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Materiality and relevance

ALWAYS START BY IDENTIFYING WHAT THE PURPOSE OF THE EVIDENCE IS, AND THE LEGAL ELEMENT/ISSUE IT RELATES TO.

Section 7: Fundamental principle that relevant evidence is 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 t**endency to prove or disprove anything (*relevance)* that is of consequence to the determination of the proceeding (*materiality)***.

Is the evidence material?	What is this evidence being used to prove? What is its purpose? What legal element/issue does it relate to? If true, does that evidence prove an element of offence (primary materiality) or backs up some other piece of evidence going towards an element (secondary materiality)? Does it resolve some kind of issue in the case? *R v Bain* - muffled sounds, possibly saying "I shot the prick". IF it is a confession, it is material to identification.
Is the evidence relevant?	Does the evidence have any tendency to make the proposition for which it is advanced more likely? *Wi v R* - does it have some/any probative tendency? Not about *sufficient* probative tendency - either it has the tendency or it doesn't. Is this **direct evidence** (ie, if true, satisfies a material issue) or **circumstantial evidence** (a further inference is required before it will prove a material issue)? If **circumstantial evidence**, consider the background assumptions (heuristics) required for that inference to be drawn. Are those assumptions true? Are the connections between that assumption and the conclusion logical? Is it based on probability, or on proven fact? If not, possible that it won't be relevant because it won't have any probative tendency. • *R v Bain* - muffled sounds, possibly saying "I shot the prick". IF it is a confession, it is material to identification. But because the sounds were mere speculation, they could not be relevant, because no one knew for sure what the sounds amounted to. No probative tendency.

Is the witness competent?	The evidence may not be material or relevant if it cannot be understood (for example, because the witness is a child).

IF EVIDENCE IS MATERIAL AND RELEVANT, THEN IT IS PRIMA FACIE ADMISSIBLE, UNLESS IT IS INADMISSIBLE OR EXCLUDED UNDER THIS ACT.

IF YOU DECIDE THAT IT IS NOT MATERIAL AND RELEVANT, IT IS NOT ADMISSIBLE.

Burden and standard of proof

- P must prove all elements of the offence beyond reasonable doubt, unless the standard is lowered by statute.
- D, to the extent that any probative burden or statutory reverse onus is imposed, must only ever prove to the standard of balance of probabilities.
- If an indictable proceeding, D may have an evidential burden to make a defence a 'live issue' which then becomes P's duty to disprove beyond reasonable doubt.
- If summary proceedings, D must prove any defence elements on balance of probabilities.

Rationale

Section 6: Purpose of Evidence Act 2006

- Provide for facts to be established by application of logical rules
- Provide rules of evidence that recognise importance of BORA rights
- Promote fairness to parties and witnesses
- Protect rights of confidentiality and other public interests
- Avoid unjustifiable expense and delay
- Enhance access to law of evidence

Protects against an unfair use of state power? **Interest in finding truth** = want all relevant evidence before the court. Exclusionary rules may be in tension with this, but based on policy.

Witnesses

Note: **procedural** rather than substantive rules. **How** evidence can be given rather than **what** evidence can be given.

1. Who can be a witness? Eligibility vs compellability
2. Privilege
3. Ways of giving evidence
4. Rules on questioning witnesses
5. Vulnerable witnesses

Principles and rationale

Purpose

Purpose of Evidence Act: to help secure the just determination of proceedings and promoting fairness to parties and witnesses.

- We want robust fact-finding, and we want witnesses to give their best evidence in order to get the best truth, but not at the expense of the fundamental principles of the trial process like D's opportunity to confront a prosecution witness, or the value of public trials and open justice.

➢ *Criticism:* does the current system, with its focus on oratory evidence, serve the participants or the fact-finders? Witnesses will need to make many months before giving evidence. Unlikely V or witnesses can give the most full and accurate information about the incident.
➢ *Criticism:* not being able to speak in narrative form may impact the value of evidence and make it difficult to get meaning across.
➢ *Criticism:* Cross-examination may not be the greatest 'legal engine' for discovering truth.
➢ *Criticism:* assessment of the credibility of witnesses may not be as accurate as once believed - historical favouring of 'live' evidence may not be as valuable in modern times.

➢ *Counter:* But changes to the way evidence is offered may devalue cross-examination and importance of open, public trials.

Who can be a witness?

Eligibility	Section 71(1)(a): any person is eligible to give evidence. Prior to 2006 Act, eligibility depended on competence to give evidence. Now, any person is presumptively eligible to give evidence. Competency of the witness is managed by ss 7

	and 8. <u>Exception:</u> under s 72: **judges, jurors and counsel in proceeding.** ● 72(1): Judge in proceeding is not eligible to give evidence in that proceeding ● 72(2): a person acting as juror or counsel is not eligible to give evidence in that proceeding except with permission of the Judge
Compellability	Section 71(1)(b): any person who is eligible to give evidence is compellable to give evidence. <u>Exceptions:</u> ● Section 73(1), **defendant** in a proceeding is not compellable for prosecution or defence. *Note also right not to be compelled to be a witness or confess guilt under s 25(d) NZBORA.* ● Section 73(2) **associated defendants** are not compellable unless the associated defendant is being tried separately or the proceeding against the associated defendant has been determined. ● Section 74: **Sovereign; Governor-General**; Sovereign or **Head of State** of a foreign country; a **Judge** in respect of conduct as Judge are not compellable. ● Section 75: a bank officer is not compellable to produce banking records, subject to a special order by the judge under s 75(2). Spousal compellability rule abolished, mostly for public policy reasons. Significant debate re: family violence victims.
Witnesses to give oath or affirmation	Section 77(1): a witness over the age of 12 years must take an oath or make an affirmation before giving evidence. Section 77(2): a witness under the age of 12 years must be informed by the Judge of the importance of telling the truth and not telling lies, and must make a promise to tell the truth before giving evidence. Section 77(4): may give evidence without oath/promise with permission of the Judge. Judge must inform of importance of telling the truth.

Testimonial privilege

Can refuse to provide certain information without being held in contempt of court if the information is subject to privilege.

- **Rationale**: Privilege arises in respect of relationships in which the public interest in maintaining special confidence outweighs the public interest in ensuring that the court has all the information it needs to come to a correct decision.

Is the information privileged?	Section 54: **solicitor-client privilege** ● Privileged if (a) intended to be confidential; (b) made in the course and for the

	purpose of requesting or obtaining professional legal services from the legal adviser, or the legal adviser giving such services to the person Section 55: **privilege and solicitors' trust accounts** ● Applies to documents and books of account/accounting records kept by the solicitor in relation to trust account money or a nominee company Section 56: **litigation privilege** ● If communication or information is made, received, compiled or prepared for the dominant purpose of preparing for a proceeding ● (2) a party who on reasonable grounds contemplates becoming party to the proceeding has privilege in respect of communication between the party and any other person; communication w legal adviser; info prepared by party; info prepared at request of the party Section 57: **privilege for settlement negotiations or mediation** ● Communications intended to be confidential and made in connection with an attempt to settle the dispute Section 58: **communications with ministers of religion** ● (1) if communication was made in confidence in minister's capacity as minister of religion, and made for the purpose of religious or spiritual advice, benefit or comfort ● Rationale is to protect interests of privacy (s 13 BORA) and freedom of religion (s 15 BORA). Info lost to the courts will be small. Section 59: **info obtained by medical practitioners and clinical psychologists** ● (a) If consults with MP or CP for drug dependency or any other condition or behaviour that may manifest into criminal conduct ● (b) does not apply if required by order of Judge or other lawful authority. ● Rationale is public interest in seeking treatment and prevention of behaviour/conditions likely to result in criminal behaviour. Narrow privilege because broader protection may not deter people from seeking treatment. Most ordinary visits unconcerned with privilege. Section 64: **informer's identity** ● Informer has a privilege in respect of info that would disclose their identity. ● Rationale to encourage people to give info to authorities without fear of retribution. Section 68: **protection of journalists' sources** ● (1)If journalist promised informant not to disclose identity, not compellable to answer any question or produce doc that would disclose identity or enable its discovery ● (2) Judge can order that this not apply if satisfied that the public interest in disclosure outweighs likely adverse effect on disclosure on any other person and the public interest in communication of facts and opinion to public by news media, and access to sources of facts
Has privilege been waived or disallowed by Judge?	Privilege can be waived expressly or impliedly if privileged information is disclosed, or disclosure is consented to. Section 67: power of Judge to disallow privilege ● (1) Must disallow claim of privilege in ss 54-59 or 64 if satisfied prima facie case that communication or information was for a dishonest person, or to enable/aid anyone to commit/plan what the person claiming privilege knew, or ought to have

