

**“GO NO FURTHER THAN THE  
WORDS OF THE SECTION”:  
FROM THE EVIDENCE ACT TO THE  
COMFORT OF THE COMMON LAW**

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## INTRODUCTION: THE IMPETUS FOR INQUIRY

Mr King: “[M]y submission is that the Evidence Act does not seek to depart from [the] common law practice. Had it done so, it would have done so expressly...”

Elias CJ: “There’s a general provision that was inserted late into the Evidence Act, which refers to the common law. Is that relevant? I can’t remember. Do you remember –”<sup>1</sup>

In New Zealand’s highest appellate court, uncertainty persists as to the proper role of the common law in light of the Evidence Act’s enactment.<sup>2</sup> Indeed, ss 10 and 12 do refer to the common law, but a mere reference need not suffice to signal the continued persuasiveness of existing cases.

This dissertation explores the relationship between the common law and the Evidence Act 2006, and its present effect on the functioning of the Act. I examine the concept of codification to elucidate what was expected of the Act and on what pretence it came about. Against this backdrop, I take a closer look at the emerging confusion surrounding the desired use of section 57, which statutorily accommodates settlement negotiation privilege.

In August 1989, the Minister of Justice asked the Law Commission to conduct a review of the law of evidence because it was disorganised, unclear, and existed “through a conglomerate of statute and common law, with the Evidence Act of 1908 at the distant centre”.<sup>3</sup> It recognised the need to make the law of evidence as “clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of

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<sup>1</sup> *Aaron Mark Wi v The Queen* [2009] NZSCTrans 25 (18 August 2009) at 41-42.

<sup>2</sup> Evidence Act 2006.

<sup>3</sup> Butterworths Legislation Series, *The Evidence Code, with a foreword by Greg King* (LexisNexis, Wellington, 2007) at Foreword. (23 November 2006) 635 NZPD 6638 per Christopher Finlayson MP. The last substantial amendment to the Evidence Act 1908 was the Evidence Amendment Act (No 2) of 1980; see also Geoffrey Palmer “Law Reform and the Law Commission in New Zealand After 20 Years –We need to try a little harder” (address to the New Zealand Centre for Public Law, Victoria University of Wellington, Thursday 30 March 2006) at 20, [57] where he compares difficulties in New Zealand with the Statute Book in the United Kingdom (and finds it is even more inaccessible than ours).

disputes”.<sup>4</sup> In 1991 the Law Commission published a Report entitled *Evidence, Reform of the Law*.<sup>5</sup> Its preliminary intention was for a ‘true’ codification to occur,<sup>6</sup> whereby an Act would “replace the previous collection of case law and statute with a single consistent code”.<sup>7</sup>

In one sense this dissertation pivots on accessibility.<sup>8</sup> A senior judge commenting extra-judicially has noted that the Act:<sup>9</sup>

...replaced the comfortably familiar Evidence Act 1908, and decades of accumulated common law. Students, lawyers and judges had to come to grips with a piece of legislation that required a new way of thinking. They would receive only limited assistance from what had gone before.

However, the cases tend to disprove this assertion.

I begin by exploring what is meant by codification, and whether codification of the New Zealand evidence law was feasible. Chapter One observes that the judicial unwillingness to let go of the familiarity of the common law and the expectations in the legal

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<sup>4</sup> Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at xviii and 2. According to Elisabeth McDonald *Hearsay Evidence – an Options Paper prepared for the Law Commission by an Advisory Committee on Evidence Law* (NZLC PP10, Wellington, 1989) this came about as a consequence of the publication in June 1989. McDonald discussed this in *Going Straight to Basics: the role of Lord Cooke in Reforming the Rule against Hearsay from Baker to the Evidence act 2006* (2008) 39 VUWLR at 143. Note that it primarily consisted of exclusionary rules: Chris Gallavin, *Evidence* (LexisNexis, Wellington, 2008) at 10: in practice, the law of evidence was “difficult to access, at times uncertain and lacking consistency”. See also DL Mathieson *Cross on Evidence* (8<sup>th</sup> ed, LexisNexis, Wellington, 2005) at [1.1].

<sup>5</sup> Law Commission *Evidence: Principles for Reform – a Discussion Paper* (NZLC PP13, Wellington, 1991). Note that this name itself suggests that the ‘code’ would be more than merely a compilation of the existing law.

<sup>6</sup> At 3. See also Law Commission *Evidence: Codification – a Discussion Paper* (NZLC PP14, Wellington, 1991) at 1.

<sup>7</sup> Helen Cull “Overview” (paper presented to the New Zealand Law Society “Evidence Act 2006” Intensive Conference, June 2007) 5 at 6. See also NZLC PP13, above n 5, at [77]. Accordingly, the Law Commission saw the need to “break out of the complexity and incoherence which, over the years, the sheer number of cases and a technical approach to the rules of evidence ha[d] created”.

<sup>8</sup> As Geoffrey Palmer pointed out, “the State has an obligation to make laws accessible if it expects citizens to obey them”. See Geoffrey Palmer address to the New Zealand Centre for Public Law, above n 3, at [57].

<sup>9</sup> Helen Winkelmann “Foreword” in Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2<sup>nd</sup> ed, Brookers, Wellington, 2010) at v.

community of a code are two viewpoints that do not naturally align, hindering the adjustment to using a code.

Centring this codification discussion on the Evidence Act, Chapter Two discusses the importance of the relationship between the Act and the common law, and the status of the Act at present. It submits that the lack of clarity regarding the Act's exhaustiveness has rendered inappropriate any claim to code status.

Chapter Three illustrates the difficulties associated with the lack of express notification or justification for the change from an intended Code to the eventual Act. This was needed to actively direct the intended approach to the new legislation, especially given the difficulties with its drafting and prolonged gestation.

Chapter Four discusses the shortcomings of the current Act and offers some explanations. The Law Commission has acknowledged that "judges can deal only with cases that come before them...".<sup>10</sup> Therefore I take a step back to look at the overarching landscape to determine the trend of how the Act is being approached, providing context for the subsequent analysis.

Chapter Five looks at the public policies balanced behind the 'without prejudice' concept. This provides a backdrop for a closer examination of s 57, which follows in Chapter Six, as an iteration of the problems with the accessibility of the common law. The issue gained momentum as several cases have arisen where the common law has been employed in a way not anticipated by the Act. I collate and assess the tensions and their underlying causes, as a means to paving the way for reform.

In Chapter Seven, I consider the implications of the Law Commission's recent recommendations from the Act's first five-yearly review, and assess whether this would resolve the issues that I have isolated. The extent to which greater benefit could be derived from enhanced clarity between the Act and the common law is also explored

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<sup>10</sup> NZLC R55, above n 4, at xviii, where it found that the judiciary do not have the opportunity to carry out the thorough overhaul of the law of evidence that was so badly required. This was the original justification for the Minister of Justice directing the Law Commission to overhaul the law of evidence.

## CHAPTER ONE: CODIFICATION

In the Law Commission's view, "[o]ne of the major features of a code is that it supercedes existing law and makes a fresh start".<sup>11</sup> It pointed out that "[r]eferences to earlier judicial decisions can obstruct that objective".<sup>12</sup> Acknowledging that the term 'codification' had many meanings, the Law Commission took the term to mean the development of a set of rules that were "comprehensive, systematic in structure [and] pre-emptive of the common law".<sup>13</sup> This would induce more than a mere legislative consolidation.<sup>14</sup>

### A. THE MEANING OF CODIFICATION

#### ORIGINS OF 'CODIFICATION'

Bentham introduced the word into the English language.<sup>15</sup> He contemplated one universal code, as a complete, self-sufficing entity, unmodifiable bar legislative enactment. He sought to limit judicial discretion and prescribe definite answers to legal problems.<sup>16</sup>

Codification may conjure semblance to the various continental codes,<sup>17</sup> which are comprehensive and gap-free in scope, providing a "systematic approach" and

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<sup>11</sup> NZLC R55, above n 4, at 10, see also NZLC PP14, above n 6, at 3 and 12; and NZLC R55, above n 4, at [35].

<sup>12</sup> NZLC R55, above n 4, at 10.

<sup>13</sup> NZLC PP14 1991, above n 6, at 1.

<sup>14</sup> See NZLC PP14 1991, above n 6, at 3. This definition is viewed as correct by Chris Gallavin, above n 4, at 15; and Bergel *Principles and Methods of Codification* (1988) 48 Lou LR 1073.

<sup>15</sup> Letter from Jeremy Bentham to Tsar Alexander I (June 1815) in Stephen Conway (ed) *The Correspondence of Jeremy Bentham* (Oxford, 1988) 464; also discussed in Leslie George Scarman "Codification and Judge-Made Law: A Problem of Coexistence" (1967) 42(3) art 3 Indiana Law Journal 355 at 357.

<sup>16</sup> John Armour *Codification and UK Company Law* in Association du Bicentenaire du Code de Commerce (ed), *Bicentenaire du Code de Commerce 1807-2007: Les Actes des Colloques* (Paris: Dalloz, 2008) 287-310 at 3; see also Dean Alfance Jr "Jeremy Bentham and the Codification of Law" (1969) 55 Cornell Law Review 58 at 65-73.

<sup>17</sup> See for example the Napoleon Bonaparte's *Code Civil* 1804 (translation: French Civil Code) and the German *Bürgerliches Gesetzbuch* 1900 (translation: German Civil Code).



“generality” to their rules.<sup>18</sup> This is because codification has been an eminent feature of the European legal landscape since pre-Roman times, as a process achieving the “recension of the sources of law into a single instrument”.<sup>19</sup> The compilation of pre-codified sources into one document aligns with Lord Scarman’s view of a ‘Code’ being a species of enacted rules formulating the law into an authoritative, comprehensive and exclusive source within its field.<sup>20</sup>

## MODERN TIMES

Although the modern concept of codification has several stable components, there is no definitive, canonical model.<sup>21</sup> Rather there are several variations, which each emphasise different dimensions of the same underlying concept.<sup>22</sup>

To avoid confusion, I wish to clarify that I am not referring to mere documents of a ‘codified form’<sup>23</sup> or codes binding industry participants in particular sectors that are simply regulatory in nature.<sup>24</sup>

### I. WEAKER FORM - NOT TRULY A CODE

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<sup>18</sup> Dan Svantesson “Codifying Australia’s Contract Law –Time for a Stocktake in the Common Law Factory” (2008) 20(2) art 5 Bond Law Review at 3.

<sup>19</sup> Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Department of Justice, Equality and Law Reform, Dublin, November 2004) at [1.06].

<sup>20</sup> Leslie George Scarman, above n 15, at 358. For further discussion on the evolution of the concept, see Expert Group on the Codification of the Criminal Law, above n 19; see also Dan Svantesson, above n 18, at 3.

<sup>21</sup> There are analytically many accepted uses of codification. See generally; Helmut Coing “An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries” in Samuel Jacob Stoljar (ed) *Problems of Codification* (Canberra: The Australian National University, 1977) at 16, 22-24; Csaba Varga *Codification as a Socio-Historical Phenomenon* (Akadémiai Kiadó: Budapest, 1991) at 318-328; John Armour, above n 16, at 3.

<sup>22</sup> Expert Group on the Codification of the Criminal Law, above n 19, at [1.31]–[1.44].

<sup>23</sup> Privacy Act 1993, s 42; also with similar wording Official Information Act, s 16(1)(d); and Local Government Official Information and Meetings Act 1987, s 15(1)(d).

<sup>24</sup> Health & Disability Commissioner, “Code of Health and Disability Services Consumers’ Rights” <[www.hdc.org.nz](http://www.hdc.org.nz)>; Privacy Commissioner, “Health Information Privacy Code of 1994” <[www.priavacy.org.nz](http://www.priavacy.org.nz)> Broadcasting Standards Authority, “Free-To-Air Television Code of Broadcasting Practice” <[www.bsa.govt.nz](http://www.bsa.govt.nz)>. Note that as specific *ad hoc* codes, these bear little resemblance to their continental cousins - see New Zealand Law Commission, *Presentation of New Zealand Statute Law – in conjunction with Parliamentary Counsel Office* (NZLC R104, Wellington, October 2008) at 128, [8.11].

In its broadest sense, “codification is used simply to describe the reduction of the law to a written form”.<sup>25</sup> In this way, it can be viewed as “the systematic collection or formulation of the law, reducing it from a disparate mass into an accessible statement which is given legislative rather than mere judicial or academic authority”.<sup>26</sup> This refers to a consolidation or ‘statutorisation’ that brings together relevant statutory provisions without making substantive change.<sup>27</sup> It may be thought of as a process of stocktake.<sup>28</sup> Famed early examples are the ancient code of Hammurabi of Babylon (c1750 BC)<sup>29</sup> and the Justinian code (529 -565 AD).<sup>30</sup>

This parallels the construct of legal textbooks, which evolve from a systematic reduction of the central principles of a legal system into written form. “[R]estatement of various branches of the common law by law professors is only another example of Justinian’s method except for the fact that it is being accomplished by a private foundation”.<sup>31</sup> As noted by Stoljar, “academic *summa* performs a role very similar to a code” as there have been numerous works “which for long periods have operated like sorts of codes at common law”.<sup>32</sup> The remark that “a good textbook has often been the foundation of a code, and in the meantime is not a bad substitute” is realistic of the common law world.<sup>33</sup>

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<sup>25</sup> NZLC PP14 1991, above n 6, at 3. The author noted that the term is often used loosely. Thus for example, when Parliament passes a statute dealing with an area of law which was previously left entirely to the common law, it is sometimes said that the law has been ‘codified’.

<sup>26</sup> Bruce Donald “Codification in Common Law Systems” (1973) 47 The Australian LJ 160 at 161.

<sup>27</sup> Andreas Rahmatian “Codification of Private Law in Scotland: Observations by a Civil Lawyer” (2004) 8(1) EdinLR 28-56, at 50, at n 135. The author found that consolidation could be a private arrangement of the legal material, for example by academics and publishers, while statutorisation involves a legislative act. There is no consistent terminology amongst authors. For further discussion of terminology, see W Dale (ed) *British and French Statutory Drafting. The Proceedings of the Franco-British Conference of 7 and 8 April 1986* (1987) 44, at 72; B Fauvarque-Cosson *Codification à Droit Constant, Modern Developments in French Codification* (2000) 4 EdinLR 350, at 353.

<sup>28</sup> Dan Svantesson, above at n 18. The author analogises that just as a warehouse periodically needs to take stock of its assets, the common law can end up in desperate need of a stocktake.

<sup>29</sup> Expert Group on the Codification of the Criminal Law, above at n 19, at [1.06], which found that it may have had Sumerian and Akkadian antecedents.

<sup>30</sup> Expert Group on the Codification of the Criminal Law, above at n 19, at [1.12]. The author noted that Justinian’s Code was a casualty of the break-up of the Roman Empire, and so did not become a living legal document; Discussed in NZLC R104, above n 24, at [8.4].

<sup>31</sup> W Seagle *The Quest for Law* (New York, Knopf, 1941) at 129.

<sup>32</sup> Samuel Jacob Stoljar (ed), above n 21, at 11.

<sup>33</sup> Courtenay Ilbert *Legislative Methods and Forms* (The LawbookExchange Ltd. New Jersey, 2008) at 162.

The endeavour to “clarify and situate the existing doctrine” and “provide a scholarly synthesis of the doctrinal solutions immanent in the existing case law” mimics the goal of the American Restatements.<sup>34</sup> Even as a weak form of codification, this can be quite effective. Such consolidation clarifies the existing law for citizens and judges alike and does not seek to direct or structure its future development in any specific fashion.<sup>35</sup> Restatement of the law seeks to veer away from solely relying upon the common law, and thus aims to “reduc[e] the jungle of case law principles into clearly arranged systems of general principles as developed with logical coherence”.<sup>36</sup>

Strictly speaking, however, a code is more than a statutory consolidation or restatement of the law.<sup>37</sup> Sometimes “consolidation of the statute law of a particular subject is not enough and ... the logical course is to proceed to codification”<sup>38</sup> in a stricter sense.

## II. A MORE COMMANDING FRAMEWORK

In a more advanced form, codification creates ‘true’ codes, borne from a synthesis of the existing statutory law with a substantial element of the common law, as well as piecemeal reform of problem areas. “A true code may be defined as a legislative enactment which is comprehensive, systematic in its structure, pre-emptive and which states the principles to be applied.”<sup>39</sup> According to Heydon’s definition of codification, a statute can legitimately be deemed a code if it covers an entire field of law, or if it restates and reforms a particular area.<sup>40</sup> In the Law Commission’s view, the element that

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<sup>34</sup> For discussion on this type of law, see generally American Law Institute *Systematic Restatement of the Law* (ALI, New York, 1917); Herbert Weschler “Restatements and Legal Change: Problems of Policy in the Work of the American Law Institute” 13 (1968) Saint Louis University Law Journal 185.

<sup>35</sup> John Armour, above n 16, at 3.

<sup>36</sup> Csaba Varga, above n 21, at 163.

<sup>37</sup> Bergel, above n 14, also cited in NZLC PP14 1991, above n 6, at 3.

<sup>38</sup> Statute Law Society *Statute Law: A Radical Simplification*, 2<sup>nd</sup> report of the Committee Appointed to Purpose Solutions to the Deficiencies of the Statute Law System of the United Kingdom (Sweet and Maxwell, London, 1974) at 47.

<sup>39</sup> NZLC PP14 1991, above n 6, at 3 where it cited Brooks, *The Common Law and the Evidence Code: Are They Compatible?* 27 (1978) UNBJL 27, 29. Note that this is the model on which the Law Commission based its codification proposition. Of particular note is the heavy emphasis it placed on the presentation of principles on which the interpretation and use of the codes relies.

<sup>40</sup> JD Heydon *Cross on Evidence* (6<sup>th</sup> Australian ed, Butterworths, Chatswood (NSW), 2000) at [1720]. The author found that a statute may be described as a code if it covers the entire fields of the subject legislated upon, so that it is an exclusive and self contained source of the relevant law.

particularly distinguishes a code from other legislative enactments is its purpose which is “to establish a legal order based on principles”.<sup>41</sup> At this level, it involves a conscious decision to start afresh, leaving the shackles of the existing law behind.<sup>42</sup> A process of gap-filling occurs, whereby settled common law principles are statutorily restated together with expansion. As English reformer Thomas Babington Macaulay noted, it is a type of “[r]eform that you may preserve”.<sup>43</sup>

Such rationalisation (contrasting with simple ‘restatement’) explicitly strives to organise and guide the law’s future development. This is achieved by providing “an exclusive framework” within which new issues must be decided.<sup>44</sup> This imposition of greater order and conceptual rigour is seen in the most successful codes, which simultaneously maintain the possibility of future judicial development. Examples of these are the French and German civil codes, which are used to actively steer the direction of judicial thought.<sup>45</sup>

Regardless of how extreme this may appear, the “historical fact” is that only after long or at least fruitful periods of case-law can codifying attempts begin.<sup>46</sup> Thus such a drastic move could not happen suddenly. The focus is not on doing away with lawyers and adjudication, but rather on reducing the expense, delay, excessive formality, and confusion of common law litigation.<sup>47</sup>

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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.

<sup>41</sup> NZLC PP14 1991, above n 6, at 3.

<sup>42</sup> Dan Svantesson, above n 18, at 4.

<sup>43</sup> (2 March 1831) 2 GBPD HC per Thomas Babbington Macaulay.

