)(b)(v), *New Zealand Sports Merchandising Ltd v DSL Logistics Ltd* HC Auckland CIV 2009-404-5548, 19 August 2010, *Wealand International (NZ) Ltd v Safe Kids in Daily Supervision Ltd* HC Auckland CIV 2008-404-004658, 24 February 2009, *McDonald v FAI (NZ) General Insurance Co Ltd* (2002) 16 PRNZ 298.

[96] See pp 2-4 above.

The basic principles in ss 7 and 8 of the Evidence Act 2006 is the starting point here. They have been set out earlier.[97] Section 7 provides that:

> All relevant evidence is admissible in a proceeding except evidence that is
> (a) inadmissible under this Act or any other Act; or
> (b) excluded under this Act or any other Act.

Section 8 is the general exclusionary test:

> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will
> (a) have an unfairly prejudicial effect on the proceeding; or
> (b) needlessly prolong the proceeding;
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

The words "inadmissible" and "excluded" are relative. Provisions of the Evidence Act or other Acts only prima facie exclude relevant evidence or provide for it to be inadmissible. The tests of relativity are the two paragraphs in s 8(1), with the variation for criminal proceedings in subs (2). The Sections dictate a five stage approach:

1. Does a provision in a statute purport to exclude or render inadmissible the particular evidence?
2. What is the probative value of the particular evidence?
3. How prejudicial to the proceeding or its length would admission of the particular evidence be?
4. Would the prejudicial effect be unfair or prolongation of the trial be needless?
5. If so, does the prejudice or needlessness outweigh the probative value of the particular evidence?

In practice stages 3 and 4 would usually merge into one and stage 5 would be hard to separate out from the reasoning non 3 and 4, but they are separated here for purposes of analysis. The New Zealand edition of "Cross on Evidence" emphasises two matters.[98] The first is that s 8 involves an exercise of judgment not an exercise of discretion. An appeal is therefore on the basis of the appellate court's assessment for itself of where the balance lies.[99] Were an exercise of discretion involved, an appellate court could only look for an error of law or a decision that was "clearly wrong".[100] The second emphasis was on the word "must". In a sense "must" is inconsequential save to exclude any residual discretion, which would, in any event, cease to exist once s 8 is recognised as involving an exercise of judgment rather than discretion. The basis for judgment of prejudice is prejudice to the proceeding as such, i.e., the administration of justice,[101] not to a particular party. The nature of the provision as involving an exercised of judgment not discretion and prejudice to the proceeding, not a particular party

[97] Page 2 above.

[98] N 62 above, para EVA 8.4.

[99] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

[100] *May v May* (1982) 1 NZFLR 165 (CA).

[101] *R v McGregor* [1968] 1 QB 371 (CCA).

is shown by the Supreme Court judgment in *R v Gwaze*[102] where evidence presented by the defence in a criminal proceeding was held to have been wrongly admitted on the basis of s 8. The case involved a hearsay statement from a South Africa medical expert on the symptoms of AIDS in young children (Gwaze was charged with rape and murder of a young relative). The Supreme Court allowed the prosecution's appeal and ordered a new trial.

It is noted that among the provisions for inadmissibility in other Acts is s 34(2)(a) of the Criminal Disclosure Act 2008. This gives the Court power to exclude evidence when that evidence is based on information that the Act requires to be disclosed but was not. An analogous provision is found in r 18.37 of the High Court Rules: "A document that should have been included in a party's affidavit of documents may be produced in evidence at the hearing only with the consent of the other party or parties or the leave of the court."

In terms of improperly obtained evidence, including breaches of the New Zealand Bill of Rights Act 1990, it has already been noted that breach does not necessarily result in inadmissibility.[103]

In *R v Shaheed*[104] the accused was arrested after accosting a young girl in the street and charged with a minor offence of disorderly behaviour. Although his was not a sufficiently serious offence to allow compulsory collection of a DNA sample[105] the police told him that if he refused their request for a sample, an order would be obtained compelling him to provide one. Shaheed was also not given an opportunity to consult a lawyer,[106] consent was given, the sample was taken and identified him as having raped another woman. At his trial for rape, the DNA evidence was led and he was convicted. A full bench of the Court of Appeal consisting of all but one of its most senior eight Judges held by a majority of 6 to 1 (Elias CJ dissenting) held that admissibility of evidence obtained in a more than obviously trivial breach[107] (or "if the discovery of the evidence is not sufficiently connected with the breach (any taint is dissipated so that the breach is not to be considered to be causative of the availability of the evidence) or if it is clear that the discovery of the evidence by other legitimate means was bound to have occurred"[108]) of a right guaranteed by the New Zealand Bill of Rights Act 1990, was to be determined by means of the Judge conducting a balancing exercise. That balancing exercise was to start from giving appropriate and significant weight to the fact that there had been a breach of a right guaranteed by the Bill of Rights Act.[109] The balancing exercise is to be directed to deciding whether exclusion of the evidence was in the

[102] [2010] NZSC 52 [2010] 3 NZLR 734. See [49]-[50] holding that the exercise of judgment results in error of law if wrong.