	known, was an offence ● (2) may disallow privilege if the evidence is necessary to enable D to present and effective defence ● Rationale: there is no reason for absolute privilege. It must be balanced with public interest in a fair and open trial.
Discretionary exemption from disclosure	Section 69: ● (1) An order can be made to prevent disclosure of confidential information or information that would reveal a confidential source. ● (2) order may be made if public interest in disclosure is outweighed by the public interest in: ○ Preventing harm to a person that the confidential info was made by/about ○ Preventing harm to the particular relationship, or relationships of the same kind or similar to that relationship ○ Maintaining activities promoting the free flow of information ● (3) Judge must have regard to ○ (a) extent of harm resulting from disclosure ○ (b) nature of communication or info and its likely importance in proceeding ○ (c) nature of proceeding ○ (d) other means of obtaining evidence ○ (e) possibility of preventing or restricting public disclosure if evidence is given ○ (f) sensitivity of evidence ■ Time since communication ■ Extent of disclosure already ○ (g) society's interests in protecting the privacy of V, in particular, V of sexual offences ● (4) may have regard to other relevant matters. Examples ● *R v X:* alleged X inexplicably attacked roommate. Two psychiatric nurses assessed X and said it would be confidential within limits. Would discuss with other psychiatrists and police. NZCA: the info was confidential but made no direction to prevent disclosure because of the importance of the proceeding. **Favoured appropriateness of disclosing criminality, notwithstanding confidentiality**. ● *R v Parkinson*: admissions by D to health professionals of offences against children. Order not to disclose despite serious charges. **Prioritised powerful public interest in free flow of info between mental health patient and services. Evidence relatively strong w/o admission/had other avenues of obtaining evidence.** This is a "catch-all" provision. Some examples identified in precursor to Evidence Act 2006 include: ● Patient to doctor ● Prospective patient to nurse ● Client to sexual abuse counsellor ● A person awaiting sentence to probation officer

	● Co-defendant to co-defendant ● Source to a journalist ● Victim to victim support officer ● Member of armed force to army chaplain ● Spousal privilege An order of this type would be made under section 52: ● May order evidence must not be given for privilege on: ○ (a) judge's own initiative ○ (b) application of person who has privilege ○ (c) application of interested person other than person with privilege Assessment is from the Judge's perspective. Irrelevant whether the person wants to waive confidentiality or not.
Public interest immunity	Section 70: non-disclosure when confidentiality is important to the State of effective conduct of public affairs. Public interest in disclosure must be outweighed by interests in withholding info.
Privilege against self incrimination	Right not to be compelled to be a witness or confess guilt under s 25(d) NZBORA. **Rationale:** ● power of the State is strong, so they should have to be put to proof in making out a case against D. The Crown bears a heavy burden and shouldn't be allowed to draw inferences from D's silence. ● Also protects from cruel trilemma: three way choice of perjury; self-incrimination and contempt. ● There may be many reasons for silence besides from guilt. Could be argued that the right to silence is practically ineffective, or that we shouldn't be protecting people from self-incrimination when they are factually guilty. Section 60: a person has a privilege against providing information that would be likely to incriminate them under NZ law. ● (1) applies if a person is required to provide specific information in the course of a proceeding; to a person exercising a statutory power or duty; or by a Police officer in the course of investigation Section 32: **fact-finder can't infer guilt from D's silence at trial** ● (1) applies if D refused to answer a question or respond to a statement in the course of investigative questioning or disclose a defence ● (2) can't infer D's guilt from this. Must direct jury not to draw this inference ● (3) doesn't apply if non-response is a fact to be proved in proceeding Section 33: **no person other than D can comment on the fact that D didn't give evidence at trial** <u>When a judge may comment on D's silence</u> *<u>R v Mcrae</u>*: if D is cross-examining a complainant as to credibility, but D is remaining silent, it may be appropriate for the Judge to point out that D has chosen not to take the stand. If D relies on an exculpatory statement but hasn't provided an evidential basis for

	it, it may be appropriate to comment if D could have addressed this in testimony but chose to remain silent. The same applies when D claims someone else is responsible but provides no evidence. *Basically, if D is being hypocritical.* *R v McNaughton* - D was arguing self defence in a murder/manslaughter case. Problematic that P suggested to jury that because D had not disclosed defence and had not taken the stand that they were guilty. However, the fact that D had been questioned, had chosen to answer the questions and had not claimed self-defence, given that the police could have investigated it. Suggested that this was a lie. It is permissible to suggest that D is lying, but impermissible to say that because they didn't disclose defence and didn't testify, they are guilty.

Ways of giving evidence

83 Ordinary way of giving evidence

(1) The ordinary way for a witness to give evidence is,—

(a) in a criminal or civil proceeding, orally in a courtroom in the presence of—

(i) the Judge or, if there is a jury, the Judge and jury; and

(ii) the parties to the proceeding and their counsel; and

(iii) any member of the public who wishes to be present, unless excluded by order of the Judge; or

(b) in a criminal proceeding, in an affidavit filed in the court or by reading a written statement in a courtroom, if both the prosecution and the defendant consent to the giving of evidence in this form; or

(c) in a civil proceeding, in an affidavit filed in the court or by reading a written statement in a courtroom, if—

(i) rules of court permit or require the giving of evidence in this form; or

(ii) both parties consent to the giving of evidence in this form.

(2) An affidavit or a written statement referred to in subsection (1)(b) or (c) may be given in evidence only if it—

(a) is the personal statement of the deponent or maker; and

(b) does not contain a statement that is otherwise inadmissible under this Act.

103 Directions about alternative ways of giving evidence

(1) In any proceeding, the Judge may, either on the application of a party or on the Judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.

(2) An application for directions under subsection (1) must be made to the Judge as early as practicable before the proceeding is to be heard, or at any later time permitted by the court.

(3) A direction under subsection (1) that a witness is to give evidence in an alternative way, **may** be made on the grounds of—

(a) the age or maturity of the witness:
(b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
(c) the trauma suffered by the witness:
(d) the witness's fear of intimidation:
(e) the linguistic or cultural background or religious beliefs of the witness:
(f) the nature of the proceeding:
(g) the nature of the evidence that the witness is expected to give:
(h) the relationship of the witness to any party to the proceeding:
(i) the absence or likely absence of the witness from New Zealand:
(j) any other ground likely to promote the purpose of the Act.

(4) In giving directions under subsection (1), the Judge **must have regard to**—
(a) the need to ensure—
(i) the **fairness of the proceeding**; and
(ii) in a criminal proceeding, that there is a **fair trial**; and
(b) the views of the witness and—
(i) the need to **minimise the stress on the witness**; and
(ii) in a criminal proceeding, the need to **promote the recovery of a complainant** from the alleged offence; and
(c) any other factor that is relevant to the just determination of the proceeding.

Ordinary way of giving evidence	Section 83(1): ordinary way of giving evidence in a criminal or civil proceeding is given orally in a courtroom in the presence of a Judge/Judge and jury; the parties; and any member of the public. Section 83(1)(b): other ways of giving evidence (eg, affidavits or reading out written statements) can be done by consent of both parties.
Alternative ways of giving evidence	**<u>Making an order for evidence in alternative way</u>** Section 103(1): in any proceeding, a Judge may, on a party's application or own initiative, direct that evidence-in-chief and cross-examination be given in the ordinary way or an alternative way. Section 103(3): a direction under s 103(1) for evidence in an alternative way may be on the grounds of: (a) the age or maturity of the witness: (b) the physical, intellectual, psychological, or psychiatric impairment of the witness: (c) the trauma suffered by the witness: (d) the witness's fear of intimidation: (e) the linguistic or cultural background or religious beliefs of the witness: (f) the nature of the proceeding: (g) the nature of the evidence that the witness is expected to give: (h) the relationship of the witness to any party to the proceeding: (i) the absence or likely absence of the witness from New Zealand: (j) any other ground likely to promote the purpose of the Act.

<table>
<tr><td></td><td>
Section 103(4): judge must have regard to:
(a) The need to ensure
(1) the fairness of the proceeding; and
(2) in a criminal proceeding, that there is a fair trial; and
(ii) the views of the witness and—
(1) the need to minimise the stress on the witness; and
(2) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
(iii) any other factor that is relevant to the just determination of the proceeding.

Section 104: before a direction is given, both parties must have the opportunity to be heard in chambers. Judge may call on a person to report on the impacts of giving evidence in the ordinary way or any alternative way.