<sup>44</sup> John Armour, above n 16, at 4. See also: Csaba Varga, above n 21, at 351: Note that realistically, seeking to enact “a ‘general code’ that embodies the whole body of the law is simply utopian”. Arguably this is because if the law is expected “both to reflect and advance the dynamism of social processes”, it “cannot be based on a system with axiomatic organization and rigidity”. Furthermore, when achieved on a larger scale, codification could bring internal coherence. Yet “[i]n each national context, a tension is at work between the ‘written’ and the ‘unwritten’, between the ‘letter’ of the most fundamental laws and their unwritten ‘spirit’” (Pryor *Constitutions: Writing nations, Reading Difference* (Birkbeck Law Press, Abingdon, 2008) at 3).

<sup>45</sup> John Armour, above n 16, at 4; see also Helmut Coing *An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries* in Samuel Jacob Stoljar (ed), above n 21, at 16, 24-27; see also Dan Svantesson, above n 18, at 3.

<sup>46</sup> Samuel Jacob Stoljar (ed), above n 21, at 12.

<sup>47</sup> Referred to in Norman W Spaulding “The Luxury of the Law: The Codification Movement and the Right to Counsel” (2004) 73(3) art 10 Fordham L. Rev. 983, at 986; see also David Dudley Field “First Principles of Reform” in David Dudley Field *Speeches, Arguments, and Miscellaneous Papers* 484, 490 (A.P. Sprague ed. 1884) at 225.

## B. THE FEASIBILITY OF A CODE

“[C]odification is a complex socio-legal phenomenon, determined by the present, yet drawing on the past”.<sup>48</sup> The degree of reform and consolidation that is most appropriate should be tailored to suit local needs and conditions.<sup>49</sup> Thus it is likely that past experience, and the stock of methods available, influence what sort of codification could or should have arisen. Arguably extra-legal factors determine its nature before legal ones effect its shape.<sup>50</sup>

### CODIFICATION IN THE COMMON LAW SPHERE

New Zealand is a ‘common law’ nation and, as a former colony, has its genesis in connections with the United Kingdom.<sup>51</sup> Accordingly, our law is far from autochthonous and the English approach to codification is highly relevant.

Traditionally, a common law statute acts “as a sword stabbing into the body of the common law to excise and rectify certain unwanted case-law developments”.<sup>52</sup> The common law approach to codification has been described as “conservative, preferring to wait until the relevant principles have been thoroughly worked out in case law before codifying, rather than seeking to use the codification itself as a means of guiding the development of jurisprudence”.<sup>53</sup> In part this is because “consolidation and uniformization, as well as doctrinal codification (i.e. restatement and text-book writing) represent in common law a genuine substitute for codification”,<sup>54</sup> neutralizing the demand for codification in the fullest reforming and exhaustive sense.

The psychology in common law systems, nourished by judicial overlay and commentary on the statutes, militates against codes. A deep ambivalence towards writing is part of our

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<sup>48</sup> Csaba Varga, above n 21, at 256.

<sup>49</sup> Discussed in Expert Group on the Codification of the Criminal Law, above n 19, at [1.76].

<sup>50</sup> Csaba Varga, above n 21, at 256.

<sup>51</sup> In this chapter, I use the term ‘common law’ to refer the pre-existing mass of cases containing precedential developments of the law and as the legal system this engenders. The difficulties of such terminology are further addressed in chapter three.

<sup>52</sup> Andreas Rahmatian, above n 27, at 52. This was discussed in comparison to a Civil Law statute, described as “a skeleton around which the flesh of the case-law and doctrine can grow”.

<sup>53</sup> John Armour, above n 16, at 1-2.

<sup>54</sup> Csaba Varga, above n 21, at 166.

constitution, matched with the reluctance to abandon the principle of Parliamentary sovereignty.<sup>55</sup> In general therefore, common law codification “still seems deformed compared to the classical model of European continental codification: particularly because it neither attempt[s] nor carry[s] out the replacement of case-law with, and the reduction of law to, the code-text”.<sup>56</sup>

Sometimes it is suggested that enacting a code stultifies the development of the law and unduly fetters judges.<sup>57</sup> Yet the Law Commission stated that it “do[es] not think either of those suggestions is correct”.<sup>58</sup> First, a “properly drafted code provides enduring principles on the basis of which the law can be developed”.<sup>59</sup> Secondly, Lord Wilberforce himself identified the need for a more principled approach to the drafting of legislation, which codes could direct:<sup>60</sup>

...[W]e may restore to judges what they have lost for many years to their great regret; the task of interpreting law according to statements of principle rather than by painfully hacking their way through the jungles of detailed and intricate legislation [and common law].

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<sup>55</sup> Vernon Bogdanor *The New British Constitution* (Oxford: Hart, 2009) at 14. The author found that correspondingly, striving for a written constitution would be pointless unless one is prepared to abandon the principle of the sovereignty of Parliament, for a codified constitution is incompatible with this principle.

<sup>56</sup> Csaba Varga, above n 21, at 166.

<sup>57</sup> NZLC PP14 1991, above n 6, at 4.

<sup>58</sup> At 4.

<sup>59</sup> At 4. It noted that where the code provides specific rules they may require amendment from time to time, but the need for this is minimised if the rules are firmly based on principles rather than on ad hoc circumstances. See also Edward Livingston *Introductory Report to the System of Penal Law Prepared for the State of Louisiana*, (James Kay, Jun. & Co, Philadelphia, 1833) at 357; see also Dick Thornburgh, Attorney General of the United States “Codification and the Rule of Law” (presented before the Conference on Criminal Code Reform; A Conference of the Society for the Reform of the Criminal Law, Washington, DC, January 1990). Commenting in the American context, the author found that “no act of legislation can be, or ought to be immutable”.

<sup>60</sup> (1 April 1965) 264 GBPD HL 1965 at columns 1175-6, cited in Letourneau and Cohen “Codification and Law Reform: Some Lessons from the Canadian Experience” (1990) Stat LR 183 at 194, where the author suggested that this is achieved by presenting to the courts legislation drafted in a simple way by definition of principle.

Looking to past domestic attempts at codification gives an impression of what bar and bench would have had in mind in terms of the Law Commission's announcement that it would codify the law of evidence.

In New Zealand, 'code' in its true sense supposedly details "a single Act that abolishes the common law on a specific topic and replaces it with a set of statutory rules that henceforth become the exhaustive and exclusive source of the law on that topic".<sup>61</sup> However, given the varied use of the term in legal works, the form of codes is not ubiquitous, although the intention to replace the existing common law seems to be so. Given that "English law ... axiomatically does not employ the legal technology of codification",<sup>62</sup> our legal culture is not empowered by the prospect either. Although codification is usually evaded,<sup>63</sup> some Acts have sought to negate this assumption.

The Minors' Contract Act exemplifies this, with its provision in s 15 for the "Act to be a code",<sup>64</sup> as does s 4 of the Property (Relationships) Act.<sup>65</sup> In a similar vein, section 5 of the Contractual Mistakes Act is specifically designated to have effect in place of the common law and of equity in the particular circumstances.<sup>66</sup> Some statutes explicitly abolish parts of the common law,<sup>67</sup> or codify only a specific area.<sup>68</sup> On a larger scale, the Crimes Act 1961 is also considered a code, as it provides an exhaustive list of crimes in New Zealand.<sup>69</sup>

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<sup>61</sup> NZLC R104, above n 24, at [8.9].

<sup>62</sup> John Armour, above n 16, at 1.

<sup>63</sup> See for example: Parliamentary Privilege Act 2014, s 3 which clarifies that the Act *avoids* comprehensive codification of parliamentary privilege; note also Parliamentary Privilege Act 2014, s 3(2)(a) which leaves it unclear to what strength the codification is, beyond assuring that there is room for continued existence of the common law.

<sup>64</sup> Minors Contracts Act 1969, s 15(1) which states that provisions of the Act shall have effect in place of the rules of the common law and of equity.

<sup>65</sup> Property (Relationships) Act 1976, s 4.

<sup>66</sup> Contractual Mistakes Act 1977, s 5. Additionally, see Sale of Goods (United Nations Convention) Act 1994, s 5 which states that the provisions of the convention are to be a code, and thus have effect in place of any other law in New Zealand relating to contracts of sale of goods.

<sup>67</sup> Property Law Act 2007, s 3, which details the Purpose of Subpart 7 of that Act (Abolition and modification of common law rules relating to property); see also Immigration Act 2009, s 124(b) which details that Part 5 of that Act purports to codify certain obligations.

<sup>68</sup> Succession (Homicide) Act 2007, s 3.

<sup>69</sup> Crimes Act 1961, s 9; see also Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA9.01].

## POTENTIAL CO-EXISTENCE

Whilst a principled compilation of the law may seem desirable, anything beyond this in a stronger sense of codification has a somewhat unnatural fit within New Zealand's inherently common law landscape. Despite this, it is conceivable that "the common law and statute coalesce into a single legal system,"<sup>70</sup> as supposedly "[c]ode and persuasive precedent can co-exist to the advantage of the law".<sup>71</sup> Certainly as the proposition is not totally unheard of, members of the profession would legitimately suppose that codification could be achieved.

Extensive revision was sometimes considered necessary to "excise dead wood, remove anomalies, promote consistency of expression and contribute to greater rationalisation" of the law.<sup>72</sup> Codification could not be approached until that process was substantially achieved.<sup>73</sup> In the context of evidence law the various reports show that such revision was comprehensive and thorough,<sup>74</sup> as the Law Commission spent a decade reviewing the law, gathering perspectives of academics, the judiciary, other members of the legal profession and community groups.<sup>75</sup> These consultation and research efforts culminated in the Commission's report of 1999 and its first comprehensive attempt at a draft code.<sup>76</sup>

Codification provided an alluring platform for comprehensive reform. In preparing the Bill, the Ministry of Justice carried forward this aim by seeking to draw all the law of evidence into one place, to bring clarity, simplicity and accessibility to the law.<sup>77</sup> As

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<sup>70</sup> Geoffrey Palmer, above n 3, at [61].

<sup>71</sup> Michael Zander *The Law-Making Process* (6<sup>th</sup> ed, Cambridge University Press, 2004) at 486.

<sup>72</sup> NZLC R104, above n 24, at [8.20].

<sup>73</sup> NZLC R104, above n 24, at [8.20].

<sup>74</sup> Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [1.3]. Ten years after receiving the initial reference, in August 1999, the Law Commission delivered its final report on an Evidence Code to the Minister of justice. The Commission's President (Hon Justice Baragwanath) described the report as "the culmination of a decade of research and consultation with special interest groups and individuals." The Law Commission consulted widely with the judiciary, practitioners, academics, and the community. It was one of the most extensive law reform exercise conducted in New Zealand legal history.

<sup>75</sup> Don Mathieson QC (ed) *Cross on Evidence* (9<sup>th</sup> ed, LexisNexis, Wellington, 2013) at 28. Note that the Commission also tested its proposals by undertaking seminars and workshops on a proposed Evidence Code.

<sup>76</sup> NZLC R55, above n 4.

<sup>77</sup> Noted in Ministry of Justice *Evidence Bill: General Comments and Miscellaneous Issues: Departmental Report for the Justice and Electoral Committee* (June 2006) at 1; This is fortified by the general assumption that codification is typically associate with systematization,



*Cross on Evidence* observes, the ‘code’ was to be “comprehensive, systematic in structure, pre-emptive of the common law, and based on principles”<sup>78</sup> rather than being piecemeal in nature. Ideally, the law should be given a referable structure, by elevating the mass of principles, rules, exceptions and other provisions “from casual incidentality to the level of a well-arranged system”.<sup>79</sup>

However if this produces a code that is too rigid and thus inhibiting future expansion or alteration of the law, this can present “a direct threat to the legal profession, to judicial authority, and to the doctrine of common law reception”.<sup>80</sup> Logically, “professional and social appreciation of its success in practice builds the best bridge between codification past and future codification”.<sup>81</sup> Furthermore, a code’s character will be determined “not so much by theoretical considerations as to the nature of codified law but by the subject-matter of the particular branch of law being codified”.<sup>82</sup>

#### NATURE OF EVIDENCE LAW

Evidentiary rules have the potential to prevent the fact finder from contemplating probative material, and can thus affect both the likelihood of a party prevailing at trial and the chance that the action will even be brought.<sup>83</sup> Such exclusionary rules can be justified when they inhibit the admission of probative evidence because they are supported by other significant values.<sup>84</sup> Given these high tensions at play, codification could be beneficial to bring forward and clarify what purposes are being served beyond

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unification, clarification, and simplification: discussed in Dan Svantesson, above n 18, at 5; see NZLC R127, above n 74, at [1.7].

<sup>78</sup> Don Mathieson QC (9<sup>th</sup> ed) above n 75, at 27-28.

<sup>79</sup> Csaba Varga, above n 21, at 351.

<sup>80</sup> Norman W Spaulding, above n 47, at 985. The author elaborated upon this point, finding that a “perfect legal code would require no intermediaries, no self-appointed class of authoritative interpreters, between law and the people ... such that everyone could know the law and everyone could be his own lawyer.”

<sup>81</sup> Csaba Varga, above n 21, at 252.

<sup>82</sup> Michael Zander, above n 71, at 486, citing Leslie George Scarman above n 15.

<sup>83</sup> David P Leonard “Power and Responsibility in Evidence Law” (1989-1990) 63 S. Cal. L. Rev. 937 at 956.

<sup>84</sup> At 956. The author later noted (at 994-5), the process of catharsis. “Trials are intended to serve as more than a search for objective truth about past events.” It acknowledges a satisfaction to be experienced by the litigants, and by society in general as it develops its impressions about the processes of the law. See also Leonard *The use of Character to Prove Conduct: Rationality and Catharsis in the Law of evidence*, 58 U. Colo. L. Rev. 1, 38-42 (1987).

simply the ascertainment of truth. Moreover, the law of evidence has been viewed as a subject fit for codification.<sup>85</sup>

However it is “essentially the response of the courts to the rigours of the trial process, and it has developed incrementally [at common law] to meet the needs of justice”.<sup>86</sup> Thus the success of collating the law of evidence yet avoiding creating a crude aggregate, as well as framing the relationship between the code and the common law in a sustainable way, was not guaranteed.

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<sup>85</sup> Don Mathieson QC (9<sup>th</sup> ed), above n 75, at 28.

<sup>86</sup> Andrew Beck “Litigation” [2011] NZLJ 345 at 348.

## CHAPTER 2: A NEW ACT

### ESTABLISHING THE RELATIONSHIP BETWEEN THE ACT AND THE COMMON LAW

To be comprehensive, the code would have had to replace all earlier common law and statutes on the same subject. However, our common law jurisdiction does not encourage the idea of a glorious legal bonfire. Realistically, cases form the prelude to a code, as well as its subsequent continuation.<sup>87</sup> Therefore, forging an appropriate and reasoned connection between cases and the Act was crucial.

Initially, the Law Commission saw no need to include a provision detailing how to construe the code.<sup>88</sup> The principles and policies were to suffice as an overarching guide alongside the Acts Interpretation Act 1924 (which promoted a purposive approach to interpretation).<sup>89</sup>

Nevertheless, the Commission eventually recommended the inclusion of s 10 (as it was then) providing for the “Code to be liberally construed”. Despite initially viewing such a section as unnecessary,<sup>90</sup> the Commission’s consultations acknowledged that “a lifetime of training has ingrained into both bench and bar an almost automatic reaction of referring to case law to resolve evidential issues”.<sup>91</sup> Hence s 10 served as a necessary reminder that the Code should be construed by reference to its purpose and principles, rather than relying on the common law.<sup>92</sup>

As for matters not provided for, s 12 was included in the initial draft because the Commission predicted that some developments, “especially of a technological nature, may not [have] be[en] contemplated or fully evolved when the code [wa]s being drafted”.<sup>93</sup> The Law Commission explicitly stated in s 12 that in any unanticipated

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<sup>87</sup> Discussed in Samuel Jacob Stoljar (ed), above n 21, at 11.

<sup>88</sup> NZLC R127, above n 74, at 20, [2.11].

<sup>89</sup> See now Interpretation Act 1999, s 5(1) which states that “The meaning of an enactment must be ascertained from its text and in the light of its purpose”.

<sup>90</sup> Law Commission *Evidence Law: Codification* (NZLC PP14, 1989) at [29].

<sup>91</sup> NZLC R55, above n 4, at [32].

<sup>92</sup> Don Mathieson QC (9<sup>th</sup> ed), above n 75, at 79.

<sup>93</sup> NZLC R55, above n 4, at [37].

situations “the courts should look to the purpose and principles of the Code to resolve the matter”.<sup>94</sup>

Although the majority of the resultant Act stayed close to the structure originally envisioned under the Commission’s Preliminary Paper,<sup>95</sup> changes to ss 10 and 12 were substantial. By the time of the Bill’s introduction, these two provisions were scarcely recognizable.<sup>96</sup> See Appendix 1 for a table of their transformation.

## **IS THE ACT TRULY A CODE?**

Mahoney et al unequivocally assert that “[t]he Act is not a code”.<sup>97</sup> In my research, I have examined the extent to which this claim is justified.<sup>98</sup> For the following key reasons, I conclude that it is indeed inaccurate to view the Act as a code, to any strength of the term.

### **I. USUAL CODE TERMINOLOGY IS NOT EMPLOYED**

The Act is not framed in accepted code terminology.<sup>99</sup> It does not claim to be a code, nor does it seek to explicitly override or exclude the common law. However, the Select Committee made no direct acknowledgement of the change from the Law Commission’s expressed intentions of codification.

Had the Select Committee or Parliament wanted to codify the Evidence Act, it could have done so explicitly. In *Re Greenpeace*,<sup>100</sup> the Supreme Court considered whether s 5(3) of the Charities Act amounted to a codification of the limits when political purpose is permissible. The Court found that codification by “the side-wind of a parenthetical

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<sup>94</sup> NZLC R55, above n 4, at [38].

<sup>95</sup> This observation is backed up in Chris Gallavin, above n 4, at 8, referring to NZLC PP14 1991, above n 6.

<sup>96</sup> See generally, Evidence Bill 2005 (256-1).

<sup>97</sup> Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3<sup>rd</sup> ed, Brookers, Wellington, 2014) at 69, [EV10.01].

<sup>98</sup> Obviously this is subject to one’s definition of a code. Chapter one elaborates on the possibilities.

<sup>99</sup> See earlier discussion about terminology used in New Zealand with other codes above in chapter one.

<sup>100</sup> *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105.

illustration” is implausible.<sup>101</sup> It argued that if Parliament had intended to codify a prohibition, its nature and scope would be better articulated.<sup>102</sup> In the Court’s view, s 5 and the Act as a whole “assumes the common law approach to charities” made evident by the Select Committee report, which thus “points away from codification”<sup>103</sup> and instead towards mere restatement.

## II. COMPREHENSIVENESS

The Act is not comprehensive or exhaustive, despite claims to the contrary during its legislative passage.<sup>104</sup> Section 5(1) states that if there are any inconsistencies between the provisions of the Evidence Act and another enactment, the other’s provisions prevail.<sup>105</sup> The inclusion of this policy shift was not accompanied by any accessible rationale.<sup>106</sup> In addition, ss 10 and 12 together provide access to the common law authorities for interpretation or where gaps may exist in the Act. In particular, the wording of s 12 demonstrates a drafting awareness that some evidential matters are not provided for.

