DEFENDANTS' STATEMENTS, IMPROPERLY OBTAINED EVIDENCE AND THE RIGHT TO SILENCE

A DEFENDANTS' STATEMENTS[1]

Key sections

- Sections 4, 21 and 27–30 of the Evidence Act 2006.

- Contain general rules about admissibility (ss 4, 21, 27) and then deal with objections to admissibility (ss 28–30).

Section 4 – definition

- A "statement" is defined in s 4 as follows:

  statement means—

  (a) a spoken or written assertion by a person of any matter; or

  (b) non-verbal conduct of a person that is intended by that person as an assertion of any matter [e.g. a nod, a shaking of the head]

- "Assertion" is an important term. It does not include what at common law were called "implied assertions".[2] Note: there is debate about whether better to refer to "unintended" assertions rather than "implied" assertions.[3]

- Statement does not include something that is unintelligible.[4]

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1 The material in this section largely adopts and draws heavily upon the papers prepared on the same topic in 2013 by Ellen France J and in 2012 by Wild J (and French J 2014-2016). It was updated by Thomas Riley for the 2018 seminar.

2 Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [EA27.01(1)].

3 See *Rongonui v R* [2010] NZSC 92, [2011] 1 NZLR 23.

4 *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1: excludes unintelligible (and therefore irrelevant) utterance by David Bain in 111 call.

- Includes both the defendant's response and the allegation to which they are responding. Some authorities suggest allegation and response together = the statement.[5]

- The Law Commission in 2013 agreed with Richard Mahoney's concerns about this conclusion.[6] The Commission said:

> [3.66] … The concept that a defendant's denial of an allegation somehow transforms that allegation into their own statement is counter-intuitive. It is also inconsistent with the definition of "statement" in s 4 which involves a written or spoken statement, or non-verbal conduct *intended* by a person … *as an assertion* …
>
> [3.67] However, the defendant's response is clearly admissible under s 27(1). The defendant's response would be unintelligible without the context …. An alternative approach would therefore be to admit the allegation on the basis that it is necessary for the defendant's statement to be intelligible.

- There is conflicting Court of Appeal authority as to whether defendant silence is a statement: compare *R v Saunokonoko* and *Hitchinson v R*.[7] The Law Commission in 2013 agreed with the Court's view in *Hitchinson*, that a defendant's silence when confronted with an allegation is not a statement.[8]

- The applicable rules about admissibility of a defendant's statement depend on who is seeking to adduce the statement: the defendant, the prosecution or a co-defendant.[9]

- Asher J in *Duffy v Police* held that a witness does not have to be able to recall the statement made by a defendant in its exact words.[10]

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5 *R v Barlien* [2008] NZCA 180, [2009] 1 NZLR 170; and compare *L v R* [2010] NZCA 131 at [35] and *Edmonds v R* [2012] NZCA 472 at [22]-[28].

6 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.66], citing Richard Mahoney "Evidence" [2009] NZ L Rev 127 at 129–132.

7 *R v Saunokonoko* [2008] NZCA 393; and *Hitchinson v R* [2010] NZCA 388 at [44].

8 At [3.69].

9 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.38].

10 *Duffy v Police* [2015] NZHC 1899 at [18].

Section 21 – defendant who does not give evidence

- If a defendant in a criminal proceeding does not give evidence, he/she may not offer his/her own hearsay statement in evidence.

- The Law Commission explains this section was included so that a defendant could not tell his/her own version of events "through another witness, and thus get their story across without being subject to cross-examination".[11]

- This rule can conflict with the duty to put the case if it is unclear whether the defendant will give evidence. Questions can appear to introduce hearsay – did you know the defendant told Tommy "X"? Sometimes, Judges need to allow questions provisionally but deal with in terms of jury directions later if the defendant does not give evidence.

- Note: the judge has control of evidence led about defendant's statements. They may need to intervene if prosecution not putting case fully and fairly. Judges can intervene to ensure both exculpatory and inculpatory parts of defendant's statements called.[12]

Section 27 – defendants' statements offered by prosecution

- Section 27 provides:

    (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 subs (1) is not admissible against that defendant if it is excluded under ss 28, 29, or 30.

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11 At [3.40].

12 *R v King* [2009] NZCA 607, (2009) 24 CRNZ 527; *R v Felise (No 1)* HC Auckland CRI-2008-092-8864, 8 February 2010; and *R v Felise (No 3)* (2010) 24 CRNZ 533 (HC). Also see Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [3.47]–[3.53].

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

- Admissibility is not limited to actual admissions/confessions.

- "Against" in subs (1) means nothing more than that the evidence becomes part of the Crown case.[13]

- All of the statement comes in – exculpatory as well as inculpatory.[14]

- Issues arise as to the ability of a co-defendant to rely on a statement offered under s 27: contrast *R v Vagaia (No 2)* with *Kupa-Caudwell v R* and *Leslie-Whitu v R*.[15]

Sections 28, 29 and 30 – three tiers[16]

Three tiers:[17]

- Statements obtained by oppression? The Crown must prove beyond reasonable doubt that the confession was obtained without such influence – s 29 "oppressive, violent, inhuman, or degrading conduct … or treatment".

- A confessional statement made in circumstances that cast doubt on its reliability? The Crown must prove on balance of probabilities that the circumstances were not such as to affect reliability – s 28.

