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**Has the Evidence Act Been a Successful Codification?
Is it a True Code?**

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Abstract

This paper examines the Evidence Act 2006 to determine whether it has been a successful codification of the law of evidence in New Zealand. It firstly looks to define what the definition of a code is, and then what values and qualities are attached with it. The depth of the research conducted by the Law Commission is recognised to have been crucial in providing for such a comprehensive and coherent Act. The Law Commissions reference to other jurisdictions is evident in the final Act with inclusions such as a gap filling provision, which is implemented in the Canadian Evidence Act. The preliminary provisions of the Act, as well as s 202, are examined to discover whether they provide for the added values of a code. It is also important that the changes caused by codification are recognised. This is because the law was contradictive and incremental, and for the code to be true comprehensive coherent code, it must have adopted change. Lastly, this paper will conclude with the following heading; by and large has the Act and Codification been worthwhile?

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 9955 words.

Subjects and Topics

Evidence Act 2006

The Law of Evidence

Codification

I Has the Evidence Act been a Successful Codification? Is it a True Code?

A Introduction

Since the passing of the Evidence Act 2006 there has been much debate as to whether its reform was necessary, whether codification was necessary and whether the Act was successfully codified.¹

When the decision was made in 1989 to reform the law, the Law Commission was strongly in favour of codification.² This was due to the problematic status of the law at the time. It was very outdated, messy, confusing, inaccessible, costly and time consuming. There was also a lot of public confusion as the law lacked a degree of certainty, causing the community to doubt the justice system.³

The Law Commission conducted a decade researching, investigating and examining the law of evidence, not just in New Zealand but also throughout developed countries. A consultation process and seminars took place, where individuals who were experienced, involved or had knowledge of the evidentiary system could discuss and work through the issues at hand, including the best way to consolidate the law of evidence.⁴

To adequately determine whether codifying the Act has been successful, it is necessary to determine what exactly codification is and means, and what added values and advantages codification should bring. I will analyse the Evidence Act 2006 to find out whether it is a true code. There will be particular focus on ss 10, 6, 7, 8, 12, 5 and 202.⁵ These, except for s 202, are preliminary provisions containing matters of interpretation, purpose, principles, evidential matters not provided for, and application. Section 202 accommodates matters of periodic review regarding the operation of the Act. The functions of these provisions is significant in the overall analysis due to whether they undermine the status of the Act as a code, or whether they sufficiently fulfill the definition and values of a code. I will also consider whether the Act is functioning adequately and competently in our justice system.

The reform of the evidence law brought about many changes. I will address these as it is important to note that majority of these changes have been brought about by the method of codification. This method requires clarity and consistency. Prior to the reform many areas within evidence were contradictory,⁶ such as propensity evidence. Therefore it is important I examine these to discover whether the benefits of codification have been worthwhile. These are significant changes of propensity evidence, and improperly obtained evidence. In summarizing my research the overarching question will then be ask; by and large has codification been worthwhile?

¹ R Mahoney, E McDonald, S Optican and Y Tinsey *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010).

² Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at 7.

³ Stephanie Bishop and Elisabeth McDonald "What's in an issue? The admissibility of propensity evidence in acquaintance rape cases" (2011) 17 CLR 168 at 169.

⁴ R Mahoney, E McDonald, S Optican and Y Tinsey *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010).

⁵ Evidence Act 2006, ss 10, 6, 7, 8, 12, 5, and 202.

⁶ New Zealand Law Society *Evidence Act 2006* (Lexis Nexis, Wellington, June 2007).

II *Why the Law Change?*

A *The Law was too Complex*

The state of the law of evidence, prior to the reform of 2006, was very chaotic.⁷ It was ambiguous, as well as inconsistent. It was also difficult for professionals and the general public to access. The law was cluttered amongst complex common law rules containing hundreds of unreported cases and piecemeal statutory reforms, such as but not limited to the Evidence Amendment Acts of 1950,⁸ 1952,⁹ 1962,¹⁰ 1974,¹¹ 1986,¹² 1980,¹³ and 1988.¹⁴ These piecemeal legislative reforms were made in attempts to clarify and consolidate the law but this made it worse, causing clutter and further complexity. As Hon Chris Finlayson MP stated:¹⁵

... we had a major exercise throughout 2005 and 2006 because evidence law, as it was, was unsatisfactory. It was contained in legislation like the Evidence Act 1908, the evidence amendment act no 2 1980 which had introduced some major changes some of which never actually came into force because the Governor General in Council didn't sign the necessary documents. We also had an array of common law, judge made law on evidence.

Instead of facilitating the fact-finders access to relevant and reliable evidence, it resulted in unnecessary complexity, uncertainty, cost and delay. Hon Phil Goff MP referred to the issue in 2005, prior to the 2006 Act, stating “the existing complexity and inconsistency of evidence law results in undue legal argument, expense and delays due to arguments over admissibility of evidence.”¹⁶

B *Public Opinion*

Secondly, public opinion began calling for change.¹⁷ There had been a wake of high profile criminal trials where propensity evidence, then character evidence, had been excluded. It was too complex for the general public to understand, which caused many to doubt New Zealand's justice system. Arguably, many legal professionals also struggled to understand it.¹⁸

Since the reform these evidential principles have created certainty and clarity throughout the legal sector but there is still work to be done. Although there is a greater understanding behind the legal reasoning of this controversial type of evidence called propensity, there is still public opinion calling for change. The main point in withholding propensity evidence at trial is to uphold basic human rights of fairness at trial, and the duty of the state to prove beyond reasonable doubt the elements of the crime the accused, without relying on irrelevant evidence, however damning ones character may be. Nevertheless the general public is either unaware of this concept or does not understand it.

⁷ C Gallavin *Evidence* (LexisNexis, New Zealand, 2008) at 7.

⁸ Evidence Amendment Act 1950

⁹ Evidence Amendment Act 1952

¹⁰ Evidence Amendment Act 1962

¹¹ Evidence Amendment Act 1974

¹² Evidence Amendment Act 1986

¹³ Evidence Amendment Act 1980

¹⁴ Evidence Amendment Act 1988

¹⁵ Justice and Electoral Committee *Evidence Amendment Bill 2007* (28 June 2007) at 10334.

¹⁶ (10 May 2005) 625 NZDP 20412.

¹⁷ Stephanie Bishop and Elisabeth McDonald “What's in an issue? The admissibility of propensity evidence in acquaintance rape cases” (2011) 17 CLR 168 at 169.

¹⁸ At 170.

An illustration of a recent and controversial matter was that of Ewen Macdonald. He was accused of murdering Scott Guy.¹⁹ Propensity evidence was withheld from this proceeding and the jury came to a not guilty verdict. Once this trial had concluded, citizens of the jury became aware of the withheld evidence and reacted in a state of shock, disbelief and confusion. One juror even wrote in complaining, feeling like he had been manipulated and tricked.²⁰ He stated that this evidence should have been admissible, and with it, the jury would have held him accountable. Subsequently, public confusion, concern and complaints flooded the media. The withheld propensity evidence concerned MacDonald going through farms, poaching and killing animals, removing their heads and legs, slaughtering 19 calves by a blow with a hammer to their head. MacDonald had failed to kill many of these calves consequently leaving them to suffer. He also emptied the victim's milk vat worth tens of thousands of dollars, burnt down a sacred whare, which had been built in 1888, and had also vandalized Scott Guy's property. While this behaviour may seem shocking to a layperson, it is not of direct relevance of the murder charge he was accused of.²¹

Section 43 of the Act refers to propensity evidence only being admissible if it “has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant”.²² Therefore if the propensity evidence is not directly relevant to the dispute or if its probative value is outweighed by its prejudicial effect on the proceedings, it will be withheld. It is important to note that New Zealand's justice system chooses to be equally fair to the accused and to the victim. Just because someone has had the propensity to act in a particular manner in the past, does not guarantee that they have acted this way again in the present case. Ewen MacDonald was not accused of running through someone's farm and randomly cutting at animals and/or humans. He was not accused of burning down a house, perhaps with people in it, causing a murder. He was accused of shooting someone with a shotgun. This arson and damage does not, in any way, show MacDonald had the propensity to shoot someone.