Together, these sections permit interpretation and use of the Act in the context of cases decided under outdated irrelevant legislation, to secondary legislation, and to the common law generally. This contradicts the ideal of promoting the principles of the Act in guiding *future* development of evidence law.<sup>107</sup>

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<sup>101</sup> At [54] per Elias CJ. Her Honour discussed the implausibility of codification of a prohibition on political purpose by parenthetical illustration, when other core concepts, such as “public benefit” or “charitable purpose”, have been left in the statute to be construed in accordance with the common law in the particular context.

<sup>102</sup> For example, as discussed in *Re Greenpeace*, at [54] by giving some definition of ‘advocacy’ (in light of the nuanced and subtle application of the principles identified in *Bowman v Secular Society Ltd* [1917] AC 406 (HL) and *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA)).

<sup>103</sup> *Re Greenpeace*, at [56].

<sup>104</sup> (23 November 2006) 635 NZPD 6802, per Mark Burton MP; he claimed that they “now have a comprehensive piece of legislation that brings together many existing statutory and common law rules and principles relating to evidence, giving this are of law clarity and accessibility of a type that it has not had for many, many years”.

<sup>105</sup> Evidence Act 2006, s 5(1).

<sup>106</sup> Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (Brookers, Wellington, 2007) at n 84.

<sup>107</sup> Admittedly ss 10 and 12 do operate subject to the purposes and principles of the Act. However, I will argue that these are merely decorative and of minimal potency in chapter four.

### III. COMMON LAW AUTHORITIES EASILY ACCESSIBLE

Sections 10 and 12 enable recourse to the common law. More significantly, s 12 outlines that, at times,<sup>108</sup> resort to the common law is mandatory.<sup>109</sup>

Recourse to the common law need not always be problematic. In *Bank of England v Vagliano Brothers*, Lord Herschell considered that if a provision were of doubtful import, resort to the common law would be legitimate to aid in the construction of the relevant provision.<sup>110</sup> However, the occasions when a judge may view the import of a section as ‘doubtful’ are, quite possibly, endless. Judges are not strangers to finding flexibility in legislation that may be interpreted to assist in their ultimate task of making a decision. Although ss 6, 7, 8, 10 and 12 seek to establish legal order based on principle, in reality their combined force directly undermines the establishment of any defined boundaries within which that search for legal order may be conducted.

Some judges consciously foster a substantive relationship between the Act and the common law, such that each has an influence on decision-making. An example is the discretion to reject improperly obtained evidence, contained in s 30. In *Fan v R*, Asher J concluded on behalf of the Court of Appeal that “the common law discretion survives the Evidence Act, although s 30 governs those cases to which the section applies”.<sup>111</sup> The same Court (although constituted by a different panel) in *Dabous v R*<sup>112</sup> echoed this: “there is no difference in the assessment of unfairness, whether it is addressed under s 30(5)(c), or under the common law”.<sup>113</sup> This suggests that reliance on the common law is a continuing possibility, even though s 30 could suffice alone. However, this strategy of approaching the Act and the common law as a co-extensive regime is not feasible for all sections<sup>114</sup> and may entrench an inconsistent approach to the Act as a whole, in turn

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<sup>108</sup> See Evidence Act 2006, s 12.

<sup>109</sup> Use of ‘must’ in Evidence Act 2006, s 12(b).

<sup>110</sup> *Bank of England v Vagliano Brothers* [1989] AC 107, 145, [189 -4] All ER Rep 93, 113 (HL).

<sup>111</sup> *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 2 at [31].

<sup>112</sup> *Dabous v R* CA618/2013, [2014] NZCA 7 per Harrison, Hansen, Dobson JJ, whereas the Court in *Fan* consisted of Harrison, Miller and Asher JJ.

<sup>113</sup> *Dabous*, at [18].

<sup>114</sup> See for example Evidence Act 2006, s 21 which was designed to negative the existing common law; See discussion in Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2<sup>nd</sup> ed, Wellington, 2010) at 85, footnotes 543-4.

bolstering judicial reluctance to accept the Act as the authoritative, primary source of evidence law in New Zealand.

Undoubtedly, the door to the common law has been left ajar. As Ellen France J noted, “... having started with the Act it may occasionally be necessary in a particular case to refer back to the common law”.<sup>115</sup> Exactly when the situation requires this is unclear.<sup>116</sup> In *Mohamed v R*, despite finding it appropriate to “focus firmly on the terms of the Act”,<sup>117</sup> the Court observed that “the application or interpretation of a particular provision in the Act may sometimes benefit from a consideration of the previous common law”.<sup>118</sup> In *Institute of Chartered Accountants v Clarke* Keane J considered that “the Act itself says that it is not a code ...[as] ss 10 and 11 [sic] allow the common law a definite place”.<sup>119</sup> *Clarke* found a continuing role for the common law in interpretation, for if “an issue of admissibility cannot be resolved under the Act, or resolved completely, s 12 makes the common law a mandatory consideration, ... in much the same way as 10(1)”.<sup>120</sup>

The Law Commission recently noted that “judges have shown some willingness to place greater emphasis on a broad reading of the interpretation aids in the Act than on the Commission’s recommendation that the Act should be a code”.<sup>121</sup> For example in *R v Moffat*,<sup>122</sup> Baragwanath J commented: “Parliament recognised that in codifying the law of evidence questions of interpretation would arise where the purposes and principles would best receive effect by retaining rather than discarding rules of the common

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<sup>115</sup> *R v Healy* CA414/07, [2007] NZCA 451 at [54].

<sup>116</sup> The meaning of ‘common law’ is uncertain, as discussed further in chapter four.

<sup>117</sup> As is consistent with Evidence Act 2006, s10(1).

<sup>118</sup> *Mohamed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [4].

<sup>119</sup> *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at [37]. Presumably the correct reference should be to s 12.

<sup>120</sup> At [40]. I will further discuss the implications of this decision in a chapter four, and in relation to settlement negotiation privilege in chapter six.

<sup>121</sup> Law Commission *Civil Pecuniary Penalties -an Issues Paper on Civil Penalties* (NZLC IP33, 2012) at [6.67]; For example, the Commission suggests that privilege in respect of civil penalties has not been retained (its intention was to abrogate the privilege; NZLC R55, above n 4, at 76) but that it could be re-established (NZLC IP33, above n 121). See also *New Zealand Air Line Pilots Association Inc v Jetconnect Ltd (No 2)* [2009] ERNZ 207 at [23] where Chief Judge Colgan proposed that the ‘privilege’ under the Evidence Act relates only to criminal liability exposure, and thus that the common law of privilege affecting civil claims is left untouched; see also *John Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, ARC 23/12 at [48].

<sup>122</sup> *R v Moffat* CA 196/2009, [2009] NZCA 437.

law.”<sup>123</sup> Admittedly the old cases can be learned from, and can be used to positively advance the direction of the law. However the drafters already considered the existing cases when composing the Act. Ultimately, the pretence of aiding judicial interpretation is a thin veil over direct resort to the former law. As Judge Burns stated in the District Court case of *Police v Stevenson*,<sup>124</sup> “[i]nsofar as ss 10(1)(c) and 12(b) are concerned, when a Judge has regard to, the common law, the result will usually be a direct application of the common law”.<sup>125</sup>

## CONCLUSION

Given these features, the Act is not amenable to any claim to code status.

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<sup>123</sup> At [20]. This related to the interpretation so s 42(1)(b); s 10 was used to justify a construction of (b) that accorded both with the fundamental purpose of the Act in s 7(3) and the pre-existing common law.

<sup>124</sup> *Police v Stevenson* DC Waitakere CRN-0809-003-987, 26 November 2008.

<sup>125</sup> At [58].



### CHAPTER 3: WAS THE CHANGE ADEQUATELY SIGNALLED?

Despite best intentions, a code was not produced. A clear signal needed to be given, to allow habituation, so that the Act could be adopted in a way to best serve its purpose. This would conceivably limit the degree of unfamiliarity and discomfort that otherwise shadows new legislation.

Unfortunately there is a lack of substantive discussion of the changes during Parliamentary debates on the Bill.<sup>126</sup> All that is available on the point is a briefing from the Ministry of Justice to the Justice Minister, which simply noted that 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 addition to aid interpretation.”<sup>127</sup> This does not provide sufficient explanation. The amendments leave the status of the Law Commission’s commentary unclear.<sup>128</sup>

In the Bill’s journey through the House, the Select Committee and other Members of Parliament avoided specifics, saying generally that the proposals of the draft Code had mostly been carried forward, without directly justifying the reasons for the new relationship with the common law.<sup>129</sup>

During the first reading, Stephen Franks MP stated that the Bill could not claim to be a codification. He observed: “I do not think the Minister used that term in his introduction, and the precise words are not used in the explanatory note that the Government has attached to the bill ... in fact, all it is doing is listing the factors that judges look at, without making the likely outcome any more obvious than before to the lay reader or the reader who is not a specialist in the area.”<sup>130</sup> He makes a valid point.

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<sup>126</sup> Evidence Bill 2005 (256-1).

<sup>127</sup> Letter from Gordon Hook (Manager of the Criminal and International Law Team, Ministry of Justice) to the Hon Phil Goff (Minister of Justice) regarding the Evidence Bill (8 February 2005), quoted in Elisabeth McDonald *Principles of Evidence in Criminal cases* (Brookers, Wellington, 2012) at 15, and in Richard Mahoney and others (2<sup>nd</sup> ed) above n 114, at [EV10.01], and NZLC R127, above n 74, at 23, [2.24].

<sup>128</sup> This was also observed in NZLC R127, above n 74, at 24, [2.26].

<sup>129</sup> See also NZLC R127, above n 74, at [2.24] where it found that scarce rationale for the change exists.

<sup>130</sup> (10 May 2005) 625 NZPD 20418.

During the second reading, Russell Fairbrother MP proclaimed that the Bill “is not a codification of the law of evidence, but [rather] an attempt to bring into statute, in a clear, concise, and accessible way, the laws that must be followed”.<sup>131</sup> Richard Worth MP contended that a degree of codification had been achieved, in that “the opportunity for judge-made law and other influences to intervene will be starkly limited by the passage of this legislation”.<sup>132</sup>

As noted by Mahoney et al, there was no submission on s 10.<sup>133</sup> It passed unamended by the Select Committee without explicit acknowledgement of the significant alteration to the Law Commission’s proposals.<sup>134</sup> In the third reading, Mark Burton (the then Minister of Justice) misguidedly claimed that we now have a “comprehensive” piece of legislation, that “brings together *many* existing statutory and common law rules and principles ... giving this area of law clarity and accessibility of a type that it has not had for many, many years”.<sup>135</sup>

The members exhibited a lack of certainty as to what was being achieved, even if they were positive about the supposed update of the law. In the absence of explicit justifications, it is unclear whether the shift was deliberate or merely a by-product of some other oversight.

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<sup>131</sup> (15 November 2006) 635 NZPD 6561.

<sup>132</sup> At 6562.

<sup>133</sup> Mahoney and others (3<sup>rd</sup> ed), above n 97, at [EV10.01].

<sup>134</sup> Given the lack of explanation, it may be that some members of the Select Committee were unaware of the change.

<sup>135</sup> (23 November 2006) 635 NZPD 6803, my emphasis added. This echoed the findings of the Select Committee in Evidence Bill 2005 (256-2) (Select Committee report) at introduction, my emphasis in italics added. Also, the Law Commission submitted that the Code would “replace *most* of the existing common law and statutory provisions on the admissibility and use of evidence in court proceedings (italics added). NZLC R55, above n 4, at xviii, and 3. It still thought the Act was a code: later, in its discussion, the Committee dismissed the suggestion that some provisions be dealt with by regulation, to make the bill less prescriptive. This was because the members found it appropriate that the content of the bill be contained in statute, as a comprehensive evidence code is too important to be relegated by regulations; Select Committee in Evidence Bill 2005 (256-2) (Select Committee report) at Part 5 Miscellaneous Regulations’.

## I. DRAFTING

When drafting a piece of legislation, it is impossible to accurately assess or project the direction of future legal development.<sup>136</sup> Attempting to freeze fragments of existing case law is unrealistic, for “nothing short of omniscience would suffice to enable the draftsmen to conceive and provide for every possible contingency”.<sup>137</sup> By the very nature of cases that come before court, not all situations in which the rule is later applied will neatly fit the envisaged pattern.<sup>138</sup>

Added to this, the Commission sought to strike a balance between excessive detail and bare statements of principle. Ideally, it would strive to “maximise predictability and uniformity in the application of the principles of the code, while endeavouring to avoid the distortion of the policies and principles which can so easily result from rules which are overly specific”.<sup>139</sup> This was vital in light of the previous evidence legislation, which was designed to create certainty in the law by being overly technical.<sup>140</sup> Yet paradoxically, this created confusion and facilitated excess use of judicial discretion, often inconsistent with the underlying principle on which admission of evidence ought to

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<sup>136</sup> Grant Gilmore “On the Difficulties of Codifying Commercial Law” (1948) 57(8) Yale Law Journal Faculty Scholarship Series, Paper 2677, 1341 where the author discusses that no matter how admirably executed, this idea limits the benefits of codification.

<sup>137</sup> MacMillan Committee on Income Tax Codification (Cmnd. 5131, 1936) at 17 discussing the relationship of code and judges, found that it is not practicable to pursue any given topic to its last details; Aristotle once remarked, “no piece of legislation can deal with every possible problem”, both cited in Michael Zander, above n 71, at 485; see also, Grant Gilmore, above n 136, at 1341 where the author discussed the conundrum between being overly general or abstract (and thus of not much use) or being overly detailed. He notes that attempting to account for everything by loading excessive amounts of detail into the statute would cause it to “wither on the vine”.

<sup>138</sup> HLA Hart *The Concept of Law* 124 (1961) at 125 -26. Hart wrote about the “indeterminacy of aim” in legislation, asserting that when “the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us”. See also David P. Leonard, above n 83, at 937.

<sup>139</sup> NZLC PP14 1991, above n 6, at 10.

<sup>140</sup> NZLC PP14 1991, above n 6, at 9, [23]: “Our present rules of evidence are characterized by their specificity. As we have seen, much of the law is expressed in terms of relatively detailed and technical rules ... The aim may originally have been to minimise uncertainty in the law but, as the analysis in the principles paper indicates, the result has been the opposite. Rather than being clear and understandable, the law is complex, confusing and difficult to apply.”

be focused.<sup>141</sup> Learning from this misfortune, the Law Commission sought to “avoid stating the law so tersely that its meaning cannot be readily elucidated”.<sup>142</sup>

## II. LENGTHY GESTATION

“This is, of course, a bill that has been lurking about in gestation for a very long time.”<sup>143</sup> The Bill first came before Parliament in May 2005.<sup>144</sup> The Act received royal assent one year later<sup>145</sup> and came into force in August 2007, almost 20 years after the Law Commission was charged with its evidentiary mission.<sup>146</sup> This prolonged period of anticipation caused some exasperation. There was no accurate way for the judiciary to anticipate what would eventuate. Often common law developments failed to align with the direction of the Act, leaving a dissonance between the preceding law and the outcome of the legislative process.

Consider, for example, the area of hearsay. Exceptions to the rule against hearsay developed for over 17 years between Cooke P’s call to go “straight to basics” (and focus primarily on the reliability of the evidence)<sup>147</sup> and the eventual birth of the Act in 2006.<sup>148</sup> After this period of divergent legal developments, the Act ended up being “both faithful to and contrary to [Cooke’s] vision”.<sup>149</sup> Even despite his visionary approach, Cooke’s foresight in the area of hearsay was not truly adopted by the Act.

Had the Act been passed sooner, this scope for disparity between it and the continuing path of the law could have been minimized, leaving less to be reconciled in the aftermath

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<sup>141</sup> The Law Commission discussed a similar situation that arose in Canada: N Brooks “The Law Reform Commission of Canada’s Evidence Code” (1978) 16 Osgoode Hall LJ 241, 306; cited in NZLC PP14 1991, above n 6, at 9.

<sup>142</sup> NZLC PP14 1991, above n 6, at 10.

<sup>143</sup> (10 May 2005) 625 NZPD 20417.

<sup>144</sup> Evidence Bill 2005 (256-3).

<sup>145</sup> It received Royal Assent on 4 December 2006.

<sup>146</sup> Evidence Act (except section 203-214) brought into force on 1 August 2007 by Evidence Act 2006 Commencement Order (SR 2007/190), cl 2(2). Sections 203-214 brought into force on 18 July 2007, by Evidence Act 2006 Commencement Order 2007 (SR 2007/190), cl 2(1).

<sup>147</sup> *R v Baker* [1989] 1 NZLR 738, 741 (CA) per Cooke P. His Honour considered it “more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards”.

<sup>148</sup> Note that his Honour’s initial proclamation coincided with the Law Commission’s 1989 Report.

<sup>149</sup> Elisabeth McDonald *Going Straight to Basis*, above n 4, at 164.

of the Act's birth. As it was, the common law developed in this interim for a further two decades after the original draft code: this could not be ignored. It seems plausible that the drafters of the Bill altered the Law Commission's proposed ss 10 and 12 to enhance efficiency: rather than prolong the enactment while bringing the Bill in line with the most recent developments, recourse to the common law permitted this to happen on a case-by-case basis. However, if this was its intention, the Select Committee could helpfully have said so.

### III. EFFECTS

The inclusion of ss 10 and 12, which function to disprove claims that the Act is a code, hinders the inference that the Act is intended to be at all reformatory. Given that the Act brewed for so long, justification of the change needed to be given by the Select Committee to acknowledge and reflag this to the judiciary. This may have helped facilitate a consistent approach to the new legislation. Without this, arguably the Act was received by a judiciary whose outlook was overshadowed by a residual mistrust in what the Act was able to achieve.<sup>150</sup>

This situation is exacerbated by excessive reverence for the common law paradigm. "Traditions and methods that reject codification, or socially established beliefs in its practical failure lead most directly to an anti-codification attitude becoming traditional."<sup>151</sup> This approach from within the New Zealand profession was strengthened by the absence of fuller explanation of the scope and intent of the new Act. The expanding distance between the drafters, the Select Committee, and the judiciary (whose expectations failed to align), permitted the inherent preference for the common law to persist, undermining any codification attempt.<sup>152</sup>

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<sup>150</sup> See *Sheppard Industries Ltd v Specialized Bicycle Components Ltd* [2011] NZCA 346, [2011] 3 NZLR 620 at [15(c)], *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at [37] and *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29 at [30].

<sup>151</sup> Csaba Varga, above n 21, at 252. Similarly, commenting in 1966, ex-chairman of the English Law Commission. Lord Scarman predicted, "if codified law succeeds in becoming more manageable and easier to understand than the law which it supersedes, the habit of codification will spread". As noted by Lord Scarman, above n 15, at XLII, if it fails, codes will become part of the useless lumber of our law. Although discussing matters in the English context, this approach can be extended to New Zealand, where practitioners look to English authorities for guidance.

<sup>152</sup> William Sampson, *Showing the Origin, Progress, Antiquities, Curiosities, and the Nature of the Common Law, Anniversary Discourse Before the Historical Society of New York* (Dec. 6

The Act was to be “the bread and butter of court lawyers”,<sup>153</sup> suggesting that practitioners involved in litigation would need “to be thoroughly re-schooled on ... the laws of evidence.”<sup>154</sup> This gives weight to the proposition that the Act did, in part, signal a new direction away from the preceding evidence rules and that reliance on former common law would no longer suffice. However, as discussed in the next chapter, the common law continues to be highly informative, at the expense of truly relying on the Act and achieving the aims behind its implementation.

