

Preliminary Paper No 22

**EVIDENCE LAW:
DOCUMENTARY EVIDENCE
AND JUDICIAL NOTICE**

A discussion paper

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EVIDENCE LAW: DOCUMENTARY EVIDENCE AND JUDICIAL
NOTICE

A discussion paper

The Law Commission welcomes your comments on this paper and seeks your responses to the questions raised.

These should be forwarded to:

The Director, Law Commission, P O Box 2590, Wellington
by 1 September 1994

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its aim is to help achieve coherent and accessible laws that reflect the heritage and aspirations of New Zealand society.

The Commissioners are:

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Preliminary Paper/Law Commission Wellington 1994

ISSN 0113-2245

This preliminary paper may be cited as: NZLC PP22

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Preface

The Law Commission's evidence reference is succinct and yet comprehensive:

Purpose: 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.

With this purpose in mind the Law Commission is asked to examine the statutory and common law governing evidence in proceedings before courts and tribunals and make recommendations for its reform with a view to codification.

The evidence reference needs to be read together with the criminal procedure reference, the purpose of which is:

To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

Both references were given to the Law Commission by the Minister of Justice in August 1989, shortly after the Commission published a preliminary paper on options for the reform of hearsay.

This is the seventh in a series of Law Commission discussion papers on aspects of evidence law. Papers on principles for the reform of evidence law, codification of evidence law, hearsay evidence, and expert and opinion evidence were published in 1991, and in 1992 the Commission published *Criminal Evidence: Police Questioning*, a major discussion paper dealing with issues related to both the evidence and criminal procedure references. The Commission will soon publish *Evidence Law: Privilege* and further papers dealing with topics such as evidence of character and credibility, and competence and vulnerable witnesses will appear as the reference progresses.

Initial work on documentary evidence was carried out under the supervision of Dr D L Mathieson QC a consultant to the Law Commission, and the Commission acknowledges his substantial contribution to this paper. In addition, our work on documentary evidence was assisted in the early stages by an advisory committee comprising the Hon Justice R C Savage, Judge J D Rabone, Mr L H Atkins QC and Dr R S Chambers QC. Draft code provisions were prepared by Mr G C Thornton QC, legislative counsel. Mr J D Rangitauira acted as a consultant on issues relating to te ao Maori.

The Law Commission has also received considerable assistance from members of the legal profession and the Department of Justice. We would like in particular to acknowledge the valuable assistance of Mr B W Robertson of Massey University, Mr R

Mahoney of Otago University, Mr G D Taylor, barrister and Mr E Tollefson, formerly of the Ministry of Justice, Canada.

This paper does more than discuss the issues and pose questions for consideration. It includes our provisional conclusions following extensive research and considerable preliminary consultation. It also includes a complete draft of the documentary evidence and judicial notice provisions for a code and a commentary on them. The intention is to enable detailed and practical consideration of our proposals. We emphasise that we are not committed to the views indicated and our provisional conclusions should not be taken as precluding further consideration of the issues.

Submissions or comments on this paper should be sent to the Director, Law Commission, P O Box 2590, Wellington, if possible by Thursday 1 September 1994. Any initial inquiries or informal comments can be directed to Paul McKnight by telephone (0-4-473 3453) or e-mail through internet (mcknightp@lawcom.govt.nz).

I

INTRODUCTION AND SUMMARY

- 1 Documentary evidence lies at the heart of much litigation and its importance cannot be overestimated. In both civil and criminal cases parties will seek to prove and disprove many issues by resort to documents. In many instances, large numbers of documents are adduced. The recent "Equiticorp" criminal trial,¹ for example, involved over 40,000 pages of documentary evidence. In other instances, only a few documents are adduced but they may provide the key to the entire case. The rules governing documentary evidence must therefore provide a sound basic structure for its admissibility and use. Unless that structure is in place, the use of documentary evidence will be impeded and inefficiency and injustice will result.
- 2 The present law in this area is out of date and at risk of failing to keep up with changes in technology, especially the increasing use of computer systems for the production and storage of documents. Overall, the rules have become too complex and technical. The bulk of statutory law is too detailed - dealing with specific problems as they have arisen rather than approaching the issues from a principled perspective. Much of the law in this area is found in ancient English cases or relatively obscure sections of the Evidence Act 1908 and other statutes. The consequence of these failings (examples of which are provided in each part of the paper) is that the rules are not well understood and can operate as a trap for the unwary. In civil cases the rules are often bypassed when counsel consent to an agreed bundle of documents being placed before the court. Though judges have, for efficiency reasons, encouraged this practice, it must be based on satisfactory rules governing documentary evidence.

¹ The case has been heard under various different names, eg, *R v Adams*, *R v Hawkins*, *R v Gunthorp*, *A G v Hawkins*.

- 3 The documentary evidence rules should
- enable the court to consider reliable evidence;
 - prevent unsatisfactory evidence coming before the court;
 - be as simple as possible and easy to use in practice;
 - facilitate agreement between the parties on admissibility and other issues concerning documentary evidence;
 - enable the court promptly to determine genuine disputes concerning admissibility issues;
 - accord with the general principles of evidence law.
- 4 In this paper we propose a complete overhaul of the rules of documentary evidence aiming to simplify and clarify the rules, to reduce them in number, and to place them within the framework of the principles underlying the law of evidence as a whole.

THE PAPER IN OUTLINE

- 5 The content of this paper is in some instances relatively complex. We therefore commence the paper with a summary of the major issues and the conclusions which the Law Commission has reached. The summary does not attempt to provide the argument in depth for the propositions stated.
- 6 Following this introduction and summary the paper has four further parts:
- authentication
 - the secondary evidence rule
 - procedural rules for dealing with documentary evidence
 - judicial notice.

The paper concludes with draft code provisions accompanied by a commentary.

Authentication

- 7 Part II of the paper covers the various rules and presumptions which govern authentication of documentary evidence.
- 8 Authentication is in the first place an aspect of relevance, and, therefore, admissibility. Unless a document is authentic - that is, unless it is written by its supposed author and is genuinely what it purports or is asserted to be - it is in most cases irrelevant and inadmissible. In chapter 2 we consider this aspect of authentication. Many documents indicate their authenticity on their face. Letters, memoranda, file notes, and other common documents will often indicate who wrote them, who received them, when they were produced and other information demonstrating authenticity. However, the common law rule of admissibility requires that before a document is received in evidence its authenticity must be shown by evidence extrinsic to the document itself. The indications on the face of the document are not on their own regarded as sufficient to demonstrate the authenticity aspects of relevance.
- 9 In our view, the common law is unsatisfactory. We propose abolition of the general requirement to authenticate documents with extrinsic evidence. Under the Law Commission's proposed code, the sole requirement in relation to authenticity will be the need to demonstrate relevance. Documents which are self-authenticating in that they contain information which demonstrates their own relevance will be admissible without the need for further evidence. To make this clear the code will contain a specific provision allowing the court to draw inferences, including an inference of authenticity, from the document itself. Documents which are not self-authenticating will still require other evidence to demonstrate relevance.
- 10 There is a further aspect to authentication in that the authenticity of a document may well remain in issue after the document is admitted and, indeed, may be a key issue in a case. In that event, the authenticity of the document concerns the weight (if any) to be given to it and will normally be the subject of additional relevant evidence.

- 11 The demonstration of a document's authenticity after its admission may also be assisted by presumptions. Chapter 3 of the paper therefore discusses some general issues concerning presumptions and differentiates between different kinds of presumptions.
- 12 Chapter 4 deals with presumptions relating to official documents, signatures and seals. These presumptions are included in the draft code as ss 12-17. They are intended to replace 29 sections of the Evidence Act 1908 and its amendments (a chart of equivalences is provided in appendix A to this paper). The provisions cover a variety of documents printed or published by the New Zealand Government, foreign governments and international organisations, as well as the signatures and seals of officials holding various public offices in New Zealand and in foreign countries. In addition to those provisions, s 13 provides that official acts which are notified in New Zealand or foreign official publications (including the *Gazette*) are presumed to have been done.
- 13 Chapter 5 deals with a number of discrete issues arising in relation to private documents:
 - *The use and admissibility of evidence concerning handwriting.* The Law Commission considers that the special common law and statutory rules governing evidence of handwriting are an unnecessary complication and should be abolished. We consider the general rules governing expert opinion evidence (which require the witness to demonstrate special knowledge or skill in handwriting comparison or special knowledge of a particular person's handwriting) are appropriate to cover handwriting evidence.
 - *Testimony concerning signatures.* The common law provides that, if a witness testifies to seeing a person sign a document in a particular name, that is evidence that the document was signed by the relevant person (unless, perhaps, the name is very common). The Law Commission considers that this rule is unnecessary once a general rule is introduced to the effect that a document containing self-authenticating information is admissible.

- *Attestation.* At one time the common law required that, if a document was attested, the attesting witness had to be called to establish that the document was genuine and properly executed (unless the witness was shown to be unavailable). That rule has been substantially modified by statute and now applies only to disputed testamentary instruments. The Law Commission proposes to abolish the last vestige of the rule.
- *Ancient documents.* At common law, a document over 20 years old produced from proper custody proves itself. The Law Commission considers that this rule is also unnecessary once there is a general rule allowing a document to authenticate itself. All documents will then be treated in the way the law now treats ancient documents.

- 14 Chapter 6, the last chapter of part II, discusses the use and admissibility of evidence produced by machines, devices and technical processes, including evidence produced by computers. This evidence is normally in the form of a document, but sometimes may be purely testimonial (as when a witness gives testimony concerning the results produced by a computer). For reasons of convenience the paper deals with all kinds of machine-produced evidence.
- 15 The present law in respect of machine-produced evidence is complicated and unclear. We suggest that the general rules of the code (particularly those governing relevance, hearsay, the burden of proof and judicial notice), together with a straightforward presumption designed to facilitate proof of machine-produced evidence, will provide a satisfactory framework for the admissibility and use of machine-produced evidence and will also allow for future technological developments.
- 16 The presumption is contained in s 18 of the draft code provisions. In outline, if the proponent adduces evidence of the operation which the machine is designed to perform and evidence that the machine ordinarily performs that operation (or if the fact-finder is able to take judicial notice of these matters), it is presumed in the absence of evidence to the contrary that the machine on the particular occasion did what it ordinarily does.

Secondary evidence

- 17 Part III of the paper deals with the secondary evidence rule. This rule, sometimes known as the best evidence rule,² requires that the original document must be produced in court. A copy, or other alternative evidence of the contents of a document, is not admissible, unless the original is shown to be unavailable.
- 18 In chapter 7 we propose a reform which retains the basic rule that secondary evidence is inadmissible as evidence of the contents of a document, but creates a broad two-tier regime of exceptions (see ss 3, 4 and 5). The first tier will allow certain reliable classes of secondary evidence to be admitted whether the document is available or not. Such evidence includes photocopies and other copies produced by a machine, device or technical process, together with copies kept by businesses and public activities. These categories of evidence are sufficiently reliable to allow their admission without requiring the proponent to incur the expense of finding and tendering the original. The aim is to make the tendering of documentary evidence easier and less expensive without sacrificing the objective of providing the fact-finder with accurate information.
- 19 The second tier will allow the admission of all other secondary evidence of the contents of a document (including oral evidence) as long as the proponent establishes that the original is unavailable (as defined in the code).
- 20 In chapter 8 we deal with rules which are technically exceptions to the secondary evidence rule, but which allow the admission of secondary evidence when the original is in an inaccessible or inconvenient form. We propose to allow information which is stored in such a way as to require a machine, device or technical process to display or retrieve it, to be adduced by way of a document produced by the appropriate machine. This covers sound and video tape recording, as well as information stored on a computer disc which must be printed out or displayed on a screen. The rule is intended in part to clarify the legal position of various forms of computer stored documents (for instance, documents

² The best evidence rule historically had wider application than the modern secondary evidence rule, and may have been a basis of the hearsay rule.

stored on optical discs) and to ensure that the form of the document is not a barrier to its reception by the court.

- 21 We also propose, for reasons of convenience, to allow transcripts of writing in code (such as shorthand) and of sound or videotapes to be received in evidence. In the case of sound recordings the court may require the recording to be played.

Procedure

- 22 In part IV of the paper, the procedures for dealing with documentary evidence are discussed and reform proposed in both civil and criminal cases.
- 23 In civil cases, the present law as contained in the High Court and District Courts Rules allows the parties considerable access to each other's documents before trial. The Law Commission's proposals build on the present law. We propose that parties should notify each other before trial of the documents they intend to adduce and should counter-notify any objections to the admissibility of those documents or questions as to their authenticity. These procedures will be flexible and the court may dispense with notification in appropriate cases. The objective is to increase efficiency by ensuring that disputes concerning documentary evidence are identified and, if possible, resolved before trial.
- 24 In criminal cases, the present law allows the defence to require the prosecution to disclose almost all the evidence the prosecution plans to adduce at trial as well as considerable amounts of other information. The prosecution cannot require the same of the defence, although the defence must give notice of an alibi defence (and the Law Commission has proposed that the defence also should be required to give notice of expert evidence).³
- 25 Given the present law, provision for notice of documentary evidence from the prosecution to the defence is unnecessary. Nor do we propose to require the defence to notify the prosecution of the documents which the defence intends to

³ Law Commission, *Criminal Procedure: Part One: Disclosure and Committal* (NZLC R14 1990) paras 109-110; Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18 1991) paras 103-109.

adduce. We consider, however, that the defence should notify the prosecution of any objection to admissibility or questions about authenticity of documents that the defence has received from the prosecution before trial. A similar requirement should be placed on the prosecution where it has obtained documents from the defence whether voluntarily, by search and seizure, or otherwise. Again, these requirements are intended to save time at trial by isolating and, if possible, resolving any disputes about documentary evidence before trial.

- 26 One further procedural rule is necessary to close a gap which exists because production of a document in the possession of the defence cannot be compelled (by subpoena or otherwise) unless the defendant chooses to give evidence. We propose that, if the defence seeks to adduce secondary evidence of a document when the defendant actually possesses the original, the court should have the power to require production of the original. If the defence fails to produce the document, the court may comment to the jury if there is one, or, in a judge-alone trial, draw any reasonable inference.

Judicial notice

- 27 Chapter 10, the last part of this paper, is concerned with the doctrine of judicial notice. This is a separate topic and is not directly related to documentary evidence. It is, however, included in the paper because it raises similar considerations.
- 28 The doctrine of judicial notice is one of some theoretical complexity. The paper discusses various aspects of the doctrine, including judicial notice of adjudicative and legislative facts and judicial notice of the law. We conclude that the doctrine of judicial notice has a wider range than the law of evidence. We accordingly propose to include in the code a single provision on judicial notice to allow fact-finders to take judicial notice of adjudicative facts which cannot reasonably be disputed. The remainder of the law concerning judicial notice is not properly part of an evidence code. The code will therefore not contain provisions concerning judicial notice of the law or legislative facts. Nor is it proposed to continue the provisions of the Evidence Act 1908 which provide for judicial notice of statutes and regulations. We consider the Evidence Act provisions are unnecessary.

Draft code provisions

- 29 The paper concludes with draft evidence code provisions accompanied by a commentary explaining their meaning and effect.

MATTERS NOT INCLUDED IN THE PAPER

- 30 While the paper deals extensively with the rules governing admissibility of documents, it does not purport to cover all the rules concerning documentary evidence.
- 31 In the first place, the rule against hearsay has a bearing on the admissibility of documentary evidence. We have fully considered the hearsay rule in our discussion paper *Evidence Law: Hearsay* (NZLC PP15), and do not therefore revisit hearsay issues in this paper. It is, however, helpful to indicate the relationship between the hearsay rule and the secondary evidence rule. Both rules deal, in part, with a similar problem: the risk of unreliability which arises when evidence is reproduced or repeated. The hearsay rule in broad terms prevents the admission of a document which records the words of a person who is not called as a witness (and is adduced to prove the truth of its contents). The secondary evidence rule, however, simply requires that the original document be presented to the court. Accordingly, the secondary evidence rule is offended if a party adduces a photocopy of a document instead of the original. But, production of a photocopy does not offend the hearsay rule unless the original document was hearsay, that is, the hearsay rule is applicable only to repetition by humans, not to reproductions made by a machine.⁴
- 32 Secondly, the paper does not deal with the formal requirements of executing documents or the rules which guide the court in interpreting documents, especially contracts, deeds and wills. As we discussed in our first paper on this reference, *Evidence Law: Principles for Reform*, those rules, an example of which is the

⁴ The Law Commission's proposed code defines "hearsay" as "a statement made by a *person* other than a *person* who is giving evidence...." [emphasis added]: see Law Commission, *Evidence Law: Hearsay* (NZLC PP15 1991), 32. It reflects definitions in other codes, notably the Federal Rules of Evidence r 801.

parol evidence rule, are best considered as part of the substantive law.⁵ An evidence code should, in general, deal only with the law of evidence and should not change the substantive law by a sidewind. The formal requirements of deeds are dealt with in the Law Commission's forthcoming report on the Property Law Act 1952.

⁵ NZLC PP13 1991, para 7.

II Authentication

- 33 Authenticity is an aspect of relevance. Unless a document is authentic - that is, unless it was written by its supposed author and is genuinely what it purports or is asserted to be - it is, in most cases, irrelevant.⁶ The requirement to demonstrate the authenticity of a document is related to the requirement to identify and show the relevance of items of real evidence. The obligation may be satisfied in many different ways depending on the kind of document, the purpose for which it is adduced and the evidence available. Methods of authentication include testimony of an author or a person who saw the author sign the document, and testimony of a handwriting expert.
- 34 Some examples illustrate the way in which authenticity issues arise. For instance, in a defamation action, the plaintiff must not only produce the defamatory document but must also show that the defendant is in some way responsible for it; and, in a case where a party adduces a letter to show a person's state of mind, the letter can be said to do this only if it was written by that person. The Advisory Committee's note to r 901 of the Federal Rules of Evidence gives another example:

Authentication and identification represent a special aspect of relevancy. Thus a telephone conversation may be irrelevant because [it is] on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved.⁷

- 35 Authenticity is not the only aspect of relevance. As is clear from the examples above, the content of the document must also have some connection with the case. However, the authenticity aspects of relevance require special attention as they are

⁶ The exceptional cases are those where one party is attempting to prove that a document is forged.

⁷ Advisory Committee's note to Federal Rules of Evidence r 901.

at present governed by an admissibility rule which operates in addition to the relevance rule.

- 36 In this chapter, we focus on authentication as an aspect of relevance and a requirement of admissibility. Authenticity may, however, remain in dispute even though it is sufficiently established to allow a document to be received in evidence. Other aspects of authenticity not solely related to admissibility (including the use of presumptions to facilitate authentication) are discussed in chapters 4 and 5.

THE COMMON LAW ADMISSIBILITY RULE

- 37 Many documents indicate their authenticity on their face. Letters, memoranda, file notes, and other common documents will often indicate who wrote them, who received them, when they were produced and other information demonstrating authenticity. However, the common law rule of admissibility requires that before a document is received in evidence its authenticity must be shown by evidence extrinsic to the document itself. The indications on the face of the document are not on their own regarded as sufficient to demonstrate the authenticity aspects of relevance.
- 38 This rule is little discussed in New Zealand or Commonwealth textbooks, though it is comprehensively dealt with in United States texts. In New Zealand the operation of the rule is seen in the requirement that documents which are not part of an agreed bundle must be introduced through a witness who testifies to the authenticity of the document.⁸ The rule imposes, as a precondition of admissibility, a requirement additional to the demonstration of relevance. The question which arises is whether there is any policy reason for this rule to continue.

⁸ See Eichelbaum (ed) *Mauet's Fundamentals of Trial Techniques* (NZ ed, Oxford University Press, Auckland, 1989) 152; *Halsbury's Laws of England* (4 ed) vol 17 paras 124-126; and for US position see *McCormick on Evidence* (Strong, 4 ed, West Publishing, St Paul, Minn 1992) vol 2, 34-58.

REFORM OF THE COMMON LAW RULE

39 It is our view that the rule requiring extrinsic evidence no longer serves any useful purpose. Originally, its intent was to prevent forged documents coming before the court. Now, however, its practical effect (in the instances where authenticity aspects have not been settled in advance of trial) is to compel the parties to call witnesses to give authenticity evidence which is largely ritualistic, in the absence of which the document is inadmissible. Often an authenticating witness will have no independent memory of having written or received the document and will in fact be relying upon what the document itself says. In those rare cases where the document's authenticity is really in issue, evidence will be called to establish or controvert this, and the question will be decided by the fact-finder applying the appropriate burden and standard of proof.

40 Moreover, at least in the United States, the rule has caused real injustice. In *Keegan v Green Giant Co*⁹ the plaintiff sued in respect of illness resulting from eating peas from a can labelled with the defendant's name. The court would not admit the label because there was no independent authenticating evidence indicating who had produced or distributed the can. But, as the dissenting judge pointed out,

the defendant company was in a much better position to demonstrate the authenticity of the can's label than the plaintiff.

41 In the Law Commission's view, where a document contains information on its face to show the authenticity aspects of its relevance, such as a signature or the naming of an addressee, that should be sufficient to allow the admission of the document in evidence. Of course, as earlier noted, the admission of the document does not foreclose the possibility of a dispute over its authenticity based on evidence suggesting the document is not what it purports to be. It will then be for the fact-finder to determine what weight (if any) should be given to the document.

⁹ 150 Me 283, 110 A 2d 599 (1954).

THE PROPOSED REFORM IN PRACTICE

- 42 In practice we consider that this reform will remove an unnecessary barrier to the admissibility of documentary evidence and will aid the efficient disposal of proceedings.
- 43 Abolishing an admissibility rule which requires extrinsic evidence of the authenticity of a document will also in many instances render it unnecessary to require a witness formally to identify a document before it is produced. This may have some modest consequences for trial procedures. Under present practice many documents, even in criminal cases, are now adduced by consent and therefore do not require formal proof by a witness. The proposed reform simply creates another class of document which can be given in evidence without formal identification by a witness.
- 44 Apart from this minor procedural difference the new rule may in a few instances have a cost effect. It will, in the case of a disputed document containing enough information to authenticate itself, shift the tactical burden of calling an authenticating witness from the proponent of a document to the opponent. This in turn results in a shift in the cost burden. In some cases this cost may be significant - for instance, if the witness resides overseas.
- 45 It must be remembered, however, that there are other pressures besides the authentication rule which influence the tactical burden on a party. Generally, parties seek to provide the best evidence they can in order to prove their case. Where there is a genuine dispute about a document the proponent is likely to call witnesses in order to demonstrate its authenticity more effectively. The fact-finder must then assess the weight to be given to the document in light of the total evidence. A document of questionable genuineness, though admissible under the code, may be given little weight if the proponent cannot bolster it with the testimony of an authenticating witness. Moreover, reforms to the authentication rule do not affect the overall burden of proof. Plaintiffs or the prosecution still need to satisfy the fact-finder to the relevant standard that the case is proved, and defendants need to establish the facts on which they bear the probative burden. In general, it seems likely that the party bearing the burden of proof on a particular

issue, whether the proponent or opponent of a document, will decide to present witnesses to bolster or impugn a self-authenticating document in respect of which there is a real dispute concerning genuineness.

46 We emphasise that the reform is confined to those documents which indicate their authenticity on their face. In some cases the document in question may not do this. Contrast a letter, which typically identifies its author, date, and addressee, with a note scribbled on a scrap of paper which has no such identification. In the latter case, other methods of establishing authenticity include:

- evidence from the author - evidence of X that she wrote the note;
- evidence of where a document is found - if a document is found in the outward correspondence files of X, that is evidence that X wrote it;
- evidence of the contents of the document - if a document contains information known only to X, that is evidence that X wrote it;
- evidence of a business system - if a document is of a kind routinely created and sent out by a business, that is evidence that the document was created and sent out in the usual way.

47 Lastly, it should be noted that abolition of the authentication rule will not affect the hearsay rule. Thus, if an authenticating statement in a document amounts to hearsay, the statement must be admissible under the hearsay rules of the code before it can be used to establish the relevance of the document. If the maker of such a statement is an available witness then the opponent may require the maker to be called (unless the court holds that is unnecessary because, for example, the maker has no real information to give on the subject). If the maker is unavailable then, in civil cases, the statement will be admissible. However, in criminal cases the statement must also be shown to be sufficiently reliable before it (and hence the document) can be admitted.¹⁰

¹⁰ The Law Commission's proposed hearsay provisions are reprinted in this paper, at 143.

CODE PROVISIONS

- 48 On the question of how the code should embody the proposed reforms, the starting point, as we earlier noted, is the relevance rule.¹¹ However, in addition to the relevance rule, it may be desirable for the sake of clarity to provide that when a judge is considering the relevance (and hence the admissibility) of a document, it is possible to draw inferences from the document itself.¹² It may also be desirable to provide that, when it is not immediately clear that a document is relevant because this depends on the proponent adducing other evidence to link the document with the issues in the case, the judge has power to admit the document subject to the party adducing the linking evidence at a later stage. We now consider those questions.

Inferences may be drawn from the document itself

- 49 The Australian Law Reform Commission proposed the following rule:

58 Inferences as to relevance

- (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

The rule is found in cl 58 of the Australian Evidence Bill 1993.

- 50 The Australian rule does no more than state an aspect of the relevance requirement. Evidence is relevant when it has a tendency to prove or disprove a fact of consequence to the determination of the proceeding. Thus evidence is relevant when it validly founds any inference which forms the basis of a factual decision. Since the objective in adducing any item of evidence is to enable the fact-finder to consider or examine it and draw inferences from it, the Australian

¹¹ See para 0. The code formulation of the relevance rule is contained in *Evidence Law: Codification* (NZLC PP14 1991), and is reprinted in this paper in app B.

