



Eyewitness Identification Evidence in Aotearoa | New Zealand

Systemic Issues Report June 2026



**Te Kāhui
Tātari Ture**
Criminal Cases
Review Commission

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Foreword

Minister,

Faulty eyewitness identification is a well-recognised cause of miscarriages of justice. The experience of the Criminal Cases Review Commission in its first five years of operation has reinforced that observation, as have the number of recent high-profile cases in New Zealand involving such evidence.

Where the Commission identifies a general matter related to miscarriages of justice it may inquire into that matter on its own initiative if that is in the public interest. In that, as in all aspects of its operations, the Commission is mindful of its legislative focus on groups disproportionately affected by the criminal justice system. Based on its experience the Commission in 2024 announced its decision to conduct an inquiry into faulty eyewitness identification evidence. The Commission has now completed that inquiry and provides this report to you as required by section 12 of its Act.

The Commission initially considered a wider range of issues, including relating to ethnicity and gender as well as more general developments in the science of memory formation and recall, of significance for the process of gathering reliable eyewitness evidence. We came to appreciate the breadth and complexity of those developments. As a result, and guided by feedback we received from our expert advisors, the Commission focussed its attention on a number of practical improvements to existing law in New Zealand.

In particular, in 2006 section 45 of the Evidence Act established formal procedures for obtaining identification evidence intended to improve its reliability and, therefore, its admissibility in criminal proceedings. Drawing largely on developments in best practice since that time, this Report recommends several amendments to those provisions to improve their effectiveness.

On behalf of the Commission, I record our gratitude to the many people who helped in the preparation of this report, which I am pleased to commend to you Minister and to Parliament.

Hon Denis Clifford
Chief Commissioner
Criminal Cases Review Commission
30 June 2026

Introduction and summary of recommendations

1. When the identity of the person who committed an offence is at issue in a criminal trial, eyewitness identification evidence can become crucial. While this kind of evidence can be intuitively compelling, decades of research have raised serious concerns about its reliability, and flawed identification evidence is a well-known cause of miscarriages of justice. In the United States, for instance, eyewitness misidentification contributes to the majority of wrongful convictions that have later been overturned by post-conviction DNA testing.¹
2. We are not aware of similar research done in this country, but of the more than 600 applications for review of convictions or sentences received by Te Kāhui Tātari Ture | Criminal Cases Review Commission (**Te Kāhui**) in our first five years of operation,² nearly one-fifth involved some form of issue with eyewitness identification,³ as have three of the six potential miscarriages of justice we have so far referred to appeal courts.⁴ Further referrals involving eyewitness identification are likely. In our view, eyewitness identification evidence has emerged as a systemic factor in actual or potential miscarriages of justice. In August 2023 we decided to conduct an inquiry into the issue.⁵ This report is the result of that inquiry.
3. The Evidence Act 2006 includes special provisions for dealing with eyewitness identification evidence. These were developed by the Law Commission as part of its 1999 report *Evidence: Reform of the Law (Evidence report)* and were intended to reduce the risk of misidentifications.⁶ Central to the provisions are the requirements for formal identification procedures, such as identification line-ups, or photo montages. These requirements were based on the scientific knowledge at the time relating to eyewitness identification evidence. However, in the two decades since the enactment of those provisions there have been significant developments in best practice and so it is timely to revisit the issue.

¹ Innocence Project “Eyewitness Misidentification” <<https://innocenceproject.org/eyewitness-misidentification>>. See also Gary L Wells “Eyewitness Identification” in Erik Luna (ed) *Reforming Criminal Justice: Volume 2, Policing* (Academy for Justice, Phoenix, 2017) 259 to 278; *Watson v R* [2025] NZCA 455 at [613].

² Under s 25 of the Criminal Cases Review Commission Act 2019, Te Kāhui may decide to investigate the conviction, sentence, or both, to which the application relates. On completion of an investigation, Te Kāhui may refer a conviction, sentence or both, to the relevant court on appeal, if Te Kāhui considers that it is in the interests of justice to do so.

³ Te Kāhui triage system breaks applications down into the issues within each application. The percentage figure above is based on a statistical review of the applications received where eyewitness identification issues have been identified as a real or a potential problem.

⁴ Of the three referrals involving eyewitness identification evidence, one appeal has been heard and granted, one has been conceded in part by the Crown and awaits hearing on the remaining part, and the another has yet to be heard.

⁵ Section 12 of the Criminal Cases Review Commission Act 2019 empowers Te Kāhui to initiate and conduct inquiries into general matters if the Commission identifies a practice, policy, procedure, or other matter of a general nature that it considers may be related to cases involving a miscarriage of justice or has the potential to give rise to such cases.

⁶ Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999).

4. During this inquiry, we have considered case law, obtained input from relevant experts, and sought feedback from various stakeholders, including police, Crown Law and the Public Defence Service. Following this process, we have identified changes to the rules for eyewitness identification evidence that would bring New Zealand law in line with international best practice, improve reliability of visual identification evidence, and thereby reduce the risk of future miscarriages of justice. Accordingly, we make the following three recommendations.

Recommendation 1: Add further requirements for formal identification procedures

5. Section 45(3) of the Evidence Act 2006 sets out the requirements for a formal identification procedure. If an identification is made according to these requirements, it is admissible in a criminal proceeding unless the defence proves it is unreliable. There are seven requirements, including, for example, that the procedure take place as soon as possible, and that the suspect is compared to at least seven other people of similar appearance.
6. **We recommend** adding additional requirements for formal procedures, including, for example, using double-blind procedures;⁷ that witnesses give a confidence statement at the time of the procedure; and that a video recording is made of the entire procedure.

Recommendation 2: Expand the definition of visual identification evidence

7. 'Visual identification evidence' is defined in section 4 of the Evidence Act 2006. This is significant because the special provisions for eyewitness identification evidence only apply to evidence that meets the definition. There have been differing approaches in the courts as to whether this applies to 'observation evidence' in cases where the defendant admits to being at the scene, and the evidence is about the witness identifying the defendant's involvement in alleged offending.
8. **We recommend** this definition be expanded to include observation evidence, consistent with a recommendation already made by the Law Commission in its most recent review of the Evidence Act.⁸

⁷ As we explain in more detail below, a double-blind procedure means, in this context, a formal identification procedure where neither the witness nor the procedure administrator knows who the suspect is, or whether the suspect is a part of the procedure.

⁸ Law Commission *The Third Review of the Evidence Act 2006* (NZLC R148, 2024) at 241–247.

Recommendation 3: Close the list of 'good reasons' for not following formal identification procedures

9. Section 45(2) of the Evidence Act provides that visual identification evidence obtained without following a formal procedure may still be admissible if there is 'good reason' for not having followed the procedure, or the prosecution can nevertheless prove that the circumstances in which the identification was made have produced a reliable identification. Section 45(4) sets out a list of good reasons, for example, that the suspect refused to participate in the procedure.
10. **We recommend** closing the list so that there is certainty around what constitutes good reason, and to encourage investigators to use formal procedures, consistent with the Law Commission's original recommendation in its *Evidence* report.

Structure of this report

11. In Part 1, we set out the background to the current rules for eyewitness identification evidence, before considering the current issues with these rules in Part 2. Part 3 of the report sets out our recommendations. Other issues we considered during the inquiry are discussed in Part 4, and Part 5 summarises the inquiry process.