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1823) at 128-9. The author spoke of the influence of English judges to American law, and questioned “Must we tread always in their steps... if we can only be wise when they are wise, we must also be foolish if they are foolish...” Cited in Perry Milled (ed) *The Legal Mind in America from Independence to the Civil War* 147, 150, 158 (1962) in at 119, 123, 126; and Norman W Spaulding, above n 47, at 987.

<sup>153</sup> Helen Cull “Overview”, above n 7, at 5.

<sup>154</sup> LexisNexis, *The Evidence Code, with a foreword by Greg King* (Butterworths Legislation Series, Wellington, 2007) at Foreword.

## CHAPTER 4: SHORTCOMINGS AND EXPLANATIONS

The discrepancy between the desired all-encompassing code and the eventual Act derogates from the intended clarity and consistency that it sought. As the Law Commission observed in its review of the Act's operation, numerous cases have "given rise to concern about the way courts are interpreting ss 10 and 12".<sup>155</sup>

This chapter assesses the major shortcomings of the existence and relationship between the two provisions.

### A. PRINCIPLES & PURPOSE: WEAK AND ONLY DECORATIVE

The Act sets out the general purpose and principles applicable to the law of evidence, no matter what its source.<sup>156</sup> These purposes and principles are "of paramount importance in determining what influence case law will have"<sup>157</sup> because they also influence the interpretation of the Act (s 10), and the making of admissibility determinations in cases where the Act does not comprehensively cover the matter (s 12).<sup>158</sup> This reflects the Law Commission's originally desired approach to resolve any ambiguity within the purposive context prescribed by the Act.<sup>159</sup>

### THE PARTICULAR SECTIONS

The Act's purpose is to help secure the just determination of proceedings, by keeping in mind six important considerations: logic, rights, fairness, confidentiality and other public interests, efficiency, and access.<sup>160</sup> This is a list of somewhat incompatible factors. For example, adhering to fairness and rights can be at the expense of efficiency. It means, for

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<sup>155</sup> NZLC R127, above n 74, at [2.35]. The review mechanism is discussed in more detail in chapter seven.

<sup>156</sup> This is generally accepted. See for example, NZLC R55, above n 4, at [38].

<sup>157</sup> Chris Gallavin, above n 4, at 12.

<sup>158</sup> Evidence Act 2006, ss 6, 7, 8, 10, and 12. See Appendix 2.

<sup>159</sup> NZLC R55, above n 4, at 10, [36]. The objective was to ensure that the law developed in a principled way, thus improving its moral quality and credibility.

<sup>160</sup> Evidence Act 2006, s 6. These purposes are not substantive in detail. For further discussion see Mahoney and others (3<sup>rd</sup> ed), above n 97, at 37-39.

example, that an interpretation should promote fairness for parties and witnesses<sup>161</sup> while also protecting public interests.<sup>162</sup> Prima facie, this sets a troublesome judicial task.<sup>163</sup> However, there is sufficient scope to select a principle on which to hinge an argument, as is later demonstrated.

Together ss 7 (relevance) and 8 (test of probative value against unfair prejudice)<sup>164</sup> provide an absolute test of admissibility: if proposed evidence does not satisfy both sections, it must be excluded. There is no residual judicial discretion to admit in the face of such inadequacy.

#### OPERATIONAL ISSUES

In such a “corpus of law”, where it is nearly impossible to provide for every eventuality, “recourse to underlying principle is of paramount importance”.<sup>165</sup> The establishment of principle should empower judges to exhibit genuine statutory interpretation when applying and developing the law, as opposed to “painfully hacking their way through the jungles of detailed and intricate legislation”.<sup>166</sup>

However, the mere existence of these principles does not automatically assure them any high degree of influence or value. They cover important social and political policy, but are sufficiently broad that any advocate of mild competence could manipulate them. Thus it is submitted that they have only a minor effect, via strategic but largely totemic use by counsel to progress an argument.

Justice Asher’s discussion in *R v Fan*<sup>167</sup> exemplifies the malleability of the purpose section of the Act and demonstrates that its range of subsections provides sufficient interpretive flexibility. His Honour noted that it would be “inconsistent with the common

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<sup>161</sup> Evidence Act 2006, s 6 (c).

<sup>162</sup> Evidence Act 2006, s 6(d).

<sup>163</sup> Mahoney and others (3<sup>rd</sup> ed), above n 97, at [EV10.02].

<sup>164</sup> See Appendix 2.

<sup>165</sup> Chris Gallavin, above n 4, at 16. These principles have developed at common law over time, and thus mirror the existing values of evidence law. Therefore, unfamiliarity is not the issue.

<sup>166</sup> (1 April 1965) 264 GBPD HL 1965, columns 1175-6 per Lord Wilberforce; cited in NZLC PP14 1991, above n 6, at 4; cited in Letourneau and Cohen “Codification and Law Reform: Some Lessons from the Canadian Experience” [1990] Stat LR 183, 194. The authors also point out that the virtues of codification are the virtues of all competent legislation.

<sup>167</sup> *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29.



law and the purpose of the Evidence Act, which is to promote fairness to parties, to construe s 30 as excluding the common law discretion”.<sup>168</sup> However, it is submitted that helping to secure the “just determination of proceedings” can be achieved by other methods beyond merely the promotion of fairness to parties, via the other subsections in s 6.<sup>169</sup> Arguably, resort to the common law is inconsistent with subs (f), which refers to “enhancing access to the law of evidence”.

In *Police v Stevenson*<sup>170</sup>, Judge Burns found that although ss 10 and 12 give priority to the Act’s purpose and principles, “that does not provide a barrier to application of the common law.”<sup>171</sup> In turn, this justified his statement that “the Act cannot be described as a complete code”.<sup>172</sup> Recourse to the common law is easily justifiable, thanks to the window-dressing nature of the Act’s statement of purpose and principles.

## **B. INTERPRETATION DIFFICULTIES**

### **PRIMA FACIE**

The Court of Appeal has indicated that if a section of the Act offers adequate guidance, reference back to the common law will not be necessary.<sup>173</sup> Moreover it considered that although the Evidence Act was not expressed as a complete code,<sup>174</sup> the focus should still be on the statute.<sup>175</sup> Similarly the Court of Appeal in *R v Timbun* took the view that when

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<sup>168</sup> At [31].

<sup>169</sup> Evidence Act 2006, s 6. Note that each of the six subsections provides a different way in which the just determination can be assisted.

<sup>170</sup> *Police v Stevenson* DC Waitakere CRN-0809-003-987, 26 November 2008.

<sup>171</sup> At [58].

<sup>172</sup> At [58].

<sup>173</sup> *R v Taea* (CA 442/07, 31 October 2007); [2007] NZCA 472.

<sup>174</sup> As was the Law Commission’s initial proposal in NZLC R55, above n 4, at 36, 38.

<sup>175</sup> Discussed in *R v Healy* (2007) 23 CRNZ 923, [2007] NZCA 451 at [46] per Ellen France J. Her Honour illustrates the preferred approach by referring to the decision of *R v Taea* [2007] NZCA 472, where the Court of Appeal had earlier found it unnecessary to refer back to the law in force before the advent of the Act. Thus at [48] her Honour used the statutory provisions as the starting point for interpretation. This is in line with a plain reading of s 10. See also *The Governor and Company of the Bank of England v Vagliano Brothers* [1981] AC 107 at 144-145 (HL) per Lord Herschell who held that “the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previous state of the law stood ...”. This was the approach taken in relation to the Criminal Justice Act 2003 (UK), discussed in *Healy* at [53].

interpreting, the statutory words must be focused on, not earlier authorities.<sup>176</sup> In *Queen v Barlien*,<sup>177</sup> Glazebrook J found that “s 10 should not be given an expansive interpretation in the face of clear wording in the Act”.<sup>178</sup> Thus her Honour was adamant that s 10 “cannot override explicit exclusionary wording in the Act itself”.<sup>179</sup>

In the Supreme Court in *R v Hart*,<sup>180</sup> Elias CJ considered the Act to be the “first stop when questions of admissibility arise. And in many cases it will be the last stop.”<sup>181</sup> The other judges agreed;<sup>182</sup> “the Courts should not follow the general common law approach ... when that is not mandated by the statutory language”.<sup>183</sup> This was supplemented with a footnote: “Indeed the Act is designed to make a break from the common law: see s 10.”<sup>184</sup> It took a consistent approach in *Mohamed v R*,<sup>185</sup> commenting: “We do not consider a great deal is now to be gained from an examination of pre-Evidence Act case law.”<sup>186</sup> The Supreme Court in *Wi v R*<sup>187</sup> acknowledged the limited function of the common law by virtue of s 10(1)(b), presuming that this was included “to emphasise that the Act marked a new departure in the law of evidence and Judges should not interpret it

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<sup>176</sup> *R v Timbun* (CA 370/07, 27 February 2008). [2008] NZCA 4 at [26]; see also *R v Weir* [2005] EWCA Crim 2866; [2006] 2 All ER 570 at [35] where the proposition that the statute be read in light of the pre-existing common law was rejected.

<sup>177</sup> *R v Barlien* CA505/2007, [2008] NZCA 180 per Glazebrook J.

<sup>178</sup> At [55]. Section 35 was considered to be final, given that no common law authority was referred to.

<sup>179</sup> At [54]. This was justified by contrast to s 12A which was included to directly preserve the common law co-conspirators rule, as differentiated from the rule in s 27(1). No such section was included to preserve the common law in relation to s 35. See Appendix 2.

<sup>180</sup> *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.

<sup>181</sup> At [1]. The case turned on the admissibility of a previous consistent statement under s 35(2) of the Evidence Act 2006. At [1], the Court described this topic as one of “conceptually unsatisfactory case law at common law”, and thus saw the need to promote a careful approach to not to stray from the text and principles of the new Act. At [9] it recommended that “[c]are is therefore needed to be taken to ensure that authorities under the former law ... do not distort the application of s 35”. This approach echoes that of making a fresh start, or new slate, as in *Wi* the year prior.

<sup>182</sup> The other judges were Blanchard, Tipping, McGrath and Wilson JJ: the judgment was delivered by Tipping J.

<sup>183</sup> *Hart*, above n 180, at [52]-[53]. This was discussed in relation to the timing of a prior consistent statement.

<sup>184</sup> At footnote 58 of the judgment. Thus the Supreme Court takes the inclusion of section 10 as permitting, if not encouraging, judges to anchor themselves firmly in the statutory concepts, before resorting to pre-Act case law.

<sup>185</sup> *Mohamed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

<sup>186</sup> At [4].

<sup>187</sup> *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.

restrictively on account of any hankering for the old common law or instinctive resistance to change”.<sup>188</sup>

Although the context of each examination varies, it appears clear that the Act is accepted as the starting point. Why then are there still issues that focus on the principled basis of accessibility to the common law?

## DEEPER PROBLEMS WITH INTERPRETATION

### I. WHAT IS THE MEANING OF ‘COMMON LAW’?

The Evidence Act is the single piece of New Zealand legislation containing the most references to ‘common law’, a term that is present in and central to the understanding of ss 10 and 12.<sup>189</sup> Yet it is not defined in the Act’s interpretation section.<sup>190</sup>

Generally, this phrase refers to the law developed by judges. Under the doctrine of stare decisis, such judge-made common law binds the courts when adjudicating similar disputes in the future. This characteristic of New Zealand’s legal system derives from England, where the common law originated in the 13<sup>th</sup> century. Over time, the decisions of judges became the basis of the modern common law system.<sup>191</sup> “Conceptually, the common (judge-made, or classically, judicially *articulated*) law is the legal foundation,<sup>192</sup> and covers seamlessly all questions. Superimposed upon this are particular statutes. Where a statute does not cover the question, then the common law supplies an answer.”<sup>193</sup> This principle is well established.

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<sup>188</sup> At [26]. The Court considered section 10 and 12 in relation to the admissibility of a defendant’s lack of previous convictions.

<sup>189</sup> New Zealand Legislation “Search Results: ‘common law’” <[www.legislation.govt.nz](http://www.legislation.govt.nz)>.

<sup>190</sup> Evidence Act 2006, s 4.

<sup>191</sup> Daniela Muth “Basic Conceptions of the Legal System: A Critical Comparison Between New Zealand and Germany” (2004) 10 Canterbury L. Rev. 152 at 154.

<sup>192</sup> The traditional theory is that judges do not make, but simply declare, the law. See William Blackstone *Commentaries on the Laws of England*, Vol 1 (Clarendon Press, Oxford, 1765), 54, 70; see also *Willis & Co v Badeley* [1982] 2 QB 324, 326 where Lord Esher MR found that there is “no such thing as judge-made law...”. In contrast, the Modern acceptance is an open acknowledgement that this is not the reality, and indeed judges change the law when overruling earlier precedents; see *In Re Spectrum Plus Ltd* [2005] UKHL 1; [2005] 2 AC 680, esp. at [34] and [35].

<sup>193</sup> John Armour, above n 16, at 5.

The leading texts suggest that ‘common law’ is taken to mean the law of evidence prior to the Act.<sup>194</sup> Chief Justice Elias stated that “[r]eference in statute to the common law without more is to the common law as it develops from time to time”.<sup>195</sup> Arguably, ss 10 and 12 would permit or require reference to judicial interpretations of earlier statutes which themselves have since been reformed by the Evidence Act of 2006. As it stands, reference to such prior case law would be seen as authorised.<sup>196</sup>

Admittedly, the drafters had the difficult task of replacing some common law and accounting for that which remained.<sup>197</sup> Given that the Act took over 16 years to eventuate, numerous cases came before the courts in the interim. Judges were faced with either anticipating the Act’s birth or simply ignoring it. The problem with the legislative solution adopted in ss 10 and 12 is that it is illogical and achieves flexibility at the expense of clarity and order. Moreover, it makes no distinction between instances where the common law is assumed, as opposed to cases where it had been expressly stated. It is problematic to leave an overhang of cases that are not directly accounted for by the statute. Such decisions can lie dormant until counsel offers them as justification for an approach not anticipated by the Act. If the cases from 1989 to 2006 had to be accounted for, the Act could have limited recourse to the ‘common law’ to this period of time.

The Supreme Court in *Wi v R* found that “[t]he common law approach in England fortifies the appropriate construction of the Act”.<sup>198</sup> This is troubling, as reference to common law in the Evidence Act may not extend to include the common law of England. Yet this is only a presumption, as the Act provides little guidance on the point. Moreover, if the English common law develops in a way that diverges drastically from our rules of evidence, few limitations exist to prevent our courts from relying on such authorities, despite the obvious disorder this could create.

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<sup>194</sup> Mahoney and others consider that the ‘common law’ refers to the law of evidence as it was before the Act. See Mahoney and others (3<sup>rd</sup> ed), above n 97 at 71, [EV10.03]; see also Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [EA10.02], who predicted that it is likely that “the common law” is likely to be taken to refer simply to the law of evidence as it existed prior to the Act, which could thus include reference to judicial interpretations of earlier statutes, where those statutes are now outdated.

<sup>195</sup> *Re Greenpeace* at [56] per Elias CJ. However, its weight for this argument is perhaps limited to future legal development, to which it likely refers.

<sup>196</sup> This is so long as the constraints of ss 10(1)(c) and 12(b) of the Evidence Act are followed.

<sup>197</sup> As discussed in J F Burrows *Statute Law in New Zealand* (3<sup>rd</sup> ed, LexisNexis, Wellington, 2003) at ch 16.

<sup>198</sup> *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11, (2009) 24 CRNZ 731 at [32].

For the sake of clarity and simplicity (two objectives of the Act), an attempt ought to be made, by the legislators, to clarify the distinction between judicial decisions rendered from interpreting current New Zealand statutes, as opposed to the pre-existing mass of common law. They are not the same thing, but both have the potential to influence and inform the searcher of law and to interrupt the direction in which the law develops.

## II. THE DISTORTED POWER OF NEW TERMINOLOGY

Judges may tend to treat a legal statement to a fresh approach when it is described as something ‘new’. In *Healy* the court found that provisions relating to ‘propensity’ evidence offered “the opportunity of a clean slate ... that should be grasped”.<sup>199</sup> The opportunity to start afresh in relation to ‘similar fact’ evidence was easier to grasp given the explicit intention illustrated in the alteration of the terminology to using the descriptor ‘propensity’. This reinforces a break with the existing law.

Such explicit change in terminology may not be required to achieve reform. Yet realistically, where provisions appear to use the same terminology, logically lawyers continue to refer to old common law cases. Moreover, when no mention is made of an intended legal development, prior lines of precedent continue to be relied on, even if passively rather than actively. In discussing whether the Act intended to alter a longstanding common law position,<sup>200</sup> Tipping J noted that nothing in the Commission’s published material or in the Parliamentary materials suggests this is so.<sup>201</sup> Parliament could have expressly altered this, but refrained from doing so, thus cultivating uncertainty and excess scope for discretion. The strength of the correlation between new terminology and reform of the law is indicative of the inherent reluctance to adopt new lines of reform without direct prompting.

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<sup>199</sup> *Healy* at [54]. See also Law Commission *Evidence Law, Character and Credibility* (NZLC PP27, 1997) at [268]–[270]. It reminded that the Act is the product of a long and considerable history of reforms and that one of the objectives in terms of the law relating to propensity evidence was to reduce the previous uncertainty as to the likely approach to the admissibility of this sort of evidence.

<sup>200</sup> The position being that evidence of lack of previous convictions was admissible.

<sup>201</sup> *Wi*, above n 198, at [27].

### III. DETERMINING PARLIAMENT'S INTENT

Added to the lack of direction and justification in Hansard for the inclusion of ss 10 and 12, seeking to assess Parliament's intent is a difficult, if not impossible task. It may be doubted whether a cohesive intention would regularly be gleaned from a group of often polarised legislators.<sup>202</sup> Seeking to justify an interpretation upon the basis that it was intended by Parliament is a somewhat flawed (if not fatal) basis for principled development of the law.

#### C. GAPS IN THE ACT

The original draft Code included a version of s 12 which outlined "Matters of evidence that are not provided for by this Code are to be determined consistently with the purpose and principles of this Code."<sup>203</sup> The Law Commission made it clear that in its view "any ambiguity in the meaning of a provision of the Code must be resolved by reference to the purpose and principles of the Code rather than to the pre-existing common law".<sup>204</sup> It also asserted that the problem of gaps in a code "is somewhat illusory" because "[i]f in a given case the code appears insufficiently specific, reference to the general policies and principles will enable the code to be interpreted appropriately".<sup>205</sup> That said, it conceded that reference back to the old cases might be helpful in elucidating the Code's principles.<sup>206</sup> However, this is not the section that eventuated in the Act.

Under s 12(b), as it now stands, the judge is required to have regard to the common law when determining the admissibility of evidence influenced by rules not provided for in the Act. This is no small requirement. As noted by Mahoney et al, there are numerous

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<sup>202</sup> This idea was raised and discussed by Justice Susan Glazebrook: "Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21<sup>st</sup> century" (Guest Lecture, University of Otago, 13 August 2014). Bills will not always have cross party support for their statutory text, yet it is still possible.

<sup>203</sup> NZLC R55, above n 4.

<sup>204</sup> At at [36]; the same idea was discussed in NZLC R55, above n 4, at [C68].

<sup>205</sup> NZLC PP14 1991, above n 6, at vii.