¹² See para 0.

rule is, strictly speaking, unnecessary. However, we provisionally consider that the clarity it provides is useful in a code.¹³

Provisional relevance¹

- 51 Sometimes it is not immediately obvious that an item of evidence is relevant. In order to demonstrate relevance it may be necessary to adduce other evidence to link the item with the issues in the proceeding. This will often be true in the case of documentary evidence. For example, the contents of a document may have a bearing on the issues in the case, but only if a particular person wrote it, and it may not be possible from the document to tell who wrote it. In that event, the relevance of the document depends on the ability to identify the writer. It may be impossible to identify the writer at the same time as the document is introduced. The judge must therefore have the power to admit the document subject to later evidence demonstrating its relevance.¹⁴
- 52 A provisional relevance section also assists the reception of non-documentary evidence. Thus, in a murder case where the accused, A, is alleged to have stabbed the deceased with a large hunting knife, evidence that another person, B, bought such a knife the day before the murder may by itself be irrelevant. However, once evidence is adduced that B is A's flatmate and that A had access to B's possessions, evidence of the purchase becomes relevant. It is impossible to adduce the evidence of the purchase and the evidence of the relationship between A and B at the same time, yet neither item is relevant in the absence of the other.
- 53 At present provisional relevance problems are often dealt with by the court accepting the party's assurance that later evidence will be adduced which links the disputed item of evidence to the issues in the case. The judge may accept such an assurance over the objection of the other party, though in criminal cases where the

¹³ It is also possible to list, by way of illustration, ways in which a document may be shown to be relevant: see Federal Rules of Evidence r 901. We have not followed this approach.

¹⁴ Provisional relevance may be considered as part of the larger topic of provisional admissibility. It may be that it is desirable to have a rule permitting the judge to admit evidence over any admissibility objection as long as there is an assurance that the evidence will later be shown to be admissible.

disputed evidence is important the judge may require the connecting evidence to be given first. The issue is dealt with pragmatically without any particular rule being invoked.

- 54 This pragmatic approach to the problem ought to continue under a codified law of evidence. Some consider that this approach is implicit in the practical application of the relevance requirement, and that no special code rule is necessary to control it. Others consider that a provisional relevance rule is useful in a code to indicate that a pragmatic approach to relevance is to be taken. At this stage we have included a provisional relevance rule in the code.

CONCLUSION: REFORM OF THE AUTHENTICATION RULE

- 55 Our conclusion is that the authentication rule should be reformed by abolishing the requirement for extrinsic evidence in relation to self-authenticating documents. For clarity we propose that the code specifically authorise the fact-finder to draw inferences, including inferences of authenticity, from documents, and we propose a provisional relevance rule allowing the judge to admit evidence subject to later evidence demonstrating its relevance.

III Presumptions

- 56 Our law makes considerable use of presumptions. Many presumptions are best considered in relation to that part of the substantive law in which they operate. For instance, the presumption of death which arises after a person has not been heard from or seen for seven years should be considered in relation to the substantive law of, for example, succession. However, presumptions are also used in the law of evidence to facilitate proof of various matters, especially in relation to documentary evidence. In this chapter, we discuss some general issues concerning presumptions before considering various specific presumptions concerning documentary evidence in chapters 4-6.
- 57 The issues concerning the nature and use of presumptions are complicated and the subject of much scholarly writing. For our purposes it is not necessary to survey all the writing. Nor is it necessary to solve all the problems associated with presumptions. It is sufficient to note that there are several forms of presumption which perform quite distinct functions.
- 58 In general terms, presumptions operate by allowing the court to infer or assume the truth of a fact (the "presumed" fact) after a party has sufficiently demonstrated the existence of other facts (the "basic" facts). In many cases presumptions shift an onus by requiring an opponent to adduce evidence or prove the contrary. The use of presumptions is, therefore, intimately connected with burdens and standards of proof.

59 Allen suggests that there are different types of presumptions to be used in different cases, and sets out four major categories.¹⁵ In the present context only two of the categories need to be discussed:

- *Presumptions shifting the evidential burden.* These presumptions require the court to assume the existence of the presumed fact, after it is satisfied of the existence of the basic fact or facts, so long as there is no evidence tending to negate the existence of the presumed fact. If the opponent of the presumption adduces evidence (including evidence by way of cross-examination) tending to negate the existence of the presumed fact then the court must decide the question on the basis of all the evidence in the case. The ultimate burden of proving the presumed fact is not disturbed.
- *Presumptions which shift a burden of proof.* These presumptions require the court to assume the existence of the presumed fact after it is satisfied of the existence of the basic fact or facts. In order to defeat the presumption the opponent must demonstrate by evidence (which may include evidence by way of cross-examination) that the presumed fact does not exist on the balance of probabilities.

60 Various factors need to be taken into account when deciding whether to create a presumption, and if so what kind to create. The factors may be grouped under four headings:¹⁶

- *Probability.* Presumptions may be created to accord with an assessment of the most likely factual situation.

¹⁵ Allen, "Presumptions in Civil Actions Reconsidered" [1981] 66 Iowa LR 843. In addition to the kinds of presumptions set out below, there are presumptions which provide a substantive rule of decision which can be applied in the absence of information, and permissive presumptions which allow, but do not require, the fact-finder to draw inferences once the basic fact or facts have been established. There is also the so-called "conclusive presumption", which presumes the existence of a fact when other facts are proved. Such "presumptions" are in effect substantive rules of law.

¹⁶ See Cleary, "Presuming and Pleading: An Essay on Juristic Immaturity" (1959) 12 Stanford LR 5; Ladd, "Presumptions in Civil Actions" [1977] Ariz St LJ 275.

- *convenience.* Presumptions may be created in order to avoid a party having to prove a fact when the evidence may be difficult or time consuming to find or likely to be unavailable. Presumptions may also be created in order to foreclose consideration of an issue, and shorten the trial, unless a party can seriously question the presumption by adducing evidence.
- *Fairness.* Presumptions may be created to compel a party to prove or adduce evidence concerning an issue because it is fair that such a burden should be imposed. For instance, a presumption may be imposed against a party with superior access to information about an issue.
- *Policy.* Presumptions may be created in order to favour an outcome which for reasons of policy is to be preferred.

PRESUMPTIONS IN EVIDENCE LAW

- 61 In the law of evidence presumptions are used to facilitate the admissibility of documentary evidence and the proof of facts.
- 62 The Evidence Act 1908 and many overseas evidence statutes create presumptions in relation to authenticity, sometimes referred to as self-authenticating presumptions. Such presumptions allow documents to be admitted which on their face explain their own identity. This, however, will be the general rule in the proposed code, so some existing presumptions will be unnecessary under the code.
- 63 The following chapters discuss presumptions and similar associated rules relating to various kinds of document. To summarise, in chapter 4 dealing with public documents, we propose a series of burden-shifting presumptions covering the authenticity of public documents and the signatures and seals of public officials. In chapter 5 we discuss various rules and presumptions relating to private documents. We conclude that although it is necessary to codify rules relating to proof of handwriting and attestation, the general rule allowing documents to authenticate themselves obviates the need for codification of the traditional presumptions relating to private documents. Finally, in chapter 6 we discuss

evidence produced by machines, devices and technical processes and propose a presumption shifting the evidential burden.

IV Authentication of public documents and official signatures and seals

- 64 There have been statutory provisions dating well back into the nineteenth century to facilitate the proof of public documents (documents held or produced by public bodies) and official seals and signatures. These provisions, contained in the Evidence Act 1908 and other statutes, have been enacted in a more or less piecemeal fashion over the years. They are at present complicated and difficult to relate to one another. We propose codified provisions which both simplify the statutory scheme and extend the facilitation rules to include documents not presently covered. The proposed code contains 7 main provisions which cover the documents referred to in 29 sections of the Evidence Act 1908 and its amendments. A chart of equivalences between the proposed code provisions and the Evidence Act provisions is found in appendix A of the paper.
- 65 There are many other Acts containing provisions affecting public documents, but we do not, at this stage, propose a full review of all the various provisions with a view to recommending amendment or repeal. However, we point out that the code provisions will often make it unnecessary for new statutes to include provisions intended to authenticate public documents.
- 66 The Law Commission's proposals are to a large extent based on those developed in the report of the Australian Law Reform Commission (and the resultant Evidence Bill), and the statute suggested by the Canadian Federal/Provincial Task Force. Instead of focusing on the way particular documents may be proved, we propose a series of presumptions of authenticity covering documents published by official sources and documents signed or sealed by officials. These presumptions, together with simplified authentication, secondary evidence and hearsay rules, both preserve and extend the present law concerning proof of public documents.

67 The Law Commission suggests a series of presumptions covering what we compendiously refer to as "official documents", that is documents produced or published by government and other public agencies, as well as presumptions covering official acts and official signatures and seals (see ss 12, 13, 15-17). In addition, we propose a single presumption, s 14, related to "public documents", a term specially defined in the code. These presumptions are discussed in more detail below.

THE POLICY UNDERLYING THE PROPOSED PRESUMPTIONS

68 The suggested presumptions concerning official documents, signatures and seals impose a burden of proof, not merely an evidential burden, on parties seeking to controvert them. The imposition of this type of presumption is seen as appropriate, taking into account the factors listed in chapter 3, because official documents are usually reliable and authentic. Moreover, to require formal proof of the authenticity or proper signing or sealing of these documents in every case would result in great inconvenience. We are also of the view that the presumptions will operate fairly because, in general, both parties have equal access to official documents.

69 The code provisions treat documents, signatures and seals from New Zealand and foreign countries in the same way. That is because the same level of reliability can be presumed to attach to each and the same (or greater) inconvenience results if proof of foreign documents is not facilitated. As the law at present stands, many foreign official documents are treated in the same manner as New Zealand documents: see, for example, s 37 of the Evidence Act 1908. We extend the parity of treatment to documents produced by international organisations, such as the Commonwealth Secretariat and the United Nations and its specialised agencies.

THE PROPOSED PRESUMPTIONS

Presumptions concerning official documents

70 We propose two presumptions relating to official documents (see s 12(1), (2)). First, the *Gazette* and other New Zealand documents which purport to be printed

or published by official order or by the official printer of New Zealand are presumed, unless the contrary is proved, to be what they purport to be, to have been so printed or published and to have been published on the purported date. Second, a similar presumption applies to analogous foreign and international documents. These two presumptions cover and extend ss 30, 32, 35 and 38 of the Evidence Act 1908, s 12 of the Evidence Amendment Act 1945 and ss 7 and 8 of the Evidence Amendment Act 1990.

Presumptions concerning official acts

- 71 The presumptions which we propose concerning official acts do not, strictly speaking, concern documentary evidence. Rather they relate to whether an act notified in official publications such as the *Gazette* was in fact done. In terms of our draft s 13(1), if an official act is notified in the *Gazette* or another New Zealand document which purports to be published by official order or by the official printer of New Zealand, it is presumed unless the contrary is proved that the act was done on the day on which the notice says it was done. A similar presumption applies to foreign official acts (s 13(2)), and the acts of international organisations (s13(3)).
- 72 At present s 46 of the Evidence Act 1908 raises a presumption of lawfulness in respect of acts notified in the *Gazette*. Our proposed provision does not continue the presumption of lawfulness, but is limited to a presumption that the act was in fact done. We do not consider that the presumption in s 46 adds anything to the common law presumption that acts which appear to have been regularly done were regularly done (*omnia praesumuntur rite esse acta*). In addition, an evidence code is an unusual and inappropriate place to locate a rule of administrative law.

Presumptions concerning official seals and signatures

- 73 Section 27 of the Evidence Act 1908 and s 11 of the Evidence Amendment Act 1945 provide that certain seals, stamps and signatures are to be judicially noticed.

Other statutes have similar provisions (for example, s 20A of the Statistics Act 1975).¹⁷ *Cross on Evidence*¹⁸ explains that the effect of these provisions is to allow the judge to accept the authenticity of the seal, stamp or signature as long as they appear on their face to be similar to the genuine article, thereby avoiding the need to call evidence relating to the authenticity of a signature, stamp or seal and the circumstances of its attachment to a document.

74 However, this is not the normal process of judicial notice, as will be clear from the discussion of that topic later in this paper. Normally, judicial notice involves the judge applying personal knowledge or carrying out limited personal research. But judges cannot know all the signatures and seals of which they must take notice, and no judge will have personal knowledge of the circumstances in which the document was signed or sealed. The judicial notice process is, therefore, inappropriate in the case of seals or signatures.

75 Nevertheless, it is our view that the policy underlying the judicial notice provisions is valid. It will often be difficult or inconvenient to prove the provenance of an official seal or signature and the parties should, in the normal course of events, be entitled to rely on the appearance of such official marks. We therefore consider that the Evidence Act provisions concerning judicial notice of seals and signatures should be re-enacted in the code as presumptions. We note that presumptions are used in cls 150 and 151 of the Australian Evidence Bill 1993 in relation to seals and signatures.

76 Sections 15, 16 and 17 of the code accordingly contain presumptions concerning the genuineness of various seals and signatures and the propriety of their attachment to the document. The seals which are covered include the Seal of New Zealand (s 15(1)) and the seals of other countries (s 16(1)), the seals of bodies including courts and tribunals established by New Zealand enactments (s 15(2)), and the seals of foreign public bodies, including courts and tribunals established

¹⁷ Note also that the common law requires judicial notice of the royal sign manual, ie, the Queen's signature.

¹⁸ *Cross on Evidence* (Mathieson, 4 NZ ed, Butterworths, Wellington, 1989) para 6.10

by law (s 16(2)). The signatures which are covered include those of persons holding public office under New Zealand law (s 15(4)), persons holding foreign public office under foreign law (s 16(4)), and the specific persons listed in s 17 including the Sovereign, the Governor-General, Ministers, Judges, the Solicitor-General, and certain Officers of Parliament.

- 77 The presumptions concerning authenticity of official seals and signatures facilitate proof of many of the public documents presently covered by the Evidence Act 1908. For instance, judgments of foreign courts are currently proved under s 37(1)(b) of the Evidence Act by producing a sealed or signed copy. Section 16(1) of the code presumes a foreign seal to be genuine and to have been validly affixed. This presumption, together with the general rule that documents may be self-authenticating, allows the court to presume the genuineness of a foreign judgment which is sealed with a court seal.

A presumption concerning "public documents"

- 78 "Public document" is a specially defined term in the code, covering documents held by a New Zealand or foreign branch of government or public agency. Section 14 provides that if a copy, extract or summary of a public document is certified to be authentic, or if it is sealed, it is presumed to be a copy, extract or summary of the document. This presumption covers in part ss 32, 44, and 44A of the Evidence Act 1908, s 12 of the Evidence Amendment Act 1945, ss 4 and 7 of the Evidence Amendment Act 1952, s 26 of the Evidence Amendment (No 2) Act 1980, and s 8 of the Evidence Amendment Act 1990.

A FOREIGN EVIDENCE ACT?

- 79 The above provisions cover many of the sections of the Evidence Act 1908 and its amendments which appear under the heading "Proof of Official Documents", "Verification of Documents" or similar headings (ss 27-47 of the 1908 Act, ss 7-12 of the 1945 Amendment, ss 6 and 7 of the 1952 Amendment). However, certain sections are not covered by the provisions, namely ss 39-41 of the Evidence Act 1908, s 7 and 8 of the 1945 Amendment, and s 6 of the 1952 Amendment.

- 80 Sections 39-41 of the Evidence Act 1908 relate to proof of aspects of foreign law. They are useful sections. Sections 7 and 9 of the 1945 Amendment and s 6 of the 1952 Amendment also enable documents to be executed overseas in the presence of officials who act as witnesses and verify the authenticity of the document. The document is then presumed to have been validly executed unless the contrary is proved.
- 81 Our present view is that it is desirable to locate the above provisions in a separate statute specifically dealing with foreign evidence issues. This would avoid cluttering the evidence code with too many rules of a procedural nature. Such a statute could also contain provisions governing the taking of evidence in foreign countries and the taking of evidence in New Zealand for use in foreign countries (ie, ss 48- 48J of the Evidence Act 1908 and ss 37- 49 of the Evidence Amendment Act (No 2) 1980).

V

Private documents: execution, attestation and handwriting

- 82 The common law has a number of rules concerning proof of execution and attestation of private documents, as well as rules about proof of handwriting and signatures. These are specific aspects of authentication around which special rules have developed.
- 83 The authorship or due execution and attestation of private documents is often of importance. These matters may be proved in a number of ways:
- by the admissible testimony of the writer;
 - by the admissible hearsay statement of the writer;
 - by the testimony of a person who saw the document written or signed;
 - by the testimony of an expert witness based on a comparison between the handwriting in the document and a handwriting sample;
 - by the testimony of a witness familiar with the handwriting of the writer;
 - by use of the presumption of authenticity of ancient documents produced from proper custody.
- 84 This chapter will consider the use of these methods to prove authorship, due execution and attestation. Our suggested reforms build on the proposal made in chapter 2 that extrinsic evidence should not be required when a document is self-authenticating. We first consider opinion evidence of handwriting.

PROOF OF HANDWRITING

85 At common law handwriting experts and witnesses familiar with a person's handwriting may give opinion evidence that a document was written or signed by that person.

Expert comparison evidence of handwriting

86 Under the present law, evidence may be offered of a comparison between the document in question and a document known to have been written by the relevant person. This comparison will normally be made by a handwriting expert whose evidence will often be helpful to the court.

87 It is sometimes suggested that non-expert witnesses may also undertake a comparison, or even that the judge or jury may do it. It is our view that without special knowledge and skill such a comparison may be unsafe. There is English case law emphasising the dangers of leaving handwriting comparison to the jury without expert help.¹⁹ We consider that a comparison of handwriting should only be carried out by an expert.

88 In New Zealand the current law on this subject is contained in s 19 of the Evidence Act 1908 which provides:

Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine may be made by witnesses, and such writings and the testimony of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute.

89 Historically, this section was enacted because courts had held that writing introduced for no other purpose than as a comparison sample should be excluded as irrelevant. We do not believe that a modern court would exclude comparison samples when used as the basis for expert opinion evidence.

90 As the law at present stands, the main effect of s 19 is to limit the admissibility of comparison samples to those which are proved to the satisfaction of the judge to

¹⁹ *Cross (Mathieson)* para 20.17; *R v Tilley* [1961] 1 WLR 1309; *R v O'Sullivan* [1969] 1 WLR 497.

be genuine. The standard of proof varies: in civil cases it is on the balance of probabilities and in criminal cases, when the samples are adduced by the prosecution, it is beyond reasonable doubt.²⁰ The objective is to reduce the possibility of the fact-finder making errors by comparing writing with a sample which is not genuine.

91 This goal may, however, be achieved in other ways. Instead of a specific provision, it is possible to rely on the expert opinion evidence rule. Under the rule proposed by the Law Commission,²¹ experts will be able to give opinion evidence when it is helpful. Thus a handwriting comparison will be admissible whenever it is sufficiently reliable for the court to consider, both in relation to the comparison sample and the standard of analysis.

92 We think it appropriate to rely on the general rule and do not propose to continue s 19 in the evidence code.

Evidence of handwriting based on familiarity

93 Opinion evidence concerning handwriting is at present admissible at common law if the witness has had sufficient opportunity to become familiar with the handwriting of the person in question. In general, it seems that the level of familiarity required is low.²²

94 In our view it is only witnesses who are truly familiar with the handwriting of a person who can provide credible evidence of authorship. Even then their opinion may not carry great weight. The opinion of a witness who has seen the signature or handwriting of a person on only a few occasions is unlikely to be useful and should be excluded.

²⁰ *R v Ewing* [1983] QB 1039; *R v Sim* [1987] 1 NZLR 356.

²¹ Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) 52, s 4.

²² *Cross* (Mathieson) para 20.16.

95 In all probability, such low grade evidence is at present used only to have the document admitted. However, the real evidence of authorship (as far as authentication is concerned) is that the document purports to be written by the relevant person. Our approach to authentication would make such low grade evidence unnecessary for admissibility purposes.

96 Moreover, we consider that, in cases when parties seek to adduce familiarity-based handwriting evidence, the proposed rules concerning opinion evidence will sufficiently deal with the issues.²³ Good quality opinion evidence based on demonstrated familiarity with a person's handwriting will be admissible under the expert opinion rule, since a witness having familiarity with the handwriting of a person has specialised knowledge based on that experience.²⁴ In view of this we do not propose a special familiarity rule for handwriting.

TESTIMONY

97 The common law provides that where a witness sees a person sign a document in a particular name, that is sufficient evidence it was signed by the relevant person, unless, perhaps, the name is very common.²⁵

98 Our general approach to authenticity allows a document to be evidence of its own authorship. It follows that a signature in a particular name is evidence that the named person signed the document. We consider that, unless there is some indication, either on the face of the document (which might include the fact that the name is a common one) or from other evidence, that further investigation is necessary, the court is justified in accepting the signature as sufficient evidence of its own authenticity.

²³ Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18 1991) 51-52, ss 3 and 4.

²⁴ See *R v Howe* [1982] 1 NZLR 618, 627.

²⁵ *Cross* (Mathieson) para 20.15; and see *Jones v Jones* (1841) 9 M & W 75; 152 ER 33; and *Roden v Ryde* (1843) 4 QB 626; 114 ER 1034.

99 We do not consider any special provision is necessary and we note that the Australian Evidence Bill 1993 does not include a provision to deal with this issue.

ATTESTATION

100 At one time, the common law required that any document which was signed by a witness attesting its execution should be proved, if possible, by testimony of that witness. Legislation in 1866 provided that an attesting witness need not be called if the document in question did not, by law, require attestation.²⁶ Section 5 of the Evidence Amendment Act 1945 now provides that even documents legally requiring attestation may be established as genuine and may be proved to have been duly executed and attested without calling the attesting witness, if other evidence establishes these facts.²⁷

101 In our view special rules concerning proof of attestation are an unnecessary complication. We consider it should be possible to establish genuineness, due execution and due attestation through an attesting witness or by any other satisfactory means.

102 The present law specifically excludes testamentary documents from the above statutory regimes. Consequently, other evidence of attestation is permitted only when it is shown that an attesting witness is unavailable. Again, we consider this requirement serves no valuable purpose. The general principle permitting proof of attestation by any satisfactory means should apply to wills as well as deeds and other instruments. The Law Commission is currently considering the law of succession and we believe this minor reform will fit well with the other proposals which are likely to emerge from that project.

²⁶ Criminal Law Procedure Act 1866 (NZ) s 8; see also Criminal Procedure Act 1865 (UK) s 7. Both these Acts apply to civil and criminal trials.

²⁷ We note the suggestion in the case law and in *Cross* (Mathieson) paras 20.18 and 20.20 that a hierarchy is established whereby if an attesting witness cannot be called to provide proof of due attestation then an attempt must be made to prove the handwriting of that witness before other evidence of due attestation may be adduced. We consider this approach is too technical and that simplification is required.

ANCIENT DOCUMENTS

- 103 At common law private documents over 30 years old produced from proper custody are said to "prove themselves". These documents are admissible in evidence without proof of due execution or attestation or any other of the necessities of formal validity. They are also, subject to being regular on their face,²⁸ and subject to other evidence, presumed to have been duly executed and to be formally valid.²⁹
- 104 "Proper custody" includes the custody of any person who might reasonably and naturally be expected to have possession of the document. By reason of s 6 of the Evidence Amendment Act 1945 the ancient document presumption now applies to documents over 20 years old.
- 105 On our reading of the cases, the common law provides that documents are presumed genuine and formally valid *in the absence of evidence to the contrary*. The rationale for the rule is one of convenience. It is founded on the antiquity of the document and the difficulty of proving due execution of a document after a considerable lapse of time.³⁰ However, if the document on its face is irregular, or if there is other evidence which throws some doubt upon the genuineness or formal validity of the document, then the court must consider these questions in light of all the evidence (including inferences which the court can draw from the document itself).
- 106 The Australian Law Reform Commission proposed a presumption for ancient documents allowing the court to presume authenticity, due execution and attestation *unless the contrary is proved*. We think this goes too far. Private

²⁸ If the document is not regular on its face no presumption of due execution arises, *Doe v Spilsbury v Burdett* (1835) 4 Ad & El 1, 19, 111 ER 687.

²⁹ *Halsbury's Laws of England* vol 17 para 129; *Clissold v McMahon* (1884) 5 NSW 61. In *McLeod v Doherty* [1971] NZLR 348 the court applied the presumption to establish valid adoption of an aero club's bylaws.

³⁰ See *Wynne v Tyrwhitt* (1821) 4 B & Ald 376, 106 ER 975.

documents are not so reliable or easy to investigate as to justify the application of a presumption which shifts the burden of proof. If there is doubt concerning a document, the obligation to prove or disprove genuineness and due execution ought to remain on the party who has the burden of proving the ingredient of the claim or the element of the offence to which the document is relevant. Application of a presumption shifting the burden of proof of genuineness or due execution might distort the overall burden of proof in the case.

- 107 We consider that our general authentication provision, which permits reasonable inferences to be drawn from a document, covers the ancient documents rule. It in fact treats all documents in the same way as the current law treats ancient documents. In our view, therefore, it is unnecessary to have an ancient documents rule in the evidence code.

RECEIPT OF LETTERS AND TELECOMMUNICATIONS

- 108 The Australian Law Reform Commission's draft code contains a series of presumptions relating to the receipt of letters and various forms of telecommunication of documents. The provisions allow the court to presume, once evidence of sending the letter or telecommunication is given

- that the letter or telecommunication was received, and
- that it was received at the specified time (for letters, four days after sending, and for telegrams and telexes, 24 hours after sending).