<u>Alternative ways of giving evidence</u>
Section 105(1):
(1) In a courtroom but unable to see D/other specified person
(2) From an appropriate place outside the courtroom
(3) By video record made prior to hearing

● Under section 105(1)(b), discretion to use any practical and technical means to facilitate the above.
● Section 105(1)(c), D should be able to see and hear the witness unless the Judge directs otherwise.

<u>Example:</u>
K v R: terminally ill complainant. An evidential video interview was filmed. CA upheld pre-trial decision that videotaped evidence was admissible, but provided a warning of possible prejudicial effect of images of a fragile, dying complainant.

There is no statutory presumption in favour of giving evidence in the ordinary way.
</td></tr>
<tr><td>Child witnesses, amended 2017</td><td>
Section 107: a child witness (defined in s 4 as under the age of 18) is <u>entitled</u> to give evidence in an alternative way.

Section 107A: a party calling the witness can apply for the witness to give evidence in the ordinary way.
● (3) May give the direction if satisfied W appreciates the likely effect of doing so. Before giving a direction, may call for a report on the effect of W giving evidnece in the ordinary way or alternative way.
● (4) must have regard to whether the interests of justice require a departure from the usual s 107 procedure, and must consider factors in s 103(3) and 103(4).
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	Section 107B: any other party can apply to have child witness give evidence in the ordinary way or a different alternative way. ● 107B(3): Judge must give opportunity for both parties to be hard in chambers and may call for a report on the impact of giving evidence in ordinary or alternative way ● 107A(4) Must have regard to whether the **interests of justice require a departure** from the usual s 107 procedure; and must consider factors in 103(3) and 103(4).
Family violence witnesses, amended 2018	Section 106A: family violence complainant is <u>entitled</u> to give evidence in chief by video recorded before the hearing. ● 106A(2) It must be recorded by a Police employee no later than 2 weeks after the incident. ● 106A(3) Must give a direction under s 103 about how other evidence (ie, cross-examination) will be given. Under s 106B, D can apply for the family violence complainant to give evidence in the ordinary way or a different alternative way. ● 106B(3) Must give each party and opportunity to be heard in chambers and may call for a report on impact of giving evidence in ordinary or alternative way ● 106B(4) must consider whether **interests of justice require departure** from s 106A and the matters in s 103(3) and 103(4).
Judicial direction under s 123	Section 123(1): Judge must give a direction in subs(2) if W offers evidence in an alternative way. Section 123(2): the direction required is: the law makes special provision for the manner in which evidence is to be given in certain circumstances and the jury must not draw any adverse inference against D because of that manner of giving evidence

<u>**Credibility of evidence in alternative way**</u>

There is an argument that alternative ways may impact on assessing the credibility of a witness.
- Scientific evidence has proven that credibility assessments tend to be unreliable anyway
- Many people make assessments on credibility via screens and technology in the modern age

Behind a screen	● Potential that victims that don't show distress won't be taken as credible. The risk of this is higher when screens are being used because the complainant is not directly faced with D/specified person and the jury cannot see the complainant. ● Ie, would allow for a burqa to be worn ● More difficult to assess credibility?
Video link	● Potential that victims that don't show distress won't be taken as credible. The risk of this is higher when video links are being used because the complainant is not directly faced with D/specified person.

	● Enables evidence to be given by those who are unavailable ● Evidence from Germany - not previously been seen as adversely affect ability to assess credibility
Pre-trial recording	Examination-in-chief ● Early recording of relevant evidence enhances its reliability regardless of age or circumstances because it occurs before memory fades- relies on good interviewing technique (Law Commission) ● Particularly useful for children's evidence ● Vulnerable adults may benefit ● Allows evidence to be captured at an earlier stage, can protect from re-victimisation ● Can be used in narrative form and edited to comply with evidential rules Cross-examination ● Occurred in K v R, but exceptional circumstances ● Video record would be taken at a special hearing, tends only to occur for child witnesses ● Consider D's right to adequately prepare a defence and to "not show" their hand until trial Potential that victims that don't show distress won't be taken as credible. The risk of this is higher when pre-recordings are being used because the complainant is not at as much risk of being re-victimised. May appear more calm and dispassionate.

Rules on questioning witnesses

Judge questioning W	Section 100: The judge can ask any questions that, in the opinion of the Judge, justice requires If the judge questions a witness, every party may cross-examine on any matters raised by the judge's question, and the party who called the witness can re-examine.
Jury questioning W	Section 101: Jury requests the Judge ask the question. The Judge will consider whether and how to put the question to W, and whether parties may question W on the answer. If question is put to W, subject to alt direction, must allow for cross-examination and re-examination.
Examination-in chief	**<u>Leading questions</u>** Section 89: a leading question (defined in s 4 as a question that directly or indirectly suggests a particular answer to the question) must not be put to a witness in examination-in-chief unless: ● The question relates to introductory or undisputed matters 　○ *Eg, required to set the scene, provide context, or draw W's attention to a particular point* 　○ *Avoid reciting evidence that W is invited to confirm answers given* ● The question is put with consent of other parties ● The judge allows the question

- *May do this if W is young, intellectually disabled, or have difficulty speaking English*
- *Should be genuinely necessary to obtain reliable evidence.*

Rationale: don't want to put words in the mouth of witness or seem like you're constructing a narrative/evidence. Also a healing opportunity for the witness, opportunity to tell their story. Assumed that the party who called the witness did so due to their reliability/credibility. Unfair that reluctant, compellable witnesses could be called and their credibility challenged by the person who compelled their evidence.

Hostile witnesses

Section 4: a hostile witness is a witness who

- Exhibits or appears to exhibit lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge
- Gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness
- Refuses to answer questions or deliberately withholds evidence

Section 37(4) a party who calls a witness may not offer evidence to challenge that witness's veracity unless Judge determines witness to be hostile. But may offer evidence as to facts in issue contrary to evidence of that witness.

Rationale: may impede truth-finding function without this exception.

Section 94: If hostile, Judge can permit party who called witness to cross-examine. Will determine the extent to which cross-examination is permitted. This would allow questioning of previous inconsistent statements.

If the judge grants leave to cross-examine, it may be under s 94 OR s 37(4).

Previous consistent statements

Section 35: PCS are generally inadmissible unless:

- Other party has challenged W's veracity or accuracy
- Integral part of events before court
- Mere fact that a complaint was made

Refreshing memory when questioning W

- Section 90(5): in order to refresh memory, W may consult a document made at the time their memory was fresh.
- Section 90(4) the document must be shown to every party. Other documents may be admissible with leave of the judge.
- Evidence of **previous statement** consistent with W's evidence is admissible if the circumstances provide reasonable assurance that the statement is reliable and the statement provides the court with information that W is unable to recall.

Cross-examination	Opportunity for D to present a fearless, vigorous and effective defence, including challenging P's evidence. But don't want W's gratuitously abused, and a truthful or reliable witness to look unsure or deceitful due to manipulation. **Unacceptable questions** Section 85(1): In any proceeding, Judge may disallow or direct W does not need to answer any question that is **improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand**. (2) May have regard to ● the age or maturity of the witness; and ● any physical, intellectual, psychological, or psychiatric impairment of the witness; and ● the linguistic or cultural background or religious beliefs of the witness; and ● the nature of the proceeding; and ● in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding. **Cross-examination in person** Section 95(1): D in a sexual case or domestic violence/harassment case is not entitled to personally cross examine the complainant or a child who is a witness. (2) may be ordered on application of witness, party calling W, or judge's own initiative. (3) may be on following grounds: (a) the age or maturity of the witness: (b) the physical, intellectual, psychological, or psychiatric impairment of the witness: (c) the linguistic or cultural background or religious beliefs of the witness: (d) the nature of the proceeding: (e) the relationship of the witness to the unrepresented party: (f) any other grounds likely to promote the purpose of the Act. (4) must have regard to (a) the need to ensure the fairness of the proceeding and, in a criminal proceeding, that the defendant has a fair trial; and (b) the need to minimise the stress on the complainant or witness; and (c) any other factor that is relevant to the just determination of the proceeding. Justified by social policy. D can get a representative lawyer to cross-examine instead. **Cross examining on previous statements** Section 96: a party can cross-examine on W's previous statements. If W doesn't admit to the statement, can produce statement in writing or disclose contents. Give W an opportunity to explain any inconsistency. **Duty to put the case** Section 92: counsel must put the case to W under cross-examination.

