Foreword

The Evidence Act 2006 has been in force for just under seven years. In a number of important respects (for instance, as to hearsay) it operates very differently from the position as it was under the common law and earlier non-comprehensive Evidence Acts. The implications of some aspects of the Act were perhaps not fully thought through prior to enactment (for instance, as to s 35 in relation to previous consistent statements). Unsurprisingly, the Act has provided some difficulties for judges and counsel. Evidential issues which crop up at trial must be addressed expeditiously and thus with only limited scope for consideration and research. Because the Act is appreciably different from previous law, reliance on previous experience is unsafe. Appellate judges have also had to come to grips with unfamiliar concepts and ideas. Although the appellate process allows rather more time for reflection, appellate judges have the onerous obligation to ensure that, as far as possible, they construe particular provisions in issue before them in ways which are consistent with the scheme of the Act as a whole.

This third edition of The Evidence Act 2006: Act and Analysis is, like the earlier editions, organised around the provisions of the Act. This makes it particularly useful for those required to address evidential questions in the context of a criminal trial and who do not have the time to read and digest discursively written textbooks. There is ample cross-referencing, limiting the risk that a focus on the most obviously relevant section might result in other relevant sections being overlooked. The overall result is a very systematic review of the Act. The book will also be of considerable value in appellate proceedings. Relevant legislative history is carefully reviewed. The authors are all leading experts on the law of evidence, they have engaged critically with the existing jurisprudence — particularly with judgments which they consider to be doubtful or wrong (including some of mine) — and they have provided references to other academic commentary. As will be implicit in what I have just said, I do not subscribe to all views expressed in the text. But, despite this, I see the debate and the associated insights as very valuable. It seems to me that every judge and lawyer engaged in litigation, particularly of a criminal nature, and whether at trial or on appeal, should have ready access to this book.

I should emphasise that this is not just a book for practitioners and will be invaluable for academic lawyers, law students and those responsible for monitoring the operation of the Act.

The Honourable Justice William Young KNZM
Supreme Court of New Zealand
May 2014
Preface

As the third edition of this book reaches the bookshops, the Evidence Act 2006 will have been in force for almost seven years. In that time, the Supreme Court has considered the application and operation of a number of the sections — for example, those dealing with propensity evidence (s 43), veracity evidence (s 37), improperly obtained evidence (s 30) and the previous consistent statements rule (s 35). The Court of Appeal and High Court have also been required to deliver numerous judgments on the operation of the Act, with significant jurisprudence dealing with the admissibility of propensity evidence about a criminal defendant, evidence of a defendant’s out-of-court statements, visual identification evidence and what was previously known as “recent complaint” evidence.

The extent of the case law during those seven years may indicate that the Act introduced uncertainty and has resulted in extensive judicial intermediation, contrary to the Law Commission’s 1989 terms of reference to make “the law of evidence as clear, simple and accessible as is practicable”. However, the first review of the operation of the Act (conducted by the Law Commission in 2013 as required by s 202) has largely demonstrated the success of the reform and the value of the many years of work put into the reference — which culminated in both the draft Evidence Code in 1999 and the Evidence Bill 2005.

The President of the Law Commission — the Honourable Sir Grant Hammond — stated in his Foreword to the 2013 Review that:

“... there is widespread acceptance that the original evidence project was a thoroughly important and worthwhile initiative in New Zealand law. It has overwhelmingly met the objectives of its proposers and the needs of users. The Evidence Act is the first port of call in the practice of evidence law in New Zealand.”

Rather than the comprehensive review proposed during the legislative process, the Commission and the Minister of Justice were therefore content with a “technical” appraisal of the Act. A number of sections that were pointed out by the Commission as potentially problematic are to be simply kept under review, rather than any amendments being proposed, so that planned amending legislation will contain only a limited amount of reform.

Cabinet approved the majority of the Law Commission’s recommendations in November 2013 and added a few more. We refer to those upcoming amendments — together with the Law Commission’s underlying analysis from the 2013 Review — at the relevant points throughout this edition. As with the second edition, this book adds to our analysis of individual sections a comprehensive discussion of the voluminous body of case law under the Act that has been handed down by trial and appellate courts. We are certain that the third edition will continue to be a valuable resource on New Zealand’s law of evidence for judges, policymakers, civil and criminal law practitioners, students and legal academics alike.
The first two editions of the book were assisted by the insights of a number of our academic colleagues, who have been acknowledged previously and whose contributions still add value to our work. During the writing of this third edition, we have relied again on the helpful comments from each other, especially the indispensable Richard Mahoney — who delivered to his co-authors nightly emails from his native Canada, interrupting his otherwise serene semi-retirement on the ski fields. We also continue to benefit from conversations with members of the profession, the judiciary and our students — who are too many in number to list here.

The authors have also been greatly assisted by the research and administrative skills of Valmai Bilsborough-York, Lani Buchanan, Rozina Khan and John Lloyd, together with the hard-working staff at Thomson Reuters NZ — especially Ian McIntosh and our superb editor Kevin Leary.

The support and understanding of our families is, as always, gratefully acknowledged and deeply appreciated. We also acknowledge the generous input of the Honourable Justice William Young, who delved into the pre-edited manuscript of this book in order to write the Foreword. As a Supreme Court justice who deals with evidence law in significant cases, we are thankful to him for his insights about the Act and his kind words about our efforts in these pages.

