FROM THE EVIDENCE ACT TO THE COMFORT OF THE COMMON LAW

MEGAN PATERSON

I Introduction

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

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

In New Zealand’s highest appellate court, uncertainty persists as to the proper role of the common law in light of the Evidence Act’s enactment. Indeed, ss 10 and 12 do refer to the common law, yet the Act’s relationship with previous case law is unclear. This article explores the gestation of ss 10 and 12, highlights confusion around their desired effect, and argues for their proper contribution to the success of the Act’s objects.

II Claims of a Code

In August 1989, the Minister of Justice asked the Law Commission to review the law of evidence because it was disorganised, unclear, and existed “through a conglomerate of statute and common law, with the

---

1 Aaron Mark Wi v The Queen [2009] NZSCTrans 25 (18 August 2009) at 41-42.
2 Evidence Act 2006.
Evidence Act of 1908 at the distant centre”. The Commission recognised the need to make the law of evidence as “clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes”. In 1991 the Commission published Evidence, Reform of the Law. Its preliminary intention was for a ‘true’ codification, whereby an Act would “replace the previous collection of case law and statute with a single consistent code”. In the Commission’s view, “[o]ne of the major features of a code is that it

---

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


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


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


supercedes existing law and makes a fresh start”. It pointed out that “[r]eferences to earlier judicial decisions can obstruct that objective”. Acknowledging that the term ‘codification’ had many meanings, the Law Commission took it to mean the development of a set of rules that were “comprehensive, systematic in structure [and] pre-emptive of the common law”. This would induce more than a mere legislative consolidation.

A What is meant by ‘Codification’?

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

Codification may conjure semblance to the various continental codes, which are comprehensive and gap-free in scope, providing a

---

8 NZLC R55, above n 4, at 10, see also NZLC PP14, above n 6, at 3 and 12; and NZLC R55, above n 4, at [35].
9 NZLC R55, above n 4, at 10.
10 NZLC PP14 1991, above n 6, at 1.
11 See NZLC PP14 1991, above n 6, at 3. This definition is viewed as correct by Chris Gallavin, above n 4, at 15; and Bergel Principles and Methods of Codification (1988) 48 Lou LR 1073.
14 See for example the Napoleon Bonaparte’s Code Civil 1804 (translation: French Civil Code) and the German Bürgerliches Gesetzbuch 1900 (translation: German Civil Code).
“systematic approach” and “generality” to their rules.\textsuperscript{15} This is because codification has been an eminent feature of the European legal landscape since pre-Roman times, as a process that achieves the “recension of the sources of law into a single instrument”.\textsuperscript{16}

Although the modern concept of codification has several stable components, there is no definitive, canonical model.\textsuperscript{17} In the common law realm, a statute traditionally acts “as a sword stabbing into the body of the common law to excise and rectify certain unwanted case-law developments”.\textsuperscript{18} The common law approach to codification has been described as “conservative, preferring to wait until the relevant principles have been thoroughly worked out in case law before codifying, rather than seeking to use the codification itself as a means of guiding the development of jurisprudence”.\textsuperscript{19} In part this is because “consolidation and uniformization, as well as doctrinal codification (i.e. restatement and text-book writing) represent in common law a genuine substitute for codification”,\textsuperscript{20} neutralising the demand for codification in the fullest reforming and exhaustive sense.

\textsuperscript{16} Expert Group on the Codification of the Criminal Law Codifying the Criminal Law (Department of Justice, Equality and Law Reform, Dublin, November 2004) at [1.06].
\textsuperscript{17} There are analytically many accepted uses of codification. See generally; Helmut Coing “An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries” in Samuel Jacob Stoljar (ed) Problems of Codification (Canberra: The Australian National University, 1977) at 16, 22-24; Csaba Varga Codification as a Socio-Historical Phenomenon (Akadémiai Kiadó: Budapest, 1991) at 318-328; John Armour, above n 13, at 3.
\textsuperscript{18} Andreas Rahmatian “Codification of Private Law in Scotland: Observations by a Civil Lawyer” (2004) 8(1) EdinLR 28-56, at 52. This was discussed in comparison to a Civil Law statute, described as “a skeleton around which the flesh of the case-law and doctrine can grow”.
\textsuperscript{19} John Armour, above n 13, at 1-2.
\textsuperscript{20} Csaba Varga, above n 17, at 166.
The psychology in common law systems, nourished by judicial overlay and commentary on the statutes, militates against codes. A deep ambivalence towards writing is part of our constitution, matched with a reluctance to abandon the principle of Parliamentary sovereignty. In general therefore, common law codification “still seems deformed compared to the classical model of European continental codification: particularly because it neither attempt[s] nor carrie[s] out the replacement of case-law with, and the reduction of law to, the code-text”.

In New Zealand, ‘code’ in its true sense supposedly details “a single Act that abolishes the common law on a specific topic and replaces it with a set of statutory rules that henceforth become the exhaustive and exclusive source of the law on that topic”.

The upshot is that although codes vary widely in their form, the common theme among code-makers is an intention to replace the existing common law to some extent.

III This Act is Not a Code

Mahoney et al unequivocally assert that “[t]he Act is not a code”. For the following key reasons, I conclude that it is indeed inaccurate to view the Act as a code, to any strength of the term.

---

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

22 Csaba Varga, above n 17, at 166.


24 Richard Mahoney and others The Evidence Act 2006: Act and Analysis (3rd ed, Brookers, Wellington, 2014) at 69, [EV10.01].
A Usual Code Terminology is Not Employed

The Act is not framed in accepted code terminology. It itself does not claim to be a code, nor does it seek to explicitly override or exclude the common law. Although the Select Committee made no direct acknowledgement of the change from the Law Commission’s expressed intentions of codification, this silence should not permit the label to persist.

Had the Select Committee or Parliament wanted to codify the Evidence Act, it could have done so explicitly. In Re Greenpeace,\(^{25}\) the Supreme Court considered whether s 5(3) of the Charities Act amounted to a codification of the limits when political purpose is permissible in the charities context. The Court found that codification by “the side-wind of a parenthetical illustration” is implausible.\(^{26}\) It argued that if Parliament had intended to codify a prohibition, its nature and scope would have to be better articulated.\(^{27}\) The Minors’ Contract Act exemplifies this, with its provision in s 15 for the “Act to be a code”,\(^{28}\) as does s 4 of the Property (Relationships) Act.\(^{29}\) In a similar vein, section 5 of the Contractual Mistakes Act is specifically designated to

---

\(^{25}\) *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105.

\(^{26}\) At [54] per Elias CJ. Her Honour discussed the implausibility of codification of a prohibition on political purpose by parenthetical illustration, when other core concepts, such as “public benefit” or “charitable purpose”, have been left in the statute to be construed in accordance with the common law in the particular context. As discussed at [56], s 5 and the Act as a whole “assumes the common law approach to charities” made evident by the Select Committee report, which thus “points away from codification” and instead towards mere restatement.

\(^{27}\) For example, as discussed in *Re Greenpeace*, at [54] by giving some definition of ‘advocacy’ (in light of the nuanced and subtle application of the principles identified in *Bowman v Secular Society Ltd* [1917] AC 406 (HL) and *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA)).

\(^{28}\) Minors Contracts Act 1969, s 15(1) which states that provisions of the Act shall have effect in place of the rules of the common law and of equity.