[103] See p 4 above

[104] [2002] 2 NZLR 377 (CA)

[105] Criminal Investigations (Blood Samples) Act 1995, s 5.

[106] Contrary to s 12.

[107] Richardson P, Blanchard and Tipping JJ at [146], McGrath J concurring at [192]-[193], Anderson J concurring at [200].

[108] Ibid.

[109] Another expression used is "a very important but not necessarily determinative factor. The breach of a right would be given considerable weight" (Richardson P, Blanchard and Tipping JJ at [144], while at [143] and [156] they use the phrase in the text; McGrath J concurring at [192]-[193], Anderson J concurring at [200]).

circumstances a proportionate response to the breach of right which had occurred.[110] Relevant factors non-exhaustively[111] identified were:[112]

- The need for an effective and credible system of justice,
- The value which the right protected and the seriousness of the intrusion upon it,
- Whether the breach had been deliberate or arose through gross carelessness,
- Whether other investigatory techniques, not involving any breach of rights, were known to be available and not used,
- The nature and quality of the disputed evidence,
- The centrality of the evidence to the prosecution's case and
- In cases where a conviction would not lead to a sentence of imprisonment, the availability of an alternative remedy or remedies.[113]

Previous authorities applying a prima facie exclusion for breach[114] were overruled. On the facts, a bare majority[115] held that the breach of fundamental rights was so grave that the evidence should be excluded.

Different Rules for Prosecution and Defence—Many of the differences between the rules applying to evidence obtained by the prosecution and rules applying to evidence obtained by the defence have already been covered in other sections of this paper. Examples are the exclusion of unreliable statements,[116] exclusion of statements influenced by oppression,[117] and improperly obtained evidence.[118] Some sections of the Evidence Act do not refer explicitly to the prosecution, but of their nature would apply only to the prosecution.[119] The rules in ss 37 to 43 relating to veracity and propensity[120] contain some differences between the defence and the prosecution in the type of evidence that may be offered and the way it may be offered, but these have been dealt with in those sections of this paper.

Section 98 however, does explicitly give different criteria for prosecution and defence who wish to offer further evidence after the closure of that party's case. Neither party may offer further evidence except with the permission of the Judge but for the prosecution the

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[110] Richardson P, Blanchard and Tipping JJ at [143] , McGrath J concurring at [192]-[193], Anderson J concurring at [200].

[111] Richardson P, Blanchard and Tipping JJ at [145] , McGrath J concurring at [192]-[193], Anderson J concurring at [200].

[112] Richardson P, Blanchard and Tipping JJ at [143], [147]-[156] , McGrath J concurring at [192]-[193], Anderson J concurring at [200].

[113] Gault J doubted this at [173].

[114] *R v Kirifi* [1992] 2 NZLR 8 (CA), *R v Butcher* [1992] 2 NZLR 257 (CA), *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA), *R v Goodw*in [1993] 2 NZLR 153 (CA), and *R v Te Kira* [1993] 3 NZLR 257 (CA).

[115] Richardson P, Blanchard, Tipping and McGrath JJ.

[116] Evidence Act 2006, s 28.

[117] Ibid, s 29.

[118] Ibid, ss 30-31.

[119] Examples are s 32 which prohibits any person to invite the fact finder to infer guilt from the defendant's silence and requires the Judge to direct the jury that it may not draw that inference, and s 33 which states that no person other than the defendant's counsel or the Judge may comment on the fact that the defendant did not give evidence at his or her trial.

[120] See pp 25-29 below.

Judge may grant permission only if the evidence relates to a purely formal matter; or to a matter arising out of the conduct of the defence the relevance of which could not reasonably have been foreseen; or the evidence was not available or admissible before the prosecution's case was closed; or for any other reason the interests of justice require the further evidence to be admitted. For the defendant the only criterion which the Judge is required to consider is whether the interests of justice require the further evidence to be admitted. A Judge would give permission only in special or exceptional circumstances and a witness cannot be recalled simply because he or she wants to change the evidence given.[121]

Before any evidence may be offered in a criminal trial it must first come into the hands of the prosecution or defence. In The Criminal Disclosure Act 2008 sets out the requirements on both parties as to disclosure of evidence. As could be expected, the duties on the prosecution are more onerous than those on the defence. There is a continuing duty on the prosecution to disclose evidence when it is requested. The Criminal Disclosure Act 2008 has improved the flow of disclosure over the preceding freedom of information process developed by the Courts,[122] which had operated for over 20 years.