Finally, we must also acknowledge the incredible contribution made by our co-author Scott Optican. During the writing of this book, both of Scott’s young children underwent significant and successful medical interventions at the hands of doctors from Auckland’s Starship Hospital. His 11-year-old daughter Samantha received a kidney transplant on 12 March 2014. His son Henry, now almost two years old and born deaf, underwent surgery for a cochlear implant two months before that. None of us, even as parents, can truly understand the impact of such a journey on a family. That Scott was still able to complete his own work, as well as provide feedback on ours, was an unbelievable achievement.

We dedicate this book to Samantha and Henry.

The law is stated as of 1 April 2014.

Richard Mahoney
Elisabeth McDonald
Scott Optican
Yvette Tinsley
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The Act therefore departs from the rule established by the Privy Council in *Wong Kam-Ming v R.*\(^ {562}\) The Ministry of Justice has noted that despite s 15 the court “retains the discretion to disallow such cross-examination if such questioning is unfair or the probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the outcome of the proceeding”\(^ {563}\) — that is, s 15 is subject to s 8.

The Law Commission noted that s 15 applies to all witnesses (not only defendants) and to evidence given in any type of hearing held to determine the admissibility of evidence — whether pre-trial or in a voir dire.\(^ {564}\) The rule therefore also applies to civil proceedings, which was of concern to the New Zealand Law Society.\(^ {565}\)

## Part 2
### Admissibility rules, privilege, and confidentiality

(\(s\) 16 to \(s\) 70)

#### Subpart 1—Hearsay evidence

\((s\) 16 to \(s\) 22)
statement made to a police officer and then written down in his or her notebook. In _R v Kereopa_ Cooper J held that the definition of “business record” in s 16(1) could also cover the written statement of an eyewitness to the police, although his Honour relied on s 8 and excluded the statement. The scope of the definition therefore has significant implications for the operation of s 19 in the context of criminal proceedings, and has given rise to some concern. Cabinet has accepted the Law Commission’s recommendation that the definition of “business record” should be amended to “exclude police notebooks that contain statements or interviews of eyewitnesses or victims”, as they are not “inherently reliable”. Hearsay statements contained in such documents may be admissible if s 18 is satisfied (which contains a general reliability standard, unlike s 19).

In _Pakai v Police_ Dobson J held that a copy of a charging document offered to prove a previous conviction for the purposes of sentencing was a business record, because (referring to para (b) of the definition):

> “In the dispatch of its criminal jurisdiction, the District Court has a duty to create and then maintain records such as Informations laid, and the endorsement upon them of how they were disposed of by the Court.”

However, in _Burrell Demolition Ltd v Wellington City Council_ Clifford J stated that:

> “… whilst the Council’s internal and external documentation was prepared in the course of the conduct of its regulatory activities, I would require further submissions before accepting that this correspondence constituted a ‘business record’, particularly as provided by subparagraph (b) … .”

In other cases, medical records concerning the injuries of the victim of a car accident and the treatment of a patient at a psychiatric hospital have been classified as business records. The more usual reliance on the definition of “business record” and on s 19 relates to financial records, including loan and mortgage documents.

In _Hastie v Police_ French J accepted that information about a vehicle’s registered owner held on the police computer system, derived from a register maintained by the New Zealand Transport Agency, was a hearsay statement contained in a business record.

**circumstances**, in relation to a statement by a person who is not a witness, include—

(a) the nature of the statement; and

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569 See EV19.01.
570 LC 2013 Review at [3.32].
572 _Pakai v Police_ HC Invercargill CRI-2008-425-37, 13 March 2009 at [40]. See also EV139.03.
573 _Burrell Demolition Ltd v Wellington City Council_ HC Wellington CIV-2006-485-1274, 12 March 2008 at [129]. Compare _Grubmayr v Bloxham_ [2010] NZAR 256 (HC) at [11], where an ex-Auckland City Council staff member’s report of the Council’s dealings with the plaintiff was admitted as a business record pursuant to s 19.
576 _Hastie v Police_ HC Christchurch CRI-2010-409-222, 9 September 2011. However, as the “supplier of the information” was held to be the car owner (allegedly the defendant’s father), the necessity grounds in s 19(1) had not been made out as there was “nothing to suggest he was unavailable and it [was] likely he would have personal recall” of the information supplied (at [52]). Further, the computer printout of the record was not produced, and no notice was given pursuant to s 22. The information could have been admitted under s 18 (with the focus on the “maker” of the statement, rather than the “supplier” of the information), if there had been notice, or by way of a certificate under s 18 of the Transport (Vehicle and Driver Registration and Licensing) Act 1986. The absence of a s 22 notice or a document (the printout) led her Honour to exclude the evidence and the convictions were quashed (at [62] and [82]).
(b) the contents of the statement; and
(c) the circumstances that relate to the making of the statement; and
(d) any circumstances that relate to the veracity of the person; and
(e) any circumstances that relate to the accuracy of the observation of the person

EV16.03.01 Indicia of reliability

This non-exhaustive definition provides the list of matters the court should consider when determining whether the “circumstances relating to the statement provide reasonable assurance that the statement is reliable” for the purposes of the admissibility rule in s 18.577 In R v Gwaze the Supreme Court agreed with the Court of Appeal that the trial judge should have excluded a particular item of hearsay evidence because it did not satisfy the required standard of reliability:578

“[T]he definition of ‘circumstances’ for the purpose of hearsay evidence makes it clear that the inquiry into reliability must include not only accuracy of the record of what is said and the veracity of the person making the statement, but also the nature and contents of the statement, and the circumstances relating to its making. The Judge’s approach, in considering only the reliability of the capture and recording of the information, was not sufficient discharge of the responsibility under ss 17 and 18 to exclude evidence except where the circumstances provide reasonable assurance of reliability.”