It is a very controversial area, which, more than likely, will always contain public criticism. Propensity evidence will always be a challenging area and for this reason must not be criticized too harshly. In general society, it can come down to personal opinion and belief. Some dispute the withholding of any propensity evidence, with the theory “once a criminal always a criminal”, or “if he's capable of destroying someone's property he's capable of murder”.²³ Whereas others contend that people are capable of change, that it is wrong to assume someone is a bad person because they have committed a crime before, and/or it is unfair to prejudice the defendants trial because of a mistake they have made in the past.²⁴

Before the reform, the rules of character evidence had grown incrementally and sometimes contradictorily.²⁵ Codification discarded all of the old anomalies and

¹⁹ *New Zealand Police v MacDonald* [2012] NZHC 2388.

²⁰ Brian Edwards “Why the Jury in the Scott Guy Murder Trial Should Have Been Privy to all the Facts About Ewen MacDonald” (6 August 2009) Media <www.brianedwardsmedia.co.nz>.

²¹ Paul Easton “What the Jury Didn't Hear” *The Sunday Star Times* (New Zealand, 2 August 2015).

²² Evidence Act 2006, s 43.

²³ Paul Easton “We Say: Juries Need to Know” *The Sunday Star Times* (New Zealand, 2 August 2015).

²⁴ Stephanie Bishop and Elisabeth McDonald “What's in an issue? The admissibility of propensity evidence in acquaintance rape cases” (2011) 17 CLR 168 at 172.

²⁵ P Roberts “All the Usual Suspects: A critical Appraisal of Law Commission. Consultation Paper No 141” (1997) 75 Crim LR 91.

applied the basic relevance standard of admissibility.²⁶ This method has provided significant clarity for professionals in the legal sector, but work is still needed to be done to enable the general public the ability to understand why the law is the way it is. Therefore I am arguing that codification has somewhat improved the application of propensity evidence. I will discuss the issues of propensity evidence in further depth below.

III The Actions of the Law Commission

The Ministry of Justice approached the Law Commission in 1989 to examine the statutory and common law governing evidence in order to make recommendations for its reform, as well as an opinion as to codification.²⁷ The idea of a code was put forward due to the problematic nature the law was in. The Evidence Act 1908 was far from being a comprehensive code. A code is intended to provide accessibility, clarity, certainty and comprehensiveness, and due to such values, the Law Commission was strongly in favour of codification.²⁸

The Law Commission spent a decade reviewing aspects of evidence law, not just New Zealand's, but also the laws of Canada, America, England and Australia.²⁹ They examined policies considering justice, liberty, security, truth and fairness. Over a decade was spent engaging in preliminary discussion papers and detailed interim reports in relation to each part of the law of evidence were published, such as improperly obtained evidence. Seminars and workshops were held to test proposals and to seek opinions of those involved in the justice sector. This in depth preparation was required to ensure such a high and sufficient standard of law.

IV What is the definition of a code?

The definition of a code is important in order to determine whether the Evidence Act 2006 is a successful codification. It would be inaccurate to simply state one definition of what a code is. There are many different meanings and interpretations of what a code is and should be. These derive from many different jurisdictions, errors, contexts and opinions.

A Origin

Bentham introduced the word code into the English language in 1815. During this time period he contemplated it to mean “one universal code, as a complete, self-sufficing entity, that cannot be modified and is a legislative enactment”.³⁰ He sought to limit judicial discretion and prescribe definite answers to legal problems. Codification has been a renowned feature of the European legal landscape since pre-Roman times, as a process of achieving the recession of the sources of law into one single instrument. It was then further developed throughout the 17th and 18th centuries AD, to require the creation of certainty of the law through its uniformity and record.³¹

B Modern interpretation

²⁶ At 96.

²⁷ New Zealand Law Society *Evidence Act 2006* (Lexis Nexis, Wellington, June 2007) at 5.

²⁸ At 8.

²⁹ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at 2.

³⁰ Megan Paterson “Go No Further Than The Words Of The Section: From The Evidence Act To The Comfort Of The Common Law” (LLB (Hons) Dissertation, University of Otago, 2014) at 8.

³¹ At 9.

In more modern times, classed to be from the 18th century onwards, there have been several variations and different dimensions of what codification is.³² However each of these variations emphasise the same underlying concept, being that a code is a systematic collection, formulation or consolidation of the law. The understanding of the word ‘codification,’ has changed and developed alongside society throughout the centuries. Its modern application has many different contexts it can be interpreted in.³³ Therefore the context of evidential law must be kept in mind when determining whether the Evidence Act 2006 has been a successful codification.

Don Mathieson states that the most important aspect of a code is the establishment of legal order based on principles or the identification of themes or at least broadly applicable principles.³⁴ This element concerns the principles of the Act to be written, readily accessible and paramount in application. Each provision of the Act should be applied in accordance with promoting the purpose and principles of the Act. Any uncertainty in the application of the Act is resolved by the use of its purpose and principles.

C Codification in Australia

Heydon, now Justice Heydon of the High Court of Australia, approached the definition of codification by comparing two different ends of the spectrum:³⁵

A statute may be described as a code if it covers the entire field of the subject legislated upon, so that it is an exclusive and self-contained source of the relevant law. In a weaker sense, it may be a code if it restates and reforms part of the overall field, leaving other parts to continue in existence.

Heydon J is recognizing that there are numerous definitions of a code. He is noting the two different extreme definitions that tend to be in the Australian legal sector and society. A code should at least restate and reform part of the overall field or at most it may cover the entire field of the subject legislated upon.

D Criminal Codification in the United Kingdom

In the United Kingdom, Ian Dennis argues that codification is the task of setting out the law in a single, coherent, consistent, unified and comprehensive piece of legislation.³⁶ He asserts that it is distinctly different from a mere consolidation, as consolidation is just placing provisions relating to the same subject matter, previously in a variety of statutes, into one singular statute. Consolidation does not contain or require any reform as such. To adequately codify the law, it can adopt this guiding principle of restating the existing law, but in order to achieve the task of coherency and consistency, a certain amount of reform is necessary to prevent any contradiction and provide for a sufficient flow of understanding.

E The New Zealand Law Commissions Definition

The Law Commission, in their research, acknowledged that there are many different ways to define a ‘code’. These were examined in detail. It was necessary to decide which elements are of relevance in this particular field. The Commission found that

³² At 10.

³³ Helmut Coing “An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries” (BA (Hons) Dissertation, The Australian National University of Canberra, 1977) at 16.

³⁴ Don Mathieson *Cross on Evidence* (9th ed, LexisNexis, Wellington, 2012).

³⁵ J D Heydon *Cross on Evidence* (6th ed, Butterworths, Chatswood, 2000) at 1720.

³⁶ Ian Dennis “Codifying the Law of Criminal Evidence” (2014) 35 SLR 107 at 109.