	Basically can't made an allegation/claim/suggestion/inference to jury about W without putting it to W in cross-examination. Give W an opportunity to respond to evidence; avoid time-wasting; truth-finding function.
Judicial direction under s 123	Section 123: if D is not permitted to cross-examine, must give a direction under s 123(2) that the law makes special provision for the manner in which questions are to be asked in certain circumstances and the jury must not draw and adverse inference against D because of that manner of questioning.
Re-examination	Section 97: W may be questioned on matters arising out of cross-examination but not any other matter without permission of the Judge. If permission is given by the Judge, other party can cross-examine W on additional evidence, and may allow further re-examination. Rationale: had a chance to make the case in examination-in-chief. Fairness to D.
Rebuttal evidence	Section 98: presumption that further evidence cannot be given after closing case. ● Further evidence may be given with Judge's permission if it is purely formal; arises out of D's conduct; wasn't available or admissible before case closed; any other reason in interests of justice Section 99: Judge may recall W if in the interests of justice.

Previous consistent statements

Previous consistent statements are prima facie not admissible UNLESS the statement:

- Responds to a challenge that will or has been made to W's veracity based on a previous inconsistent statement or a claim of invention
- Forms an integral part of events before court or
- Consists of mere fact that a complaint was made in a criminal case

Rationale: the benefit of admitting this type of evidence is to overcome reliability or veracity concerns, especially in cases where it's suggested a complaint wasn't made soon enough so it must be an invention. But without limit, this would reduce the efficiency of the court - no need to admit repetitive evidence.

- *Hart v R*; Elias CJ: the general rule in s 35 is based on the experience that, in general, repetition does not add anything to the evidence given by a witness. It has long been treated as superfluous
- *R v Rongonui* - the rule in s 35 was designed to prevent witnesses bolstering their testimony [*in an empty way*] by [*repetition*] reference to something they had said on a previous occasion.

Is it a statement?	Section 4 definition:**:**

	• A spoken or written assertion by a person of any matter • Non-verbal conduct of a person that is intended by that person as an assertion of any matter (eg, hand gesture) **Assertion** • *Rongonui,* NZSC: complainant said in evidence-in-chief that shortly after the alleged sexual violation she "told her friends what had happened". Contextually, she means she told her friends the substance of what happened; the details of the assault. **Inviting the inference that the assault occurred. Amounts to an assertion that SV occurred.** • *O'Donnell,* NZCA: Alleged sexual offending at a party. Complainant came home and "spoke to her father" who took her back to the party to confront D. D was conveying a sequence of events. **This is not about the content of the conversation, but about her conduct of what actually occurred. It is not an assertion that SV occurred.** Law Commission: is this distinction desirable or reconcilable? Suggested abolishing PCS rule and using ss 7 and 8.
Is it a previous statement?	Section 4 definition: a statement made by a witness at any time other than at the hearing at which W is giving evidence.
Is it consistent with other evidence?	More than just a lack of inconsistency. Look for repetition. • *Hart v R;* Elias CJ (obiter): s 35(1) is only engaged when a statement **actually matches what a witness said in court**. • *Hitchinson v R* - s 35 **wasn't intended to exclude relevant and probative evidence which is not repetitive** which can be categorised as a previous consistent statement only in the sense that it is consistent with the witness' tenor of evidence more generally
Exceptions	Section 35: previous consistent statements are inadmissible unless an exception in s 35(2) applies. **Challenge to veracity or accuracy** Section 35(2)(a) if the PCS responds to a challenge that will or has been made to W's veracity or accuracy based on a previous inconsistent statement or a claim of invention. • This means any suggestion that W is lying or mistaken (*R v Barlien*). • A pre-trial plea of not guilty doesn't amount to a challenge even if expanded to be that events didn't happen - will need to be more specific (*H v R*). • But it's quite likely that this bar will be relatively easy to reach, especially in SV cases - most cross-examination will result in challenges to W's veracity and accuracy. Most defences in practice will include a challenge to veracity (ie, that the offence never happened/is an invention) • PCS: if the challenge is re: truthfulness of statement specifically, but not about tendency to refrain from lying more generally, often won't be a challenge to veracity. **Integral part of events before the court** Section 35(2)(b). Seems unlikely following *O'Donnell*.

	<u>Consists of mere fact of complaint</u> Section 35(2)(c): consists of the mere fact that a complaint has been made in a criminal case. **<u>Res gestae (common law exception)</u>** Section 35(1) does not apply to statements which are part of the events in issue. **Rationale**: all circumstances surrounding a relevant event should be admissible to give a true picture of what occurred. *<u>Rongonui v R</u>*: no legislative history that indicates Parliament intended to bring res gestae within scope of s 35(1). Examples of res gestae: “Words spoken as part of the event in issue” - ie, complainant repeating what they cried out during the event, or what they said to a 111 operator as events unfolded - ie, things that amount to an account of the very event, not just repetition of an assertion. 1. Spontaneous utterances accompanying an event 2. Contemporaneous statements explanatory of an act 3. Statements concerning a present physical or medical condition In this case, not res gestae because the evidence was that she told her friends what had happened. There was a break in time between the event and those words being uttered: they weren’t a spontaneous part of the event or explanatory of them.
Judicial direction	If a suggestion is made that complainant delayed making or failed to make a complaint in a sexual case, the Judge may give a warning to the jury that there can be good reasons for V to delay making or fail to make a complaint (**s 127**).

Hearsay

Rationale: we want to hear evidence directly from witnesses in court. This enables us to test their reliability and credibility in cross-examination. If a witness is giving statements other people have made, we can't cross-examine the person who made that statement.

Is it a hearsay statement? 1.Utterance by non-witness 2.Statement (ie, not an unintended implied assertion 3.Truth purpose	**Is the utterance made by a non-witness** Section 4 definition of "hearsay statement": a a statement that was made be a person other than a witness and is offered in evidence for the truth of its contents. Section 21: D who doesn't give evidence cannot offer their own hearsay statement. **Is it a statement?** Section 4:: 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 ● **Hearsay statement**: a statement that was made be a person other than a witness and is offered in evidence for the truth of its contents. Unintended implied assertions If the fact-finder is being invited to draw an inference from what the witness is saying, that is not necessarily a hearsay use. Why did the witness themselves offer the evidence? If relevance arises wholly from the inferences themselves, not the words of the statement, and those inferences weren't intended by the speaker, then not captured by s 17. *Holtham*: D was charged with supplying meth. Evidence of text messages from D's phone were given at trial saying "can I have ¼ chicken". There were about 40 messages using this kind of phrase, so indicated that some kind of code was being used. ● The "author/declarant" of the statement was the person who sent them. The purpose of the statement wasn't to assert that D was a drug dealer. This required an inference to be drawn/reading between the lines. ● Assertion = words w specific intention. Were inferences intended by the speaker? If yes, caught by HS - if no, not HS. ● **Was it the declarant's intention to assert the relevance of the statement, or some other utterance?** ● Not a hearsay purpose. *Manase*: Uncle was charged with sexual violation of 3.5 year old niece. She had contracted an STI. Mother called conference with male family members and expressed her concern. Uncle said she may have contracted the STI from him as they had shared a lollipop. A picture the child had drawn for receptionist of clinic was of her "uncle's lollipop" and looked like a penis. Question on whether this was hearsay, as the child could not be cross examined. ● The child was not trying to make the assertion that she had seen her uncle's penis. That was an inference the fact-finder was being invited to draw from the evidence. ● Truth purpose = trying to assert that something is true.

	• Under previous Act, unclear whether unintended implied assertions were hearsay. Decided this *was* hearsay. • 2006 Act is clear that unintended implied assertions are not hearsay, as the definition of "statement" itself requires an assertion. **Is it submitted for a truth purpose?** Section 4: a statement that was made be a person other than a witness and is offered in evidence for the truth of its contents. In other words, hearsay is: a statement made by a non-witness that is being offered as a statement of the truth. If it's being offered for another purpose then it's not hearsay. • Ask: is this offered because the statement *itself* would resolve an issue, if believed? • **May help to remember the purpose: want to be able to cross-examine for the truth** • Sankoff's test for hearsay: Who is the real witness? Who is the most important witness? Who is it saying the meaty thing with a truth value, the person we would want to cross-examine? • Elisabeth McDonald's test for hearsay: does it make sense to add "and so it's true" at the end of the sentence? If yes, it's being offered for a truth purpose. If *no,* then it's offered for another purpose. • Eg, could be offered due to legally operative effect of those words - "I do" • Eg, could be offered because the existence of the words provide motive, not because the words themselves are true • Eg is it the fact that the statement was *made* (ie, something the witness can actually be cross-examined about & is a good witness for) or is it being alleged that the *statement itself* is evidence and proves something (in which case the witness cannot testify to its truth). *Hunt* case: breach of confidence publishing book. D said "my lawyer told me it would be okay". This is a statement made by a non-witness (the lawyer). The purpose of this is to show that Hunt had a ground for believing he could publish the book - lack of MR on reasonable grounds. We don't care if it's true that it's ok to publish. Not for a truth purpose, so not a hearsay use. Hearsay statements are presumed to be inadmissible under s 17.
General admissibility of hearsay	Section 18: a hearsay statement is admissible if the circumstances relating to it provide reasonable assurance that the statement is reliable *and* the maker of the statement is unavailable or undue expense or delay would be caused if declarant required to be W. **Unavailability/undue expense or delay** Section 16: defines "unavailable as a witness" as • dead; or • outside New Zealand and it is not reasonably practicable for him or her to be a witness; or • unfit to be a witness because of age or physical or mental condition; or

- cannot with reasonable diligence be identified or found; or
- not compellable to give evidence.