- If neither ss 28 nor 29 apply, is the statement improperly obtained? Whether a statement is improperly obtained is determined on the balance of probabilities. If it is

13 *R v Green* [2009] NZCA 400 at [12].
14 *Kendall v R* [2012] NZCA 5 at [15].
15 *R v Vagaia (No 2)* HC Auckland CRI-2006-092-16228, 20 March 2008; *Kupa-Caudwell v R* [2010] NZCA 357; and *Leslie-Whitu v R* HC Rotorua CRI-2009-263-163, 5 October 2011.
16 See *R v Hawea* [2009] NZCA 127 at [31].
17 *R v Hawea* [2009] NZCA 127 at [31].

improperly obtained, the Court must determine whether exclusion is proportionate to the impropriety – s 30(2)(b).

Section 28 – reliability

- Where reliability is raised, the judge must exclude statement unless "satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability" (s 28(2)).

- This involves a shifting onus – the defendant first has to establish an evidential foundation for the reliability challenge, and then the prosecution has to satisfy the judge the circumstances in which the statement was made are not likely to have adversely affected reliability. Alternatively, the judge may raise a reliability issue.

- In *R v Wichman*, the majority of the Supreme Court held that in an enquiry under s 28 "the congruence (or the reverse) between what is asserted in the statement and the objective facts and the general plausibility (or otherwise) of the statement are relevant":[18]

> [83] It would be incongruous. if an obviously true confession were to be excluded on the basis of a theoretical likelihood that the circumstances in which it was made may have affected its reliability.

- The majority uses the example of a person prone to delusions confessing to murder and identifying the location of the victim's remains which was previously unknown.

- However, Elias CJ dissented, noting that the focus of s 28 was on whether the circumstances in which the statement is made exclude the tendency to produce reliable evidence.[19]

- The majority's approach has been adopted subsequently by the Court of Appeal in *Lyttle v R* and *Walker v R*.[20] The Law Commission did not propose any amendment to

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18 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753 at [84].
19 At [322].
20 *Lyttle v R* [2017] NZCA 245; *Walker v R* [2017] NZCA 188.

s 28 in their March 2019 report on the basis that the current law was sufficiently clear due to *Wichman*.[21] While the focus of s 28 is on the circumstances surrounding the making of the statement, that should not prevent judges from considering any obvious indications that the statement is true or false.

- Note: Section 28(4) provides a non-exhaustive list of factors to be considered, but the judge *must* have regard to each of the listed factors if relevant.

- Since the Act came into force, there are very few examples of a defendant's statement being excluded under s 28.[22]

- In *Pora v R*, the Privy Council allowed the defendant's appeal from his conviction for murder.[23] The defendant had confessed to being involved in the circumstances of the victim's rape and murder. However, the Privy Council said that the defendant's account was "strewn with inconsistencies, contradictions, implausibility and vagueness".[24] On the appeal, the Privy Council admitted evidence from a clinical neuropsychologist and a consultant psychiatrist concerning mental abnormalities of the defendant which supported the defence argument that the defendant had falsely confessed to an offence he did not commit.

- The Privy Council noted that the police were fastidiously correct in treatment of Pora:[25]

> But it is precisely because of the experience that people confess to crimes that they did not commit that one should be vigilant to examine possible reasons that confessions may be false. As the senior Canadian prosecutor, Bruce MacFarlane, has said, 'judges and juries tend to disbelieve claims of innocence in the face of a confession, and are usually unwilling to accept that someone who has confessed did not actually commit the crime'. In light of that entirely natural and to-be-expected reaction, careful attention should be paid after the confession has been made to reasons given that it was in fact untrue. Indeed, such is the potential potency of confession evidence that particular care is required in examining whether it reflects the true state of affairs.

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21 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [6.19]

22 One example is *R v PK* [2012] NZHC 1045.

23 *Pora v R* [2015] UKPC 9, [2016] NZLR 277 at [57].

24 At [7].

25 *Pora v R* [2015] UKPC 9, [2016] NZLR 277.

Section 29 – oppression

- Where oppression is raised, the judge must exclude the statement unless "satisfied beyond reasonable doubt that the statement was not influenced by oppression" (s 29(2)).

- This section requires a similar approach to s 28 in terms of the shifting onus. The section can be triggered by the defendant or the judge. But note the higher standard of proof for the prosecution once the section is triggered.

- Section 29(3) expressly provides it is irrelevant whether or not the statement is true.

- Section 29(4) non-exhaustively lists relevant factors and s 29(5) defines "oppression".

- There is little case law on s 29. A recent example considering ss 28 and 29 is *C (CA77/2013) v R*.[26] There was a family meeting prior to C going to police station and confessing. An allegation was made of a threat C would be "taken out" if he did not go to the police station and confess. C was taking medication for depressive disorder. Judge concluded C was not afraid and went to the police because he wanted it all to be over. The DC findings that confession was not unreliable and not oppressive were upheld.

Section 30 – improperly obtained statement

- Unlike ss 28 and 29, s 30 not limited to statements. It applies to all types of evidence offered by prosecution in criminal proceedings.

- Section 30 is not to be treated as conferring a broad discretion to exclude defendants' statements for reasons addressed in ss 28 and 29.[27]

- Discussed in following section.

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26 *C (CA77/2013) v R* [2013] NZCA 170.

27 *R v Wichman* at [69].

B IMPROPERLY OBTAINED EVIDENCE

Overview – s 30 of Evidence Act

- Only applies to evidence offered by the prosecution.

- The section can be triggered by either the defendant or judge – although an evidential foundation must be laid for the impropriety asserted (s 30(1)).

- If an evidential foundation is laid, the judge must find on the balance of probabilities whether the evidence was improperly obtained (s 30(2)(a)).

- If the judge finds the evidence was improperly obtained, they must determine whether the exclusion of evidence is proportionate to the impropriety (s 30(2)(b)), using the s 30(3) considerations as a guide.