Therefore, in determining whether “the circumstances relating to the statement provide reasonable assurance of reliability”, a judge should consider at least the following matters.

(1) Paragraph (a): the nature (or “type”) of the statement

This inquiry encompasses whether the statement579 is written or oral, recorded in some way, formal, signed,580 witnessed, authentic,581 prepared by someone with experience,582 first-hand, et cetera.583 In R v Key it was clearly relevant to the assessment of reliability that the statement was recorded by a police officer in a notebook based on what he thought he heard the witness say about what her son had told her.584 Winkelmann J stated that in such a situation:

“The potential for distortion and miscommunication is obvious. The point is underlined by the fact that discussion occurred in the context of a telephone conversation, in the course of a relatively informal exchange and not face to face. This was not after all a formal interview, and there is no suggestion that [the maker] knew that her discussion was being recorded in some way nor that she was asked to confirm the accuracy of the record.”

These matters may also be relevant to the inquiry into the circumstances relating to the making of the statement (discussed at EV16.03.01(3) below).586 In Adams v R the Court of Appeal stated:587

“As to the circumstances relating to Mr Grant’s making the statement, this was not a case where an independent person interviewed Mr Grant, and took a formal statement, or arranged

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577 See EV18.02.
579 See EV4.20.02.
581 Orji v R [2013] NZCA 629 at [55]-[56]; Yang v Chen (No 2) [2011] NZCCLR 13 (HC) at [207].
582 BS v PAR FC Dunedin FAM-2011-012-181, 31 August 2011 at [18].
583 See LC Evidence Code at [C76]. See R v Kereopa HC Tauranga CRI-2007-087-411, 11 February 2008 at [11]. Also to be considered are whether the statement was voluntarily made, what prompted the making of the statement, and was it given as part of an investigation: see R v Goodman [2008] NZCA 384 at [100]; R v Check [2009] NZCA 548 at [39]; Mana Coach Services v New Zealand Tramways and Public Passenger Transport Union (Wellington Branch) Inc EmpC Wellington WC13A/08, 30 June 2008 at [22]; R v Xue HC Auckland CRI-2008-004-5894, 5 February 2009 at [22]. See also the discussion of the reliability of first-hand versus double hearsay at EV4.20.05.
584 R v Key HC Auckland CRI-2006-092-12705, 2 March 2009.
585 R v Key HC Auckland CRI-2006-092-12705, 2 March 2009 at [20].
586 R v Tait DC Auckland CRI-2008-090-5831, 29 March 2010 at [33].
587 Adams v R [2012] NZCA 386 at [35].
for him to swear an affidavit. Had that been the case, there would have been little or no issue as to there being reasonable assurance as to the reliability of the statement.”

(2) Paragraph (b): the contents of the statement

Regarding the contents of the statement, this inquiry may assess matters such as: whether it is an oral statement accompanying and explaining a relevant act; what the level of detail is; whether there is a lack of ambiguity; whether there is consistency throughout; and whether it is a declaration against interest or a self-serving statement.

The reference to the “contents” of the hearsay statement in para (b) of the definition may in some situations also invite consideration of the veracity of the maker — an investigation the courts have been willing to undertake in the context of discussing the impact of a lack of cross-examination. In R v Kereopa it was noted that the statement the eyewitness had made to the police included information about her state of mind and physical condition at the time, including the fact that she had not been drinking.

(3) Paragraph (c): the circumstances relating to the making of the statement

This inquiry potentially covers a wide range of matters, such as: consideration of the surrounding physical environment (for example, how noisy it was); when the statement was made (that is, how long after the event the statement refers to); whether it was a “spontaneous utterance”; whether it was voluntary or prompted; what the relationship between the maker and the witness was; and whether the maker realised that the statement could be repeated or used in evidence.

In Pepene v R the Court of Appeal upheld the trial judge’s decision on reliability, noting that she had placed weight on the “cognitive” nature of the statement made to the police officer, which referred to the fact that the maker had been asked “general, open-ended questions such as ‘tell me about what happened’, rather than specific questions.”

In TK v R the very young complainant’s statement to an adult (ST) was held to be inadmissible, the Court of Appeal finding that in the context the question amounted to a “direct prompt … flowing from the conversation of [ST and the child’s grandmother] which the child would have heard.”

(4) Paragraphs (d) and (e): any circumstances that relate to the veracity, or accuracy of observation, of the maker

Evidence which assists in considering the veracity of the person making the statement (that is, the maker of the statement, who will not be a witness) must also satisfy the substantial helpfulness test in s 37. In R v Kereopa it was accepted that the maker of the statement (who had subsequently died) had previous dishonesty convictions but that evidence of the convictions did not meet the test in s 37(1). Although Cooper J accepted that consistent evidence offered by other witnesses was relevant in assessing the accuracy of observation of the maker of the statement, only she had a clear view of the fight and only she saw the actual stabbing, hence her evidence was very significant in the context of the...
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2006 No 69 > Pt 2 > s 16

case as a whole. His Honour noted the difficulties with the reliability of identification evidence generally and declined to admit the evidence under s 18 or s 19.602

Evidence relevant to assessing the accuracy of the observation of the maker of the hearsay statement includes information about their sobriety at the time.603

EV16.03.02 The veracity or accuracy of the witness offering evidence of a hearsay statement

The list of factors to be considered (or “indicia” of reliability) does not include any reference to the veracity or accuracy of the witness (who is giving evidence of the statement) because according to the Law Commission the veracity and accuracy “of the witness who relates the hearsay can be tested before, and assessed by, the fact-finder”.604 This approach was questioned by the Court of Appeal prior to the Act coming into force in R v Shortland:605

“We have reservations as to whether, in practice, it will prove practicable to segment reliability assessments so as to exclude from consideration the accuracy and truthfulness of the witness who gives evidence of the statement ….”