\(^{29}\) Property (Relationships) Act 1976, s 4.
have effect in place of the common law and of equity in the particular circumstances. Some statutes explicitly abolish parts of the common law, or codify only a specific area. On a larger scale, the Crimes Act 1961 is also considered a code, as it provides an exhaustive list of crimes in New Zealand.

B Comprehensiveness

Nor is the Act comprehensive or exhaustive, despite claims to the contrary during its legislative passage. To be comprehensive, the code would have had to replace all earlier common law and statutes on the same subject. However, our common law jurisdiction does not encourage the idea of a glorious legal bonfire. Section 5(1) states that if there are any inconsistencies between the provisions of the Evidence Act and another enactment, the other’s provisions prevail. The inclusion of this policy shift was not accompanied by any accessible rationale. In addition, ss 10 and 12 together provide access to the common law authorities for interpretation or where gaps may exist in

---

30 Contractual Mistakes Act 1977, s 5. Additionally, see Sale of Goods (United Nations Convention) Act 1994, s 5 which states that the provisions of the convention are to be a code, and thus have effect in place of any other law in New Zealand relating to contracts of sale of goods.
31 Property Law Act 2007, s 3, which details the Purpose of Subpart 7 of that Act (Abolition and modification of common law rules relating to property); see also Immigration Act 2009, s 124(b) which details that Part 5 of that Act purports to codify certain obligations.
32 Succession (Homicide) Act 2007, s 3.
33 Crimes Act 1961, s 9; see also Bruce Robertson (ed) Adams on Criminal Law (looseleaf ed, Brokers) at [CA9.01].
34 (23 November 2006) 635 NZPD 6802, per Mark Burton MP; he claimed that they “now have a comprehensive piece of legislation that brings together many existing statutory and common law rules and principles relating to evidence, giving this area of law clarity and accessibility of a type that it has not had for many, many years”.
35 Evidence Act 2006, s 5(1).
36 Richard Mahoney and others The Evidence Act 2006: Act and Analysis (Brokers, Wellington, 2007) at n 84.
the Act. In particular, the wording of s 12 demonstrates a drafting awareness that some evidential matters are not provided for.

IV  A Confused Landscape

Several other features exacerbated the uncertainty as to what the Act was intended to achieve, and which have arguably marred its reception into the Statue Books.

A  A Lengthy Gestation

“This is, of course, a bill that has been lurking about in gestation for a very long time.” The Bill first came before Parliament in May 2005. The Act received royal assent one year later and came into force in August 2007, almost 20 years after the Law Commission was charged with its evidentiary mission. Often common law developments had failed to align with the direction of the Act, leaving a dissonance between the preceding law and the outcome of the legislative process.

Consider, for example, the area of hearsay. Exceptions to the rule against hearsay developed for over 17 years between Cooke P’s call to go “straight to basics” (and focus primarily on the reliability of the evidence) and the eventual birth of the Act in 2006. After this period

---

37 (10 May 2005) 625 NZPD 20417.
38 Evidence Bill 2005 (256-3).
39 It received Royal Assent on 4 December 2006.
41 R v Baker [1989] 1 NZLR 738, 741 (CA) per Cooke P. His Honour considered it “more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards”. 
of divergent legal developments, the Act ended up being “both faithful to and contrary to [Cooke’s] vision”.\textsuperscript{43} Even despite his visionary approach, Cooke’s foresight in the area of hearsay was not truly adopted by the Act.

Had the Act been passed sooner, this scope for disparity could have been minimised. As it was, the common law developed in this interim for a further two decades after the original draft code; this could not be ignored. Rather than prolong the enactment while bringing the Bill in line with the most recent developments, ongoing recourse to the common law permitted this to happen on a case-by-case basis. This may explain why the drafters of the Bill altered the Law Commission’s proposed ss 10 and 12. However, if this was its intention, the Select Committee could helpfully have said so.

\textbf{B Drafting}

When drafting a piece of legislation, it is impossible to accurately assess or predict the direction of future legal development.\textsuperscript{44} Attempting to freeze fragments of existing case law is unrealistic, for “nothing short of omniscience would suffice to enable the draftsmen to conceive and provide for every possible contingency”.\textsuperscript{45} By the very nature of cases

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{42} Note that his Honour’s initial proclamation coincided with the Law Commission’s 1989 Report.
  \item \textsuperscript{43} Elisabeth McDonald \textit{Going Straight to Basis}, above n 4, at 164.
  \item \textsuperscript{44} Grant Gilmore “On the Difficulties of Codifying Commercial Law” (1948) 57(8) Yale Law Journal Faculty Scholarship Series, Paper 2677, 1341 where the author discusses that no matter how admirably executed, this idea limits the benefits of codification.
  \item \textsuperscript{45} MacMillan Committee on Income Tax Codification (Cmnd. 5131, 1936) at 17 discussing the relationship of code and judges, found that it is not practicable to pursue any given topic to its last details; Aristotle once remarked, “no piece of legislation can deal with every possible problem”, both cited in Michael Zander \textit{The Law-Making Process} (6th ed, Cambridge University Press, 2004) at 485; see also, Grant Gilmore, where the author discussed the conundrum between being overly general or abstract (and thus of not much use) or being overly detailed.
\end{itemize}
\end{footnotesize}
that come before court, not all situations in which the rule is later applied will neatly fit the envisaged pattern.  

Added to this, the Commission sought to strike a balance between excessive detail and bare statements of principle. Ideally, it would strive to “maximise predictability and uniformity in the application of the principles of the code, while endeavouring to avoid the distortion of the policies and principles which can so easily result from rules which are overly specific”. This was vital in light of the previous evidence legislation, which had been designed to create certainty in the law by being overly technical. Yet paradoxically, this created confusion and facilitated excess use of judicial discretion, often inconsistent with the underlying principle on which admission of evidence ought to be focused. Learning from this misfortune, the Law Commission sought to “avoid stating the law so tersely that its meaning cannot be readily elucidated”.

He notes that attempting to account for everything by loading excessive amounts of detail into the statute would cause it to “wither on the vine”.  

46 HLA Hart The Concept of Law 124 (1961) at 125 -26. Hart wrote about the “indeterminacy of aim” in legislation, asserting that when “the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us”. See also David P. Leonard “Power and Responsibility in Evidence Law” (1989-1990) 63 S. Cal. L. Rev. 937 at 937.


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


C. **Shifts But No Signal**

Unfortunately there is a lack of substantive discussion of the changes effectuated during Parliamentary debates on the Bill.\(^{51}\) All that is available on the point is a briefing from the Ministry of Justice to the Justice Minister, which simply noted that the “Bill adds reference to the status of the common law with respect to the Bill that did not appear in the Code. This was thought to be a helpful addition to aid interpretation.”\(^{52}\) This does not provide sufficient explanation. The amendments leave the status of the Law Commission’s commentary unclear.\(^{53}\)

In the Bill’s journey through the House, the Select Committee and other Members of Parliament avoided specifics, saying generally that the proposals of the draft Code had mostly been carried forward, without directly justifying the reasons for the new relationship with the common law.\(^{54}\)

During the first reading, Stephen Franks MP stated that the Bill could not claim to be a codification. He observed: “I do not think the Minister used that term in his introduction, and the precise words are not used in the explanatory note that the Government has attached to the bill … in fact, all it is doing is listing the factors that judges look at, without making the likely outcome any more obvious than before to

---

\(^{51}\) Evidence Bill 2005 (256-1).