- 109 As the common law at present stands, proof of sending a letter is in general evidence of receipt. According to *Phipson on Evidence*,

To prove that an act has been done, it is admissible to prove any *general* course of business or office, whether public or private, according to which it would have ordinarily been done, there being a probability that the general course would be followed in the particular case. ... In proving the posting of a letter, it is relevant to show that it was delivered to a person who habitually took all such letters to the post or that it was put in a place from which letters are habitually taken to the post. To prove the delivery of a letter on a due date it is relevant to prove that the letter

was properly addressed, posted in due time and afterwards not returned. However, proof of the ordinary course of business may not be sufficient to establish the central facts in a criminal case.³¹

- 110 Phipson indicates that it is possible to establish receipt of a letter by drawing a natural inference from evidence that the letter was properly addressed and posted with a stamp on it. In addition, it is possible to establish the time when a letter arrived by adducing evidence of how long it normally takes the postal service to process and deliver a letter of that type. Analogous inferences could be drawn in respect of other methods of document delivery (eg, courier delivery) or documentary telecommunications, including telexes and faxes.
- 111 Insofar as the Australian presumption relates to receipt of a communication, we consider that it does not in fact add to the natural inference which the fact-finder may draw from evidence that the communication was properly sent.
- 112 However, the main purpose of the Australian presumption seems to be to overcome the difficulty of establishing the precise time of receipt of letters and telecommunications.³² Though this may on occasion be difficult to establish, we are doubtful of the utility of a presumption. The non-existence of a presumption at common law does not appear to cause any serious inconvenience. In most cases precise timing of receipt of a communication is not in issue and need not be proved. In cases where precise timing is important the parties will inevitably adduce evidence of this. In such cases, the presumption may disturb the normal burden of proof (which lies on the party seeking to establish the ingredient of the cause of action or affirmative defence). We do not think there is a policy justification for this.

³¹ *Phipson on Evidence* (Howard, Crane and Hochberg, 14 ed, Sweet & Maxwell, London 1990) paras 17.05-17.06.

³² Australian Law Reform Commission, *Interim Report on Evidence* (ALRC 26 1985) Appendix C para 273, vol 2, 307.

- 113 Moreover, the time it takes for a letter to be delivered differs markedly depending on the class of mail (fastpost or normal) and on the distance (overseas, domestic, or across town). Time of delivery also varies for telecommunications.
- 114 The Law Commission, therefore, does not propose to include in the code a presumption relating to receipt of letters and telecommunications.

VI

Evidence produced by machines, devices and technical processes

115 A significant volume of evidence comes before the court as the result, wholly or in part, of the use of machines, devices and technical processes. Some examples are:

- testimonial evidence of the time, the result of a witness having looked at a clock or watch;
- evidence resulting from the use of a typewriter or a word processor;
- evidence of a photograph resulting from the use of a camera and the chemical process of developing the photograph;
- evidence of a bill produced by a creditor's computer billing system;
- evidence of the speed of a car, the result of the driver looking at the speedometer, or the same evidence, based on a police officer using a speed radar;
- evidence of the activities of a supermarket based on the records kept by its computer system which
 - records the sales of items of stock as they are passed over a bar code reader at the checkout,
 - adjusts its record of the inventory level of each item, and
 - automatically issues an order for stock as an inventory level becomes low;

- evidence given by way of a computer simulation of an event (for example, an aeroplane accident) introduced to give the fact-finder some idea of how the event occurred.

116 Such evidence ranges from the simple to the extremely complex. The rules in the evidence code must cater adequately for the range of machine-produced evidence, and, in order to avoid constant amendment, should as far as possible allow for future technological developments.

117 Some evidence produced by machines, devices and technical processes is documentary. For instance, computers produce information on discs or as paper printouts, both of which are forms of document. Other evidence is testamentary, given by witnesses based on their observations of machines. For reasons of convenience, we deal with both types of machine-produced evidence in this chapter, though this paper is nominally concerned only with documentary evidence.

THE COMMON LAW

118 At common law there are two possible obstacles to the admission of evidence produced by machines, devices and technical processes (and especially computer-produced documentary evidence). These obstacles are the hearsay rule and a requirement to show reliability.

Hearsay

119 The accepted view seems now to be that the hearsay rule is only in issue when the computer purports to reproduce information which comes from a human. The rule has no application when the computer collects and collates the information itself. In this case the computer output is treated as an item of real evidence.³³

120 We consider that the rules we have proposed for hearsay are sufficient to deal with any hearsay issues posed by computer- and other machine-produced

³³ Tapper, *Computer Law* (4 ed, Longman, London, 1989) 373-377.

documents. The hearsay issues are the same whether or not the document is produced by a machine.

A requirement to show reliability

121 A second possible obstacle to the use of evidence produced using computers and other machines and devices is exemplified by the cases of *Holt v Auckland City Council* [1980] 2 NZLR 124 and *Ministry of Transport v Hughes* [1991] 3 NZLR 325.³⁴ Those cases establish that the machine must be shown

- to be of a type that is recognised as dependable by the branch of science or skill that uses it (though in appropriate cases this can be the subject of judicial notice);
- to have been properly constructed and in good condition when it was used to produce the evidence in question; and
- to have been operated by a properly qualified operator (if there was one) and to have been used correctly.

122 It is not, however, clear whether these requirements relate to the admissibility of the evidence. In *Hughes*, the court was concerned that a speed radar was properly operated. The only evidence of the offence was provided by the machine and therefore the accuracy of the machine was required to be proved beyond reasonable doubt. The decision rests on the failure of the prosecution to discharge that burden of proof, rather than on an exclusion of the evidence. In *Holt*, the Court of Appeal was concerned with evidence of blood alcohol level produced by a gas chromatography machine. It is possible to regard this decision as turning on the burden of proof or, alternatively, as based on a finding that, in the absence of evidence that the machine was working properly, the result produced was inadmissible.

³⁴³⁴ See also *Marac Financial Services v Stewart* [1993] 1 NZLR 86 for an example of a civil case where the requirement was applied.

123 Whether the three requirements described above relate to the admissibility of evidence or to the standard and burden of proof in relation to machine-produced evidence may on occasions be important. In Transport Act 1962 cases involving speeding or drink-driving offences, it is often true that the only evidence of the crucial element of the offence is provided by a machine. Consequently the accuracy of the machine must be proved beyond reasonable doubt or that element of the offence will not be established.³⁵ In such cases it is not important whether the evidence is inadmissible or whether it simply fails to come up to the required standard. In either event the result is the same. In some cases, however, the machine-produced evidence will not be the only evidence relevant to the crucial element. In this situation, if the requirements in *Holt* and *Hughes* relate to the standard of proof, the machine-produced evidence, even if regarded as insufficiently reliable on its own, may be considered in combination with other evidence with a view to determining whether the necessary element has been proved. If, however, the requirements relate to admissibility, they will, if not satisfied, require the machine-produced evidence to be excluded, with the result that it cannot form part of the proof of the relevant element. In an evidence code this uncertainty should be resolved.

Machine-produced evidence - judicial notice and presumptions

124 Another relevant aspect of the common law is exemplified by the Western Australian case of *Zappia v Webb* [1974] WAR 15, 17. In a passage referred to in both *Holt* and *Hughes* it was said,³⁶

It is well established that the courts will take judicial notice of the use, nature and purpose of many mechanical or scientific instruments in common use, such as watches, thermometers, barometers, speedometers and the like. These instruments are of a class which by general experience are known to be trustworthy, even if not infallible, so that there is a presumption of fact, in the absence of evidence to the contrary, that readings taken from such instruments are correct, and hence it is not necessary to show that at the relevant time the instrument had been tested and

³⁵ Except in cases where the statute or regulation creates a presumption concerning the accuracy of the device, as is the case with some Transport Act 1962 provisions, especially those dealing with drink-driving offences.

³⁶ The passage is also quoted in *Marac Financial Services v Stewart* [1993] 1 NZLR 86, 92.

found to be working correctly. But the acceptance of a particular instrument without proof of its function, operation and accuracy depends on the extent to which it is commonly used within the community, so that a mechanical device recently invented will usually require expert evidence to establish what it can measure or accomplish and whether it can be relied on. Later, as the device becomes known, a stage may be reached where the courts will be sufficiently familiar with it not to require proof of what it is and what it does, but may still require evidence of its accuracy at the relevant time.

125 The full judgment in *Zappia* indicates that courts use the doctrine of judicial notice to categorise machines in three ways according to how familiar the machine is. In relation to two of the categories the courts apply presumptions. The three categories are:

- machines which are presumed, in the absence of evidence to the contrary, to do what they purport to do and to yield accurate evidence (eg a watch);
- machines which are presumed, in the absence of evidence to the contrary, to do what they purport to do, but which require evidence to establish that they were working reliably on the particular occasion;
- machines in relation to which evidence is required to establish both the way they work in general and the fact that they were working reliably on the particular occasion.

Both presumptions may be rebutted by evidence sufficient to discharge an evidential burden,³⁷ in which event the court decides the issue on the basis of the evidence before it.

126 Depending on the particular machine, these presumptions may in part satisfy the requirements in *Holt* and *Hughes*. It is probable, however, that, if there is a human operator, the *Zappia* presumptions will not aid in establishing that a machine was properly operated.

127 We note that presumptions of a similar nature are also imposed by legislation. In *Hughes* the issue concerned the status of a certificate of accuracy of a speed radar

³⁷ See para 0 for a discussion of presumptions which shift the evidential burden and presumptions which shift the burden of proof.

in terms of s 197(3) of the Transport Act 1962. That section requires a court presented with such a certificate to presume, in the absence of evidence to the contrary, that the radar machine is accurate. The certificate does not, however, give rise to a presumption that the radar was operated properly on the particular occasion - this has to be proved by evidence.

TWO APPROACHES TO REFORM CONCERNING MACHINE-PRODUCED EVIDENCE

128 As the previous discussion indicates, the common law rules relating to machine-produced evidence are complex and, in some respects, unclear. In this section we outline two approaches to reform which have been taken overseas. We then, in the next section, set out the Law Commission's proposals.

Specific legislation for computer output

129 Some countries have legislation dealing solely with computer-produced documents. This legislation deals with various issues raised by such evidence, including those associated with the rules concerning hearsay and secondary evidence. There are a number of problems with this approach.

- Special provisions would complicate the operation of our proposed hearsay reform. As previously indicated, we consider that the code hearsay rules are adequate to deal with all the computer hearsay issues. A special hearsay exception for computer-produced evidence is not required.
- Special provisions would also complicate the operation of our secondary evidence rules.
- Documentary evidence produced by a computer or machine is in principle and in practice no different from testimonial evidence based on results produced by a computer or machine. It raises the same problems and should have the same solutions.

130 The provision of specific legislation for computer-produced documents has been criticised by Tapper³⁸ and is not followed in the Australian Law Reform Commission's draft Act. We agree that specific legislation is not the appropriate approach for New Zealand.

The Australian presumption

131 The Australian Evidence Bill 1993, which is based on a recommendation of the Australian Law Reform Commission, creates two presumptions concerning the reliability of machine-produced evidence. The first, cl 146 (which is a narrower presumption), applies to all documents produced by a device or process. The second, cl 147, applies only to business records. Clause 147(3) excludes from the operation of the business presumption any document produced for an administrative or legal proceeding (though the presumption in cl 146 remains applicable).³⁹ The Bill provides:

146 Evidence produced by processes, machines and other devices

- (1) This section applies to a document or thing:
 - (a) that is produced wholly or partly by a device or process; and
 - (b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.
- (2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise a doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

147 Documents produced by processes, machines and other devices in the course of business

- (1) This section applies to a document:
 - (a) that is produced wholly or partly by a device or process; and

³⁸ Tapper, *Computer Law* 395.

³⁹ The Australian Law Reform Commission states that the provision excludes from the operation of the presumption all documents produced by a business when *a significant purpose* for the document's existence was future litigation: *Report on Evidence* (ALRC 38, Canberra, 1987) para 234(a).

- (b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.
- (2) If:
- (a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence); and
 - (b) the device or process is or was at the time used for the purposes of business;
- it is presumed (unless evidence sufficient to raise a doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process produced that outcome.
- (3) Subsection (2) does not apply to the contents of a document that was produced:
- (a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
 - (b) in connection with an investigation relating to or leading to a criminal proceeding.

THE LAW COMMISSION'S PROPOSAL

132 Our proposal for evidence produced by machines, devices and technical processes relies, first, on the principle of relevance and the requirement to discharge the burden of proof and, secondly, on a provision to facilitate proof of the operation of the machines (along the lines of cl 146 of the Australian Evidence Bill 1993) coupled with the rules concerning judicial notice.

Relevance and the burden of proof

133 Under both the present law and the proposed code, machine-produced evidence can be analysed in terms of two basic questions.

- Is the evidence relevant? This question arises in every case.
- Is the reliability of the machine sufficiently established? This question arises when the party adducing the machine-produced evidence bears the burden of proof. The party must then establish the reliability of the machine beyond reasonable doubt or on the balance of probabilities as the case may be.

134 As to the first question, relevance, this must be established by all parties who adduce evidence. For machine-produced evidence this may be achieved in three basic ways. First, it may be possible to glean the answer from the evidence itself. Thus, a document produced by a machine, such as a computer generated account, may on its face disclose what it is and what the machine does in producing it. Secondly, a witness may give evidence explaining what the machine does. Finally, it may be possible to take judicial notice of the way the machine works (if it is common knowledge and indisputable, see chapter 10, paras 0-0). This is the case, for example, with a clock.

135 The second question applies to parties who are relying on machine-produced evidence to prove an issue on which they bear the burden of proof. The proponent does not need to prove the reliability of the machine as a condition precedent to the admissibility of the evidence. Nevertheless, when the proponent adduces machine-produced evidence to establish an issue on which the proponent bears the burden of proof, that evidence will often on its own be insufficient to establish reliability to the requisite standard. The proponent will then need to bolster the machine-produced evidence with other evidence proving its reliability.

136 Some aspects of the proof of reliability will be covered by the presumption which in the next section (paras 0-0) we suggest should be included in the code. This enables the fact-finder to presume that a machine which ordinarily performs a task did so on the particular occasion in question. It therefore aids the proponent in discharging any applicable burden of proof. But it should be emphasised that the presumption is not the only way of showing reliability of a machine and discharging a burden of proof. That can be done by any evidence which logically founds an inference of reliability. For instance:

- evidence may be given of a specific test of the accuracy of the machine, showing it was working properly at the relevant time - the accuracy of a set of scales may be shown by evidence that the scales correctly measured an object of known weight used to test the machine;

- testimony may be offered that the machine is ordinarily capable of accurately performing the functions it purports to perform, that it was in good repair, and that its operator was competent;
- though it may not be definitive, evidence may be offered that the machine is frequently used and relied upon - particularly if it is in widespread use by businesses which may be expected to demand a high level of reliability.

137 The basic approach outlined above is similar to that of the common law. However, we do not think it necessary to lay down requirements similar to those in *Holt* and *Hughes* (see para 0). It is always essential to discharge the requisite burden of proof concerning the reliability of any relevant machine-produced evidence. The *Holt* and *Hughes* requirements may serve as useful guidelines in some cases, but the burden of proof may be discharged in other ways, as the examples in the above paragraph show. A decision whether the burden has been discharged will always depend on the facts of each individual case.

A presumption concerning evidence produced by machines, devices and technical processes

138 We consider that a provision adapted from cl 146 of the Australian Evidence Bill 1993 will appropriately facilitate the use of evidence produced by machines, devices and technical processes. This provision has a similar function to and is intended to replace the common law presumptions described in *Zappia*. The provision is as follows:

18 Evidence produced by a machine, device or technical process

If a party offers evidence that was produced wholly or partly by a machine, device, or technical process and the machine, device, or technical process is of a kind that ordinarily does what a party asserts it to have done, it is presumed, in the absence of evidence to the contrary, that on a particular occasion the machine, device, or technical process did what that party asserts it to have done.

139 In simple terms, when the proponent adduces evidence of the operation which the machine is meant to perform and evidence that the machine ordinarily performs that operation, it is presumed in the absence of evidence to the contrary that the machine did what it ordinarily does on the particular occasion in question. Evidence of ordinary operation may come from an expert who can describe how

the machine works and can establish that it is based upon sound scientific or engineering principle. Or, in some instances, it may be sufficient to tender evidence of the history of the machine establishing its trouble-free ordinary operation. Or, in the case of simple machines, the evidence of an operator who knows how the machine works or who has long experience with it may be all that is necessary to establish its ordinary operation. Finally, on some occasions, evidence along the above lines will not be necessary at all. That is because, in the case of a commonly used machine, the judge may take judicial notice of its ordinary operation (as is the current position under the common law).

- 140 Once evidence of ordinary operation is before the court (or judicial notice of that is taken) the proponent need not adduce evidence that the machine on the occasion in question did what it ordinarily does. The court will presume this. The presumption therefore facilitates discharge of the applicable burden of proof (whether on the balance of probabilities or beyond reasonable doubt).
- 141 The opponent of the presumption has two basic options. First, it may be possible to dispute the evidence of ordinary operation by calling other witnesses with knowledge of the type of machine. Alternatively, the opponent may, by presenting evidence, endeavour to show that the machine did not perform properly on the occasion in question. The opponent may, for example, call evidence relating to the maintenance of the machine, or may call evidence tending to suggest that the result given by the machine is erroneous (for instance, in a case involving a computer-generated telephone bill, evidence that the toll calls listed on the bill were never made: see para 0).
- 142 In our view, the presumption is fair and convenient. Evidence that a machine ordinarily does what it is said to do shows sufficiently the general reliability of the machine to found a valid conclusion. In broad terms, the presumption allows the proponent to avoid the cost of calling evidence relating to the maintenance of the machine, unless there is good reason to do so.
- 143 An opponent will often need to lead specific evidence to challenge the reliability of the machine once its ordinary operation is established. In some cases it may be difficult or costly to obtain this evidence. Nevertheless, the presumption is based

upon a natural inference and is also limited to the performance of the machine. Where human operation of the machine is involved, the proper use of the machine by its operator will still need to be established by evidence. Further, in both civil and criminal cases, the opponent has procedural rights which provide pre-trial opportunities to test the machine and the reliability of the evidence. (These safeguards, which for the most part exist under the present law, are discussed in chapter 9.)

- 144 Though our provision is based on the Australian presumption we do not follow the Australian approach in one major respect. Clause 147 of the Australian Evidence Bill 1993 presumes that machines used by businesses produce the outcome that the proponent asserts they produce without evidence of the machine's ordinary operation. Although businesses do have incentives to keep accurate records, we consider that the Australian proposal gives too much weight to the assumed reliability of machines used by businesses and that there should be some evidence of a machine's operation before an inference of reliability is drawn. This does not impose an onerous standard on businesses in most cases. For everyday machines the requirement can be met without calling expert evidence. Indeed many business machines will qualify for judicial notice, and the court will often be justified in drawing the inference from evidence that a machine is widely used by business and generally considered reliable. However, in cases involving complicated or novel machines (for example, complex computer billing systems) reasonably comprehensive evidence will need to be called to establish reliability. We consider this is desirable.

An example: records of telephone calls

- 145 It is useful to consider the working of the suggested provision with reference to an example. New Zealand telephone companies rely on computers to generate toll accounts. A simplified description of the billing system is as follows. A caller makes a toll call. The telephone company's computer logs the call, its origin, destination, and duration. It registers this information against the customer's account, and stores it on disc or tape. From this information, it prints out a bill and sends it to the customer. The computer also creates a record of the account

for the company. This may be directly printed onto microfiche, or may be stored on optical disc.

- 146 In an action to recover a debt owed to the company by the caller, the company must establish that the amount is owing. It will do this by adducing evidence of its own record of the account rendered, which was produced entirely by computer. It will also need to adduce evidence of what the computer ordinarily does and its general accuracy. The fact-finder will then presume that the computer did what it ordinarily does.
- 147 In order to controvert the presumption, the customer will need to adduce evidence that puts the accuracy of the machine in issue. It would be sufficient for the customer simply to testify that the relevant call was not made. The burden then rests on the company as plaintiff to prove that the debt is due. To achieve this the plaintiff may, or may not, adduce additional evidence of the reliability of the machine. Whether the plaintiff adduces additional evidence or not, the court will consider and determine the issue in light of all of the evidence.
- 148 Similar issues arise in criminal cases. In *R v Dahlberg* (unreported, 1 April 1992, Nelson, T No 1/92), a murder case, a vital item of evidence concerned a telephone call made to the house of the victim's father from the house where the accused was living at the relevant time. The telephone company kept computer records of all calls made, their duration, time and destination. Evidence of the computer record was held to be admissible, and was supported by testimony from the system operator concerning how the computer system worked.
- 149 Under our proposed provision the position would not be very different. The ordinary working of the computer recording system would need to be established by evidence of how the system worked and that it was ordinarily reliable. That done, the fact-finder would presume that the system worked accurately on the particular occasion. Of course, related issues would not be affected by the proposed section. In the *Dahlberg* case the related issues included whether the call was made by the accused or some other person.

CONCLUSION

- 150 Evidence produced by machines, devices and technical processes is one of the more complicated issues discussed in this paper. We have endeavoured to propose a simple and fair presumption in order to facilitate the use of machine-produced evidence while retaining flexibility in order to cope with rapid changes in technology. Apart from the presumption, we consider that the issues are best handled within the framework of the general code rules, especially those concerning relevance, burden of proof, judicial notice and hearsay.
- 151 In a limited number of cases specific presumptions covering particular issues, such as those imposed by the Transport Act 1962 (see para 0), may be required to supplement the general code rules. The need for such provisions should be determined on a case by case basis, after first considering whether the general provisions of the code are adequate.

VII SECONDARY EVIDENCE

THE SECONDARY EVIDENCE RULE

152 Where the contents of a document are to be proved, the law of evidence requires that the original must be produced or its absence explained. This is usually called the secondary evidence rule. Primary evidence may be defined as "the best evidence, or that kind of proof which, under any possible circumstances, affords the greatest certainty of the fact in question...", whereas secondary evidence is "all evidence falling short of this...".⁴⁰ The rule may be seen as the last vestige of the old best evidence rule, now largely obsolete.⁴¹ Lord Denning said,

That old [best evidence] rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is in your hands you must produce it. You cannot give secondary evidence of it by producing a copy.⁴²

153 The best evidence rule also provided one rationale for the rule against hearsay. Indeed, there are a number of parallels between the secondary evidence rule and the hearsay rule. As we earlier noted, both can be viewed as guarding against unreliability when a process of reproduction or repetition is involved. Hearsay applies only to human communication, which can be oral or in writing. The secondary evidence rule applies both to human recollection of documents and to machine reproduction (for example, photocopying).

⁴⁰ Greenleaf, *A Treatise on the Law of Evidence* (Arno, New York, 1972) 95; Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Rothman Reprints, South Hackensack, NJ, 1898) 487.

⁴¹ However, in *Phipson on Evidence* (Howard) 121, para 36-02, 965 it is noted that historically the secondary evidence rule predates the best evidence principle, and can be traced to the old doctrine of *profert* which required production of any instrument pleaded.

⁴² *Garton v Hunter* [1969] 2 QB 37, 44.

THE PRESENT LAW: THE SCOPE OF THE RULE

- 154 The secondary evidence rule applies only where a party is seeking to prove the contents of a document - where the party is relying on the words or other information contained in the document. The rule does not apply where the contents of a document are used only for the purposes of identifying it, or where the party merely seeks to prove the existence of the document (for example, a party may wish to prove the existence of a will simply to establish that a person was testate at a given date).⁴³ Similarly, the rule does not apply where the delivery of a deed is in issue.
- 155 Originally, the rule applied only to writings. On occasions, suggestions have been made that the rule now extends to photographs and tape recordings. However, photographs have long been accepted in evidence without production of the negative. Their exclusion from the rule can perhaps be explained by the fact that they are often introduced merely to illustrate the testimony of a witness.⁴⁴
- 156 The application of the rule to video and tape recordings is unclear. In the English case of *Kajala v Noble* it was held that the rule "is limited and confined to written documents in the strict sense of the term and has no relevance to tapes or films."⁴⁵ The issue was whether a copy of a video tape could be admitted when the BBC would not release the original because it was its policy not to do so. This decision conflicts with the earlier decision in *R v Stevenson*,⁴⁶ where tape recordings were held to be inadmissible because it was likely that the tapes were not the originals. The New Zealand Court of Appeal explicitly left the point open in *R v Wickramasinge*.⁴⁷ Another related issue is whether transcripts of tape and video recordings are admissible (discussed at paras 0-0).

⁴³ See *Cross* (Mathieson) para 20.2 for a full discussion of these limitations.

⁴⁴ The rule does, however, appear to apply when a photograph is of a writing and the contents of the writing are in issue.

⁴⁵ (1982) 75 Cr App Rep 149, 152 QBD.

⁴⁶ [1971] 1 All ER 678.

⁴⁷ (1992) 8 CRNZ 478, 481.

THE PRESENT LAW: EXCEPTIONS TO THE SECONDARY EVIDENCE RULE

157 The secondary evidence rule requires either the production of the original or an explanation for its absence. The principal situations which the courts and the legislature have accepted as exceptions to the secondary evidence rule are where

- the original is lost or destroyed or cannot be found after due search;
- production of the original is, for practical purposes, impossible;
- production of the original would be highly inconvenient due to the public nature of the document;
- the original is in the possession of another party to the proceedings who does not produce the document after being served with a notice to produce; and
- the original is in the possession of a stranger to the proceedings who lawfully refuses to produce it after being served with a subpoena.

In addition, a party's admission about the contents of a document may be received in evidence without accounting for the absence of the original.

158 The exception for public documents is justified on the grounds of the inconvenience that would be caused by the removal of public documents from proper custody. Many statutes contain provisions facilitating proof of public documents. For example, the Evidence Act 1908 contains provisions facilitating proof of the Journal of the House of Representatives (s 30) and provisions concerning proof of proclamations, treaties and acts of state of any country, judgments, decrees, orders of a court in any country and affidavits, pleadings and documents filed in such a court (s 37).