Section 12 lists material required to be disclosed by the prosecutor at the commencement of criminal proceedings, that is, initial disclosure. The main items are:

- A summary sufficient to fairly inform the defendant of the facts on which it is alleged an offence has been committed and the facts alleged against the defendant; and
- A summary of the defendant's right to apply for further information under subsection (2) before entering a plea; and
- The maximum penalty and the minimum penalty (if there is one) for the offence; and
- A list of the defendant's previous convictions known to the prosecutor.

At any time after criminal proceedings are commenced, the prosecutor must, if requested by the defendant in writing, as soon as reasonably practicable disclose the following information to the defendant:

(a) The names of any witnesses whom the prosecutor intends to call at the hearing; and
(b) A list of the exhibits that are proposed to be produced on behalf of the prosecution at the hearing or trial; and
(c) A copy of all records of interviews with the defendant; and
(d) A copy of all records of interviews of prosecution witnesses by a law enforcement officer that contain relevant information; and
(e) A copy of job sheets and other notes of evidence completed or taken by a law enforcement officer that contain relevant information; and

[121] An example of circumstances in which a Judge would give permission would be evidence of a prosecution witness' previous consistent statement introduced to rebut an allegation of recent fabrication made by the defence after the prosecution has closed its case. In *R v Milliken* (1969) 53 Cr App r 330, the Court of Appeal held that the trial judge had rightly allowed the prosecution to adduce evidence in rebuttal of an allegation of a police frame-up made by the accused for the first time at trial (followed in *R v Wickremasinghe (No 3)* HC, Auckland, T 013408, 6 March 2003, Chambers J).

[122] *Commissioner of Police v Ombudsman* [1988] 2 NZLR 365 (CA) developed from the provisions on access to personal information in the Official Information Act 1982..

(f) A copy of any records of evidence produced by a testing device that contain relevant information; and
(g) A copy of any diagrams and photographs made or taken by a law enforcement officer that contain relevant information and are intended to be introduced as evidence as part of the case for the prosecution; and
(h) A video copy of any video interview with the defendant; and
(i) A copy of relevant records concerning compliance with the New Zealand Bill of Rights Act 1990; and
(j) A copy of any statement made by, or record of an interview with, a co-defendant in any case where the defendants are to be proceeded against together for the same offence; and
(k) A list of any information described in paragraphs (a) to (j) that the prosecutor refuses under sections 15-18 to disclose to the defendant.

Reasons must be given for refusal and if requested, the grounds in support of that reason. Section 15 states that a prosecutor is not required to record or obtain information for the purpose of disclosure. Section 16 gives reasons for withholding information which include that the information is likely to prejudice the maintenance of the law, facilitate the commission of another offence, prejudice the security of the country, endanger the safety of any person, or would constitute contempt of court or of the House of Representatives. Section 17 imposes restrictions on disclosing the address of the witness or informant, and section 18 allows trade secrets to be withheld.

The requirements for full disclosure are found in s 13 and must be fulfilled as soon as reasonably practicable after a defendant has pleaded not guilty, elected trial by jury, or if the information has been laid indictably, after the first court appearance. The standard information for full disclosure is wide and includes witness statements and briefs of evidence, convictions of a prosecution witness, and exhibits. It differs from the initial disclosure[123] in that it requires information about evidence which it is not proposed to call, for example a list of any other exhibits which are not proposed to be introduced as evidence and information supplied by a person who is not going to be called as a witness.

Sections 20 to 23 list the disclosure requirements imposed on a defendant. These are primarily written notice of the particulars of any alibi if the defendant intends to adduce evidence in support of an alibi, and disclosure of evidence to be given by an expert witness. The Court or Registrar must give written notice of the requirements to a defendant if he or she pleads not guilty to a summary offence, or if the information has been laid indictably when he or she makes a first court appearance or if the defendant elects trial by jury. These requirements, as might be expected are required at a later stage than the requirements imposed on the prosecution which must be fulfilled at the commencement of proceedings.

