

**Confessions for Cash: The Consequences of Using Incentivised Witnesses in New
Zealand Criminal Cases**

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Abstract

Several research studies have examined criminal cases involving incentivised witnesses and the potential for this source of information to contribute to wrongful convictions. These studies focus primarily on witnesses incentivised through a reduction in their criminal charges or prison sentence, such as accomplices and prison informants. However, there is a shortage of literature regarding financially incentivised witnesses and a lack of comparative research on incentivised witnesses overall as well as the legislation governing this type of evidence. This comparative study seeks to analyse all types of incentivised witnesses in the United States of America (US) and Aotearoa New Zealand (NZ) to discuss how the use of incentivised witnesses may contribute to miscarriages of justice in New Zealand, determine whether the use of incentivised witnesses is ethical, and examine whether the current legislation regarding incentivised witnesses is comprehensive enough. The research defines the term *incentivised witnesses* and discusses how they may contribute to miscarriages of justice. Outlining the history of judicial policy transfer from the US to New Zealand and summarising current legislation in place provides context to the issue. This research analyses secondary sources, including existing academic literature, legislation, court records, and news media, focusing on case studies. The thesis concludes with recommendations of possible changes to legislation in New Zealand regarding the use of incentivised witness evidence, informed by existing research and legislation changes in the US.

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Attestation of Authorship

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

Signed: _____

Date: 25/09/2023

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1. Introduction

Research regarding incentivised witnesses and their contribution to miscarriages of justice have largely focussed on prison informant evidence and police informants (Allen, 2020; Anderson, 2021; Fessinger, Bornstein, Neuschatz, DeLoach, Hillgartner, Wetmore, & Douglass, 2020; Gebert, 1979; High, 2021; Key, Neuschatz, Bornstein, Wetmore, Luecht, Dellapaolera, & Quinlivan, 2017; Neuschatz, DeLoach, Hillgartner, Fessinger, Wetmore, Douglass, Bornstein, & Le Grand, 2020; Surratt, 2018; Sutterer, 2022; Wetmore, Golding, Tucker, & Neuschatz, 2022; Wetmore, Neuschatz, Fessinger, Bornstein, & Golding, 2020). This study is unique in that it takes a comparative approach to the topic of all types of incentivised witnesses. The proposed research analyses the use of incentivised witness evidence in the United States of America (US) and New Zealand (NZ) by using comparative analysis as a method. A key aspect of this thesis defines what incentivised witnesses are and how they may contribute to miscarriages of justice, focusing on case studies. This research outlines the history of judicial policy transfer from the US to New Zealand and summarises current legislation and policy. Recommendations for legislative and policy change in New Zealand regarding the use of incentivised witnesses, informed by legislative reform in parts of the US and other jurisdictions, concludes the thesis.

For clarity, this research refers to informants who have provided information *after* they have been made aware that a reward or other incentive can be claimed, or who pre-emptively seek a reward in exchange for providing information. This research does not involve members of the community who proactively report crimes or provide statements about what they have seen with no inducements.

1.1 Research questions

Studies have identified that certain types of incentivised witness evidence contribute to miscarriages of justice (Allen, 2020; Fessinger et al., 2020; Gebert, 1979; Key et al., 2017; Neuschatz, Lawson, Swanner, & Meissner, 2008; Neuschatz et al., 2021; Neuschatz, Wilkinson, Goodsell, Wetmore, Quinlivan, & Jones, 2012; Surratt, 2018;

Sutterer, 2022; Wetmore et al., 2022; Wetmore et al., 2020). However, only some of this research has been completed in the New Zealand context, and these studies encompass few varieties of incentivised witnesses, preferring to focus on only one type of incentivised witness at a time, such as prison informants (Anderson, 2021; High, 2021). In comparison, this research will define all types of witnesses who provide evidence in exchange for some type of leniency or other benefit. The present research seeks to answer the following questions:

1. Is the use of incentivised witnesses in criminal cases in New Zealand ethical;
2. Does the use of incentivised witness evidence in New Zealand criminal cases contribute to miscarriages of justice; and
3. Is the current New Zealand legislation and judicial warnings regarding the use of incentivised witness evidence sufficient, to avoid miscarriages of justice?

1.2 Structure of the thesis

This work will consist of nine overarching chapters that comprise the thesis. Chapter one serves as an introduction to provide background knowledge and outline the significance of the research. It discusses how the research will be conducted and gives an overview of the structure of the thesis, including the research questions.

Chapter two is a comprehensive literature review, designed to synthesise and identify gaps in academic discussions regarding using incentivised witnesses in the US and New Zealand. It explores the literature available regarding the definition of an “incentivised witness” and briefly outlines what can be considered an incentive. The literature review discusses policy transfer, jury psychology, changes to legislation regarding incentivised witness evidence, and explains what a miscarriage of justice is in detail.

Chapter three outlines the research design and methodology employed in this research. It discusses the methods used to collect the data, including legislation, court cases, and information obtained directly from Police and Crown Law. It also discusses the limitations of relying on secondary data. These constraints impacted the study by depending on

Official Information Act (OIA) requests and what information the police are willing to disclose to the public regarding obtaining and using this type of evidence.

Chapter four is an analysis chapter. This chapter defines incentivised witnesses and the benefits they may receive for providing evidence. It concludes by raising the issue of disincentives and touches on witness coercion by police.

Chapter five discusses the history, legislation, and policy regarding the use of incentivised witnesses across New Zealand and the US. It begins with a brief introduction to the origins of the Anglo-centric justice system utilised by both New Zealand and the US. It then describes policy transfer and gives examples of how New Zealand may have taken note of initiatives in the US and implemented them in Aotearoa New Zealand. It discusses the legislation in New Zealand focusing on topics closely related to incentivised witnesses, such as the Criminal Disclosure Act 2008 and the Evidence Act 2006. Chapter five also outlines the policy and procedures New Zealand police officers undertake for the use of incentivised witnesses in New Zealand. It briefly touches on comparable legislation and policy in the US.

Chapter six presents the repercussions of incentivised witness evidence, using case studies to further demonstrate this concern's reality. There are four case studies in total. The first, Teina Pora, demonstrates how a young and vulnerable person unwittingly implicates themselves in a crime at the hope of claiming a \$20,000 reward. The second, David Tamihere, is a case where a prison informant was found guilty of fabricating evidence and was convicted of perjury. David Tamihere still awaits his Court of Appeal date. The third, Scott Watson, has many miscarriage of justice risk factors including prison informant evidence and is awaiting a Court of Appeal hearing set down for June 2024. The fourth case, Gail Maney, has several incentivised witnesses involved, and her case is currently being advanced by a team of investigators and lawyers who hope to prove her innocence.

Chapter seven outlines why incentivised witnesses are problematic. This includes discussion on how there is no legislated need for corroboration for

incentivised witness evidence to be put forward and raises the issue of prosecutorial bias by discussing how prosecutors appear to “vouch” for their witnesses simply by having them give evidence. It discusses the impacts that incentives have on false accusations or false secondary confessions,¹ and how there is danger in using informants as a “last resort”. The chapter briefly discusses jury psychology and how instructions to juries may or may not alter juror decision making. Chapter seven raises the issue that there is no public data available on the use of informants, the risks that informants pose on vulnerable communities, and the cost to the taxpayer involved with using incentivised witnesses.

Chapter eight is a thorough discussion, using the findings of the data analysis to make legislative and policy recommendations that could be adopted by agencies in Aotearoa New Zealand, to ensure the safety and legitimacy of court cases that involve evidence given by incentivised witnesses. Legislation in New Zealand and the US is analysed and compared to provide these recommendations.

Chapter nine concludes the thesis by presenting the overall findings of the research. This includes the practical implications experienced in the research, the strengths and limitations of the study, recommendations for future research, and concluding statements.