Reliability

Section 16 defines circumstances:

- Nature of statement
    - *Is it written or oral? Recorded in some way? Witnessed or signed first-hand?*
- Contents of statement
    - *Oral statement accompanying an act, the level of detail; consistency throughout; is it self-serving or against the author's interests?*
- Circs re making statement
    - *Physical environment; spontaneous and voluntary or prompted; made in response to general, open-ended questions; relationship between author and witness; did they realise it could be repeated or used in evidence? Made at the time, or later?*
- Circs re veracity of declarant
    - *Notorious for lying?*
- Circs re the accuracy of observation of declarant
    - *Impaired vision or hearing?*

Example - *Preston* cases

D was charged with murdering his ex-wife in her Miramar home. Circumstantial evidence suggesting it was D, but no direct evidence. Various HS statements were made by Mei to friends about the nature of the relationship.

2015 hearing

Balcony incident

- Ms Chen heard an argument between Mei and Preston and rushed over. She didn't see it, but Mei told her Preston had pushed her off the balcony. He was there and very agitated, but didn't deny it, instead saying "she really upset me". Another witness had seen the incident first-hand.
    - Necessity: Mei was unable to give evidence as she was dead.
    - Reliability: The evidence was corroborated by an eyewitness. She arrived at the scene quickly. Mei made statement in Preston's presence and he didn't deny.
    - Section 8: probative value limited as this goes to propensity, so secondary relevance. Quite reliable, so if reliability warning under s 122, no undue prejudicial risk.

Facebook message

- FB message from Mei to Leilani. Chatting about a woman who had been killed in Miramar. Mei: "Maybe one day crazy Michael can kill me too". Nothing further was said and Mei and Preston lived together for a period after this.
- Reliability: accurately recorded, but meaning of statement speculative. Preston is crazy now and I'm worried he will kill me? He may go crazy one day and kill me? Too unclear. Not sufficiently reliable to come under s 18.
- Section 8: limited probative value as no actual threat. Jury may attach too much

	weight, so significant prejudicial effect. <u>2017 appeal</u> **Four different statements being challenged as hearsay:** ● Text from Mei to Preston: "Why u say u want me to die are u going to kill me" ● Statement to Sergeant that she was worried about Preston's reaction if she got full custody. Was fearful for her safety and said sometimes he was so crazy she worried he could kill her. ● After outing with friend and kids, became emotional and told her friend she did not think she wanted full custody "cos Michael will kill me". Really? Yes, definitely, really really scared ● Skype convo w/i 2 weeks of death, told friend that appellant had said to her "I want to kill you" **Decision** ● <u>Purpose</u> is at least in part re: truth of those statements ● <u>Unavailability</u> easily satisfied ● <u>Reliability</u> - reasonable assurance of reliability ○ Narrative from the whole set of evidence overwhelmingly supports Mei's account of a tempestuous relationship ○ Other evidence corroborates these statements: P's obsession with Mei, derogatory statements Preston made, and complaints he made to various bodies about her. ○ No motive to lie ● <u>Section 8</u> - ○ Probative value strong, shows motive ○ Prejudicial risk by making Preston sound crazy. Potential bias/prejudice on that ground. But evidence: re mental health already before the court. ○ Potential prejudicial risk if viewed that Mei is speaking from beyond the grave? But addressed well via judicial direction: this is evidence of relationship *at the time* statements were made, not at the time of death.
Other exceptions	**Section 19 exception: business records.** ● Main rationale: business records are reliable. ● Examples; Police statements, copies of information, various medical records etc ● Person unavailable or no useful purpose requiring presence or undue expense or delay requiring presence ● No reliability assessment, but still look at s 8 **Section 21: D doesn't give evidence cannot offer own statement** ● Rationale: D is available and could be cross-examined **Section 22 notice req:** ● Rationale: encourage admissibility decisions to be made pre-trial, allow opposing party to find rebuttal evidence where HS is admitted. ● Must give sufficient notice before hearing to provide fair opportunity to respond
Judicial warning/direction	Section 122(2): if a hearsay statement is admitted, Judge must consider giving the jury a direction/warning. 122(1) if believe evidence may be unreliable, may warn of caution in deciding whether to accept the evidence and weight to be given to it.

	122(3) a party may request a judge to give a warning, but Judge need not comply if of opinion it may unnecessarily emphasise evidence, or there is any other good reason to to comply with request.

Veracity and propensity

In NZ, we have a clear demarcation between the two, unlike in other countries.
Basically:

- Veracity = truthfulness or intentional honesty/dishonesty. It is relevant to whether the particular witness is likely to be telling the truth.
  - Section 37(5) = veracity means the disposition of a person to refrain from lying.
- Propensity = capacity/capability/ability to do something. It is relevant to whether D acted in a certain way re: the charged offences.

Veracity is, in effect, a subset of propensity: the propensity or capacity of a person to be truthful or untruthful. Consequently, s 40(4) = evidence that is solely/mainly relevant to veracity is governed by veracity rules.

<u>Purpose and rationale</u>

Overall, the fact-finder is trying to assess credibility. This can be dependent on the witness's truthfulness, but also the reliability and accuracy of their evidence. There is a distinction between truthfulness and error.

- Direct proof of mendacity, or "probative credibility" is when witnesses are called to contradict another witness's evidence
- Indirect proof is the suggestion that a witness is the kind of person that should not be believed ("moral credibility").

Direct proof of mendacity is useful in court. It can be proven, or at least tested, in front of the fact-finder in cross-examination. Indirect proof, however, bypasses the evidence the witness actually gives in court and focusses on their general record of truth-telling, reliability, credibility or accuracy. **It is this indirect proof that should be regulated by admissibility rules, because it is only of secondary relevance. It helps the fact finder determine the weight of the witness's direct evidence**.

There are risks to using veracity and propensity evidence.

- Too much veracity/propensity evidence can distract the fact-finder from direct evidence, could be of little probative value, and may waste time
- Stereotyping or bias
- Prejudice the jury (they've done bad things before, so likely they've done it again, even if the Crown hasn't discharged its burden of proof)
- Moral prejudice (D is a bad person and deserves punishment, even if they haven't done *this*)
- Potential for undue weight

<u>Issue spotting - veracity or propensity?</u>

Section 37(5) = veracity means the disposition of a person to refrain from lying.

Matters put to the witness about accuracy or reliability are not veracity. It is only if there is an allegation that the complainant is **untruthful (ie, deliberately lying) about the current charge** that we would go to veracity.

Section 40(1) = evidence that tends to show a person's propensity to act in a certain way or to have a particular state of mind, being evidence of acts, omissions, events or circumstances with which a person is alleged to have been involved.

Rationale: common sense notion that people tend to behave in a consistent and predictable way over time.

Propensity evidence is used to expose inaccuracies in a witness's evidence. Is that the purpose for which the evidence is being used for? Is the previous behaviour to do with background, context or narrative? If yes, it's propensity rather than veracity,

Propensity and veracity in sexual violence cases

44 Evidence of sexual experience of complainants in sexual cases

(1) In a sexual case, **no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge**.
Subsection (1) is subject to the requirements in section 44A.

(2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the **reputation of the complainant in sexual matters.**

(3) In an application for permission under subsection (1), the **Judge must not grant permission unless** satisfied that the evidence or question is of **such direct relevance to facts in issue** in the proceeding, or the issue of the appropriate sentence, that it would be **contrary to the interests of justice to exclude it**.

(4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1).

(5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.

(6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.

Effectively, CANNOT GIVE EVIDENCE OR ASK QUESTIONS ON SEXUAL EXPERIENCE OF COMPLAINANT WITH A PERSON OTHER THAN D, OR REPUTATION OF COMPLAINANT IN SEXUAL MATTERS UNLESS JUDGE PERMITS. Judge cannot permit unless contrary to the interests of justice to exclude it.

- Rationale: the trial process is distressing for complainants and we need to avoid the risk of victim-blaming by jurors. This type of evidence is not controlled well enough under ss 7 and

8, so we need a specific rule. But also trying to avoid unfairness to D, so it's not categorically banned: admissible if so relevant it would be contrary not to admit it.