Complainants in sexual cases—At common law it was possible for a complainant in a sexual case to be cross-examined as to any sexual association with persons other than the accused. A major change is made by s 44(1) of the Evidence Act 2006 which provides that no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the judge. The judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to the facts in issue, or the issue of the

[123] To be provided when the case is called for the first time.

appropriate sentence, that it would be contrary to the interests of justice to exclude it. However, the permission of the judge is not required to rebut evidence given under subs (1). Any evidence relating to previous sexual experience that is said to go to credit has to satisfy both s 44 and s 37. That is to say that it must be "substantially helpful" in assessing veracity and be of such direct relevance to the facts in issue that it would be contrary to the interests of justice to exclude it. However, in *R v Clode*,[124] the Court of Appeal noted that s 44 is not intended to preclude or somehow truncate the advancement of a full defence which is otherwise open to an accused.

There is a total prohibition on evidence or questioning of a witness that relates directly or indirectly to the reputation of the complainant in sexual matters. Where the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subs (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.

Presenting Evidence

This part of the report turns away from the human rights aspect of evidence towards the forensic aspects of evidence. It is worth starting this section by again referring to s 7 of the Evidence Act 2006:

> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding;
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

This provision sums it up that there are no net absolutes in this area and admissibility will be determined on an instance-by-instance basis. Naturally the courts are engaged in providing authorities on the correct approach to this instance-by-instance approach, but it must always be kept in the forefront of thought that these authorities are general guidance to approach not hard and fast rules.

Areas of Probative Value Limits

Hearsay—The admission of "hearsay" evidence is governed by Part 2 Sub-part 1 of the Evidence Act 2006.[125] A "hearsay" statement is defined as "a statement that (a) was made by a person other than a witness, and (b)is offered in evidence at the proceeding to prove the truth of its contents".[126] The general provision on admitting hearsay statements is in s 18(1):

> A hearsay statement is admissible in any proceeding if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—

[124] [2007] NZCA 447.

[125] Sections 16-22.

[126] Section 4(1).

(i) the maker of the statement is unavailable as a witness;[127] or
(ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

This general provision is subject to ss 20 and 22 found in Part 2 Sub-part 1, and to any other provision dealing with hearsay.[128] Section 20 excludes hearsay where the rules of court allow hearsay statements as for interlocutory applications[129] and in documents discovered to an opposite party or in answers to interrogatories. Section 22 covers criminal proceedings where there is a different procedure and principles applied. By s 19(1) hearsay statements in "business records"[130] are admissible if:

(a) the person who supplied the information used for the composition of the record is unavailable as a witness; or
(b) the Judge considers no useful purpose would be served by requiring that person to be a witness as that person cannot reasonably be expected (having regard to the time that has elapsed since he or she supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he or she supplied; or
(c) the Judge considers that undue expense or delay would be caused if that person were required to be a witness.

Again, this is subject to ss 20 and 22. It has been held that double hearsay is excluded.[131]

While many problems with hearsay statements have been eliminated by the Act or by procedural changes such as agreed bundles of documents, a significant number of issues remain, particularly about identifying what is a hearsay statement.[132] A discussion of these is considered to be beyond the scope of this Report.

The specific criminal proceeding provisions are ss 21 and 22. By s 21, no evidence can be given by the defence about what a defendant has said unless the defendant him or herself gives evidence. Where a defendant does give evidence and the defence also wishes to present hearsay evidence, s 22 sets out the procedure. Unless every party waives compliance or the judge dispenses with the requirements,[133] the prosecution or a defendant seeking to have hearsay evidence admitted must give written notice of his or her intention to every other party, containing the name of the witness (unless there is a relevant anonymity order exists), the content of the statement (if it is oral) or a copy of the document itself (if it is written), the circumstances relating to the statement that provide reasonable assurance that the statement is

[127] The principle here is that if the maker of the original statement is a witness, he or she can be cross-examined. Hence if a later witness repeats what an earlier witness has said, the earlier witness must be made available for cross-examination to avoid the statement being hearsay. See the definitions of "witness" in s 4 and "circumstances" and "unavailable as a witness in a proceeding" in s 16.

[128] Such as s 34(1) discussed at p 30 below.

[129] High Court Rules rr 7.29 and 7.30.

[130] The terms "business" and "business record" are defined in s 16

[131] *R v Rajamani* HC, Auckland CRI 2005-004-001002, 5 June 2008.

[132] See 'Cross on Evidence" (New Zealand edition, as at January 2011) paras EVA 17.4-17.7.