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an Evidence Code should be a true code, in that it develops a set of rules that are “comprehensive, systematic in structure, pre-emptive of the common law and based on principles”.³⁷ Comprehensive in that it is sufficiently inclusive, systematic in that all of its parts form a coherent and integrated body and pre-emptive in that it displaces all other law in its subject area and saves only that which the code expects. A code based on principles rather than ad hoc circumstances minimises the requirement for dramatic amendments in the future. It should also be independent to enable it to be applied in a relatively self-sufficient way.³⁸

V *What is the function of a code? What are its qualities?*

Although the definition of code is relevant, the values of a code are of immense importance. The decision to codify was made because of the added qualities a code brings.

A *A Fresh Start*

Codification offers a common authoritative starting point for the particular field, drafted in a clear and consistent style. Its provisions and principles are paramount over any other legislation in the area.³⁹ Codification is the only way to achieve a truly comprehensive form, in that it deals with all elements in the field, on a large drafting scale. The goal is to offer a text that reflects the whole picture of regulation in the field. This is where the added value of codification lies as it should weed out obsolete provisions, sort out any contradictions in the existing law, identify any gaps in the existing law, and sort out any textual complications. It is to supersede existing law, thereby making a fresh start. As the Law Commission said “[o]ne of the major features of a code is that it supersedes existing law and makes a fresh start. References to earlier judicial decisions can obstruct that objective”.⁴⁰

B *Purpose and Principles*

A code is based around its purpose and principles and these principles reflect how the code is to be applied. The goal of each particular code is therefore explicit. A judge should determine admissibility on the basis of the principles and purpose, as the principles indicate how the purpose of the code is actually to be sufficiently achieved.⁴¹ William Wilberforce praised the advantages that derived from having written principles. He argued:⁴²

By presenting to the courts legislation drafted in a simple way by definition of principle, we may restore to judges what they have lost for many years to their great regret; the task of interpreting law according to statements of principles rather than by painfully hacking their way through the jungles of detailed and intricate legislation.

He also noted how judges have indicated the need for a more principled approach. There are also indications from New Zealand courts that judges will be receptive to a more principled and less technical approach, as in *R v Baker* where the court went “straight to basics” and approached the general principle of relevance by asking

³⁷ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at 1.

³⁸ At 7.

³⁹ C Gallavin *Evidence* (LexisNexis, New Zealand, 2008) at 1.5.1.

⁴⁰ Law Commission *Evidence: Reform of the Law* (NZLC R55, Wellington, 1999) at 10.

⁴¹ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at 6.

⁴² Letourneau and Cohen “Codification and Law Reform: Some Lessons from the Canadian Experience” (1990) Stat LR 183 at 194.

“whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence”.⁴³ All modern evidential codes impose some limits on the general principle of logical relevance expressed in terms of unfair prejudice, misleading or confusing effect and time wasting. In order to receive the greatest benefit from a principled approach, the principles should be stated in the early part of the code. This will substantially reform the law. Relatively specific principles are best placed within their substantive provisions such as privilege and public interest immunity.⁴⁴

However it must be noted that general principles cannot be the sole basis of an evidence code. Principles are the means to indicate how the purposes of evidence are to be achieved, and it should be clear that if evidence offends against the principles there is no residual discretion to refuse to exclude it.⁴⁵ A code containing a principled approach also provides for clarity. It becomes simplified and systematic. This will provide for people in the legal profession to have confidence and understanding as to its application and interpretation.

C Gapless

A code should also be gapless. A gapless code allows for greater certainty and accessibility.⁴⁶ It is important that not only the lawyer or judge can access the law but also the general public. Mechanisms, such as a gap filling provision, or providing reliance on the Acts principles, are placed into the Act to ensure the code is gapless. Thus, because a code is gapless, it is an entirely prospective instrument.

D Efficient

It is unreasonable for users of the system to have to waste large amounts of time searching for the applicable law. A code places all relevant provisions into one comprehensive location. This provides for high quality administration efficiency, which makes the law straightforward. Codification also makes jobs for those working in the legal justice sector a lot more manageable, as it becomes quick and efficient to a higher degree.⁴⁷

E Legitimacy of Criminal Law

Codification enables legal professionals to maximize the fairness of the law and to ensure that it adheres to the ethical standards required. A code advances the legitimacy of the law by ensuring that the various and competing aims of social defence, promotion of individual liberty and autonomy and due process of law are debated and resolved through the democratic process.⁴⁸ Contemporary parliamentary approval enhances the legitimacy of the law.

F Society

Codification makes policies, such as the securing of public and social interests, explicit. It also arranges the law so that it is accessible to the public in a way that its basic principles can be sufficiently understood. In words of Professor Wechsler a code

⁴³ *R v Baker* [1989] 1 NZLR 738 at [64]

⁴⁴ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [1].

⁴⁵ At [15].

⁴⁶ At [32].

⁴⁷ C Gallavin *Evidence* (LexisNexis, New Zealand, 2008) at 1.5.1.

⁴⁸ Ian Dennis “Codifying the Law of Criminal Evidence” (2014) 35 SLR 107 at 111.

demonstrates that "... when so much is at stake for the community and the individual, care has been taken to make law as rational and just as law can be".⁴⁹ Lastly, citizens in a democratic society should be given fair warning as to what is prohibited conduct, in accordance with the public policy of having liberty of autonomy.⁵⁰ A code enables citizens to freely access the law in order to understand the conduct that is prohibited, better than if they had to search through a large mass of statutory and common law sources.

G But why then, are some People Against Codification?

Brooks explains that one of the issues concerned with codification is that it is impossible to predict exactly which cases will arise.⁵¹ Very detailed rules will still only catch some of the cases and will include some that should be excluded. Brooks is concerned as the aim of a code is to avoid frequent and detailed amendment to deal with particular problems, but this is not possible if all issues are not covered. It is argued that there should be a very low level of specificity in drafting a code.⁵² Ian Dennis also mentions that there are negative affects codification has. He refers to the fact that courts will still need to interpret the codified law and apply it to differing circumstances and that a code may freeze at a particular stage of its development.⁵³

These authors have failed to take into account mechanisms such as; a gap filling section, which provides for unforeseen situations, or a principled approach, which is used not only to fill gaps but also follow society as it changes. Something such as technology, that is forever changing and growing, cannot be regulated by a rules based approach; it must be regulated by a principled approach. The principled, discretionary approach keeps the code up to date and forever applicable.

VI Jurisdictions

The Commission was tasked with examining every single aspect of the law of evidence. Many jurisdictions were looked into such as Australia, Canada, America, England as well as other codes within New Zealand. The Commission was able to draw on a range of existing codes and draft codes such as the Australian Law Reform Commissions draft of the Evidence Act the draft code of the Canadian Law Reform Commission, and the United States Federal Rules of Evidence.⁵⁴

A Australia

Australia's Evidence Code⁵⁵ is important, as it is a very comprehensive codification within a legal system that is very similar to New Zealand's. It also concerned a significant amount of consultation and is implemented both at the federal level and in some states under consideration. However the Australian Law Reform Commission (ALRC) expressed concern about having a principled discretionary approach. The Commission emphasised the importance of predictability and equality before the law and felt that only a rules based approach can properly achieve this. ALRC stressed how dangerous it can be leaving decisions to judges without sufficient statutory guidance, and efficiency requires parties should as far as possible know where they

⁴⁹ H. Wechsler "The Challenge of a Model Penal Code" (1952) 65 Harv LR 1097 at 1099.

⁵⁰ Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, Wellington, 1991) at [13]

⁵¹ Brooks "The Law Reform Commission of Canada's Evidence Code" (1978) 16 Osgoode Hall LJ 241 at 306.

⁵² At 307.

⁵³ Ian Dennis "Codifying the Law of Criminal Evidence" (2014) 35 SLR 107 at 110.

⁵⁴ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [2].