¹ Secondary confession evidence refers to evidence provided by a witness who alleges that during conversations with a defendant, the defendant admitted to the offending. This is discussed further in chapter 4.3.

2. Literature review

2.1 Briefly defining incentivised witnesses

This study defines incentivised witnesses as “any witness who testifies on behalf of a party for a tangible or expected benefit—from the government or otherwise—in a trial proceeding” (Surratt, 2018, p. 255).” The term “incentivised witness” is an all-encompassing term for the purpose of this research which includes: the public who claim rewards offered by police, cooperating witnesses, police confidential informants, accomplice witnesses, and prison informants (Anderson, 2021; Medwed, 2019; Neuschatz et al. , 2012; Wetmore et al., 2020). In addition to financial rewards, other incentives to give evidence include the relocation of witnesses, reductions in sentences, release from prison, or charges dropped (Innocence Project, 2019; Northwestern University School of Law Center on Wrongful Convictions, 2004; Wetmore et al., 2020). The research will define individual types of incentivised witnesses in greater detail.

2.2 Policy transfer

To provide further knowledge, the incentives given by police and prosecutors in exchange for information have been used for centuries in colonised countries because of police and penal policy transfer from 18th-century colonial Great Britain, where the British parliament would offer financial rewards for information to members of the public to be reported and used in court (Allen, 2020; Martin, 2017; Northwestern University School of Law Center on Wrongful Convictions, 2004). Furthermore, New Zealand and the US are not exempt from this policy transfer, and it can be argued that New Zealand closely mimics the USA’s approach to criminal justice policy (Martin, 2017). For this reason, the research proposed is a comparative analysis of the use of incentivised witnesses in the US and New Zealand.

2.3 Testimony believed by the jury

Academics and lawyers have identified that New Zealand juries tend to find prison informant testimony credible regardless of their motivation to testify, due to the convincing way the evidence is relayed in court and the weight that police

and prosecution place on the evidence (Anderson, 2021; High, 2021; Wetmore et al., 2022). This psychological phenomenon, as described in Wetmore et al. (2022), will also be explored in the research in chapter 7.5.

2.4 Legislature changes

In addition to this research, recent studies have considered whether the legislation around incentivised witnesses in the US and New Zealand is robust enough to avoid injustices (Allen, 2020; Anderson, 2021; Dyhrberg, 2002; Fessinger et. al., 2020; High, 2021; Innocence Project, 2013; Medwed, 2019; Surratt, 2018; Sutterer, 2022; Wetmore et al., 2022; Wetmore et al., 2020). For example, in the US state of Illinois, it has recently been legislated that for prison informant evidence to be heard in court, there must be a “reliability hearing” prior to trial to satisfy that the evidence is credible enough to be heard by the jury (Innocence Project, 2013). While the Solicitor-General has produced guidelines for the use of prison informants, New Zealand does not have legislation to guide prosecutors in using other types of incentivised witnesses (Crown Law, 2021; High, 2021). Other evidence where there is an element of human error, such as visual identification evidence, has specific regulation codified in legislation, yet there are no definitive rules for incentivised witness evidence (Anderson, 2021; High, 2021). New Zealand law sets out clear expectations for how visual identification evidence is obtained, including outlining when it must be excluded if the processes have not been followed.² It seems contradictory that there is legislation to regulate visual identification evidence but not the use of evidence provided by informers, as such regulations are formulated to avoid or reduce miscarriages of justice.

2.5 Miscarriages of justice

When people hear the term “miscarriage of justice”, many automatically think of wrongful convictions, as this is the most widely researched type of miscarriage of justice (Bohm, 2005; Naughton, 2013; Savage & Milne, 2012). This is also seen in many academic

² See Appendix F for New Zealand legislation regarding visual identification evidence.

definitions of a miscarriage of justice. For example, Garner (2000, as cited in Bohm, 2005) defines a miscarriage of justice as “a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime” (p. 196). However, miscarriages of justice can also include aspects of the system not respecting due procedure. As Bohm (2005) rightly points out, miscarriages of justice are not solely reliant on wrongful convictions. They can also involve unjust sentencing, incorrect charges or applications of the law, and wrongful arrests (Savage & Milne, 2012). What scholars and officials struggle with when classifying, identifying, and quantifying miscarriages of justice is that no register, either governmental or private, exists to record every instance of a miscarriage of justice (Bohm, 2005; Leo, 2005). Any existing registers seem to only identify cases of wrongful conviction and subsequent exoneration, excluding miscarriages of justice that regard manifestly unjust sentences, instances where no prison time is served, or where there have been procedural issues that may have resulted in a different outcome at trial, which are all concrete examples of a miscarriage of justice. The study of miscarriages of justice, in general, is under-studied and often without theory, with lawyers and investigators dominating the topic as opposed to criminologists (Leo, 2005).

Investigating miscarriages of justice is also extremely time-consuming. It requires many resources, both in terms of financing and human resources, and investigators have to overcome barriers placed in their way to gain access to crucial evidence (Leo, 2005; Savage & Milne, 2012). The holders of this evidence may not provide it to the requester, or it may have been some time since the original court case, and evidence has been destroyed over the years (Leo, 2005). Many miscarriages of justice cases are challenging to prove. While DNA testing has improved significantly since its first use in the late 1980s, many cases do not contain DNA at the crime scene, or if they do, the DNA evidence is often destroyed by the time it is able to be thoroughly tested, either by modern standards or whether it is even tested at all (Scheck et al., 2000 as cited in Leo,

2005). Typically, only extreme cases involving exonerations of the wrongfully convicted garner the attention of news media and upset the public.

The causes that contribute to miscarriages of justice are widely researched (Bohm, 2005; Johnson, 2019; Leo, 2005; Northwestern University School of Law Center on Wrongful Convictions, 2004; Scheck & Neufeld, 2002). These contributing factors can be considered systemic issues in the justice system due to the number of times they arise across multiple cases. The most researched contributing factors to miscarriages of justice include eyewitness misidentification, false confessions and guilty pleas, sub-par investigations and tunnel-vision by police, judicial and prosecutor misconduct, non-disclosure of exculpatory facts, sub-par defence representation, and a defendant's general lack of access to justice (Bohm, 2005; Leo, 2005; Dufraimont, 2008).

As discussed later in chapter six of this thesis, a case study aspect shows that many systemic issues in the justice system which contribute to miscarriages of justice can appear multiple times throughout cases. For example, the David Tamihere case study discussed in chapter 6.2 shows that incentivised witnesses are the primary issue within his claimed miscarriage of justice. However, problematic eyewitness identification is a concern here too. Miscarriages of justice can also be considered intersectional problems. David Tamihere is both Māori and has previous convictions, which makes him more at risk of a miscarriage of justice, as Māori are overrepresented in New Zealand prison systems (Fernando, 2018; McIntosh & Workman, 2017; Quince, 2007). His previous convictions make him, in the eyes of police and the courts, a suspect with the propensity to commit the crimes he was accused of and makes him less sympathetic to the public (Natapoff, 2009). As Leo (2005) contends, researchers must consider all demographic and sociological factors along with the legal and case-specific aspects when researching miscarriages of justice.

Many miscarriages of justice can be attributed to human error and are simply an accident or can occur due to multiple errors made in good faith (Leo, 2005). An example of an unintentional cause of wrongful conviction can be where an eyewitness identification

procedure that was poorly administered due to resource or personnel constraints, results in a misidentification and the wrong person being charged. However, some miscarriages of justice are intentional and committed by those in power, where personal gain or motivation outweighs justice (Bohm, 2005). This is true in the case of one of New Zealand's most extreme wrongful convictions, that of Arthur Allan Thomas. Police planted evidence, a single spent rifle ammunition cartridge, which ultimately resulted in his conviction (New Zealand Governor-General, 1980). Mr Thomas spent nine years in prison before being granted a Royal Pardon and was released (New Zealand Governor-General, 1980). No punitive action was taken against the police officers who planted the evidence.