<sup>206</sup> NZLC R55, above n 4, at [36].

occasions when the Act does not deal completely with all admissibility issues regarding a particular class of evidence.<sup>207</sup>

The Ministry of Justice said that the purpose of cl 12 was “to provide the Act with some flexibility in cases where courts are faced with new developments in technology ... not contemplated at the time the Act was drafted”.<sup>208</sup> However, as noted by Mahoney et al, “if new technologies are at issue, the common law will presumably offer no insights into how they should be used, except at the level of principle”.<sup>209</sup> That being the case, the principles contained within the Act ought to be sufficient to guide the development of the Act in future, unanticipated areas, as was the original express view of the Law Commission.<sup>210</sup>

However, the cases show that it is not technological developments that have called s 12 into use. The judiciary exhibits a continued reliance on s 12 as a gateway back to the pre-Act cases.

#### FINDING GAPS IN THE ACT: IS THIS JUSTIFIED?

The Court of Appeal found that there is no automatic preservation of the common law.<sup>211</sup> If the Evidence Act abrogated the rationale for an earlier rule, then the Act is inconsistent with that rule.<sup>212</sup> In *R v Healy*, the Court of Appeal reiterated the statute, finding that s 12 “deals with the situation where there is a lacuna because matters are not provided for”.<sup>213</sup> In *R v Mata*<sup>214</sup> the Court of Appeal adopted *R v Carnachan* in rejecting the appellant counsel’s proposition, and held: “We see no place for s 12 in the analysis of the issue

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<sup>207</sup> Mahoney and others (3<sup>rd</sup> ed), above n 97, at 72, [EV12.01] For example, see admissibility of reputation evidence under section s 37 or 40, discussed at [EV37.03(4)] and [EV40.02(5)].

<sup>208</sup> Ministry of Justice *Evidence Bill: Part 1 – Preliminary Provisions Departmental Report for the Justice and Electoral Committee* (June 2006) at 13, in relation to the draft Bill.

<sup>209</sup> Mahoney and others (3<sup>rd</sup> ed), above n 97, at [EV12.01].

<sup>210</sup> NZLC PP14 1991, above n 6, at [33] and [36].

<sup>211</sup> *R v Carnachan* [2009] NZCA 196. In contrast to the common law position, the Evidence Act 2006 changed so that it is now not improper for a party to call as a witness, a person known to be hostile. Therefore the court assumed that changes brought about by the Evidence Act show that the common law is not automatically reserved.

<sup>212</sup> At [39]. This was the rule in *R v O’Brien* [2001] 2 NZLR 145, which the Court in *Carnachan* considered had been overridden.

<sup>213</sup> *Healy* at [49].

<sup>214</sup> *R v Mata* [2009] NZCA 254.

raised on this aspect of the appeal.”<sup>215</sup> Added to this, the Supreme Court noted “resort is not to be had to the common law when statute covers the ground”.<sup>216</sup> But the limits of what the statute covers are not black and white.

Practitioners and judges have grown to expect that if an aspect of the common law is to be changed substantively, it will be unequivocally stated. To this end, Mr King, counsel for the appellant in *R v Wi*,<sup>217</sup> stated that the Evidence Act does not seek to depart from the common law practice regarding adducing evidence of good character. He reasoned that “[h]ad it done so, it would have done so expressly, had it been intended to then it would have been the subject of widespread debate, discussion and consultation, which it clearly was not”.<sup>218</sup>

Taking a contrary view, the Court of Appeal in *R v Kant*<sup>219</sup> found that despite no express heralding of the change, the Act *did* intend to alter a common law principle. It noted that the cases prior to the commencement of the Evidence Act 2006 “now need to be treated with circumspection”.<sup>220</sup> This approach is refreshing, yet it was not followed in *Wi v R*, where the Supreme Court considered that “the Act may well have done so ... but the lack of any suggestion that the law was to change in this significant respect is surprising if that is what was intended”.<sup>221</sup>

Clearly, as explicitly stated by the Court of Appeal in *Singh*, the common law can legitimately continue to inform evidentiary decisions.<sup>222</sup> Despite concluding for other reasons that the statements should not be excluded, Asher J in *Fan* was keen to observe “there remains a general common law discretion to exclude evidence where its admission

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<sup>215</sup> As noted at [2], the issue was calling a hostile witness at trial. Judge Blackie’s decision granting the Crown’s application under Crimes Act 1961, s 344A (to permit the prosecution to call Mr Alex Mata at trial). The Court in *Mata* held at [25]-[25] that the rationale underpinning *O’Brien* no longer applies in cases governed by the 2006 Act.

<sup>216</sup> *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] 2 NZLR 709; [2008] NZSC 24 at [71].

<sup>217</sup> *Wi*, above n 198.

<sup>218</sup> *Aaron Mark Wi v The Queen* SC 28/2009, [2009] NZSCTrans 25 at 42.

<sup>219</sup> *R v Kant* [2008] NZCA 269 (31 July 2008).

<sup>220</sup> At [20]. The Law Commission materials show a clear distinction between veracity and propensity evidence “in a way which has altered the previous approach under the common law.”

<sup>221</sup> *Wi*, above n 218, at [27].

<sup>222</sup> *Singh v R* [2010] NZCA 133 at [52]. The Court footnoted sections 10 and 12.



would be unfair”.<sup>223</sup> In *New Zealand Institute of Chartered Accountants v Clarke*<sup>224</sup>, Keane J considered that the common law has “a continuing place in setting the boundaries to the privilege conferred”.<sup>225</sup>

Sometimes, even though the Act does sufficiently cover a particular area, judges appear dissuaded from using the Act’s wording as the determinative instrument and often refer back to previous cases. Judges can label an area where they wish to justify moving beyond the language of the Act as being ‘not provided for’ rather than being directly rescinded by the statute. In *R v Fan*<sup>226</sup> s 30(5)(c), containing the ground of impropriety based on unfairness was at issue.<sup>227</sup> The pre-Evidence Act cases appeared to exclude evidence on the ground of general unfairness but could not be relied upon, given the specific description of “obtained unfairly” in s 30(5). The Court found that its inclusion centred on the notion of ‘obtaining’, rather than on general impropriety.<sup>228</sup> Despite the ‘fairness’ of this ‘obtaining’, it considered it necessary to “look further to whether it was in fact the intention of the drafters of the Act to limit the considerations of unfairness only to the act of ‘obtaining’”,<sup>229</sup> and thus explored the common law.

The Court in *Fan* discussed three cases since the enactment of the Evidence Act in which the general discretion to exclude on fairness grounds was relied upon.<sup>230</sup> However, those cases had not explicitly considered whether the general discretion survived the Act, thus the Court felt the need to look further. Despite acknowledging that s 30 provides an obstacle to the argument that admitting the evidence is unfair (as opposed to the

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<sup>223</sup> *Fan*, above n 167, at [52].

<sup>224</sup> *Clarke*, above n 119.

<sup>225</sup> *Clarke*, above n 119, at [44]. This was based upon the opinion expressed in *Cross on Evidence*, 3613, EVA 57.9 rather than reference to sections 10 or 12, and thus avoided giving an explanation of the extent to which continual referral to case law would be helpful. This was considered in the context of section 57, which is analysed further in chapter six.

<sup>226</sup> *Fan*, above n 167.

<sup>227</sup> At [17]. Thus the Court of Appeal was tasked with determining whether to exclude evidence on grounds of unfairness.

<sup>228</sup> At [20]. It was the giving, rather than the receiving, which was at issue in this case (as it was alleged to have been unfair).

<sup>229</sup> At [23].

<sup>230</sup> At [28]; The three cases are *R v Petricevich* [2007] NZCA 325 at [18]; *R v Cameron* [2009] NZCA 87 at [41]; and *R v Simanu* [2011] NZCA 326.

argument that it had been unfairly obtained),<sup>231</sup> the Court subsequently found no indication from the Law Commission of an intention to exclude this common law discretion.<sup>232</sup>

The fundamental source of unease about when s 12 is enlivened is the lack of guidance as to what constitutes a perceived substantive gap, and when the common law could be used to fill this. Taking the view (as the Court did in *Fan*) that s 30 deals with unfairness grounds only in part, thus provoking recourse to the common law via s 12 to fill the gap, is questionable. That section deals with improperly obtained evidence, not the general concept of unfairness; hence its coverage of unfairness is arguably limited to that context. According to the Law Commission, “this is not the type of gap at which s 12 is targeted”.<sup>233</sup> However, the Act provides no clear qualification of exactly what type of ‘gap’ s 12 is aimed at, thus permitting its creative or direct misuse.

In *Fan*, given that the Court found s 30 could not be interpreted as including general unfairness, s 10(1)(c)(i) ought to have barred the conclusion that a general common law discretion to exclude evidence may remain.<sup>234</sup> Moreover *Fan*’s reliance on s 12 to endorse the continued existence of a part of the fairness discretion exemplifies the potential strength of s 12. Any viable interference with s 7(1) was not discussed, thus arguably placing s 12 on something of a pedestal above relevance.

In *Sheppard Industries Ltd v Specialized Bicycle Components Ltd* the Court of Appeal used s 12 to import a common law exception to the settlement negotiation privilege,<sup>235</sup> as

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<sup>231</sup> *Fan*, above n 167 at [29] and footnote 16 of that case; Donald L Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA30.10]; Richard Mahoney and others (2<sup>nd</sup> ed), above n 9, at [EV30.10(1)]; and Bruce Robertson (ed) looseleaf, above n 195, at [EA30.10].

<sup>232</sup> *Fan*, above n 167, at [30]. The Court mentioned the following two publications: NZLC R55, above n 4, at [105]; and Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1993) at [44], [56]. However it did not refer to the Law Commission *Police Questioning* (NZLC R31, 1994) which stated at 34 (with regard to the improperly obtained evidence rule) that “the rule provides for the exclusion of improperly obtained evidence” and that the “lack of clarity in the guiding principles behind the current fairness discretion (i.e. to exclude evidence on the ground of unfairness) has, therefore, been addressed by the proposed rule”. At 101 it stated “the new rule replaces the fairness discretion”. Had this clear statement been located, it may have been difficult to avoid.

<sup>233</sup> NZLC R127, above n 74, at 29.

<sup>234</sup> NZLC R127, above n 74, at 29.

<sup>235</sup> *Sheppard Industries Ltd v Specialized Bicycle Components Ltd* [2011] NZCA 346, [2011] 3 NZLR 620 at [15(c)].

a means to remedy a perceived problem with the scope of s 57 itself.<sup>236</sup> Again, this exemplifies the capacity for s 12 to be invoked to find a route back to the common law, with little guidance on when this actually is appropriate.

#### WHEN IS THE ACT SUFFICIENT?

It is not always clear whether parts of the Act were intended to exclude common law authorities. Justice Glazebrook's discussion in *R v Barlien* illuminates the difficulty of gauging the Select Committee's intentions regarding common law exceptions that were not included in the Act.<sup>237</sup> Judicial confidence in their own views, and those of judges who decided previous cases may, in instances of doubt, trump the will of the Parliamentarians who enacted the legislation. Excessive esteem for previous common law developments needs to be moderated more frankly.

My view of the cases on point echoes that of Mahoney and others. Care is needed to ensure that "wholesale reversion to the pre-2006 Act law does not occur".<sup>238</sup> This contradicts the intentions of the enactment to bring the law of evidence into a single, accessible source, and also clashes with substantive reforms within the Act. Moreover, if judges are not compelled to use the Act in its entirety, the statute and its purpose is undermined, in turn weakening its longevity. Already there have been "difficulties in accepting the Act as the sole governing body of law".<sup>239</sup> This is unsurprising, given that the Law Commission warned that significant reform proposed in codification would not achieve its purpose unless accompanied by a change in approach by the judiciary and practitioners.<sup>240</sup>

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<sup>236</sup> This is the view of the Law Commission, per NZLC R127, above n 74, at 29 at [2.40].

<sup>237</sup> *Barlien*, above n 178, at [36]. This is discussed in relation to recent complaint evidence in sexual offences, where a submission from the Law Society was not adopted, but no explanation was given by the Committee in its report. Similarly at [37] Glazebrook J discusses the lack of explanation for the non-inclusion of the *res gestae* exception.

<sup>238</sup> Mahoney and others (3<sup>rd</sup> ed), above n 97, at [EV10.03].

<sup>239</sup> This was also noted in Andrew Beck "Evidence Act of Civil Litigators" (New Zealand Law Society Continuing Legal Education, November 2012) at 7.

<sup>240</sup> NZLC R55, above n 4, at 3, [8].

## CONCLUSION

Together, ss 10 and 12 present a formidably accessible path to the common law. Naturally, provisions of this statute should allow for some organic growth to occur, but only so long as it is principled. Yet this is whimsical given the non-discernibility of the principles and purpose upon which this should be based. However, excessive and casual referral undermines the provisions of consistency of approach, predictability, and accessibility intended by the statute, and is contrary to the principled approach that the Act ought to achieve. The more that the focus is on the common law, the less weight and prominence the Act itself has as the main source of evidence law in New Zealand.

This is particularly so in relation to settlement negotiation privilege where the provisions of the Act are already overgrown by common law authorities whose persuasiveness is sustained.

## CHAPTER 5: THE CONCEPT OF ‘WITHOUT PREJUDICE’

### A. PUBLIC POLICY CONSIDERATIONS

Section 57 of the Evidence Act provides a statutory home for the common law concept of ‘without prejudice’.<sup>241</sup> Before analysing the particular functioning of s 57, it is helpful to discuss the rationale behind this concept.

The ‘without prejudice’ rule<sup>242</sup> is a key part of effective negotiation during settlement discussions. It was developed to allow parties “to go as far as possible in attempting to settle a dispute without the fear that their position may be compromised should settlement not be achieved”.<sup>243</sup> The term has different meanings in different contexts. Here it refers to the communication being made ‘without prejudice’ to the maker’s right to pursue or defend litigation as if the statement had not been made.<sup>244</sup> Put simply, parties should “be encouraged fully and frankly to put their cards on the table”.<sup>245</sup>

### DEEPER RATIONALES

Arguably, debate about the underlying basis of the ‘without prejudice’ construct “appears to be academic, because privilege rules have now been codified in the Evidence Act 2006”.<sup>246</sup> Although this statement acknowledges its undeniable existence as part of the evidence law regime, such commentary oversimplifies the statutory adoption of the concept, and fails to appreciate some ongoing practical difficulties and shortcomings.

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<sup>241</sup> That is to say, something being said without prejudice to the position of the speaker/writer if the terms he or she proposes are not accepted.

<sup>242</sup> *Rush & Tompkins v Greater London Council* [1989] AC 1280, 1299 per Lord Griffiths.

<sup>243</sup> Andrew Beck, “Litigation” [2010] NZLJ 411 at 413; see also from *Butler v Countrywide Finance Ltd* (1992 5 PRNZ 447) as discussed in Donna Buckingham ““Privilege and Confidentiality” (paper presented to the New Zealand Law Society “Evidence Act 2006” Intensive Conference, June 2007) 153 at 169.

<sup>244</sup> Discussed in Law Commission *Evidence Law – Privilege – A discussion paper* (NZLC PP23, 1994) at 65; cf the contractual context where a concession may be made ‘without prejudice’ to the maker’s rights to revert, at some future date, to the original position under the contract. Sometimes the expression may be made without any specific legal consequence at all, e.g. where a payment is made voluntarily, but ‘without prejudice’, in the vain hope that it might be reclaimed at some future time.

<sup>245</sup> *Scott Paper Co v Drayton Paper Works Ltd* [1927] 44 RPC 151, 156 per Clauson J in referring to dicta by Justice Robert Walker.

<sup>246</sup> Andrew Beck, “Litigation” [2010] NZLJ 411 at 413.

Thus the policy considerations still demand analysis, relevant to ascertaining the desired boundaries of the privilege.<sup>247</sup>

It is clear that the rule rests, at least in part, upon public policy.<sup>248</sup> In *Oceanbulk Shipping & Trading SA v TMT Asia Ltd*,<sup>249</sup> Lord Clarke of the Supreme Court (UK) followed Robert Walker LJ's finding in *Unilever plc v The Proctor & Gamble Co*,<sup>250</sup> the rule is partly based on the parties' express or implied agreement that "communication in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues".<sup>251</sup> Its other basis is the public policy focusing on "encouraging litigants to settle their differences rather than litigate them to a finish",<sup>252</sup> with the rationale that parties are more likely to make admissions and speak frankly if they can trust that nothing said will later be relied upon in court. This increases the likelihood of seeking to settle disputes by negotiation. The House of Lords in *Ofulue v Bossert* supported the findings in *Unilever* in 2009.<sup>253</sup>

Even aside from the reduced cost and delay associated with court proceedings, settlement has the potential to produce a solution that is superior to anything a court ruling can produce<sup>254</sup> because options for mutual gain can be explored. It is in the public interest

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<sup>247</sup> Note that some Courts prefer to describe the rule as one of 'admissibility' rather than as one of privilege (for example see *Rush & Tompkins*, above n 242). This is because the purpose is not to prevent a third party having access to communications (which most privileges are about), but rather it is the person to whom the statement is made who is generally the person seeking to tender it as evidence. For more discussion see Law Commission *Evidence Law – Privilege – A discussion paper* (NZLC PP23, 1994) at 67.

<sup>248</sup> *Cutts v Head* [1984] Ch. 290, 306 per Oliver LJ, who held that "the rule rests, at least in part, upon public policy is clear form many authorities ... it is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings."

<sup>249</sup> *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44.

<sup>250</sup> *Unilever Plc v The Procter & Gamble Co* [2001] 1 All ER 783 (CA).

<sup>251</sup> *Unilever Plc v Procter & Gamble Co* [1999] EWCA Civ 3027 (28 October 1999) at [17] per Robert Walker LJ. See also Lord Clarke in *Oceanbulk*, above n 249, observing Robert Walker LJ's comments in *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783 (CA); this was subsequently followed in *Ofulue v Bossert* [2009] AC 990, [2009] 3 All ER 93 (HL). This is discussed by Andrew Beck, "Litigation" [2010] NZLJ 411, at 413, where the author notes that "the courts that have discussed the matter in the past [and] have offered the two theories underlying the privilege as alternatives, depending upon the particular situation".

<sup>252</sup> *Rush & Tompkins*, above n 242, at 1299 per Lord Griffiths.

<sup>253</sup> *Ofulue v Bossert*, above n 253.

<sup>254</sup> Hon Justice McGechan "Miscellaneous" (seminar presented to New Zealand Law Society "Evidentiary Issues", July –August 1996) at 57.

that disputes are settled and litigation reduced to a minimum, so the policy factors favour enlarging the cloak under which negotiations may be conducted without prejudice. This policy is prompted by a “rigorous insistence on the absence of any magic in the form of words used by the parties, everything being made to depend upon their intention”.<sup>255</sup>

## **B. BALANCING WITH THE INTERESTS OF JUSTICE**

### THE NATURE OF RULES OF EVIDENCE

The concept of a privilege recognises that the public interest in protecting certain types of confidences can be more important than ensuring a court has all relevant evidence at its disposal. The rules of evidence differ from other rules of substantive law. They are directed towards “ensuring the fairness of the trial process, and are born from the concern that there are certain things that ought not to be heard by the decider of fact”.<sup>256</sup> Given the potential inability of the fact-finder, be it judge or jury, to separate what is relevant from what is not, some admissions are removed from consideration “lest they sully the decision-making process”.<sup>257</sup>

### THE POWER AND INTRUSION OF PRIVILEGES

However, the existence of privileges can interfere with the interests of justice. Jeremy Bentham ridiculed privileges, driven by the appreciation that they exclude reliable and particularly probative evidence, which hinders the acquisition of truth.<sup>258</sup> Similarly, these

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<sup>255</sup> DL Mathieson *Cross on Evidence* (5<sup>th</sup> New Zealand ed, Butterworths, 1996) at [10.44].