1. The rules for eyewitness identification evidence

The history of the risks associated with eyewitness identification evidence

- 1.1 Cases of mistaken eyewitness identification are not a new phenomenon and have had a significant impact on the development of criminal law. In the late nineteenth century, the wrongful conviction of Adolf Beck based on mistaken eyewitness identification evidence, and his subsequent acquittal, led to a committee of inquiry and eventually the establishment of the right of appeal for criminal decisions.⁹
- 1.2 In the late 1970s, misidentification again became a significant issue in the United Kingdom. A 1976 government investigation found that there had been 38 convictions overturned because of mistaken identity in England and Wales since 1945.¹⁰ A year later, the English Court of Appeal gave its decision in the *Turnbull* case,¹¹ establishing the rule that a trial judge should warn a jury to be especially cautious in cases where the prosecution case depends wholly or substantially on the correctness of one or more identifications of the accused, as well as warning the jury that a mistaken witness can nevertheless be a convincing witness.
- 1.3 These rules came to be known as the *Turnbull* guidelines and were essentially incorporated in New Zealand law in 1982 by s 344D of the Crimes Act 1961,¹² which required judges to warn juries when the evidence relates to visual identification and the case against the accused was wholly or substantially dependent on such identification.¹³

The Evidence Act 2006 and the introduction of formal procedures

- 1.4 Beginning in the 1980s, a growing body of scientific knowledge about the reliability of eyewitness identification gave rise to concerns about the role of mistaken identifications in miscarriages of justice and wrongful convictions, and in particular, the way that the *process* of gathering identification evidence can affect its reliability.¹⁴ In the following decades, this led to

⁹ Edwin M Borchard *Convicting the Innocent: Errors of Criminal Justice* (Yale University Press, New Haven, 1932) at 7 and Stephen Kós "A Short History of Appeal" (paper presented to the Australia and New Zealand Law and History Society Conference, Christchurch, June 2018) at [36].

¹⁰ Home Office *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (HC 338, 1976).

¹¹ *R v Turnbull* [1977] QB 224.

¹² Though New Zealand judges have been required to exercise caution in relation to identification evidence since the 1950s: *R v Fox* [1953] NZLR 555 (CA).

¹³ This section has since been repealed and replaced by s 126 of the Evidence Act 2006. See below at [1.13].

¹⁴ Elizabeth F Loftus "Eyewitness Testimony: Psychological Research and Legal Thought" (1981) 3 *Crime and Justice* 105 and Thomas H Kramer, Robert Buckhout and P Eugenio "Weapon Focus, Arousal, and Eyewitness Memory" (1990) 14 *Law*

further phases of law reform that went beyond the requirement to exercise caution in *relying* on eyewitness identification evidence and established formal procedures for *gathering* that evidence, aimed at improving its reliability.¹⁵

1.5 In 1989, the Law Commission was tasked with reviewing the law of evidence in New Zealand. The resulting *Evidence* report set out recommendations for the reform and codification of the law of evidence, among them a number relating to eyewitness identification evidence. The Law Commission noted that although the research on eyewitness evidence was still evolving, studies did not support the degree of faith that judges, jurors, lawyers and law enforcement seemed to have in eyewitness evidence.¹⁶ The scientific evidence showed that a formalised procedure for gathering eyewitness identification evidence was more likely to produce reliable identifications. Based on this finding, the Commission's main recommendation was a special admissibility rule for eyewitness identification evidence which encourages the use of formal procedures.¹⁷ The requirements for the formal procedure were based on the scientific research available at the time,¹⁸ though not all of the initial recommendations were carried through in the final report.¹⁹

1.6 These recommendations formed the basis for the provisions enacted in the Evidence Act 2006 which concern eyewitness identification:²⁰

- Section 4 – definition of visual identification evidence
- Section 45 – admissibility of eyewitness identification evidence (including the formal procedure)
- Section 126 – judicial warnings regarding identification evidence.

and Human Behavior 167.

¹⁵ The variables affecting the reliability of eyewitness identification evidence are sometimes divided into two categories: (1) estimator variables, which are things to do with the witness such as how far they were from the suspect; and (2) system variables, which are things to do with how the evidence is gathered, such as instructions given to the witness and the number of people to whom a suspect is compared. Broadly speaking, estimator variables have been addressed by the use of cautions in relying on the evidence, while system variables have been addressed through requirements to follow robust formal procedures for gathering the evidence.

¹⁶ Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at [201].

¹⁷ At [201].

¹⁸ At 53–57.

¹⁹ The Law Commission initially recommended that the investigating officer must not be involved in the identification procedure, to limit the risk of the witness being influenced, though the recommendation was not pursued after submitters claimed attending officers would need to know the identity of suspects for security reasons: Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at 59.

²⁰ The provisions relating to identification procedures have undergone only minor amendments. The Evidence Amendment Act 2016 replaced the word "person" in s45(3) with "suspect", and the words "was reported" in 45(4) with the "occurred".

Definition of visual identification evidence (Section 4)

- 1.7 Section 4 defines 'visual identification evidence'. This is significant because the safeguards of the formal procedure and special admissibility rules only apply to 'visual identification evidence'. The definition provides:

visual identification evidence means evidence that is—

- (a) an assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was present at or near a place where an act constituting direct or circumstantial evidence of the commission of an offence was done at, or about, the time the act was done; or
- (b) an account (whether oral or in writing) of an assertion of the kind described in paragraph (a).

- 1.8 The current definition focuses on whether the defendant was 'present or near' a place at the time of an offence, not whether the defendant was the person who committed a particular act. There have been issues about what happens when a defendant admits being 'present or near' but denies having committed the offence. Identifications of the defendant committing the offence have become known as 'observation evidence' and not always treated as falling within this definition. We return to this topic below, because we recommend this definition be expanded to include observation evidence.

Admissibility of visual identification evidence (Section 45)

- 1.9 Section 45 sets out special admissibility rules for visual identification evidence:

45 Admissibility of visual identification evidence

- (1) If a formal procedure is followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence or there was a good reason for not following a formal procedure, that evidence is admissible in a criminal proceeding unless the defendant proves on the balance of probabilities that the evidence is unreliable.
- (2) If a formal procedure is not followed by officers of an enforcement agency in obtaining visual identification evidence of a person alleged to have committed an offence and there was no good reason for not following a formal procedure, that evidence is inadmissible in a criminal proceeding unless the prosecution proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.
- (3) For the purposes of this section, a formal procedure is a procedure for obtaining visual identification evidence—
 - (a) that is observed as soon as practicable after the alleged offence is reported to an officer of an enforcement agency; and

- (b) in which the suspect is compared to no fewer than 7 other persons who are similar in appearance to the suspect; and
 - (c) in which no indication is given to the person making the identification as to who among the persons in the procedure is the suspect; and
 - (d) in which the person making the identification is informed that the suspect may or may not be among the persons in the procedure; and
 - (e) that is the subject of a written record of the procedure actually followed that is sworn to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
 - (f) that is the subject of a pictorial record of what the witness looked at that is prepared and certified to be true and complete by the officer who conducted the procedure and provided to the Judge and the defendant (but not the jury) at the hearing; and
 - (g) that complies with any further requirements provided for in regulations made under section 201.
- (4) The circumstances referred to in the following paragraphs are good reasons for not following a formal procedure:
- (a) a refusal of the suspect to take part in the procedure (that is, by refusing to take part in a parade or other procedure, or to permit a photograph or video record to be taken, where the enforcement agency does not already have a photo or a video record that shows a true likeness of that person):
 - (b) the singular appearance of the suspect (being of a nature that cannot be disguised so that the person is similar in appearance to those with whom the person is to be compared):
 - (c) a substantial change in the appearance of the suspect after the alleged offence occurred and before it was practical to hold a formal procedure:
 - (d) no officer involved in the investigation or the prosecution of the alleged offence could reasonably anticipate that identification would be an issue at the trial of the defendant:
 - (e) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency soon after the offence occurred and in the course of that officer's initial investigation:
 - (f) if an identification of a person alleged to have committed an offence has been made to an officer of an enforcement agency after a chance meeting between the person who made the identification and the person alleged to have committed the offence.

1.10 To summarise, the starting point is that, provided investigators follow a formal identification procedure that meets the requirements, identification evidence will be admissible in a criminal

proceeding unless the defendant proves (on the balance of probabilities) it is unreliable.²¹ The formal procedure can be carried out in different ways, such as a line-up or a photo montage, provided it meets the criteria in s 43(5),²² but in practice the most common formal identification procedure in New Zealand is the photo montage.²³

- 1.11 If a formal procedure has not been followed, visual identification evidence can still be admitted so long as there is a good reason for not having followed the procedure, or the prosecution proves (beyond reasonable doubt) that the circumstances in which it was made have produced a reliable identification.²⁴ We return to the criteria for the formal procedure in more detail below, because our first recommendation is that further criteria should be added to the list in light of recent developments in scientific knowledge about best practice for gathering eyewitness identification evidence.
- 1.12 The section then sets out a list of circumstances which are deemed to be good reasons for not following the formal procedure, for example, that the suspect has refused to participate in the procedure, or that their appearance is so singular that there are no similar persons to be compared. This is another topic we revisit, because we recommend closing this list so that it is a comprehensive list of good reasons for not following a formal procedure.