Several studies have attempted to examine criminal cases involving incentivised witnesses and the potential this source of information must contribute to miscarriages of justice, primarily focusing on prison informants and accomplice witnesses (High, 2021; Innocence Project, 2019; Key et al., 2017; Medwed et al., 2019; Neuschatz et al., 2012; Wetmore et al., 2020). In the US, between 17 and 21 per cent of wrongful conviction cases where people have been exonerated through DNA evidence have involved incentivised witnesses (Fessinger et al., 2020; Innocence Project, 2019). The Northwestern School of Law Center on Wrongful Convictions published a 2004 report on incentivised witnesses, described as "groundbreaking" (Innocence Project, 2013). This US report stated that incentivised witnesses were the dominant source of miscarriages of justice and that witnesses will lie if they are incentivised to (Northwestern University School of Law Center on Wrongful Convictions, 2004). The data from New Zealand miscarriage of justice cases involving incentivised witnesses has not been compiled into one study, however, multiple individual cases will be included in this research.

Miscarriages of justice harm not only the person wrongfully convicted and their whānau but also the victims of the crime. If an innocent person is wrongfully convicted, the perpetrator is free to walk amongst society and can further victimise (Bohm, 2005). This is demonstrated in some case studies discussed later in this research, in chapter 6.1.18

2.6 Summary

The purpose of this review was to synthesise the literature regarding the use of incentivised witnesses in the US and New Zealand. Despite considerable research on secondary confession evidence via prison informants, significant gaps exist in the literature regarding incentivised witnesses. An overwhelming majority of the research focuses on prison informants (Allen, 2020; Anderson, 2021; Fessinger et al., 2020; Wetmore, et al., 2022). There is a lack of academic research on financial rewards given to the public. The police and Crown are reluctant to release information of this kind, and police policy regarding incentives is not published in an accessible manner. The accuracy of the information obtained by this method is unknown, the efficacy of offering rewards for information is unexplored, and the rate at which financial rewards are paid out is information tightly held by the police (Strang, 2021; United States Government, n.d.). This lack of transparency and uncharted academic territory requires specific attention to address the risks that incentivised witnesses pose to natural justice in Aotearoa New Zealand.

3. Methodology and research design

3.1 Introduction

Chapter three outlines the research design and methodology employed in this research, beginning with the researcher positionality statement. It discusses the methods used to collect the data, including legislation, court cases, and direct information from Police. It also discusses the limitations of relying on secondary data and the constraints that may impact the study by depending on Official Information Act requests.

3.2 Researcher positionality statement

As an analyst employed at the Criminal Cases Review Commission, miscarriages of justice and the risks associated with certain types of evidence are at the forefront of my mind when undertaking my work. We know that there are systemic issues in our justice system that contribute to miscarriages of justice, and I am always interested in finding out more about the root cause of these issues. Thinking about aspects of our justice system that do not seem fair has me asking the following questions; if rewards are available for criminal cases, does that mean our justice system is up for sale? Is our justice system getting it right if we must pay people to secure convictions? Is it ethical to reward people for information on cases, with little evidence to corroborate? While much research has been completed regarding prison informants, there is not an abundance of literature on other types of incentivised witness such as accomplice witnesses and people paid by police to testify, though they have featured many times in claimed miscarriage of justice cases going through New Zealand courts. I want to understand how this type of evidence is gathered and used, what our justice system has in place to ensure the safety of this evidence, and how Aotearoa New Zealand can avoid potential miscarriages of justice through justice policy reform. I chose to use case studies to highlight the issue, as I believe putting a real-life story to a phenomenon gives valuable perspective and helps to humanise the topic.

3.3 Research Design

This research seeks to explore and understand the relationship between incentivised witnesses and miscarriages of justice in Aotearoa New Zealand. Most studies in this area have focused on prison informants or jailhouse ‘snitches’ (Allen, 2020; Anderson, 2021; Fessinger et. al, 2020; High, 2021; Key et al., 2017; Neuschatz et al., 2008; Neuschatz et al., 2021; Neuschatz et al., 2012; Surratt, 2018; Sutterer, 2022; Wetmore et al., 2022; Wetmore et al., 2020). However, prison informants are just a portion of witnesses who are incentivised to give evidence in criminal cases, and more attention ought to be given to the part other types of incentivised witnesses might play when considering miscarriages of justice. Currently, no academic research analyses and compares all types of incentivised witnesses in New Zealand and very few overseas. The present research seeks to answer the questions:

1. Is the use of incentivised witnesses in criminal cases in New Zealand ethical;
2. Does the use of incentivised witness evidence in New Zealand criminal cases contribute to miscarriages of justice; and
3. Is the current New Zealand legislation and judicial warnings regarding the use of incentivised witness evidence sufficient, to avoid miscarriages of justice?

This research is qualitative in nature and analyses only secondary data and information. The history of penal and police policy is discussed. Legislation of New Zealand and the federal US are compared, along with information available via the internet and Official Information Act. Comparative analysis as a method is used. Case studies are outlined and analysed to examine the possibility of real-life harm that may come from using incentivised witnesses.

3.4 Method selection

Comparative analysis in criminology and criminal justice studies is beneficial to inform policy makers about policies and legislation and how these structures are executed. The comparative method is an influential tool used to explain and understand the various societal conditions, which gives a broader perspective and enables the researcher to

gain a deeper context and make well-rounded policy recommendations that are robust to criticism and grounded in fact and principle (Howard, Newman, and Pridemore, 2000; Mawby, 1999; Pakes, 2010).

International comparative criminology is invaluable for identifying, assessing, and understanding criminal justice systems in different countries. By comparing different countries' systems, policymakers can learn from others' experiences and understand examples of both good and bad practices, which are crucial components to policing studies as stated by Mawby (1999) and again noted by Howard et al. (2000) in terms of criminal justice research in general. Howard et al. (2000) state that detailed accounts of criminal justice systems in single countries are beneficial to increase our knowledge of these systems, even when no comparisons are drawn. While traditionally comparative criminology would focus on isolated nations, globalisation and the invention of the internet have resulted in less isolation and allowed for ease of movement of both information and physical travel between countries (Martin, 2017; Pakes, 2010).

This research is grounded in what Mawby (1999) considers the second approach to comparative analysis in criminology: directly drawing comparisons between two or more countries. Howard et al. (2000) discusses this type of research as a parallel study, with the topical comparison being a sub-section of the parallel study. This type of analysis follows a perspective of a topical or social problem in two countries. It draws on secondary sources, noting correlations and contrasts between the countries, often in a historical context (Howard et al., 2000). In this research the topical problem, which is the history of the use of incentivised witnesses, will be set, followed by the current legislation and police policy in both New Zealand and the US. This is another sub-section of comparative criminology described as justice system analysis by Howard et al. (2000), which scrutinises the detail of the legal and sometimes bureaucratic processes a country uses within the justice system. Explanations of the identified similarities and differences will be explored, which may be accounted for in terms of socio-political factors, culture, and economic development (Mawby, 1999).

The comparative approach is invaluable for 22

providing context to an issue and laying a baseline for robust scholarly analysis (Howard et al., 2000).

3.5 Methodology

Case studies are an appropriate methodology for the proposed research, as they have an inherently comparative nature and orientation and are an integral part of comparative research (Pakes, 2010). Case studies are necessary because the issue being researched is focusing on specific circumstances, allowing the researcher to make overall comparisons between cases and countries (Chopard & Przybylski, 2021; Howard et al., 2000). Case studies are by nature descriptive due to the varied and deep sources of information that are consulted to compile them. A case study's "unique strength is its ability to deal with a full variety of evidence" (Yin, 1990, p. 20, as cited in Chopard & Przybylski, 2021, p. 1). As Chopard & Przybylski (2021) note, descriptive case studies, commonly used in criminal justice research, can "help make the unfamiliar familiar" by showing the reader an understandable illustration of the issues at a point along with who is involved and other significant features (p. 2).