⁵⁵ Evidence Act 1995.

stand on the question of admissibility before trial. Consequently, ALRC found that a rules based approach tends to be more certain, easier to implement and thus less time consuming than a principled discretionary approach.⁵⁶

B Canada

The Canadian Law Reform Commission went for a principled approach, basing its application on the principles and the purpose of the code. This decision was made in order to avoid a lengthy code,⁵⁷ as it is impossible to cover every single issue that may arise. Canada therefore demonstrates a principled approach to reform of evidence law based on application for the aims and purposes of codification. It contains a principle derived from the rule of relevance, which states, “all relevant evidence is admissible except as provided in this Code or in any other Act”.⁵⁸

In terms of interpretation, the Canadian draft explicitly states, “this code shall be liberally construed to secure its purpose and is not subject to the rule that statutes in derogation of the common law shall be strictly construed”.⁵⁹ As you will further see, the New Zealand reform adopted this principle in s 5.⁶⁰

The Canadian Evidence Draft Code also contains a gap filling provision. This stated, “matters of evidence not provided for in this Code shall be determined in the light of reason and experience as to secure the purpose of this code”.⁶¹ The New Zealand Law Commission recognised the benefits of this provision and were determined to ensure the New Zealand Evidence Code contains one too. Although Leonard did not think that a gap filling provision was necessary as he thinks there can be no gap in a code based on properly formulated principles.⁶²

C America

The American Code⁶³ was significant to the Law Commissions research as it is a well-developed code in theoretical terms that has been successfully applied in practice in the United States Federal Jurisdiction. It is also the basis for many of the other state codes. The American Code and the Canadian Code both contain statements of purposes. It contains a principle of “relevance”, stating that even if evidence is relevant it is to be excluded if its probative value is substantially outweighed by danger of unfair danger of prejudice, potential for it to mislead the jury, or cause undue delay.⁶⁴ This type of provision provides policy grounds for excluding logically relevant evidence, and the New Zealand Law Commission agreed that these specific policy considerations should be stated explicitly.⁶⁵

D England

The law of Evidence in England is compelling, as it does not possess a code.⁶⁶ This is fascinating, as it is very unusual for New Zealand to reform and develop its law ahead

⁵⁶ Australia Law Reform Commission *Evidence: Interim Report* (ALRC R26, 1985) at 39.

⁵⁷ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [2].

⁵⁸ At [16].

⁵⁹ Law Commission *Evidence: Reform of the Law* (NZLC R55, Wellington, 1999) at 32.

⁶⁰ Evidence Act 2006, s 5.

⁶¹ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [35].

⁶² At [36].

⁶³ Evidence Act 1989.

⁶⁴ Law Commission *Evidence Law: Principles for Reform* (NZLC PP13, Wellington, 1991) at [10].

⁶⁵ At [11].

⁶⁶ C Gallavin *Evidence* (LexisNexis, New Zealand, 2008) at 1.5.1.

of England. New Zealand is frequently influenced by England in its application and interpretation of the law. England is part of the Common Wealth and is usually further advanced and developed.

E New Zealand

In New Zealand, codification has facilitated the creation of a legal framework, which provides for a degree of stability and directions the evolution of the law. Some of our codes, for instance the Crimes Act⁶⁷ which is considered a code as it provides an exhaustive list of crimes in New Zealand, or the Land Transfer Act,⁶⁸ or the Sale of Goods Act,⁶⁹ have lasted relatively unaltered in concept and form for many years.

VII An analysis of the Evidence Act 2006

A Section 10 Interpretation – Are the Values of a Code Accomplished?

Section 10 was further added into the Act as a reminder to construe the code by reference to its purpose and principles, rather than relying on the common law.⁷⁰ Investigation and consultation provided that caution should be had to the interpretation of the Act, as a lifetime of training has been ingrained into both the bench and bar, and there might be an almost automatic reaction of referring to case law to resolve evidential issues.⁷¹ As the Supreme Court stated in *Mahomed* “we do not consider a great deal is now to be gained from an examination of pre-Evidence Act case law. The Act substantially codified that case law and it is preferable, and consistent with s 10(1) to focus firmly on the terms of the Act: albeit the application or interpretation of a particular provision in the Act may sometimes benefit from a consideration of the previous common law”.⁷²

1 Section 10(1)(a)

Section 10(1)(a) states that the Act must be interpreted in a way that promotes its purpose and principles.⁷³ There is much debate concerning whether this section prevents the Act from being a true code, as it gives the judiciary the opportunity to construe the Act as largely representing an additional source of the law of evidence, rather than the sole source of the law of evidence.⁷⁴ If it was the sole and only source of evidence, it would not be able to apply to every facts scenario, it would not be able to keep up with society changing and it would not be a gapless code. It has been made so that any ambiguity in the meaning of the provisions must be resolved by reference to the principles of the code. It therefore provides clarity and essentiality on what is to be achieved. This is a significant improvement in the law of evidence. Decisions can be made according to the relevant facts of each case. Thus the promotion of purpose and principles is very beneficial, as it has been recognised that cases of evidence in New Zealand can differ dramatically.

2 Section 10(1)(b)

⁶⁷ Crimes Act 1961.

⁶⁸ Land Transfer Act 1952.

⁶⁹ Sale of Goods Act 1908.

⁷⁰ Law Commission *Evidence: Reform of the Law* (NZLC R55, Wellington, 1999) at [32].

⁷¹ At [32].

⁷² *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [4].

⁷³ Evidence Act 2006, s 10(a).

⁷⁴ C Gallavin *Evidence* (LexisNexis, New Zealand, 2008) at [1.5].

Section 10(1)(b) sets out that the Act is not subject to any rule that statutes in derogation of the common law should be strictly construed.⁷⁵ The Supreme Court in *Wi v R* referred to this section and stated that it was included to emphasize that the Act marked a new departure in the law of evidence. This was really to try and prevent any subconscious resistance to change.⁷⁶ This provides for many of the qualities contained in a code. Marking a new departure in the law is creating a fresh start in the law of evidence in New Zealand. It is leaving behind any contradictory and incoherent law.

3 Section 10(1)(c)

Section 10(1)(c) allows for interpretation to have regard to the common law, as long as it is consistent with its provisions, promotion of its purpose and principles and the application of s 12.⁷⁷ Note that s 12⁷⁸ will be covered later on. Initially the intention of codification was to replace the previous collection of case law and statute law with one single consistent code. This has largely been achieved but resort is still made to extraneous sources, as in s 10(1)(c) and s 12. It is crucial to note though, that in either case, reference to extraneous sources is only where the common law is consistent with the purpose and principles of the Act.

Mahoney argues that s 10(1)(c) lessens the contention that the Act is a code; as such significant flexibility is given to the judiciary in the application of the common law.⁷⁹ Also, during the Committee Stage hearing of the Bill, Hon Finlayson MP and Mr. Tanszos MP expressed concern about the references to the common law bringing back somewhat uncertain references to the law, as it is never static but always developing.⁸⁰ *Healy v R*⁸¹ addressed this issue. There was much confusion amongst the High Court as to what this meant for the status of the Act being a code. A code is typically meant to be an exclusive and self-contained source of the law. When approaching that particular field of law, the code is supposed to contain all of the relevant law, and there should be no need for any extraneous sources. It was also recognised that the main objective of the reform was to reduce the uncertainty that existed at the common law. *Healy* found that reference to the common law in s 10(c) undermines the Act as a code and should not have been included in the Act if it is supposed to be a code.⁸² This is where reference to the origins of the code is very useful. Such as the preliminary papers, the 2013 review⁸³ and the commentary.⁸⁴ These discuss the reasons for including the common law in s 10(c), which are for illustrative and interpretive aid purposes. The inclusion of the common law was not intended to be relied on or refer to instead of the provisions of the Act. However Gordon Hook wrote; “the Bill adds reference to the status of the common law with respect to the Bill that did not appear in the Code. This was thought to be a helpful

⁷⁵ Evidence Act 2006, s 10(b).