[133] Section 22(1)(b) and (c) respectively. The judge may dispense only if, having regard to the nature and contents of the statement, no party is substantially prejudiced by the failure to comply with the requirements, or compliance was not reasonably practicable in the circumstances, or the interests of justice so require – subs (5)(a)-(c).

reliable (if s 18 applies) or why a record is a business record (if s 19 applies), why the person who made the statement or document is unavailable as a witness or why undue expense or delay would be caused if the person were required to be a witness.[134] All this needs to be done in sufficient time before the hearing to allow a response to be prepared.[135]

Veracity—There is a general principle in s 37(1) of the Evidence Act 2006 that "a party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity." Subsection (3) contains a non-exhaustive list of factors to determine whether such evidence would be "substantially helpful". These are:

> (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
> (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
> (c) any previous inconsistent statements made by the person:
> (d) bias on the part of the person:
> (e) a motive on the part of the person to be untruthful.

Subsection (4) provides for limits on a witness challenging its own witness's credibility. A party may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile, but may offer evidence as to the facts in issue contrary to the evidence of that witness.[136] "Veracity" is defined as "the disposition of a person to refrain from lying, whether generally or in the proceeding."[137]

There are special provisions relating to veracity evidence in criminal proceedings. A defendant may offer evidence about his or her veracity.[138] The prosecution may lead evidence of a defendant's veracity only if the defendant has offered evidence about his or her veracity or has challenged the veracity of a prosecution witness by reference to matters other than the facts in issue, and the judge gives leave.[139] In deciding whether to give leave, the judge "may take into account":[140]

> (a) the extent to which the defendant's veracity or the veracity of a prosecution witness has been put in issue in the defendant's evidence:
> (b) the time that has elapsed since any conviction about which the prosecution seeks to give evidence:
> (c) whether any evidence given by the defendant about veracity was elicited by the prosecution.

In criminal proceedings, a defendant can challenge the veracity of a co-defendant only if this is relevant to a defence to be raised by the defendant and the judge gives leave.[141] A

[134] Ibid, subss (2(a)-(g), and (3).

[135] I bid, subs (4).

[136] Section 37(3)(a) ad (b) respectively.

[137] Section 37(5).

[138] Section 38(1).

[139] Section 38(2)(a) and (b) respectively.

[140] Section 38(3).

[141] Section 39(1)(a) and (b) respectively.

defendant proposing to challenge a co-defendant's veracity must give a notice to all co-defendants of the contents of the proposed evidence in sufficient time before the trial to allow a response to be prepared[142] unless all co-defendants waive compliance or the judge gives leave.[143]

***Propensity*—**Propensity evidence was traditionally called similar fact or bad character evidence. At common law the rule permitting the admission of similar fact evidence is an exception to the general and fundamental rule that all relevant evidence is prima facie admissible. However, the test for the admissibility of such evidence has never been entirely settled. Cases applying the test to the facts are inconsistent. Traditionally the common law prohibited the prosecution offering propensity evidence against a defendant, because of the danger of prejudice to the defendant. Because of this risk, courts have sought to restrict both the cross-examination of a defendant and the admission of propensity evidence against him or her. that risk of prejudice must be outweighed by the probative value before evidence could be admitted, an easily applied test for admissibility was lacking and the law was uncertain. The judgment in *R v Taunoa*[144] in which the situation was described as a "vexed issue" was a catalyst for change in New Zealand. The Evidence Act 2006 now includes provisions intended to codify the similar fact rule in both civil and criminal proceedings.

The new propensity provisions are sections 40 to 43 inclusive of the Evidence Act 2006. Their most significant features can be summarised as follows:

1. What was described at common law as similar fact or bad character evidence is now propensity evidence.
2. Propensity evidence may be offered in a civil proceeding subject only to the general exclusion provision[145] and other rules of admissibility.
3. If the propensity evidence is solely or mainly relevant to veracity then the veracity rules apply.
4. A defendant may offer propensity evidence about himself or herself but as a consequence, and with the permission of the judge, the prosecution may offer retaliatory propensity evidence about the defendant.
5. New written notice provisions apply where a defendant offers propensity evidence about a co-defendant.
6. The prosecution may only offer propensity evidence about a defendant if the evidence is of probative value in relation to an issue in dispute which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.
7. Factors relevant to assessment of the probative value of propensity evidence are prescribed including:
    (a) The nature of the issue in dispute (a mandatory consideration);
    (b) The frequency of the acts which are the subject of the evidence;

[142] Section 39(3)(a) and (b) respectively.

[143] Section 39(2)(a) and (b) respectively.

[144] (CA 494/04, 13 April 2005).

[145] Section 8, see p 2 above.