\(^{52}\) Letter from Gordon Hook (Manager of the Criminal and International Law Team, Ministry of Justice) to the Hon Phil Goff (Minister of Justice) regarding the Evidence Bill (8 February 2005), quoted in Elisabeth McDonald *Principles of Evidence in Criminal cases* (Brookers, Wellington, 2012) at 15, and in Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Wellington, 2010), at [EV10.01], and Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 23, [2.24].

\(^{53}\) Also observed in NZLC R127, [2.26].

\(^{54}\) See also NZLC R127 at [2.24] where it found that scarce rationale for the change exists.
the lay reader or the reader who is not a specialist in the area.” He makes a valid point.

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

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

55 (10 May 2005) 625 NZPD 20418.
56 (15 November 2006) 635 NZPD 6561.
57 At 6562.
58 Mahoney and others (3rd ed), above n 24, at [EV10.01].
59 Given the lack of explanation, it may be that some members of the Select Committee were unaware of the change.
60 (23 November 2006) 635 NZPD 6803, my emphasis added. This echoed the findings of the Select Committee in Evidence Bill 2005 (256-2) (Select Committee report) at introduction, my emphasis in italics added. Also, the Law Commission submitted that the Code would “replace most of the existing common law and statutory provisions on the admissibility and use of evidence in court proceedings (italics added). NZLC R55, above n 4, at xviii, and 3. It still thought the Act was a code: later, in its discussion, the Committee dismissed the suggestion that some provisions be dealt with by regulation, to make the bill less prescriptive. This was because the members found it appropriate that the content of the bill be contained in statute, as a comprehensive evidence code is too important to be relegated by regulations;
The members exhibited a lack of certainty as to what was being achieved, even if they were positive about the supposed update of the law. In the absence of explicit justifications, it is unclear whether the shift was deliberate or merely a by-product of some other oversight.

Without any justification by the Select Committee to acknowledge the change from a ‘code’ to a mere Act, and reflag this to the judiciary, arguably the Act was received by a judiciary whose outlook was overshadowed by a residual mistrust in what the Act was able to achieve.\(^{61}\) In \textit{New Zealand Institute of Chartered Accountants v Clarke}, the court suggested that the possibility that “if the common law were to have a place s 57 would surely have said so, as s 53(5) does as to one field of legal professional privilege.”\(^{62}\) It adds that “of course, the Act itself says that it is not a code and ss 10 and 11 allow the common law a definite place.”\(^{63}\) It is clear that the Act alone would not suffice to govern the evidentiary privilege rules. The Court in \textit{Sheppard Industries Ltd v Specialized Bicycle Components Ltd} found that aside from s 57(3), “plainly, however, there are other recognised exceptions to the ‘without prejudice’ rule” and “in respect of other exceptions… resort must be had to the common law.”\(^{64}\) Quite simply, there “is no suggestion that Parliament considered that the exceptions not mentioned in ss 57(3) and 67 should no longer be available.”\(^{65}\)

---

Select Committee in Evidence Bill 2005 (256-2) (Select Committee report) at Part 5 Miscellaneous Regulations’.

62 \textit{New Zealand Institute of Chartered Accountants v Clarke} [2009] 3 NZLR 264 (HC) at [37].
63 At [37].
65 At footnote n 4.
V  Assessing the Act’s Prosperity

Undoubtedly, the door to the common law has been left ajar and judges have been looking back to old cases.

Such recourse need not always be problematic. In *Bank of England v Vagliano Brothers*, Lord Herschell considered that if a provision were of doubtful import, resort to the common law would be legitimate to aid in the construction of the relevant provision.⁶⁶ However, the occasions when a judge may view the import of a section as ‘doubtful’ are, quite possibly, endless. Judges are not strangers to finding flexibility in legislation to assist their decision-making. Although ss 6, 7, 8, 10 and 12 seek to establish legal order based on principle, in reality their combined force directly undermines the establishment of any defined boundaries within which that search for legal order may be conducted.

Some judges consciously foster a substantive relationship between the Act and the common law. An example is the discretion to reject improperly obtained evidence, contained in s 30. In *Fan v R*, Asher J concluded on behalf of the Court of Appeal that “the common law discretion survives the Evidence Act, although s 30 governs those cases to which the section applies”.⁶⁷ The same Court (although differently constituted) in *Dabous v R*⁶⁸ echoed this: “there is no difference in the assessment of unfairness, whether it is addressed under s 30(5)(c), or under the common law”.⁶⁹ This suggests that reliance on the common law is a continuing possibility, even though s 30 could suffice alone. However, this strategy of approaching the Act and the common law as

---

⁶⁸ *Dabous v R* CA618/2013, [2014] NZCA 7 per Harrison, Hansen, Dobson JJ, whereas the Court in *Fan* consisted of Harrison, Miller and Asher JJ.
⁶⁹ *Dabous*, at [18].
a co-extensive regime is not feasible for all sections and may entrench an inconsistent approach to the Act as a whole, in turn bolstering judicial reluctance to accept the Act as the authoritative, primary source of evidence law in New Zealand.

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

The Law Commission noted in 2012 that “judges have shown some willingness to place greater emphasis on a broad reading of the interpretation aids in the Act than on the Commission’s recommendation that the Act should be a code”. For example in R v

---

70 See for example Evidence Act 2006, s 21 which was designed to negative the existing common law; See discussion in Richard Mahoney and others (2nd ed) above n 52, footnotes 543-4.
71 R v Healy CA414/07, [2007] NZCA 451 at [54].
72 As is consistent with Evidence Act 2006, s10(1).
74 New Zealand Institute of Chartered Accountants v Clarke [2009] 3 NZLR 264 (HC) at [37]. Presumably the correct reference should be to s 12.
75 At [40].
76 Law Commission Civil Pecuniary Penalties -an Issues Paper on Civil Penalties (NZLC IP33, 2012) at [6.67]; For example, the Commission suggests that privilege in respect of civil penalties has not been retained (its intention was to abrogate the privilege; NZLC R55, above n 4, at 76) but that it could be re-
Moffat, Baragwanath J commented: “Parliament recognised that in codifying the law of evidence questions of interpretation would arise where the purposes and principles would best receive effect by retaining rather than discarding rules of the common law.”

Admittedly the old cases can be learned from, and can be used to positively advance the direction of the law. However the drafters already considered the existing cases when composing the Act. ‘Aiding judicial interpretation’ can veil what is, in effect, direct resort to the former law. As Judge Burns stated Police v Stevenson, “[i]nsofar as ss 10(1)(c) and 12(b) are concerned, when a Judge has regard to the common law, the result will usually be a direct application of the common law”.

A Shortcomings with Pivotal Sections

The dissonance between the initial code status of the reform and the eventual Act derogates from the clarity and consistency that the reform sought. As the Law Commission observed in its 2013 review of the Act’s operation, numerous cases have “given rise to concern about the way courts are interpreting ss 10 and 12”.

---

established). See also New Zealand Air Line Pilots Association Inc v Jetconnect Ltd (No 2) [2009] ERNZ 207 at [23] where Chief Judge Colgan proposed that the ‘privilege’ under the Evidence Act relates only to criminal liability exposure, and thus that the common law of privilege affecting civil claims is left untouched; see also John Matsuoka v LSG Sky Chefs New Zealand Ltd [2013] NZEmpC 165, ARC 23/12 at [48].