- If it is, the judge must exclude the evidence (s 30(4)).

Was the evidence improperly obtained?

- An exhaustive definition is provided at s 30(5):

  evidence is **improperly obtained** if it is obtained—

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

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

  (c) unfairly.

- Sections 30(5)(a) and (b) say the evidence must be obtained "in consequence of" stated forms of impropriety. This requires a causal link between the impropriety and

obtaining the evidence.[28] This will ultimately be a question of judgment.[29] The strength of that link can be relevant also in the s 30(2)(b) balancing exercise.[30]

- Taking a global approach to assessing impropriety, rather than looking at each individual action that makes up the overall conduct, risks shrouding the issue of causation.[31]

- Although s 30(5)(c) does not include the words "in consequence of", the terminology "unfairly obtained" evidence necessarily involves a causal link between unfairness and obtaining the evidence.[32]

- Section 30(5)(c), "unfairly obtained", is very broad.[33] In deciding whether a statement has been obtained unfairly by the police, the judge must take into account the guidelines set out in practice notes on that subject issued by the Chief Justice (s 35(6)).[34] However, conduct that breaches the Practice Note is not necessarily unfair.[35]

- Earlier impropriety may taint a later statement or search.[36]

- Note: there is no requirement that a defendant can only apply for exclusion on the basis of breach of his or her *own* rights.[37] However, the court is less likely to exclude evidence where the right breached is not the defendant's.[38]

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28 See *Boskell v R* [2014] NZCA 497 at [10]: a "material or operative effect" is required; *Chetty v R* [2015] NZCA 241 at [29].

29 *Nicol v R* [2017] NZCA 130 at [30].

30 See *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207; *R v Horsfall* [2008] NZCA 449, (2008) 24 CRNZ 402 at [44]; *R v Edmonds* [2007] NZCA 557; *Chetty v R* at [29].

31 *R v Bailey* [2017] NZCA 211 at [17]-[18].

32 *R v Hennessey* [2009] NZCA 363 at [28].

33 See discussion in Robertson at [EA30.10]. In *Graham v R* [2015] NZCA 568 at [31] the Court of Appeal doubted whether tortious conduct would qualify.

34 See Practice Note on Police Questioning (s 30(6) Evidence Act 2006) [2007] 3 NZLR 297. Note the Practice Note has only limited application to undercover police officers: *R v Wichman* at [106] and [112].

35 *R v Wichman* at [101].

36 See, for example, *R v Alo* [2007] NZCA 172, [2008] 1 NZLR 168 at [21]; and *Pollard v R* [2010] NZCA 294.

37 See discussion in Robertson at [EA30.5].

38 See, for example, *Pettus v R* [2013] NZCA 157 at [50]; and *R v Yeung* CRI-2006-092-10945, 22 May 2009 at [134]; *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835 at [23].

Is exclusion proportionate to the impropriety?

- This issue is determined by a balancing process that should give appropriate weight to the impropriety, but also take proper account of the need for an effective and credible system of justice (s 30(2)(b)).

- The Law Commission acknowledges the balancing process is evaluative and necessarily fact-specific.[39] Section 30 has been criticised for providing a lack of guidance on how to conduct balancing process, including the weight, interpretation and application of the relevant factors.[40] Nonetheless, the Law Commission concluded in its 2019 report that it would be inappropriate to make s 30 more prescriptive as to the application of the balancing process, because it would unduly limit the ability of the courts to take a fact specific approach.[41]

- Courts endeavour to achieve a proper balance between two competing policies: on the one hand, the need to protect accused persons from inquisitorial attack (re Judges Rules) and, on the other, of conceding to the police a proper degree of freedom in pursuing their investigations.[42]

- The Chief Justice's practice note is designed to protect the interests of suspects, the police and society more generally. There is public interest in maintaining compliance with the standard of conduct set out in the guidelines.[43]

- Appropriate account should be taken of the need for "an effective and credible system of justice", which requires a focus on the wider and longer term administration of

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39 Law Commission at [4.10]–[4.11].

40 See, for example, Scott Optican "*R v Williams* and the Exclusionary Rule: Continuing Issues in the Application and Interpretation of Section 30 of the Evidence Act 2006" [2011] NZ L Rev 507; Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at p 245; and Richard Mahoney "Evidence" [2010] NZ L Rev 433 at 445.

41 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [7.47]-[7.48].

42 *R v Chetty* [2016] NZSC 68 at [24]-[25] citing *F (CA541/2009) v R* [2010] NZCA 520.

43 At [49] and [54].

justice generally. This is particularly important when considering breach of rights such as privilege against self-incrimination.[44]

- In *Hamed v R*, the Supreme Court noted that despite the wording of s 30(2)(b), "effective and credible system of justice" is not a consideration that points only to admissibility, rather, it can go both ways.[45]

- Section 30(3) sets out an inclusive list of factors that the court may have regard to in determining whether exclusion is proportionate to impropriety. These are very similar to factors listed in *R v Shaheed* prior to the Evidence Act.[46]

Section 30(3)(a): importance of any right breached and seriousness of intrusion on it

- Exclusion of improperly obtained evidence is more likely where impropriety involves breach of the New Zealand Bill of Rights Act 1990.[47]

- However, compliance with Chief Justice's Practice Note on Police Questioning is also important.[48]

Section 30(3)(b): nature of impropriety (whether deliberate, reckless or done in bad faith)

- Police bad faith will be important – it likely to result in exclusion.[49]

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44 *R v Chetty* at [188] per Elias CJ (in dissent).
45 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [60], [187], [228] and [258].
46 *R v Shaheed* [2002] 2 NZLR 377 (CA).
47 *Hamed v R* at [53] and [191]. See for example *S v Police* [2018] NZHC 1582, where an evidential blood test was excluded where S was not given the opportunity to use the bathroom during his detention, resulting in him soiling himself. Breach of BORA rights was one ground for justifying exclusion - at [87] Duffy J considered "Whilst the view I have reached will mean that the conviction cannot be sustained, I consider the need for effective vindication of the breach of the appellant's ss 21 and 23(5) rights warrants exclusion of the evidence. No other remedy is available. Upholding those rights in circumstances such as the present is very important, not just in terms of the appellant's rights to privacy and dignity but also in terms of the rights of other persons who may find themselves in a similar predicament."
48 *R v Hennessey* [2009] NZCA 363 at [30]; *Chetty v R* at [125].
49 See discussion in Robertson at [EA30.12(3)].