Case studies provide the reader with a comprehensive understanding of the topic due to the detailed and thorough description. Context is provided to explain what happened, why, and the result. The rich information is often gathered from many data sources, and triangulation, to an extent, is used where different data sets and themes are compared (Chopard & Przybylski, 2021). This makes case studies the perfect accompaniment to comparative criminology research. Case studies are invaluable when assessing the efficacy of legislation and the potential downfalls of a type of policy or procedure due to the cause and effects discussed, and the relationships analysed (Chopard & Przybylski, 2021). Data sources used in this study are news media articles, legislation, court judgments, and legal analysis and commentary.

3.6 Data Collection

This research is based entirely on official information sources and secondary data. An information request was sent to the New Zealand Police, Crown Law, and the Ministry of

Justice. A series of questions were put to each of these agencies regarding using incentivised witnesses. For this request, the term “incentivised witnesses” encompassed:

- Members of the public who claim financial rewards for information relating to crimes.
- Cooperating witnesses.
- Police confidential informants.
- Accomplice witnesses.
- Prison informants.

The researcher requested any relevant internal policies which were able to answer the following queries:

- How the agency determines which cases are eligible or appropriate to offer financial rewards in exchange for information.
- The process which must occur before financial rewards can be claimed or what needs to happen for that to be completed.
- What resources are available to the agencies in terms of offering incentives to witnesses? For example, the use of Police discretion for charges dropped, financial rewards, and offers of support for parole.
- The procedures for obtaining information via prison informants.
- The procedures for onboarding confidential informants and what incentives they may be offered.
- Policy regarding disclosure of incentives offered to witnesses who provide evidence at court. This includes general disclosure to the judge, jury and disclosure to the defendant.

The researcher also requested any data available on the use of incentives, particularly:

- Financial rewards for information.
- The total amount paid out.
- The number of cases where rewards have been paid out

- The efficacy of these rewards when it comes to solving cases, charging a suspect, or securing a conviction.

The agencies all responded to the researcher individually. However, none of the information requests were answered in full by any agency, and the researcher holds the view that these responses were sub-par and disappointing. The Ministry of Justice responded advising that the queries above were not within the Ministry's remit, and that the request would be transferred to the police and Crown Law had the researcher not already provided those agencies with the same request. Crown Law responded making several references to the Solicitor-General's Prosecution Guidelines and the Solicitor-General's Guidelines for use of Inmate Admissions, along with advising that some questions were better answered by the police. The agencies provided very brief answers to the questions held, and at some points declined the request because the data requested "did not exist" or "could not be found" (W. Olsson, personal communication, September 9, 2022). For example, this answer was in response for a request of police's policy regarding disclosure to the defence of incentives offered to witnesses. Police stated they comply with the Criminal Disclosure Act 2008 and do not hold specific police policy on disclosure. The data received, and responses given by police will be examined in the analysis portion of this thesis located in chapter 5.3.2.

The secondary data was acquired by using search engines with differing combinations of the key terms "incentive," "witness," "snitch," "informant," "jailhouse," and "reward." This produced links to several news media articles relating to the topic and alerted the researcher to high-profile criminal cases relating to incentivised witnesses. Websites relating directly to wrongful convictions were consulted.

To understand the law regarding incentivised witnesses, the New Zealand Legislation website was consulted. It was in this website's internal search engine that the correct legislation was obtained. For case studies, LexisNexis was consulted using the key terms listed above. Several local and international books, journal articles, and opinion pieces from experts on the topic were also analysed and considered.

3.7 Limitations

Comparative criminology, like any research method or approach, has its limitations. The most obvious limitation is that when assessing problems like miscarriages of justice in a comparative space, the research relies on incidences that have already been discovered and that have had attempts to rectify. Likened to an iceberg, the miscarriage of justice cases we see in news media is the tip, with likely many more below the surface that are yet to be identified. A retired High Court Judge Sir Thomas Thorp conducted extensive research regarding miscarriages of justice in New Zealand over a two year period which called for and ultimately resulted in the recommendation to parliament for New Zealand to establish a Criminal Cases Review Commission (Taylor, 2006; White, 2020). According to Sir Thomas Thorp's study, up to 20 people in New Zealand were wrongfully incarcerated as of 2005, and were yet to be formally identified (Taylor, 2006; White, 2020). If considerable data on miscarriages of justice is not available, the research can be jeopardised as it is difficult to scrutinise and validate the comparisons made.

When researching the law and police policy, the researcher must rely on sources that are often supplied via the Official Information Act 1982 and Freedom of Information Act requests or published online by the agencies concerned. The problem with this is the agencies under review or investigation become the gatekeeper of information, so they are the ones to decide what is relevant and disclosable, which consequentially means that these agencies may not release information that they do not want to be made public.

What makes comparative criminology difficult, too, is what data is generally available. International sources are not always accessible in other countries, and the researcher may not always know where to look (Mawby, 1999). Definitions of problems are not always the same, so a researcher may not be comparing issues accurately. Mawby (1999) notes that this results in a great deal of comparative criminology involving secondary data review where it might be difficult to check the validity of data and difficult to compare to other countries due to the way the data is constructed. By focusing on

topics so intensely, the subject matter can be separated from the cultures and nations that the issues arise in, and it can be difficult to generalise findings (Howard et al., 2000).

A limitation to using case studies to analyse miscarriages of justice is that this is a formula closely followed by many researchers in this area and has now become what some critics call the “familiar plot” and a “dead end” (Leo, 2005, p. 207). The reason for this is little academic value is added to the pool of literature by just using descriptive case studies and not extending the analysis beyond describing the stories (Leo, 2005). When using case studies to research miscarriages of justice, it is important to look further than just the personalised stories and understand sociological, financial, racial and institutional forces at play (Leo, 2005). As Leo (2005) states, criminological research into miscarriages of justice must continue to develop both theoretically and through method and not rely on the “familiar plot” to ensure the study of these phenomena can thrive.

3.8 Ethical considerations

Ethics approval was not required for this research, as all research was completed using secondary sources and well-known cases for the case studies, many of which have been reported on in mainstream news media.

3.9 Summary

Chapter three outlined the research design and methodology employed in this research, and why international comparative criminology is used as a method with a focus on case study methodology. Comparative analysis in criminology and criminal justice studies is beneficial to inform policy makers about policies and legislation and how these structures are executed. International comparative criminology is valuable for assessing and understanding criminal justice systems in different countries (Howard et al., 2000; Mawby 1999). Comparative criminological research is bolstered with the use of case studies, as case studies provide the reader with a comprehensive understanding of the topic due to the detailed and thorough description, and by nature being inherently comparative (Pakes, 2010). It discussed the methods used to collect the data, including the sourcing of legislation, court cases, and information direct from police. It also discussed the

limitations of relying on secondary data and the constraints that impacted the study by depending on Official Information Act requests. The key points here are that when relying on data from official information sources, the gatekeeper of the information may not always want to release the information. When comparing different countries, international sources are not always accessible, and the researcher may not always know where to look (Mawby, 1999).

4. Defining incentivised witnesses and incentives

Chapter four is an analysis chapter, defining incentivised witnesses and outlining the benefits they may receive for providing evidence. It concludes by raising the issue of disincentives and touches on witness coercion by police.

Marie Dyhrberg KC quite aptly distinguishes informants from ordinary, non-incentivised witnesses on page 1 of her 2002 article:

“Informants are not ordinary witnesses. Ordinary witnesses are not granted immunity for their criminal behaviour. They do not get letters confirming that they have been “cooperative and very helpful to the police” when they appear for sentence. They do not get reduced sentences. Ordinary witnesses do not get shifted to nicer/less secure prisons and they do not receive special support at their parole hearings. Ordinary witnesses generally do not get name changes, new identities, help to move to new locations and gifts of cash or other benefits. Informants do.” (Dyhrberg, 2002, p. 1)

Building off this excellent quote, this research defines each type of incentivised witness in the following sections.