Section 126 – judicial warnings about identification evidence

- 1.13 Section 126 is a mandatory requirement for judges to provide jurors with a warning when the case against a defendant depends wholly or substantially on the correctness of an eyewitness identification.

126 Judicial warnings about identification evidence

- (1) In a criminal proceeding tried with a jury in which the case against the defendant depends wholly or substantially on the correctness of 1 or more visual or voice identifications of the defendant or any other person, the Judge must warn the jury of the special need for caution

²¹ For example, long delays between reporting an offence and a formal identification procedure might provide a basis for a defendant to argue that visual identification evidence is unreliable.

²² The formal procedure reflects the recommendations made by the Law Commission in the *Evidence* report, though two criteria were added: there must be a written record of the procedure in addition to a pictorial record, and it must comply with any regulations made under s201 of the Act. There are currently no relevant regulations regarding eyewitness identification. Refer to Other Issues in this Report for a discussion of s 201.

²³ In *Daniels v R* [2011] NZCA 234 at [11] the Court of Appeal noted 'The practical difficulties in parading at least seven identically or similarly dressed men are obvious. Parading, or obtaining full body photographs of, at least seven men of similar height and build poses similar difficulties. Those difficulties represent some of the reasons why identification parades are now rare in New Zealand. Although this Court has several times expressed a preference for visual identification, the reality is that identification from a photo montage is now the norm.' Expert feedback on this report noted that there are many risks associated with a live parade, while there are distinct advantages to a photo montage, one being that it can be done more promptly, and while a witness's memory is still fresh.

²⁴ The Law Commission noted that police particularly favoured this aspect of the proposal, because it would potentially allow the admission of visual identification evidence even when a formal procedure was not followed. Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at at 57 and [202].

before finding the defendant guilty in reliance on the correctness of any such identification.

(2) The warning need not be in any particular words but must—

(a) warn the jury that a mistaken identification can result in a serious miscarriage of justice; and

(b) alert the jury to the possibility that a mistaken witness may be convincing; and

(c) where there is more than 1 identification witness, refer to the possibility that all of them may be mistaken.

(3) If evidence of identity is given against the defendant in any criminal proceeding and the defendant disputes that evidence, the court must bear in mind the need for caution before convicting the defendant in reliance on the correctness of any such identification and, in particular, must bear in mind the possibility that the witness may be mistaken.

1.14 We make no recommendation in relation to judicial warnings, but we discuss some of the issues in case law in the Other Issues section below.

2. Current issues with eyewitness identification evidence

- 2.1 This section of the report examines the legal and scientific developments in the two decades since the passage of the Evidence Act.

Appeals concerning eyewitness identification evidence in New Zealand

- 2.2 We have identified fourteen cases between 1996 and 2026 where convictions have been quashed or set aside following some form of misidentification of suspects by eyewitnesses; inappropriate procedures used to obtain eyewitness identification evidence; or prosecutorial or counsel misconduct in relation to those procedures.²⁵ New Zealand has two pending appeals involving eyewitness misidentification: one is an appeal following referral from the Commission, the other is Scott Watson's appeal in the Supreme Court on the issue of his identification by the water taxi driver.²⁶
- 2.3 There have been a number of cases where courts have acknowledged that eyewitness identification evidence can be unreliable and heavily influenced by the methods used to obtain an identification.²⁷ In *R v Edmonds*, the Court of Appeal noted that identification evidence can be unreliable because of the distortions arising from the collection process, as well as the inherent unreliability of perception and memory.²⁸ The court acknowledged that much work has been done in recent years on attempting to improve investigation and collection processes and it noted that even with the use of properly constituted identification parades, an approximate error rate of twenty per cent still occurs.²⁹
- 2.4 The case law dealing with eyewitness identification evidence reflects various issues arising from the formal procedure and special admissibility rules under the Evidence Act.³⁰

²⁵ *X v R* [2024] NZHC 467; *Hall v R* [2022] NZSC 71; *Mukoko v R* [2018] NZCA 87; *Moulden v R* [2017] NZCA 433; *Pora v R* [2015] UKPC 9, [2016] NZLR 277; *Ake v R* [2015] NZCA 334; *Fukofuka v R* [2013] NZSC 77; *Redman v R* [2013] NZCA 672; *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725; *R v Farmer* [2007] NZCA 229; *R v Akatere* CA114/1, 16 October 2001; *R v Dougherty* [1996] 3 NZLR 257 (CA); *Tamihere v R* [2026] NZSC 22; *Chin v Police* [2024] NZHC 2646.

²⁶ *Watson v R* [2026] NZSC 15 (leave judgment).

²⁷ See, for example, *Watson v R* [2025] NZCA 455 at [618] and *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [15].

²⁸ *R v Edmonds* [2009] NZCA 303 at [35].

²⁹ At [36]; British Psychological Society *Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory* (2008) at [34].

³⁰ *Tamihere v R* [2026] NZSC 22; *Hall v R* [2022] NZSC 71; *Daniels v R* [2011] NZCA 234; *Chin v Police* [2024] NZHC 2646; *R v P* CA259/90, 13 December 1991; *Tufui v R* [2020] NZCA 568; *Richards v R* [2025] NZCA 291; *Mukoko v R* [2018] NZCA 87; *Skedgwell v New Zealand Police* [2017] NZHC 1085; *Watson v R* [2026] NZSC 15 (leave judgment); *R v Turaki* [2009] NZCA 310; *R v Edmonds* [2009] NZCA 303; *Tupuivao v R* [2023] NZCA 254; *R v Kingi* [2017] NZCA 449.

Identification processes are regularly challenged through the courts for a variety of reasons, including:

- Inadmissibility of evidence on the basis that the evidence is unreliable because some or all of the required steps in the procedure have not been followed, such as no similarity in appearance between the suspect and the fillers in the lineup,³¹ or intentional or unintentional communication by the lineup administrator to the witness.³²
- No good reason for not following a formal procedure.³³
- Factors internal to the witness, such as eyesight, sobriety, previous recognition.³⁴
- Lack of appropriate judicial warnings to the jury.³⁵
- Lack of confidence of the witness to substantiate a finding beyond reasonable doubt.³⁶

2.5 Some of these appeals were successful and others were not, but the volume of appeals is very significant in itself. Between 2013 and 2026, there have been well over twenty appeals involving challenges to eyewitness identification evidence under s 45 of the Evidence Act.³⁷

2.6 As evidenced by the recent comments from the Court of Appeal in *Watson v R* and the Supreme Court in *Tamihere v R*, awareness of the issues of eyewitness misidentification continues to grow, and the science underlying the reduction of risk in misidentifications is increasingly accepted by the courts.³⁸

2.7 The following cases illustrate some of the issues that can arise in connection with eyewitness identification evidence.

Case study: X v R

2.8 In late 2013, X was convicted of two charges of committing an indecent act with intent to

³¹ *Moulden v R* [2017] NZCA 433.

³² *X v R* [2024] NZHC 467.

³³ *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725.

³⁴ *Ratnam v R* [2019] NZCA 281.

³⁵ *Ake v R* [2015] NZCA 334.

³⁶ *R v Eruera* [2015] NZHC 2655.

³⁷ *Tamihere v R* [2026] NZSC 22; *Hall v R* [2022] NZSC 71; *Daniels v R* [2011] NZCA 234; *Chin v Police* [2024] NZHC 2646; *R v P* CA259/90, 13 December 1991; *Tufui v R* [2020] NZCA 568; *Richards v R* [2025] NZCA 291; *Mukoko v R* [2018] NZCA 87; *Skedgwell v New Zealand Police* [2017] NZHC 1085; *Watson v R* [2026] NZSC 15; *R v Turaki* [2009] NZCA 310; *R v Edmonds* [2009] NZCA 303; *Tupuivao v R* [2023] NZCA 254; *R v Kingi* [2017] NZCA 449; *Moulden v R* [2017] NZCA 433; *X v R* [2024] NZHC 467; *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725; *Ratnam v R* [2019] NZCA 281; *Ake v R* [2015] NZCA 33; *R v Eruera* [2015] NZHC 2655; *Keil v Police* [2017] NZCA 430; *Meaker v R* [2016] NZCA 236; *Stanley-Hunt v R* [2019] NZHC 2274; *Abubot v R* [2021] NZCA 641.