- There is some ambiguity as to whether police conduct *after* evidence has been obtained (such as an attempt to cover up the impropriety) can be taken into account in the balancing process.[50]

Section 30(3)(c): nature and quality of evidence

- Reliability will be important.[51]

- There is a distinction between evidence in search and seizure cases (where the evidence is usually inherently reliable) and cases involving confession evidence.[52]

- In cases involving confessional statements, while any issue of unreliability is to be determined under s 28, the fact the statement is reliable/unreliable will be a relevant factor for the s 30 balancing process.[53]

Section 30(3)(d): seriousness of offence

- The seriousness of the offence is a factor that can "cut both ways" in determining admissibility.[54] This consideration does not have primacy.[55]

- The Supreme Court in *Hamed v R* rejected a statement in *R v Williams* that an offence is "serious" if the likely starting point for the sentence is at least four years' imprisonment.[56] The Court held seriousness refers to a continuum – it is not an absolute concept, but a comparative one.[57]

- In *Underwood v R*, Miller J for the Court of Appeal held:[58]

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50 See *Kueh v R* [2013] NZCA 616, in which the Court of Appeal declined to determine this issue.
51 See discussion in Robertson at [EA30.12(4)].
52 *R v Hawea* at [41]–[42]. Note that this seems to be mistakenly stated in *R v Caine* [2014] NZHC 770 at [31].
53 *R v Hawea* at [50].
54 *Hamed v R* at [65], [187] and [239].
55 *Wilson v R* [2015] NZSC 189 at [88(b)] per the majority of the Supreme Court.
56 *Hamed v R* at [241] and [277]; and *R v Williams*.
57 At [241].
58 *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 at [49]; *W v R* [2017] NZCA 522. The Law Commission endorsed this approach in Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [7.28].

- No ratio emerges from *Hamed* re s 30(3)(d).

- Penalty is not always a reliable guide, rejecting *Williams*. The starting point of a sentence is nonetheless a better guide than the maximum sentence.

- Seriousness should be treated like other s 30(3) criteria, as an evaluative consideration.

- An assessment of seriousness requires a long term perspective of the administration of justice, in which trials generally should be conducted on their merits but, that being so, seriousness cannot take primacy over other considerations.

- Seriousness does not justify admission where the breach of right causes an unfair trial.[59]

- Want of seriousness does not favour exclusion – rather, in such a case, s 30(3)(d) has no role to play at all.

- A grave breach of an important right must justify exclusion even if the evidence would not result in an unfair trial.

- The balancing exercise calls for an explanation about the s 30(3) criteria which apply to the case at hand. Where the seriousness of the offence counts it should be mentioned, and an explanation is needed where seriousness depends on the facts and may tip the balance.

- In *Kalekale v R*, the Court held that where offending is serious and the evidence is reliable, especially in circumstances where the impropriety was more in the nature of an oversight than an egregious breach of rights, it is more likely that this factor will result in the evidence being admitted.[60]

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[59] See for example *D v R* [2018] NZCA 173 where Police questioning in breach of the Practice Note (cross-examination of the appellant) breached "an important protection against false confessions". At [36] the Court held "Where the nature of the breach is such as to raise concerns about the reliability of the evidence, [s 30(3)(d)] weighs against the admission of the evidence."

[60] *Kalekale v R* [2016] NZCA 259 at [41].

- In *R v Chetty*, the majority of the Supreme Court held "rape is obviously a serious offence, a factor which can cut both ways, but in this case favours admission".[61]

Section 30(3)(e): availability of other investigatory techniques not involving any breach of rights

- Judges in *Hamed v R* differed as to whether the fact there was no lawful way for the police to obtain the evidence in question was a factor favouring admissibility or exclusion.

- The Law Commission suggests that the availability of alternative investigatory techniques will ordinarily operate as a factor favouring exclusion of evidence, but in some situations (such as when the situation is urgent), the availability of alternative techniques will become a neutral factor. Where no alternative investigatory techniques are available, s 30(3)(e) should be a neutral factor.[62]

- A lack of other available techniques treated as neutral factor in *R v Kuru*.[63]

- In *R v Chetty*, the majority said that because the critical events being investigated involved only the defendant and the complainant, no other investigative techniques were available to the Police. This favoured admission of the defendant's statement.[64] Elias CJ, in dissent, disagreed and held that unfair pressure to obtain a confession should not properly be viewed as an "investigatory technique" for the purpose of s 30(3)(e).

Section 30(3)(f): availability of alternative remedies to exclusion

- This factor will only rarely be relevant.[65]

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61 *R v Chetty* at [67].
62 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [7.36]–[7.40].
63 *R v Kuru* [2015] NZCA 414 at [46].
64 *R v Chetty* at [192].
65 See *R v Shaheed*; and *Hamed v R* at [70], [202], [247] and [275].