However, evidence of prior sexual abuse is not ***necessarily*** veracity evidence, produced to discredit the complainant/witness. It could also be evidence to:

- Explain the victim's sexual knowledge (eg, in *Manase* - wouldn't be expected to have knowledge about sex without an offence being committed)
- Provide an alternative explanation for the situation (eg, in *Manase*, the child had been abused in the past. They may have transferred this knowledge to another person. This is another explanation for the events, not discrediting the child's evidence)
- Recent sexual experience may be admissible to explain physical evidence (eg, medical evidence that sexual intercourse has occurred within the last month)
- Recent sexual experience may be admissible to explain the complainant's distress - in other words, to provide an alternative explanation for the situation (*Brown v R*; distressed due to cheating on husband in consensual sex, not because of sexual assault)
- About history of making allegations of sexual violence, especially if it is suggested that the current allegation is false.

Many of these are about propensity (propensity to understand sexual activity; propensity to be distressed; propensity to have had consensual sex in the past month) in order to provide an alternative theory of the case, rather than about alleging that the complainant is untruthful. **Matters put to the witness about accuracy or reliability are not veracity. It is only if there is an allegation that the complainant is untruthful that we would go to veracity.** Otherwise, we deal with this under propensity rules.

Even if there are previous complaints of sexual violence that did not result in conviction, that is not necessarily evidence that the complainant is lying.

- The police may have refused to prosecute due to lack of evidence
- There might be reasons a complainant didn't want to press charges/go to court

So only go to veracity if there is a clear suggestion that the accusations are fabricated. Otherwise, deal with as propensity.

Section 44 framework

1. Propensity/veracity evidence about a SV complainant?
2. Is it specifically about previous allegations of SV that are clearly false ?
    1. Yes: veracity (s 37)
    2. No: propensity (s 44)
3. Only admissible if of such relevance it would contrary to interests of justice to exclude it

Veracity

Section 37(5) = veracity means the disposition of a person to refrain from lying.

Matters put to the witness about accuracy or reliability are not veracity. It is only if there is an allegation that the complainant is **untruthful (ie, deliberately lying) about the current charge** that we would go to veracity.

<table>
<tr><td>Is it a veracity issue?</td><td>Section 37(5): veracity means the disposition of a person to refrain from lying.

Why was the evidence offered? How is it material and relevant? Is that purpose to allege that W is lying?
● Matters put to the witness about accuracy or reliability are not veracity. It is only if there is an allegation that the complainant is untruthful (ie, deliberately lying) about the current charge that we would go to veracity.</td></tr>
<tr><td>Substantially helpful</td><td>Section 37(1): a party may not offer evidence about a person's veracity unless the evidence is substantially helpful in assessing veracity.

Section 37(3) may consider
(a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
(b) that the person has been convicted of 1 or more offences that indicate a propensity for a lack of veracity:
(c) any previous inconsistent statements made by the person:
(d) bias on the part of the person:
Usually more relevant to reliability rather than veracity? May be relevant to motive to be untruthful.
(e) a motive on the part of the person to be untruthful.

<u>R v Chase</u>: W had previous dishonesty offences: stealing from an employer and interfering with an electricity meter. These were going to be used towards veracity in a violent assault/rape trial.
● Consider "broader, more human context"
● Financial struggles. Had been evicted and was living in a barn. Seeking a place for them and young song to live. This is the context that lead to offending.
● Considering that, those actions don't make her significantly more likely to lie about being violently assaulted or raped.
○ Note: remember heightened relevance test.</td></tr>
<tr><td>Evidence about D's</td><td>Section 38(1): D can offer evidence about their own veracity.</td></tr>
</table>

veracity	Section 38(2): **prosecution may offer evidence about D's veracity only if:** (a) **D has given oral evidence** in court about their veracity or challenged the veracity of P's witness by reference to facts other than facts in issue (b) Judge permits it Section 38(3): may take into account: (a) the extent to which the defendant's veracity or the veracity of a prosecution witness has been put in issue in the defendant's evidence: (b) the time that has elapsed since any conviction about which the prosecution seeks to give evidence: (c) whether any evidence given by the defendant about veracity was elicited by the prosecution. Section 39: D may offer evidence challenging a co-defendant's veracity only if the evidence is relevant to a defence raised by D and Judge permits it. (2) Must give notice in writing to that co-defendant. **KEEP IN MIND IF VERACITY CHALLENGE, PREVIOUS CONSISTENT STATEMENTS.**

Propensity

<u>Propensity framework</u>

1. What is the evidence? What is the event in the past?
2. Who is offering it?
3. Who is it about (ie, defendant or witness?)
4. Materiality (double check: veracity or propensity)
5. Relevance
6. Is it governed by general propensity rule (s 40 and ss 7 and 8) or a specific rule?

Is it propensity evidence?	**<u>Identifying propensity</u>** ● Section 40(1): evidence that tends to show a person's propensity to act in a certain way or to have a particular state of mind, being evidence of acts, omissions, events or circumstances with which a person is alleged to have been involved.

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Section 40(4): evidence solely or mainly related to veracity is governed by rules in s 37.
Propensity evidence is used to expose inaccuracies in a witness's evidence. Is that the purpose for which the evidence is being used for? Is the previous behaviour to do with background, context or narrative? If yes, it's propensity rather than veracity.

Rationale: common sense notion that people tend to behave in a consistent and predictable way over time.

<u>Admissibility</u>
Section 40(2): a party may offer propensity evidence about any person - prima facie admissible.
</td>
</tr>
<tr>
<td>Exceptions to admissibility</td>
<td>
<u>Propensity evidence about D</u>
Section 41(1): D may offer propensity evidence about themselves.
Section 41(2) if D does so, P or another party may, with permission of the Judge, offer propensity evidence about D.

<u>R v Wi</u> - D wanted to offer evidence that they had never been convicted in the past.

Noted there is no heightened relevance test for propensity evidence. Admissibility is governed by general exclusionary rules in ss 7 and 8.
Is a lack of propensity to do something counted as propensity evidence? Decided yes - otherwise there is little propensity evidence D could practically offer, and s 41 would be of little value.
Discussed the probative value of the evidence (s 8):

this kind of evidence can be probative: "there's a first time for everything, but…".
It may not be strong - just because you haven't done it before, doesn't mean you never will
has some evidentiary weight: some slight tendency to prove the offence has not been committed.

<u>If D hasn't offered propensity evidence:</u>
Section 43: if D hasn't offered propensity evidence about themselves, P may offer propensity evidence only if evidence has probative value re: an issue in dispute which outweighs the risk that evidence may gave an unfairly prejudicial effect on D.
(2): the Judge must take into account the nature of the issue in dispute.
(3) the Judge may consider:
(a) Frequency
(b) Connection in time
(c) Similarity between evidence and accused offence
(d) Number of persons making allegations similar to offence
(e) Whether those allegations are result of collusion
(f) Extent to which the events are unusual
(4) Judge must consider
(a) Whether evidence is likely to unfairly predispose fact-finder against D
(b) Whether fact-finder will give disproportionate weight
</td>
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</table>

This is similar to section 8 consideration except:

- Here, the Judge MUST exclude evidence if the risk of an unfairly prejudicial effect outweighs probative value. Under s 8, the Judge MAY ADMIT evidence if probative value outweighs prejudicial effect
- Relevance of evidence must be to an issue in dispute, not just general relevance
- Prejudice to D, rather than prejudice to proceedings

R v Mohamed: Evidence about a "van incident" was admitted at trial for murder (child abuse case). A child had been left in a hot van about 1 week prior to death. Security officer had found the child and was concerned about risk of overheating. The parents of child arrived back at the car and argued with the security officer about whether the child was "perspiring" and then left. Suggested that part of the reason was because the child had already been badly injured due to ongoing abuse, and were trying to hide this.

- **Propensity needs some specificity - propensity to act in a *particular* way or have a *particular* state of mind**
- **Noted subtle distinction between probative burden in s 43 and s 8**:
  - S 43 = *may admit ONLY* if PV > PE. So if prejudicial effect is equal to probative value, can't admit.
  - S 8 = *must exclude if* PE > PV. So if prejudicial effect is equal to probative value, no requirement to exclude.
- **To figure out PV/PE: Rationale for admission of propensity evidence may rest largely on concepts of linkage and coincidence**
  - Link: does the link make it more likely that D committed the offence?
  - Coincidence: does it seem like too much of a coincidence to imagine that, despite propensity evidence, someone other than D did it? How much of a stretch is it that it's coincidence?
  - In terms of a murder charge, leaving a child in the car doesn't have any clear linkage or coincidence with murder. It shows "mere propensity" to act badly towards daughter, but not a propensity to kill or to have a murderous state of mind. Coincidence and linkage towards duty to provide necessaries of life, however, is there.