³⁸ *Watson v R* [2025] NZCA 455 and *Tamihere v R* [2026] NZSC 22.

offend.³⁹ The alleged offending occurred on two separate occasions, two months apart. The complainant was the same in both incidents.

- 2.9 Two identification procedures were held. The complainant did not identify X in the first procedure. The second procedure used the same photo of X, in the same position in the photo montage. The complainant identified X in the second procedure as the person she had seen on each occasion of the alleged offending.
- 2.10 X denied the alleged offences and contested the identification evidence from the outset. At a judge alone trial in 2015, the complainant said she had not identified X at the first procedure because she was not entirely certain. During cross examination the complainant referred to a 'further discussion' she had with police following the procedure for the first montage. Police evidence was that the formal identification procedure was routine. X was convicted on both charges.
- 2.11 Two unsuccessful appeals followed and in 2020 X applied to Te Kāhui for a review. In the ensuing investigation, Te Kāhui located a document on police file which showed vital disclosure had been withheld from both the Crown and the defence to the effect that the complainant only identified X after receiving an indication from an officer – after the first, unsuccessful identification procedure – that X was a suspect. Te Kāhui referred the matter to the High Court, where the appeal was successful and both convictions quashed.

Case study: Hall v R

- 2.12 While pre-dating the Evidence Act, the case of *Hall v R* illustrates the importance of the formal procedures and special admissibility rules for eyewitness identification evidence. These protections, later introduced by the Evidence Act, would be strengthened by our recommendations.
- 2.13 In September 1986, Mr Hall was found guilty by a jury of the 1985 murder of Arthur Easton and wounding of Brendon Easton. Mr Hall was not identified by the victim's sons as the offender. They described the offender as a six-foot tall, likely Māori, male. Mr Hall is Pākehā and is five foot seven inches tall. Mr Hall unsuccessfully appealed his conviction to the Court of Appeal in 1987. Twice in 1988 and once in 1993, Mr Hall applied under the Royal prerogative of mercy but all three applications were declined.
- 2.14 An independent witness, Mr Turner, saw the offender running away from near the crime scene

³⁹ *X v R* [2024] NZHC 467.

and described the person he saw as Māori, wearing a dark blue sweatshirt. Mr Turner said '[w]hen he turned around I could see that he was definitely [sic] dark skinned, he was not white'.⁴⁰ Once police suspected Mr Hall was the offender, they challenged Mr Turner on his evidence. Mr Turner's evidence remained unchanged. He stated: 'I am 100% sure he was a Māori. That was my immediate impression. I do not feel he was a Pākehā, not even a dark skinned one.'⁴¹

2.15 When Mr Turner's written statement was prepared by the police, it omitted mention of the ethnicity of the offender and referred to a blue sweatshirt, an exhibit that was not physically shown to Mr Turner. On the night the murder occurred Mr Hall was wearing a red sweatshirt.

2.16 Mr Turner was not asked to participate in a line-up or photo montage procedure to identify the suspect. He was excluded from a reconstruction experiment carried out by police. Mr Turner was not called by the police to give evidence at trial. Mr Turner's written statement was read to the jury. A blue sweatshirt belonging to Mr Hall was produced as an exhibit at trial. The sweatshirt had been purchased in December 1985, after the murders.

2.17 Two years after Mr Hall's trial, his defence counsel was provided with Mr Turner's original statements of evidence, describing the offender seen by Mr Turner as Māori. In February 2022, Mr Hall was again released on parole. He appealed to the Supreme Court. In June 2022, Mr Hall's convictions were quashed. He had spent 19 years in prison. The Supreme Court said:⁴²

It is clear that justice has seriously miscarried in this case. As to why that is so, the Crown accepts that such departures from accepted standards must be either the result of extreme incompetence or of a deliberate and wrongful strategy to secure conviction. The Crown also acknowledges that without these departures there was insufficient evidence either to charge or to convict Mr Hall.

In these circumstances, where evidence before the jury omitted a critical fact, disclosure obligations were not met, and key statements made by Mr Hall should not have been before the jury, it is in the interests of justice to direct verdicts of acquittal.

2.18 In one sense, these are examples of police and/or prosecutorial misconduct in the context of eyewitness identification. But equally, if our recommendations were adopted, we consider situations like these could well be avoided in future. In the case of X, if the formal procedure were double-blind, the administrator would not have been able to influence the witness without it being shown on record, and a contemporaneous confidence statement would have revealed the witness's lack of confidence following the first, unsuccessful identification. In the

⁴⁰ *Hall v R* [2022] NZSC 71 at [13].

⁴¹ At [14].

⁴² At [40]–[41].

case of *Hall*, Mr Turner's evidence would now be subject to the special admissibility rules for visual identification evidence, which would be further improved by the recommendations.

Subsequent developments in scientific knowledge and reform in other jurisdictions

- 2.19 Scientific knowledge concerning eyewitness evidence has continued to develop in the decades since the current rules for visual identification evidence were developed and enacted. Two reports are particularly significant, the lead author of both being Gary Wells, a renowned expert whose publications were referred to by the Law Commission in the original *Evidence* report.
- 2.20 The first report was published in 1998 by the American Psychology-Law Society, a division of the American Psychological Association, in its official journal, *Law and Human Behavior*.⁴³ Entitled 'Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads', the report was the work of a committee appointed to draft good practice guidelines. We refer to this report as the 1998 AP-LS Recommendations.
- 2.21 The report recommended four requirements for formal identification procedures intended to reduce the incidence of misidentifications: the procedure should be double-blind, the witness should receive specific pre-procedure instructions, fillers should look similar to the suspect, and a statement as to the witness's level of confidence in the identification should be taken at the time of the procedure.
- 2.22 Aspects of these recommendations were already a part of the Law Commission's recommendations. Section 45 as enacted complies with the recommendation to compare a suspect with people who look similar, and the aspect of the pre-procedure instruction that the suspect may or may not be among the persons included in the procedure. There is, however, no requirement for the procedure to be double-blind (and equally no requirement to inform the witness the procedure is double-blind), or for a confidence statement to be taken.
- 2.23 In 2020, the American Psychology-Law Society published the second report, 'Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence'.⁴⁴ This report was the result of work done by a committee appointed by the Society to update the recommendations in the 1998 report in light of subsequent developments in scientific knowledge, in particular the proliferation of detailed experimental studies on the impact of changes in procedure on the reliability of identifications, and large-scale field studies

⁴³ Gary L Wells and others "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads" (1998) 22 *Law and Human Behavior* 603 (the '**1998 AP-LS Recommendations**').

⁴⁴ Gary L Wells and others "Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence" (2020) 44 *Law and Human Behavior* 3 (the '**2020 AP-LS Recommendations**').

of historical line-ups. We refer to this as the 2020 AP-LS Recommendations. The report made nine recommendations:⁴⁵

1. Conduct a **pre-procedure interview** with the witness, documenting key aspects of the witness's recollections.
2. Ensure there are **evidence-based grounds to suspect** an individual is guilty before including the suspect in a procedure.
3. Hold **double-blind procedures** where neither the witness nor the administrator knows who the suspect is, or an equally effective method for preventing the administrator from inadvertently influencing the witness.
4. Ensure there is **only one suspect in each procedure**, with at least five appropriate fillers who do not make the suspect stand out in the procedure based upon physical appearances or other contextual factors such as clothing or background.
5. Provide specific and clear **pre-procedure instructions** for the witness.
6. Obtain an **immediate confidence statement** from the witness following the identification procedure.
7. **Video record** the entire process.
8. **Avoid repeated identification procedures** with the same witness and suspect.
9. **Avoid show-ups** wherever possible.⁴⁶

2.24 Of these more recent recommendations, s 45 of the Evidence Act only complies with the requirement to use similar fillers,⁴⁷ and some aspects of the pre-procedure instructions. (Section 45 requires a written report to be prepared, and sworn by the officer who conducted the procedure, but not a video recording.)

2.25 A review of other comparable jurisdictions highlights that many have implemented some changes to address the known risks that accompany eyewitness identification. A more detailed account is included in the appendix, but, in general, reforms have tended to coalesce around

⁴⁵ Recommendations (i), (iii), (v) and (vi) are the four original recommendations from the 1998 AP-LS Recommendations.