⁷⁶ *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.

⁷⁷ Evidence Act 2006, s 10(c).

⁷⁸ Section 12.

⁷⁹ R Mahoney, E McDonald, S Optican and Y Tinsey *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at 60.

⁸⁰ Justice and Electoral Committee *Evidence Amendment Bill 2007* (28 June 2007) at 10334.

⁸¹ *Healy v R* [2007] 3 NZLR 850 (HC).

⁸² At 54.

⁸³ New Zealand Law Commission *The 2013 Review of the Evidence Act 2006* (National Library of New Zealand Cataloguing-in-Publication-Data, Law Commission report; no 127, February 2013).

⁸⁴ Law Commission *Evidence: Reform of the Law* (NZLC R55, Wellington, 1999).

addition to aid interpretation.”⁸⁵ The benefits of the Law Commissions Commentary will be considered further below.

In a report by the Law Commission it is noted that recourse to the common law is not always problematic.⁸⁶ As in *Vagliano* Lord Herschell observed that he was:⁸⁷

... far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If for example a provision were of doubtful import, such resort would be perfectly legitimate. Or again if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning or been used in a sense other than their ordinary one in relation to such instruments the same interpretation might well be put upon them in a code.

In this application Lord Herschell is referring to, is the exact purpose common law is to be used for in the Evidence Act 2006. It is to help aid interpretation where greater explanation of the provisions is required and where the common law is relevant. Reference to the common law in such circumstances is allowable in the Act, as the law commission recognised that the principles of the Act were not completely foreign to the common law. Many provisions in the Act actually codify existing common law, such as s 30,⁸⁸ which codifies the test stated in *R v Shaheed*,⁸⁹ and s 18(1)⁹⁰ which codifies *R v Baker*.⁹¹ The Law Commission referred to this issue, stating that the objective of the Code is to reform the law and wherever appropriate the code will embody the wisdom and experience of the common law.⁹² Where provisions have codified the common law, reference to the earlier case law may be helpful in the application of the Acts principles. Therefore the Act is still a code, as only those common law authorities that are consistent with the provisions of the Act, and its purpose and principles, are to be consulted. As Justice Keane explains:⁹³

The Act is the starting point and may be well the end point. It speaks for itself and is not to be read subject to the common law. If it speaks explicitly and completely there can be no resort to the common law. If it speaks less than definitively and completely, there can and may need to be, but only insofar as the common law matches with the purpose, principles and provisions of the Act.

4 *The Law Commissions commentary*

Another interpretive aid is the Law Commissions Commentary.⁹⁴ This was published to be “an authoritative guide to interpreting the Code”.⁹⁵ It discusses the way each code provision is intended to apply, and it states that the ultimate determination of the code should be on the principles rather than the common law (even though comparisons with the previous law may be helpful).

The Law Commission followed suggestions made by the Scottish Law Commission, that a commentary could be used to; justify and explain the principles which the code

⁸⁵ Gordon Hook (Manager of the Criminal and International Law Team, Ministry of Justice) to Phil Goff (Minister of Justice) regarding the Evidence Bill 2005 (8 February 2005).

⁸⁶ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [31].

⁸⁷ *Bank of England v Vagliano Brothers* [1891] AC 107, 145 [1891-4] All ER Rep.

⁸⁸ Evidence Act 2006, s 30.

⁸⁹ *R v Shaheed* [2002] 2 NZLR 377 (CA).

⁹⁰ Evidence Act 2006, s 18(1).

⁹¹ *R v Baker* [1989] 1 NZLR 738.

⁹² Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [31].

⁹³ *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at [38].

⁹⁴ Law Commission *Evidence: Reform of the Law* (NZLC R55, Wellington, 1999).

⁹⁵ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [38].

embodies, to indicate its intended field of application, to make clear in what respects it is intended to alter the substance of the existing law and, to point out the relationship between the Articles.⁹⁶ As Phil Goff stated, the origins of the Act have a continuing role as guides to its interpretation.⁹⁷

B Purpose of the Act – Does this Achieve the Values and Advantages of a Code?

The purpose of the Act is achieved through six objectives listed in s 6(a) – (f).⁹⁸ The Primary purpose of the Act is to help secure the just determination of proceedings. Although s 6 does not have any direct operative effect, it is an aid to the interpretation and application of other features of evidence. Section 6 states that the purpose is to help secure the just determination of proceedings by providing for facts to be established by the application of logical rules, providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act, promoting fairness to parties and witnesses, protecting rights and confidentiality and other important public interests, avoiding unjustifiable expense and delay, and enhancing access to the law of evidence.⁹⁹

1 Section 6(b)

Section 6(b) states the purpose of providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990.¹⁰⁰ The New Zealand Law Society was of the view that the application of the Bill of Rights Act 1990 to proceedings is “axiomatic” and argued there should be an express reference to it.¹⁰¹ The Select Committee agreed stating “we consider it important to recognise the fundamental importance of that Act in the purpose section of the Bill”.¹⁰² As Hon Rick Barker said “the reference to the New Zealand Bill of Rights Act requires legal practitioners to have regards to the rights in that Act”.¹⁰³

The Bill of Rights Act 1990 also includes substantive rights such as freedom from discrimination and freedom of religion, as well as procedural rights, which are arguably covered by s 6(c).¹⁰⁴ This provision was not included in the draft code written by the Law Commission as it was felt to be repetitive and unnecessary. Section 6(d) protects the rights of confidentiality and other important public interests and the Law Commission, in their draft, considered that privacy issues and human rights would be included as “important public interests”.¹⁰⁵ Section 6(b)¹⁰⁶ in time might prove to be problematic as there are provisions within the Act, such as ss 95¹⁰⁷

⁹⁶ At [40].

⁹⁷ (10 May 2005) 625 NZDP 20412.

⁹⁸ Evidence Act 2006, s 6(a) – (f).

⁹⁹ Evidence Act, s 6.

¹⁰⁰ Bill of Rights Act 1990.

¹⁰¹ New Zealand Law Society *Evidence Act 2006* (Lexis Nexis, Wellington, June 2007).

¹⁰² R Mahoney, E McDonald, S Optican and Y Tinsey *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [6.03].

¹⁰³ At [6.03].

¹⁰⁴ Evidence Act 2006, s 6(c).

¹⁰⁵ R Mahoney, E McDonald, S Optican and Y Tinsey *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [6.03].

¹⁰⁶ Evidence Act 2006, s 6(b)

¹⁰⁷ Section 95.

and 103,¹⁰⁸ where judges are required to take account of “religious beliefs”. There may be a conflict or clash in application of the law.

2 Section 6(c)

The objective of s 6(c) is to promote fairness to parties and witnesses,¹⁰⁹ which has in practice, been referred to in support of applying particular provisions of the Act as well as in relation to the reliance on pre-Act common law authority, as mandated by ss 10 and 12.

3 Section 6(e)

The objective of 6(e) is to avoid unjustifiable expense and delay.¹¹⁰ This was very effective in the case of *R v Christie* where a video interview was presented as evidence. This video contained 7 hours of footage. The court applied s 6(e) and withheld large portions of the video that were not of direct relevance.¹¹¹

4 Section 6 (f)

Section 6(f) requires the law of evidence to be readily accessible.¹¹² In the select committee stage it was said that the Act... “provides a central place where the law of evidence can be found. I think for the public that is enormously helpful”.¹¹³ The purpose provision therefore provides for the added advantages of a code. It is also important to note that some people may not have access to legal counsel and it is therefore to the advantage of everyone to have the law of evidence clear and accessible. It is important to note that s 6 has significance in other provisions such as when interpreting the Act in s 10,¹¹⁴ exercising inherent powers s 11,¹¹⁵ and making admissibility decisions when the Act or any other enactment does not fully cover the matter as in s 12.¹¹⁶

C Section 7 Relevance Principle – Does this Achieve the Values of a Code?