<sup>256</sup> Andrew Beck “Evidence Act of Civil Litigators” (New Zealand Law Society Continuing Legal Education, November 2012) at 1.

<sup>257</sup> At 1.

<sup>258</sup> Jeremy Bentham *Rationale of Judicial Evidence* (1827) vol 5 (Rothman & Co 1995) at 304, “What then, will be the consequence [of refusing to recognize a privilege]? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present.” See also Louisell “Confidentiality, Conformity and Confusion: Privileges in Federal Court Today” (1956) 31 TUL. L. Rev. 101, at 110 where the author notes that Anglo-American analysis proceeds from the premise that recognition of the privileges constitutes a perpetual threat to the ascertainment of truth in litigation.

concerns motivated Wigmore to assert that privileges should be given only narrow recognition.<sup>259</sup>

In the New Zealand context, such purist fears are overcome by the need to encourage out-of-court dispute resolution. Moreover, parties to a settlement each recognise the need for some degree of frankness and “disclosure *inter partes*, which generally transcends what would occur if the matter were fought out in Court”.<sup>260</sup> In seeking to reach a settlement, they relinquish some right that they might otherwise feel entitled to if the matter were litigated to conclusion.

#### CURBING THE ‘WITHOUT PREJUDICE’ CONSTRUCT

Ideally a privilege would be as broad as possible to encourage dispute resolution, yet not be so protective of evidence from admission when the interests of justice outweigh this interest. The privilege arising from the cloak of ‘without prejudice’ must not be abused for the purpose of misleading the court.<sup>261</sup> As Lord Griffiths in *Rush & Tompkins* noted and as more recent decisions illustrate, even in situations to which the without prejudice rule undoubtedly applies, “the veil imposed by public policy may have to be pulled aside” to disclose admissions, in cases “where the protection afforded by the rule has been unequivocally abused”.<sup>262</sup> Given that the courts respond to the rigours of the trial process, the law of evidence has developed incrementally to meet the needs of justice. Over time, an array of such circumstances demanding disclosure has been identified, including; to prove that a binding agreement has been reached and as evidence of the terms of that agreement;<sup>263</sup> to prove an act of bankruptcy;<sup>264</sup> to prove one party made a

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<sup>259</sup> J. H. Wigmore *Evidence in Trials at Common Law* 2291 (McNaughton rev. 1961) 8. Wigmore argued that privilege should *only* be recognized if the following four conditions were met; 1) communication made in confidence that it will not be disclosed; 2) confidentially is an essential part of satisfactorily maintaining the particular relationship; 3) the relationship is one which the community wishes to foster; 4) the injury to the relationship by compelled disclosure of the communications will outweigh the benefits gained for the correct disposal of the matter; see also David P. Leonard, above n 83, at 954.

<sup>260</sup> *AWA Limited v Daniels t/a Deloitte Haskins and Sells* 18 March 1992 SC of NSW Com. Div at p 7 per Rolfe J. His Honour referred to discussion by Williams J in *Vaughan Holdings Limited v Lyndsay* HC AK CP 318/97 8 February 1999; see also *Wicks v Waitakere City Council* (High Court, Auckland, CIV 2005-404-5146, 13 October 2006) per Rodney Hansen J.

<sup>261</sup> *Pitts v Adney* (1961) 78 WN (NSW) 886, at 889.

<sup>262</sup> *Rush & Tompkins*, above n 242, at 1300c; noted in *Unilever*, above n 252.

<sup>263</sup> *Tomlin v Standard Telephones & Cables Ltd* [1969] 1 WLR 1378; *Allison v KPMG Peat Marwick* (1994) 8 PRNZ 128.



threat to another party;<sup>265</sup> in relation to costs (often referred to as a ‘Calderbank Letter’);<sup>266</sup> to prove delay;<sup>267</sup> to identify handwriting;<sup>268</sup> and if exclusion would “mislead the court on issues which it must determine”.<sup>269</sup> Evidently, the words ‘without prejudice’ have never been conclusive<sup>270</sup> because, if they were, miscarriages of justice may be unduly protected.

The privilege attached to communications made without prejudice for the purpose of settling a dispute has always had uncertain boundaries.<sup>271</sup> Presumably, exceptions to the privilege should be made only when the interests of justice plainly outweigh the interest in conferring protection or where the absence of an exception would discourage settlement negotiation. Yet the Act’s lack of guidance on how to delicately balance these competing interests has left a problematic deficiency, casting doubt on the ongoing scope and function of the ‘without prejudice’ construct.

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<sup>264</sup> *In re Daintry, ex parte Holt* [1893] 2 QBD 116; *Re Conor (Debtors), ex parte Carter Holt Harvey Ltd* [1996] 1 NZLR 244.

<sup>265</sup> A threat that would be carried out if the settlement offer was not accepted, see *Rush & Tompkins*, above n 242, at 740.

<sup>266</sup> *Cutts v Head* [1984] Ch 290; *Calderbank v Calderbank* [1975] 3 All ER 333; High Court Rule 48G.

<sup>267</sup> *Walker v Wilsher* [1889] 23 QBD 335 (CA) at 338; *Consolidated Alloys (NZ) Ltd v Edging Systems (NZ) Ltd* [2012] NZHC 2818 (25 October 2012) at [16].

<sup>268</sup> *Waldridge v Kennison* (1794) 1 Esp 142.

<sup>269</sup> *Cedenco Foods Ltd v State Insurance Ltd* (1996) 10 PRNZ 142 (CA).

<sup>270</sup> See for example *South Shropshire District Council v Amos* [1986] 1 WLR 1271; *Buckinghamshire County Council v Moran* [1989] 2 WLR 152; *Telecom New Zealand Ltd v Sintel-Com Ltd* [2008] 1 NZLR 780, CA, at 784.

<sup>271</sup> Andrew Beck, “Litigation” [2010] 411, at 413.

## CHAPTER 6: SETTLEMENT NEGOTIATION PRIVILEGE

### AN ITERATION OF THE ISSUES WITH SECTIONS 10 AND 12 AND THE CODIFICATION ATTEMPT

“[C]omplex, confused, or incomplete laws create a sense of misrule, and can lead to complex, confused, or incomplete justice.”<sup>272</sup>

Section 57(1) creates a privilege for communications between parties attempting to settle a dispute.<sup>273</sup> Section 57(2) has the same effect in respect of a document prepared in connection with an attempt to settle a dispute. Evidence protected by s 57(1) and (2) is inadmissible under the Act, even though it is relevant.

The privilege is no longer absolute as was originally suggested by the Law Commission.<sup>274</sup> Section 57(3) sets out the statutory exceptions to the privilege. Subsections (a) and (b) cater for whether a dispute has been settled and the terms of such a settlement. Section 57(3)(c) provides for the situation where a party refuses the other

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<sup>272</sup> Dick Thornburgh, above n 59, at 2. The speaker went on to note, in the United States context, that we “cannot afford disparity in the application of criminal justice since it erodes the foundation of fairness on which a democratic system must be predicated.”

<sup>273</sup> See Appendix 2. Although I do not directly address the scenario of mediation, the cases on point are still relevant. Note that ‘settlement’ involves parley and bargaining between parties, in the hope of reaching agreement (Stephen Hooper, Peter Spiller and Ian Macduff *Negotiation* in Peter Spiller (ed) *Dispute Resolution in NZ* (Oxford University Press, Victoria, 1999) 23) whereas ‘mediation’ is a process involving an intermediary (Paul Hutcheson and Stephen Hooper *Mediation* in Peter Spiller (ed) *Dispute Resolution in NZ* (Oxford University Press, Victoria, 1999) 57); see also NZLC R127, above n 74, at 166. This point was noted in *Jung*, above n 278, at [37] and [40] where Heath J found that “a mediation fulfils much the same role as without prejudice settlement negotiations”; see also *Vaocluse*, above n 260, at 559, where the Court of Appeal found that “the whole point of mediation is to remove the process from litigation or arbitration and to ensure that anything said or done in a mediation does not later redound to the detriment of any party, should the mediation fail to achieve settlement”. See further discussion by Williams J in *Vaocluse*, above n 260, referring to *AWA Limited v Daniels t/a Deloitte Haskins and Sells* 18 March 1992 SC of NSW Com. Div Rolfe J at p 7.

<sup>274</sup> In NZLC PP23, 1994, above n 246, at 51, the Law Commission controversially recommended that settlement privilege be “qualified”, which would mean that the privilege could be overridden if the interests of justice outweigh the need for the privilege. Note that the provision contained no exceptions to the settlement negotiation privilege, on the basis that the common law exceptions were unclear in scope and effect (at 202). However in 1999 the Law Commission altered its view and concluded that litigation privilege should be made absolute (NZLC R55, above n 4, at 70). In the final version of the Law Commission’s draft code, the equivalent provision (to 57) contained a complete statement of the circumstances where the privilege “does not apply”; see NZLC R55, above n 4, at 58.

side's offer to settlement, thus forcing litigation to ensue. The idea is that the refusing party should be aware that their refusal would influence the judge's determination of costs.<sup>275</sup> These are the only exceptions set out under the section.<sup>276</sup>

In general, a lack of cases relating to a particular area of a statute seems to indicate that the statute has been well drafted. Conversely, the frequency of appeals, as has occurred under s 57, runs counter to the view that the law in a particular area is settled and suggests that its implementation was either unexpected, misunderstood, or calls for amendment. Accordingly, something about s 57 is causing trouble.

#### **A. COMPETING READINGS OF THE SCOPE OF SETTLEMENT NEGOTIATION PRIVILEGE**

There are two competing readings of s 57.<sup>277</sup> Either it is comprehensive or parts of the common law continue to be influential.

The first, stricter view is that while the common law had recognised limits to the without prejudice privilege, these were intentionally not all retained in s 57. Thus s 57 together with s 67 states the law exhaustively and appears to narrow the common law. Such a reading strongly protects the privilege, in that only exceptions listed in the Act are effective in overturning the privilege. In *Jung v Templeton*,<sup>278</sup> Heath J found that s 57 was complete and thus the common law could not dent the armour of the privilege.

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<sup>275</sup> This device is frequently used to promote settlements, see Bruce Robertson, looseleaf, above n 195, at [EA57.06].

<sup>276</sup> Note that the privilege can be waived only if all the persons who have that privilege agree; see Evidence Act 2006, s 65; discussed in *Jung*, above n 278, at [58]. The dilemma of how extensively to state the exceptions to such a privilege is shared at other common law jurisdictions. The Australian Evidence Act lists specific exceptions to the privilege under section 131 of its Evidence Act 1955 (Cth). However these exceptions have been criticised for creating further uncertainty, and thus undermining the purpose of the privilege itself: see Nina Khouri *Privilege for settlement negotiations and mediation: Law Commission acknowledges the elephant in the room* (17 May 2013) NZLawyer 14).

<sup>277</sup> Note that the High Court judges had differing views in two 2009 cases, within months of each other; *Clarke*, above n 119 and *Jung v Templeton* (HC Auckland CIV-2007-404-5383, 30 September 2009).

<sup>278</sup> *Jung v Templeton* (HC Auckland CIV-2007-404-5383, 30 September 2009).

According to Mahoney et al, the effect of codification is that “there is little room to argue for the continued existence of these earlier exceptions”.<sup>279</sup>

The alternative, broader, view is that s 57 does not comprise a definitive statement of the privilege; thus the common law exceptions on point continue to apply. Through use of ss 10 and 12, these exceptions are accessible and have been judicially grafted onto the Act. In support of this suggestion are *New Zealand Institute of Chartered Accountants v Clarke*, *Sheppard Industries*, *McCulloch v Quinn*, *Consolidated Alloys v Edging Systems*, and the views of Don Mathieson QC.<sup>280</sup>

Robert Walker LJ compiled a list of exceptions in *Unilever*,<sup>281</sup> which have since been considered the central exceptions to the settlement negotiation privilege, both in the United Kingdom<sup>282</sup> and in New Zealand.<sup>283</sup> More recently, the Law Commission acknowledged the common law exceptions in its 2013 Review.<sup>284</sup>

## **B. IDEAL PERSPECTIVE ON THE PRIVILEGE**

These two opposing views can be reconciled. The commentary to the draft Code made it clear that the “section [was] intended to state the existing law”.<sup>285</sup> This suggests both intended comprehensiveness but also no major reform of the old exceptions. How could the section, which does not list all the common law ‘exceptions’ to the privilege, be seen as comprehensive and consistent with the former state of the law? Accommodating both

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<sup>279</sup> Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (Brookers, Wellington, 2007) at 233 [EV 57.09]; cited in *Clarke* at [43] later in Richard Mahoney and others (2<sup>nd</sup>), above n 9, at [EV57.08], n 1489.

<sup>280</sup> *Clarke*, above n 119; *Sheppard Industries*, above n 150; *McCulloch v Quinn & Ors* [2012] NZHC 1850; *Consolidated Alloys (NZ) Ltd v Edging Systems (NZ) Ltd* [2012] NZHC 2818; Don Mathieson, looseleaf, above n 232, at [EVA57.9].

<sup>281</sup> *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436 (CA) at [23]. For examples of each of these exceptions, see Miranda Karali and Jacqueline Zalapa “Is it really without prejudice when settling a dispute?” *Lloyd’s List*, (Wednesday 22 December 2010), available at <www.clydeco.com>. In *Unilever* at [25], Robert Walker LJ justified these exceptions by reminding the Court that none of these exceptions to the public policy rule involve the disclosure of admissions that bear on the subject-matter in dispute.

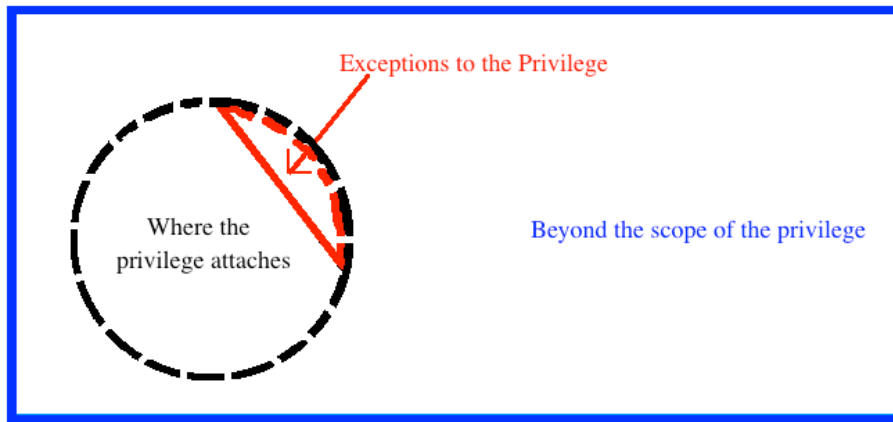
<sup>282</sup> *Oceanbulk*, above n 249, at [32]-[33], [46].

<sup>283</sup> In particular see *Sheppard Industries*, above n 150.

<sup>284</sup> NZLC R127, above n 74, at [10.40].

<sup>285</sup> NZLC R55, above n 4, at [C.247]-[8].

suggestions is feasible if such exceptions are thought of “not just as exceptions, but as instances beyond the true scope of the privilege”.<sup>286</sup>



This diagram shows the privilege as the dotted black circle. Its edge is not solid, as the limits of the privilege are uncertain. A segment of the privileged material is cut away (that in red) resembling situations where a privilege had attached (the requisite elements were met) however, for public policy reasons, admission of the privileged material is justified. These are true ‘exceptions’ to the privilege. The rest of the diagram, in blue, is beyond the scope of the privilege. Material (communications or documents) in this area cannot correctly be considered to be privileged. This will be because the elements necessary for the privilege to attach were not all present in the first place. In such instances the privilege never attached, and thus no ‘exception’ to it needs to be made. Such instances include, for example, when a communication is not intended to be confidential, or is not intended to settle a dispute.

Therefore rather than simply examining whether s 57 is comprehensive, I suggest a reconceptualization of the privilege and a change in approach that works to improve the law in this area, in line with the overarching goals of the Act.

The following table breaks down the elements of the privilege, its exceptions, and how the common law ‘exceptions’ are configured into the model of s 57:

<sup>286</sup> *Clarke*, above n 119, at [47], discussing the eight categories of exception listed in *Unilever* by Robert Walker LJ (none of which involved the disclosure of admissions bearing on the subject matter in dispute (*Unilever*, above n 250, at 793)).

|  |   |
|--|---|
| Elements of the <b>Privilege:</b>  | <ul style="list-style-type: none"> <li>• civil proceeding<sup>287</sup></li> <li>• communication<sup>288</sup> or document prepared<sup>289</sup></li> <li>• between parties to the dispute <ul style="list-style-type: none"> <li>– intended to be confidential</li> <li>– made in connection with an attempt to settle</li> </ul> </li> </ul> |
| Current so-called ‘exceptions’ under s 57(3): <ul style="list-style-type: none"> <li>• (a) terms of an agreement settling the dispute</li> <li>• (b) prove existence of agreement when its conclusion is at issue</li> <li>• (c) written offer made without prejudice as to costs, used for costs determination</li> </ul>   |   |
| Other common law exceptions, covered by s 57(3) <ul style="list-style-type: none"> <li>• where rectification is sought in respect of a settlement agreement</li> <li>• whether a concluded agreement has been reached;<sup>290</sup></li> <li>• to explain delay or apparent acquiescence;<sup>291</sup></li> <li>• whether the claimant acted reasonably in his conduct to mitigate loss;<sup>292</sup></li> <li>• where an offer is expressly made without prejudice except as to costs;<sup>293</sup></li> </ul>  | Accounted for s 57(3), subs: <ul style="list-style-type: none"> <li>(a)</li> <li>(b)</li> <li>(c)</li> <li>(c)</li> <li>(c)</li> </ul>  |
| Common law exceptions that exemplify instances beyond the scope of the privilege: <ul style="list-style-type: none"> <li>• to show an agreement should be set aside on grounds of misrepresentation, fraud or undue influence;<sup>294</sup></li> <li>• where exclusion of the evidence would act as a cloak from perjury, blackmail, or other ‘ambiguous impropriety’;<sup>295</sup></li> <li>• a statement acted upon that may give rise to an estoppel<sup>296</sup> (where the rest of a communication may be privileged, but this part is exempt).</li> </ul> | In these instances, no privilege ever attached. Such situations cannot correctly be deemed a genuine attempt to settle a dispute. Thus they are not truly ‘exceptions’ to the privilege.  |

<sup>287</sup> Note that the NZLC R127, above n 74, at 182, [R22] suggests s 57 be amended to also apply expressly to criminal proceedings. See Appendix 3, and also Cabinet Paper “Amendments to the Evidence Act 2006” (12 November 2013) CAB 100/2008/1 at [15]-[17].

<sup>288</sup> Evidence Act 2006, s 57(1).

<sup>289</sup> Evidence Act 2006, s 57(2).