159 Many statutes also provide for the admissibility in evidence of certified copies of documents. For example, s 42 of the Births and Deaths Registration Act 1951 provides:

A certified copy of any entry in a register made or given and purporting to be signed by the Registrar-General or sealed or stamped with his seal, or made or

given and purporting to be signed by any Registrar or Acting Registrar or the Deputy Registrar-General or any Deputy Registrar shall be received in any Court as prima facie evidence of the birth or death to which it relates.

Similarly, s 45 of the Land Transfer Act 1952 provides that a certified copy of any registered instrument affecting land within the Registrar's district signed by the Registrar and sealed with the Registrar's seal shall be received in evidence for all purposes for which the original instrument might be put in evidence.

- 160 The statutory exceptions are not limited to public documents. The Evidence Amendment Act (No 2) 1980, which makes certain documentary hearsay admissible, provides in s 6 that a statement in a document admissible under that Act may be proved by the production of the original or the material part of the original or by a copy certified to be a true copy in such manner as the court may approve. Section 5 of the Evidence Amendment Act 1952 (as amended) allows for the admissibility of prints taken from film (which includes microfilm) of business documents where the document photographed was destroyed, whether deliberately or otherwise. Section 5 of the Banking Act 1982 allows for copies of any entry in the ordinary business records of a bank to be received in evidence if the entry was made in the usual and ordinary course of business, the business record is in the custody and control of the bank, and the copy has been compared with the original entry and is correct.

THE RATIONALE FOR THE SECONDARY EVIDENCE RULE

- 161 Historically, the rule was said to prevent parties presenting a fraudulent copy to the court when the original was available, though according to Wigmore⁴⁸ the primary reasons for the rule are that
- a copy is always liable to errors on the part of the copyist;
 - the original may contain, and the copy may lack, features of handwriting, paper, and the like, that may provide an opposing party with valuable means of learning legitimate objections to the significance of the document; and

⁴⁸ 4 Wigmore, Evidence §1179 (Chadbourn rev, 1972).

- oral testimony based on recollection of the original is almost certain to contain errors.

162 Cleary and Strong argue that, although the prevention of fraud is still one justification for the rule, the basic contemporary justification is the "tremendous importance of the written word to the law".⁴⁹ Documents should be presented to the court in the most accurate way possible because a slight variation can have important consequences. Moreover, as Wigmore also pointed out, the original may reveal certain features which may assist an opponent in raising legitimate objections.

CRITICISMS OF THE RULE

163 Though the rule has not been the subject of as much comment as some other areas of the law of evidence, this is not, we believe, because it works satisfactorily but rather because it is often ignored in practice, at least in civil cases. As previously noted, in the civil jurisdiction, the usual practice is for counsel for the parties to agree a bundle of documents in advance of trial. This eliminates both the need to produce the original in court and to authenticate it. In criminal cases however, this procedure is not regularly used, and secondary evidence problems can arise as a result.

164 The Roskill report on complex fraud trials⁵⁰ considered that the exclusion of reliable documentary evidence in fraud trials by reason of the secondary evidence and hearsay rules was a major problem. The report recommended, among other things, that the judge be given power to admit copies of documents and otherwise inadmissible documentary hearsay.⁵¹ Though the recommendations are confined to fraud trials, and we do not follow them closely, they support the view that there

⁴⁹ Cleary and Strong, "The Best Evidence Rule: An Evaluation in Context" (1966) 51 Iowa LR 825, 828.

⁵⁰ Fraud Trials Committee (Roskill Committee), *Fraud Trials Committee Report* (HMSO, London, 1986) ch 5.

⁵¹ The Roskill report also recommended reforms in relation to the proof of authenticity (para 5.36), and, in ch 6, recommended pre-trial procedures which will be discussed later in this paper: see below ch 9, paras 0-0.

is room for relaxation of the secondary evidence rule in criminal cases, without causing unfairness to the accused.

- 165 Another of the problems with the rule and its exceptions is that it has not kept pace with the technological changes that have occurred in the areas of data processing, storage and retrieval. The rule was developed when there were no computers, photocopiers or even carbon paper. Although statutory amendments have relaxed the rule (for example, in relation to microfiche and microfilm), these are of limited application. The result is that there is uncertainty in the commercial community regarding the admissibility of some records stored by different computer methods.⁵²
- 166 Even where statute makes explicit provision for the reception of secondary evidence of records stored in ways other than in writing on paper, the provisions are restrictive. As we have already mentioned, s 5 of the Evidence Amendment Act 1952 (as amended) allows for the admissibility of prints taken from microfilm, but only where the original has been destroyed. Many organisations that have microfilm records retain the originals for some period for a variety of reasons.⁵³ Although retrieval of the original will often be more cumbersome and substantially more costly than production of the microfilm, the strict application of the best evidence rule requires that the original be produced in court because it is still in existence.
- 167 A similar but more general problem occurs when businesses keep copies of records on easily accessible microfilm or computer files, which the business itself uses for its ordinary needs. The originals, on the other hand, may be mostly paper records stored in boxes in warehouses. This storage method is unavoidable but, by its nature, it is difficult to access and the papers easily become disarranged. The secondary evidence rule requires the party to produce the original, incurring some expense, yet it is very likely that the copy is accurate and reliable.

⁵² See n **Error! Bookmark not defined.**

⁵³ For example, retention of the original is required by the Income Tax Act 1976 s 428. In some cases, however, the Commissioner of Inland Revenue may waive the requirement, s 428(4).

- 168 Moreover, when the original is in the hands of a non-party, the rule requires the proponent of the evidence to incur the expense of searching it out and issuing a subpoena for it. Yet the proponent may well have kept a perfectly accurate copy. If a rule imposes costs on parties to litigation, it must be clear that the cost is justified by the increase in quality of the evidence made available.
- 169 In our view all the above problems with the rule indicate a need for reform.

REFORM OF THE RULE

- 170 Any reform of the rule, as well as being clear and practical, must give guidance to businesses concerning the way in which they should keep their records, must not impose undue costs on litigants, and must promote the goals of rational ascertainment of facts and fairness to the parties.

Retention of the rule

- 171 Documentary evidence is extremely important in the conduct of modern litigation. This is especially so in civil cases, though in criminal cases, such as complex fraud trials, documents are also of central importance. The secondary evidence rule is beneficial to the extent that it ensures that written or recorded words are conveyed to the court in the most accurate form possible. Even a minor change in the wording of a document can make a significant difference to its meaning. We therefore do not suggest total abolition of the rule - which would make it possible for any evidence to be adduced to prove the contents of a document.
- 172 We propose an approach, modelled on the United States Federal Rules of Evidence, which retains (and, indeed, slightly extends) the core secondary evidence rule, but provides broader exceptions than the present law allows. A two-tier regime of exceptions is proposed. The first tier will allow certain reliable classes of secondary evidence to be admitted notwithstanding the availability of the original. The second tier will allow the admission of other secondary evidence as long as the original is shown to be unavailable. A further specific exception for documents not closely related to a controlling issue is discussed and rejected.

- 173 Within this basic approach we suggest that a slight extension of the rule is appropriate to cover documentary evidence which is not writing, like photographs, sound and video recordings and computer discs. There is no rational reason for distinguishing between written and non-written documents. Non-written documents present the same problems of potential mistake and fraud, and, as permanent records of past events, may be just as important in a proceeding. This extension will not, however, erect undue barriers to the admissibility of non-written documents because we propose rules to allow the court to receive non-written documentary evidence in forms which are convenient and reliable. For instance, under our suggested regime, photographs will be admissible as either negatives or positive prints, and soundtapes will be able to be adduced in transcript form in some cases. (These issues are fully discussed in chapter 8.) This extension makes the law more rational and imposes useful but not onerous safeguards on the reception of non-written documentary evidence.
- 174 We now discuss in detail the proposed exceptions to the secondary evidence rule.

EXCEPTIONS TO THE SECONDARY EVIDENCE RULE BASED ON RELIABILITY

Rationale and effect of exceptions based on reliability

- 175 In many cases the contents of a document can be reliably determined without requiring production of the original. Accordingly, we consider that the rule should be relaxed to allow for the reception of copies of documents produced by methods or in circumstances which assure reliable reproduction. This has already been achieved to a considerable extent by the various statutory enactments, but it has been a piecemeal approach and there is, as we previously mentioned, uncertainty in the commercial community regarding the scope of some of the statutory provisions.⁵⁴ Our proposals would go further than these provisions.

⁵⁴ The use of a new technology, storage of information on optical discs, has created some doubt. Some have suggested that s 5 of the Evidence Amendment Act 1952 (which allows evidence of a copy kept on microfilm to be admissible) by confining itself to "film" implies that other recording systems cannot produce an admissible copy. This suggestion seems unfounded: see Wong and Viskovic "Documents optically stored, when are they admissible" Lawtalk, 6 July 1992, 9.

They aim to remove the existing uncertainty and make the tendering of documentary evidence easier and less expensive, without sacrificing the goal of providing the fact-finder with accurate information. We propose that these exceptions to the secondary evidence rule apply both in criminal and civil proceedings.

176 We also propose procedural safeguards to ensure that any relaxation of the secondary evidence rule does not increase the opportunity to submit fraudulent documents. These safeguards, which for the most part are intended to facilitate investigation and testing of documentary evidence before trial, are discussed in chapter 9.

177 An important effect of the secondary evidence rule is the allocation of the cost of searching for and producing an original document when it is held by a non-party to the proceeding. If one of the parties holds a document it is available to other parties through normal discovery procedures. Where, however, a non-party holds the document there may be significant costs in obtaining it. Under the common law rule these costs are borne by the proponent of the document, who must either present the original, or show efforts to find it. One of the effects of the reform we propose is to shift the cost burden of finding the original to the opponent in those instances where the proponent has adduced a reliable form of secondary evidence. In our view, production of a document in a reliable form should be sufficient to allow it to be admitted. If the opponent then wishes to challenge the document it is both efficient and fair that the cost of so doing should be borne by the opponent. Of course, the proponent will not always choose to rely on the right to present secondary evidence and will on occasion, notwithstanding the cost, find and produce an original, especially when the document is important to the proponent's case.

178 Based on reliability, we propose exceptions to the secondary evidence rule which would provide for the admissibility of

- carbon copies and copies produced by machines, devices and technical processes,
- business records, and

- public documents.

We also discuss whether the exception should cover informal admissions by parties.

Carbon copies and copies produced by machines, devices and technical processes

179 When the secondary evidence rule originated several centuries ago, copies of documents were produced by hand and thus the risk of inaccurate copying was high. Today, it is rare for copies to be made in this way, except for copies produced simultaneously with the original by the use of carbon paper. Most copies are produced by techniques such as photocopying, facsimile transmission or other forms of electronic copying. Copies produced by these techniques (and also carbon copies) are reliable and in some cases are indistinguishable from the original. We do not think rejection of these copies is, as a general rule, warranted. Cleary and Strong point out that:

Copying, ... when accomplished by modern methods of reproduction yields a counterpart from which the possibility of inadvertent error is virtually eliminated. Nevertheless, the thinking which rejected subsequent manual copies has been continued and applied to all subsequent copies regardless of how made, from letterpress copies to copies produced by photographic methods.⁵⁵

180 We consider that the objective of providing the court with the most accurate evidence possible will usually be achieved when a carbon copy or a copy produced by a machine, device or technical process is tendered in evidence. Though in some cases such copying does not reproduce all the relevant features of the original (eg faint annotations), or may fail to show that a document has been tampered with, these difficulties are relatively rare. Moreover, carbon copies, photocopies, faxes and other machine-produced copies are regularly relied on in business on the basis that they are accurate reproductions of the originals. The rule has already been relaxed in the United States (Federal Rules of Evidence rr 1001 and 1003), and the Law Reform Commissions of Canada⁵⁶ and Australia⁵⁷

⁵⁵ Cleary and Strong 825, 829.

⁵⁶ Canadian Law Reform Commission, *Report on Evidence* (Ottawa, 1975) cl 76.

have proposed changes to the law which would permit the use of this class of reliable copy. We consider that these copies should be admissible in evidence, even when the original is available to the party tendering the document.

181 We envisage that our provision will include:

- carbon copies;
- copies produced by photographic means, such as photocopying and photography onto microfilm;
- copies of sound and videotapes produced by machines designed to reproduce such tapes;
- facsimiles (faxes);
- copies made by computers of documents stored on discs;
- copies made by word-processing programs on computers;
- images of documents stored on computers.

Business records

182 As businesses strive to deal with the growing volume of documents, they seek more economical and efficient methods of storage. The code should, wherever possible, recognise the use that is made in business of copies of records and should facilitate proof of the contents of these documents.

183 Most business records will be admissible under the exception discussed above relating to copies produced by devices. However, it is desirable to admit a wider range of secondary evidence of business records on the ground that there is usually a strong incentive for a business to produce and maintain accurate records. We therefore favour an exception to the secondary evidence rule to provide that a

⁵⁷ Australian Law Reform Commission, *Report on Evidence* (ALRC 38, 1987) cl 125(1)(b); see also Evidence Bill 1993 cl 48(1)(b).

document which is a copy or an extract or a summary of an original document and which forms part of the records of a business is admissible in evidence.

- 184 This exception to the secondary evidence rule in relation to business records does not affect the rule against hearsay. If a business record contains hearsay, it must also be admissible under the code hearsay rule.

Public records

- 185 The common law has long recognised the inconvenience that would result if a party was required to produce in court the original of a public document. As a result, the current law provides that public documents can be proved by copies of various kinds.⁵⁸ What constitutes a public document is not always clear. Factors which assist in determining whether a document is "public" include whether there is a strict duty to inquire into all the circumstances recorded, whether it concerns a public matter, whether the record is to be retained, and whether the document is open for public inspection. The weight to be given to each of the criteria depends on the type of document. For example, the duty to inquire is important if the document is a return, but the duty to record is more important if the document is a register.⁵⁹

- 186 A multitude of statutes contain provisions governing the proof of public documents and we consider it is desirable to reform the law in order to lessen the need for these specific provisions. We seek to achieve this with two exceptions to the secondary evidence rule. First, we propose to extend the rule covering business records to the records of government and public bodies. Second, we propose a specific exception permitting the admission of copies of public documents that have been printed under the authority of the New Zealand Government or of a foreign government and copies which are certified to be true copies by their proper custodian.

⁵⁸ *Cross (Mathieson)* para 20.12.

⁵⁹ *Cross (Mathieson)* para 17.13.

Informal admissions

187 At common law a further exception to the secondary evidence rule applies in respect of a party's informal admissions. Admissions are the statements of a party or agent which another party seeks to tender against the party who made the admission. At present, admissions concerning the contents of a document are received in evidence, notwithstanding that they are secondary evidence and whether or not the original is available, on the basis that they are likely to be reliable. We consider that this rule is unnecessary in the context of the proposed evidence code.

188 Given the broad reliability-based exceptions to the secondary evidence rule which we have suggested, it is unlikely that an admissions exception would allow much additional evidence to be received by the court. Such an exception would also create unnecessary complications. For instance, if an exception were included in the code it would be necessary to define "admission", which would be difficult. Moreover, the common law has developed categories for admissions of employees and agents and these would have to be dealt with by complicated code provisions. At common law, the admissions exception also applies to the hearsay rule. However, our hearsay reform does not create a specific list of exceptions, and an admissions rule is therefore unnecessary for hearsay purposes. In summary, we consider that an admissions exception created simply for the secondary evidence rule would rarely be invoked, and would involve an unwarranted degree of complication.

189 It should be noted that the preceding discussion relates only to informal admissions. Formal admissions made in a civil case (sometimes after notice under r 291 of the High Court Rules or r 313 of the District Courts Rules) are a procedural device to avoid calling unnecessary evidence at trial. Our documentary rules do not affect this useful procedure.

AN EXCEPTION BASED ON UNAVAILABILITY

190 We propose to continue the common law rule that secondary evidence is admissible if the original is unavailable. Though such evidence may present some risk of fraud or mistake, the court would be unreasonably impeded in ascertaining

the facts if secondary evidence was not admissible in this situation. Under our proposal the original is defined as unavailable in various circumstances including: where it has been destroyed; where it cannot be found after reasonable search; where it is under the control of a non-party and cannot be obtained by judicial process; and where it is held by another party to the proceeding.

- 191 This exception is relatively straightforward, but there remain two issues of detail to address: whether there is a need for a bad faith limitation; and whether there ought to be a hierarchy of secondary evidence. These we now discuss.

Should secondary evidence be admissible if the original is unavailable due to bad faith?

- 192 As a limitation on the unavailable original exception, r 1004 of the Federal Rules of Evidence provides that if the unavailability of an original or duplicate is due to the bad faith of the proponent, then the proponent may not adduce secondary evidence of that document. The Australian Evidence Bill 1993 and the Evidence Act proposed by the Canadian Federal/Provincial Task Force Rule have similar provisions.

- 193 The bad faith limitation is intended to prevent evidence coming before the court in a situation where there is a high risk that it is false or misleading.⁶⁰ However, the United States experience seems to be that the provision is rarely applied to exclude secondary evidence. We think the same would be the case in New Zealand and consider the bad faith limitation unnecessary. We note that a copy admitted after the proponent has destroyed the original in suspicious circumstances will in general be given little weight by the fact-finder.

A hierarchy of secondary evidence?

- 194 We have also considered whether the code should prescribe a hierarchy of secondary evidence where the original is unavailable. If this were done the rules

⁶⁰ Weinstein and Berger, *Weinstein's Evidence Manual* (Matthew Bender, New York, 1988) para 9.03[02].

would provide that secondary evidence of the contents of a document would only be admissible if it could be shown that no better evidence is available.

- 195 The Canadian Federal/Provincial Task Force on Uniform Rules of Evidence opted for a hierarchy of secondary evidence, adopting the approach taken in the California Evidence Code. The Task Force explained its view as follows:

A copy is normally much more reliable than other forms of secondary evidence, and therefore applying the best evidence principle it ought to be given preference as a means of proof.⁶¹

This approach is in principle consistent with the goal of the secondary evidence rule, which is to put before the court the most reliable (or the "best") evidence available.

- 196 No hierarchy is, however, imposed at common law. If the original is unavailable, a party may adduce any other evidence to prove the contents of the document. The common law position does not seem to have created difficulties and was adopted in the Canadian Law Reform Commission draft code, the Federal Rules of Evidence and the Australian Evidence Bill 1993 (following the Australian Law Reform Commission's recommendation). The Advisory Committee on the Federal Rules of Evidence notes that:

While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities.⁶²

- 197 We consider that, in most cases, parties will adduce the best form of secondary evidence available, and that the increased complexity of a hierarchy of secondary evidence is unwarranted.

⁶¹ Report of the Federal/Provincial Task Force on the Uniform Rules of Evidence (1982) 383.

⁶² Advisory Committee's Note to r 1004.

A FURTHER EXCEPTION? DOCUMENTS NOT CLOSELY RELATED TO AN ISSUE IN THE PROCEEDING

- 198 Rule 1004(4) of the Federal Rules of Evidence provides that secondary evidence of a document is admissible where the document is not closely related to a controlling issue. According to Weinstein,

Rule 1004(4) recognises the exception commonly found in American jurisdictions for so-called collateral matters. This provision - which eliminates the need for an original when the document is only tangentially related to the material issues in the case - promotes efficiency and gives the trial judge discretion to apply the best evidence rule flexibly rather than overtechnically.⁶³

- 199 The provision has disadvantages. It may often be uncertain which documents are of vital importance to the case and which are merely related to collateral issues. The cost of resolving that uncertainty may, in some circumstances, outweigh any savings in not requiring the production of the original document. In addition, the secondary evidence regime outlined in this paper is sufficiently liberal to allow the admission of much secondary evidence. We therefore consider that an exception for documents not closely related to an issue is unnecessary in our proposed code.

OTHER STATUTES

- 200 There are many provisions in particular statutes which authorise the court to receive secondary evidence. An example is s 5 of the Evidence Amendment Act 1990, which applies only to certain proceedings under the Commerce Act 1986, and which is intended to reduce delay in obtaining documents:

5 Facsimiles

Subject to any Rules of Court made under section 51C of the Judicature Act 1908, and to any contrary direction by the Court -

- (a) a facsimile of a document or thing that is admissible in evidence under this Act is admissible evidence of that document or thing.

⁶³ Weinstein's *Evidence Manual* para 9.03[05].

Since the proposed code provisions will cover facsimiles, provisions such as s 5 will be unnecessary.

- 201 Another example of a special statutory admissibility regime is that created by ss 5, 6 and 7 of the Banking Act 1982. Section 5 provides an exception to both the secondary evidence rule and the hearsay rule in relation to the business records of banks. Copies of the business records of a bank are admissible if it is proved in evidence or certified under subs (3) that they were compared to the original and found to be accurate. Under subs (1) admissible copies are evidence of the fact that the entry was made (a non-hearsay use) and of the "matters, transactions, and accounts therein recorded" (a use which amounts to an exception to the hearsay rule). It is interesting to note that there is no provision in the Banking Act 1982 allowing the *original* record to be evidence of the truth of the matter contained in the record. In addition, s 6 provides that, in the absence of a court order made "for special cause", bank officers are not compellable witnesses in proceedings in which the bank is not a party. Nor can the bank be compelled to produce a business record as long as its contents can be proved by a copy admissible under s 5. Section 7 provides that parties can apply to the court for an order to inspect a bank's business records.
- 202 These provisions recognise that bank records are in many instances likely to be useful evidence of financial transactions and that banks and bank officers will often be called upon to provide evidence. The provisions facilitate the admissibility of bank records, protect bank officers from the inconvenience of frequently being called as witnesses and protect the integrity and security of original bank records by allowing the bank to keep custody of them at all times.
- 203 Examination of the effect of our proposed rules on these provisions shows that they should not be necessary if the law of evidence is codified. Under the rules which we propose, copies of records which are made by machines and copies which are themselves business records will be admissible on the same terms as originals. Consequently, no secondary evidence exception needs to be made for banking records.

- 204 Such records and copies of records will also be admissible under our hearsay rule. In civil cases an available maker may be required to be called, though this may not often be insisted upon (and in some cases the court may dispense with the requirement). In criminal cases the records will need to demonstrate a satisfactory level of reliability. It seems certain that records kept by a bank will satisfy this requirement in almost every case. It therefore seems that s 5 will be unnecessary.
- 205 The procedural rights in ss 6 and 7 need further analysis. It may be that these rights need to be maintained, with the provisions being left in the Banking Act 1982 or placed in a procedural code.

Special statutory rules and the code provisions

- 206 As a general proposition, it seems clear that an evidence code should not without good reason be more restrictive in allowing the admission of secondary evidence than the current law. Accordingly, the effect of many of the current statutory provisions needs to be maintained. They are, however, a source of unnecessary complexity. It is also desirable for all evidential provisions to be located as far as possible in the one statute. The best course is, therefore, to ensure that the general provisions of the evidence code wherever practicable deal with the admissibility of all kinds of secondary evidence. Any special statutory provisions can then be repealed. For future statutes, drafters will need to consider whether in light of the provisions of the code there is any need for specific secondary evidence provisions. They will often be unnecessary. If in a given case it appears that the code rules are not adequate, it will be desirable first to consider amending the general provisions of the code, or inserting a special rule in the code. Only if these courses are clearly inappropriate or inconvenient should a special secondary evidence provision be included in a non-evidence statute.

VIII Documents in inconvenient forms

DEVICES TO RETRIEVE, PRODUCE OR COLLATE INFORMATION

- 207 Not all documents can be used by the court in their existing form. For instance, documents stored on a computer disc need to be read by a computer and documents in the form of an audiotape need to be played on a tape recorder. The evidence code should contain rules to enable the court to obtain the information in these documents in an understandable form. Such rules are probably technically exceptions to the secondary evidence rule, though their primary purpose is to make it possible for the court to use the evidence.
- 208 In addition to this problem, there is uncertainty in the commercial community regarding the admissibility of documents stored on optical discs. There is also confusion about whether a computer-produced document is an original or a copy.⁶⁴
- 209 In order to clarify the situation and allow the admission of documentary evidence in a convenient form, we propose a code provision stating that, if information is stored in such a way that it cannot be used by the court unless it is retrieved, produced or collated by a machine, device or technical process, a party may tender a document that was or purports to have been produced by use of the machine, device or technical process. This provision is similar to cl 48(1)(b) of the Australian Evidence Bill 1993.

⁶⁴ See n 54.

TRANSCRIPTS OF CODED WRITING

- 210 Sometimes a document offered in evidence will be in code, as is the case with shorthand writing. Such documents are usually unintelligible to the court unless they are transcribed. We propose that the code should permit a transcript to be admissible in these cases.

TRANSCRIPTS OF SOUND AND VIDEO RECORDINGS

- 211 Should the code permit a transcript of a recording to be admitted to prove the contents of the recording? This question was discussed in *R v Menzies*.⁶⁵ In precise terms, the issue in *Menzies* was not whether the original tape recording had to be produced but rather whether a transcript of the recording was admissible in addition to the playing of the original tape in court. The Court of Appeal decided that, while there should normally be at least one playing of the tape to the jury, in some cases the aid of an expert will be required and that the expert's evidence may take the form of production of a transcript. As examples, the court referred to cases in which "there may be the use of a foreign language" or when

deficiencies in the recording may make it necessary to play tapes more than once to make a better understanding, yet the sheer length of the tapes may mean that inordinate time would be taken by replaying them to the jury.⁶⁶

- 212 In such cases, a transcript will be both convenient and economical. The Australian Law Reform Commission proposed in its draft Act to permit the tendering of a transcript to prove the contents of a document that is "an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound."⁶⁷ We favour such a proposal but recognise that, in the case of a recording, the production of the transcript without the playing of the tape may give the fact-finder a misleading impression. Transcripts do not convey the tone in which words are spoken, though the tone may completely change the

⁶⁵ [1982] 1 NZLR 40.

⁶⁶ [1982] 1 NZLR 40, 49.