In accordance with s 7, relevance is a necessary condition of admissibility,¹¹⁷ but under the Act, not a sufficient condition. This means that, just because evidence is relevant, does not mean that it is automatically admissible. The principle is rational and contextual; it requires reasons for what the proof is and why it is relevant. All modern code and draft codes impose some limits on the general principle of logical relevance expressed in terms of unfair prejudice, misleading or confusing effect and time wasting.¹¹⁸ Principles are the means to indicate how the purpose of the Act is to be achieved.

D Section 8 Probative Value Principle – Does this Achieve the Values of a Code?

¹⁰⁸ Section 103.

¹⁰⁹ Section 6(c).

¹¹⁰ Section 6(e).

¹¹¹ *R v Christie* HC Christchurch CRI-2008-009-3597-, 30 March 2009.

¹¹² Evidence Act 2006, s 6(f).

¹¹³ R Mahoney, E McDonald, S Optican and Y Tinsey *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [6.06].

¹¹⁴ Evidence Act 2006, s 10.

¹¹⁵ Section 11.

¹¹⁶ Section 12.

¹¹⁷ Section 7.

¹¹⁸ Don Mathieson *Cross on Evidence* (9th ed, LexisNexis, Wellington, 2012).

Section 8 provides the other principle of the Act. It just states that evidence must be excluded if its probative value is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding, or that it will needlessly prolong the proceeding.¹¹⁹ Therefore this principle, like s 6(e), also works to save time. This use of the word “must” provides certainty that there is no working around this principle. Thus the judiciary should determine admissibility of evidence on the basis of these principles (s 7 and s 8) and it should be clear that if evidence offends against these principles there is no residual discretion to refuse to exclude it.¹²⁰

In accordance with this principle the defendant no longer has the absolute right to present evidence relevant to their defence. If the probative value is outweighed, then it will be inadmissible.¹²¹ This is a significant reform of the law as prior to the Act the defendant had the right to present all evidence relevant to their defence, and this was not subject to any discretionary control.¹²²

Codification of the principles of relevance, and general exclusion encourages clear and principled thinking about contestable evidence. In applying these principles, the New Zealand Supreme Court has excluded evidence on the grounds of irrelevance, and the court has demonstrated how the inquiry into purpose allows identification of the applicable admissibility rule. Some may disagree with this process but in the words of Lord Cooke, the going straight to the basics approach has much to commend in terms of transparent decision-making.¹²³

E Section 12 Gapless – Does this Achieve the Values of a Code?

Section 12 refers to evidential matters that are not provided for. In summary it states that evidential matters not provided for within the Act are to be made in accordance with the purpose and principles, and common law, as long as the common law is consistent with these.¹²⁴ This is a gap filling provision, included as the Commission insisted it was important to deal with the whole topic not just a piecemeal reform.¹²⁵ As I stressed earlier, a gapless code is preferred as it brings clarity, accessibility and prevents undue delay. The aim is to maximize predictability and uniformity in the application of the principles and purpose of the code.

The Law Commission addressed that there could be two types of potential gaps. A gap due to developments in society, such as technology, and a gap that is outside of the scope of the Act, so by its nature it is not covered.¹²⁶ The first type is filled by application of the purpose and principles, with the latter covered by the application of s 12. The passing of time can render legislation obsolete but the use of s 12 and/or the principles and purpose of the Act, works to prevent this. These gap-filling mechanisms have the advantage of preventing the need of frequent amendments in the future, as having too many amendments can affect the Acts clarity. The Resource Management Act is an evident example of this problem. Due to such a high number of

¹¹⁹ Evidence Act 2006, s 8.

¹²⁰ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [20].

¹²¹ At [21].

¹²² *Lobban v R* [1995] 1 WLR 877.

¹²³ Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991).

¹²⁴ Evidence Act 2006, s 12.

¹²⁵ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [36].

¹²⁶ At [33].

amendments it has over doubled in size, with people “scrambling over issues such as climate change”.¹²⁷

1 *Inclusion of the Common Law*

In terms of defining whether the Act is a true code, s 12 argumentatively, is problematic in that it includes the use of the common law, alongside s 10. The inclusion of the common law is very controversial, as a true code should not refer to extrinsic aids; it should be comprehensive. The Act, to be truly comprehensive, would have had to replace all of the pre-Act common law and statute law on the law of evidence. This requirement was found to be problematic as the common law jurisdiction of New Zealand does not support this concept of discarding all pre-Act common law.¹²⁸ The question is whether it goes beyond permitting reference to the common law. The Crime Prevention and Criminal Justice Group determined that the meaning of this provision is to:¹²⁹

Provide the Act with some flexibility in cases where courts are faced with new developments in technology ... which were not contemplated at the time the Act was drafted. The courts could give effect to these changes but only to the extent whereby use of the technology was consistent with the purposes and principles of the Act.

Even though resorting to common law may prevent the Act from being a true code, it provides for greater certainty. In *Vagliano Brothers* Lord Herschell stated that:¹³⁰

Even though he did not agree with reference being made to the common law, it could be used for the purpose of aiding in the construction of the provisions of the code.

The main function of the common law in the Evidence Act is to be illustrative, as it does not bind the court in its application of the Act.¹³¹

The New Zealand Supreme Court in *Wi v R* noted how useful the previous common law could be as an interpretation aid if the common law is in accordance with its principles. It stated that the common law “fortifies the appropriate construction of the Act”. Some of the common law has actually been embedded into the Act, such as the common law derived from *R v Shaheed*, which listed a number of consideration factors now codified in s 30(3).

2 *Future Developments of Electronic Evidence*

Electronic evidence can be affected by the passing of time as it is ever changing. This was considered by the Law Commission as the kind of gap that could be accommodated entirely by reference to the principles of the Act.

New rules were implemented to clarify the admissibility of electronic evidence. Section 137(1) provides that where evidence is produced by a machine device or technical process, which is of a kind that ordinarily does what a party asserts it to

¹²⁷ Sir Geoffrey Palmer QC “Law Making in New Zealand: Is There a Better Way?” (Harkness Henry Building, Waikato University, 2014).

¹²⁸ Sir Geoffrey Palmer QC “Law Making in New Zealand: Is There a Better Way?” (Harkness Henry Building, Waikato University, 2014).

¹²⁹ Crime Prevention and Criminal Justice Group “Departmental Report for the justice and electoral committee: Evidence Bill 2006.

¹³⁰ *Bank of England v Vagliano Brothers* [1891] AC 107, 145 [1891-4] All ER Rep.

¹³¹ Law Commission *Evidence Law: Codification* (NZLC PP14, 1991) at [30].

have done, then it is presumed that it did so on that relevant occasion. The Commission chose the particular words “machine device or technical process” to cover both current and future technological advances. “Technical process” is intended to cover a chemical or other process, which might not be sensibly described as having been carried out by a machine or device. Technical evidence about the workings of a machine was avoided, as it would have become too complex, when these matters are not seriously in dispute.

F Section 5 Inconsistencies

Section 5(1) of the Act provides that in the case of any inconsistency between the Evidence Act and any other legislation, the other legislation is to prevail.