(c) Connection in time between the acts the subject of the evidence and the acts which constitute the offence;
(d) The extent of the similarity between the acts the subject of the evidence and the acts that constitute the offence;
(e) The number of persons making allegations that are the same or similar to the subject of the offence;
(f) Whether the allegations may be the result of collusion or suggestibility;
(g) The extent to which the acts the subject of the evidence and the acts which constitute the offence are unusual.

8. Factors relevant to assessment of the prejudicial effect of evidence are prescribed including:
   (a) Whether the evidence is likely to unfairly predispose the fact-finder against the defendant;
   (b) Whether the fact-finder will tend to give disproportionate weight in reaching a verdict to the evidence of the other acts or omissions.

The definition of propensity evidence in s 40(1) is wide and does not distinguish between positive or negative behaviour. As a result behaviour that would not historically have been regarded as evidence of propensity can now qualify for admission. The law in New Zealand permits the prosecution to offer evidence of alleged criminal acts that have resulted in the acquittal of the accused.[146] One case attempted to draw a distinction between the admissibility of such evidence in cases where the issue is identity and cases where the issue is whether or not the offence occurred.[147] Later cases however, did not accept that distinction.[148] If evidence of acquittal is given, a direction is required from the judge as to the emphasis which should be given to it. As there is no reference to acquittals in s 40, the situation is unaffected by the Evidence Act.

Evidence of reputation, often produced by a defendant in a criminal proceeding, is also not referred to in s 40. Currently the leading New Zealand case in the area is *R v Falealili*.[149] It is arguable that the old English rule is no longer observed in New Zealand and that any reputation evidence would be regarded as inadmissible.

One problem arising from the Evidence Act is the lack of a standard of proof or threshold test for evidence to qualify as propensity evidence. Some decisions of the New Zealand Court of Appeal have suggested that the standard of proof for the admission of similar fact evidence is the balance of probabilities,[150] but the reference in s 40(1) to "allegations" and the absence of any reference to a threshold test or standard of proof would suggest that a bare allegation might well be sufficient to meet the definition of propensity evidence.

At common law the propensity rule was exclusionary, but it should be noted that s 40(2) is expressed in permissive terms. However, s 40(3) places limits on propensity evidence about a defendant in a criminal proceeding, and a complainant in a sexual case in

[146] *R v Degnam* [2001] 1 NZLR 280.

[147] *R v G* [2001] 3 NZLR 729.

[148] *R v Holtz* [2003] 1 NZLR 667 and *R v Kingi* CA 66/06, 21 March 2006.

[149] [1996] 3 NZLR 664, 674 (CA).

[150] *R v Accused (CA 8/96)* (1996) 13 CRNZ 677.

relation to the complainant's sexual experience. Under s 40(4) any evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in s 37 which are discussed below.[151]

Section 41 permits a defendant to offer propensity evidence about him or herself, including eliciting evidence by cross-examining a witness called by another party. This is a partial codification of the good character rule and must relate to a witness's personal experiences of the defendant, or particular acts by which the witness's opinion of his or her character or disposition was assessed. The only limitation on the admissibility of propensity evidence offered by a defendant is that the evidence falls within the definition of s 40(1) of propensity evidence. If the defendant offers propensity evidence about himself or herself, then the prosecution or another party may, with the permission of the judge, call retaliatory propensity evidence.[152] This reflects the common law rule as to rebuttal character evidence. The requirement of the judge's permission is intended to prevent unfairness to the defendant. It should be noted that the defendant may offer evidence about the propensity of a prosecution witness without risking the admission of propensity evidence at the hands of the prosecution. The final subsection, 41(3), provides that s 43 which limits the circumstances in which the prosecution may offer propensity evidence about a defendant, does not apply to "rebuttal" propensity advice.

Section 42 states that propensity evidence by a defendant about a co-defendant may be offered with the permission of the judge if it is relevant to a defence raised or proposed to be raised by the defendant. It is recognised at common law that the test for admissibility of evidence offered by one co-defendant against another is less stringent than if the evidence was offered by the prosecution.[153] Section 42 also follows the common law rule that a defendant intending to give propensity evidence against a co-defendant must give written notice, although such notice is not required to be given to the prosecution. The requirement in s 42(3) that the notice must "include the contents of the proposed evidence" is satisfied by a general outline.