It may be that the veracity or accuracy of the witness is such that it would be a time-wasting exercise to have the jury hear the witness’s evidence, only to have the witness undermined under cross-examination to the extent that the evidence must be completely discounted. In such cases the better approach would be to exclude the evidence under s 8(1)(b) (the probative value of the evidence being outweighed by the risk that the evidence will “needlessly prolong the proceeding”).

In Adams v R, decided after the Act came into force, the Court of Appeal stated:606

“It is clear from the opening words ‘in relation to a statement by a person who is not a witness’ that the focus must be on the statement that is sought to be admitted as hearsay evidence, as opposed to the person who is intended to give the hearsay evidence. Thus, in the present case, the focus must be on Mr Grant, and the statement he is alleged to have made to Mr Drake, not on Mr Drake himself. That distinction is logical. While Mr Grant is not available to give evidence and cannot be cross-examined, Mr Drake will give evidence about the circumstances in which the statements came to be made and will be available for cross-examination. Undoubtedly, Mr Drake’s veracity and reliability will be tested at trial.”

In this case the Court held that the judge erred in finding the statements were inadmissible, given his emphasis on the witness’s (Mr Drake’s) veracity. The Court found that the “Judge’s conclusion had the effect of usurping (at least in significant part) the jury’s function of assessing the credibility and reliability of Mr Drake at trial”.607 Such an approach, it is suggested, is consistent with the legislated indicia of reliability in s 16.

599 The maker being a person who is “unavailable as a witness”: s 18(1)(b)(i) (that is, will not give evidence and be cross-examined in the proceedings: see the definition of “witness” in s 4(1)). Although the term “maker” is not defined in the Act, it is used in ss 18 and 22 but not in ss 16 and 19, perhaps a legislative oversight. The Law Commission stated that “[w]hether a person is the maker of the statement is a question of fact. The question is likely to only arise in cases where more than one person was involved in preparing a statement”: LC Evidence Code at [C79]. See also R v Hovell [1986] 1 NZLR 500 (CA) and R v Harriman [2008] NZCA 53 at [32] ff. In Donnelly v R [2011] NZCA 660 the Court of Appeal treated the unavailable witness (T) as the maker of the hearsay statement, although he had never signed or adopted the notes made by the private investigator hired by the defendant: Donnelly v R [2011] NZCA 660 at [69]; Booth v R [2013] NZCA 371 at [16].


603 R v Hollands DC Hamilton CRI-2010-019-10648, 9 September 2011 at [13(b)].

604 LC Evidence Code at [C75].

605 R v Shortland [2007] NZCA 37 at [44].


EV16.03.03  The existence of supporting or conflicting evidence

The Law Commission also noted that the factors in s 16(1) (or the “indicia” of reliability) do not include reference to “the consistency of the statement with other evidence not directly related to the statement.” In the Law Commission’s view:

“It is important to distinguish between the circumstances relating to the statement and other evidence in the case: hearsay that the circumstances relating to the statement indicate to be reliable should not be held inadmissible because it contradicts other evidence.”

Whether there is other corroborating or conflicting evidence can be assessed by the fact-finder rather than considered as an admissibility question because “[l]ogically, the general strength of the case does not affect the reliability of individual items of evidence.” The Law Commission also considered that limiting the admissibility inquiry in this way would allow an admissibility decision to be made at the time the statement is offered in evidence (when the existence and weight of other evidence will not be known).

However, the definition of “circumstances” in s 16(1) may arguably require some consideration of other evidence. First, the reference to the “contents” of the statement in para (b) only has meaning (as being different from the “nature” of the statement: para (a)) if the contents can be compared to other evidence. Further, the fact that the court can consider the “veracity” of the maker of the statement could mean that other conflicting statements or conflicting evidence can be taken into account as part of that inquiry.

In R v Check the Court of Appeal seemed to accept that the existence of other confirmatory evidence was relevant to the s 8 inquiry, rather than to the reliability inquiry.

The wording of s 8(2) may also indicate that in criminal proceedings, if the hearsay statement is the only evidence supporting the defence’s theory of the case, it should be admitted if sufficiently reliable, without having regard to the existence or not of other corroborating evidence.

EV16.03.04  Impact of inability to cross-examine the maker

Another factor not mentioned expressly in the Act, but one that underlies the rationale and consequently the scope of the hearsay rule, is the extent to which the inability to cross-examine the maker of the statement should be taken into account as part of the admissibility decision. At common law the courts have clearly weighed reliability against the loss of ability to cross-examine, and prior to the Act this meant, especially in criminal cases, that unless cross-examination of the maker would have made no appreciable difference, the hearsay was not admitted.

The fact that the maker of the statement is not available to be cross-examined may be treated as a matter to take into account when determining whether the circumstances relating to the statement “provide reasonable assurance that the statement is reliable” (s 18). For example, the lack of any other independent evidence, coupled with the importance of the maker’s evidence, may mean that the statement is sufficiently reliable to be admitted.