<sup>290</sup> *Tomlin v Standard Telephones and Cables* [1969] 1 WLR 1378 is an example of this. As noted in *Muller v Linsley* (30 November 1994, 139 SJ LB 43), many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact that it admits, but simply in the fact that it was made. Thus correspondence of an agreement is admissible because the letters are irrelevant to the facts that were themselves admitted therein, but rather they’re relevant because of the offer and acceptance therein which replaces the cause of action previously disputed.

<sup>291</sup> *Walker v Wilsher* (1889) 23 QBD 335, at 338 per Lindley LJ, who limited it to the fact that “such letters have been written and the dates at which they were written”. It is just the fact of this, not their content. Only occasionally a fuller submission of evidence is needed to paint a fair picture to the court of the rights and wrongs of the delay.

<sup>292</sup> Discussed in *Muller*, a decision centred on discovery rather than admissibility. According to Hoffmann LJ, this was an issue removed from the truth or falsity of the statements, and thus fell beyond the principle of public policy protecting without prejudice communications.

<sup>293</sup> Recognized in *Cutts v Head*, above n 248 and in *Rush & Tompkins*, above n 242. It is based on the express or implied agreement between the parties.

<sup>294</sup> *Underwood v Cox* (1912) 4 DLR 66 is a striking illustration of this.

<sup>295</sup> Hoffmann LJ used the expression ‘unambiguous impropriety’ in *Foster v Friedland* 10 November 1992, CAT 1052. However the Court in *Unilever* warned that this should only be exercised in the clearest instances of abuse of a privileged occasion.

<sup>296</sup> This originates from the view of Neuberger J in *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178, 191.

All exceptions, not simply those at common law,<sup>297</sup> can be distinguished from situations in which the privilege simply does not attach or where it attached but has been waived. However, the courts do not always observe these linguistic distinctions.<sup>298</sup>

### C. PROBLEMATIC PRESENT APPROACHES

The Law Commission has observed that the courts have “sought ways to get around the limits of [s] 57” which are conceptually dubious, at best.<sup>299</sup>

Justice Keane’s assessment in *New Zealand Institute of Chartered Accountants v Clarke*<sup>300</sup> began hopefully, with his acknowledgement that the “Act is the starting point and may well be the end point”.<sup>301</sup> However, he suggested that the common law was needed to define the general scope of the privilege.<sup>302</sup> But reference back to the common law does not illuminate the intended scope of the statutory privilege.

*Clarke* and *Sheppard* present an unpropitious leap from describing exceptions to defining the breadth of the privilege. In *Sheppard*,<sup>303</sup> Arnold J relied on s 12 and *Clarke* to assert that there are other recognised exceptions to the rule that continue to apply,<sup>304</sup> thus

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<sup>297</sup> Don Mathieson QC (9<sup>th</sup> ed), above n 75, at 263, [EVA57.9]. The author suggests that generally, the common law exceptions that can be viewed as examples outside the true scope of the privilege, rather than as exceptions to it.

<sup>298</sup> This idea was discussed in the American context of psychotherapist-patient privilege law in Melissa L. Nelken “The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law” (2000) 20(1) Rev. Litig. 1 (The University of Texas School of Law Publications, Inc).

<sup>299</sup> NZLC R127, above n 74, at [10.54].

<sup>300</sup> *Clarke*, above n 119.

<sup>301</sup> *Clarke*, above n 119, at [38]. Moreover, his Honour found that it speaks for itself and is not to be read subject to the common law.

<sup>302</sup> *Clarke*, above n 119, at [49]. His Honour took the view that the scope of the privilege was not defined by subs (1) and (2).

<sup>303</sup> The key issue in *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346; [2011] 3 NZR 620 (26 July 2011) was whether or not the parties could contract out of s 57(3)(b) by providing that it does not apply for an oral settlement agreement reached through mediation. In that case it was unnecessary to confirm whether parties could contract out of the provisions of s 57.

<sup>304</sup> At [15].

rendering admissible evidence that would have been deemed to be privileged and inadmissible on a strict reading of s 57(1).<sup>305</sup>

In my view, s 12 is far from preserving the common law as a reservoir of additional rules to be called into command whenever convenient, as earlier discussions in chapter three have attempted to demonstrate. The clear process to follow before resorting to the common law was *not* followed in *Clarke* or *Sheppard Industries*.<sup>306</sup> It appears that s 12 was misused.

First, this area of settlement negotiation is already covered by the Act. Suggesting that the exceptions to the privilege not listed are gaps in the Act serves to misconstrue the function of s 12. Secondly, neither case ensured an alignment with the purpose and principles of the Act, as is required. Each decision effectively used the common law to amend the Act – a direction not anticipated by the drafters of the code and Bill. “Tucked away in a footnote, and made without the benefit of full argument or reasoning, a statement of this type can be left unremarked for many years until it is quoted in support of an argument.”<sup>307</sup> This misguidedly fosters unnecessary and unprincipled statutory reconfiguring.<sup>308</sup>

Moreover, Keane J’s problematic view that the Act itself permits reference to the common law<sup>309</sup> renders sections such as s 53(4), and even s 57(3) itself, redundant. As Mahoney has noted, “if we are still to recognise common law exceptions to s 57, why stop there?”<sup>310</sup> If such a process is acceptable in relation to settlement negotiation privilege, it could equally be permissible in relation to other listed rules and exceptions that, *prima facie*, seem comprehensive and complete. This negates the attempt to bring the law of evidence into a single, authoritative source.

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<sup>305</sup> At [15(c)].

<sup>306</sup> Andrew Beck, “Litigation” [2011] NZLJ 345 at 348.

<sup>307</sup> Andrew Beck, “Litigation” [2011] NZLJ 345 at 348.

<sup>308</sup> Somewhat ironically, the parties in *Sheppard*, above n 303, settled, thus forgoing the opportunity to have the matter considered by the Supreme Court.

<sup>309</sup> *Clarke*, above n 119, at [37] Keane J suggested that ss 10 and 11 [sic] allow the common law a definitive place.

<sup>310</sup> Richard Mahoney “Evidence” [2010] NZ L Rev 433 at 453. The author noted the following examples: adding to s 56(3)’s specific exception concerning the best interests of a child, or s 35’s previous consistent statement rule which could have the recent complaint doctrine reintroduced to it.



*Unilever* found that “even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions in cases where the protection afforded by the rule has been unequivocally abused”.<sup>311</sup> It is submitted that, in light of the Evidence Act, this approach is misleading. Each of the main exceptions mentioned in *Unilever* and *Sheppard* can be accounted for in the wording of s 57. If the situation cannot accurately fit the elements of s 57, then it is beyond the ‘true scope’ of the privilege. In this way, issues can be resolved without necessitating reference to the common law.

Although Parliament could have done so, it made no mention of retaining the existing common law exceptions. In contrast, s 53(5) expressly preserves the common law of legal professional privilege beyond the Act’s narrow focus of ‘proceedings’. As Keane J commented, if s 57 were intended to redefine the privilege at common law, to erect a more formal and nearly absolute privilege, “one would have expected it to say so very plainly”.<sup>312</sup> Thus, the scope of the privilege is as it was before, but modelled in a statutorily different way. To frame the question in terms of exceptions versus the rule obscures the issue, because it suggests that such discussions can occur once it is established that the privilege attached in the first place.

#### POTENTIAL BENEFITS FROM A GREATER FOCUS ON S 67?

Section 67(1) provides that a Judge *must* disallow a claim of privilege if satisfied that there is a prima facie case that the communication was made, or information compiled for a dishonest purpose, or to facilitate the commission of an offence.<sup>313</sup> Section 67(1) adopts the existing law, which excluded claims of professional privilege for

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<sup>311</sup> *Unilever*, above n 251, at [37].

<sup>312</sup> *Clarke*, above n 119, at [49].

<sup>313</sup> Evidence Act 2006, s 67. See Appendix 2. For example, if a threat were made during the negotiation, to commit perjury at the trial if the proposed settlement falls through, then the judge would be required to disallow the privilege because, per s 67(1), the threat is made for a dishonest purpose. Note also, subsection (2) gives the judge discretion to disallow the privilege to enable defendants in a criminal proceeding to present an effective defence.

communications intended to further the commission of a crime or fraud and extends this to all privileges.<sup>314</sup>

In *Clarke*, Keane J noted that hypothetically, if the erroneous ‘CA’ signature had been privileged, he would still not have set aside the privilege under s 67(1) because “[a]t most, use of the designation could only have brought to the letter a dishonest purpose”.<sup>315</sup> The majority in *Bradford & Bingley* found the mere possibility that the party who makes the admission during negotiations may commit perjury by giving contradictory testimony at trial is not enough to destroy the privilege.<sup>316</sup> This suggests that some abuse of the privileged occasion itself is required before the privilege is lost.<sup>317</sup> Although its application to privilege settlement negotiations seems limited, s 67 ought to be considered instead of importing common law exceptions en masse that include situations such as fraud, perjury, or blackmail for which s 67 may already account.

#### D. PRACTICAL REALITIES

At present, a penumbra of uncertainty surrounds the privilege – a likely deterrent for practitioners contemplating a settlement process. Moreover there are fears that in the absence of common law to follow, the privilege may be unable to keep up to date with public policy developments.<sup>318</sup> My reconceptualisation of s 57 addresses these concerns.

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<sup>314</sup> NZLC R127, above n 74, at 356; see also NZLC R55, above n 4, at [321]. Note that ‘dishonest purpose’ is not defined in the Act. The cases suggest that it generally refers to situations beyond simply dishonesty, to include “all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances”; see *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553 (Ch) at 565; For further discussion, consider *Rollex Group (2010) Ltd v Chaffers Group Ltd* [2012] NZHC 1332, [2012] NZAR 746 at [32]-[33] per Kós J; *Cityside Asset Pty Ltd v I Solution Ltd* [2012] NZHC 3162, [2013] 1 NZLR 722; and *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming* [1995] 2 AC 378 (PC); discussed in Mahoney and others 2014 at 335-6, [EV67.02]. Note also, subs (1) covers the common law ‘crime/fraud’ exception, discussed in *The Queen v Cox* (1884) 14 QBD 153 (Cr C R); see also Mahoney and others (3<sup>rd</sup> ed), above n 97, at [EV67.02].

<sup>315</sup> *Clarke*, above n 119, at [54].

<sup>316</sup> *Bradford & Bingley v Rashid* [2006] UKHL 37; [2006] 1 WLR 2066 (HL) at [65].

<sup>317</sup> Richard Mahoney “Evidence” [2006] NZLR 717 at 723. Therefore, falsely designating CA status might constitute an offence, but s 67(1) appeared to envisage an offence prompted by the communication itself.

<sup>318</sup> Andrew Beck “Litigation” [2010] NZLJ 411 at 414. The author notes that the flexibility of the common law is valuable in a situation of this nature, where rules have been developed on a public interest basis. In light of the Act, New Zealand courts would not be able to adopt the

## MAXIMISING THE PRIVILEGE'S EFFECTIVENESS

Parties may become reluctant to wholeheartedly engage in any settlement process “if it becomes just another step in the legal wrangle regarding their dispute – particularly when the process is designed to provide an alternative to that route”.<sup>319</sup> The messier the law is in this area, the more dramatically the rationale of the privilege is undercut.

Realistically, discussions between parties' representatives may contain a concoction of admissions, half-admissions against one's interests, assertions of a party's case, offers, counter-offers, and statements about future plans that may be characterised as threats or merely as ‘thinking aloud’. As Simon Brown LJ put it, in the course of argument, “a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution”.<sup>320</sup> Some privileges, such as legal adviser-client privilege,<sup>321</sup> have few exceptions because the policies served by the privilege are embodied in the limiting definition of the privilege itself. To a lesser extent, the same is true for s 57. It is worth remembering that s 57 was originally intended by the Law Commission to be absolute,<sup>322</sup> thus caution is advised before new exceptions are recognised. If Parliament had been concerned about permitting greater flexibility, it could have provided for more so-called exceptions. The better approach is to conduct proceedings in accordance with s 57, in order to have a valid claim to privilege.<sup>323</sup>

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approach taken in *Oceanbulk*, above n 249. The author alludes to the proposition that, in this regard, the codification of evidence rules may not be a good idea.

<sup>319</sup> Mark Beech *Mixing with the grown ups* at <[www.nzlawyermagazine.co.nz](http://www.nzlawyermagazine.co.nz)> at 2; See also Nina Khouri (17 May 2013), above n 276 at 12. The author found that the fact that “the protection can no longer be described as absolute has become like an elephant in the room; most lawyers and mediators are now aware that those limits are there, but avoid addressing them because they are complex and uncertain, and because focussing on them can undermine the spirit of the mediation”.

<sup>320</sup> *Unilever* at [22] per Robert Walker LJ, discussing comments by Simon Brown LJ.

<sup>321</sup> Evidence Act 2006, s 54. See Appendix 2.

<sup>322</sup> NZLC R55, above n 4, at [261].

<sup>323</sup> For further advice on how practitioners should treat this, see Nina Khouri “Privilege for settlement negotiations and mediation: Law Commission acknowledges the elephant in the room” *NZLawyer* (12 July 2013) at 13.

The Act arguably limits the organic development of the privilege. Comparatively, this is highlighted by *Oceanbulk Shipping & Trading*<sup>324</sup>, where the United Kingdom Supreme Court surveyed the boundaries of the privilege. In assessing whether a new exception should be generated, Lord Clarke JSC referred to the list of exceptions to the privilege compiled by Robert Walker LJ in *Unilever*.<sup>325</sup> This put the issue in context of other exceptions already permitted. The Court found that a further exception should be recognised, so that contracts where negotiations had been conducted on a ‘without prejudice’ basis would require the same interpretation exercise. A New Zealand court might consider itself unable to take such an approach, if no supplementary exceptions are permitted. The law on point could be regarded as frozen.

However, s 57 itself contains strong guidance as to its appropriate future use, thus there is no need to attempt to remain ‘up to date’ with overseas developments of the privilege. The Act is not a code, but where it needs to develop, this can be done by judges looking forward, rather than sideways. The expansion of further discrete exceptions should not be encouraged given that free and frank discussion is such an important ingredient in the recipe for out-of-court dispute resolution.<sup>326</sup>

## CONCLUSION

In *Cutts v Head*,<sup>327</sup> Fox LJ noted that the scope of the purely convention-based ‘without prejudice’ rule depends upon customary usage, which is not immutable. This suggests that it may *never* be appropriate to attempt a definitive statement of the scope of the rule.<sup>328</sup> Instead, viewing the elements of the privilege as defined, and the exceptions to this as limited, is a more practical outlook that has better longevity.

A misguided reading of s 57 is aggravated by ss 10 and 12, which makes it all too easy for judges to resort to what they are familiar with rather than persist with the process of plain statutory interpretation. It is not that s 57 has loose or suboptimal wording but

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<sup>324</sup> *Oceanbulk*, above n 249.

<sup>325</sup> See *Unilever*, above n 251, at [23], discussed in *Oceanbulk*, above n 249, at [31].

<sup>326</sup> A similar idea was echoed in *Unilever*, above n 251, at [41].

<sup>327</sup> *Cutts v Head*, above n 248, at 316.

<sup>328</sup> In *Unilever*, above n 251, at [19], citing Hoffman J in *Muller*.

rather than its simplicity of approach was unexpected.<sup>329</sup> Therefore, s 57 needs to be read in this way to give assurance that settlement negotiation privilege can still adequately operate for parties, without undermining the incentives of entering settlement negotiations.

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<sup>329</sup> The Law Commission's suggestion to implement a code implied that the section would be fully detailed and comprehensive, however *prima facie*, this was not the case. Furthermore, as a code was not produced (see earlier discussion in chapter two) a reassessment of expectations is necessary.

## CHAPTER 7: WHERE TO FROM HERE?

### LAW COMMISSION RECOMMENDATIONS

#### I. THE PERIODIC REVIEW MECHANISM

The Act requires the Law Commission to conduct a review every five years to “help ensure it is working as intended and that it remains up-to-date”.<sup>330</sup> Such a feature is rare,<sup>331</sup> indicating that enacting an Evidence Act was far from effortless and that the possibility of some transitional problems was recognised.<sup>332</sup>

In 2006, Sir Geoffrey Palmer observed that there is a “direct and dynamic relationship between pre-legislative and post-legislative scrutiny”.<sup>333</sup> The mechanism alludes to the inevitable difficulty associated with an attempt to codify common law. Christopher Finlayson MP reported that, given it was the first time in a century that there had been a comprehensive reform of the Evidence Act, providing for periodic review was necessary.<sup>334</sup>

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<sup>330</sup> Cabinet Paper “Amendments to the Evidence Act 2006” (12 November 2013) CAB 100/2008/1 at [7]. Note that the Law Commission was considered to be the appropriate body to undertake these reviews, (CAB 100/2008/1 at [24]). It has been the Law Commission’s duty to keep watch over the Acts of Parliament, recommending correction where judicial interpretation reveals omission or ambiguity, and to suggest renovation and repair of the law. For more discussion on the role of a Law Commission in an institutionalized setting, see Indiana Law at 365 Leslie George Scarman, above n 15.

<sup>331</sup> The following are the only New Zealand Acts containing a mechanism for review: Walking Access Act 2008, s 80 (Minister must review Act); Veterans’ Support Act 2014, s 282 (Review of operation of Act); Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, s 56 (Review of the Act); Motor Vehicle Sales Act 2003, s 163 (Review of operation of Act); Psychoactive Substances Act 2013, s 106 (Ministry must review Act); Members of Parliament (Remuneration and Services) Act 2013, s 67 (Review of Act); Canterbury Earthquake Recovery Act 2011, s 92 (Annual reviews of Act); Plumbers, Gasfitters, and Drainlayers Act 2006, s 187 (Review of Act). The following have review mechanisms for isolated parts of the legislation; Interpretation Act 1999, s 28 (Review of this Part 4 –Application of Legislation to the Crown); Food Act 2014, s 138 (Review of Operation of s 137; The Intelligence and Security Committee Act 1996, s 21 (Requirement to hold periodic reviews in accordance with the terms of reference specified under s 22(3)(a)).

<sup>332</sup> Moreover the mechanism acknowledges the historic difficulty in updating legislation, bearing in mind the legislative history of the Evidence Act, “which was first enacted in 1908 then amended three or four times...” see (23 November 2006) 635 NZPD 6638.

<sup>333</sup> Geoffrey Palmer address, above n 3, at [101]. The author suggested consideration should to be given to imposing some requirements in both phases, to avoid the common syndrome ‘we have a problem, let’s pass a law’.

<sup>334</sup> (28 June 2007) 640 NZPD 10334, per Christopher Finlayson MP. He noted the balance between ensuring the new legislation is kept up to date, whilst warning against regular

The 2013 Cabinet Paper gives explicit reasons why five-yearly reviews are appropriate and required.<sup>335</sup>

- the extensive nature of the 2006 reforms;
- the short existence of the Act, with several provisions yet to be considered by the higher courts;
- that many provisions are still being monitored by the Law Commission; and
- “the need to maintain a single source of evidence law”.<sup>336</sup>

## II. PROPOSED AMENDMENT TO SECTION 57

Following its 2013 Review, the Law Commission recommended that a subsection be inserted into s 57(3) to permit a court to order disclosure if it deemed the interests of justice to outweigh the need for the privilege.<sup>337</sup>

Cabinet has accepted this recommendation as part of a planned amendment to the legislation,<sup>338</sup> so that the privilege for settlement negotiations and mediation would be subject to an overriding judicial discretion to disallow. Yet the Law Commission gives no examples of when this would be appropriate. The Cabinet Paper merely acknowledges that the Law Commission considers this amendment would provide clarity, given that the present confined circumstances where the privilege does not apply have “created problems for the courts and the position remains unclear”.<sup>339</sup> Admittedly, it would be illogical to keep updating the statute every time more exceptions are grafted onto the privilege, as this would be feverishly expensive to administer. However, there is no explanation for how the Commission’s recommendation would in fact bring clarity.