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


80 At [58].

81 NZLC R127, 2013 above n 59, at [2.35],
Realistically, cases form the prelude to a code, as well as its subsequent continuation. Therefore, forging an appropriate and reasoned connection between cases and the Act was crucial. Initially, the Law Commission saw no need to include a provision detailing how to construe the “Code”. The principles and policies were to suffice as an overarching guide alongside the Acts Interpretation Act 1924 (which promoted a purposive approach to interpretation).

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

As for matters not provided for, s 12 was included in the initial draft because the Commission had predicted that some developments, “especially of a technological nature, may not be contemplated or fully evolved when the code is being drafted”. The Law Commission explicitly stated in s 12 that in any unanticipated situations “the courts should look to the purpose and principles of the Code to resolve the matter.”

---

82 Discussed in Samuel Jacob Stoljar (ed), above n 21, at 11.
83 NZLC R127, above n 52, at 20, [2.11].
84 See now Interpretation Act 1999, s 5(1) which states that “The meaning of an enactment must be ascertained from its text and in the light of its purpose”.
85 Law Commission Evidence Law: Codification (NZLC PP14, 1989) at [29].
86 NZLC R55, above n 4, at [32].
88 NZLC R55, above n 4, at [37].
89 NZLC R55, above n 4, at [38].
Although most of the Act stayed close to the structure envisioned under the Commission’s Preliminary Paper, changes to ss 10 and 12 were substantial. By the time of the Bill’s introduction, these two provisions were scarcely recognisable.

B Principles and Purpose: Weak and Only Decorative

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

The Act’s purpose is to help secure the just determination of proceedings, by keeping in mind six important considerations: logic, rights, fairness, confidentiality and other public interests, efficiency, and access. These factors can be incompatible. For example, adhering to fairness and rights can be at the expense of efficiency. It means, for example, that an interpretation should promote fairness for parties and witnesses whilst also protecting public interests. Prima facie, this sets a troublesome judicial task.

---

90 This observation is reinforced by Chris Gallavin, above n 4, at 8, referring to NZLC PP14 1991, above n 6.
91 See generally, Evidence Bill 2005 (256-1).
92 This is generally accepted. See for example, NZLC R55, above n 4, at [38].
93 Chris Gallavin, above n 4, at 12.
94 Evidence Act 2006, ss 6, 7, 8, 10, and 12.
95 NZLC R55, above n 4, at 10, [36]. The objective was to ensure that the law developed in a principled way, thus improving its moral quality and credibility.
96 Evidence Act 2006, s 6. These purposes are not substantive in detail. For further discussion see Mahoney and others (3rd ed), above n 24, at 37-39.
97 Evidence Act 2006, s 6(c).
Together ss 7 (relevance) and 8 (test of probative value against unfair prejudice) provide an absolute test of admissibility and if proposed evidence does not satisfy both sections, it must be excluded. There is no residual judicial discretion to admit in the face of such inadequacy.

C. Operational Issues

In such a “corpus of law”, where it is nearly impossible to provide for every eventuality, “recourse to underlying principle is of paramount importance”.100 The establishment of principle should empower judges to exhibit genuine statutory interpretation when applying and developing the law, as opposed to “painfully hacking their way through the jungles of detailed and intricate legislation”.101

However, the mere existence of these principles does not automatically assure them any high degree of influence or value. It is submitted that they may have only a minor effect, via strategic but largely totemic use by counsel to progress an argument. In Police v Stevenson,102 Judge Burns found that although ss 10 and 12 give priority to the Act’s purpose and principles, “that does not provide a barrier to application of the common law.”103 Recourse to the common law is easily justifiable, thanks to the evasive nature of the Act’s statement of purpose and principles.

98 Evidence Act 2006, s 6(d).
99 Mahoney and others (3rd ed), above n 24, at [EV10.02].
100 Chris Gallavin, above n 4, at 16. These principles have developed at common law over time, and thus mirror the existing values of evidence law. Therefore, unfamiliarity is not the issue.
101 (1 April 1965) 264 GBPD HL 1965, columns 1175-6 per Lord Wilberforce; cited in NZLC PP14 1991, above n 6, at 4; cited in Letourneau and Cohen “Codification and Law Reform: Some Lessons from the Canadian Experience” [1990] Stat LR 183, 194. The authors also point out that the virtues of codification are the virtues of all competent legislation.
103 At [58]. In turn, this justified his statement that “the Act cannot be described as a complete code”.

Justice Asher’s discussion in *R v Fan* exemplifies the malleability of the purpose section of the Act and demonstrates that its range of subsections provides sufficient interpretive flexibility. Arguably, resort to the common law is inconsistent with subs (f), which refers to “enhancing access to the law of evidence” as it undermines the ability of the Act being the sole, instructional source of evidence law. However his Honour noted that it would be “inconsistent with the common law and the purpose of the Evidence Act, which is to promote fairness to parties, to construe s 30 as excluding the common law discretion”. Helping to secure the “just determination of proceedings” can be achieved by other methods beyond the promotion of fairness to parties, via the other subsections in s 6.

### D All’s Well that Appears Well?

Prima facie, the Act appears to hold authority wherever possible. But issues around the principled basis of accessibility to the common law still brew behind its surface.

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

---


105 At [31].

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


108 As was the Law Commission’s initial proposal in NZLC R55, above n 4, at 36, 38.

109 Discussed in *R v Healy* (2007) 23 CRNZ 923, [2007] NZCA 451 at [46] per Ellen France J. Her Honour illustrates the preferred approach by referring to the decision of *R v Taea* [2007] NZCA 472, where the Court of Appeal had earlier found it unnecessary to refer back to the law in force before the advent
that when interpreting, the statutory words must be focused on, not earlier authorities.\textsuperscript{110} In \textit{Queen v Barlien},\textsuperscript{111} Glazebrook J found that “s 10 should not be given an expansive interpretation in the face of clear wording in the Act”.\textsuperscript{112} Thus her Honour was adamant that s 10 “cannot override explicit exclusionary wording in the Act itself”.\textsuperscript{113}

In the Supreme Court in \textit{R v Hart},\textsuperscript{114} Elias CJ considered the Act to be the “first stop when questions of admissibility arise. And in many cases it will be the last stop.”\textsuperscript{115} The other judges agreed;\textsuperscript{116} “the Courts of the Act. Thus at [48] her Honour used the statutory provisions as the starting point for interpretation. This is in line with a plain reading of s 10. See also \textit{The Governor and Company of the Bank of England v Vagliano Brothers} [1981] AC 107 at 144-145 (HL) per Lord Herschell who held that “the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previous state of the law stood ...”. This was the approach taken in relation to the Criminal Justice Act 2003 (UK), discussed in \textit{Healy} at [53].

\textsuperscript{110} \textit{R v Timbun} (CA 370/07, 27 February 2008). [2008] NZCA 4 at [26]; see also \textit{R v Weir} [2005] EWCA Crim 2866; [2006] 2 All ER 570 at [35] where the proposition that the statute be read in light of the pre-existing common law was rejected.

\textsuperscript{111} \textit{R v Barlien} CA505/2007, [2008] NZCA 180 per Glazebrook J.

\textsuperscript{112} At [55]. Section 35 was considered to be final, given that no common law authority was referred to.