608 LC Evidence Code at [C75].
609 LC Evidence Code at [C75].
615 See EV8.06.
616 R v Bain [1996] 1 NZLR 129 (CA) provides an example of a hearsay statement the defence sought to introduce that was seemingly uncorroborated.
617 And provides the reason for the definition of “witness” — one who can be cross-examined. See LC Evidence Reform at [50].
618 See R v L [1994] 2 NZLR 54 (CA) and s 25(f) of the New Zealand Bill of Rights Act 1990.
619 R v Bishop HC Gisborne CRI-2008-416-3, 28 February 2008 at [49] and [53].
620 See R v Bishop HC Gisborne CRI-2008-416-3, 28 February 2008 at [25].
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not sufficiently reliable for it to be admitted given the inability to cross-examine the maker.\(^{621}\) Alternatively, once the judge considers that the statement is sufficiently reliable, sometimes referred to as “threshold reliability”,\(^ {622}\) the extent to which lack of cross-examination is significant in the particular circumstances of the case could form part of the inquiry under s 8(1)(a) and (2).

This approach has been favoured by the courts since the implementation of the Act.\(^ {623}\) Lack of an ability to cross-examine is seen as particularly important in situations where there is evidence that the maker has resiled from, or retracted, a statement made pre-trial,\(^ {624}\) or where further detail beyond that contained in the statement would be important.\(^ {625}\) In \textit{Clasen v Police} the lack of information about the maker’s eyesight in a case where correct identification was critical meant that the inability “to subject the complainant’s purported identification to any scrutiny” rendered the evidence inadmissible under s 8.\(^ {626}\)

The issue that remains, and may well only be decided on a case-by-case basis, is to \textit{what extent} the inability to cross-examine means the evidence should be excluded.\(^ {627}\) In \textit{R v L} the most oft-cited pre-Act case, the Court of Appeal concluded: \(^ {628}\)

“If the testimony appears to be inherently reliable and there is \textit{nothing} in any other evidence or in the surrounding evidence casting \textit{any doubt} on its trustworthiness the Court may properly conclude on that material that \textit{cross-examination would not have made any relevant difference}.”

The emphasised words make this, it is submitted, a very high threshold and may well, if rigorously applied, undermine the liberalisation of the rule against hearsay that the Act has introduced.\(^ {629}\) Courts have noted that lack of the ability to cross-examine the maker is, of itself, not sufficient to exclude sufficiently reliable hearsay statements.\(^ {630}\)

**EV16.03.05 Threshold admissibility, weight and the role of s 122**

In \textit{R v Kereopa} the Crown submitted that a direction could be given pursuant to s 122 (the applicable warnings provision) in situations where the jury may need guidance on the weight to give hearsay evidence that might be unreliable.\(^ {631}\) Cooper J responded:\(^ {632}\)

> “[A]n important and probably dominant consideration will be whether the probative value of the evidence is outweighed by an unfairness caused by an inability to cross-examine”: \textit{Erskine v Ministry of Social Development} HC Whangarei CRI-2008-488-68, 24 July 2009 at [13]; \textit{R v Aekins} DC Auckland CRI-2006-004-13245, 16 August 2007 at [51]; \textit{R v Bishop} HC Gisborne CRI-2008-416-3, 28 February 2008 at [18]. See also \textit{R v Holtham (No 1)} HC Nelson CRI-2006-042-2569, 9 May 2008 at [12].

> “It is necessary to consider whether an inability to cross-examine may prejudice the defence. Accordingly the veracity of the [maker’s] statement is a crucial consideration. If the evidence appears to be inherently reliable and there is nothing in any other evidence or the surrounding circumstances to cast any doubt on its trustworthiness, the Court may properly conclude that the cross-examination would make any relevant difference. Also to be taken into account … is the warning that the Judge would give to the jury if the evidence were admitted without cross-examination.”

See also EV8.04.\(^ {633}\)

\(^{621}\) See \textit{R v Aekins} DC Auckland CRI-2006-004-13245, 16 August 2007 at [50]; compare \textit{Police v Rahman} DC Waitakere CRI-2009-090-113, 12 May 2009 at [81].

\(^{622}\) See EV18.02.

\(^{623}\) “[A]n important and probably dominant consideration will be whether the probative value of the evidence is outweighed by an unfairness caused by an inability to cross-examine”: \textit{Erskine v Ministry of Social Development} HC Whangarei CRI-2008-488-68, 24 July 2009 at [13]; \textit{R v Aekins} DC Auckland CRI-2006-004-13245, 16 August 2007 at [51]; \textit{R v Bishop} HC Gisborne CRI-2008-416-3, 28 February 2008 at [18]. See also \textit{R v Holtham (No 1)} HC Nelson CRI-2006-042-2569, 9 May 2008 at [12].

\(^{624}\) See \textit{R v Bishop} HC Gisborne CRI-2008-416-3, 28 February 2008 at [41], \textit{Police v Bell} [2008] DCR 681 at [48].

\(^{625}\) \textit{Haywood v Bray} [2013] NZHC 371 at [7].

\(^{626}\) \textit{Clasen v Police} HC Auckland CRI-2011-404-108, 7 July 2011 at [17].

\(^{627}\) In \textit{Clout v Police} [2013] NZHC 1364 at [21] Miller J said:

> “… I think it wholly unlikely that cross-examination could have advanced [the] defence at all. … Cross-examination is a powerful tool, but I am unpersuaded that it would have made \textit{any} difference here; it had no discernable impact on the [other] eyewitnesses.” (emphasis added)

\(^{628}\) \textit{R v L} [1994] 2 NZLR 54 (CA) at 63 (emphasis added).


\(^{630}\) See eg \textit{Adams v R} [2012] NZCA 386 at [51].
“It is, however, important to bear in mind that before any questions of the application of s 122 arises, it is first necessary for there to be a conclusion that the evidence is sufficiently reliable for it to be admitted. It would, I think, be wrong to rely on s 122 as a basis for lowering the threshold that must be met under s 18, and ultimately, s 8 of the Act.”