- Where evidence has already been excluded under s 30 in an earlier proceeding against the defendant, that can be taken into account as a factor favouring admissibility.[66] The defendant has already had the benefit of the exclusion (in the earlier proceeding).

- In *Marwood v Commissioner of Police*, the majority held that in the civil proceedings before them, exclusion of evidence was not the only meaningful remedy that could be employed to vindicate the appellant's right. A claim for financial compensation would be a viable alternative remedy.[67]

Section 30(3)(g): impropriety necessary to avoid apprehended physical danger

- This factor has been long recognised as a legitimate reason to admit improperly obtained evidence.[68]

- Often overlaps with s 30(3)(h) – urgency.

Section 30(3)(h): urgency

- Can favour admission of evidence.

- It is most commonly raised where police fear evidence will be destroyed unless they act quickly.[69]

Factors not listed in s 30(3)

- Importance of evidence to prosecution case – a factor included in *R v Shaheed* but not in s 30. This factor was in the original Evidence Bill but removed by the Select Committee. There was disagreement in *Hamed v R* about whether it can now be taken

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66 *Clark v R* [2013] NZCA 143, (2013) 26 CRNZ 214. In that case the Court reversed the approach adopted in *JF v R* [2011] NZCA 645. See *Commissioner of Police v Marwood* [2015] NZCA 608 at [56]–[57]; and *R v Alsford* [2015] NZCA 628.

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

68 See *R v Goodwin* [1993] 2 NZLR 153 (CA) at 171; *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA); *R v Williams* CA101/00, 31 July 2000; *R v Lapham* (2003) 20 CRNZ 286 (CA); and *R v Williams* at [123].

69 See, for example, *R v Hjelmstrom* (2003) 20 CRNZ 208 (CA); *R v Merrett* CA280/05, 3 March 2006; and *Shirtliff v R* [2012] NZCA 336.

into account.[70] The Law Commission considered whether s 30(3) should be amended to specifically refer to the centrality of the evidence to the prosecution case, but ultimately recommended the status quo be maintained; s 30(3) already allows "other matters" to be taken into account, and while there is authority holding that the centrality of the evidence can be considered, making it an express factor would risk over-emphasising its importance.[71]

- The strength of causal link between impropriety and obtaining of evidence can be taken into account.

- A defendant's recidivism is factor in favour of admission.[72]

- Although there is some uncertainty over this, there are judgments which indicate courts have residual discretion to not admit evidence, where admission would be unfair though there was no impropriety on the part of the Police, not under s 30 but through exercise of the courts' common law discretion.[73]

- Whether the evidence was obtained in breach of the Privacy Act 1993.[74]

Use of excluded evidence in subsequent proceedings

- As noted above, once out does not mean always out. Evidence excluded under s 30 in one proceeding may still be admitted in a subsequent proceeding.[75] Analysis under s 30 is proceeding-specific; the judge in the second proceeding is required to undertake a fresh assessment.[76]

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70 *Hamed v R* at [201], [236]–[237], [260] and [270]; *Tye v R* [2012] NZCA 382 at [36]; *Holdem v R* [2014] NZCA 546 at [28](d); *Hoete v R* [2013] NZCA 432 at [44]; *R v Liu* [2015] NZHC 732 at [197]–[198]; *Dickson v R* [2015] NZCA 286 at [31]; *Chetty v R* at [84, fn 84]

71 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [7.23].

72 *R v Kuru* at [45].

73 Discussion in Simon France (ed) *Adams on Criminal Law-Evidence* (online looseleaf ed, Thomson Reuters) at [EA.30.10.].

74 *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710.

75 *Clark v R* at [20].

76 At [22].

- However, earlier exclusion can be taken into account in subsequent proceedings as a factor in the balancing assessment.[77]

Application to civil proceedings

- In *Marwood v Police*, the Supreme Court held that, in a civil proceeding taken by way of law enforcement and with a Police Officer as plaintiff, it is open for a Judge to exclude evidence obtained in breach of the Bill of Rights Act.[78]

- Note though that the Court in *Marwood* was concerned with quasi-criminal proceedings under the Criminal Proceeds (Recovery) Act, where the Crown was a party. While being careful not to express a final view, the Law Commission suggested that there should be no jurisdiction to exclude improperly obtained evidence in civil proceedings involving only private parties – a situation which to date has not been considered by the courts.[79]

C RIGHT TO SILENCE

Statutory provisions

- Section 23(4) of the New Zealand Bill of Rights Act 1990 provides: everyone who is arrested or detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

- Evidence Act: ss 32, 33 and 60.

- In *R v Perry*, a man was interviewed in relation to a manslaughter.[80] He gave an alibi, but when confronted with contradictory evidence from the Police, he asked to speak to a lawyer. After doing so, he informed the Police he had been advised not to make a statement. One of the Inspectors then advised him that it might not be in his best

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77 At [27].
78 *Marwood v Commissioner of Police*.
79 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [7.80].
80 *R v Perry* [2016] NZSC 102.

interests to remain silent if he was in fact involved in the death of the deceased. After discussing the matter with his co-accused, the man made a statement after which he was arrested.

- The majority of the Supreme Court held that the defendant had not asserted a wish to remain silent but rather was in two minds as to whether to say anything further.[81] However, the evidence was still deemed to be improperly obtained under r 5 of the *Practice Note,* since the defendant was being detained and the relevant discussions were not properly recorded.[82] Despite this, the majority would have admitted the evidence under s 30 due to the limited nature of the inspector's remarks, the tenuous causal connection with his decision to resume the interview, and the cogency of the evidence.