1 Does this undermine the statute of the Act as a code?

Mahoney, questions s 5 in suggesting that it is contrary to prioritizing the principles of the Act, because the Act is now subject to secondary legislation.¹³² An objective of the Act was to replace the previous collection of statute law, with a single consistent code. Largely this has been achieved but there is an inconsistency as s 5 is allowing for other legislation to prevail.

Hon Chris Finlayson MP recognised that the Act is not comprehensive or exhaustive as s 5 allows for other provisions prevail.¹³³ However s 5 is useful where one topic is dealt with in many different acts, and should not be bound specifically to the Evidence Act.¹³⁴

The Court of Appeal in *Pope* applied s 5 regarding the admissibility of hearsay evidence.¹³⁵ It was held that when hearsay evidence does not meet the particular requirements of another enactment, the Evidence Act couldn't operate as a fallback position. In *Birchler* the Supreme Court enforced s 5 and found that there could be no recourse to s 30 of the Evidence Act if s 64(2) Land Transport Act had not been complied with.¹³⁶ Thus it would be equitable to assert that the application of s 5 is practical in practice.

G Section 202 Periodic Review – Does this Achieve the Values of a Code?

The Act contains a provision requiring a review every 5 years.¹³⁷ This is appropriate as due to the extensive nature of the 2006 reforms and such a comprehensive codification and reform means that the act will take some years to bed in.¹³⁸ The codification is expected to be the new starting point of the law, not its final completion. Each review will alter aspects of the code that require improvement. This was explained well by Hon Chris Finlayson, MP who said:¹³⁹

I predict this amendment is probably not just a one-off experience. Given the huge nature of the exercise of reforming the law of evidence comprehensively for the first time in a century,

¹³² R Mahoney, E McDonald, S Optican and Y Tinsey *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [5.01].

¹³³ (10 May 2005) 625 NZDP 20412.

¹³⁴ Don Mathieson *Cross on Evidence* (9th ed, LexisNexis, Wellington, 2012).

¹³⁵ *R v Pope* [2008] NZCA 284.

¹³⁶ *Birchler v Police* [2010] NZSC 109 at [17].

¹³⁷ Evidence Act 2006, s 202.

¹³⁸ New Zealand Law Commission *The 2013 Review of the Evidence Act 2006* (National Library of New Zealand Cataloguing-in-Publication-Data, Law Commission report; no 127, February 2013) at [1.8].

¹³⁹ Justice and Electoral Committee *Evidence Amendment Bill 2007* (28 June 2007) at 10334.

and given the changes that have been made, it could well be, while the legislation is in its infancy, that some other questions will arise. We may have to deal with other questions, because when we try to reduce everything into a code and express ourselves clearly in English, covering as many situations as we can, there may well be other circumstances that require clarification. I am afraid that is the name of the game.... Simply because of the nature of the exercise that we have undertaken.

The Commission in its 2013 review found that it is important s 202 remains in place, at least until the next review.¹⁴⁰ This is because several provisions have yet to be considered by the higher courts, there is still a number of provisions the Law Commission is monitoring, and a need to maintain a single source of evidence law.¹⁴¹ It is also a good way to ensure that the high quality of legislation is being met. The Select Committee emphasized that the Evidence Act should be regarded as a codification of the law of evidence in New Zealand that the amendment should not be seen as resolving from the purpose of the Act and moreover that s 202 of the Act sets out a very clear mechanism for mandatory review.¹⁴²

H Size

The size of evidence law in New Zealand has dramatically dropped. Prior to the 2006 enactment, the matter was covered by many different statutes, such as but not limited to, the Evidence Act 1908,¹⁴³ the Acts and Regulations Publication Act 1989,¹⁴⁴ the Bill of Rights Act,¹⁴⁵ and the Evidence (Witness Anonymity) Amendment Act 1997.¹⁴⁶ As well as many amendments such as but not limited to; the Evidence Amendment Act (No 2) 1980,¹⁴⁷ and the Evidence Amendment Acts 1950,¹⁴⁸ 1952,¹⁴⁹ 1962,¹⁵⁰ 1974,¹⁵¹ 1986,¹⁵² 1988.¹⁵³

Where as the source of Evidence law is contained within the Evidence Act 2006 only contains 216 sections and therefore what is contained in this slim piece of legislation is only that with significant relevance. There is no unnecessary provision. Each provision is clear and gets straight to the point. Even though there is still reference to other statutes and common law, the amount of extraneous statutes have dropped dramatically and the Evidence Act 2006 is the clear starting point when approaching this field of law. Before this reform, no one really knew where to start.

Ian Dennis found that Australian and New Zealand Evidence Acts show that codification of the law of evidence is not just desirable in theory but feasible in practice if there is political and professional support. They demonstrate that an evidence code in a common law jurisdiction does not have to be gigantic unwieldy piece of legislation; it can be drafted in the same way as a normal statute and

¹⁴⁰ New Zealand Law Commission *The 2013 Review of the Evidence Act 2006* (National Library of New Zealand Cataloguing-in-Publication-Data, Law Commission report; no 127, February 2013) at [1.34].

¹⁴¹ At [1.34].

¹⁴² (10 May 2005) 625 NZDP 20412.

¹⁴³ Evidence Act 1908.

¹⁴⁴ Acts and Regulations Publication Act 1989.

¹⁴⁵ Bill of Rights Act 1990.

¹⁴⁶ Evidence (Witness Anonymity) Amendment Act 1997.

¹⁴⁷ Evidence Amendment Act (No 2) 1980.

¹⁴⁸ Evidence Amendment Act 1950.

¹⁴⁹ Evidence Amendment Act 1952.

¹⁵⁰ Evidence Amendment Act 1962.

¹⁵¹ Evidence Amendment Act 1974.

¹⁵² Evidence Amendment Act 1986.

¹⁵³ Evidence Amendment Act 1988.

interpreted according to the normal principles of statutory construction.¹⁵⁴ Also, as Hon Chris Finlayson MP expressed:¹⁵⁵

... this is the first comprehensive reform in 100 years. The bill is not at all like the Evidence Amendment Act (No 2) of 1980. That Act dealt only with three or four key topics. This Bill is a fresh start in the law of evidence in almost every respect. Some said that there was no need for a comprehensive code of the law of evidence. I happen to think that those people were totally wrong. Some said judges and lawyers know the law. Well, with respect, they do not. Over the years lawyers in particular have become very sloppy when dealing with evidential matters, and one of the purposes of the Act is to raise standards.

VIII Changes due to the reform – Do these Achieve the Values of a Code?

The reform and codification of the law of evidence in New Zealand created some significant changes to the law. These changes were implemented with the intentions of allowing the law to flow better, as some areas were contradictory or too confusing.

A Propensity

The Law Commission recognised that the common law rules governing character evidence have grown incrementally and sometimes contradictorily.¹⁵⁶ Codification discarded all of the old anomalies and applied the basic relevance standard of admissibility. Character evidence was also named as propensity evidence.

The Commission, during its research, found that evidence of character, and of credibility, can be of assistance to the fact-finder to the extent of being decisive. The Commission highlighted that this type of evidence was admitted either to attack or support the credibility of a witness or to prove the witness acted in the alleged way. The issue is that the evidence may distract the fact-finder from the real issues in dispute and become unfairly prejudicial.¹⁵⁷

Section 43 established a two-tiered test, relating to evidence offered by the prosecution about a defendant.¹⁵⁸ First, that the evidence must be classified as propensity evidence, and second that the evidence will be considered subject to a balancing test. This is largely codifying the fundamental test that existed under the common law rules, from *Shaheed*, which is whether the probative value of the evidence outweighs the risk, that the evidence may have an unfairly prejudicial effect on the defendant.¹⁵⁹ In the *Shaheed* test, there is no question of whether a breach of an enactment is reasonable in terms of the New Zealand Bill of Rights Act. This is in effect, a departure from the idea that illegally is not the touchstone of unreasonableness.¹⁶⁰ Nonetheless, shortly after the Act was passed, the Court of Appeal held that while it may be necessary in some circumstances to refer back to the common law, the starting point for an assessment of propensity evidence is the words of the Act.¹⁶¹

¹⁵⁴ Ian Dennis “Codifying the Law of Criminal Evidence” (2014) 35 SLR 107.