The jury should be advised about the relative weight that could or should be given to the hearsay evidence in the context of the case as a whole.633

**duty** includes any duty imposed by law or arising under any contract, and any duty recognised in carrying on any business practice.

**EV16.04.01** Duty

The definition of “duty” is necessary to clarify the scope of the definition of “business record”.634

(2) For the purposes of this subpart, a person is **unavailable as a witness** in a proceeding if the person—

(a) is dead; or

(b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or

(c) is unfit to be a witness because of age or physical or mental condition; or

(d) cannot with reasonable diligence be identified or found; or

(e) is not compellable to give evidence.

**EV16.05.01** “Unavailable as a witness”

This definition of unavailability is different from that contained in s 2 of the Evidence Amendment Act (No 2) 1980 in a number of ways, although some of the existing case law on s 2 will remain relevant.635 Note that other provisions in the Act (see s 168 for example) reflect an increased use of technology (video link in particular) to enable witnesses from outside the jurisdiction to give evidence in a proceeding.

(1) Subsection (2)(b): “outside New Zealand and it is not reasonably practicable for him or her to be a witness”

The focus for this inquiry is whether or not the maker of the out-of-court statement is able to be a witness (that is, give evidence and be cross-examined) even though they may be outside New Zealand. The emphasis is on the practicalities of a person being a witness, even from a distance.636 Whether it is “reasonably practicable” will depend not only on the availability of the technology,637 but also on the expense and inconvenience incurred, as balanced against the nature of the proceedings and the significance of the witness’s evidence.638

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633 See EV122.01 ff and McDonald *Principles* at [4.4.6]. In *Adams v R* [2012] NZCA 386 at [27] the Court of Appeal said:

“The difference between application of the threshold test and determination of reliability of evidence at trial is illustrated by reference to s 122 of the Act. That section provides that in a criminal proceeding tried with a jury, if the presiding judge is of the opinion that any evidence given in the proceeding that is admissible may nevertheless be unreliable, the judge may warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to the evidence.”

634 See EV16.02.01.
636 In *R v Interclean Industrial Services Ltd* DC Auckland CRI-2011-092-16845, 2 August 2012 at [8] the witness’s travel to Europe for several months without a pre-planned itinerary rendered him unavailable under s 16(2)(b).
In *R v Osborne* Duffy J summarised the pre-Act authorities in a situation where the witness had left the county before the trial.639 Duffy J noted that the expert witness had gone on a pre-arranged cruise to the Greek Islands, which could not satisfy the test for unavailability under s 16(2)(b),640 although an unexpected departure in defiance of a witness summons could well result in a different outcome.641

The courts have also considered the issue of unavailability with regard to prospective witnesses who reside outside New Zealand in a jurisdiction where giving evidence by video link is possible, but where the person may simply refuse to make themselves available to testify in this way.642

In *Solicitor-General v X* the Court of Appeal held that a Chinese national was not unavailable to give evidence merely because he was not in New Zealand and declined to travel.643 Although noting that a foreign national has no legal obligation to give evidence in a New Zealand court, the Court held that this did not mean he was non-compellable,644 therefore the Crown had to satisfy s 16(2)(b) and the focus on “reasonable practicability”. The Court needed to know “what steps had been taken to secure Mr Zhou’s attendance at trial, whether in person, or by some technological means, such as video link”.645 Despite the Attorney-General making several requests to China’s Central Authority for Mr Zhou to come to New Zealand or to give evidence by video link, to which there was no response, the Court was not satisfied that the Crown had discharged the burden of demonstrating that it “was not reasonably practicable for Mr Zhou to be a witness.” 646 This seems to suggest that the difficulty involved in organising the technological means for an overseas witness or their reluctance to testify from outside New Zealand will not, without more,647 be enough to render a person “unavailable” under s 16(2)(b).648

(a) Application of perjury provisions

In a number of cases concern has been expressed in the context of an application for a witness to give evidence from another country via video link that such an arrangement is unsatisfactory when the witness will not be subject to sanctions for perjury.649 In *Omni Marketing Group, Asia Pte Ltd v Transactor Technologies Ltd* Winkelmann J held that a witness giving evidence in such a way would still be committing perjury pursuant to the Crimes Act 1961.650 As long as there are reciprocal extradition

637 In *R v Holtham (No I)* HC Nelson CRI-2006-042-2569, 9 May 2008 Miller J was prepared to accept that a police officer on secondment in the Solomon Islands was unavailable, as it was acknowledged that the telecommunications facilities were too poor to allow video-conferencing. However, his Honour excluded the hearsay statement on the grounds that the loss of the right to cross-examine was unfairly prejudicial in the circumstances.

638 *Clout v Police* [2013] NZHC 1564 at [17].


642 See also *Inverness Medical Innovations Inc v MDS Diagnostics Ltd* HC Auckland CIV-2007-404-748, 10 June 2009 at [3] and [8].

643 *Solicitor-General v X* [2009] NZCA 476.

644 *Solicitor-General v X* [2009] NZCA 476 at [35].

645 *Solicitor-General v X* [2009] NZCA 476 at [36].

646 *Solicitor-General v X* [2009] NZCA 476 at [37].

647 In *Thompson v Police* [2012] NZHC 2234, [2013] 1 NZLR 848 at [34] Priestley J held that the two witnesses to disorderly behaviour, who had returned to the United Kingdom:

“… were outside New Zealand and therefore unavailable. The option of locating them and flying them back to New Zealand would not only be unduly expensive but would be disproportionate …. In short, their return to give evidence ‘was not reasonably practicable’.”