- Conversely, in *R v Kumar* it was held by the majority of the Supreme Court that the "active elicitation" of a defendant by undercover officers amounted to a breach of s 23(4).[83] Mr Kumar had been arrested in relation to murder and was subsequently placed in a cell occupied by two undercover officers. The officers were under instructions to develop a rapport with Mr Kumar "to a stage where [he] will feel comfortable talking about his criminality".

- During the course of the ensuing conversation, Mr Kumar told the undercover officers:

    - That he had been charged with murder;

    - That the police had bugged his car;

    - That he and his co-accused had gone to a brothel to create an alibi and had considered fleeing the country;

    - That the victim had owed him $74,000 for drugs; and finally

81 At [49].
82 At [59].
83 *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204.

- That he had killed the victim with a single punch and subsequently burned the body.

- The majority found that the officers' questioning was systematic and comprehensive, and that they "steered the conversation to matters that interested them in terms of the police investigation".[84] Taking into account the fundamental importance of the right to silence, the seriousness of the police intrusion upon it and the fact that the evidence was not critical to the prosecution, it was excluded under s 30.[85]

- The Chief Justice agreed, commenting that the conduct of the undercover officers "undermin[ed] legal advice [which] led to making statements against his interests".[86]

Section 32 – silence before trial

- This section attempts to prevent the fact-finder from using a defendant's silence before trial as evidence of their guilt.

- Two recent Court of Appeal cases have examined s 32: *Smith v R* and *McNaughton v R*.[87]

Scope

- Pursuant to s 32(1), s 32 applies to criminal proceedings in which it appears that the defendant failed—

  (a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or

  (b) to disclose a defence before trial.

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84 At [63].
85 At [70].
86 At [148].
87 *Smith v R* [2013] NZCA 362, [2014] 2 NZLR 241; and *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467.

- Although section heading refers to "silence", s 32 is not limited to situations where a defendant does not say anything before trial. Also applies where a defendant says something before trial but does not disclose the defence later relied upon.[88]

- Similarly, inviting the jury to infer that a defendant's account of events given in evidence is fabricated because it contained a narrative not previously mentioned to Police will be a breach of s 32.[89]

- The section applies where a defendant gives a partial response to police questions but then exercises their right to silence.[90]
- Section 32(1)(a) only covers "investigative questioning". This is defined in s 4:

> **investigative questioning** means questioning in connection with the investigation of an offence or a possible offence by, or in the presence of,—
>
> (a) a member of the police; or
>
> (b) a person whose functions include the investigation of offences.

Section 32(1)(a) does not apply to defendant silence in the face of allegations or questions from a person on "even terms" with the defendant.[91]

- Section 32 does not apply if the fact the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding (s 32(3)). E.g. a trial for the offence of failing to answer questions under s 185 of the Customs and Excise Act 1996.

Extent of protection

- Section 32(2) provides that if subs (1) applies—

  (a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subs (1); and

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88 *Smith v R* at [50]–[53]; and *McNaughton v R* at [15].
89 *Hamdi v R* [2017] NZCA 242 at [30]-[33].
90 *Blair v R* [2012] NZCA 62 at [25]–[33]; and *R v Kingi* HC Whangarei CRI-2010-088-2617, 29 July 2011 at [37].
91 *Hitchinson v R* [2010] NZCA 388 at [38]–[39].

(b) if the proceeding is with a jury, the judge must direct the jury that it may not draw that inference from a failure of that kind.

- Section 32(2)(a) is breached where prosecutor invites the fact-finder to *infer that the defendant is guilty* based on a failure to raise defence before trial, but not where prosecutor *challenges defendant's credibility* on the basis that the defendant said nothing about the defence in advance of the trial.[92] This preserves the distinction recognised at common law.[93]

- A credibility challenge will be possible, for example, if the defendant exercises the right to silence prior to trial and then later claims that they had no opportunity to speak up.[94]

- The distinction between using silence to infer guilt and using silence to challenge credibility can be difficult.[95] It has been rejected by the High Court of Australia and criticised by the English Court of Appeal.[96]

- The section does not prohibit a judge in a judge-alone trial from relying on a defendant's pre-trial silence to infer guilt. The Law Commission's draft code did prohibit judges from doing so,[97] suggesting that Parliament may have deliberately chosen to leave the possibility open.[98]

- The Law Commission in March 2019 again recommended amending s 32 to clarify that a judge may not draw an inference that a defendant is guilty from their pre-trial silence.[99]

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92 *Smith v R* at [42]; and *McNaughton v R* at [16]. See *Hastings v R* [2015] NZCA 180.
93 *R v Hill* [1953] NZLR 688 (CA) at 694; *R v Foster* [1955] NZLR 1194 (CA) at 1200; *R v Ryan* [1973] 2 NZLR 611 (CA) at 615; and *R v Coombs* [1983] NZLR 748 (CA) at 751–752.
94 *Hamdi v R* at [23].
95 See *McNaughton v R* at [16]; and *E (CA727/09) v R* [2010] NZCA 202 at [60].
96 *Petty v R* (1991) 173 CLR 95; and *R v Gilbert* (1978) 66 Cr App R 237 (CA) at 244.
97 *Evidence Code and Commentary* (NZLC R55(2), 1999) at 90.
98 See Robertson at [EA32.02(2)]; and McDonald at 263. See also *Edmunds v Police* [2014] NZHC 1498 at [31]-[32].
99 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [5.63]

- In some cases, breach of s 32(2)(a) may be countered by strong judicial direction to the jury.[100]

- Even where the prosecutor makes an acceptable credibility challenge, the judge is required to give a s 32(2)(b) warning.[101]

- Failure to give a s 32(2)(b) direction will not necessarily nullify trial. On appeal, the question of whether failure to give a direction resulted in a miscarriage of justice is a separate issue.[102]

Section 33 – silence at trial

- In a criminal proceeding, no person other than the defendant or the defendant's counsel or the judge may comment on the fact that the defendant did not give evidence at his or her trial.