Section 43 concerns propensity evidence offered by the prosecution about defendants, limits the circumstances in which it can be offered, and gives a list of factors to be considered. The New Zealand Evidence Act does not require the probative value to "substantially" outweigh the risk of prejudice, but merely to outweigh the risk. There is then a mandatory requirement on the judge to take into account the nature of the issue in dispute. In consideration of the list of discretionary factors, no guidance is given to a judge as to the standard of proof. The reference in subs (3)(a) is to actions which "have occurred" not "have allegedly occurred", and in subs (3)(b) the reference is to the connection in time between those actions and the offence being tried. The only direction on time is contained in s 122(2)(e) which requires the judge to consider giving a jury a warning as to the reliability of the evidence if the time gap is more than 10 years. In contrast to s 43(3), the list of factors for the judge to consider in s 43(4) is mandatory. The prejudicial effect is likely to be greater with a jury than with a judge, and there are three main areas to consider:

- Erosion of the presumption of innocence;
- The danger of propensity reasoning; and
- Circularity of reasoning.

[151] See pp 22-23 above.

[152] Section 41(2).

[153] *Lowery v R* [1974] AC 85 (PC) .

The attempt in the Evidence Act to codify the test in this complicated area of the law has not dealt with the ultimate difficulty which is the application of the probative value/ prejudicial effect test.

The test for the admission of propensity evidence in civil cases has always been more relaxed, but the basic problem of balancing probative value with prejudicial effect remains. Under s 40(2) a person may call propensity evidence about any person and there is no specific test for admissibility.

Identification Evidence—Section 45 of the Evidence Act allows the admission of visual identification evidence in a trial. It is framed as a rebuttable presumption that the evidence is admissible unless the defendant can prove on the balance of probabilities that it is unreliable. It should be noted that the defendant is required to prove that the evidence **is** unreliable, not that it is "likely to be" or any other formulation. "Reliable", does not mean correct but "based on reason or good grounds, where the surrounding circumstances are conducive to accurate evidence and the witness inspires confidence".

A formal procedure for identification is laid down in subs (3) and if this is not followed then there must be a good reason to depart from it. Effectively this codifies the common law and all sub-paragraphs must be complied with. Conditions include that the procedure takes place as soon as practicable after the alleged offence is reported, and there are safeguards for the defendant in that there must be no fewer than 7 other persons for comparison, no indication is given to the identifier as to which is the accused, and the identifier is told that the person to be identified may or may not be among the persons in the procedure. A list of "good reasons" for not following the procedure (any of which is sufficient) is provided in s 45(4) which include a refusal of the person to take part; the singular appearance of the person to be identified; and that there has been a substantial change in the appearance of the person to be identified. If the formal procedure is not followed and there is no good reason, the evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification. In *R v Edmonds*,[154] the procedure was not followed, because identification of the suspects had been given by a person who knew them well and only a day after the offence. It was held that this was not a good reason for not following the procedure, but that nevertheless the Crown had proved beyond reasonable doubt that the identification had been made in circumstances which had produced a reliable identification. Factors to be considered include those internal to the witness, such as eyesight and state of sobriety, and external factors such as the state of the lighting, distance and obstructions to the view. It was further held that s 45(4) did not provide an exhaustive list of good reasons for not holding a formal procedure. A high degree of familiarity is not required before an enforcement agency can be excused from carrying out a formal procedure,[155] but the witness must be able to actually recognise the defendant.[156] There is no limitation on who can give identification evidence, and even hearsay is admissible on a visual identification.

[154] [2010] 1 NZLR 763 (CA).

[155] See *Harney v R* [2010] NZCA 264.

[156] In *Tararo v R* [2010] NZCA 287 it was held that the evidence of a police officer who had never met the defendant but had recently seen a photograph of him was not recognition evidence.

Reliability is the sole issue in the admission of voice identification evidence. However, under s 46 the presumption is that voice identification evidence is inadmissible unless the prosecution can prove on the balance of probabilities a reliable identification. This is a reversal of the presumption in s 45 and the rationale is that voice identification is of dubious value. In *R v Wickramasinghe,*[157] the New Zealand Court of Appeal accepted that evidence given by a doctor identifying a person by comparison of voices was admissible. That there must always be a solid basis for comparison was reaffirmed by the Court of Appeal in *R v Waipouri,*[158] which also ruled that a jury must be appropriately warned.

Of course in neither of these sections is s 30 excluded which enables evidence to be challenged on the basis that is has been improperly obtained.[159] Evidence obtained by any breach of the NZBORA is included in the definition of improperly obtained evidence.

Previous consistent statements

By s 35(1) of the Evidence Act 2006, a witness cannot generally give evidence of his or her previous statement which is consistent with what the witness says in evidence. A witness cannot generally enhance his or her evidence by saying he or she has said the same before. The first exception is "to respond to a challenge to the witness's veracity or accuracy, based on a previous inconsistent statement of the witness or on a claim of recent invention on the part of the witness".[160] The second exception is where the circumstances surrounding the previous statement are such as to indicate that it is reliable.[161] The third is where the witness cannot recall the earlier situation[162] and another witness gives evidence of what happened, or a document is put to the witness.