His Honour did not discuss the possibility of their evidence being given by video link.

See further Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS, Wellington, 2010) at 54 ff and *Police v Hobbs* DC Nelson CRI-2008-042-2784, 29 April 2009 at [12]. See also *Naresh v McCluskie* [2009] NZCA 328 at [9] and [23], where a witness was considered to be unavailable as he was “in Australia and out of contact”.

treaties between the relevant country and New Zealand.\footnote{651} this is not a matter that needs to be weighed when considering the application. However, when there is no local sanction and no relevant reciprocal arrangements, such absence is a matter to be taken into account.\footnote{652}

(2) Subsection (2)(c): “unfit to be a witness”

Section 16(2)(c) removes the reference to “old” age,\footnote{653} so that the inquiry into unavailability can relate to the effect of youth on the ability to be a witness,\footnote{654} as well as old age. When discussing this ground, the Law Commission stated:\footnote{655}

“Trauma, or the severe impairment of a statement maker’s emotional state will make it necessary for the judge to consider under para (c) whether the maker is unfit to attend because of his other mental condition … .”

In \textit{R v Alovili} Wylie J considered the availability of an eyewitness who suffered from treatment-resistant paranoid schizophrenia.\footnote{656} Evidence from a forensic psychiatrist was that the stress of being in a courtroom would increase his social phobic symptoms and lead to a likely relapse of his psychotic symptoms. His capacity to give reliable evidence under such circumstances was therefore viewed as being greatly reduced. His Honour, following the pre-Act authority of \textit{R v Harmer},\footnote{657} stated: “Of itself mental condition does not suffice to render a person unavailable as a witness.”\footnote{658} In finding that the witness was not unavailable, Wylie J noted that most witnesses prefer not to recall stressful memories and may not give their best evidence as a result; however, the “quality of the evidence is a matter for the jury”, and “if the threshold of availability is set too low, there must be the possibility of tactical decisions being made to avoid the cross-examination of potentially unsatisfactory witnesses”.\footnote{659} However, counsel for the accused agreed that the witness should give evidence via closed-circuit television (CCTV) from outside of the courtroom and be allowed to take breaks when necessary.\footnote{660}

Although this decision appears to set a high threshold for those with mental disabilities, the option of allowing evidence to be given in an alternative way provides an important option in situations where the evidence may otherwise be ruled inadmissible under s 8 on the grounds of unfair prejudice.

Unavailability on the grounds of “mental condition” has included those with dementia,\footnote{661} and those with brain injuries (including a consequential loss of memory).\footnote{662}

In some cases physical disability may amount to unavailability under s 16(2)(c) — for example, if the person is bedridden and unable to sit up comfortably for any period of time.\footnote{663}

\footnote{650} Omni Marketing Group, Asia Pte Ltd v Transactor Technologies Ltd HC Auckland CIV-2007-404-430, 29 May 2008 at [29].
\footnote{651} Omni Marketing Group, Asia Pte Ltd v Transactor Technologies Ltd HC Auckland CIV-2007-404-430, 29 May 2008 at [32].
\footnote{653} This was the wording in s 2(2)(c) of the Evidence Amendment Act (No 2) 1980.
\footnote{654} Cottingham v R [2012] NZCA 555 at [2] (three-year-old child held to be unavailable as precluded from giving evidence “by any mode”). See also TK v R [2012] NZCA 185 at [9] and [16], in which two attempts to record an evidential interview in compliance with the Evidence Regulations 2007 failed due to the child’s age. The Australian Law Reform Commission recommended a similar reform of the Uniform Evidence Act’s definition of “unavailability of persons” so that the focus is on mental and physical inability regardless of age: Australian Law Reform Commission Uniform Evidence Law (ALRC 102, 2005) at 234 (Recommendation 8-2). See Stephen Odgers Uniform Evidence Law (10th ed, Thomson Reuters, Sydney, 2012) at 1050–1054.
\footnote{655} LC Evidence Code at [C80].
\footnote{657} R v Harmer [2002] 3 NZLR 560 (HC).
\footnote{658} R v Alovili HC Auckland CRI-2007-404-162, 27 June 2008 at [26].
\footnote{659} R v Alovili HC Auckland CRI-2007-404-162, 27 June 2008 at [28].
\footnote{661} R v Todorovic [2012] DCR 370 at [2]–[3].
\footnote{663} DHM v PSB [2012] NZFC 7629 at [4] and [13]. In this case the discomfort caused by any type of questioning process meant the judge was satisfied the maker was unable to be a witness.
Section 16(2)(d) makes it clear that an inability to either identify or find a person renders them unavailable, in comparison to the former provision that referred only to an inability to be found.664 The Law Commission ultimately rejected earlier suggestions that the definition should include reference to witnesses who refuse to give evidence even though physically present in court, or those who cannot reasonably be expected to recollect matters dealt with in the statement.665 However, s 19(1)(b) contains the second of these inquiries in the context of business records only.666

(4) Subsection (2)(e): “not compellable to give evidence”

The most important change to unavailability from the definition in the Evidence Act 1908 is the addition of the factor now contained in s 16(2)(e), namely unavailability by reason of non-compellability. Those who cannot be compelled to testify (for example, the Sovereign (s 74) and the defendant in a criminal case (s 73)) are considered “unavailable as a witness” for the purposes of the hearsay rule. The consequences of classifying a non-compellable defendant, or co-defendant, as “unavailable” are discussed in the context of s 21.667