- Does not prevent judge from drawing adverse inference from defendant's silence at trial, or from inviting jury to do so. When it is appropriate to do so is a matter of common law.[103]

- The Court of Appeal in *R v McRae* suggested (stressing this was not an exhaustive list) the following circumstances where judicial comment might be appropriate:[104]

    - If an accused person has been given leave to cross-examine a complainant as to credit, in circumstances where he could be expected to give evidence himself, then a strong comment may well be justified if he fails to do so.

    - If an accused person relies on an exculpatory statement and the matters referred to therein but gives no evidence to back up the statement, then a balanced comment might well be justified.

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100 For example, *E (CA727/09) v R*; *Hamdi v R* at [39].
101 *Hastings v R* at [50].
102 *Osman v R* [2012] NZCA 32 at [29]; *Hastings v R* at [57].
103 See discussion in McDonald at 265–269.
104 *R v McRae* (1993) 10 CRNZ 61 (CA) at 64.

- If an accused person through counsel has made a suggestion that someone else is responsible for the crime but gives no evidence in support of that proposition a comment could reasonably be expected.

- In some cases an attempt is made by the accused to get his version of events before the jury by putting factual allegations to Crown witnesses. If those allegations are not accepted and the accused refrains from giving evidence then an appropriate comment might well be anticipated.

- The Law Commission considered an amendment to s 33 to provide legislative clarification of when a judge may comment on a defendant's silence at trial but decided no change was necessary because the courts have provided sufficient guidance.[105]

Section 60 – privilege against self-incrimination

- Pursuant to s 60(1), s 60 applies if—

(a) a person is required to provide specific information—

(i) in the course of a proceeding; or

(ii) by a person exercising a statutory power or duty; or

(iii) by a police officer or other person holding a public office in the course of an investigation into a criminal offence or possible criminal offence; and

(b) the information would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment.

- "Incriminate" means to provide information that is reasonably likely to lead to, or increase the likelihood of, the prosecution of a person for a criminal offence.[106]

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105 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [5.62]

106 Evidence Act 2006, s 4. See also definition of "self-incrimination" in s 4: the provision by a person of information that could lead to, or increase the likelihood of, the prosecution of that person for a criminal offence.

- Section s 60(2) provides that where s 60(1) applies, the person—

  (a) has a privilege in respect of the information and cannot be expected to provide it; and

  (b) cannot be prosecuted or penalised for refusing or failing to provide the information, whether or not the person claimed the privilege when the person refused or failed to provide the information.

- Section 60 will not have effect where the privilege against self-incrimination is expressly or by necessary implication removed by an enactment (s 60(3)).

- Section 60 only applies where a person is *required* to provide information. In most cases defendants can simply exercise their general right to silence in response to police questioning, so s 60 will not be relevant. Reliance on s 60 is only necessary where the law has removed right to silence in a specific context (but has not removed privilege against self-incrimination).

- Defendant in criminal proceeding cannot claim s 60 privilege when giving evidence about the matter for which he or she is being tried (s 60(4)).

- Privilege has been claimed in situations that might have been unexpected:

  - A wife was called to give evidence against her husband regarding domestic violence charges, and was anticipated to resile from her earlier sworn statement detailing violence. She claimed privilege on the basis her evidence could incriminate her as to alleged perjury.[107]

  - A co-defendant was already convicted as a party to murder. They were called to give evidence at the new trial of the principal offender. If they gave evidence, it

[107] *Singh v R* [2010] NZSC 161.

could result in a further guilty verdict for the principal offender, prejudicing the witness on his appeal against his conviction.[108]

- Co-defendants were found guilty of manslaughter. They were called to give evidence at a subsequent severed trial of their third co-defendant. The witnesses were appealing their convictions. They claimed privilege because of potential prejudice to their appeal, and the possibility of retrial.[109]

- In *Singh v R*, William Young J, for the Supreme Court, held:

> [31] Under s 60(1)(b) of the Evidence Act 2006, the privilege against self-incrimination can only be invoked in relation to information which, if provided, would be "likely" to incriminate the person claiming the privilege. The use by the legislature of the word "likely" shows that it intended to confine the privilege to circumstances where the potential for incrimination is "real and appreciable" and not "merely imaginary and fanciful". This means that the claim can only be invoked where later prosecution is itself likely.

- With reference to the particular circumstances in *Singh*, William Young J also said:

> … all of this illustrates the risk that too ready an acceptance of a claim of privilege may encourage gaming behaviour by defendants (and set the scene for more pressure to be placed on complainants in domestic violence cases)".[110]

- Section 62(1) reads:

> If in a court proceeding it appears to the Judge that a party or witness may have grounds to claim a privilege against self-incrimination in respect of specific information required to be provided by that person, the Judge must satisfy himself or herself that the person is aware of the privilege and its effect.

- If such a warning is not given, the self-incriminatory evidence may be improperly obtained under s 30 and could be excluded.[111]

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108 *R v McNaughton* [2014] NZHC 2208.
109 *R v Te Tomo* [2017] NZHC 1062.
110 *Singh v R* at [20].
111 *Young v Zhang* [2017] NZCA 622 at [49].