A number of the issues arising from s 35 were considered by the Court of Appeal in *R v Barlien.*[163] Statements admitted under s 35 are admissible as proof of their content.[164] The terms of s 35 are definitive and are not to be "got around" by calling in aid the general principle in s 7 or the s 10 principle that the Act is to be construed in the light of the common law.[165] The Court accepted that this gave rise to problems, but considered that it must follow what was actually in the Act.[166] Its concern at the problems caused it to direct the Registrar to provide a copy of the judgment to the Ministry of Justice and the new Zealand Law Commission.[167] Equally, the Court of Appeal has held that s 35 is restricted to "repetitive" evidence, that is, previous statements that repeat what has been given in evidence.[168] Therefore, s 35 is not brought into play by a previous statement that is merely compatible with evidence at trial.

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[157] (1992) 8 CRNZ 478 (CA).

[158] [1993] 2 NZLR 410 (CA).

[159] See pp 2-4 above.

[160] Evidence Act 2006, s 35(2).

[161] Section 35(3)(a).

[162] Section 35 (3)(b).

[163] [2008] NZCA 180, [2009] 1 NZLR 170. See also *Rongonui v R* [2010] NZSC 92.

[164] Ibid, at [20].

[165] Ibid, at [54]-[56].

[166] Ibid, at [36]-[39], [47]-[49], and [70]-[72].

[167] Ibid, at [73].

[168] See *Hitchinson v R* [2010] NZCA 388.

By s 34(1) of the Evidence Act 2006 the contrary situation, namely, previous admissions contrary to a party's interests is covered. The principles against hearsay, opinion and expert evidence, or previous consistent statements do not apply to admissions contrary to a party's interests. Section 34(2) covers the exceptional case of a person ("third party") other than the party concerned making an admission contrary to the interest of the party concerned. Unlike an admission by the party concerned, which can be regarded as reliable, statements by another which are need to be confirmed as to reliability. Subsection (2) does this by two paragraphs:

> (a) the circumstances relating to the making of the admission provide reasonable assurance that the admission is reliable; or
> (b) the third party consents.

An admission is a statement adverse to the person's interest in the current proceeding,[169] in other words, adverse to the party's position on either liability or quantum.[170] Any other statements by a party that might be adverse to the party's interests outside the proceeding will fall to be considered under the rules relating to hearsay.[171] Section 34 applies only to civil proceedings.

Opinion and expert evidence—A witness may give opinion evidence only if the witness is giving expert evidence[172] or it is "necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived."[173] The Evidence Act 2006 defines "expert" as "a person who has specialised knowledge or skill based on training, study, or experience" and "expert evidence" as "the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion".[174] Expert opinion evidence is admissible if "is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding."[175] Section 25 lays to rest a number of issues that have arisen at common law in relation to expert evidence. It may be given about an ultimate issue to be determined in a proceeding and a matter of common knowledge.[176] If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.[177]

In a civil proceeding, an expert evidence has to state that he or she is familiar with Schedule 4 to the High Court Rules[178] and agrees to abide by it.[179]

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[169] Evidence Act 2006, s 4(1).

[170] "Cross on Evidence" (New Zealand edition, current update January 2011), para EVA 34.3.

[171] Ibid.

[172] Evidence Act 2006, s 25.

[173] Section 24.

[174] Section 4(1).

[175] Section 25(1).

[176] Section 25(2)(a) and (b) respectively.

[177] Section 25(3).

[178] Annexed to this Report.

The recent case of *Smith v Attorney-General*[180] may be noted. The Court of Appeal held that a psychiatrist's expert evidence was not inadmissible because he was connected to a party, also gave evidence of fact, and the cover of his witness statement said it was "on behalf" of the Crown in "opposition" to Smith's proceeding. The argument had been based on the rather absurd idea that an expert called by a party (as distinct from being instructed by the court itself[181]) had to have a degree of independence similar to that of the judge and could only give expert evidence.

[179] High Court Rules r 9.43.

[180] [2009] NZCA 321.

[181] In the earlier High Court appeal (*Smith v Legal Services Agency* HC Wellington CIV 2009-485-1781, 8 February 2010), an appeal from from refusal of legal aid for *Smith v Attorney-General*, Smith's counsel had cited *Bonish v Austria* (1985) 9 EHRR 191 for the independence point but failed to note that *Bonish* was a case of the Court instructing the expert as its own witness.