⁴⁶ Show-ups (also known as confrontations) are when a witness is shown the suspect in a one-on-one situation. In practice, show-ups are used very rarely in New Zealand and photo montages are the preferred formal procedure.

⁴⁷ Though it does require seven – two more than the recommended five.

five aspects of formal procedures:⁴⁸

- Only one suspect per procedure, with at least five fillers.
- Use of fillers that fit the eyewitness's description of the suspect.
- Double-blind administration.
- Pre-line up instructions.
- Collection of confidence statements.

⁴⁸ Gary L Wells "Eyewitness Identification" in Erik Luna (ed) *Reforming Criminal Justice: Volume 2, Policing* (Academy for Justice, Phoenix, 2017) 259 at 271.

3. Our recommendations

- 3.1 We make three recommendations for amendment to the Evidence Act to bring New Zealand law in line with current best practice, and to address what we see as current issues with the operation of the Act.

Recommendation 1: Add further requirements for formal identification procedures

- 3.2 The 2020 AP-LS Recommendations are an authoritative statement of current best practice for identification procedures. That report was recently considered by the Court of Appeal in 2025 in *Watson v R*.⁴⁹ Significantly, the usefulness of the recommendations in helping prevent eyewitness misidentification and the general scientific principles underpinning them was not the subject of challenge.⁵⁰ In our view, implementing these recommendations in New Zealand will further reduce the risk of miscarriages of justice caused by unreliable eyewitness identification evidence.
- 3.3 We received a range of feedback on this proposal from the justice sector stakeholders and experts who considered a draft version of this report. There was broad support for this recommendation, though some submitters questioned whether these changes were really necessary. Ultimately, we are satisfied that the 2020 AP-LS Guidelines reflect current best practice based on current scientific knowledge; section 45 was based on the best practice at the time of the Evidence report; and it makes sense to update that provision to reflect subsequent developments.
- 3.4 A significant issue was whether implementation of current best practice in eyewitness identification procedures should be achieved by amending the primary legislation, by regulation under s 201 of the Evidence Act, or be left up to police to address at the level of policy. Relatedly, there was a difference of view about the extent to which existing police procedure already incorporates aspects of the 2020 AP-LS Recommendations. We agree with submitters who stressed the importance of the issue merits amendment to primary legislation, and accordingly recommend amendment to s 45. In the end, our recommendation addresses the legislative framework in the Evidence Act, and it is a matter for police how to implement these requirements in practice and policy.

⁴⁹ *Watson v R* [2025] NZCA 455 at [713].

⁵⁰ At [612] and [706].

3.5 We recommend the inclusion of the following requirements from the 2020 AP-LS Recommendations that are not presently included in the formal identification procedure, as the law stands:⁵¹

- Pre-procedure interview with the witness.
- Evidence-based grounds for including suspect in procedure.
- Additional pre-procedure instructions to the witness.
- Double-blind administration of the procedure (or an equally effective method).
- Immediate confidence statement from witness.
- Video record of entire procedure.

3.6 We address each of these in turn.

Pre-procedure interview with witness

3.7 Before the formal procedure goes ahead, the investigator should interview the witness to:⁵²

- Ensure a detailed description of the suspect is obtained and to test the witness's memory prior to an identification taking place.
- Document their description of the suspect.
- Obtain their self-report of the viewing conditions during the offence.
- Document any claims of prior familiarity with the suspect.
- Instruct witnesses not to discuss the event with other co-witnesses and warn the witness against attempting to identify the suspect on their own (via the internet or through social media).

3.8 Studies suggest that investigators fail to accurately record key details of statements provided in interviews.⁵³ Recording interviews with witnesses thus provides an objective record of the

⁵¹ 2020 AP-LS Recommendations at 3 to 36.

⁵² At 9.

⁵³ Ronald P Fisher and R Edward Geiselman *Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview* (Charles C Thomas, Springfield (Ill), 1992); Amina Memon, Christian A Meissner and Joanne Fraser "The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years" (2010) 16 *Psychology, Public Policy, and Law* 340. James H Smith-Spark, Joshua Bartimus and Rachel Wilcock "Mental Time Travel Ability and the Mental Reinstatement of Context for crime witnesses" (2017) 48 *Consciousness and Cognition* 1; Neil Brewer and others

information elicited. This excludes omissions or errors that may be introduced via an investigator's recall of the interview.⁵⁴ Evidence arising from the pre-procedure interview may also facilitate an investigator's efforts to locate a suspect.⁵⁵

- 3.9 The commentary accompanying this part of the 2020 AP-LS Recommendations also notes that evidence-based interviewing protocols, such as the cognitive interview, have been developed to avoid leading and suggestive questioning, and enhance witness reporting by facilitating the retrieval of information from memory. Police might give consideration to incorporating these protocols in existing instructions for interviews.⁵⁶

Evidence-based grounds for including suspect in procedure

- 3.10 Evidence-based grounds should exist to suspect that an individual is guilty of the specific offence before including that individual in an identification procedure. There should be some evidence that provides reasonable grounds for suspicion, such as a unique fit to a specific description given by an eyewitness.
- 3.11 Conducting lineups in the absence of evidence-based reasons for suspicion is a risk factor for mistaken identification.⁵⁷ A mere hunch is not evidence-based suspicion. Fitting a general description to a suspect is not considered evidence-based suspicion as general descriptions can be applied to large numbers of people. By way of example, some scenarios that would not, in our view, provide reasonable grounds for suspicion are:
- A search of police records reveals that a suspect was convicted of a similar crime in the same jurisdiction, has been released from prison and is now living in the neighbourhood where the crime was committed.
 - There are multiple witnesses to a crime and the identification of the suspect made by the first witness is used to establish evidence-based suspicion for the remaining witnesses.
- 3.12 One way to implement this recommendation would be to require investigating officers to present a proposal for conducting a formal procedure to a supervisor for approval. As part of this process, the investigator should be able to identify the evidential basis for suspicion.⁵⁸

"Interviewing Witnesses: Eliciting Coarse-Grain Information" (2018) 42 Law and Human Behavior 458.

⁵⁴ 2020 AP-LS Recommendations at 10.

⁵⁵ At 9–11.

⁵⁶ 'Police Instructions – Investigative interviewing witness guide' (undated) at [5/37] to [3/37]; see also 'Police Policy and Procedural Guidelines – Electronic Recording of Police Interviews' (undated) at pages 1–17.

⁵⁷ 2020 AP-LS Recommendations at 11.

⁵⁸ At 11–13.

Pre-procedure instructions to witness

- 3.13 The following written instructions should be provided to the eyewitness before the procedure is conducted:
- a. the procedure administrator does not know whether the suspect is in the procedure; and if the suspect is in the procedure, does not know who the suspect is;
 - b. the suspect might not be in the procedure at all, so the correct answer might be “not present” or “none of these”;
 - c. if they feel unable to decide, they have the option of responding “don’t know”;
 - d. after deciding they will be asked to state how confident they are in that decision; and
 - e. the investigation will continue even if no identification is made.
- 3.14 This recommendation addresses the concern that if witnesses approach an identification with the mistaken belief that the suspect must be present in the procedure, the witness may be predisposed toward making a positive identification. It is important to remind witnesses that they do not have to choose anyone and that the suspect may or may not be present in the procedure. A large percentage of witnesses think the suspect is present and it is their task to identify him or her.⁵⁹
- 3.15 The police do not currently provide a written set of instructions to eyewitnesses. This recommendation could be implemented by having pro-forma instructions to be provided to identification witnesses before the formal procedure is conducted, as well as a script for the administrator. This would allow the administrator to work through the instructions with the witness to ensure that the witness understands, while avoiding remarks that could inadvertently influence the witness, for example, saying ‘tell us if you recognise anyone’.
- 3.16 Formal procedures should be conducted using a double-blind procedure, where neither the witness nor the administrator are told whether the suspect is in the procedure, or who the suspect is; or an equally effective method of preventing the administrator inadvertently influencing the witness.
- 3.17 The current approach of single-blind testing risks the administrator communicating to the

⁵⁹ Tim Valentine and Ryan J Fitzgerald “Identifying the Culprit: An International Perspective on the National Academy of Sciences Report on Eyewitness Identification Evidence” (2016) 30 Applied Cognitive Psychology 135; 2020 AP-LS Recommendations at 20-21.

witness the identity of the suspect through verbal or non-verbal behaviour, intentional or unintentional.⁶⁰ Accordingly, experts consider double-blind procedures the single most important part of a reliable identification because if the administrator does not know who the suspect is, they cannot contaminate the witness's evidence.⁶¹

3.18 Concern about procedure administrators influencing witnesses is long-standing. In the 1999 *Evidence* report, the Law Commission noted that, for this reason, it considered proposing that the investigating officer not be involved in the identification procedure. Submitters said this requirement was undesirable because an attending officer would need to know who the suspect was for security reasons, and the recommendation did not proceed.⁶² However, now that photo montages are the main form of identification procedure used in New Zealand, security during the procedure is no longer a pressing concern.