Law Commission's comments on ss 32 and 33

- The Law Commission has acknowledged the confusion these two sections can create:[112]

> … it appears well settled in the case law that section 32 only prevents inviting or drawing inferences that a defendant is guilty from their pretrial silence. It does not preclude challenge to or comment on the defendant's credibility based on the belated proffering of an explanation. The courts have described this distinction as a "fine line" for prosecutors and trial judges to walk in practice. The difficulty arises because a challenge to credibility based on pre-trial silence effectively invites the fact-finder to assign some evidential significance to a defendant's pre-trial silence, which can come perilously close to an invitation to infer guilt

- The Law Commission suggested altering the sections, either to prohibit adverse inferences from being drawn from either pre-trial/trial silence, or to permit the drawing of appropriate adverse inferences from pre-trial/trial silence and remove the current prohibition on inviting inferences of guilt. After hearing submissions, it ultimately recommended retaining the status quo despite the difficulties above.

[112] Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake I te Evidence Act 2006* (NZLR R142, 2019) at [5.9]

APPENDIX: KEY STATUTORY PROVISIONS

4 Interpretation

(1) In this Act, unless the context otherwise requires,—

Statement means—

(a) a spoken or written assertion by a person of any matter; or

(b) non-verbal conduct of a person that is intended by that person as an assertion of any matter.

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.

21 Defendant who does not give evidence in criminal proceeding may not offer own statement

(1) If a defendant in a criminal proceeding does not give evidence, the defendant may not offer his or her own hearsay statement in evidence in the proceeding.

(2) To avoid any doubt, this section does not limit the previous consistent statement rule.

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, and is admissible against a co-defendant in the proceeding only if it is admitted under section 22A.

(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) except section 22A, subpart 2 (opinion evidence and expert evidence), and section 35 (previous consistent statements rule) do not apply to evidence offered under subsection (1).

(4) [Repealed]

28 Exclusion of unreliable statements

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

(a) the defendant or, if applicable, a co-defendant against whom the statement is offered raises, on the basis of an evidential foundation, the issue of the reliability of the statement and informs the Judge and the prosecution of the grounds for raising the issue; or

(b) the Judge raises the issue of the reliability of the statement and informs the prosecution of the grounds for raising the issue.

(2) The Judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.

(3) However, subs (2) does not have effect to exclude a statement made by a defendant if the statement is offered only as evidence of the physical, mental, or psychological condition of the defendant at the time the statement was made or as evidence of whether the statement was made.

(4) Without limiting the matters that a Judge may take into account for the purpose of applying subsection (2), the Judge must, in each case, take into account any of the following matters that are relevant to the case:

(a) any pertinent physical, mental, or psychological condition of the defendant when the statement was made (whether apparent or not):

(b) any pertinent characteristics of the defendant including any mental, intellectual, or physical disability to which the defendant is subject (whether apparent or not):

(c) the nature of any questions put to the defendant and the manner and circumstances in which they were put:

(d) the nature of any threat, promise, or representation made to the defendant or any other person.

29 Exclusion of statements influenced by oppression

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

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

(b) the Judge raises the issue of whether the statement was influenced by oppression and informs the prosecution of the grounds for raising the issue.

(2) The Judge must exclude the statement unless satisfied beyond reasonable doubt that the statement was not influenced by oppression.

(3) For the purpose of applying this section, it is irrelevant whether or not the statement is true.

(4) Without limiting the matters that a Judge may take into account for the purpose of applying subsection (2), the Judge must, in each case, take into account any of the following matters that are relevant to the case:

(a) any pertinent physical, mental, or psychological condition of the defendant when the statement was made (whether apparent or not):

(b) any pertinent characteristics of the defendant including any mental, intellectual, or physical disability to which the defendant is subject (whether apparent or not):

(c) the nature of any questions put to the defendant and the manner and circumstances in which they were put:

(d) the nature of any threat, promise, or representation made to the defendant or any other person.

(5) In this section, *oppression* means—

(a) oppressive, violent, inhuman, or degrading conduct towards, or treatment of, the defendant or another person; or

(b) a threat of conduct or treatment of that kind.

30 Improperly Obtained Evidence

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

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

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

(2) The Judge must—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) unfairly.

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

32 Fact-finder not to be invited to infer guilt from defendant's silence before trial

(1) This section applies to a criminal proceeding in which it appears that the defendant failed—

(a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or

(b) to disclose a defence before trial.

(2) If subsection (1) applies,—

(a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and

(b) if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.

(3) This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.

33 Restrictions on comment on defendant's right of silence at trial

In a criminal proceeding, no person other than the defendant or the defendant's counsel or the Judge may comment on the fact that the defendant did not give evidence at his or her trial.

60 Privilege against self-incrimination

(1) This section applies if—

(a) a person is (apart from this section) required to provide specific information—

(i) in the course of a proceeding; or

(ii) by a person exercising a statutory power or duty; or

(iii) by a Police officer or other person holding a public office in the course of an investigation into a criminal offence or possible criminal offence; and

(b) the information would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment.

(2) The person—

(a) has a privilege in respect of the information and cannot be required to provide it; and

(b) cannot be prosecuted or penalised for refusing or failing to provide the information, whether or not the person claimed the privilege when the person refused or failed to provide the information.

(3) Subsection (2) has effect—

(a) unless an enactment removes the privilege against self-incrimination either expressly or by necessary implication; and

(b) to the extent that an enactment does not expressly or by necessary implication remove the privilege against self-incrimination.

(4) Subsection (2) does not enable a claim of privilege to be made—

(a) on behalf of a body corporate; or

(b) on behalf of any person other than the person required to provide the information (except by a legal adviser on behalf of a client who is so required); or

(c) by a defendant in a criminal proceeding when giving evidence about the matter for which the defendant is being tried.

(5) This section is subject to section 63.