4.1 Prison informants

Prison informants are the most studied and written about type of incentivised witness (Allen, 2020; Fessinger et al., 2020; Key et al., 2017; Neuschatz et al., 2008; Neuschatz et al., 2021; Neuschatz et al., 2012; Surratt, 2018; Sutterer, 2022; Wetmore et al., 2022; Wetmore et al., 2020). Prison informants, also known as jailhouse snitches, have been imprisoned with the key suspect of a crime and are incentivised to provide secondary confession evidence to the police to use in court to secure a conviction against that suspect (Anderson, 2021; Innocence Project, 2019). The types of incentives vary and can be as inconsequential as a packet of cigarettes and a cup of coffee or significant and life-changing; a large financial reward, prison time reduced, or charges dropped. Oftentimes, prison informants are provided with a letter of recommendation to be used

at parole hearings, detailing their cooperation in an investigation that has resulted in another's conviction (Anderson, 2021). This type of evidence is generally used as a last resort, likely when police have circumstantial evidence and require something that appears more concrete to tie the loose ends of a case together, though it is important to note that the issue of incentivised witness evidence being a “last resort” is not limited to prison informants.

Some academics and commentators have called prison informants a “necessary evil”, and prison informant testimony is considered equally as essential to criminal proceedings as any other person who can give evidence in court (Dyhrberg, 2002; Fessinger et al., 2020; Natapoff, 2009). However, the use of this type of evidence is inherently linked to wrongful convictions and should be controlled to assure reliability and mitigate the potential for miscarriages of justice (Anderson, 2021; Dyhrberg, 2002). As High (2021) indicates, there are three primary considerations when discussing prison informants; the first concern is that prison informants are unreliable, the second is that studies have shown juries give too much weight to prison informant evidence, and the third is that our legislation and trial procedures likely do not have enough substance to address the unreliability of the evidence and the issues associated with juror psychology (Anderson, 2021; Dyhrberg, 2002, Fessinger et al., 2020; High, 2021).

Dufraimont (2008) indicates that prison informants are a leading cause of miscarriages of justice, and their curated “confessions” are given with the extreme confidence only those experienced at criminal trials could give, using a mixed bag of news reporting, hearsay, and other case evidence provided by others to concoct their stories. Jurors, who are ordinary members of the public, are usually unable to discern between false evidence given by informants and the truth, which is no surprise given the fact that police and prosecution put forward the evidence as credible and are oftentimes tricked by the informants themselves (Dufraimont, 2008).

4.2 Police confidential informants

Police confidential informants have been studied for decades, despite the dearth of publicly available information on this category of incentivised witness. Gebert wrote about confidential informants as early as 1979, describing them as essential to a police investigation as they hold a “general wealth of criminal intelligence” while noting that their motives to supply police with information “may be as diverse and devious as the criminal activity they wish to uncover” (Gebert, 1979, p. 1).

Police confidential informants are also known as confidential human sources or criminal informants. Typically, there is an “information-liability exchange”, as discussed in Natapoff (2004, p. 651), where a person exchanges incriminating information about other people and is shown leniency for their own crimes as a result. Alternative incentives are similar to those that other incentivised witnesses are offered; money, preferential treatment in prison, support for early release, obtaining benefits for another person, and reduced sentences (Natapoff, 2004). Confidential informants agree to seek out information to give to police for future events and are sometimes tasked with wearing a wire or buying drugs from a suspected dealer in a controlled environment (Natapoff, 2004).

The public and judiciary are typically blind to the inner workings of these negotiations, as deals between informants and law enforcement are private conversations that are not usually recorded (Natapoff, 2004). On the odd occasion where deals are written down as contracts and plea bargains, they tend to be non-specific and vague (Natapoff, 2004). Due to the secret nature of the deals, informants are often deprived of legal representation, and the judicial system has no oversight, which allows for a perceived loosening of the law (Natapoff, 2004; Natapoff, 2009). In this situation, police typically make the arrests and decide on initial charges to be laid (Natapoff, 2009). Prosecutors then finalise charges and oversee plea bargaining and other aspects of the trial (Natapoff, 2009). On large or resource intensive investigations, police and prosecutors

typically work together to determine benefits like dropped charges or financial rewards (Natapoff, 2009). It is noted that Natapoff's (2009) research is based in the US.

As demonstrated by an Official Information Act request to the New Zealand Police for this thesis, data on confidential informants is hard to obtain as the police believe the release of this information will "prejudice the maintenance of the law," (W. Olsson, personal communication, September 9, 2022) so the public has truly little insight into confidential informants and their relationships with police. Often, questions about confidential informants are only answered in vague manners due to court proceedings (Natapoff, 2004).

As Natapoff (2004) points out, police informants do not just affect the criminal legal system; they can affect entire communities, particularly in low socioeconomic areas where options are limited and where people of colour are more disproportionately affected. This type of informant damages relationships, social organisation, and social norms in communities (Natapoff, 2004). This is because criminal informants, often dubbed "snitches," are essentially given permission to continue committing crimes as long as their information proves valuable to the police, thereby inflicting crime on the societies they are a part of yet disrupting their privacy by surveilling them (Natapoff, 2004).

Natapoff (2009) discusses how law enforcement can be at the mercy of confidential informants, relying on them for information about who should be investigated and for what charges. This aspect of policing unintentionally allows criminals to inform on their competitors, by either exacting revenge or excluding them from competing (Natapoff, 2009). This destabilises the integrity of the justice system as criminals, to an extent, can choose which crimes are investigated while at the same time committing their own crimes in plain view and, arguably, with permission from law enforcement (Natapoff, 2009).

One difficult thing about this research was obtaining information from police and the Crown regarding "special" witnesses or confidential informants. The police claim they do

not provide this type of information to the public as it can arm criminals with knowledge of the tools police have at their disposal to combat crime (W. Olsson, personal communication, September 9, 2022) This, in turn, means that confidential informants have the privilege of having their identities and livelihoods protected. The furthest that the New Zealand police will go to answer any questions about confidential informants is in relation to total payments. In an Official Information Act response, New Zealand Police advised that \$1,860,586 has been paid out to confidential informants in the ten financial years between 2013 and 2022 (J. Van den Heuvel, personal communication, June 6, 2023). Police did not state how many informants were on their records.

4.3 Cooperating witnesses and accomplice witnesses

For the purposes of this research, “cooperating witnesses” and “accomplice witnesses” are considered nearly identical and can therefore merge into one; a witness who, if it were not for helping police or prosecution implicate someone else, might find themselves charged with a crime. Fessinger et al. (2020) describe the relationship between the informant and prosecution as a cooperation system, stating it “benefits both the informant and the prosecutor: the informant gets some leniency or benefit, and the prosecutor gets information that will help in the prosecution of other, often more “culpable and dangerous, criminals” (p. 152). However, despite the similarities of cooperating witnesses and accomplice witnesses, and how they both use the “cooperation system,” it is important to further examine the nuanced differences between the two.

Cooperating witnesses can know details about the criminal case at hand through their own first-hand experience, such as being an eyewitness to the occurrence (Fessinger et al., 2020). However, many of these witnesses also have knowledge of the cases through connections and acquaintances with the defendant (Fessinger et al., 2020). The evidence that cooperating witnesses provide is largely based on purported conversations with the defendant, where the defendant supposedly admits to the crime, at which point it is considered a “secondary confession” that the police and prosecution can use as inculpatory evidence, despite having no corroboration that the cooperating witness is

telling the truth (Neuschatz et al., 2008). Incentives for a cooperating witness to give evidence, other than avoiding indictment for themselves, can be of monetary value and relocation assistance (Fessinger et al., 2020).