\textsuperscript{113} At [54]. This was justified by contrast to s 12A which was included to directly preserve the common law co-conspirators rule, as differentiated from the rule in s 27(1). No such section was included to preserve the common law in relation to s 35.


\textsuperscript{115} At [1]. The case turned on the admissibility of a previous consistent statement under s 35(2) of the Evidence Act 2006. At [1], the Court described this topic as one of “conceptually unsatisfactory case law at common law”, and thus saw the need to promote a careful approach to not to stray from the text and principles of the new Act. At [9] it recommended that “[e]nvironment needs to be taken to ensure that authorities under the former law ... do not distort the application of s 35”. This approach echoes that of making a fresh start, or new slate, as in \textit{Wi} the year prior.

\textsuperscript{116} The other judges were Blanchard, Tipping, McGrath and Wilson JJ: the judgment was delivered by Tipping J.
should not follow the general common law approach ... when that is
not mandated by the statutory language”.\textsuperscript{117} This was supplemented
with a footnote: “Indeed the Act is designed to make a break from the
common law: see s 10.”\textsuperscript{118} It took a consistent approach in \textit{Mohamed v R},\textsuperscript{119}
commenting: “We do not consider a great deal is now to be gained
from an examination of pre-Evidence Act case law.”\textsuperscript{120} The Supreme
Court in \textit{Wi v R}\textsuperscript{121} acknowledged the limited function of the common
law by virtue of s 10(1)(b), presuming that this was included “to
emphasise that the Act marked a new departure in the law of evidence
and Judges should not interpret it restrictively on account of any
hankering for the old common law or instinctive resistance to
change”.\textsuperscript{122}

Although the context of each examination varies, it appears clear that
the Act is accepted as the starting point. Yet beyond this point,
confusion persists.

\textit{E} \textbf{What is the Meaning of ‘Common Law’?}

The Evidence Act is the single piece of New Zealand legislation
containing the most references to ‘common law’, a term that is present
in and central to the understanding of ss 10 and 12.\footnote{\textsuperscript{123} Yet it is not
defined in the Act’s interpretation section.\textsuperscript{124}}

\begin{footnotes}
\item[117] \textit{Hart}, above n 114, at [52]-[53]. This was discussed in relation to the timing
of a prior consistent statement.
\item[118] At footnote 58 of the judgment. Thus the Supreme Court takes the inclusion
of section 10 as permitting, if not encouraging, judges to anchor themselves
firmly in the statutory concepts, before resorting to pre-Act case law.
\item[120] At [4].
\item[122] At [26]. The Court considered section 10 and 12 in relation to the
admissibility of a defendant’s lack of previous convictions.
\item[123] New Zealand Legislation “Search Results: ‘common law’”
\item[124] Evidence Act 2006, s 4.
\end{footnotes}
Generally, this phrase refers to the law developed by judges. Under the doctrine of stare decisis, such judge-made common law binds the courts when adjudicating similar disputes in the future. This characteristic of New Zealand’s legal system derives from England, where the common law originated in the 13th century. Over time, the decisions of judges became the basis of the modern common law system.125 “Conceptually, the common (judge-made, or classically, judicially articulated) law is the legal foundation,126 and covers seamlessly all questions. Superimposed upon this are particular statutes. Where a statute does not cover the question, then the common law supplies an answer.”127 This principle is well established.

In an evidentiary setting, the leading texts suggest that ‘common law’ is taken to mean the law of evidence prior to the Act.128 Chief Justice Elias stated that “[r]eference in statute to the common law without more is to the common law as it develops from time to time”.129 Arguably, ss 10 and 12 would permit or require reference to judicial

126 The traditional theory is that judges do not make, but simply declare, the law. See William Blackstone Commentaries on the Laws of England, Vol 1 (Clarendon Press, Oxford, 1765), 54, 70; see also Willis & Co v Badeley [1982] 2 QB 324, 326 where Lord Esher MR found that there is “no such thing as judge-made law…” In contrast, the Modern acceptance is an open acknowledgement that this is not the reality, and indeed judges change the law when overruling earlier precedents; see In Re Spectrum Plus Ltd [2005] UKHL 1; [2005] 2 AC 680, esp. at [34] and [35].
127 John Armour, above n 13, at 5.
128 Mahoney and others consider that the ‘common law’ refers to the law of evidence as it was before the Act. See Mahoney and others (3rd ed), above n 24 at 71, [EV10.03]; see also Bruce Robertson (ed) Adams on Criminal Law (looseleaf ed, Brookers) at [EA10.02], who predicted that it is likely that “the common law” is likely to be taken to refer simply to the law of evidence as it existed prior to the Act, which could thus include reference to judicial interpretations of earlier statutes, where those statutes are now outdated.
129 Re Greenpeace at [56] per Elias CJ. However, its weight for this argument is perhaps limited to future legal development, to which it likely refers.
interpretations of earlier statutes which themselves have since been reformed by the Evidence Act of 2006. As it stands, reference to such prior case law would be seen as authorised.\(^{130}\)

Admittedly, the drafters had the difficult task of replacing some common law and accounting for that which remained.\(^{131}\) Given that the Act took over 16 years to eventuate, numerous cases came before the courts in the interim. Judges were faced with either anticipating the Act’s birth or simply ignoring it. Problematically, the legislative solution adopted in ss 10 and 12 is illogical and achieves flexibility at the expense of clarity and order. Moreover, it makes no distinction between instances where the common law is assumed, as opposed to cases where it had been expressly stated. It is problematic to leave an overhang of cases that are not directly accounted for by the statute. Such decisions can lie dormant until counsel offers them as justification for an approach not anticipated by the Act. If the cases from 1989 to 2006 had to be accounted for, the Act could have limited recourse to the ‘common law’ to this period of time.

The Supreme Court in \(Wi v R\) found that “[t]he common law approach in England fortifies the appropriate construction of the Act”.\(^{132}\) This is troubling, as reference to common law in the Evidence Act may not extend to include the common law of England. Yet this is only an assumption, as the Act provides little guidance on the point.

For the sake of clarity and simplicity (two objectives of the Act), a legislative attempt ought to be made to clarify the distinction between judicial decisions rendered from interpreting current New Zealand statutes, as opposed to the pre-existing mass of common law.

\(^{130}\) This is so long as the constraints of ss 10(1)(c) and 12(b) of the Evidence Act are followed.

\(^{131}\) As discussed in J F Burrows Statute Law in New Zealand (3rd ed, LexisNexis, Wellington, 2003) at ch 16.

F  The Distorted Power of New Terminology

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

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

---

133 *Healy* at [54]. See also Law Commission *Evidence Law, Character and Credibility* (NZLC PP27, 1997) at [268]–[270]. It reminded that the Act is the product of a long and considerable history of reforms and that one of the objectives in terms of the law relating to propensity evidence was to reduce the previous uncertainty as to the likely approach to the admissibility of this sort of evidence. 134 The position being that evidence of lack of previous convictions was admissible. 135 *W?*, above n 132, at [27].
**G  Determining Parliament’s Intent**

Added to the lack of direction and justification in Hansard for the inclusion of ss 10 and 12, seeking to assess Parliament’s intent is a difficult, if not impossible task. It may be doubted whether a cohesive intention would regularly be gleaned from a group of often polarised legislators.\(^{136}\) Seeking to justify an interpretation upon the basis that it was intended by Parliament is a somewhat flawed (if not fatal) basis for principled development of the law.