⁶⁷ Australian Law Reform Commission, *Report on Evidence* (ALRC 38, 1987) 192, cl 125(1)(c). See also Australian Evidence Bill 1993 cl 48(1)(c).

interpretation. While we therefore agree that the transcript of a tape recording should be admissible, we think this needs to be accompanied by a provision giving a party the right to request the court to direct that the tape be played. If the recording is available this is a necessary safeguard to ensure fairness, particularly in criminal trials. If the recording is not available, the transcript will be admissible as secondary evidence of an unavailable original.

213 Recently, the question of transcripts of videotapes has arisen in the context of criminal cases where the police have videotaped interviews with suspects.⁶⁸ The videotaping procedure raises issues such as:

- should the jury be able to take the videotape into the jury room during deliberations and replay it?
- must the prosecution provide a transcript of the tape?
- if a transcript is made should the jury have it as an aid to deliberations?

These issues also arise in the context of sexual cases involving children where evidence is recorded on videotape under the provisions of ss 23C-23I of the Evidence Act 1908.

214 All the above issues were fully discussed in *R v Edwards*,⁶⁹ a case involving a videotaped police interview. The court indicated that, in general, the jury may see the videotape in court but will not be able to view it repeatedly. The judge may require a transcript, and this will be done where the videotape is long or difficult to follow. If a transcript is made it will generally be available to the jurors during their deliberations, though a warning will be given that the transcript may be inaccurate. In *R v Thomas*⁷⁰ the videotaped evidence-in-chief of a child complainant in a sexual case was made available by the judge to the jury during

⁶⁸ See Law Commission, *Criminal Evidence: Police Questioning* (NZLC PP21 1992) para 129-131.

⁶⁹ (1991) 7 CRNZ 528.

⁷⁰ (1992) 9 CRNZ 113.

their deliberations. The Court of Appeal held that it was unfair to the accused to allow the jury to view repeatedly the evidence-in-chief in isolation from the cross-examination and the other evidence.

- 215 These rules are not so much evidential rules of exclusion as examples of ways in which the court uses its inherent jurisdiction to control the criminal trial and ensure that it is fairly conducted. We consider it is best left to judges to control proceedings in these cases on the basis of any guidelines developed by the Court of Appeal.

VOLUMINOUS DOCUMENTS

- 216 The present law allows the parties to use charts in appropriate cases. These are often diagrammatic representations of complex chains of events designed to facilitate understanding by the judge or the jury. The items on which the charts are based must be proved by independent evidence. On a similar basis, r 1006 of the Federal Rules of Evidence allows the contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court to be presented in the form of a chart, summary or calculation. This rule allows summaries of long documents to be adduced as well as summaries of large numbers of documents.
- 217 The distinction between the present law and the provisions of the Federal Rules of Evidence is that the Federal Rules allow the summary to be evidence of the contents of the document or documents, whereas our present law insists that independent evidence of the contents be adduced. As a safeguard, the Federal Rules provide that the originals or duplicates must be made available to other parties in the proceeding for examination or copying and the court may order that they be produced in court. The rule is designed to promote ease of understanding and efficiency. The contrary argument may be made that it unduly simplifies the evidence and may undesirably lighten the onus of proof on the prosecution in a complex fraud or conspiracy trial.
- 218 Our provisional view is that a rule similar to r 1006 of the Federal Rules of Evidence is useful so long as there is the safeguard enabling the opponent to

require production of the original document or documents. We, however, invite comments on the desirability of this provision.

I PROCEDURAL RULES

PROCEDURAL RULES

219 We have indicated that the right to inspect documents and other procedural rights are relevant to the operation of the proposed documentary rules. Procedures to enable parties to investigate and test each other's documentary evidence may be particularly valuable in the context of a less stringent authentication requirement based on relevance, a more liberal secondary evidence regime, and a provision facilitating the use of evidence produced by machines, devices and technical processes. Moreover, sound procedural rules promote efficiency by facilitating the resolution of disputes concerning documents on the basis of agreement between the parties before trial.

220 This chapter outlines the existing discovery and disclosure rights in civil and criminal cases. We then propose reforms to build on that law.

CIVIL CASES

221 The High Court and District Courts Rules provide in nearly identical terms extensive powers for each party to investigate and test the documentary evidence of other parties:

- *Discovery.* Parties may seek general discovery of documents by requiring opponents to produce a list of all relevant documents that they have or have had in their possession or power. If the document is no longer in the possession of a party, information must be given about how it came to be parted with and what has become of it. The list must include all relevant documents, whether originals or copies. The listed documents, unless they are privileged, become available for inspection by other parties and copies

may be made. Documents omitted from the list are inadmissible in evidence unless all parties consent or the court grants leave (HCR 293-317; DCR 315-339).

- *Particular discovery.* The court may order particular discovery in respect of a single document, or a class of documents, at any time during the course of proceedings (HCR 299-301; DCR 321-323).
- *Subpoena to produce documents.* A party may by subpoena require any person to attend at court and bring specified documents. In the High Court such a document is traditionally known as a subpoena duces tecum; in District Courts it is called a witness summons (HCR 497, form 35; DCR 496, form 41).
- *Notice to produce.* A party may serve on any other party a notice requiring production of a specified document or documents (HCR 315; DCR 337).
- *Formal admissions.* Parties may serve a notice to admit the authenticity of a document. If the party on whom the notice is served admits the document, its authenticity will not be in issue in the case. In addition, if during the course of discovery a party takes advantage of the opportunity to inspect a document, the party is presumed, in the absence of notice to the contrary, to admit that any original is what it purports to be and is duly executed, and that any copy is a true copy (HCR 291, 314, 316; DCR 313, 336, 338).
- *Other rights of inspection (relating to property and processes).* Parties may apply to the court for an order to inspect property, take samples from property, make any observation about property, measure, weigh or photograph property, do experiments with property, and observe any process. An order may permit a party to enter any land or do anything necessary to gain access to the property and may be made against anyone, whether a party or not (HCR 322; DCR 340-341).

CRIMINAL CASES

222 Disclosure by the prosecution and inspection by the defendant of documentary evidence in criminal cases depends on the rules of criminal procedure. In the Law Commission's report, *Criminal Procedure: Part One: Disclosure and Committal* (NZLC R14), the present state of the law concerning the prosecution's duty to disclose evidence to the defendant is set out and recommendations made for a comprehensive disclosure regime. As the law at present stands there are various times at which the prosecution must reveal evidence to the defendant:

- In an indictable case, the preliminary hearing allows the defendant to obtain much of the prosecution's evidence.
- The Official Information Act 1982 establishes a general duty to respond to requests for information held by public agencies. It applies to information held by a prosecuting agency which may be evidence in a proceeding: *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385.
- Particular disclosure obligations have also been developed by the courts. For example, the defendant can require the prosecution to reveal the names and addresses of all the witnesses interviewed: *R v Mason* [1975] 2 NZLR 289; [1976] 2 NZLR 122.
- Finally, there are administrative guidelines laid down and followed by the police. For instance, the prosecution's forensic science evidence is revealed under guidelines laid down in a Police Instruction (also issued by the New Zealand Law Society).⁷¹

Taken together the above obligations result in almost all documentary evidence being available to the defendant to inspect or copy.

223 The rules concerning disclosure of documentary evidence by the defence to the prosecution are very different. The police may use search warrants to search for

⁷¹ New Zealand Law Society, *Rules of Professional Conduct for Barristers and Solicitors* Appendix II; Police General Instruction C171.

and seize documents, and these may be used against defendants and others who may have relevant evidence in their possession. In addition there are statutory powers to compel a potential defendant to give an investigating authority documentary (or other) evidence, as in s 9 of the Serious Fraud Office Act 1990.

224 There is some English authority to the effect that the prosecution may serve on the defendant a notice to produce the original of a document held by the defendant. Unlike the position under r 315 of the High Court Rules, this notice does not compel production but, if the defendant refuses to produce the document, that may be the subject of comment from the judge and the prosecution may adduce secondary evidence.⁷² For practical reasons, this course of action seems to be used very rarely.

225 It also seems that it is possible for the court to order the production of any document in the defendant's possession if the defendant chooses to give evidence at trial. The rationale for the non-compellability of documentary evidence is the privilege against self-incrimination. If the defendant chooses to give evidence, the privilege is waived (at least in respect of the offence charged) and the defendant must answer all questions put and, for the same reason, produce all documents requested, subject to other privileges.⁷³ Apart from these limited cases the prosecution cannot compel production or inspection of documents held by defendants.⁷⁴

226 Under ss 20 and 181 of the Summary Proceedings Act 1957 both the prosecution and the defence can use a witness summons to compel a witness to attend to give evidence and produce documents. This enables parties to obtain copies and originals of documents held by non-parties, as long as their existence is known.

⁷² *Trust Houses v Postlethwaite* (1944) 109 JP 12.

⁷³ *R v Hanifah* (unreported, High Court, Hamilton, 5 November 1991, T33/91, Penlington J); *R v Adams* [1965] VR 563; *R v Kingston* (1986) 2 Qd R 114, 122; *Cross* (Mathieson) para 20.8.

⁷⁴ See para 0, for discussion of a proposed rule requiring the defence to produce original documents if they possess the original and seek to adduce a copy.

HEARSAY

- 227 The Law Commission's proposed hearsay rules are also relevant to the issues concerning procedural safeguards. We suggested in the discussion paper *Evidence Law: Hearsay* (NZLC PP15) that, where a statement (including a statement in a document) is hearsay and the declarant is available, the opponent may compel the proponent to call the declarant. This applies to both civil and criminal cases.
- 228 The above provision would apply to a hearsay statement in a document which the proponent relies on to authenticate the document. For example, if a party wishes to produce a letter signed "Catherine Lambert" (which constitutes a hearsay statement that the letter was written by Catherine Lambert), and if Catherine Lambert is an available witness, the proponent of the letter can be compelled to call her. If, however, she is not available the hearsay statement is admissible evidence to demonstrate the relevance of the letter.
- 229 In criminal cases, the Law Commission's proposal also requires notification of the intention to adduce hearsay (though it should be noted that earlier statements by the witness who is giving evidence do not constitute hearsay). Parties will, therefore, have to notify each other of any of their documentary material containing hearsay. The notification procedure, though primarily aimed at hearsay, will also give the parties notice of many of the potential secondary evidence or authentication issues.

THE AUSTRALIAN PROVISIONS

- 230 As recommended by the Australian Law Reform Commission, cls 166-169 of the Australian Evidence Bill 1993 allow parties to request each other to produce any available specified document or thing in order to test its authenticity or identity, to call any witness who has information reflecting on the authenticity of a document, or to allow testing or examination of any machine which is used to produce or store any document. Requests may be enforced by court order. In our view the Australian proposal would not add greatly to the range of powers available to litigants under existing New Zealand law. Moreover, it would add extra costs to

interlocutory procedures which we do not consider justified. We therefore propose simpler procedural safeguards.

THE LAW COMMISSION'S PROPOSALS

231 As we earlier indicated, in a liberalised admissibility regime procedural safeguards are necessary to protect opposing parties. They are also highly desirable to promote efficiency because they result in most documentary evidence problems being addressed and resolved prior to the hearing. Further, they prevent parties being surprised by evidence of which they are unaware. The aim is to formulate safeguards which are fair to all parties, which make trial and pre-trial proceedings speedier and less costly, and which do not undermine the value of reform of the admissibility rules.

232 Given the present state of the law, which treats civil and criminal cases very differently, it is necessary to discuss the two types of proceedings separately. The intention in the case of both types of proceedings is to build on the existing procedural rules.

Civil cases

233 As the law stands, parties have, if they desire, considerable access to each other's documents during the discovery process. The present law also allows parties to inspect and test each other's computers and other devices, under the property inspection rule.⁷⁵ Moreover, our proposed hearsay rules would in some circumstances allow parties to compel each other to call certain witnesses. The rules of privilege, however, prevent discovery of documents produced for the purposes of litigation, even if they are to be given in evidence at trial. Furthermore, discovery does not provide any indication of which documents, out of possibly a very large number, will be tendered in evidence at trial. At the discovery stage these limitations may be appropriate since the parties are still investigating and formulating their case.

⁷⁵ HCR 322, DCR 340-341, see para 0.

- 234 It is now a common practice, particularly in the High Court, for orders to be made for the exchange of documentary evidence and witness statements before trial. It is also common for these orders to require the parties to notify each other of any objections to the admissibility of evidence and to indicate if the authenticity of any document is in issue.
- 235 Some argue that increased pre-trial disclosure of evidence is, on occasions, undesirable because it prevents a party from confronting a witness with surprise information which shows the witness to be unreliable. In our view, however, retention of the opportunity for surprise is of doubtful utility, even in the case of witnesses who may be inclined to modify their testimony to make it more consistent with disclosed documents. An unreliable witness is usually revealed, not by surprise confrontation with undisclosed evidence, but rather by careful cross-examination highlighting all the difficulties and inconsistencies in the testimony, or by the production of other evidence tending to show unreliability. Moreover, existing procedure already allows little opportunity for surprise by requiring comprehensive pre-trial discovery. Our conclusion is that a general requirement of pre-trial disclosure of all documentary evidence better promotes rational ascertainment of facts and the other goals of the trial.
- 236 We propose, therefore, that before trial commences parties should notify other parties of all documents which will be tendered at the trial and, if requested, provide other parties with an opportunity to examine and copy the notified documents. Notification should take place when the case is ready for trial. At that stage notification does not affect the privacy interests protected by privilege since the document is eventually to be revealed at trial.
- 237 The objective of the procedure is to provide a simple and practical mechanism that allows the parties to identify those documents (some of which may not have been available at discovery) which give rise to admissibility or authenticity disputes and those which do not. Compliance with the notice requirement ought to be simple - the parties may, for instance, indicate largely by reference to the list of documents provided at discovery which documents will be used. Non-compliance will generally result in the document being inadmissible. In cases where there are few documents the parties can agree to less formal procedures,

and, in exceptional cases, the court will have power to dispense with the notice requirement. This flexibility means that the rules will be compatible with systems of case management.

238 We also propose that, where a party intends to object to the admissibility of a document or to question the document's authenticity, this intention should be counter-notified to the proponent. The aim of this procedure is to facilitate, as far as possible, the resolution of the dispute between the parties before trial (but, unless the issue is very complicated, without a special interlocutory application and hearing). Objections to the admissibility of a document and questions concerning its authenticity should not be able to be raised at the trial unless they have been notified, though, again, it will be necessary to provide that the court may dispense with this requirement in exceptional cases.

Criminal cases

239 In its report *Criminal Procedure: Part One: Disclosure and Committal* (NZLC R14) the Law Commission recommended a comprehensive regime for criminal disclosure. That report also recommended limited obligations for the defence to disclose expert and alibi evidence. In relation to expert evidence we have expanded on that recommendation in our discussion paper *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18). Defence disclosure obligations fall far short, however, of a requirement to disclose all documentary evidence.

240 As outlined above (para 0), the Law Commission has suggested that pre-trial notification of hearsay evidence should be mandatory for both the prosecution and the defence. It is likely that much documentary evidence will contain hearsay and will therefore have to be notified under the proposed hearsay provisions. Given this proposal in respect of hearsay and the existing obligation on the prosecution to disclose all documentary evidence, it is a relatively small step to suggest that in criminal as well as civil cases all documentary evidence should be disclosed by all parties before trial.

241 There are, however, objections to imposing advance disclosure on defendants. Though there are growing calls for disclosure of the defence case prior to trial,⁷⁶ others maintain that the presumption of innocence requires the defence to be able to put the prosecution to the proof without disclosing any aspect of the defence case.

242 On that basis, the hearsay notification provisions have attracted some adverse comment in submissions made to the Law Commission in response to *Evidence Law: Hearsay* (NZLC PP15), on the grounds that they may create practical difficulties and improperly prejudice the conduct of the defence. These objections are summarised in the submission from L L Stevens and G Olsen:

In our opinion, the notification procedure advocated in Preliminary Paper No 15 in respect of criminal proceedings would introduce unwarranted complications into the trial process. A very real danger is the resulting rigidity that such a move would introduce. Often, counsel for defendants in criminal trials for various reasons receive late instructions and an exclusionary rule could result in prejudice to the accused especially where the notification procedures could not be utilised because of late (or no) notice to the prosecution. Moreover, it may prove prejudicial to an accused if the notification process resulted in disclosing the case proposed by an accused in advance of the trial. Although the Preliminary Paper states that an accused who gives notice of an intention to offer hearsay evidence should not be treated as having elected to call such evidence, we are concerned as to the scope for confusion arising from such a regime.

243 We think that those comments are open to debate. The court would, for example, almost invariably grant leave to produce an undisclosed or late disclosed document where defence counsel had been instructed at a late stage. Nevertheless, in the absence of any indication that lack of a requirement to disclose defence documents prior to trial is causing problems, we are inclined to the view that no general disclosure requirement is necessary. We would, however, welcome comments if there are problems of which we are unaware.

244 The Roskill Committee on fraud trials recommended a procedure under which the prosecution would disclose all documentary evidence to the defendant prior to trial, with the defendant then being obliged to indicate which of the documents

⁷⁶ Mills, "Civil Rights v Police Frustration: Police Questioning Powers: Powers of search, detention and interview: the right of silence and related issues" paper presented to the New Zealand Law Conference, 2-5 March 1993, Wellington, Conference Papers vol 1, 241, 256.

would be challenged concerning its admissibility, and which of the documents would be the subject of any dispute concerning authenticity. The grounds of the challenge or the reason for the dispute would also be required to be given.⁷⁷ Effectively, this procedure allows the defendant to "agree" a document in advance of trial, in much the same way as civil parties "agree" documents. In this way, the prosecution will know whether an authentication witness or an original document will be necessary or desirable, or whether calling a witness or producing a document would simply be a waste of time and money. Such a provision can obviously result in a real saving in resources and would not create difficulties for the defence since the requirement would not, in most cases, result in the disclosure of any information about the nature of the defendant's case.

- 245 Section 10 of our draft code provisions, which applies to all criminal cases, is a disclosure requirement adapted from the recommendations of the Roskill Committee. It provides that, unless the court dispenses with the requirement, the defendant must notify the prosecution of all objections to the admissibility of documents and all questions concerning their authenticity. We specifically ask for comments concerning the desirability of this requirement in both serious fraud and general criminal cases in New Zealand, including defended summary trials in District Courts.
- 246 The code contains a similar section relating to objections to admissibility and questions concerning authenticity raised by the prosecution when the defendant has voluntarily given notice to the prosecution that a particular document will be evidence at trial.
- 247 Finally, the requirements for disclosure of documentary evidence in criminal cases are deficient in one respect. Under our proposed admissibility rules, a party adducing a "reliable" copy of a document (ie a copy produced by a device or a business or public record) need not adduce the original, but may leave it to the opponent of the document to seek and produce the original if the opponent decides this is desirable. If the original is in the hands of a non-party then either

⁷⁷ Fraud Trials Committee, paras 6.93-6.96.

the prosecution or defence may issue a witness summons and require the production of the document (though if the prosecution has closed its case it will need to obtain leave to call further evidence). If the document is in the hands of the prosecution, a defendant may compel its production for inspection pursuant to the prosecution's duty to disclose. A gap, however, exists. Production of a document in the possession of a defendant cannot be compelled unless that defendant chooses to give evidence. In general, this is an aspect of the privilege against self-incrimination, which we accept. However, if a defendant seeks to adduce secondary evidence of a document and that defendant actually possesses the original, then it is necessary and fair for the court to have the power to require production of the original and, if the defendant fails to do so, to comment to the jury if there is one, or, in a judge-alone trial, to draw any reasonable inference. We envisage that the court will not exercise that power where the defendant has a genuine reason for not producing the original.

CONCLUSION

248 In this chapter we have suggested three procedural rules:

- In civil cases, lists of the documents to be produced should be exchanged pre-trial and all challenges to a document's admissibility or authenticity should be counter-notified.
- Parties in criminal cases should, after inspecting documents which have been disclosed to them, indicate which of the documents will be challenged as to admissibility or authenticity.
- In criminal cases, a defendant who possesses an original document but seeks to adduce secondary evidence can be required to produce the original.

249 Overall, the practical effect of these procedural rules should be to prevent surprise and to encourage the resolution in advance of trial of most disputes over documentary evidence.

IX JUDICIAL NOTICE

- 250 It is possible to view a court proceeding as a set of decisions to be made by the judge and jury concerning the existence of facts and the application of the law. These decisions are based on information which may come from various sources. Evidence is one source of information. It is presented by the parties and is the usual basis of decisions about facts. Other forms of information include judicial notice and legal submissions.
- 251 This chapter, the last of the paper, is concerned with the doctrine of judicial notice. This is a separate topic and is not directly related to documentary evidence. It is, however, included in the paper because it raises similar considerations.
- 252 The kinds of information suitable for judicial notice and the processes which are involved in obtaining it are not settled. Some think of judicial notice as encompassing all or almost all of the processes for obtaining information other than the process of hearing evidence. Others have a more limited conception of judicial notice and consider that it is only one of a range of possible processes for obtaining information. For instance, it is possible to debate whether the process of gathering information about the law is properly described as taking judicial notice,⁷⁸ or whether the use of common sense on the part of the fact-finder when assessing the evidence amounts to taking judicial notice.⁷⁹
- 253 In our view the law of evidence is primarily directed at regulating the evidence which comes before the court. Judicial notice is often used as a substitute for

⁷⁸ See paras 0 to 0.

⁷⁹ See paras 0 to 0.

evidence and to that extent is properly the subject of an evidence code. But judicial notice is also used in other situations. As Thayer says,

Whereabouts in the law does the doctrine of judicial notice belong? Wherever the process of reasoning has a place, and that is everywhere. Not peculiarly in the law of evidence. It does, indeed, find in the region of evidence a frequent and conspicuous application; but the habit of regarding this topic as a mere title in the law of evidence obscures the true conception of both subjects.⁸⁰

254 Complete theoretical analysis and definition of the doctrine of judicial notice is therefore beyond the scope of an evidence reform. We accordingly discuss judicial notice in outline only and propose to limit our suggestions for reform to those aspects of the subject which require to be governed by an evidence code. Moreover, we do not propose rules which would control all aspects of the process of judicial notice. In our view the advantage of judicial notice is its flexibility. The courts in part use the doctrine to ameliorate the rigour of the rules of evidence, though taking care to ensure that the process is fair to all parties. If detailed rules are imposed, the advantage of flexibility is likely to be lost.

255 With the above in mind this paper discusses four aspects of judicial notice:

- judicial notice of adjudicative facts,
- the fact-finder's use of experience and common sense to assess the evidence in a proceeding,
- judicial notice of legislative facts,
- judicial notice of the law.

Some further issues relating to judicial notice, for which no code rules are proposed, are discussed for the sake of completeness.

⁸⁰ Thayer, 278.

ADJUDICATIVE FACTS

256 Adjudicative facts (as opposed to legislative facts which are described below, paras 277-283) are the facts which are either in issue in the proceeding or relevant to the facts in issue and which therefore need to be established by the parties if they are to succeed. They are the facts within the province of the fact-finder, whether judge or jury.

257 As the law stands, judicial notice of adjudicative facts is limited in scope. The common law rule is that the judge or the jury may notice an adjudicative fact which is "so notorious that it cannot be the subject of serious dispute".⁸¹ The following are examples of judicial notice of adjudicative facts.

- In *Auckland City Council v Hapimana* [1976] 1 NZLR 731, the court took judicial notice of the fact that the DSIR was closed on public holidays, though it was not prepared to notice that 2 January was a public holiday.
- In *Pera Te Hikumata v Tucker* (1894) 12 NZLR 368 the court noticed, in respect of an interlocutory application to examine a witness on commission, that Gisborne was more than 200 miles away from Dunedin.
- In *Simpson v Simpson* [1952] NZLR 278, 287 the court noticed, in the course of deciding what order would be just in a case concerning a home in a matrimonial proceeding, that there was a nationwide shortage of housing.

258 Facts suitable for judicial notice will change over time: notorious facts to a present day court may be different from those which were noticed by an early twentieth century court.⁸² Notorious facts may also differ from place to place. For example, a Wellington court may know that Oriental Parade is a popular place for people to walk or sit on a sunny weekend afternoon, but an Auckland court

⁸¹ *R v Wood* [1982] 2 NZLR 233, 235.

⁸² *Cross* (Mathieson) para 6.2.

may not know this.⁸³ Furthermore, in addition to drawing on personal knowledge the judge may consult reference works of unimpeachable accuracy, including calendars, maps, basic textbooks and dictionaries.

259 There are three rationales advanced for this form of judicial notice:

- First, it avoids disputes about matters that cannot genuinely be disputed, saving time and expense. The judge when judicially noticing a fact preempts the need for any evidence.⁸⁴
- Second, "it tends to produce uniformity of decision on matters of fact where diversity of findings might otherwise result".⁸⁵ For instance, the court may take judicial notice that the Rt Hon David Lange was the Prime Minister of New Zealand in 1986. It would be absurd if in different cases judges reached different conclusions as to the identity of the Prime Minister because one party or other failed to provide proper proof. Sometimes commercial customs are also noticed for this reason.
- Third, it "prevents the possibility of a decision which is demonstrably erroneous or false".⁸⁶ By taking judicial notice of an obvious fact which a party has failed to prove, the judge may avoid making a decision contrary to common sense.

260 It is generally agreed that the law should permit judicial notice of adjudicative facts which cannot reasonably be disputed. In these cases judicial notice operates as a direct substitute for evidence. We therefore propose to codify the present law by providing that judicial notice may be taken of all adjudicative facts which are:
(a) so known and accepted generally in the locality that they cannot reasonably be

⁸³ See Australian Law Reform Commission, *Interim Report on Evidence* (ALRC 26, 1985) vol 1, para 978, for discussion of judicial notice of matters known in the locality.

⁸⁴ See n 81.

⁸⁵ See n 81.