Neuschatz et al. (2008) define an accomplice witness as “one that through his/her own admission has participated in a crime and is willing to testify regarding the role of the co-conspirator” (pp. 137-138). The accomplice witness usually receives a lesser sentence, or no charge at all, for their own role in the crime in exchange for their evidence against the alleged primary offender (Fessinger et al., 2020). Again, as with other types of incentivised witnesses, accomplice witnesses may also be offered preferential treatment in prison, financial rewards, and other privileges.

4.4 Members of the public who claim rewards offered by police

It is expressly noted that this type of incentivised witness is not referring to members of the public who witness a crime and report the details to the police immediately; it is about members of the public who only come forward once a reward is offered. It is acknowledged that sometimes, cases are unable to be solved without the use of rewards. The New Zealand Police advise that rewards are offered as police have a responsibility to “explore all options and avenues in reducing and resolving crimes” (W. Olsson, personal communication, September 9, 2022). However, is it ethical for people to be financially rewarded or given immunity for information related to a crime when sometimes decades have passed, and they only come forward because of potential monetary or otherwise gain?

It has been reported that police benefit from advertising rewards as it breathes new life into forgotten cases and gives the public a view that police are still pursuing closure for families, though little to no research has been done regarding the efficacy of offering rewards for solving cold cases (Gay, 2008; Downes, 2013). In recent years, New Zealand Police have offered several rewards for information on cold cases, which typically include the promise of a cash incentive and potential immunity from prosecution if a co-offender was to come forward with information. In an Official Information Act request response,

police were not prepared to disclose how many offers for reward were claimed and paid out, “as it would be likely to prevent members of the public coming forward in the future” (W. Olsson, personal communication, September 9, 2022). Despite the unwillingness of police to disclose this information via the OIA in 2022, previous news media articles have reported that in the five years between 2003 and 2008, \$800,000 had been offered in reward money, but the sum of zero had been paid out (Gay, 2008). Police did provide a table outlining the cash reward amounts offered between 2011 and 2022, as requested via the OIA, which shows that \$750,000 in reward money has been made available to aid in the resolution of a case (W. Olsson, personal communication, September 9, 2022).

Rewards month/year	Cash reward amount
January 2013	\$50,000
March 2013	\$50,000
September 2013	\$20,000
November 2013	\$50,000
October 2014	\$50,000
June 2015	\$30,000
June 2015	\$50,000
December 2018	\$50,000
May 2019	\$100,000
November 2020	\$100,000
April 2021	\$100,000
July 2022	\$100,000

Table 1: Rewards offered 2011 – 2022 (W. Olsson, personal communication, September 9, 2022).

4.5 Types of incentives

Fessinger et al. (2020) state that psycho-legal research has shown that when an incentive is offered, informants are more likely to fabricate evidence that benefits the informant directly. The types of incentives offered to potential witnesses are myriad and almost impossible to quantify or identify due to the closed-door nature of discussions between police and potential witnesses. A non-exhaustive list of incentives is as follows;

- Minor physical rewards such as a packet of cigarettes or a meal.
- Financial rewards, sometimes worth thousands of dollars.
- Better conditions when in prison.
- Reduced prison time and/or early release.

- Pending charges dropped.
- Immunity from prosecution.
- Witness protection.
- Benefits for another person, such as charges dropped or prison time reduced for a family member.

4.6 Disincentives

An aspect to incentivised witnesses that is not largely discussed in literature is the impact that coercion, disincentives, or “anti-incentives” has on defendants or potential witnesses. There is a chance that police can coerce false evidence from an informant if they employ bullying or otherwise intimidating tactics, as discussed in the Scott Watson case study in chapter 6.3. In literature regarding suspects’ own false confessions, police have admitted to lying and deceiving suspects to obtain confessions (Wakefield & Underwager, 1998). This literature can be used to include incentivised witnesses as well, as the tactics used to obtain direct confessions from suspects is often similar to how witnesses are questioned.

Being questioned by police can be considered a stressful circumstance for most people, but more so for those who have no experience of being interrogated, and this stress is exacerbated when being questioned by a person with authority or perceived authority (Wakefield & Underwager, 1998). Witnesses can be promised that cooperating will make things easier for them, or police might ask leading or loaded questions. A person may be confined to a space during questioning and isolated away from support people, which can increase suggestibility and in turn increases chances of false information being provided (Wakefield & Underwager, 1998). This risk of false information is again increased if a person has vulnerabilities such as a neurodiversity or mental impairment (Wakefield & Underwager, 1998).

As discussed in chapter 6, Case studies, threats are routinely used by law enforcement to obtain information about a crime. For example, in chapter 6.3, one of the key eyewitnesses in Scott Watson’s case was advised by police that essentially either he

had to point the finger at Scott Watson, or the witness himself would be under scrutiny as he had already been labelled a liar by police (White, 2007). The witness describes how he and other witnesses were under immense pressure, and that police were relentless in their investigation (White, 2021). Similarly, in chapter 6.4, one of the key witnesses who was a known drug user was advised by police that if she did not provide information about Gail Maney's involvement in a suspected murder that police would involve Child, Youth and Family and she would have her children taken out of her care (*Maney Gail Denise v R* [2005]). These threats and bullying tactics leave the witness feeling like they have little option other than to provide information, true or not, to protect themselves from law enforcement.

4.7 Summary

Chapter four defined the individual types of incentivised witnesses including prison informants, confidential informants, cooperating witnesses and accomplice witnesses. This chapter raised the benefits that incentivised witnesses may receive for providing evidence including monetary payments, leniency with sentencing, immunity, and others. It concluded by raising the issue of disincentives and touched on witness coercion by police.

5. History, legislation, and police procedure

5.1 Introduction

The United States of America and Aotearoa New Zealand are both nations colonised by the English Crown in the 17th and 19th centuries, respectively. With this anglicising came the English legal and criminal justice systems, and under English Common Law, informants were used early on (Anderson, 2021). Records dating back to the 13th century discuss a system described as an “approver system”, where one charged with a capital offence could make an accusation against another, and if their accusation proved successful, they would not face punishment for the offence they themselves were accused of (Sherrin, 1997 as cited in Anderson, 2021). It is worth noting that in this instance if their accusation was unsuccessful, they would receive the death penalty (Anderson, 2021).

In the 18th century, the English parliament rewarded informants financially if they were able to provide information that proved valuable in court. Some researchers consider this type of inducement the first use of incentivised witnesses (Allen, 2020; Northwestern University School of Law Center on Wrongful Convictions, 2004). This was claimed to be efficient in solving cases, and the process has been used consistently since then. In 1819, Jesse Boorn of Vermont, US, became the first victim of a wrongful conviction believed to have been caused in part due to an incentivised witness, a prison informant (Allen, 2020). The use of incentivised witness evidence has contributed to miscarriages of justice since the time it came into existence, however, we have very few safeguards for preventing this from occurring.

5.2 Policy transfer

Aotearoa New Zealand’s justice, policing, and penal policy in some ways resembles the US, and with this, the use of incentivised witnesses has transferred across countries. The transfer of justice policy is due in part to the influence the US has on New Zealand, both socially and culturally, with officials using American discourse to push their own agendas (Martin, 2017). For example, a private individual who formed

the lobby group Sensible Sentencing Trust invited a then-prospective ACT member of parliament to join him on a “fact finding mission” to California (Martin, 2017, p. 561). In California they assessed the Three Strikes policy, which enforces harsher sentences for those convicted of multiple serious crimes (Martin, 2017). The following year at election time, ACT entered into an agreement with the National party where it was agreed that, among other things, under a National government with ACT’s support New Zealand would implement a Three Strikes regime of its own (Martin, 2017). The Three Strikes policy was implemented in 2010 but ultimately repealed by a later Labour government in 2022 (New Zealand Ministry of Justice, 2022). Globalisation and the advent of the internet have also made policy transfer easier. For example, researchers continue to draw on scholarship in the US to inform their own studies about the prison system in New Zealand (Martin, 2017).