Propensity evidence about complainant in a sexual case

Section 44: CANNOT GIVE EVIDENCE OR ASK QUESTIONS ON SEXUAL EXPERIENCE OF COMPLAINANT WITH A PERSON OTHER THAN D, OR REPUTATION OF COMPLAINANT IN SEXUAL MATTERS UNLESS JUDGE PERMITS. Judge cannot permit unless contrary to the interests of justice to exclude it.

- Rationale: the trial process is distressing for complainants and we need to avoid the risk of victim-blaming by jurors. This type of evidence is not controlled well enough under ss 7 and 8, so we need a specific rule. But also trying to avoid unfairness to D, so it's not categorically banned: admissible if so relevant it would be contrary not to admit it.

Opinion evidence

Starting position

Section 23 - a statement of opinion is **not admissible** except as provided by section 24 and 25.

Rationale: at trial, the role of a witness is to present facts based on their immediate senses and experiences. It is for the fact finder to form an opinion and to draw inferences on the evidence they have heard. But we also want to put all material and relevant evidence before the jury for determination.

'Lay opinion' exception

24 General admissibility of opinions

A witness may state an opinion in evidence in a proceeding if that opinion is **necessary** to enable the witness **to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived**.

Is it a statement of opinion?	Section 4: ● **Opinion**, in relation to a statement offered in evidence, means a statement of opinion that tends to prove or disprove a fact ● **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
The opinion must be necessary	It must be necessary in order to communicate/ensure jury understands evidence. That means it should be something that the fact-finder would not be able to infer themselves without the statement of opinion. *J v R* [2013] NZCA: rape complainant. Opinion evidence on D's belief in consent was necessary because it was the only way that perspective could be provided to the jury, and D's belief in consent is material and relevant.
The opinion must be **based on something the witness saw, heard or otherwise perceived**.	This is somewhat related to "necessity". Can't just be an abstract opinion, it needs to be related to W's perceptions and evidence. W must explain the factual bases for their opinion as much as possible, to allow the jury to form their own opinion/belief.

<table>
<tr><td></td><td><u>R v Bain</u>: police officer gave evidence on their perception of Bain’s emotional state after the murders, based on what he saw and heard.

May be useful to consider:
How entangled are the facts and opinion/perception/conclusions?
Are the perceptions/statements of fact conclusions in themselves?
Eg, he looked 24-30 years old
I got the impression he knew the people in the car
They looked drunk because X,Y,Z
They seemed angry because X,Y,Z
It might be useful to consider: if someone said “that’s just your opinion!” Would that seem unreasonable?
How many supporting reasons are provided to back up the perception?
How much editorialising is taking place?</td></tr>
<tr><td>Needs to be an ordinary opinion,</td><td>Drawing on general knowledge that any ordinary person would have. Section 25 covers expert or specialist opinion, so anything on that basis must be admitted under that section.

<u>R v Bain</u>: ambulance officer wanted to give evidence on D’s fits and compare them with others they’d observed. This was more than just explaining what had been observed and perceived. It was drawn on specialist knowledge that a lay person would not have, so not admissible as general opinion evidence.</td></tr>
</table>

<u>Expert opinion exception</u>

Rationale of admitting expert opinions: evidence may be very complex or technical, and in order to help fact-finder make sense of it, expert opinion can be given. The risk is, however, that a jury would ascribe too much weight to the opinion and just defer to the expert’s view rather than using it to inform their own view.

<table>
<tr><td>Is it expert opinion?</td><td><u>Section 4 definitions</u>
Expert means a person who has specialised knowledge or skill based on training, study, or experience
This could include a qualification; on-the-job training and experience.
Expert evidence means the evidence of an expert based on the specialised knowledge or skill of that expert and includes evidence given in the form of an opinion
Is the opinion/matter within the witness’s are of expertise?</td></tr>
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	Platt v R: expert in conducting sexual assault examinations was giving evidence. They gave an opinion on foetal alcohol syndrome, but they are not an expert in that matter. Any experience they did have was too long ago, so outside expertise. Cannot offer an expert opinion on that. Note section 25(2): not *inadmissible* simply because it is about an ultimate issue to be determined or is a matter of common knowledge.
Is any **parallel evidence** being brought in?	Section 25(3): opinion must be based on facts from the expert's general expertise, or on facts that will be proved in trial or judicially noticed. Special provision for expert evidence on insanity. Section 25(4): if the opinion is based on a statement made to the expert, that statement is admissible in order for the expert to provide an opinion on it, despite the rules on hearsay or previous consistent statements.
Is the opinion likely to be of **substantial help**?	Section 25(1): evidence is admissible if fact-finder is likely to get substantial help from it in understanding other evidence in the proceeding, or in ascertaining a fact of consequence to the proceeding. This is because science etc can change. We don't just assume it is material or helpful. Effectively results in a reliability test. May be worth considering where the expert sits within their field. Are they an outlier, well-respected, in a novel area (can be difficult to assess - look to how well it is tested and supported)? Subject to disagreement, approval, peer-reviewed? *Daubert* reliability factors, endorsed in *Lundy*: ● Has the theory/technique been tested? ● Has it been subject to peer review and publication? ● Known or potential rate of error, or existence of standards? ● Has it been generally accepted?

Identification evidence

<u>Visual identification evidence</u>

Rationale: feels probative and useful, as it's usually "eyewitness" evidence. However, people can be mistaken but still convinced they are correct, and could be compelling and convincing (albeit incorrect) witnesses. Cross-examination is not effective at testing visual ID evidence, so we need some kind of admissibility rule that can ensure it doesn't unfairly prejudice D.

<table>
<tr><td>Is it visual identification evidence?</td><td><u>Section 4 definition</u>:
● a) evidence that is an assertion by a person based wholly or partly on what that person saw, to the effect that a D was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done;
● b) or an account of an assertion of the kind in para a)

Is the purpose of the evidence to prove the identification of a person, or some other material issue? Is identification even in issue in the proceeding?

Is it positive identification/recognition evidence or resemblance evidence?
<u>R v Turaki</u> - W had talked to someone outside a party. Drew conclusion this person was D. Positive ID evidence is direct or circumstantial evidence that the accused was the person at or near the scene. Resemblance evidence is more along the lines of "I saw someone with blue eyes, a black hoodie and blonde hair" that requires an inference from the fact finder to conclude it was D. Resemblance evidence is not covered by visual ID rules: positive ID evidence is.
● In other words, resemblance evidence is basically a bare reporting of observations.
● Positive visual identification evidence, or recognition evidence, includes some processing of those observations.</td></tr>
<tr><td>Has there been a formal procedure for s 45(3) purposes?</td><td>Section 45(1): first step in determining admissibility is seeing whether a formal procedure was followed.

Section 45(3) lays out the requirements for a formal procedure:
(a) As soon as practicable after offence is reported
(b) Suspect compared to no less than 7 other people similar in appearance
(c) No indication is given to person making identification as to who the suspect is</td></tr>
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	(d) The person making ID is informed the suspect may or may not be in the procedure (e) Written record of the procedure followed is sworn to be true and complete by officer who conducted it, and provided to Judge and D at the hearing (f) A pictorial record of what W looked at that is prepared and certified to be true and complete by officer who conducted it and provided to the Judge and D at the hearing (g) that complies with any further requirements provided for in regulations made under section 201. *Fraser*: clear that **dock identification will not meet section 45(3) procedure** requirements. Dock identification will only be admissible if there is a good reason not to follow the procedure under s 45(4), or if P can prove reliability under s 45(2). Emphasises we don't have dock identification unless there's a good reason for not following process (eg, see *Harney*). Law Commission discussion of dock identification: very undesirable and unreliable as D is very identifiable in a courtroom. Not very probative and likely prejudicial.
Was there a **good reason for not following the procedure**?	Section 45(1): admissible if there is a good reason not to follow a formal procedure. Section 45(4) lays out the good reasons: (a) Suspect refused to take part or permit a photo or video (if the agency doesn't already have a photo or video) (b) Appearance of suspect being so they can't be disguised (c) Substantial change in suspect's appearance (d) No officer could reasonably anticipate identification being in issue (e) If an identification of alleged person was made to officer soon after the offence occurred in the course of initial investigation (*ie an informal process very soon after, may be unnecessary to repeat a formal process)* (f) If identification was made after a chance meeting between the person who made the identification and the person alleged to have committed the offence *Harney:* Another circumstance of 'good reason' - recognition evidence of a person known to the witness (for example, a spouse or someone closely related that would be expected to recognise). In the **circumstances if people know each other well**, may not require a formal lineup. *Fraser:* Group of **people in lion costumes**. Charged w wounding offence for getting into a fight due to costume. Running a defence of mistaken identity. Had done dock identification (ie, pointing in court - "that's who I saw as a lion" In s 45(3)(b), at least 7 other people similar in appearance. Should this be slight, pale red-haired men, or should they be slight, pale red-haired men in lion costumes? ● The purpose of the identification is to recognise D's face and features - not about the lion suit. ● Even if the judge is wrong, then can photoshop the lion costume in ● Not good enough reason to move away from procedure in s 45. Should have done photo montage

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<tr><td></td><td><u>Ahomiro:</u> Extensive facial tattoos. Seven other photos. All had facial tattoos but question about whether they were sufficiently similar to D's. D had tattoos on face but a bare forehead. Wearing face covering during offence, clear forehead had no tattoos. Only 1-2 in line-up had forehead tattoos.