⁸⁶ *Auckland City Council v Hapimana* [1976] 1 NZLR 731, 732.

disputed, or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Processes involved in judicial notice of adjudicative facts

261 A decision to take judicial notice may be initiated in two ways. First, it may be requested by a party during the course of the hearing. Parties do this to avoid calling evidence which it is inconvenient to obtain. A request to take judicial notice will be considered by the judge, who will normally hear the opposing party on the question. Secondly, judicial notice may be taken at the initiative of the judge (or the jury). The need to take judicial notice in this way may arise during the course of deliberations because there is a gap in the proof. Since this form of judicial notice is taken without reference to the parties, and to a certain extent circumvents the normal burden of proof, the judge (or jury) must be careful in its application. When judicial notice is taken in these circumstances, it is usually for the third of the reasons discussed above, to avoid a patently absurd result.

Judicial notice by the jury

262 Judicial notice of indisputable adjudicative facts may be taken by the jury.⁸⁷ The jury, however, is more limited than the judge in that it cannot research facts from permissible sources, because it does not during deliberations have access to materials other than exhibits in the case.

263 Judicial notice by the jury is a rarely explored subject, mainly because the reasoning process of the jury is secret and cannot be examined. In *R v Wood*⁸⁸ the propriety of judicial notice by the jury was examined because the jury asked questions of the judge during its deliberations. The court in that case recognised that the jury was entitled to take judicial notice of indisputable facts. It was, however, held that the fact in question did not reach the necessary standard of indisputability and should not have been noticed.

⁸⁷ See n 81.

⁸⁸ See n 81.

264 It may also be possible for the judge to instruct the jury to take judicial notice of a fact (either at the request of parties or on the judge's own initiative). For instance, it may be appropriate for the judge to consult a calendar and instruct the jury to take judicial notice of the fact that 23 June 1993 was a Wednesday. This simplifies the jury's task by removing extraneous and potentially confusing facts from its deliberations and focusing the jury on the true areas of dispute.

Notice to the parties

265 Both the Federal Rules of Evidence and the Australian Evidence Bill 1993 require that the parties be given an opportunity to comment on the propriety of taking judicial notice of a fact. This is considered necessary in order to avoid judicial notice being taken in inappropriate circumstances. The requirement does not necessarily involve prior notice. It is possible to allow the parties to comment after the judge has indicated a provisional intention to take judicial notice. The judge can then confirm or modify the decision.

266 Giving notice to the parties presents no difficulty in cases where the parties themselves request that judicial notice be taken. It is also possible where the judge decides to take judicial notice during the course of the trial or decides to direct the jury to take notice. It is, however, more difficult, though still possible, to give notice to the parties when the judge takes judicial notice during the course of deliberation; and it is impossible to ensure that the jury gives notice of its intention to take judicial notice of a fact.

267 We have concluded that a notice provision is unnecessary. Notorious facts are those facts which are so indisputable that the parties do not need to adduce evidence to prove them. The test is a stringent one and the judge may only notice a limited range of facts. In the unlikely event of an erroneous decision to take judicial notice, there is always the remedy of appeal. On balance we think it unnecessary to create procedural barriers to judicial notice which may complicate or lengthen proceedings when that is what judicial notice is intended to avoid. No doubt, however, a judge will allow parties to make submissions concerning the propriety of taking judicial notice whenever that seems desirable.

THE FACT-FINDER'S USE OF EXPERIENCE AND COMMON SENSE TO
ASSESS THE EVIDENCE AND DETERMINE FACTS

- 268 Consideration of the fact-finder's use of experience or common sense to assess the evidence raises difficult philosophical problems concerning the nature of knowledge and reasoning, which the law can only imperfectly address. As with other aspects of judicial notice, we do not attempt a full theoretical analysis, but rather seek a practical approach which can be adopted by an evidence code. The following discussion canvasses the matters which we consider are relevant and proposes a solution.
- 269 Fact-finders, whether judge or jury, need to use their general knowledge when assessing evidence, especially in relation to credibility issues. Thus juries are always instructed to use their experience and common sense when assessing the evidence and reaching a verdict.
- 270 This is often particularly necessary when making assessments of tendencies or likelihoods. For example, evidence may be given that a witness is a close friend of the accused. The fact-finder may conclude that a witness who is a close friend is more likely to lie than a disinterested witness. That possibility is a matter for the experience of the fact-finder, and the fact-finder must assess whether the witness is indeed lying, taking into account all the other evidence in the case.
- 271 The Court of Appeal has said that the use of general knowledge is legitimate but is different from taking judicial notice:

The taking of judicial notice is to be distinguished from the use which juries may make of their own general knowledge in forming opinions on matters of credibility, probability, intention, knowledge and the like. Both a judge and a jury may use such knowledge as an aid to reaching a conclusion on such matters. But there is a difference between a tribunal, judge or jury, relying on its own experience of the ordinary course of human affairs and the taking of judicial notice.⁸⁹

- 272 This distinction allows the jury to perform their task in a sensible way without undue interference from the judge. However, the Australian Law Reform Commission has pointed out that, in strict logic, it is difficult to see the distinction

⁸⁹ *R v Wood* [1982] 2 NZLR 233, 236.

between judicial notice of adjudicative facts and the use of experience and common sense to assess evidence.⁹⁰ The Australian Law Reform Commission preferred to apply the indisputability test to all information used by the fact-finder but not presented in evidence.

- 273 It is possible for the indisputability test to be applied to the experience and common sense which the fact-finder uses to assess the evidence in a case. For example, it is probably indisputable as a general proposition that a friend of the accused is more likely to lie in the witness box than a stranger. This, however, is an assessment of a tendency or probability - a friend *may* lie - whereas an adjudicative fact is certain - Gisborne *is* more than 200 miles from Dunedin. Moreover, there can be considerable dispute about the weight to be given to a tendency.
- 274 In our view it is doubtful whether the application of the indisputability test to "common sense" reasoning is of real value. In jury cases, the use of "common sense" will occur in the secrecy of deliberations, and will not be open to scrutiny on appeal. All that an appellate court can do is to overturn irrational decisions. In judge-alone cases, the appellate court could explicitly apply the indisputability test to any contested factual assumption made by the trial judge. That, however, is inherent in the process followed by the court when it scrutinises the correctness of the judge's reasoning and conclusions.
- 275 A better way of controlling the use of unreliable or questionable "common sense" reasoning is the introduction of expert evidence. For instance, in the past it was thought that "common sense" indicated that children are less truthful than adults. This is now regarded as false - in general children's evidence is believed to be as reliable as that of adults, though sometimes less complete. This change in thinking has been the result of psychological research which has been presented to courts in the form of expert evidence. In many cases, expert evidence may be helpful in challenging or supplementing the fact-finder's assumptions.

⁹⁰ Australian Law Reform Commission, *Interim Report on Evidence* (ALRC 26, 1985) vol 1, paras 974-977.

276 We do not propose to include any provision in the code regulating the use of common sense and experience to assess the evidence in a proceeding. Nor do we envisage that the judicial notice provisions will apply to this process. In our view, assessment of the evidence in a proceeding is a matter of fact and logic, and not a matter of law to be regulated by the code.

LEGISLATIVE FACTS

277 Commentators have suggested that judicial notice is taken of legislative facts.⁹¹ Legislative facts are facts used by the judge to formulate, interpret and develop the law. Judges, especially appellate court judges, routinely consider factual material when interpreting a statute or developing a common law rule. Information about the legislative history of a statute, articles in legal journals, and statistical and other empirical information are all important in that regard. This material may reach the courts through the submissions of counsel, the testimony of a witness, and sometimes by way of the judge's own research.

278 An example of the use of legislative fact is provided in *Ministry of Transport v Noort* [1992] 3 NZLR 260, 279 where the Court of Appeal was required to interpret the New Zealand Bill of Rights Act 1990:

Perhaps of greater practical importance in most cases, access to a lawyer is a means of ensuring that the citizen knows of his or her rights and duties under the particular law and how he or she should exercise those rights and discharge those duties. The common assumption that criminal justice is an inevitably confrontational system is not borne out by experience. Rather as a recent detailed empirical study concludes (Dixon, "Common sense, legal advice and the right of silence" [1991] Public Law 233, 235), the presence of the legal adviser in the station cell and the interview room may often be better understood, not as a disruptive introduction of due process values, but as an earlier introduction of pressure for informal settlement. While, Dr Dixon comments, "common sense" may suggest that legal advisers obstruct police work by asserting rights and demanding due process, the study shows that officers often see the benefits from the legal advice which suspects receive. Apart from leading to earlier confessions, legal advisers can explain the situation to the suspect and improve communication with the police (pp 239-240).

⁹¹ Davis, "Judicial Notice" (1955) 55 Columbia LR 945; Carter, "Judicial Notice: Related and Unrelated Matters" in Campbell and Waller (eds), *Well and Truly Tried* (Law Book Company, Melbourne, 1982).

- 279 The interpretation, formulation and development of the law are part of the judge's duty to apply the law to the facts of the case, and are particular skills of the judge. It is appropriate to allow the judge to receive relevant information in this task. Such information is also important because a legal rule, once formulated in a decision, often creates a precedent for later cases.
- 280 The use of judicial notice of legislative facts was explicitly recognised in *Comptroller of Customs v Gordon and Gotch*.⁹² The judgment explains the importance of the distinction between legislative and adjudicative facts, noting that, in respect of legislative facts, judicial notice of a wide range of material is possible. The judgment also indicates the limits which should be placed on the taking of judicial notice of legislative facts. There must be no unfairness to the parties; and, if a fact which is to be judicially noticed is likely to be a controlling influence on the decision, then fairness may require that the intention to take notice of the fact be disclosed to the parties.
- 281 One possible use of judicial notice of legislative facts is in placing parliamentary material, including Hansard, before the court. The Law Commission has considered the issues concerning the legitimate use of Hansard in its report *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17), which suggests that statutory rules would not be helpful in a climate where the courts continue to develop the rules and practices about the relevance and significance of parliamentary material in interpretation.
- 282 Legislative facts also have particular application in "constitutional" cases. Canadian and United States judges use empirical and other material to interpret their constitutions. With the enactment of the New Zealand Bill of Rights Act 1990 such material will become more important to New Zealand judges.
- 283 It is clear that the ability to take judicial notice of legislative facts is valuable when courts are engaged in interpreting, formulating and developing the law. The use of legislative facts in this way is not, however, strictly an evidential issue and

⁹² [1987] 2 NZLR 80, 91, Jeffries J delivering one of three judgments (all concurring in the result) of the Full Court of the High Court, on appeal from a decision of the Indecent Publications Tribunal.

in our view should not be governed by rules in an evidence code. We think it appropriate to follow the model of the Federal Rules of Evidence which leave it to the court to control the use of legislative facts by developing appropriate guidelines and safeguards. We also consider it would be difficult to specify other than very broad code rules without unduly constraining the courts.

JUDICIAL NOTICE OF THE LAW

- 284 It is the judge's primary duty in our legal system to apply the law to the facts of the case as established by the evidence. In doing this the judge is assisted by the legal submissions made by or on behalf of the parties. But this assistance does not bind the judge. If the parties or their lawyers fail to advert to relevant law, or if they incorrectly state the law, the judge must ignore the submissions and apply the correct law to the facts. In practice, the judge will often point out to the parties any problem with the law as they present it, or if the issue arises after argument has concluded, require further submissions. In the final analysis the judge must endeavour to ensure that the law is correctly applied to the case. If the judge fails to do so, any error can be corrected on appeal.
- 285 This logically implies an obligation on the judge to verify the text of the law. If the parties supply an incorrect text of a statute or case report, it would be an error for the judge to rely upon the supplied text. It must therefore be part of the judge's duty to endeavour to ensure that a correct copy or the original text comes before the court. In practice, questions as to the authenticity of a text arise from time to time in the course of argument. In such cases argument on the point should not be concluded until the text has been verified by the appropriate party. If, however, this process fails, the judge may research the point personally. Thus, the judge's duty to apply the correct law covers not only interpretation but also authentication of the statutes and case law presented by the parties.
- 286 Sometimes the judge's duty to apply the law to the case is expressed as a duty to take judicial notice of the law. Historically, the common law provided that the judge must judicially notice public statutes and the case law developed in other courts (eg, the Court of Queen's Bench judicially noticed the case law of the Court of Chancery and the Ecclesiastical Courts). The case law of the judge's own court

was not judicially noticed; it was simply presumed to be known by the judge. As time passed, some of the rules governing judicial notice of statutes, but not case law, have been added to or changed by statutory reform. The present position is expressed in ss 28 and 28a of the Evidence Act 1908 which require judicial notice of all Acts of Parliament and regulations.

287 In our view it is illogical for the purposes of the doctrine of judicial notice to distinguish between statutes and case law. There are therefore two ways in which a codified law of evidence can deal with judicial notice of the law. The first option is to provide in the code for judicial notice of statutory and common law, as the Australian Law Reform Commission proposed. Such a code provision would be along the following lines:

Judicial notice of matters of law

- (1) Judicial notice is to be taken of matters of law, including the provisions and coming into operation of
 - (a) Acts of Parliament; and
 - (b) Imperial Acts which are part of the law of New Zealand; and
 - (c) regulations.
- (2) In this section **regulations**
 - (a) has the meaning given in section 2 of the *Acts and Regulations Publication Act 1989*; and
 - (b) includes any instrument that has under section 6A of the *Regulations Act 1936* or section 14 of the *Acts and Regulations Publications Act 1989* been printed or published as if it were a regulation.

The other option is to have no code rules concerning judicial notice of the law, and instead rely on the general duty of the judge to apply the law. Thus, the Federal Rules of Evidence have no provision requiring the judge to take judicial notice of the law.

288 Whichever of the above alternatives is adopted, the current law and practice will not be affected. If the authenticity of the text of the law is questioned it must be verified before the case is decided - as is the practice now. One factor favouring the inclusion of statutory provisions concerning judicial notice of the law is that such provisions have existed for a considerable time and their sudden absence

may cause confusion. It is also arguable that it is convenient to find the rules governing judicial notice of the law in statutory form and that this will add to the ease of use of the code.

289 On the other hand, the primary function of an evidence code is to provide a legal framework governing the way *facts* are proved in proceedings. Provisions concerning judicial notice of the *law* are not strictly part of an evidence code. Moreover, a statutory provision concerning judicial notice of the law is unnecessary in that it adds nothing to the judge's obligation to apply the law, and does not alter the practical position. It is also arguably illogical or circular for an evidence code to instruct a judge to judicially notice statutory law. How then does the judge come to look at the evidence code? On balance we prefer to omit from the code any rules concerning judicial notice of the law.

Sections 29 and 29A of the Evidence Act 1908: presumptions concerning statutes

290 In addition to judicial notice provisions, the Evidence Act 1908 contains, in ss 29 and 29A, provisions to the effect that official copies of Acts of Parliament and of regulations are to be presumed accurate in the absence of proof to the contrary. These provisions are in our view not only unnecessary, but also misleading.

291 They are unnecessary because the law is not proved by evidence. The judge assisted by counsel will have copies of relevant Acts or regulations, will check that they have not been amended or repealed, and will apply them to the facts of the case. This happens in courtrooms every day.

292 Sometimes, however, a copy of an Act or regulation may have an error. If the presumption is then applied without qualification, the error must be proved by the party seeking to show the provision is badly copied. This can be done by reference to the assent copy of an Act or the original regulation. If, however, the party with the burden is not aware of the error and adduces no evidence to prove it, application of the unqualified presumption requires that the judge decide the case on the basis of the incorrect copy of the text of the law.

293 Of course, the bare presumption is qualified by the judge's obligation to apply the law and by ss 28 and 28A, which provide that judicial notice must be taken of the

law. If the judge knows of a mistake in the text then the judge may "judicially notice" the correct text of the Act or regulation and apply it, disregarding the strict effect of the presumption. This, however, means that the judge by personal investigation is providing the "proof" necessary to defeat a presumption. This is plainly inappropriate. In fact, the judge's obligation to apply the law or to take judicial notice of the law overrides the presumption so that it can have no effect. Although it is normal to rely on the official copies of the statutes, if any question of their veracity is raised it must be investigated and the judge must be sure that the correct text of the law is being applied.

- 294 These presumptions do not appear in either the Federal Rules of Evidence or the Australian Evidence Bill 1993. We consider that the presumptions should be omitted from our code.

OTHER ISSUES CONCERNING JUDICIAL NOTICE

- 295 For completeness, this section mentions three issues which are sometimes linked to judicial notice.

Seals and signatures

- 296 There are a number of statutory provisions requiring judges to take judicial notice of seals and signatures. We discuss these in chapter 4,⁹³ and propose that they should be replaced with presumptions.

Section 42 of the Evidence Act 1908

- 297 Section 42 of the Evidence Act provides:

All Courts and persons acting judicially may, in matters of public history, literature, science, or art, refer, for the purposes of evidence, to such published books, maps, or charts as such Courts or persons consider to be of authority on the subjects to which they respectively relate.

⁹³ See paras 0-0

This provision is not expressed as a judicial notice provision and in our view is properly regarded as an exception to the hearsay rule.

298 In *Te Runanga o Muriwhenua Incorporated v Attorney-General*⁹⁴ the Court of Appeal explained that while s 42 allows works of authority to be admitted as evidence, such works are not to be regarded as conclusive. This makes it clear that s 42 is not a judicial notice provision. It simply allows materials to be admitted as evidence, which may then form the basis for drawing inferences of fact.

299 We consider that the Law Commission's proposed hearsay rules are sufficient to cover this exception to the hearsay rule.

International matters

300 In matters concerning New Zealand's international relations, the courts have traditionally taken their lead from the executive branch of government. On questions such as whether New Zealand is at war with another nation or whether a country is to be recognised as a state, the executive certifies the proper answer and the courts accept it as conclusive. Moreover, the courts in some cases have asked the executive for such a certificate. This is constitutionally proper, since it is for the executive to conduct international relations.⁹⁵ We do not wish to affect this rule.

301 The Australian Evidence Bill 1993 includes a provision expressly retaining the rules of common law and equity relating to the issue of Crown Certificates in matters of international affairs (cl 145). We question the necessity for such a provision in an evidence code. It is a rule of constitutional law, and we consider it best left to the common law.

⁹⁴ [1990] 2 NZLR 641.

⁹⁵ See Mann, *Foreign Affairs in the English Courts* (Clarendon, Oxford, 1986) 23-62.

CONCLUSION

302 For the purposes of an evidence code it is unnecessary to include all aspects of judicial notice. As Thayer⁹⁶ suggests, the doctrine of judicial notice extends beyond the law of evidence into all aspects of reasoning and decision-making. An evidence code has more modest goals than the regulation of all reasoning by the court; it must concentrate on regulation of the way in which facts are proved. In our view, therefore, the code should only provide rules for those aspects of judicial notice which directly concern the law of evidence. We accordingly propose to codify the rules governing judicial notice of adjudicative facts. Judicial notice in this situation operates as a substitute for evidence in that it provides proof of facts which would otherwise need to be proved by evidence. We consider that other aspects of judicial notice are best omitted from an evidence code.

⁹⁶ See n 82.

DRAFT LEGISLATION AND COMMENTARY

JUDICIAL NOTICE

PART 5

THE TRIAL PROCESS

Division 2 - Judge and jury

Judicial notice

1 Judicial notice

Judicial notice may be taken of the following:

- (a) facts so known and accepted generally or in the locality in which the proceeding is being held that they cannot reasonably be questioned; and
- (b) facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Compare: *Evidence Bill 1993 (Aust)* cl 144.

COMMENTARY

Judicial notice

C1 This division of the draft code comprises the rules which relate to judge and jury. Most of the rules have yet to be researched and developed by the Law Commission. At this time, however, it is convenient to consider one part of the division, the rules concerning judicial notice.

C2 Section 1 is the code provision concerning judicial notice of indisputable adjudicative facts. Judicial notice may be taken of (a) facts so known and accepted generally or in the locality that they cannot reasonably be questioned, and (b) facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

C3 Various other aspects of judicial notice are considered in chapter 10 of the discussion paper. The paper suggests that it is not appropriate for the code to contain provisions concerning judicial notice of the law or legislative facts.

DOCUMENTARY EVIDENCE AND EVIDENCE PRODUCED BY MACHINE,
DEVICE, OR TECHNICAL PROCESS

PART 5

THE TRIAL PROCESS

**Division 4 - Documentary evidence and evidence produced
by machine, device, or technical process**

Definitions and interpretation

1 Definitions

In this Division

copy in relation to a document, includes a copy of a copy, a hand-written copy and a copy that is not an exact copy of the document but is identical to the document in all relevant respects;

COMMENTARY

C4 This division of the draft code comprises provisions relating to the admissibility and authenticity of documentary evidence. It also contains a provision concerning documentary and other evidence produced by a machine, device or technical process. The division aims to achieve a considerable simplification, shortening and clarification of the existing rules.

C5 The draft code provisions are arranged under the following headings:

- Definitions and interpretation,
- Admissibility and proof of documents,
- Pre-trial procedural requirements concerning documents,
- Presumptions about official and public documents,
- Evidence produced by machine, device or technical process.

Section 1

C6 Section 1 contains definitions of **copy**, **country**, **document**, **foreign country**, **international organisation**, **original**, and **public document**. At present, these definitions are stated to apply only to this division of the code. When, however, the various parts of the code are brought together it is likely that these definitions will be placed in a general definitions section.

C7 The definition of **copy** is important in relation to s 4 (Admissibility of document - whether or not original is available). For a document to be admitted under ss 4(2), 4(3)(a) and (c), and 4(4) it must be a "copy". **Copy** is defined to include a copy of a document that it not an exact copy but is identical in all relevant respects. Thus, a black and white photocopy of a document printed in colour or a copy of a computer-generated invoice printed on a different form from that sent to the customer would both ordinarily be within this definition. When, however, the missing feature (eg, colour) is relevant to an issue, the document cannot be treated as a copy. Such a document may still be admissible under s 5(2)(b), which allows all relevant evidence of the contents of a document to be received if the original is shown to be unavailable.

The definition also includes a hand-written copy of a printed document and a copy of a copy.

country includes a State, territory, province or other part of a country;

document means any record of information and includes

- (a) anything on which there is writing; and
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) anything from which sounds, images or writing can be reproduced, with or without the aid of anything else; and
- (d) a book, map, plan, graph, photograph or videotape;

foreign country means a country other than New Zealand;

international organisation means an organisation of States or Governments of States or an organ or agency of such an organisation, and includes the Commonwealth Secretariat;

C8 **Country** is defined to include a state, territory, province and other part of a country. It includes, for example, Australian states and Canadian provinces.

C9 The term **country** appears only in the definition of **foreign country**. We include a separate definition of country because the term may well appear in other parts of the code.

C10 **Document** is defined in wide terms to mean any record of information. The terms of this definition cover a diverse range of documents including all written documents, photographs, motion picture films, audiotape recordings, videotapes, compact discs,

computer discs and microfilm. The definition is a development of those in the Evidence Amendment Act (No 2) 1980 and the Australian Evidence Bill 1993.

C11 The definition is broad enough to include documents which are extracts from or parts of larger documents.

C12 **Foreign country** is defined as any country other than New Zealand. A definition of **New Zealand** is not included. It is intended that the definition of **New Zealand** suggested by the Law Commission in its report *A New Interpretation Act* (NZLC R17 1990) should apply. That definition reads:

New Zealand or other words or phrases referring to New Zealand, when used as a territorial description, comprises all the islands and territories within the Realm of New Zealand other than the self-governing state of the Cook Islands, the self-governing state of Niue, Tokelau, and the Ross Dependency.

The Cook Islands, Niue, Tokelau and the Ross Dependency are, therefore, treated as foreign countries for the purposes of the evidence code.

C13 Although **New Zealand** is defined in the current Acts Interpretation Act 1924, that definition is deficient in that it does not refer to the Ross Dependency. If the Law Commission's suggested definition is not enacted prior to the enactment of the evidence code, it will be necessary to revisit the definition of **foreign country** and perhaps include a definition of **New Zealand** in the code.

C14 The definition of **international organisation** covers all organisations to which states or governments of states belong. For clarity it specifically mentions the Commonwealth Secretariat. The definition is based on those used in the Official Information Act 1982 and the Privacy Act 1993.

original in relation to a photograph, includes the negative and a print made from it;

C15 In relation to a photograph, **original** expressly includes the negative and a print made from it. The definition is extended in this way to make it clear that a party wishing to adduce a photograph may simply adduce the print without producing the negative.

C16 The meaning of original is not further defined in the legislation because the Law Commission considers that its meaning is generally clear. It is useful to note, however, that for some documents there may be multiple originals. For instance, if two copies of a contract are executed both are originals for the purposes of the evidence code. Similarly, all the printed copies of a company prospectus are originals.

C17 The meaning of original is particularly important in relation to the two-tiered system of admissibility contained in ss 4 and 5. In terms of s 5, a copy and other secondary evidence (including oral evidence) of a document are in most circumstances admissible only if the original document is not available to the party who wishes to prove its contents.

public document means a document that

- (a) forms part of the records of the legislative, executive or judicial branch of the government of New Zealand, or of a person or body holding a public office or exercising a function of a public nature under the law of New Zealand; or
- (b) forms part of the records of the legislative, executive or judicial branch of the government of a foreign country, or of a person or body holding a public office or exercising a function of a public nature under the law of a foreign country; or
- (c) forms part of the records of an international organisation; or
- (d) is being kept by or on behalf of a branch of government, person, body or organisation referred to in paragraphs (a), (b), or (c).

document, Compare: *Evidence Amendment Act (No 2) 1980 s 2; Evidence Bill 1993 (Aust) dictionary.*

international organisation, Compare: *Official Information Act s 2.*

C18 **Public document** is defined in broad terms which are similar to those in the Australian Evidence Bill 1993. This definition is relevant to two substantive provisions. The first is s 4(4) which concerns the admissibility of copies of public documents printed by the authority of the New Zealand Government or the government of a foreign country. The second is s 14 which contains a presumption concerning the authenticity of sealed or certified public documents.