New Zealand’s criminal justice system is a good example of policy transfer and emulation. However, we tend not to adopt the whole system of the US and instead cherry-pick what suits the political agenda and public appetite at the time (Martin, 2017). Though Aotearoa New Zealand has a strong tendency to copy policy from the US, this is often met with hostility. As Martin (2017) notes, “Three strikes laws faced staunch opposition from within the state bureaucracy, supermax principles were challenged by prisoners in the High Court, zero tolerance and broken windows were used largely as symbols and remained at odds with national policing strategy” (p. 561).

It is important to understand the extent that globalisation influences New Zealand’s criminal justice policy. While New Zealand is small in population and isolated compared to the rest of the world, we are the eighth most globalised country on the planet (AT Kearney-Foreign Policy Globalization Index, 2004, as cited in Martin, 2017). This allows for the freer migration of policies that are not necessarily attached to political ideology (Martin, 2017).

New Zealand has a much lower incarceration rate of 170 people in prison per 100,000 population (Ministry of Justice, 2023), whereas the US has

565 people in prison per 100,000 population (Sawyer & Wagner, 2023). However, the racial inequity in rates of imprisonment of Māori in New Zealand and African Americans in the US is strikingly similar, with Māori making up 52% of the imprisoned population despite being approximately 15% of the population in New Zealand (Ministry of Justice, 2023), and African Americans making up 38.5% of the prison population (BOP: Federal Bureau of Prisons Web Site, n.d.) despite making up a population percentage of just over 12% (US Department of Health and Human Services Office of Minority Health, 2021).

5.3 New Zealand

5.3.1 Legislation

Despite the inherent unreliability and risks that this type of evidence poses, New Zealand courts allow testimony given by incentivised witnesses. In August 2021, the Solicitor-General of New Zealand published a set of guidelines to govern prison informant evidence. Though this is a step in the right direction, it addresses just one type of incentivised witness evidence, prison informants, and further safeguards need to be implemented to address all categories of incentivised witnesses. As of June 2023, the legislation regarding incentivised witness evidence is covered in both the Criminal Disclosure Act 2008 and the Evidence Act 2006. Each of these portions of the law that encompass incentivised witness evidence in New Zealand is included in the list of appendices, with the most impactful sections detailed below.

5.3.1.1 Evidence Act 1908

The Evidence Act 1908 (**1908 Act**) is not generally discussed in recent literature, as it has been replaced by the Evidence Act 2006. However, it is important to note that several sections of the 1908 Act are pertinent to incentivised witness evidence, though not explicitly referred to by name, and these sections have laid the foundation for the Evidence Act 2006 which New Zealand courts abide by today.

Section 12B notes that evidence of an accomplice does not need to be corroborated for someone to be convicted of a crime. Section 12C discusses when a witness may have an ulterior motive to give false and prejudicial evidence against a defendant, the Judge

may decide whether they wish to give the jury a warning about considering that witness's evidence.

Sections 13B and 13C discuss witness anonymity, where the Judge can make an order to suppress a witness's name and details if there are safety concerns. Interestingly, section 13C states that a witness can only be given name suppression if there are no credibility issues and no motive or propensity to be untruthful.

5.3.1.2 Evidence Act 2006 and judicial warnings

New Zealand does not have any specific laws on the use of incentivised witness evidence and instead defers to standard judicial warnings as outlined in the Evidence Act 2006 (**the Evidence Act**) (Anderson, 2021). The judicial system likes to put all information that is relevant to a case out in the open for the jury to consider, and as part of this, incentivised witness evidence is considered relevant (High, 2021). The relevant sections of the Evidence Act are assessed below.

When it comes to incentivised witness evidence, sections 7 and 8 of the Evidence Act have been considered by courts as avenues for this type of testimony to be excluded (High, 2021). Section 7 affirms that evidence that is not relevant to proceedings should be excluded. Section 8 outlines that a judge must exclude evidence if it is "unfairly prejudicial" or if the value of the evidence is outweighed by a risk of prejudicial effect. Legal commentators have questioned whether Section 8 of the Evidence Act can act as a reliability test or threshold for incentivised witness evidence (Anderson, 2021; High, 2021).

As High (2021) states, "Section 27 of the NZ Evidence Act provides that the statement of a defendant, offered by the prosecution, is admissible (s. 27(1)) and is not subject to the hearsay reliability rules" (s. 27(3)) (p. 223). This causes issue, as there is no corroboration baseline to confirm that the defendant made a statement to the informant, who then relayed the information to the prosecution (High, 2021). The relevant safeguard against involuntary confessions made by defendants at section 28 of the Evidence Act

is insufficient to protect against false informant evidence, and the only safeguards left after section 28 is efficient cross-examination, and judicial warnings (High, 2021).

Section 122 of the Evidence Act discusses when a Judge can consider evidence and warn the jury if the judge considers the evidence to be unreliable. The specific section reads:

“122 Judicial directions about evidence which may be unreliable

(1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—

(a) whether to accept the evidence:

(b) the weight to be given to the evidence.

(2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:

(a) hearsay evidence:

(b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:

I evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:

(d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a Police station, or another place of detention:

(e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.

(3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—

(a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence;
or

(b) if the Judge is of the opinion that there is any other good reason not to comply with the request.

(4) It is not necessary for a Judge to use a particular form of words in giving the warning.

(5) If there is no jury, the Judge must bear in mind the need for caution before convicting a defendant in reliance on evidence of a kind that may be unreliable.

(6) This section does not affect any other power of the Judge to warn or inform the jury.”

The judge can give a warning to the jury on the evidence about its reliability and how it may be prejudicial if it is untrue, deferring the decision on whether the evidence is relevant and credible to the jury (High, 2021). An essential part of these provisions is that the judge may consider the warning under section 122 or an exclusion under section 7 – not that they are required to – so the decision is purely up to the individual judge’s discretion (Anderson, 2021). It also results in a deeper psychological issue where the

jury may be more inclined to believe the evidence is accurate simply because it is put forward by the prosecution or allowed by the judge (High, 2021). There is also a general hesitancy within the judiciary for judges to block jurors from hearing all relevant evidence, no matter how questionable it may be (Anderson, 2021). It has been acknowledged in a recent court case, which relied significantly on prison informant evidence, that section 122 of the Evidence Act is a “statutory recognition that a motive to lie, such as an offer or hope of a reward, can in itself be an indication of unreliability” (*W v R* [2020]), as cited in Anderson, 2021, p. 4).

The Supreme Court does not want to reach as far to say that prison informant evidence should be immediately ruled inadmissible pre-trial. However, they have acknowledged that it could be excluded under sections 7 and 8 of the Evidence Act (Anderson, 2021). Other recent judgments from the Supreme Court have identified that incentivised witness evidence, mainly that coming from prison informants, should be acknowledged as “exceptionally concerning and warranting close scrutiny” (High, 2021, p. 218).

5.3.1.3 Criminal Disclosure Act 2008

The Criminal Disclosure Act 2008 outlines the process for releasing information to the defendant and what needs to be disclosed to the prosecution. This includes spelling out what the prosecutor must disclose to the defendant. Section 3 (g) specifically states that the prosecution must disclose to the defence:

“3 (g) a copy of any information supplied to the prosecutor in connection with the case by any person or persons whom the prosecutor proposes to call to give evidence as an expert witness or witnesses.”