3.19 Another issue raised about this recommendation during our inquiry was the resource implications of double-blind procedures, especially in smaller communities with only a few police officers where every officer may know the identity of the suspect.⁶³ Fortunately, there are technological solutions to this problem. Instead of photo montages, it is possible to use a laptop computer with software that delivers pre-procedure instructions, randomises and presents the photo montage, records any identification decision and collects a confidence statement at the end of the procedure. The witness can self-administer the procedure with no one else present in the room. This form of procedure can also be videoed.⁶⁴ This approach would meet our recommendation, because it would be an 'equally effective method' of preventing the administrator from inadvertently influencing the witness.

Immediate confidence statement

3.20 The administrator should take a statement from the witness as to their confidence in the identification immediately after the procedure. A confidence statement should be recorded with only the blinded administrator in the room and prior to any other non-blind individuals being allowed in. The statement should be recorded regardless of whether the identification is positive, negative or the witness is unsure.

3.21 The rationale for this recommendation is that the confidence of a witness can dramatically shift

⁶⁰ 2020 AP-LS Recommendations at 14 to 17; see also Tim Valentine and Ryan J Fitzgerald "Identifying the Culprit: An International Perspective on the National Academy of Sciences Report on Eyewitness Identification Evidence" (2016) 30 *Applied Cognitive Psychology* 135 at 136.

⁶¹ Gary L Wells "Eyewitness Identification" in Erik Luna (ed) *Reforming Criminal Justice: Volume 2, Policing* (Academy for Justice, Phoenix, 2017) 259 at 266.

⁶² Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at [206].

⁶³ 2020 AP-LS Recommendations at 16.

⁶⁴ At 16.

from low at the time of identification to high at the time of a trial, because of the confirmatory effect of subsequent events, such as the charging of the person identified. This phenomenon makes delayed confidence statements poor evidence as to accuracy.⁶⁵ Having a good record of the witness's confidence at the time of the formal procedure can guard against the risk of overstatement of confidence at the time of trial.

Video record of entire procedure

- 3.22 A video record should be made of the entire formal procedure, from the pre-procedure interview through to the final confidence statement from the witness.⁶⁶ Presenting a video record of the procedure to a judge and/or jury will offer assurances that a full and correct procedure has been followed and the evidence being presented can be relied upon. It will also provide a level of protection for police. Because police routinely make video recordings of interviews, they have access to the appropriate technology to implement this recommendation, as well as detailed policy and procedure concerning video records of interviews.⁶⁷

Recommendation 2: Expand the definition of visual identification evidence

- 3.23 Courts have taken various approaches to the issue of what kind of identification evidence comes within the definition of 'visual identification evidence' in s 4 of the Evidence Act. The application of this definition is important because only evidence that meets that definition is subject to safeguards of the formal procedure and special admissibility rules.⁶⁸

- 3.24 The following kinds of identification evidence have been the source of difficulty:

- **Circumstantial identification evidence** (where a general description is given but not an identification);⁶⁹
- **Recognition evidence** (where the witness purports to identify the offender as someone with whose appearance the witness is already acquainted);⁷⁰

⁶⁵ Tim Valentine and Ryan J Fitzgerald "Identifying the Culprit: An International Perspective on the National Academy of Sciences Report on Eyewitness Identification Evidence" (2016) 30 Applied Cognitive Psychology 135 at 136; see also Wells et al 2020 at 21–23.

⁶⁶ 2020 AP-LS Recommendations at 23–24; see also Tim Valentine and Ryan J Fitzgerald "Identifying the Culprit: An International Perspective on the National Academy of Sciences Report on Eyewitness Identification Evidence" (2016) 30 Applied Cognitive Psychology 135 at 136.

⁶⁷ 'Policy and Procedure Guideline for Electronic Recording of Police Interviews'. The Evidence (Video Records and Very Young Children's Evidence) Regulations 2023 also provide guidance regarding video-recorded evidence.

⁶⁸ See discussion above at [1.8].

⁶⁹ *R v Ryan* [2021] NZCA 147 at [34](a); *Higgins v R* [2017] NZCA 486 at [12]. Circumstantial evidence is not visual identification evidence because no identification is formally made.

⁷⁰ *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [16]. Recognition and resemblance evidence have been held to come within the meaning of visual identification evidence: *R v Turaki* [2009] NZCA 310 at [62] and [63]. But, in some

- **Resemblance evidence** (another form of description evidence, where the witness says the suspect resembles someone but does not make a formal identification);⁷¹
- **Observation evidence** (evidence about the actions of the suspect when the presence of the suspect at the scene of the offence is not disputed, but the alleged actions of the suspect are disputed).⁷²

3.25 Of these, observation evidence is a particular source of ongoing uncertainty. Early decisions held that observation evidence falls outside the definition of visual identification evidence.⁷³ But more recently, in *Pink v R*, the Court of Appeal acknowledged that there are difficulties with the definition and there is no 'bright line distinction' between visual identification evidence and observation evidence.⁷⁴ In 2023, two further cases involving observation evidence were heard by the Court of Appeal, both of which supported the approach taken in *Pink*.⁷⁵

3.26 In its third review of the Evidence Act in 2024, the Law Commission set out its concerns about the uncertainty arising from the inclusion of observation evidence in the definition of visual identification evidence, and that the current state of the law may not adequately protect against misidentifications. Accordingly, it recommended that the definition be clarified to include observation evidence, so that the safeguards for identification evidence would apply.⁷⁶

3.27 Implementing this recommendation would provide clarity and address the risks associated with misidentification of the defendant where a person asserts they saw the defendant performing an act constituting direct or circumstantial evidence of the commission of an offence.

3.28 The Law Commission noted that implementation of the recommendation may result in an increased administrative burden for police and the courts, but it considered this was preferable to no formal identification procedure being carried out when there is a risk of misidentification.⁷⁷

circumstances, the fact that the evidence is recognition and resemblance evidence has been considered a good reason for not following a formal procedure: *R v Ryan* [2021] NZCA 147 at [42].

⁷¹ *R v Ryan* [2021] NZCA 147 at [34](b); *R v Turaki* [2009] NZCA 310 at [58].

⁷² *R v Howard* [2017] NZCA 159 at [26]; *R v Turaki* [2009] NZCA 310 at [92]–[93]; *R v Edmonds* [2009] NZCA 303 at [42].

⁷³ *R v Turaki* [2009] NZCA 310 at [42] and *R v Edmonds* [2009] NZCA 303 at [65].

⁷⁴ *Pink v R* [2022] NZCA 306 at [59].

⁷⁵ *Sheed v R* [2023] NZCA 488 and *Tupuivao v R* [2023] NZCA 254.

⁷⁶ Law Commission *The Third Review of the Evidence Act 2006* (NZLC R148, 2024) at [11.1] and 245. The recommendation was to insert a new paragraph in the definition of "visual identification evidence" in section 4(1) referring to evidence that is an "assertion by a person, based wholly or partly on what that person saw, to the effect that a defendant was the person observed performing an act constituting direct or circumstantial evidence of the commission of an offence."

⁷⁷ At [11.24].

3.29 We endorse the Law Commission’s recommendation. We note that the recommendation was supported by eight of the eleven contributors that provided feedback on this report.⁷⁸

Recommendation 3: Close the list of ‘good reasons’ for not following formal identification procedures

3.30 In its *Evidence* report, the Law Commission proposed that the list of good reasons in s 45(4) should be a closed list because the existence of a good reason would assure admission, and there remained a pathway for evidence to be admitted if it could be proved reliable.⁷⁹ The Law Commission received opposition to the list being made exhaustive and ultimately the list of good reasons was not closed.