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amendments as soon as a case arises on a particular aspect; “In other words, the legislation will need to have time to settle down.”

<sup>335</sup> CAB 100/2008/1, above n 332, at [23]. It was produced subsequent to the Law Commission’s R127 Review, above n 74. .

<sup>336</sup> At [23.4].

<sup>337</sup> NZLC R127, above n 74, at 182, [R22]. See Appendix 3.

<sup>338</sup> CAB 100/2008/1, above n 332, at 16, discussed is with respect to settlement discussions of mediations in civil cases. As to whether this change is imminent, observe that the recommended change to s 57 is part of an Evidence Amendment Bill that is only at Priority 6 (Drafting Instructions to Parliamentary Counsel Office) on the 2013 Legislative Programme; see cabinet paper at [5].

<sup>339</sup> Cabinet Paper 2013 at 16, Appendix 1.

Moreover, no explicit mention is made of what the ‘interests of justice’ means. It could simply be interpreted by regarding the ordinary meaning of the words in light of their context and the objects and purpose of the statute,<sup>340</sup> but this would leave its scope dangerously flexible. Although the proposed discretion may limit the misuse of ss 10 and 12, it may also lead to a haphazard addition of exceptions, as the previous (or developing) common law exerts its familiar pull. There is a stark difference between permitting principled development as opposed to the default importation of varying precedents from prior New Zealand cases and other jurisdictions.

The Law Commission admitted that there “will continue to be legitimate circumstances outside those in s 57(3) where the interest in admitting evidence from settlement negotiations will outweigh the interest in upholding the privilege”.<sup>341</sup> However, no distinction is made between exceptions to the privilege and situations beyond its scope. It would have been more helpful if the Commission had included specific direction on the exercise of this judicial discretion

If a new ‘exception’ needs to be carved from the scope of the privilege, it should be left to Parliament to do so. The present three exceptions under subs (3) are submitted to be sufficient. The problems with the section, shown by the cases, are largely due to a misplaced fear that old common law exceptions are simply ignored. If a reconfiguration of the approach to the privilege that this dissertation has explored is understood and accepted, these fears ought to subside, as the benefits of settlement negotiation privilege would be adequately safeguarded.

### III. WHERE DOES THIS LEAVE SECTIONS 10 AND 12 AND THE RELATIONSHIP BETWEEN THE ACT AND THE COMMON LAW?

In its 2013 Review, the Law Commission agreed with Elisabeth McDonald’s observation that it is difficult to see how the addition of reference to the common law was necessary.<sup>342</sup> Moreover, the mandatory form in s 12 presents an invitation to judges to

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<sup>340</sup> *Policy Paper on the Interests of Justice* (September 2007 Reference ICC-OTP) at 4, <[www.icc-cpi.int](http://www.icc-cpi.int)>; See also Vienna Convention on the Law of Treaties, art 31.

<sup>341</sup> NZLC R127, above n 74, at 172, [10.54].

<sup>342</sup> Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 16; discussed NZLC R127, above n 74, at [2.64].



refer to the case law to solve evidential issues in an “almost automatic reaction”, and place heightened reliance on the common law to achieve justice in a particular case, “or to avoid a problem with a particular provision of the Act”.<sup>343</sup>

However, despite these clear issues, the Law Commission did not recommend any alteration to ss 10 and 12,<sup>344</sup> for three central reasons.

First, it found that “mostly the courts have adopted an appropriate interpretation of s 10”.<sup>345</sup> Although this is accurate, it leaves unanswered the unremitting issues surrounding the meaning of the ‘common law’, the distortion of ‘new technology’, and the legal fiction in the determination of Parliament’s intent.<sup>346</sup>

Secondly, the Commission found that in most cases the problems with ss 10 and 12 are because “the court has struggled with the interpretation of a substantive provision”.<sup>347</sup> Taking this approach suggests that solving the issues with s 57 would remove the need to amend ss 10 and 12. However, even if s 57 is read in the way I have proposed, this still leaves ss 10 and 12 as a gateway to the common law that is very tempting and all too easy for judges to pass through. Arguably they will not have the desire to do so, (given the clarified scope of s 57), however the possibility still exists as suggested by the Supreme Court which asserted that “[t]he experience of the common law should not ... be completely ignored” in determining relevance under s 7, an issue pertaining to all evidentiary issues.<sup>348</sup>

Thirdly, the Law Commission took the view that there has not yet been enough judicial consideration of s 12 to assess the extent of any difficulties. It suggested that problems are “most likely to arise in assessing what amounts to a ‘gap’ under the provisions”.<sup>349</sup>

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<sup>343</sup> NZLC R127, above n 74, at [2.64].

<sup>344</sup> At [2.65].

<sup>345</sup> At [2.65].

<sup>346</sup> As discussed above in chapter three.

<sup>347</sup> NZLC R127, above n 74, at 34 [2.65]

<sup>348</sup> *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11, (2009) 24 CRNZ 731 at [25]

<sup>349</sup> NZLC R127, above n 74, at 34 [2.65] as is illustrated by *Fan*. It considered that in that case, the Court used s 12 to revive “what it considers to be a useful pre-existing rule”. However, if such an approach is taken, usefulness is a justification that can be emulated in many courts at the expense of treating the Act as applicable sufficient.

Clearly, s 12 was included for the unforeseen case, rather than instances where a provision is silent on a previously existing rule of common law.<sup>350</sup>

Undeniably, there is an issue with the wording of a provision dealing with a question ‘only in part’, which facilitates the reintroduction of admissibility rules on which the Act appears to be silent. However, silence can be intentional, as for example under s 57. If this were not so, then the drafters’ intentions to reconceptualise the law in a given area, without altering it substantively, could always be undermined. This need not be the case.

Nonetheless, the Law Commission found that “a gap-filling provision for the unforeseen case is desirable” despite the potential for misuse and detracting from the ideals of an all-encompassing Act.<sup>351</sup> It seems as though the Commission surrendered to the ongoing difficulty of limiting judicial access to common law authorities, as there are “other routes for judges to employ pre-existing common law rules”, such as the weaknesses of the purpose and principles.<sup>352</sup> “Changes to ss 10 and 12 would [in its view] only result in the amendment of one of those routes.”<sup>353</sup> Thus its preference is to retain the current wording at this time, and to keep the provisions under monitoring and review over the next five years.<sup>354</sup>

That said, the Commission admitted that amendment to both ss 10 and 12, to revert to the form originally proposed by the Law Commission, would serve a useful signalling purpose.<sup>355</sup> Yet as this suggestion is not sanctioned, nothing in the statute gives notice to the judiciary that the overuse of common law authorities ought not to continue.

On the contrary, this practice has the potential to persist, especially with cases such as *Clarke* and *Sheppard* setting a trend of allowing the common law to proliferate at the expense of the Act. Arguing that there is a gap in the Act to be filled by reference to s 12

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<sup>350</sup> At [2.66].

<sup>351</sup> At [2.67].

<sup>352</sup> At [2.67]. As commentators have noted, and I have discussed, the purpose and principles in ss 6-8 are sufficiently flexible to accommodate much of the common law; see also Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2<sup>nd</sup> ed, Brookers, Wellington, 2010) at [EV10.03].

<sup>353</sup> NZLC R127, above n 74, at 34 [2.67].

<sup>354</sup> At [2.67]. See Appendix 3.

<sup>355</sup> At [2.67].

provides an easier route to what is familiar, rather than taking the particular substantive section at face value. Perhaps by the time of the next five-yearly review, the prevailing law may have gone beyond the limits of perspicuity, such that neither the exploration of cause nor any thorough explanation may help. This is detrimental. It stokes the fire of ‘satellite litigation’,<sup>356</sup> leaving the Act in a *mélange* with former common law authorities.

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<sup>356</sup> Nina Khouri, (17 May 2013), above n 276. The author gives this name to litigation about litigation.

## CONCLUSION: ADDRESSING THE DISSATISFACTION

This dissertation has detected the dissonance that occurred when anticipations of the Law Commission's proposal, the draft Bill, and the eventual use of the Act failed to align. As Heath J observed in *Jung*; "It is possible that a problem has arisen because Parliament modified the recommendations of the Law Commission".<sup>357</sup> The Law Commission was only established in 1985, just three years before being tasked with an overhaul of the evidence law.<sup>358</sup> While aspirational in its approach, it was perhaps naïve about the effect of claiming that a codification of the law of evidence would eventuate.

Underlying this, a systemic issue may persist between law reform drafters and those in Parliament who do not carry forward all the suggested changes, but are not obliged to give explanations. Added to this difficulty, this dissertation has identified the judicial tendency to veer back to the common law as a familiar authority upon which to rely. Consideration of ss 10 and 12 appears to be merely ritualistic as these sections themselves provide a permeable barrier to resorting to common law authorities. In fact it is a route by which to return. As I have shown, what eventuated was not a code and no amount of wishing will make it so. Mislabelling it as such will only serve to heighten expectations and augment confusion upon realisation that it is not a code.

Judges must accustom themselves to not only beginning with the Act, but also actually staying with it wherever possible. Despite the comments in *Barlien* and *Hart*,<sup>359</sup> judges are slipping into references to the pre-existing common law, beyond what the Law Commission, drafters, and Parliament appear to have envisaged. Unless a new approach is adopted this trend will continue, burying the Act in a quilted overlay of cases, old common law precedents and case law from foreign jurisdictions, thus ironically reinvigorating the very issues that prompted the Act's initial conception. The common law's continuing influence derogates from the indigenous effort to start afresh that was a hallmark of the 2006 legislation.

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<sup>357</sup> *Jung*, above n 278, at [60].

<sup>358</sup> It was established by the Law Commission Act 1985; see also NZLC PP14 1991, above n 6, at ii.

<sup>359</sup> *Barlien*, above n 178, and *Hart*, above n 181. See earlier discussion in Chapter 4.

Driven by the desirability of promoting settlement as a means of resolving disputes extra-judicially, I have examined whether s 57 is functioning adequately. Rather than incorporate a new subsection under s 57(3), adopting the suggested reconceptualisation of s 57 would address the present disconnect between the clear wording of the section and its application by the courts which gravitate towards the old common law. Section 57 is the foremost provision prompting ss 10 and 12 to be engaged. Therefore, if its difficulties are overcome, then the major generator of excessive access to the common law will subside.

At a broader level, this proposed reconceptualisation gives hope to the idea that a code could legitimately induce a fresh start for the law and provide the “opportunity of a clean slate [that] should be grasped”.<sup>360</sup> Both dispelling the existing confusion surrounding the Act’s relationship with the common law, and rebutting the assumption that the common law continues to be persuasive alongside the act are necessary steps towards ensuring that the Evidence Act fulfils the original goals it endeavoured to accomplish.<sup>361</sup> In turn, this helps to negate the apparent discomfort with codification in the New Zealand law realm.

If not, then at least ss 10 and 12 should only be turned to as a last resort, after having thoroughly examined the Act in the hope that it may suffice, rather than instinctively searching for ways back as the introductory quote arguably demonstrates.

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<sup>360</sup> *Messenger v Stanaway Real Estate Limited* CIV-2012-404-7205, [2014] NZHC 2103 at [20]. See also *Body Corporate 191561 v Argent House Ltd* (2008) 19 PRNZ 500 (HC) at [31].

<sup>361</sup> NZLC R104, above n 24, at [8.16].

## APPENDIX 1: COMPARISON OF PROVISIONS

|            | Draft Code Provisions  | Evidence Bill Provisions  | Evidence Act 2006 Provisions   |
|------------|--|---|--|
| Section 10 | <p><b>Section 10 Code to be liberally construed</b></p> <p>C64 This section is a reminder that it is to the purpose and principles of the Code, rather than to the common law, that judges and lawyers should look for answers to evidential issues.</p> | <p><b>10 Interpretation of Act</b></p> <p>(1) This Act –</p> <p>(a) must be interpreted in a way that promotes its purpose and principles; and</p> <p>(b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but</p> <p>(c) may be interpreted having regard to the common law, but only to the extent that the common law is consistent with –</p> <p>(i) its provisions; and</p> <p>(ii) the promotion of its purpose and its principles; and</p> <p>(iii) the application of the rule in <b>section 12</b></p> <p>(2) Subsection (1) does not affect the application of the Interpretation Act 1999 to this Act.</p> | <p><b>10 Interpretation of Act</b></p> <p>(1) This Act—</p> <p>(a) must be interpreted in a way that promotes its purpose and principles; and</p> <p>(b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but</p> <p>(c) may be interpreted having regard to the common law, but only to the extent that the common law is consistent with—</p> <p>(i) its provisions; and</p> <p>(ii) the promotion of its purpose and its principles; and</p> <p>(iii) the application of the rule in section 12.</p> <p>(2) Subsection (1) does not affect the application of the Interpretation Act 1999 to this Act.</p>  |
| Section 12 | <p><b>12 Evidential matters not provided for</b></p> <p>Matters of evidence that are not provided for by this Code are to be determined consistently with the purpose and principles of this Code.</p>   | <p><b>12 Evidential matters not provided for</b></p> <p>If there is no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part, decisions about the admission of that evidence –</p> <p>(a) must be made having regard to the purpose and principles set out in section 6 to 8</p> <p>(b) to the extent that the common law is consistent with the promotion of that purpose and those principles and is relevant to that decisions to be taken, must be made having regard to the common law.</p>   | <p><b>12 Evidential matters not provided for</b></p> <ul style="list-style-type: none"> <li>• If there is no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part, decisions about the admission of that evidence— <ul style="list-style-type: none"> <li>○ (a) must be made having regard to the purpose and the principles set out in sections 6, 7, and 8; and</li> <li>○ (b) to the extent that the common law is consistent with the promotion of that purpose and those principles and is relevant to the decisions to be taken, must be made having regard to the common law</li> </ul> </li> </ul> |

## **APPENDIX 2: SELECTED PROVISIONS FROM THE EVIDENCE ACT 2006**

### **6 Purpose**

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.

### **7 Fundamental principle that relevant evidence admissible**

(1) 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.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

### **8 General exclusion**

(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.

### **10 Interpretation of Act**

(1) This Act—

- (a) must be interpreted in a way that promotes its purpose and principles; and
- (b) is not subject to any rule that statutes in derogation of the common law should be strictly construed; but
- (c) may be interpreted having regard to the common law, but only to the extent that the common law is consistent with—

- (i) its provisions; and
  - (ii) the promotion of its purpose and its principles; and
  - (iii) the application of the rule in section 12.
- (2) Subsection (1) does not affect the application of the Interpretation Act 1999 to this Act.

## **12 Evidential matters not provided for**

If there is no provision in this Act or any other enactment regulating the admission of any particular evidence or the relevant provisions deal with that question only in part, decisions about the admission of that evidence—

- (a) must be made having regard to the purpose and the principles set out in sections 6, 7, and 8; and
- (b) to the extent that the common law is consistent with the promotion of that purpose and those principles and is relevant to the decisions to be taken, must be made having regard to the common law.

## **12A Rules of common law relating to statements of co-conspirators, persons involved in joint criminal enterprises, and certain co-defendants preserved**

Nothing in this Act affects the rules of the common law relating to—

- (a) the admissibility of statements of co-conspirators or persons involved in joint criminal enterprises; or
- (b) the admissibility of a defendant's statement against a co-defendant in circumstances where the defendant's statement is accepted by the co-defendant.

Section 12A: inserted, on 4 July 2007, by section 5 of the Evidence Amendment Act 2007 (2007 No 24).

## **27 Defendants' statements offered by prosecution**

(1) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant, but not against a co-defendant in the proceeding.

(2) However, evidence offered under subsection (1) is not admissible against that defendant if it is excluded under section 28, 29, or 30.

(3) Subpart 1 (hearsay evidence), subpart 2 (opinion evidence and expert evidence), and section 35 (previous consistent statements rule) do not apply to evidence offered under subsection (1).

(4) To avoid doubt, this section is subject to section 12A.

Section 27(4): added, on 4 July 2007, by section 6 of the Evidence Amendment Act 2007 (2007 No 24).

## **35 Previous consistent statements rule**

(1) A previous statement of a witness that is consistent with the witness's evidence is not admissible unless subsection (2) or subsection (3) applies to the statement.



(2) A previous statement of a witness that is consistent with the witness's evidence is admissible to the extent that the statement is necessary 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.

(3) A previous statement of a witness that is consistent with the witness's evidence is admissible if—

(a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and

(b) the statement provides the court with information that the witness is unable to recall.

#### **54 Privilege for communications with legal advisers**

(1) 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.

(2) In this section, **professional legal services** means, in the case of a registered patent attorney or an overseas practitioner whose functions wholly or partly correspond to those of a registered patent attorney, obtaining or giving information or advice concerning intellectual property.

(3) In subsection (2), **intellectual property** means 1 or more of the following matters:

(a) literary, artistic, and scientific works, and copyright:

(b) performances of performing artists, phonograms, and broadcasts:

(c) inventions in all fields of human endeavour:

(d) scientific discoveries:

(e) geographical indications:

(f) patents, plant varieties, registered designs, registered and unregistered trade marks, service marks, commercial names and designations, and industrial designs:

(g) protection against unfair competition:

(h) circuit layouts and semi-conductor chip products:

(i) confidential information:

(j) all other rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.

#### **57 Privilege for settlement negotiations or mediation**

(1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of 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.
- (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of 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.
- (3) This section does not apply to—
- (a) the terms of an agreement settling the dispute; or
  - (b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or
  - (c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer that—
    - (i) is expressly stated to be without prejudice except as to costs; and
    - (ii) relates to an issue in the proceeding.

Compare: 1908 No 89 Schedule 2 r 48G

## **65 Waiver**

- (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
- (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
- (3) A person who has a privilege waives the privilege if the person—
  - (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
  - (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.
- (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.
- (5) A privilege conferred by section 57 (which relates to settlement negotiations or mediation) may be waived only by all the persons who have that privilege.

## **67 Powers of Judge to disallow privilege**

- (1) A Judge must disallow a claim of privilege conferred by any of sections 54 to 59 and 64 in respect of a communication or information if satisfied there is a

prima facie case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.

(2) A Judge may disallow a claim of privilege conferred by any of sections 54 to 59 and 64 in respect of a communication or information if the Judge is of the opinion that evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence.

(3) Any communication or information disclosed as the result of the disallowance of a claim of privilege under subsection (2) and any information derived from that disclosure cannot be used against the holder of the privilege in a proceeding in New Zealand.

### **APPENDIX 3: LAW COMMISSION AMENDMENT RECOMMENDATIONS**

- [R1] “We recommend that ss 10 and 12 be kept under review with any problems identified to be considered at the next five year review.”
- [R22] “We recommend amending s 57 to apply expressly to criminal proceedings, and adding a paragraph to s 57(3) that allows a court to order disclosure if the court considers that, in the interests of justice, the need for the communication or document to be disclosed it he proceeding outweighs the need for the privilege, taking into account the particular nature and benefit of settlement negotiations, mediation or plea discussions as the case may be.”

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