C19 The definition of **public document** includes the records of the legislative, executive or judicial branches of the government of New Zealand or a foreign country. The term "legislative" is chosen as one of general import. It includes (because of the wide definition of **country** contained in the code) the legislative bodies of the states or provinces of a federal country, whether unicameral or bicameral, as well as any federal legislative bodies.

C20 The definition of **public document** also includes the records of a person or body holding a public office or exercising a function of a public nature under the law of New Zealand or of a foreign country. It covers, therefore, the full range of public agencies, including local authorities in New Zealand and overseas. The definition is, however, intended to exclude both the records of companies or associations of a private nature incorporated under the law of New Zealand or a foreign country and the records of persons holding offices of a private nature.

C21 The definition also includes documents which form part of the records of an international organisation (such as the United Nations and its specialist organs). This is based on the principle that foreign countries and international organisations should be treated in the same way.

2 Interpretation

- (1) A reference in this Division to **a business or a public activity** includes a reference to
 - (a) a profession, occupation, trade or undertaking; and
 - (b) an activity engaged in or carried on by the legislative, executive or judicial branch of the government of New Zealand or a foreign country; and
 - (c) an activity engaged in or carried on by a person or body holding a public office or exercising a function of a public nature under or because of the law of New Zealand or a foreign country, being an activity engaged in or carried on in the performance of the duties of the office or the exercise of the function; and
 - (d) an activity engaged in or carried on by an international organisation.
- (2) In subsection (1), **business** includes
 - (a) a business that is not engaged in or carried on for profit; and
 - (b) a business engaged in or carried on outside New Zealand; and
 - (c) a business engaged in or carried on by an incorporated or unincorporated association or partnership.

Section 2

C22 Section 2 contains two unrelated interpretation provisions. The first, which is in subs (1) and (2), is a definition of **a business or a public activity**; the second, in subs (3), establishes when a document is to be regarded as unavailable to a party for the purposes of the code.

C23 The significance of the definition of **a business or a public activity** is seen in s 4(3). Under that provision the records of or kept by a business or a public activity are admissible whether or not an original of the document is available. Section 4(3) therefore allows the admission of what have traditionally been referred to as business records, and also allows the admission of the records of a public activity as defined in s 2(1).

C24 Section 2(1) covers the full range of New Zealand and foreign public agencies, including local authorities, as well as international organisations. Section 2(2) provides that the business activity in question need not be carried on for profit and need not be carried on in New Zealand.

- (3) For the purposes of this Act, an original document is not available to a party if, and only if,
 - (a) it cannot be found after reasonable inquiry and search by the party; or
 - (b) it has been destroyed; or

- (c) it is not in the possession or under the control of the party and
- (i) it cannot be obtained by any judicial procedure; or
 - (ii) it is in the possession or under the control of another party against whose interests the first-mentioned party wishes to prove the contents of the document; or
 - (iii) it was in the possession or under the control of another party, being a party against whose interests the first-mentioned party wishes to prove the contents of the document, at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding or in a dispute with the first-mentioned party.

Definitions: **foreign country, international organisation, local authority**, s 1; **New Zealand**, *Draft Interpretation Act* in Law Commission, *A New Interpretation Act* (NZLC R17).

C25 Section 2(3) states the rules for determining when an original document is regarded as not available to a party. If a document is unavailable, s 5 provides that copies and other evidence of the contents of the document are admissible in evidence.

C26 In general, a document is unavailable if it has been destroyed, cannot be found after a reasonable search or cannot be obtained for some other reason. However, subparas (ii) and (iii) of s 2(3)(c) provide that a document is unavailable to a party in two sets of circumstances which arise when the document possibly could be obtained but is or was in the possession or under the control of another party:

- First, under s 2(3)(c)(ii) an original is treated as unavailable if the party against whose interests the document is adduced has the original. In this case, the party holding the original can, if desired, readily adduce it.
- Second, under s 2(3)(c)(iii) an original is treated as unavailable if the party against whose interests it is adduced had the original in the past, and at that time knew or ought to have known that the document was likely to be relevant in the proceeding or in a dispute with the party adducing the secondary evidence. In this case, the party has had adequate opportunity to examine the original. If that party now needs a further opportunity to examine the original or wishes to adduce it, then that party will bear the cost of locating and obtaining it.

Ordinarily, the result of the provision will be the convenient admission of undisputed secondary evidence without need of the original.

C27 In s 2(3)(c), and in the other places where the term appears, "party" means a party to a proceeding. The term "party" will be so defined for the purposes of the code generally.

3 Requirement of original

To prove the contents of a document, a party must offer an original, except as is provided otherwise in this Act or any other Act.

Definitions: **document**, **original**, s 1; **Act**, *Draft Interpretation Act* in Law Commission, *A New Interpretation Act* (NZLC R17).

Section 3

C28 Section 3 establishes the basic rule concerning admissibility of documents. It preserves the essence of the secondary evidence rule, which requires a party seeking to prove the contents of a document either to produce the original or to prove the contents by other evidence falling within the exceptions allowed by the law. The Law Commission considers the principle underlying the secondary evidence rule is sound in that it seeks to ensure that written matter and recorded spoken words are conveyed to a court in the most accurate form possible. The code rules in fact extend the application of the secondary evidence rule insofar as the broad definition of "document" includes photographs, and sound and video recordings.

C29 However, as the law at present stands, there is a major practical difficulty with the secondary evidence rule. It has not kept up with technological advances concerning the storage, processing and retrieval of data. Uncertainty has resulted. The law should now recognise that current technology is such that accuracy is in many instances obtainable without the need to require the production of an original. The code therefore extends the exceptions to the secondary evidence rule to allow the admission of those classes of secondary evidence which are generally regarded as reliable. The exceptions are contained in s 4 and are discussed shortly. It, of course, always remains open to a party disputing the accuracy of secondary evidence to locate and produce the original.

C30 Section 3 provides that exceptions to the secondary evidence rule may be contained in "any other Act" as well as in the evidence code. There are at present many provisions in other Acts which enable courts to receive secondary evidence in particular circumstances. These exceptions add complexity to the law. The Law Commission considers that the general provisions in the code will make at least some of the particular exceptions in other statutes redundant (see paras 0-0 of the discussion paper).

C31 In s 3 "Act" is used in the sense suggested by the Law Commission in its report *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17) 14, and is confined to Acts of Parliament (including Imperial Acts which are part of New Zealand law). This ensures that the code is not amended indirectly by regulation.

4 Admissibility of document - whether or not original available

- (1) A party may prove the contents of a document by offering evidence in any manner authorised in subsections (2) to (6), whether or not an original of the document is available to that party.
- (2) A party may offer a document that is or purports to be a copy of an original document and
 - (a) is or purports to be a carbon copy; or
 - (b) has been or purports to have been produced by a machine, device, or technical process that reproduces the contents of documents.
- (3) A party may offer a document that is part of the records of or kept by a business or a public activity (whether or not still in existence) and is or purports to be
 - (a) a copy of an original document; or
 - (b) an extract from or a summary of an original document; or
 - (c) a copy of an extract from or summary of an original document.
- (4) A party may offer a document that is or purports to be a copy of a public document, an extract from or summary of a public document, or a copy of an extract from or summary of a public document, and was or purports to have been
 - (a) printed or published by the Government Printer, or by the authority of the New Zealand Government, or by order of or under the authority of the House of Representatives; or
 - (b) printed or published by the government or official printer of a foreign country; or
 - (c) printed or published by the authority of the legislative, executive or judicial branch of the government of a foreign country; or
 - (d) printed or published by an international organisation; or
 - (e) sealed with the seal of a person who or a body that might reasonably be supposed to have the custody of that public document; or
 - (f) certified to be such a copy, extract or summary by a person who might reasonably be supposed to have the custody of that public document.

Section 4

C32 Sections 4 and 5 establish a two-tiered scheme of exceptions to the secondary evidence rule, which will apply in both civil and criminal proceedings.

C33 Section 4 contains exceptions which provide for the admissibility of those classes of secondary evidence which are considered to have a sufficient likelihood of reliability to justify their admission. Section 4(1) accordingly permits those classes of secondary evidence to be adduced by a party, whether or not the original document is available to

that party. On the other hand, s 5 covers less reliable secondary evidence and only operates when the original document is not available.

C34 Section 4(2) allows the admission of a copy purporting to have been produced by a machine, device or technical process that reproduces the contents of documents. For the avoidance of doubt a carbon copy is specifically referred to. No definition of "machine, device or technical process" is provided. The objective in using these general words is to enable the courts to deal appropriately with technological developments, both current and future. A "machine" or a "device" will include, for example, a photocopier, a computer, a word processor or a fax machine. "Technical process" is intended to cover a chemical or other process which might not aptly be described as carried out by a machine or device.

C35 Section 4(3) allows the admission of documents that are part of the records of or kept by a business or a public activity and purport to be copies of original documents, or extracts or summaries of such documents. Copies of extracts or summaries are also admissible. The justification for the admission of these records is the incentive which a business or a public activity has for the maintenance of reliable records.

C36 Section 4(4) allows the admission of documents that purport to be copies, extracts or summaries of public documents (as defined) which have been printed or published by the Government Printer or by the authority of the Government or the House of Representatives or by various foreign authorities. It also provides for the admissibility of copies, extracts or summaries of public documents sealed or certified by their custodian. Various presumptions cover the documents admissible under s 4(4): see ss 12, 13, and 14.

(5) If information or other matter is stored in such a way that it cannot be used by the court unless a machine, device, or technical process is used to display, retrieve, produce, or collate it, a party may offer a document that was or purports to have been displayed, retrieved, produced, or collated by use of the machine, device, or technical process.

(6) If information or other matter is recorded in a code (including shorthand writing) or in such a way as to be capable of being reproduced as sound, a party may offer a document that purports to be a transcript of the information or matter.

(7) A party who offers a transcript of information or other matter in a sound recording under subsection (6) must play the recorded sound of all or part of that information or matter in court during the hearing if the sound recording is available and the court so directs, either on the application of another party or of its own motion.

Definitions: **copy, document, foreign country, international organisation, public document**, s 1; **New Zealand**, *Draft Interpretation Act* in Law Commission, *A New Interpretation Act* (NZLC R17).

Compare: Evidence Bill 1993 (Aust) s 48.

C37 The provisions of s 4(6) and (7) are closely related. Subsection (6) enables the admission of a document which purports to be a transcript of information recorded in shorthand or some other code or in such a way as to be capable of being reproduced as sound. The words "information or other matter" are deliberately wide in order to include matter not consisting of words. Figures, symbols, music and other sounds, such as radar

blips, are examples. Subsection (7) obliges a party who has offered a transcript in evidence to play in court the recorded sound from which the transcript is derived if the recorded sound is available and another party or the court so requires. It may be that subs (7) is not strictly necessary because a court could, in the exercise of its inherent power to control proceedings, direct that the tape or other sound recording be played. It is, however, preferable for the power to be explicit.

C38 The provisions contained in s 4 relate solely to the secondary evidence rule and have no bearing on the application of the rule against hearsay. The two rules are complementary. Any document that contains hearsay must also be admissible under the hearsay rules in the code.

C39 Section 4(5) allows the admission of information which is stored in such a way that it cannot be used by the court without the assistance of a machine, device or technical process. Information stored in a computer or on microfiche will fall within this category, as will sound and video recordings. The subsection offers a practical solution to the obvious problem that information stored in such ways is unintelligible without display on a screen or conversion to paper form.

5 Admissibility of document where original not available

- (1) A party may prove the contents of a document in a manner authorised in subsection (2) if an original document is not available (as determined under section 2(3)) to that party.
- (2) A party may offer as evidence of the contents of a document
 - (a) a document that is a copy of, or an extract from or a summary of, the document; or
 - (b) other evidence, including oral evidence, of the contents of the document.

Definitions: **copy, document, original**, s 1.

Compare: *Evidence Bill 1993 (Aust)* s 48(4).

Section 5

C40 Section 5(1) provides that other secondary evidence is admissible only when the original document is not available. Whether an original is available to a party is determined in every case in accordance with s 2(3).

C41 Section 5(2)(a) permits proof of the contents of a document by means of a copy of, an extract from, or a summary of the document. In the alternative, para (b) permits "other evidence, including oral evidence," of the contents of the document. Taken as a whole, s 5 allows any relevant evidence of the contents of a document to be admitted if the original is unavailable.

C42 No preferential hierarchy is imposed in relation to the evidence covered by s 5(2)(a) and s 5(2)(b). To do so would add unwarranted complexity (see paras 0-0 of the discussion paper).

6 Summary of voluminous documents

- (1) A party may, with the approval of the court, give evidence by means of a summary or chart as to the contents of a voluminous document or a voluminous compilation of documents that cannot conveniently be examined in court.
- (2) A party offering evidence by means of a summary or chart must, if the court so directs on the request of any other party or of its own motion, either, as the court may direct, produce the voluminous document or compilation of documents for examination in court during the hearing or make it or them available for examination and copying by other parties at a reasonable time and place.

Compare: *Evidence Bill 1993 (Aust)* s 50; *Federal Rules of Evidence* r 1006.

7 Proof of signatures on attested documents

An attesting witness need not be called to prove that a document was signed, executed or attested as it purports to have been signed, executed or attested.

Definitions: **document**, s 1.

Compare: *Evidence Act 1908* s 18.

Section 6

C43 Section 6 permits the court to admit evidence given by means of a summary or chart of the contents of a voluminous document or compilation of documents that cannot conveniently be examined in court. The section is modelled on r 1006 of the Federal Rules of Evidence and is designed to meet a practical need. As a control measure to ensure fairness, such evidence can only be given with the approval of the court. Subsection (2) obliges a party who has given evidence of this kind to produce (if the court so directs) the voluminous document in court or elsewhere at a reasonable time and place for examination by other parties.

Section 7

C44 Section 7 is based on s 18 of the Evidence Act 1908. It abrogates the old rule that one of the subscribing witnesses to an attested document must be called unless all such witnesses are unavailable. Section 7 allows any relevant evidence of due execution or attestation to be given to prove these issues whether or not the attesting witness is

available. Unlike s 18 of the Evidence Act, s 7 applies to wills. Section 7 is discussed at paras 0-0 of the discussion paper.

Pre-trial procedural requirements concerning documents

8 Admissibility, notice and disclosure of documents in civil proceedings

- (1) A document is not admissible in a civil proceeding unless
 - (a) the party who proposes to offer the document as evidence
 - (i) gives notice in writing to every other party of the existence and general description of the document and the proposal to offer that document as evidence; and
 - (ii) upon request, provides every other party with an opportunity to examine and copy the document at a reasonable time and place; or
 - (b) the court dispenses with that requirement under subsection (2).
- (2) The court may dispense wholly or partly with the requirement under subsection (1)(a) in such circumstances as the court considers proper and subject to any conditions that the court may impose.
- (3) A party must comply with subsection (1)
 - (a) sufficiently before the hearing to provide all the other parties with a fair opportunity to consider the document; or
 - (b) within such time, whether before or after the commencement of the hearing, as the court may allow and subject to any conditions that the court may impose.
- (4) A party need not comply with a requirement of this section in relation to a party who has waived that requirement.
- (5) The requirements for the admissibility of documentary evidence stated in this section are additional to the provisions of sections 3, 4, and 5.

Section 8

C45 Under present procedures many of the issues concerning admissibility and authenticity of documentary evidence are resolved before trial. The Law Commission considers this should be encouraged by the new code. Moreover, a more liberal secondary evidence regime and a less stringent authentication requirement based on relevance indicate a need for specific procedures to enable parties to investigate and test each other's documentary evidence. The objectives of ss 8-11 are to promote efficiency and economy by ensuring that most problems concerning documentary evidence are dealt with before the hearing and to formulate safeguards which are fair to all parties.

C46 Differing procedural safeguards are necessary for civil and criminal proceedings. For both types of proceeding it is proposed to build on rather than replace the existing law.

C47 Section 8(1) requires a party to a civil proceeding who proposes to offer a document as evidence to give notice in writing to other parties of the existence and general description of the document and also to give other parties an opportunity to inspect and copy the document. The notice requirement is in addition to any disclosure which occurred during discovery. Its purpose is to indicate to other parties which documents will be given in evidence. It can, however, be complied with very simply. For instance, parties may indicate largely by reference to the list of documents provided at discovery which documents will be adduced. And, in many cases, there will be few documents, in which event the parties may agree to less formal procedures. Under subs (2), the court has power to dispense with the notice requirements, subject to any conditions thought necessary. Subsection (2) also enables the court to develop a specific regime for a particular case - for example, a complex case with a large volume of documents. This may be done in the context of a system of case management or an application for directions under rr 438 or 446H of the High Court Rules or r 434 of the District Courts Rules.

C48 The timing of compliance with the obligations in subs (1) is of practical importance. Subsection (3) therefore stipulates that there must be compliance sufficiently before the hearing to give other parties a fair opportunity to consider the document. Again, the court may dispense with that obligation, subject to any necessary conditions.

C49 Subsection (5) places beyond doubt that the procedural requirements in s 8 are additional to the admissibility requirements of ss 3, 4 and 5. Documents admissible in terms of those sections must also comply with the notice requirements of s 9.

9 Objections to document in civil proceedings

- (1) A party to a civil proceeding who proposes to
 - (a) object to the admissibility of a document notice of which has been received by that party in accordance with section 8; or
 - (b) deny that the document is what it is claimed to be or that it was produced, signed or executed as it purports to have been,

must give notice in writing to every other party of that proposal to object or deny unless the court, in accordance with subsection (3), dispenses with the requirement to give notice.

- (2) A notice under subsection (1) must
 - (a) state the grounds for the objection or denial; and
 - (b) be given

- (i) sufficiently before the hearing to provide all the other parties with a fair opportunity to consider the notice; or
 - (ii) within such time, whether before or after the commencement of the hearing, as the court may allow and subject to any conditions that the court may impose.
- (3) The court may dispense with the requirement to give notice of a proposal on such conditions as the court may impose.

Definitions: **document**, s 1.

Section 9

C50 Section 9 complements s 8. It deals with the obligations of parties who propose to object to the admissibility or deny the authenticity of documents of which they have been notified. A party who proposes to object to the admissibility of a document, or deny that it is what it is claimed to be or that it was produced, signed or executed as it purports to have been, must notify other parties of that proposal unless the court dispenses with the requirement. The notice must state the grounds for the objection or denial and be given sufficiently before the hearing to provide other parties with a fair opportunity to consider the objection.

10 Objections to document in criminal proceedings

- (1) A defendant in a criminal proceeding who proposes to
 - (a) object to the admissibility of a document disclosed to that defendant by the prosecution; or
 - (b) deny that the document is what it is claimed to be or that it was produced, signed or executed as it purports to have been,

must give notice in writing to the prosecution of that proposal to object or deny unless the court, in accordance with subsection (4), dispenses with the requirement to give notice.

- (2) A prosecutor in a criminal proceeding who proposes to
 - (a) object to the admissibility of a document disclosed to the prosecution by a defendant (whether voluntarily, as the result of a search or seizure, or otherwise); or
 - (b) deny that the document is what it is claimed to be or that it was produced, signed or executed as it purports to have been,

must give notice in writing to that defendant of that proposal to object or deny unless the court, in accordance with subsection (4), dispenses with the requirement to give notice.

- (3) A notice under subsection (1) or (2) must
- (a) state the grounds for the objection or denial; and
 - (b) be given
 - (i) sufficiently before the hearing to provide the other party with a fair opportunity to consider the notice; or
 - (ii) within such time, whether before or after the commencement of the hearing, as the court may allow and subject to any conditions that the court may impose.
- (4) The court may dispense with the requirement to give notice of a proposal on such conditions as the court may impose.

Definitions: **document**, s 1.

Section 10

C51 Section 10 is concerned with criminal proceedings and needs to be considered in conjunction with the Law Commission's recommendations for a comprehensive regime for criminal disclosure contained in its report *Criminal Procedure: Part One: Disclosure and Committal* (NZLC R14). Section 10 assumes a general obligation on the part of the prosecution to disclose to defendants all documentary evidence which it is intended to offer at the trial: see para 0 of the discussion paper.

C52 In the case of defendants to criminal proceedings, s 10 does not create a general obligation to disclose to the prosecution documentary evidence which the defence proposes to offer at the trial. Nor is any obligation imposed on defendants to disclose their proposed documentary evidence to other defendants. However, in the Law Commission's report *Criminal Procedure: Part One: Disclosure and Committal* (NZLC R14) and in its discussion paper *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18), specific defence disclosure obligations are recommended in respect of alibi and expert evidence.

C53 The one obligation which s 10 imposes on defendants in criminal proceedings arises when a defendant intends to object to the admissibility or deny the authenticity of a document disclosed by the prosecution. The defendant must then give notice to the prosecution stating the grounds for the objection in sufficient time to provide a fair opportunity for it to be considered. This may not always be practicable. Accordingly, s 10(3)(b)(ii) enables the court to extend the time, subject to any conditions it sees fit to impose. Under s 10(4) the court may also dispense with the requirement to give notice, again on such conditions as may be considered appropriate.

C54 Section 10(2) places on the prosecution a similar obligation to give notice of intention to object to the admissibility or deny the authenticity of a document disclosed by the defendant (whether voluntarily, as the result of a search or seizure, or otherwise).

C55 Although notice of intention to object to the admissibility or deny the authenticity of a document which the prosecution proposes to offer at trial must be given by a defendant to the prosecution, it need not be given to other defendants. Similarly, notice of objection by the prosecution need only be given to the defendant who proposes to offer the document.

11 Originals to be made available by defendants in criminal proceedings

If a defendant in a criminal proceeding possesses an original of a document but that defendant offers evidence of the contents of the document other than by offering the original, the court may, on the request of any other party or of its own motion, require that defendant to produce the original in court during the hearing. The court may comment to the jury, if any, or may draw any reasonable inference, if that defendant fails to comply with such a requirement.

Definitions: **document, original**, s 1.

Section 11

C56 Section 11 is intended to fill a gap which otherwise may arise in criminal proceedings if a defendant, through another witness, offers secondary evidence of a document when the original is in the defendant's possession. This situation may arise when the document falls within the categories covered by s 4 of the code (documents admissible whether or not the original is available). In the absence of s 11, the obligation would then be on the prosecution or other defendants to secure the production of the original, if this is thought necessary. If, however, the original is in the possession of the defendant, who chooses not to give evidence, the prosecution and other defendants have no means of securing the production of the original to enable it to be tested or examined. In such a case, s 11 empowers the court, of its own motion or on the application of the prosecution or another defendant, to require the defendant to produce the original. The court may comment to the jury (if any) or draw any reasonable inference if the defendant fails to comply.

Presumptions about official and public documents

12 New Zealand and foreign official documents

- (1) A document that purports
- (a) to be the *Gazette*; or
 - (b) to have been printed or published by authority of the New Zealand Government; or
 - (c) to have been printed or published by the Government Printer; or
 - (d) to have been printed or published by order of or under the authority of the House of Representatives,

is presumed, unless the contrary is proved, to be what it purports to be and to have been so printed or published and to have been published on the date on which it purports to have been published.

- (2) A document that purports
- (a) to be a government or official gazette (by whatever name called) of a foreign country; or
 - (b) to have been printed or published by the government or official printer of a foreign country; or
 - (c) to have been printed or published by the authority of the legislative, executive, or judicial branch of the government of a foreign country; or
 - (d) to have been printed or published by an international organisation;

is presumed, unless the contrary is proved, to be what it purports to be and to have been so printed or published and to have been published on the date on which it purports to have been published.

Definitions: **document**, **foreign country**, **international organisation**, s 1; **New Zealand**, *Draft Interpretation Act* in Law Commission, *A New Interpretation Act* (NZLC R17).

COMMENTARY

Sections 12-17

C57 Sections 12-17 contain various presumptions concerning documentary evidence. They replace some 29 sections of the Evidence Act 1908 (and its amendments) which are complicated and difficult to relate to each other. The presumptions must be distinguished from the earlier admissibility rules contained in ss 3-5. The presumptions simply assist or facilitate the admission of documentary evidence or the proof of particular facts. Sections 12-17 are concerned with official and public documents and impose a burden of proof (not merely an evidential burden) on parties seeking to controvert them.

C58 The code does not include a presumption concerning ancient documents produced from proper custody. The Law Commission considers that the code provisions concerning self-authenticating documents (see para 0) render it unnecessary to have a presumption concerning ancient documents (see paras 0-0 of the discussion paper).

Section 12

C59 Section 12(1) contains a presumption concerning New Zealand Government and parliamentary documents. It is presumed that a document purporting to be the

Gazette, or to have been printed or published by the authority of the New Zealand Government or by the Government Printer, or by the order of or under the authority of the House of Representatives, is what the document purports to be. Such a document is also presumed to have been printed or published as it purports to have been printed or published. The presumption applies unless the contrary is proved.

C60 Section 12(2) is similar in content to s 12(1), except that it relates to the documents of foreign governments. Subsection (2)(c) includes documents purporting to have been printed or published by the authority of the "legislative, executive or judicial branch of the government of a foreign country". These words are intended to be sufficiently wide to embrace all kinds of executive and legislative bodies; and the wide definition of "country" in s 1 results in states, provinces and territories being regarded as a country for the purposes of the section. Subsection (2)(d) refers to documents purporting to have been printed or published by an international organisation.

13 Notification of acts in official documents

- (1) If the doing of an act by the Governor-General or the House of Representatives or by a person authorised to do the act by the law of New Zealand is notified or published in
 - (a) the *Gazette*; or
 - (b) a document that was printed or published by authority of the New Zealand Government; or
 - (c) a document that was printed or published by the Government Printer; or

- (d) a document that was printed or published by order of or under the authority of the House of Representatives,

it is presumed, unless the contrary is proved, that the act was done and that it was done on the date (if any) that appears in the *Gazette* or document.