3.31 The list of good reasons in s 45(4) for not following a formal procedure is already extensive,⁸⁰ but because it is not closed, the list has been extended through the case law. Additional good reasons have been held to include where a formal procedure was of no useful purpose;⁸¹ when visual identification evidence takes the form of recognition by an eyewitness;⁸² and practical utility.⁸³

3.32 We agree with the Law Commission’s initial proposal, and recommend that the list be closed. There was a difference of opinion among submitters on this proposal. Those opposed were unconvinced there was a problem in this area, or were concerned to preserve scope for the courts to identify new good reasons as they arise.

3.33 In our view, s 45(4) already provides an extensive list of good reasons for a formal identification procedure not being followed. The purpose of the formal procedure is to reduce the known risks that are associated with eyewitness identification evidence. The list of good reasons affords the prosecution a variety of alternative avenues for not carrying out a formal procedure. Even if there are no good reasons, identification evidence is still admissible provided the prosecution can prove that the circumstances in which the identification was made has produced a reliable identification.

3.34 If the courts’ ability to enlarge the list of good reasons under s45(4) is retained, this has the

⁷⁸ We note that the submissions opposed made substantially the same points that were made in opposition to the Law Commission’s recommendation. See Law Commission *The Third Review of the Evidence Act 2006* (NZLC R148, 2024) at [11.10]–[11.14].

⁷⁹ Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at 60.

⁸⁰ See provision above at [1.9].

⁸¹ *R v Edmonds* [2009] 303 NZCA [78].

⁸² *Harney v Police* [2011] NZSC 109, [2011] 1 NZLR 725 at [26].

⁸³ *R v Ryan* [2021] NZCA 147 at [42].

potential to circumvent the formal identification procedure mandated by Parliament. The Court of Appeal has noted that if the list is extended too lightly, the remedial purpose of the formal procedure will be undermined.⁸⁴

- 3.35 The Evidence Act was enacted to codify the law of evidence, improve clarity, ensure fairness and make court procedures more efficient and accessible and the continued expansion of the list of good reasons risks undermining that intention. Closing the list will – in cases where the formal procedure has not been followed – focus the question of admissibility on the specific reliability of the identification, rather than an assumed reliability based on an additional ‘good reason’, which tend to be general. Accordingly, we recommend the list be closed.

⁸⁴ *R v Ryan* [2021] NZCA 147 at [41].

4. Other issues

- 4.1 During the research and preparation of this Report, we identified additional issues concerning eyewitness identification procedures.

Section 126 – judicial warnings

- 4.2 Section 126 of the Evidence Act provides for judicial warnings to be given to jurors when the case against the defendant depends ‘wholly or substantially’ on the correctness of any visual or voice identification evidence. If a warning is required and a judge fails to give that warning to the jury, that constitutes an error of law.⁸⁵
- 4.3 The courts have interpreted this to mean judicial warnings are necessary in cases where the identification is disputed by the defendant. If identification is not considered to be an issue or is not found to be visual or voice identification evidence, no warning is required.⁸⁶ The case law underpinning when such warnings are to be given can be confusing. Some courts have held that recognition evidence requires a warning, but that resemblance, description, circumstantial and observation evidence does not.⁸⁷ Other courts have held that description evidence can require a warning.⁸⁸ As submitted by the Crown in *E (CA113/09)*:⁸⁹

[Section 126] is awkwardly worded for it mandates a judicial direction in accordance with the provision’s terms whenever ‘the case against the defendant depends wholly or substantially on the correctness of one or more visual identifications of the defendant or any other person’. **In a sense most criminal prosecutions ultimately rest upon such a proposition.**

- 4.4 The frequency of appeals regarding the giving of judicial warnings indicates that there is clearly an issue about the circumstances in which a warning should be given and the wording of such warnings.⁹⁰

⁸⁵ *R v Turaki* [2008] NZCA 310 at [87].

⁸⁶ *Tamahaga v R* [2023] NZCA 599 at [49].

⁸⁷ *R v Turaki* [2009] NZCA 310.

⁸⁸ *Ponga v R* [2014] NZCA 496 and *R v Turaki* [2009] NZCA 310.

⁸⁹ *E (CA113/09) v R (No 2)* [2010] NZCA 280 at [60] (emphasis added).

⁹⁰ *R v P* (1991) 8 CRNZ 33 (CA); *Tamahaga v R* [2023] NZCA 599; *B v R* [2025] NZCA 285; *R v Alleston* [2009] NZCA 205; *R v Adams* [2008] NZCA 171; *R v Henry* [2008] NZCA 292; *Elia v R* [2011] NZCA 381; *R v Hohepa* [2008] NZCA 316; *R v Peato* [2009] NZCA 333; *Pritchard v R* [2010] NZCA 403; *Kepa v R* [2022] NZCA 369; *Pink v R* [2022] NZCA 306; *Witehira v R* [2011] NZCA 658; *Fukofuka v R* [2013] NZSC 77; *Mataroa v R* [2020] NZCA 382; *R v Turaki* [2009] NZCA 310; *J v R* [2024] NZCA 605.

- 4.5 We considered recommending that judicial warnings under s 126 should be mandatory in any situation involving eyewitness identification evidence. Following feedback from submitters, however, it became apparent that if our recommendation about expanding the definition of visual identification evidence to include observation evidence is implemented, this would assist with clarifying when judicial warnings are required. For this reason, we have decided not to make a recommendation concerning s 126.

Section 201 – regulations for formal procedure

- 4.6 The Evidence Act allows for regulations to prescribe additional requirements for formal identification procedures under s 45(3).⁹¹ We considered recommending regulations as an alternative means of implementing change to the formal procedure, but a number of contributors submitted their preference for changes to be made to the primary legislation only, given the importance of eyewitness identification evidence and the known and acknowledged risks of miscarriages of justice that such evidence can cause. We accept this point and have decided not to proceed with the recommendation, but note that regulations are a potential tool for making changes to the requirements for formal identification procedures.

Social media and internet identifications

- 4.7 Since the passage of the Evidence Act in 2006 there have been significant developments in internet technology and social media. As police noted during this inquiry, social media plays an increasingly important role in identifying individuals during investigations. The difficulty these identifications pose for the criminal justice system is that these amount to repeated informal identifications. Consultation with experts on this matter suggests that there may be significant problems introduced by this form of repeated testing. In our view, the potential impact of repeated identifications is something courts should be alert to when assessing and directing juries on identification evidence where a social media identification has taken place. Longer term, we think this matter requires further attention during the next review of the Evidence Act.

Police procedure

- 4.8 Police procedure is an important part of the eyewitness identification process.⁹² Our

⁹¹ Under s 45(3)(g), a formal identification procedure must comply with any relevant regulations made under s 201, which authorises the making of regulations to address various matters.

⁹² In the course of this inquiry police provided us with, and we considered, a number of current and historical documents. Among the current documents were New Zealand Police 'Identification of offenders' (Police Instructions, 2019); 'Electronic Recording of Police Interviews' (Policy and Procedural Guidelines, undated); 'Identification of Offenders' *Police Manual*; New Zealand Police 'CIB009: Evidence' (CIB Module); 'Identifying the suspect', 'RS01 ID Suspect', and 'ID Suspect

recommendations will likely require some changes to existing procedure. Further, we received feedback from one of the experts that there should be a substantive revision of all police procedural manuals. There is a substantial literature on procedure to reduce the known risks associated with eyewitness identification.⁹³ Other countries with similar law have already incorporated many of the recommendations into their procedures.⁹⁴ We would encourage Police to consider what changes to procedure might be appropriate in light of these developments.

plan' (Recruit training material); and 'Visual Identification Evidence Webinar Resource Booklet' (Prosecutor training, May 2022).