¹⁵⁵ (23rd November 2006) 635 NZDP 6802.

¹⁵⁶ P Roberts “All the Usual Suspects: A critical Appraisal of Law Commission. Consultation Paper No 141” (1997) 75 Crim LR 91.

¹⁵⁷ Law Commission *Evidence Law Character and Credibility* (NZLC PP27, 1997) at [53].

¹⁵⁸ Evidence Act, s 43.

¹⁵⁹ *R v Shaheed* [2002] 2 NZLR 377 (CA).

¹⁶⁰ *R v Grayson and Taylor* [1997] 1 NZLR 399.

¹⁶¹ *R v Healy* [2007] 23 CRNZ 923, [2007] NZCA 451.

Section 122(2)(e) provides that in a proceeding tried with a jury, the judge must consider whether to give a warning of the need for caution due to unreliability, if evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.¹⁶² However the meaning of “conduct” remains a matter for future judicial determination.¹⁶³

The codification of propensity evidence has been very controversial. Immediately following the reforms, there was a tendency of the courts to avoid classifying evidence under the propensity provisions.¹⁶⁴ Many contest that codifying propensity provisions has lowered the bar and allows for the admission of evidence that would have previously been excluded. The Court of Appeal in *Leonard* found that codification has had the effect of propensity evidence, against the defendant, being more commonly admitted, than it was before the Act.¹⁶⁵

B Improperly Obtained Evidence

Section 30 consolidates the law of improperly obtained evidence.¹⁶⁶ Previously it was dealt with through a vast amount of authorities such as the Bill of Rights Act,¹⁶⁷ the Evidence Act 1908,¹⁶⁸ and the Acts and Regulations Publication Act.¹⁶⁹

It is suggested, by Don Mathieson, that before the Evidence Act 2006, the courts upholding of a general discretion to exclude improperly obtained evidence on the grounds of unfairness, never existed. Also that there was only loosely expressed dicta in its support, and even if such discretion did exist, its existence was shadowy, and that clarity of the law would not be achieved if there is such a wide discretion to exclude unfairly obtained evidence.¹⁷⁰ However within this reform comes the concept of unfairness which is included in the definition of improperly obtained evidence, thus s 30 provides that the balancing test will also apply to cases where evidence has been obtained unfairly.¹⁷¹

Before the Act was implemented, the Judges’ Rules, which set out acceptable police questioning practices, provided the prime focus for arguments that a defendant’s statement been obtained fairly.¹⁷² A new version of these rules has been incorporated into the Practice Note on Police Questioning. Under s 30(6) the judge, in deciding whether the police obtained a statement unfairly, must now take into account guidelines set out in practice notes on that subject issued by the Chief Justice.¹⁷³ It requires the Chief Justice to issue a practice note containing guidelines for the fair obtainment of evidence by the Police. The Act does not provide that the practice notes will carry the force of the law, just that the judge must take it into account when considering the issue of unfairness.¹⁷⁴ For example, number four of a Practice Note on

¹⁶² Evidence Act 2006, s 122(2)(e).

¹⁶³ New Zealand Law Society *Evidence Act 2006* (Lexis Nexis, Wellington, June 2007) at 83.

¹⁶⁴ *R v S* [2007] NZCA 497.

¹⁶⁵ *R v Leonard* [2007] NZCA 452, [2008] 2 NZLR 18.

¹⁶⁶ Evidence Act 2006, s 30.

¹⁶⁷ Bill of Rights Act 1990.

¹⁶⁸ Evidence Act 1908.

¹⁶⁹ Acts and Regulations Publication Act 1989.

¹⁷⁰ Don Mathieson *Cross on Evidence* (9th ed, LexisNexis, Wellington, 2012).

¹⁷¹ R Mahoney, E McDonald, S Optican and Y Tinsey *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at [30].

¹⁷² At [30.10].

¹⁷³ Evidence Act 2006, s 30(6).

¹⁷⁴ At 128.

Police Questioning, which was issued by the Chief Justice in 2007, states “whenever a person is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence must be fairly explained”.¹⁷⁵

IX *By and large has the Act and Codification been worthwhile?*

As a result of the Evidence Act 2006, for the first time, the law of evidence in New Zealand will be; readily accessible, certain, comprehensive, systematic, and based on principles. It also works to prevent undue delay and expense. The Evidence Act 2006 is clearly the first place point of contact in the field, and this fact alone has made the reform worthwhile. Codification has created necessary changes to certain areas of the law, to ensure a coherent nature. It has therefore not just been a mere consolidation of the law of evidence, but a comprehensive reform.

The Act was created on a large drafting scale, well worth the decade of thorough research. The principled approach has, in practice, provided an easy to understand, simplistic, basic method. The intention of the reform was to replace the previous collection of case law and statute law with a single consistent code. Generally this has been achieved but resort is still made to extraneous sources in three respects. Firstly, as in s 5, provisions of evidence in other statutes take priority over the Act. Hon Chris Finlayson MP recognised that the Act is not comprehensive or exhaustive, due to s 5 stating that if there are any inconsistencies between the provisions of the Act and another enactment, the other provisions prevail.¹⁷⁶ Secondly, in accordance with s 10(c) and s 12(b), the Act preserves a limited role for the common law in interpreting the Act, and where there is a gap in the Act with respect to admissibility. Yet, in either case, this is only where the common law is consistent with the purpose and principles of the Act. To be a complete and true comprehensive code, it would have had to replace all earlier common law and statutes on the same subject, although New Zealand’s common law jurisdiction does not encourage the idea of discard all common law.¹⁷⁷ However, the reference to common law and statute law does not automatically lead to the assumption that a code does not exist. The pivotal importance is the intention to establish legal order based on principles. The codification of the principles has encouraged clear and principled thinking about the admissibility of evidence. Such openness and accessibility helps to ensure the quality of the legislation. Lastly, the reference to practice notes, in accordance with s 30(6), is expressly delegating to the judiciary the legislative role of determining the rules by which the fairness and admissibility of statements taken by the police will be judged. These Practice Notes do not have the legal status of the Act, but an extraneous source the judiciary is to refer to.

Section 202, requiring the periodic review, reassures everyone that this reform is not the finishing point.¹⁷⁸ Despite the fact that the Act does not refer to itself as a code, that it is not entirely exhaustive, and that it is not framed in traditional code terminology, the structure of the Act has stayed true to the four parameters established under the Law Commission’s paper on codification, these being; a legislative

¹⁷⁵ R Mahoney, E McDonald, S Optican and Y Tinsey *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at 129.

¹⁷⁶ (23rd November 2006) 635 NZDP 6802.

¹⁷⁷ Sir Geoffrey Palmer QC “Law Making in New Zealand: Is There a Better Way?” (Harkness Henry Building, Waikato University, 2014).

¹⁷⁸ New Zealand Law Commission *The 2013 Review of the Evidence Act 2006* (National Library of New Zealand Cataloguing-in-Publication-Data, Law Commission report; no 127, February 2013).

enactment which is comprehensive, systematic in its structure, preemptive of the common law and based on principles. It will take a while to perfect and it is unusual for the first attempt of such a large reform to be flawless. However, the judiciary now has a sufficient starting point in approaching the law of evidence in New Zealand.

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