**H  Addressing Gaps in the Act**

If the Act is not comprehensive, the issue then arises as to how legislative crevices might be identified, and whether they can be forged afresh.

The original draft Code included a version of s 12 which stated “Matters of evidence that are not provided for by this Code are to be determined consistently with the purpose and principles of this Code.”\(^{137}\) The Law Commission made it clear that “any ambiguity in the meaning of a provision of the Code must be resolved by reference to the purpose and principles of the Code rather than to the pre-existing common law”.\(^{138}\) It also asserted that the problem of gaps in a code “is somewhat illusory” because “[i]f in a given case the code appears insufficiently specific, reference to the general policies and principles will enable the code to be interpreted appropriately”,\(^{139}\) That said, it conceded that reference back to the old cases might be helpful

---

\(^{136}\) This idea was raised and discussed by Justice Susan Glazebrook: “Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21st century” (Guest Lecture, University of Otago, 13 August 2014). Bills will not always have cross party support for their statutory text, yet it is still possible.

\(^{137}\) NZLC R55, above n 4.

\(^{138}\) At at [36]; the same idea was discussed in NZLC R55, above n 4, at [C68].

\(^{139}\) NZLC PP14 1991, above n 6, at vii.
in elucidating the Code’s principles.\textsuperscript{140} However, this is not the section that eventuated in the Act.

Under s 12(b), as it now stands, the judge is required to have regard to the common law when determining the admissibility of evidence influenced by rules not provided for in the Act. This is no small requirement. As noted by Mahoney et al, there are numerous occasions when the Act does not deal completely with all admissibility issues regarding a particular class of evidence.\textsuperscript{141}

The Ministry of Justice said that the purpose of cl 12 was “to provide the Act with some flexibility in cases where courts are faced with new developments in technology … not contemplated at the time the Act was drafted”.\textsuperscript{142} However, as noted by Mahoney et al, “if new technologies are at issue, the common law will presumably offer no insights into how they should be used, except at the level of principle”.\textsuperscript{143} That being the case, the principles contained within the Act ought to be sufficient to guide the development of the Act in future, unanticipated areas, as was the original express view of the Law Commission.\textsuperscript{144}

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

\textsuperscript{140} NZLC R55, above n 4, at [36].
\textsuperscript{141} Mahoney and others (3rd ed), above n 24, at 72, [EV12.01] For example, see admissibility of reputation evidence under section s 37 or 40, discussed at [EV37.03(4)] and [EV40.02(5)].
\textsuperscript{142} Ministry of Justice Evidence Bill: Part 1 – Preliminary Provisions Departmental Report for the Justice and Electoral Committee (June 2006) at 13, in relation to the draft Bill.
\textsuperscript{143} Mahoney and others (3rd ed), above n 24, at [EV12.01].
\textsuperscript{144} NZLC PP14 1991, above n 6, at [33] and [36].
VI Finding Gaps: Dubious Justifications

The Court of Appeal found that there is no automatic preservation of the common law. If the Evidence Act abrogated the rationale for an earlier rule, then the Act is inconsistent with that rule. In *R v Healy*, the Court of Appeal reiterated the primacy of the Act, finding that s 12 “deals with the situation where there is a lacuna because matters are not provided for”. In *R v Mata* the Court of Appeal adopted *R v Carnachan* in rejecting the appellant counsel’s proposition, and held: “We see no place for s 12 in the analysis of the issue raised on this aspect of the appeal.” Added to this, the Supreme Court noted “resort is not to be had to the common law when statute covers the ground”. But the limits of what the statute covers are not black and white.

Practitioners and judges have grown to expect that if an aspect of the common law is to be changed substantively, it will be unequivocally stated. To this end, Mr King, counsel for the appellant in *R v Wi*, submitted that the Evidence Act does not seek to depart from the common law practice regarding adducing evidence of good character.

---

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

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

147 *Healy* at [49].


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

150 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] 2 NZLR 709; [2008] NZSC 24 at [71].
He reasoned that “[h]ad it done so, it would have done so expressly, had it been intended to then it would have been the subject of widespread debate, discussion and consultation, which it clearly was not”.\footnote{Aaron Mark Wi v The Queen SC 28/2009, [2009] NZSCTrans 25 at 42.}

Taking a contrary view, the Court of Appeal in \textit{R v Kant}\footnote{R v Kant [2008] NZCA 269 (31 July 2008).} found that despite no express heralding of the change, the Act \textit{did} intend to alter a common law principle. It noted that the cases prior to the commencement of the Evidence Act 2006 “now need to be treated with circumspection”.\footnote{At [20]. The Law Commission materials show a clear distinction between veracity and propensity evidence “in a way which has altered the previous approach under the common law.”} This approach is refreshing, yet it was not followed in \textit{Wi v R}, where the Supreme Court considered that “the Act may well have done so … but the lack of any suggestion that the law was to change in this significant respect is surprising if that is what was intended”.\footnote{Wi, above n 132, at [27].}

Clearly, as explicitly stated by the Court of Appeal in \textit{Singh}, the common law can legitimately continue to inform evidentiary decisions.\footnote{Singh v R [2010] NZCA 133 at [52]. The Court footnoted sections 10 and 12.} Despite concluding for other reasons that the statements should not be excluded, Asher J in \textit{Fan} was keen to observe “there remains a general common law discretion to exclude evidence where its admission would be unfair”.\footnote{Fan, above n 70, at [52].} In \textit{New Zealand Institute of Chartered Accountants v Clarke},\footnote{Clarke, above n 74.} Keane J considered that the common law has “a continuing place in setting the boundaries to the privilege conferred”.\footnote{Clarke, above n 74, at [44]. This was based upon the opinion expressed in \textit{Cross on Evidence}, 3613, EVA 57.9 rather than reference to sections 10 or 12, and thus avoided giving an explanation of the extent to which continual referral to
Sometimes, even though the Act does sufficiently cover a particular area, judges appear dissuaded from using the Act’s wording as the determinative instrument and often refer back to previous cases. Judges can label an area where they wish to justify moving beyond the language of the Act as being ‘not provided for’ rather than being directly rescinded by the statute. In *R v Fan*¹⁵⁹ s 30(5)(c), the court examined how the ground of impropriety based on unfairness could be kept in check.¹⁶⁰ The pre-Evidence Act cases appeared to exclude evidence on the ground of general unfairness but could not be relied upon, given the specific description of “obtained unfairly” in s 30(5). The Court found that its inclusion centred on the notion of ‘obtaining’, rather than on general impropriety.¹⁶¹ Despite the ‘fairness’ of this ‘obtaining’, it considered it necessary to “look further to whether it was in fact the intention of the drafters of the Act to limit the considerations of unfairness only to the act of ‘obtaining’”,¹⁶² and thus explored the common law.

The Court in *Fan* discussed three cases since the enactment of the Evidence Act in which the general discretion to exclude on fairness grounds was relied upon.¹⁶³ However, those cases had not explicitly considered whether the general discretion survived the Act, thus the Court felt the need to look further. Despite acknowledging that s 30 provides an obstacle to the argument that admitting the evidence is unfair (as opposed to the argument that it had been unfairly

---

¹⁵⁹ *Fan*, above n 104.
¹⁶⁰ At [17]. Thus the Court of Appeal was tasked with determining whether to exclude evidence on grounds of unfairness.
¹⁶¹ At [20]. It was the giving, rather than the receiving, which was at issue in this case (as it was alleged to have been unfair).
¹⁶² At [23].
¹⁶³ At [28]. The three cases are *R v Petricevich* [2007] NZCA 325 at [18]; *R v Cameron* [2009] NZCA 87 at [41]; and *R v Simanu* [2011] NZCA 326.
obtained), the Court subsequently found no indication from the Law Commission of an intention to exclude this common law discretion.