⁹³ Margaret Bull Kovera and Andrew J Evelo "Improving Eyewitness-Identification Evidence Through Double-Blind Lineup Administration" (2020) 29 *Current Directions in Psychological Science* 563; Neil Brewer and Nathan Weber "Eyewitness Confidence and Latency: Indices of Memory Processes Not Just Markers of Accuracy" (2008) 22 *Applied Cognitive Psychology* 827; *Watson v R* [2025] NZCA 455 at [713]–[714]; Police Scotland *Identification Procedures National Guidance* (2021) <<https://www.scotland.police.uk/access-to-information/policies-and-procedures/guidance-documents/guidance-documents-g-i/>>; Tim Valentine and Ryan J Fitzgerald "Identifying the Culprit: An International Perspective on the National Academy of Sciences Report on Eyewitness Identification Evidence" (2016) 30 *Applied Cognitive Psychology* 135 at 135–136.

⁹⁴ See appendix.

5. Summary of inquiry process

- 5.1 Our work on the issue of eyewitness identification evidence began in late 2022, with the preparation of initial papers on the topic which were circulated to justice sector stakeholders for feedback. After considering that initial round of feedback, we decided in August 2023 to conduct an inquiry into the issue under s 12 of the Act. The scope of that inquiry included risks relating to eyewitness identification, identification of best practice, existing police practice, the operation of s 45 of the Evidence Act and judicial directions on eyewitness evidence.
- 5.2 In late 2023 and early 2024, an expert reference group was formed, and the inquiry was publicly announced in March 2024. As part of our inquiry, we undertook an extensive review of the developments in the relevant academic literature, as well as the post-Evidence Act case law in New Zealand. We also engaged with New Zealand Police about current practice and procedure, and were provided with relevant policies and other documents. This engagement was of assistance in understanding how the legislation is working in practice, and formulating our recommendations. We particularly benefited from the assistance of Professor Neil Brewer in analysing this material.
- 5.3 In October 2025, we decided to refine the scope of the inquiry to focus on the legislative requirements for formal identification procedures, and in early 2026, we circulated a draft version of our report with justice sector stakeholders and experts. We received a range of detailed feedback on our initial proposals, including from Colin Carruthers KC, Crown Law, Te Aka Matua o te Ture | Law Commission, the Ministry of Justice, New Zealand Police, Nigel Hampton KC, and the Public Defence Service.
- 5.4 We particularly want to acknowledge the various contributions at different stages from Professor Neil Brewer (Flinders University), Associate Professor Carrie Leonetti (Waipapa Taumata Rau University of Auckland), Professor Nessa Lynch (University College Cork, Ireland and Te Herenga Waka Victoria University of Wellington) and Professor Yvette Tinsley (Te Herenga Waka Victoria University of Wellington), as well as those who participated in the expert reference group.
- 5.5 The contributions of experts and submitters have been of real assistance in refining our recommendations and we are grateful for the time and effort of all who have assisted in this work, including previous Commissioners and kaimahi.

6. Appendix: Review of cognate jurisdictions

Australia

- 6.1 Following the 1998 AP-LS Recommendations, the New South Wales Police incorporated three of the recommendations into the New South Wales Police Force Handbook.⁹⁵ New South Wales has implemented double-blind procedures, matching suspects to verbal descriptions, detailed pre-lineup instructions, pre-lineup interviews and video and audio recording of the process. Queensland and Tasmania also video record eyewitness identification procedures.⁹⁶
- 6.2 Australian Federal Police have issued a guideline which sets out the policies and procedures to lawfully collect admissible suspect identification evidence from witnesses per the Crimes Act 1900 (ACT) and the Evidence Act 1995 (Cth).⁹⁷ Administrators of photo lineups are not allowed to be involved in the investigation, and an audio and video record of the witness identification procedure is to be taken. The photo boards and the recordings are to be treated as exhibits.

England and Wales

- 6.3 In England and Wales, specialist staff are trained to run identification procedures. Video recording is widely used in specialist identification facilities and a typical set up is to use four cameras to record the lineup composition, presentation, the witness and the suspect's lawyer.⁹⁸

Canada

- 6.4 The Government of Canada set up a committee to establish a working group to report on the prevention of miscarriages of justice which reported in 2021. Chapter 5 of that report relates to eyewitness identification.⁹⁹ The summary of recommendations contained in that report include double-blind procedures for lineups; pre-lineup instructions for the witness; care to avoid cross contamination between witnesses and; when it is practical, recording of the

⁹⁵ Hayley J Cullen, Lianne Adam and Celine van Golde "Evidence-based policing in Australia: an examination of the appropriateness and transparency of lineup identification and investigative interviewing practices" (2021) 23 International Journal of Police Science & Management 85 at 87.

⁹⁶ Because each Australian State has different laws, the procedures used vary from state to state.

⁹⁷ Australian Federal Police *Better Practice Guide on Identification Evidence* (2017).

⁹⁸ Tim Valentine and Ryan J Fitzgerald "Identifying the Culprit: An International Perspective on the National Academy of Sciences Report on Eyewitness Identification Evidence" (2016) 30 Applied Cognitive Psychology 135. In December 2023 the UK government, via the Home Office, issued a revised code of practice concerning identification of persons in criminal investigations, and keeping accurate and reliable records: Home Office *PACE Code D 2023: Code of Practice for the Exercise by Police Officers of Statutory Powers to Identify Persons* (December 2023).

⁹⁹ FPT Heads of Prosecutions Committee Working Group *Report on the Prevention of Miscarriages of Justice* (Government of Canada, 2021) ch 5 "Eyewitness Identification and Testimony".

procedure via audio and/or video.

- 6.5 In 2023, the Law Reform Commission of Canada proposed guidelines that establish uniform rules for obtaining eyewitness descriptions, conducting double-blind lineups and police officers are encouraged to undergo training to acquire techniques that enhance the reliability of witness statements.¹⁰⁰

Scotland

- 6.6 Police Scotland has published national guidance on identification procedures.¹⁰¹ The preferred visual identification procedure in Scotland is a video identification parade. The other available options are photo boards, identification parades, group identification, confrontation identification, voice identification, facial imaging and informal identification. The choice of procedure is up to the officer in charge of the investigation who is required to consult the officer who will be conducting the parade, to determine which procedure is the most suitable in a particular case. The officer conducting the parade should ensure appropriate arrangements are in place to prevent witnesses from communicating with each other both before and after the parade. No one involved in the investigation of the suspect is permitted to view the material prior to it being shown to any witnesses. No discussion is allowed between police officers, other trained staff and witnesses about the composition of images. Any deviation from the standard video identification parade forms must be amended to show exactly what statement was made or question asked. Arrangements must be made for all relevant material containing sets of images used for video identification to be kept securely and their movement accounted for and recorded.

New Jersey, United States

- 6.7 In 2001, the New Jersey office of the Attorney General issued guidelines for formal identification procedures which incorporated the 1998 AP-LS Recommendations. These guidelines were updated in 2021.¹⁰² In summary, the guidelines recommend double-blind administration, providing viewing instructions to the witness, recording of any identification

¹⁰⁰ Public Prosecution Service of Canada *The Path to Justice: Preventing Wrongful Convictions* ch 5 "Eyewitness Identification and Testimony"; National Judicial Institute "11.24 Eyewitness Identification Evidence" (June 2023) <<https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/final-instructions/rules-of-evidence/eyewitness-identification-evidence/>>; Neil Brooks *Pretrial Eyewitness Identification Procedures: Police Guidelines* (Law Reform Commission of Canada, Study Paper, Criminal Law Series, Ottawa, 1983).

¹⁰¹ Police Scotland *Identification Procedures National Guidance* (2021) <<https://www.scotland.police.uk/access-to-information/policies-and-procedures/guidance-documents/guidance-documents-g-i/>>.

¹⁰² New Jersey Office of the Attorney General *Guidelines for Preparing and Conducting Out-of-Court Eyewitness Identifications* (9 February 2021) New Jersey State Library Digital Repository <<https://dspace.njstatelib.org/items/b1051b61-2450-4b15-adfc-26277c96083d>>.

results, obtaining a statement of certainty from the witness, and the recording, in video and audio format, the identification procedure.

- 6.8 Many other states in the United States now follow the same basic elements in carrying out their eyewitness identification procedures.¹⁰³

¹⁰³ Gary L Wells “Eyewitness Identification” in Erik Luna (ed) *Reforming Criminal Justice: Volume 2, Policing* (Academy for Justice, Phoenix, 2017) at 271–272; see also *Watson v R* [2025] NZCA 455 at [714].