Reasonable for person identifying to latch on to that
Not similar enough under s 45(3)(b).
On the facts, not the case that 7 suitable photos weren't in the system. The police could have used 7 photos with facial tattoos with bare forehead
Not good reason to diverge
</td></tr>
<tr><td>If no procedure, can P prove beyond reasonable doubt that the evidence is reliable?</td><td>Section 45(2): If a formal procedure is not followed and there was no good reason for not following a formal procedure, that evidence is inadmissible unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.

<u>Ahomiro</u>: Very little discussion, but court just says that the forehead is too much of a giveaway and reliability is tarnished. Clearly quite a high threshold.

<u>Harney</u>: P must prove the surrounding circumstances were conducive to an accurate identification so that if the jury believes W's evidence, they can properly rely on it. Confidence of W in their own evidence is a poor predictor of ID evidence, but it isn't irrelevant - ie, certainty and uncertainty will affect weight.

<u>D v R:</u> ID not through s 45(3) procedure. Had been a 4 month delay. Circumstances: not ideal, but W had a good view of D's face at the time, so on this basis can allow ID evidence in.</td></tr>
<tr><td>If procedure followed or good reason, can D prove on BOP that the evidence is unreliable?</td><td>Section 45(1): even if a procedure was followed, or there was a good reason not to, evidence is not admissible if D can prove that, on balance of probabilities, the evidence is unreliable.</td></tr>
<tr><td>Is a judicial direction necessary?</td><td>Section 126(1): Where case against D wholly or substantially depends on visual or voice ID, must warn jury for special need for caution before finding guilt.
Section 126 (2) content of warning must include:

Warn the jury of miscarriage of justice
Alert jury to possibility of a mistaken witness being convincing
If more than 1 ID witness, refer to possibility that they could all be mistaken

May be worth considering racial bias or struggles in identifying people from different racial backgrounds.A delay in time may be worth warning about, as might an intervening event, such as a photo being published online.</td></tr>
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<u>Voice identification evidence</u>

Is it voice identification evidence?	Section 4: "voice identification evidence": first hand, mechanical/electronic transmission identified as voice of D or other person connected w act that is direct or circumstantial evidence of commission of offence.
Has P proved reliability on BoP?	Section 46: starting presumption is that voice ID evidence is inadmissible unless P proves, on the balance of probabilities, that the circumstances of procuring voice ID have produced reliable evidence. *Law Commission actually recommended BRD standard here. BOP is probably some kind of compromise in Parliament.*
Warning	Section 126(1): Where case against D wholly or substantially depends on visual or voice ID, must warn jury for special need for caution before finding guilt. Section 126 (2) content of warning must include: ● Warn the jury of miscarriage of justice ● Alert jury to possibility of a mistaken witness being convincing ● If more than 1 ID witness, refer to the possibility that they could all be mistaken

Section 8: General exclusion

Note: ***Mahomed v R*** **= no need to repeat a s 8 analysis if one has been done under s 43 in propensity.**

Section 8(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
(b) Needlessly prolong the proceeding

Probative value	● Type of evidence: how direct is the evidence? Does it go to an element of offence/central issue? How logical is the inference? Or secondary materiality; does it support credibility of other evidence? ● Necessary? Does it duplicate proof of something else or is it the only way info can be put before fact finder? ● Direct or circumstantial relevance? ● What is the logical link? What are the heuristics/assumptions/generalisations based on? Uncontroversial or shaky/tenuous? ● Witness credibility and reliability.
Unfairly prejudicial effect	● Prejudicial effect is more about it being harmful to other side's case - this is inevitable. The concern is an unfairly prejudicial effect. ● Will the jury be influenced by the evidence in a way that is unfair or illegitimate? Will they be mislead, will they misunderstand, will they be distracted?

	• Moral prejudice; reasoning prejudice? Potential factual triggers for undue prejudicial effect: • Violence and aggression • Willingness to engage in criminal behaviour • Gang affiliation • Gruesome photographs, things engaging emotive responses • Previous convictions *R v Bain*: real concerns about prejudicial effect of evidence like "I shot the prick". If probative, only slightly due to difficulty in determining what was said. The prejudicial effect could be profound. The jury would be entitled to find guilt on the basis of a statement that is unable to be proved to the satisfaction of experts or lay people. Photos • *R v Weatherston*: 200+ photos of stab wounds. Could create moral prejudice. Judge = defence theory was that D lost control and carried out a frenzied attack. This was already put in issue by D, and the photos are a useful addition. • BUT *R v Tauira*: photos in a murder trial. Less grisly photos were available and could address the same issues. Very prejudicial, little probative value, and not entirely necessary. *R v R*; family violence, coercive control case. Physical and sexual abuse of daughters and wife, physical abuse of intellectually disabled son spanning 15 years. Propensity evidence of how D behaved with his family: "awful; not human; never showered; hated NZers". D was painted as a monster and his name was blackened, but evidence wasn't directly related to charges. Significant risk of bias. Warning was given by the judge to take care, and that was deemed sufficient. **Section 8(2): right of D to offer effective defence**
Needlessly prolong the proceeding	• Repetition and duplication • Very low probative weight for time and effort (opportunity to cull relevant evidence with little weight) • Things like a child being unable to string a sentence together

Judicial warnings	If evidence is not excluded under section 8, should judge give a warning to the jury? Can the risk of prejudice be alleviated?
	
	Section 122: **directions about unreliable evidence**
	• If Judge is of the opinion that evidence that is admissible may nevertheless be unreliable, they may warn of caution needed in deciding whether to accept the evidence and the weight to ascribe to it.
	• (2) the Judge must consider giving a warning if:
	  ○ Hearsay
	  ○ Evidence of statement by D, if that is the only evidence implicating D
	  ○ Evidence given by a witness who may have a motive to give false evidence
	  ○ Statement by D to another person made while both were detained
	  ○ Evidence about conduct of D if more than 10 years prior
	• (3) party may request Judge to give a warning, but Judge need not comply if it might unnecessarily emphasise evidence, or there is another good reason not to comply

	Section 123: **directions about ways of giving evidence** Section 124: **warnings about lies** ● Applies if evidence is offered suggesting that D lied before or during proceeding ● (2) not obliged to give direction about inference to be drawn by jury ● (3) If of the opinion jury may put undue weight on the lie, must warn jury that they must be satisfied before using the evidence; that people lie for various reasons; not necessarily conclude that lie = guilt Section 125: **directions about children's evidence** ● (1) must not give warning about corroboration of evidence if they wouldn't give that warning about evidence of an adult ● (2) must not, unless expert evidence supporting the need for the direction, give a direction that instructs jury to scrutinise evidence/take special care or suggest children have a tendency to invent or distort Section 126: **judicial warnings about ID evidence** ● (1) Where case against D wholly or substantially depends on visual or voice ID, must warn jury for special need for caution before finding guilt. ● (2) content of warning must include: warning of risk of miscarriage of justice; alerting jury to possibility of a mistaken witness being convincing; if more than 1 ID witness, refer to the possibility that they could all be mistaken Section 127: **delay in sexual violence complaint** allows the judge to tell the jury that there can be good reasons for a victim of a sexual offence to delay making, or even fail to making, a complaint regarding the offence. *R v R*; family violence, coercive control case. Physical and sexual abuse of daughters and wife, physical abuse of intellectually disabled son spanning 15 years. Propensity evidence of how D behaved with his family: "awful; not human; never showered; hated NZers". D was painted as a monster and his name was blackened, but evidence wasn't directly related to charges. Significant risk of bias. Warning was given by the judge to take care, and that was deemed sufficient.