- (2) If the doing of an act by a foreign legislature or a person authorised to do the act by the law of a foreign country is notified or published in
 - (a) a government or official gazette (by whatever name called) of a foreign country; or
 - (b) a document that was printed or published by the government or official printer of a foreign country; or
 - (c) a document that was printed or published by the authority of the legislative, executive, or judicial branch of the government of a foreign country,

it is presumed, unless the contrary is proved, that the act was done and that it was done on the date (if any) that appears in the gazette or document.

- (3) If the doing of an act by an international organisation is notified or published in a document that was printed or published by the international organisation, it is presumed, unless the contrary is proved, that the act was done and that it was done on the date (if any) that appears in the document.

Definitions: **document, foreign country, international organisation**, s 1; **New Zealand, Draft Interpretation Act** in Law Commission, *A New Interpretation Act* (NZLC R17).

Compare: *Evidence Act 1908* s 46.

COMMENTARY

Section 13

C61 Section 13(1) is an adaptation of s 46 of the Evidence Act 1908. It provides that if an act performed by the Governor-General or the House of Representatives or a person authorised by the law of New Zealand is notified in the *Gazette* or a document printed or published by the New Zealand Government or Government Printer or the House of Representatives, the act will be presumed to have been done unless the contrary is proved. The presumption relates to an *act* notified in an official document and is not, strictly

speaking, a presumption concerning a document. It is, however, convenient to place the provision in this division, because the presumption has a direct relationship to documents offered in evidence.

C62 Subsections (2) and (3) of s 13 are similar in content to s 13(1), except that they relate to the documents of foreign governments and parliaments, and international organisations.

C63 Section 13 covers a wide variety of publications but it does not presume the accuracy of all the facts mentioned in those publications. For example, although s 13 covers the published reports of Royal Commissions and annual reports of departments printed in the Appendix to the Journals of the House of Representatives, it does not operate to presume that the Royal Commission findings or the departmental accounts are correct. These are not "acts ... notified or published" in the publication. On the other hand, s 13 does operate to presume that an Order in Council notified in the *Gazette* was made, and, where the accounts of a government department are certified by the audit office, that they were certified.

C64 Unlike s 46 of the Evidence Act 1908, s 13 does not explicitly presume the lawfulness of the action notified or published in the official publication. We consider that a presumption of lawfulness, as opposed to a presumption that the act was in fact done, is unnecessary and undesirable in an evidence code. It does not add anything to the common law presumption of the regularity of official acts (*omnia praesumuntur rite esse acta*) and is best considered as a matter of substantive administrative law.

14 Authenticity of public documents

A document that purports to be a copy of, or an extract from or a summary of, a public document and to have been

- (a) sealed with the seal of a person who or a body that might reasonably be supposed to have the custody of that public document; or
- (b) certified to be such a copy, extract or summary by a person who might reasonably be supposed to have the custody of that public document,

is presumed, unless the contrary is proved, to be a copy of the public document or an extract from or summary of the public document.

Definitions: **copy**, **document**, **public document**, s 1.

Section 14

C65 Section 14 creates a presumption concerning a copy of, extract from, or summary of, variously sealed or certified public documents. The section is of practical use in

facilitating the admissibility of public documents under s 4(4). **Public document** is defined in s 1.

15 Presumptions as to New Zealand official seals and signatures

- (1) The imprint of a seal that appears on a document and purports to be the imprint of the Seal of New Zealand, or the former Public Seal of New Zealand, or one of the seals of the United Kingdom on a document relating to New Zealand, is presumed, unless the contrary is proved, to be the imprint of that seal and the document is presumed, unless the contrary is proved, to have been sealed as it purports to have been sealed.
- (2) The imprint of a seal that appears on a document and purports to be the imprint of the seal of a body (including a court or tribunal) exercising a function of a public nature under the law of New Zealand is presumed, unless the contrary is proved, to be the imprint of that seal and the document is presumed, unless the contrary is proved, to have been sealed as it purports to have been sealed.
- (3) The imprint of a seal that appears on a document and purports to be the imprint of the seal of a person holding a public office or exercising a function of a public nature under the law of New Zealand is presumed, unless the contrary is proved, to be the imprint of that seal and the document is presumed, unless the contrary is proved, to have been sealed as it purports to have been sealed.
- (4) A document that purports to have been signed by a person as the holder of a public office or in the exercise of a function of a public nature under the law of New Zealand is presumed, unless the contrary is proved, to have been signed by that person acting in his or her official capacity.

Definitions: **document**, s 1.

Sections 15-17

C66 Sections 15-17 contain presumptions as to the authenticity of various seals and signatures. These presumptions depart from the approach of existing statutory provisions which provide for certain seals, stamps and signatures to be judicially noticed. The two different approaches are considered in paras 0-0 of the discussion paper where it is suggested that the existing judicial notice provisions are better expressed as presumptions of genuineness. In each case the presumption applies unless the contrary is proved.

Section 15

C67 Under s 15(1) the imprint of a seal purporting to be the Seal of New Zealand or the former Public Seal of New Zealand or one of the seals of the United Kingdom used on a document relating to New Zealand, is presumed to be genuine and to have been sealed as it purports to have been sealed. Section 15(2) contains a similar provision relating to the

imprint of a seal of a body (including a court or tribunal) exercising a function of a public nature under the law of New Zealand. Section 15(3) contains a similar provision relating to the imprint of a seal of a person holding public office or exercising a function of a public nature under the law of New Zealand. Subsection (4) extends the presumption by providing that a document that purports to have been signed by a person as a holder of public office or in the exercise of a function of a public nature under the law of New Zealand is presumed to have been signed by that person acting in his or her official capacity. In each case the presumption applies unless the contrary is proved.

16 Presumptions as to foreign official seals and signatures

- (1) The imprint of a seal that appears on a document and purports to be the imprint of the seal of a foreign country is presumed, unless the contrary is proved, to be the imprint of the seal of that country and the document is presumed, unless the contrary is proved, to have been sealed as it purports to have been sealed.
- (2) The imprint of a seal that appears on a document and purports to be the imprint of the seal of a body (including a court or tribunal) exercising a function of a public nature under the law of a foreign country is presumed, unless the contrary is proved, to be the imprint of that seal and the document is presumed, unless the contrary is proved, to have been sealed as it purports to have been sealed.
- (3) The imprint of a seal that appears on a document and purports to be the imprint of the seal of a person holding a public office or exercising a function of a public nature under the law of a foreign country is presumed, unless the contrary is proved, to be the imprint of that seal and the document is presumed, unless the contrary is proved, to have been sealed as it purports to have been sealed.
- (4) A document that purports to have been signed by a person as the holder of a public office or in the exercise of a function of a public nature under the law of a foreign country is presumed, unless the contrary is proved, to have been signed by that person acting in his or her official capacity.

DEFINITIONS: **DOCUMENT, FOREIGN COUNTRY**, S 1.

Section 16

C68 Section 16 creates presumptions covering foreign seals and signatures analogous to those in s 15 relating to New Zealand.

17 Presumption as to certain official signatures

A document that purports to have been signed by

- (a) the Sovereign; or
- (b) the Governor-General; or

- (c) a Minister of the Crown; or
- (d) a member of the Executive Council; or
- (e) a Judge of a court in New Zealand; or
- (f) a Judge of a foreign superior court; or
- (g) the Solicitor-General; or
- (h) a Justice of the Peace; or
- (i) the Speaker of the House of Representatives; or
- (j) the Clerk of the House of Representatives; or
- (k) the Clerk of the Executive Council,

is presumed, unless the contrary is proved, to have been signed by that person acting in his or her official capacity.

Definitions: **document**, s 1.

Compare: *Evidence Amendment Act 1945* ss 11 and 11A.

Section 17

C69 Section 17 converts ss 11 and 11A of the Evidence Amendment Act 1945 from judicial notice provisions to a presumption. A document that purports to have been signed by one of the listed official persons is presumed, unless the contrary is proved, to have been duly signed by the person acting in his or her official capacity. The list of persons is extended from that in the 1945 Act to include the Sovereign, a Judge of any foreign superior court, the Clerk of the House of Representatives, and the Clerk of the Executive Council.

C70 The signatures of the people listed in s 17 are all covered by the presumption in s 15(4). Section 17 is therefore repetitive, but has been included for ease of use of the code.

C71 In relation to Justices of the Peace, s 17 is not restricted to the signatures of Justices sitting in court (as is s 11 of the 1945 Act). Since all signatures of Justices are covered by s 15(4) it would be confusing to repeat the restriction in s 17. There will therefore be a presumption concerning signatures of Justices of the Peace on affidavits, though no similar presumption will apply to solicitors' signatures. This creates a minor anomaly but we do not consider it will cause problems in practice.

18 Evidence produced by machine, device, or technical process

If a party offers evidence that was produced wholly or partly by a machine, device, or technical process and the machine, device, or technical process is of a kind that ordinarily does what a party asserts it to have done, it is presumed, in the absence of evidence to the contrary, that on a particular occasion the machine, device, or technical process did what that party asserts it to have done.

Compare: *Evidence Bill 1993 (Aust)* cl 146.

Section 18

C72 The presumption in s 18 differs from other presumptions in this division in that it applies to all kinds of evidence (ie, not simply to documentary evidence) produced by a machine, device or technical process. The presumption also relates to both public and private documents.

C73 No definition of "machine, device or technical process" is provided. The objective of using these general words is to enable the courts to deal appropriately with technological developments, both current and future. A "machine" or a "device" will include, for example, a photocopier, a computer, word processor or a fax machine. "Technical process" is intended to cover a chemical or other process which might not aptly be described as carried out by a machine or device.

C74 In outline, s 18 provides that if the proponent of machine-produced evidence adduces evidence of the operation which the machine is meant to perform and evidence that the machine ordinarily performs that operation (or if the fact-finder is able to take

judicial notice of those matters), it is presumed in the absence of evidence to the contrary that the machine on the particular occasion did what it ordinarily does.

C75 The presumption is an adaptation and simplification of cl 146 of the Australian Evidence Bill 1993. The limited scope and operation of the presumption are discussed at paras 0-0 of the discussion paper. The objective of the presumption is to facilitate the proof of documents and other things by reducing the need for complex and expensive technical evidence concerning the workings of a machine when those matters are not seriously in issue. The provision does not, however, obviate the need for evidence establishing what the machine ordinarily does and, where relevant, that the machine was properly used by any human operator.

Other sections

The following sections will not be in Division 4 but will be presented elsewhere in the code.

A Establishment of relevance of a document or thing

If a question arises concerning the relevance of a document or thing, the court may examine it and draw any inference from it, including an inference as to its authenticity and identity.

Definitions: **document**, s 1.

Compare: *Evidence Bill 1993 (Aust)* cl 58.

B Provisional admission of evidence

If a question arises concerning the relevance of any evidence, the court may admit that evidence subject to a later finding that there is evidence capable of establishing its relevance.

Compare: *Evidence Bill 1993 (Aust)* cl 57.

COMMENTARY

Other sections

C76 These sections are suggested in chapter 2 of the discussion paper. They are closely related to the relevance rule. At this stage, the Law Commission has not determined where in the code they are most conveniently placed. This question can be better addressed when the code is more fully developed.

Section A

C77 Chapter 2 of the discussion paper points out that the authenticity of a document is an aspect of relevance (see paras 0-0). It is, therefore, unnecessary to have code rules concerning authenticity. Section A is, however, inserted to clarify one aspect of the relevance rule (which is found in Part 2 of the code under the heading General Principles). Section A empowers the court to examine and draw inferences from any document or thing, the relevance of which is in question. Thus a document which contains the necessary information can be self-authenticating. This makes it clear that the common law rule that extrinsic evidence is required to authenticate a document is abrogated.

Section B

C78 Section B also clarifies an aspect of the relevance rule. It recognises that the practicalities of court proceedings are such that, at the time when many documents or things are tendered in evidence, their relevance to the issues in the proceeding may need to be established by other evidence. The section permits the court to admit evidence when it is tendered, subject to a later finding that there is other evidence capable of establishing its relevance. If the other evidence is not forthcoming, the provisionally admitted evidence must later be excluded from consideration. The operation of Section B is discussed in more detail at paras 0-0 of the discussion paper.

Appendix A

THE EVIDENCE ACT 1908 AND THE PROPOSED CODE PROVISIONS

This table indicates the provisions of the Evidence Act 1908 and its Amendments which provisions proposed in this paper are intended to replace.

Evidence Act 1908	Law Commission's Provisions
	References are to Division 4 of Part 5 - Documentary evidence and evidence produced by machine, device or technical process
s 27	ss 15, 17
s 28	unnecessary in the code ¹
s 28A	unnecessary in the code ¹
s 29	unnecessary in the code ¹
s 29A	unnecessary in the code ¹
s 30	s 12(1)
s 31	s 12(1) partly unnecessary in the code ¹
s 32	ss 12(1), 13(1), 14
s 33	ss 15, 17
s 34	s 12(2)
s 35	ss 12(1), 13(1)
s 36 repealed	
s 37	ss 15, 16, 17
s 38	unnecessary in the code
s 39	an issue of foreign evidence ²
s 40	an issue of foreign evidence ²
s 41	an issue of foreign evidence ²

s 42	covered by hearsay rules ³
s 43	s 15
s 44	ss 14, 15
s 44A	ss 4(3), 4(4), 14, 16
s 44B repealed	
s 45 repealed	
s 46	s 13(1)
Evidence Amendment Act 1945	
s 2	interpretation only, see s 1
ss 3, 4 repealed	
s 5	s 7
s 6	unnecessary in the code ⁴
s 7	a foreign evidence issue ²
s 8 repealed	
s 9	a foreign evidence issue ²
s 10 revokes regulations only	
s 11	s 17
s 11A	s 17
s 12	ss 3, 4(3), 4(4), 12(1), 14
Evidence Amendment Act 1952	
s 3	interpretation only, see s 1
s 4	ss 4(2), 14
s 5	ss 4(2), 4(3)
s 6	a foreign evidence issue
s 7	ss 14, 15
Evidence Amendment Act (No 2) 1980	
s 26	ss 14, 15
s 27	s 15
Evidence Amendment Act 1990	
This Act applies only to certain Commerce Act 1986 proceedings	

s 4	a foreign evidence issue, ² s 13 is relevant
s 5	s 4(2)
s 6	s 16
s 7	s 13(1), (2)
s 8	ss 3, 13(1), 14
s 9	unnecessary in the code
s 10	partly unnecessary in the code, see also s 14

1 See discussion paper paras 0-0.

2 See discussion paper paras 0-0.

3 The proposed hearsay provisions for the code are reprinted in app B.

4 See discussion paper paras 0-0.

APPENDIX B

OTHER CODE PROVISIONS

EARLY SECTIONS FOR AN EVIDENCE CODE

These draft provisions were first published in Evidence Law: Codification (NZLC PP14). We reproduce them here for the convenience of readers.

PART 1

PURPOSES

1 Purposes

The purposes of this Code are to:

- (a) promote the rational ascertainment of facts in proceedings; and
- (b) help promote fairness to parties and witnesses in proceedings and to all persons concerned in the investigation of criminal offences; and
- (c) help secure rights of confidentiality and other important public and social interests; and
- (d) help promote the expeditious determination of proceedings and the elimination of unjustifiable expense.

PART 2

GENERAL PRINCIPLES

2 Fundamental principle - relevant evidence is admissible

- (1) All relevant evidence is admissible in proceedings except evidence that is excluded in accordance with this Code or any other Act.
- (2) Evidence that is not relevant is not admissible in proceedings.

- (3) Evidence is relevant for the purposes of this Code if it has a tendency to prove or disprove a fact that is of consequence to the determination of a proceeding.

3 General exclusion

In any proceeding, the court shall exclude evidence if its probative value is outweighed by the danger that the evidence may:

- (a) have an unfairly prejudicial effect; or
- (b) confuse the issues; or
- (c) mislead the court or jury; or
- (d) result in unjustifiable consumption of time; or
- (e) result in unjustifiable expense.

DRAFT HEARSAY SECTIONS FOR AN EVIDENCE CODE

These sections were first published in Evidence Law: Hearsay (NZLC PP15). We reproduce them here for the convenience of readers.

PART 3

ADMISSIBILITY RULES

Division 1 - Hearsay evidence

1 Definitions and interpretation

- (1) In this Division

hearsay means a statement that

- (a) was made by a person other than a person who is giving evidence of the statement at a proceeding; and
- (b) is offered in evidence to prove the truth of the statement;

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.

- (2) For the purposes of this Division, the maker of a statement is unavailable as a witness if the maker

- (a) is dead; or

- (b) is outside New Zealand and it is not reasonably practicable to obtain his or her evidence; or
 - (c) is unfit to attend as a witness because of age or physical or mental condition; or
 - (d) cannot with reasonable diligence be identified or found; or
 - (e) cannot, after all reasonable steps to compel attendance have been taken, be compelled to attend; or
 - (f) cannot reasonably be expected to recollect the matters dealt with in the statement.
- (3) Notwithstanding subsection (2), the maker of a statement shall not be regarded as unavailable as a witness if the unavailability was brought about by the party offering the statement for the purpose of preventing the maker of the statement from attending or giving evidence.
- (4) For the purposes of sections 3(2)(b), 4(1)(a) and 4(2)(c), the "circumstances relating to the statement" include
- (a) the nature and contents of the statement; and
 - (b) the circumstances in which the statement was made; and
 - (c) any circumstances that relate to the credibility of the maker of the statement.

2 Hearsay rule

Hearsay is not admissible in proceedings except as provided by this Code or by any other enactment.

3 Admissibility of hearsay in civil proceedings

- (1) In a civil proceeding, section 2 does not have effect to exclude hearsay if the party offering the hearsay complies with subsection (2).
- (2) A party to a civil proceeding who offers a statement that is hearsay must, if required by any other party to the proceeding, call as a witness the maker of the statement unless
- (a) the maker of the statement is unavailable as a witness; or
 - (b) in the circumstances, including the circumstances relating to the statement, the court finds that the attendance of the maker of the statement need not be required.

4 Admissibility of hearsay in criminal proceedings

- (1) In a criminal proceeding, section 2 does not have effect to exclude hearsay if

- (a) the circumstances relating to the statement that is hearsay provide reasonable assurance that the statement is reliable; and
 - (b) the party offering the hearsay complies with such of the requirements of this section as apply in the particular case.
- (2) A party to a criminal proceeding who offers a statement that is hearsay must, if required by any other party to the proceeding, call as a witness the maker of the statement unless
- (a) the maker of the statement is unavailable as a witness; or
 - (b) the maker of the statement is an accused person, but this exception does not apply where an accused person offers a statement made by that person; or
 - (c) in the circumstances, including the circumstances relating to the statement, the court finds that the attendance of the maker of the statement need not be required.
- (3) A party to a criminal proceeding who proposes to offer a statement that is hearsay must give notice in writing to every other party to the proceeding of the proposal to offer that statement unless
- (a) the requirement to give notice is waived by all the other parties to the proceeding; or
 - (b) under subsection (5), the court dispenses with the requirement to give notice.
- (4) A notice under subsection (3) must
- (a) include the contents of the statement and the name and address (if known) of the maker of the statement; and
 - (b) be given sufficiently before the hearing to provide all the other parties to the proceeding with a fair opportunity to prepare to meet the statement.
- (5) The court may dispense with the requirement to give notice under subsection (3) if
- (a) having regard to the nature and contents of the statement, no party is substantially prejudiced by the failure to give notice; or
 - (b) giving notice was not reasonably practicable in the circumstances; or
 - (c) the failure to give notice can appropriately be dealt with as a matter of the weight to be attributed to the statement.
- (6) A party to a criminal proceeding who is given notice under subsection (3) of a proposal to offer a statement that is hearsay must, if that party requires the maker of the statement to be called as a witness, give notice of that requirement, as soon as practicable, to the party proposing to offer the statement. The court may treat a failure to give notice under this subsection as a relevant circumstance for the purposes of subsection (2)(c).

5 Additional evidence where hearsay offered

If hearsay is offered in a proceeding, any party to the proceeding may, for the purpose of meeting that hearsay and with the leave of the court,

- (a) recall any witness, whether or not that witness has been present in court since giving evidence; and
- (b) call any additional witness, whether or not that witness has been present in court during the hearing.

6 Hearsay in interlocutory proceeding

Section 2 does not have effect to exclude hearsay in an interlocutory proceeding if the party who offers it also offers evidence of its source.

BIBLIOGRAPHY

Australian Law Reform Commission, *Interim Report on Evidence* (ALRC 26, Canberra, 1985)

Australian Law Reform Commission, *Report on Evidence* (ALRC 38, Canberra, 1987)

Canadian Law Reform Commission, *Report on Evidence* (Ottawa, 1975)

Eichelbaum (ed), *Mauet's Fundamentals of Trial Techniques* (NZ ed Oxford University Press, Auckland, 1989)

Fraud Trials Committee, (Roskill Committee) *Fraud Trials Committee Report* (HMSO, London, 1986)

Greenleaf, *A Treatise on the Law of Evidence* (Arno, New York, 1972)

Howard, Crane and Hochberg, *Phipson on Evidence* (14 ed, Sweet & Maxwell, London, 1990)

Mathieson, *Cross on Evidence* (4 NZ ed, Butterworths, Wellington, 1989)

Strong and others, *McCormick on Evidence* (4 Practitioner ed, West Publishing, St Paul, Minn, 1992)

Tapper, *Computer Law* (4 ed, Longman, London, 1989)

Tapper, *Cross on Evidence* (7 UK ed, Butterworths, London, 1991)

Thayer, *A Preliminary Treatise on Evidence at Common Law* (Rothman Reprints, South Hackensack, NJ, 1898)

Weinstein and Berger, *Weinstein's Evidence Manual* (Mathew Bender, New York, 1988)

Wigmore, *Evidence in Trials at Common Law* (Little, Brown and Company, New York, 1983)

AUTHENTICATION

Alexander and Alexander, "The Authentication of Documents Requirement: Barrier to Falsehood or to Truth?" (1973) 10 San Diego Law Review 266

Allen, "The Myth of Conditional Relevancy" (1992) 25 Loyola of Los Angeles Law Review 871

Ball, "The Myth of Conditional Relevancy" (1980) 14 Georgia Law Review 435

Broun, "Authentication and Contents of Writing" [1969] Arizona State Law Journal 611

Ehrich, "Unnecessary Difficulties of Proof" (1923) 32 Yale Law Review 436

Levin, "Authentication and Content of Writings" (1956) 10 Rutgers Law Review 632

Michael and Alder, "Real Proof" (1952) 5 Vanderbilt Law Review 344

Nance, "Conditional Relevance Reinterpreted" (1990) 70 Boston University Law Review 447

Strong, "Liberalizing the Authentication of Private Writings" (1967) 52 Cornell Law Quarterly 284

PRESUMPTIONS

Allen, "Presumptions in Civil Actions Reconsidered" (1981) 66 Iowa Law Review 843

Cleary, "Presuming and Pleading: An Essay on Juristic Immaturity" (1959) 12 Stanford Law Review 5

Ladd, "Presumptions in Civil Actions" (1977) Arizona State Law Journal 275

Morgan, "Further Observations on Presumptions" (1943) 16 Southern California Law Review 245

Morgan, "Instructing the Jury Upon Presumptions and Burden of Proof" (1933) 47 Harvard Law Review 59

Morgan, "Some Observations concerning Presumptions" (1931) 44 Harvard Law Review 906

PRIVATE DOCUMENTS

Inbau, "Lay Witness Identification of Handwriting" (1939) 34 Illinois Law Review of Northwestern University 433

MACHINE-PRODUCED EVIDENCE

Amory and Poulet, "Computers in the Law of Evidence - A Comparative Approach in Civil and Common Law Systems" [1987] Computer Law and Practice 114

Evidence Law Reform Committee, *Report on Business Records and Computer Output* (August 1987)

Nelson, "Garbage In, Garbage Out: The Need for New Approaches to Computer Evidence" (1986) 9 American Journal of Trial Advocacy 411

New South Wales Law Reform Commission, *Evidence (Business Records)* (1973)

Oxlee, "Evidence from Imagery" [1993] 143 NLJ 915

Reynolds, "Optical Disc Document Images: Evidentiary Aspects in Victoria" (1991) 3 Bond Law Review 85

Smith, "The Admissibility of Statements by Computer" [1981] Criminal Law Review 387

Wong and Viskovic, "Documents optically stored, when are they admissible" Lawtalk, 6 July 1992, 9

SECONDARY EVIDENCE

Cleary and Strong, "The Best Evidence Rule: An Evaluation in Context" (1966) 51 Iowa Law Review 825

PROCEDURE

Mills, "Civil Rights v Police Frustration: Police questioning powers: Police powers of search, detention and interview: The right of silence and related issues." Paper presented to the New Zealand Law Conference 2-5 March 1991, Wellington, Conference Papers Volume 1, 241.

Teasdale, "Stand and Deliver: Notice to Produce Documents in Criminal Proceedings" (1975) 125 NLJ 1171

Weinberg "Complex Fraud Trials - Reducing their Length and Cost" (1992) 1 Journal of Judicial Administration 153

JUDICIAL NOTICE

Carter, "Judicial Notice: Related and Unrelated Matters" in Campbell and Waller (eds) *Well and Truly Tried* (Law Book Company, Melbourne, 1982)

Davis, "Judicial Notice" (1955) 55 Columbia Law Review 945

Manchester, "Judicial Notice and Personal Knowledge" (1979) 42 *Modern Law Review* 22

Mann, *Foreign Affairs in the English Courts* (Clarendon, Oxford, 1986)

Morgan, "Judicial Notice" (1944) 57 *Harvard Law Review* 269

Other Law Commission publications:

REPORT SERIES

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- NZLC R22 Final Report on Emergencies (1991)
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- NZLC R26 Annual Report 1993 (1993)
- NZLC R27 The Format of Legislation (1993)

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