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

In Fan, given that the Court found s 30 could not be interpreted as including general unfairness, s 10(1)(c)(i) ought to have barred the conclusion that a general common law discretion to exclude evidence may remain. Moreover Fan’s reliance on s 12 to endorse the continued existence of a part of the fairness discretion exemplifies the

---

164 Fan, above n 104 at [29] and footnote 16 of that case; Donald L Mathieson (ed) Cross on Evidence (online looseleaf ed, LexisNexis) at [EVA30.10]; Richard Mahoney and others (2nd ed), above n 52, at [EV30.10(1)]; and Bruce Robertson (ed) looseleaf, above n 33, at [EA30.10].

165 Fan, above n 104, at [30]. The Court mentioned the following two publications: NZLC R55, above n 4, at [105]; and Law Commission Criminal Evidence: Police Questioning (NZLC PP21, 1993) at [44], [56]. However it did not refer to the Law Commission Police Questioning (NZLC R31, 1994) which stated at 34 (with regard to the improperly obtained evidence rule) that “the rule provides for the exclusion of improperly obtained evidence” and that the “lack of clarity in the guiding principles behind the current fairness discretion (i.e. to exclude evidence on the ground of unfairness) has, therefore, been addressed by the proposed rule”. At 101 it stated “the new rule replaces the fairness discretion”. Had this clear statement been located, it may have been difficult to avoid.

166 NZLC R127, above n 52, at 29.

167 NZLC R127, above n 52, at 29.
potential strength of s 12. Any viable interference with s 7(1) was not discussed, thus arguably placing s 12 on something of a pedestal above relevance.

In Sheppard Industries Ltd v Specialized Bicycle Components Ltd the Court of Appeal used s 12 to import a common law exception to the settlement negotiation privilege,\textsuperscript{168} as a means to remedy a perceived problem with the scope of s 57 itself.\textsuperscript{169} Again, this exemplifies the capacity for s 12 to be invoked to find a route back to the common law, with little guidance on when this actually is appropriate.

\textbf{A \hspace{1em} When is the Act Sufficient?}

It is not always clear whether parts of the Act were intended to exclude common law authorities. Justice Glazebrook’s discussion in \textit{R v Barlien} illuminates the difficulty of gauging the Select Committee’s intentions regarding common law exceptions that were not included in the Act.\textsuperscript{170} Excessive esteem for previous common law developments needs to be moderated more explicitly.

Together, ss 10 and 12 present a formidably accessible path to the common law. However, excessive and casual referral undermines the values of consistency of approach, predictability, and accessibility intended by the statute, and is contrary to the principled approach that the Act ought to achieve. The more that the focus is on the common

\textsuperscript{168} \textit{Sheppard Industries Ltd v Specialized Bicycle Components Ltd} [2011] NZCA 346, [2011] 3 NZLR 620 at [15(c)].
\textsuperscript{169} This is the view of the Law Commission, per NZLC R127, above n 52, at 29 at [2.40].
\textsuperscript{170} \textit{Barlien}, above n 111, at [36]. This is discussed in relation to recent complaint evidence in sexual offences, where a submission from the Law Society was not adopted, but no explanation was given by the Committee in its report. Similarly at [37] Glazebrook J discusses the lack of explanation for the non-inclusion of the \textit{res gestae} exception.
law, the less weight and prominence the Act itself has as the main source of evidence law in New Zealand.

B Looking Forward: Law Commission Recommendations

The Act requires the Law Commission to conduct a review every five years to “help ensure it is working as intended and that it remains up-to-date”.\(^ {171}\) The mechanism alludes to the inevitable difficulty associated with an attempt to codify common law. Such a periodic review feature is rare,\(^ {172}\) indicating that the possibility of transitional problems was recognised.\(^ {173}\)

\(^{171}\) Cabinet Paper “Amendments to the Evidence Act 2006” (12 November 2013) CAB 100/2008/1 at [7]. Note that the Law Commission was considered to be the appropriate body to undertake these reviews, (CAB 100/2008/1 at [24]). It has been the Law Commission’s duty to keep watch over the Acts of Parliament, recommending correction where judicial interpretation reveals omission or ambiguity, and to suggest renovation and repair of the law. For more discussion on the role of a Law Commission in an institutionalised setting, see Indiana Law at 365 Leslie George Scarman, above n 12.

\(^{172}\) The following are the only New Zealand Acts containing a mechanism for review: Walking Access Act 2008, s 80 (Minister must review Act); Veterans’ Support Act 2014, s 282 (Review of operation of Act); Māori Television Service (Te Aratuku Whakaata Itirangi Māori) Act 2003, s 56 (Review of the Act); Motor Vehicle Sales Act 2003, s 163 (Review of operation of Act); Psychoactive Substances Act 2013, s 106 (Ministry must review Act); Members of Parliament (Remuneration and Services) Act 2013, s 67 (Review of Act); Canterbury Earthquake Recovery Act 2011, s 92 (Annual reviews of Act); Plumbers, Gasfitters, and Drainlayers Act 2006, s 187 (Review of Act). The following have review mechanisms for isolated parts of the legislation; Interpretation Act 1999, s 28 (Review of this Part 4 – Application of Legislation to the Crown); Food Act 2014, s 138 (Review of Operation of s 137; The Intelligence and Security Committee Act 1996, s 21 (Requirement to hold periodic reviews in accordance with the terms of reference specified under s 22(3)(a)).

\(^{173}\) Moreover the mechanism acknowledges the historic difficulty in updating legislation, bearing in mind the legislative history of the Evidence Act, “which was first enacted in 1908 then amended three or four times…” see (23 November 2006) 635 NZPD 6638.
In 2006, Sir Geoffrey Palmer observed that there is a “direct and dynamic relationship between pre-legislative and post-legislative scrutiny”.\textsuperscript{174} The 2013 Cabinet Paper gives explicit reasons why five-yearly reviews are appropriate and required:\textsuperscript{175}

- the extensive nature of the 2006 reforms;
- the short existence of the Act, with several provisions yet to be considered by the higher courts;
- that many provisions are still being monitored by the Law Commission; and
- “the need to maintain a single source of evidence law”.\textsuperscript{176}

Christopher Finlayson MP reported that, given it was the first time in a century that there had been a comprehensive reform of the Evidence Act, providing for periodic review was necessary.\textsuperscript{177}

C Review of Sections 10 and 12

In its 2013 Review, the Law Commission agreed with Elisabeth McDonald's observation that it is difficult to see how the addition of reference to the common law was necessary.\textsuperscript{178} Moreover, the mandatory form of s 12 presents an invitation to judges to refer to the case law to solve evidential issues in an “almost automatic reaction”, and place heightened reliance on the common law to achieve justice in

\textsuperscript{174} Geoffrey Palmer address, above n 3, at [101]. The author suggested consideration should to be given to imposing some requirements in both phases, to avoid the common syndrome ‘we have a problem, let’s pass a law’.
\textsuperscript{175} CAB 100/2008/1, above n 171, at [23]. It was produced subsequent to the Law Commission’s R127 Review, above n 52.
\textsuperscript{176} At [23.4].
\textsuperscript{177} (28 June 2007) 640 NZPD 10334, per Christopher Finlayson MP. He noted the balance between ensuring the new legislation is kept up to date, whilst warning against regular amendments as soon as a case arises on a particular aspect; “In other words, the legislation will need to have time to settle down.”
\textsuperscript{178} Elisabeth McDonald Principles of Evidence in Criminal Cases (Brookers, Wellington, 2012) at 16; discussed NZLC R127, above n 52 at [2.64].
a particular case, “or to avoid a problem with a particular provision of the Act”.\textsuperscript{179}

However, despite these clear issues, the Law Commission did not recommend any alteration to ss 10 and 12:\textsuperscript{180} “We recommend that ss 10 and 12 be kept under review with any problems identified to be considered at the next five year review.” This was for three central reasons.