The addition of the ground of non-compellability may also result in the courts treating witnesses who are excused from appearing or testifying (for example, under s 159(3)(b) of the Criminal Procedure Act 2011, with “reasonable excuse”, or s 165(2)(a), with “just excuse”) as “unavailable”. Given that the effect of such a section is to set aside a summons, this may well have the effect of rendering such a person non-compellable.668

In R v Lologa Lang J considered, in a different context, the application for an order pursuant to s 352(1) of the Crimes Act 1961 (since repealed: see now s 165(2) of the Criminal Procedure Act 2011) to excuse the woman partner of a defendant charged with murder.669 According to Lang J, the determination of whether or not a “just excuse” existed involved weighing the “adverse consequences to the witness if she is compelled to give evidence against the adverse consequences for the administration of justice if she is not required to do so”.670

In rejecting the application, Lang J noted that spousal non-compellability had been abolished under the 2006 Act. According to Lang J, this demonstrated Parliament’s view that:

“… persons who are in a close personal relationship with an accused person must nevertheless in the ordinary course of events fulfil their duty to the community to give evidence against such persons should that be required.”

664 Judge Harrop held that the ground for establishing unavailability had been made out in the context of a male assaults female charge in Police v Bell [2008] DCR 681. After listing the number of attempts by the officer in charge of the case to locate the complainant, Judge Harrop concluded at [31]:

“I am satisfied that there is ample evidence for me to conclude that [the complainant] cannot with reasonable diligence be found. Quite simply, this is because reasonable diligence has clearly been applied by Constable Coleman, yet despite that she has not been found.”


666 See EV19.01.

667 See EV21.01.

668 Under the common law, Simon France J considered himself bound by the Court of Appeal’s decision in R v M-T [2003] 1 NZLR 63 (CA) so that he did not treat a non-compellable spouse as “unable” to testify for the purposes of the common law exception to the rule against hearsay: R v GDA HC Auckland CR1-2005-004-17305, 1 August 2006. The requirement of an “inability” to testify does not survive the Act, so it will be open to the courts to decide the status of an excused witness for the purposes of the definition of unavailability. If excused witnesses are considered to be non-compellable, this could have implications for the prosecution of domestic violence offences in situations where the complainant is not required to testify.

See further Elisabeth McDonald “Hearsay in Domestic Violence Cases” [2003] NZLJ 174.

669 R v Lologa [2007] 3 NZLR 844 (HC).

670 R v Lologa [2007] 3 NZLR 844 (HC) at [15].
Subsection (2) does not apply to a person whose statement is sought to be offered in evidence by a party who has caused the person to be unavailable in order to prevent the person from attending or giving evidence.

**EV16.06.01 Subsection (3): causing unavailability**

This subsection (which had no equivalent in the Evidence Amendment Act (No 2) 1980) has been rendered less comprehensible due to the change from the Evidence Code version which provided:

“Notwithstanding subsection (2), the maker of a statement is not to be regarded as unavailable as a witness if the unavailability was brought about by the party offering the statement for the purpose of preventing the maker of the statement from attending or giving evidence.”

The Code version made it clear that s 16(3) is aimed at preventing a party from potentially benefiting from rendering someone unavailable to testify (for example, the party kidnaps or kills the maker of the statement, or pays him or her to go into hiding). The subsection would apply when a party anticipates that the maker may not testify consistently with the out-of-court statement, and so causes them to be unavailable in an attempt to offer the preferred hearsay evidence.

**Difficulty with the section as enacted**

When a party has caused the unavailability of a statement maker, the result under s 16(3) is that the s 16(2) definition of unavailability no longer applies. But s 16(3) does not expressly prevent a party from offering the statement in evidence.

Section 16(3) applies only to “a person whose statement is sought to be offered in evidence”. However, the concept of unavailability is also relevant to suppliers of information (s 19(1)(a)). When the supplier of the information is not the statement-maker in a business record, s 16(3) will not apply. The business record could still be offered in evidence by the party who caused the unavailability of the supplier of this information.

Section 16(3) requires that the party intentionally cause the unavailability of the statement-maker. If a party negligently causes the death of a witness, that party will still be able to apply s 16(2)'s definition of unavailability. The Law Commission has not recommended any changes to this provision.

17 Hearsay rule

A hearsay statement is not admissible except—

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

(b) in cases where—

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

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

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671 *R v Lologa* [2007] 3 NZLR 844 (HC) at [17]. Such reasoning suggests that, with respect to spouses and partners of criminal defendants, successful appeals to the “just excuse” provision of s 165(2)(a) of the Criminal Procedure Act 2011 will be rare, if based on claimed detriment to the relationship. If an application to be excused is made on the basis that the applicant will suffer serious physical or psychological harm if he or she testifies, it is suggested the result may well be different. Compare *R v M-T* [2003] 1 NZLR 63 (CA). See also EV71.05.

672 The subsection was taken from s 29(3) of the Canadian draft Code (see Law Commission Evidence Law: Hearsay (NZLC PP15, 1991) at 33), but there is no discussion of the rationale for the provision in Law Reform Commission of Canada Hearsay (SP9, 1974). The proposed formulation in that paper was:

“… provided that the person’s [maker’s] inability … to testify is not due to any wrongdoing of the proponent of his statement committed for the purpose of preventing the person from attending or testifying.”

This was part of a section which provided that the hearsay rule did not apply to statements of an unavailable witness — therefore if the maker was rendered unavailable by the proponent, the hearsay rule would apply, thereby amounting to a disadvantage.

673 LC Evidence Code at [C82].

674 LC 2013 Review.

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