First, it found that “mostly the courts have adopted an appropriate interpretation of s 10”.\textsuperscript{181} Although this is accurate, it leaves unanswered the persistent issues surrounding the meaning of the ‘common law’, the distortion of ‘new technology’, and the pretence of determining Parliament’s intent.

Secondly, the Commission found that in most cases the problems with ss 10 and 12 are because “the court has struggled with the interpretation of a substantive provision”.\textsuperscript{182} This suggests that solving the issues with disputed sections would reduce the need to amend ss 10 and 12. However this still leaves ss 10 and 12 as a gateway. As suggested by the Supreme Court, that possibility still persists: “[t]he experience of the common law should not … be completely ignored”.\textsuperscript{183}

Thirdly, the Law Commission took the view that there has not yet been enough judicial consideration of s 12 to assess the extent of any difficulties. It suggested that problems are “most likely to arise in

\textsuperscript{179} NZLC R127, above n 52, at [2.64].
\textsuperscript{180} At [2.65].
\textsuperscript{181} At [2.65].
\textsuperscript{182} NZLC R127, above n 52, at 34 [2.65]
assessing what amounts to a ‘gap’ under the provisions”. Clearly, s 12 was included for the unforeseen case, rather than instances where a provision is silent on a previously existing rule of common law.

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

Nonetheless, the Law Commission found that “a gap-filling provision for the unforeseen case is desirable” despite the potential for misuse of an all-encompassing Act. It seems as though the Commission surrendered to the ongoing difficulty of limiting judicial access to common law authorities, as there are “other routes for judges to employ pre-existing common law rules”, such as the flaws of the purpose and principles. “Changes to ss 10 and 12 would [in its view] only result in the amendment of one of those routes.” Thus its

---

184 NZLC R127, above n 52, at 34 [2.65] as is illustrated by Fan. It considered that in that case, the Court used s 12 to revive “what it considers to be a useful pre-existing rule”. However, if such an approach is taken, usefulness is a justification that can be emulated in many instances at the expense of treating the Act as sufficient.

185 At [2.66].

186 This section arguably reforms the law relating to settlement negotiation privilege. It simplifies the prior common law authorities, and states only those exceptions to the rule which have survived the enactment.

187 At [2.67].

188 At [2.67]. As commentators have noted, and I have discussed, the purpose and principles in ss 6-8 are sufficiently flexible to accommodate much of the common law; see also Richard Mahoney and others (2nd ed) above n 52, at [EV10.03].

189 NZLC R127, above n 52, at 34 [2.67].
preference is to retain the current wording at this time, and to keep the provisions under monitoring and review over the next five years.190

That said, the Commission admitted that amendment to both ss 10 and 12, to revert to the form originally proposed by the Law Commission, would serve a useful signalling purpose.191 Yet as this suggestion has not been adopted, nothing in the statute gives notice to the judiciary that the overuse of common law authorities ought not to continue.

On the contrary, this practice has the potential to persist, especially with cases such as Clarke and Sheppard setting a trend of allowing the common law to proliferate at the expense of the Act. Arguing that there is a gap in the Act to be filled by reference to s 12 provides an easier route to what is familiar, rather than taking the particular substantive section at face value. This is detrimental. It stokes the fire of ‘satellite litigation’,192 leaving the Act in an uneasy mélange with former common law authorities.

D Confronting the Dissatisfaction

Despite comments in Barlien193 and Hart,194 judges are slipping into references to the pre-existing common law, beyond what the Law Commission and Parliament appear to have envisioned. Unless a new approach is adopted this trend will continue, burying the Act in a quilted overlay of cases, old common law precedents and case law from foreign jurisdictions - thus ironically reinvigorating the very issues that prompted the Act’s initial conception. The common law’s continuing

190 At [2.67].
191 At [2.67].
192 Nina Khouri Privilege for settlement negotiations and mediation: Law Commission acknowledges the elephant in the room (17 May 2013) NZLawyer 14. The author gives this name to litigation about litigation.
193 Above n 111.
194 Above n 114.
influence derogates from the indigenous effort to start afresh that was a hallmark of the 2006 legislation. The judicial tendency to veer back to the common law as a familiar authority upon which to rely undercuts the opportunity to make use of this “clean slate”. 195 Thus my view of the cases on point echoes that of Mahoney and others. Care is needed to ensure that “wholesale reversion to the pre-2006 Act law does not occur”.196

Judges must accustom themselves to not only beginning with the Act, but also actually staying with it wherever possible. At present, consideration of ss 10 and 12 appears to be merely ritualistic as these sections themselves provide a permeable barrier to resorting to common law authorities.

VII Concluding Remarks

As Heath J observed in Jung; “It is possible that a problem has arisen because Parliament modified the recommendations of the Law Commission”.197 The Law Commission was only established in 1985, just three years before being tasked with an overhaul of the evidence law.198 While aspirational in its approach, it was perhaps naïve about the effect of claiming that a codification of the law of evidence would eventuate.

Underlying this, a systemic issue may persist between law reform drafters and those in Parliament who do not carry forward all the suggested changes, but are not obliged to give explanations. Already

196 Mahoney and others (3rd ed), above n 24, at [EV10.03].
197 Jung v Templeton (HC Auckland CIV-2007-404-5383, 30 September 2009), at [60].
198 It was established by the Law Commission Act 1985; see also NZLC PP14 1991, above n 6, at ii.
there have been “difficulties in accepting the Act as the sole governing body of law”.\textsuperscript{199} This is unsurprising, given that the Law Commission warned that the significant reform proposed would not achieve its purpose unless accompanied by a change in approach by the judiciary and practitioners.\textsuperscript{200} Accepting that the Act is not a Code is only one step. A clear signal needed to be given, to allow habituation, so that the Act could be adopted in a way to best serve its purpose.

At present, the cases from 2006 - 2014 display uncertainty as to whether some evidence law has been reformed, simply consolidated, or completely ignored by the Act.\textsuperscript{201} Dispelling the existing confusion surrounding the Act’s relationship with the common law is a necessary step towards ensuring that it fulfils the original reform goals.\textsuperscript{202}

\textsuperscript{199} This was also noted in Andrew Beck “Evidence Act of Civil Litigators” (New Zealand Law Society Continuing Legal Education, November 2012) at 7.
\textsuperscript{200} NZLC R55, above n 4, at 3, [8].
\textsuperscript{201} This piece was substantively finished in October 2014, and thus only deals with case and statute law up to that point.
\textsuperscript{202} NZLC R104, above n 23, at [8.16].