The Criminal Disclosure Act 2008 also specifies that the prosecutor must provide a list of the information they are refusing to provide along with the reasons why. There are several reasons why information may be withheld under section 16 of the Criminal Disclosure Act, including the “prejudice the maintenance of the law”, which police and prosecution often rely on, as it allows the non-disclosure of material that has the potential to affect how police prevent, investigate, or detect offences. This same wording is also

used in the Official Information Act 1982. Another reason under section 16 that is relevant to this subject is “the information is likely to endanger the safety of any person”. Disclosing information about an incentivised witness has the potential to bring harm to that person, even if they are provided with a pseudonym. In other words, the defendant may know that a person has been incentivised to provide evidence against them, yet they may not be provided any details on this person if the defendant or other people are able to establish their identity from this information. Non-disclosure is also allowed if there is a pre-trial witness anonymity order or a witness anonymity order under sections 110 and 112 of the Evidence Act 2006, attached at Appendix F.

What causes issue in some cases is it is often left up to the prosecutor and the police to determine exactly what is relevant and disclosable, so even though information that pertains to the reliability of informant evidence is considered disclosable by the Act, police and prosecutors still have the end decision unless appealed in court (Dyhrberg, 2002).

5.3.1.4 Crown Law and Solicitor-General’s guidelines

Crown Law provided a response to the Official Information Act request detailed in chapter 3.6, data collection, and either advised the questions were better suited to be answered by police, or they referred to the Solicitor-General’s Prosecution Guidelines and the Solicitor-General’s Guidelines for use of Inmate Admissions. However, queries that Crown Law did provide a response to are detailed below.

Crown Law advised that financial rewards and other incentives are for the police and other prosecuting agencies to determine when a reward might be offered and therefore Crown Law does not have internal policies governing this (B. Charmley, personal communication, September 23, 2022). However, Crown Law did refer to section 12 of the Solicitor-General’s Prosecution Guidelines where it is stated that if a prosecuting agency intends to issue a reward for a witness that includes immunity, the Deputy Solicitor-General must give consent first (Crown Law, 2013). They also stated that the withdrawal of charges must be done in accordance with section 146 of the Criminal

Procedure Act 2011, and that charges may be dismissed under section 147 of this Act (B. Charmley, personal communication, September 23, 2022). It is noted that this is legislation that governs all criminal charges and does not refer explicitly to incentivised witness evidence.

Crown Law refers to the Solicitor-General's Prosecution Guidelines regarding confidential informants and anonymous witnesses' identities. Crown Law advise that informants have protections under s 64 of the Evidence Act 2006, where that information is would disclose or is likely to disclose his or her identity (B. Charmley, personal communication, September 23 , 2022). The specific section of the Solicitor-General's Prosecution Guidelines regarding this reads:

“There will be good reason for restricting disclosure where the identity of an informer is at stake. The general principle is that the identity of an informer may not be disclosed unless the Judge is of the opinion that the disclosure of the name of the informer, or of the nature of the information, is necessary or desirable in order to establish the innocence of the defendant.”

(Crown Law, 2013, p. 17).

In regard to pre-trial anonymity orders under section 110 of the Evidence Act 2006, prosecutors must obtain consent from the Deputy Solicitor-General before they can make an application (B. Charmley, personal communication, September 23, 2022).

The Solicitor-General's Prosecution Guidelines expects that any terms of immunity or inducements given to a witness should always be disclosed to the defendant, including payment for information (B. Charmley, personal communication, September 23, 2022). Crown Law advised that in regard to data on the use of incentives, police seek the Deputy Solicitor-General's consent for immunity and Crown Law is advised of what the reward amount will be (B. Charmley, personal communication, September 23, 2022). However, Crown Law also advised that collating this data to provide a response to the OIA would “require a search of Crown Law's system for every previous such Police request, each one of which would need to be manually checked” and declined the request under s 18(f)

of the OIA on the basis the information cannot be made available without substantial collation or research (B. Charmley, personal communication, September 23, 2022).

In 2020, the Supreme Court identified a need for more guidance on prison informant evidence (Crown Law, 2021). As a result, the Solicitor-General released guidelines on the matter in August 2021 regarding the use of secondary confessions and inmate evidence by suggesting changes to procedure (Crown Law, 2021; High, 2021). These guidelines highlight the “remarkable ingenuity” some prison informants show when crafting false statements and that prison informants’ motivations to give evidence, whether truthful or not, vary greatly depending on their circumstances therefore this evidence must render greater scrutiny (Crown Law, 2021). Crown Law (2021) and the Solicitor-General expect all law enforcement, Crown Prosecutors, government agencies, and instructed lawyers to adhere to these guidelines. However, without legislative change, these guidelines are little more than advice and do not regulate the practice. Critics have suggested that these safeguards and guidelines may “entrench corrupt deals” by encouraging closed-door agreements, which in turn can result in more miscarriages of justice (White, 2021). The Supreme Court also recommended that police keep a register of inmate informants. The police state in an OIA response that they began using this register in August 2021 (J. Van den Heuvel, personal communication, June 6, 2023).

5.3.2 Police policy

For this research, a request was made to the New Zealand Police (the police) under the Official Information Act 1982 (OIA). The New Zealand Police National Headquarters responded to this request stating that while they acknowledge the term ‘incentivised witnesses’ has been used by the Courts, it is not used by the New Zealand Police. The New Zealand Police provided a copy of the chapters ‘Posting rewards for investigations’ and ‘Investigative interviewing witness guide’ to answer some of the above queries.

The police state in the ‘Posting rewards for investigations’ chapter that “rewards are posted to encourage the public to supply information that leads to the conviction of an

offender responsible for committing a serious crime and is offered when all other practical leads have been exhausted and the investigation is stalled”, but they may be offered at any stage of an investigation (W. Olsson, personal communication, September 9, 2022). Rewards are offered as police are responsible for exploring “all options and avenues in reducing and resolving crimes” (W. Olsson, personal communication, September 9, 2022).

The police manual states that criteria and procedures need to be satisfied when police request to post a reward, and the reward money is a district responsibility that should be sourced from Police budgets or in conjunction with external agencies. This includes cases of a cross-agency investigation or funding offered by an individual, such as the family of a missing person. These criteria, procedures, and rules are inserted below.

Posting rewards for investigations

Requesting authority to post a reward

Internal funding

When internal funding is available through Police budgets to post a reward for an unsolved investigation, the steps in this table apply.

Step	Action				
1	<p>The officer in charge (O/C) of the investigation:</p> <ul style="list-style-type: none"> • prepares a report: <ul style="list-style-type: none"> ◦ detailing the enquiry to date and circumstances of the investigation ◦ reasons for posting the reward ◦ recommended amount for the reward • sends the report to the District Commander. 				
2	The District Commander may support the request (see step 3) for reward or decline it.				
3	<p>If the District Commander supports the request for a reward, then the report must:</p> <ul style="list-style-type: none"> • show the District Commander's acceptance of funding responsibility (Note: A request without the District Commander's recommendation must not be approved by the Commissioner) • be sent to the Co-ordinator: Special Programmes at National Criminal Investigations Group, PNHQ. 				
4	<p>The Co-ordinator: Special Programmes, on receipt of the endorsed report:</p> <ul style="list-style-type: none"> • prepares a sample reward notice (Appendix 1 refers) with details of the immunity (if sought) and investigation • sends the report and draft notice to Legal Services at PNHQ. 				
5	<p>Legal Services, PNHQ should verify other matters raised in the notice, such as immunity. If immunity is:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 50%; text-align: left;">included...</th> <th style="width: 50%; text-align: left;">not included...</th> </tr> </thead> <tbody> <tr> <td style="vertical-align: top;"> <ul style="list-style-type: none"> • send the report and draft notice to the Crown Law Office (Solicitor General) to confirm the legality of the immunity. <p>The Crown Law Office (Solicitor- General):</p> <ul style="list-style-type: none"> • makes a decision to: <ul style="list-style-type: none"> ◦ approve immunity, or, ◦ suggest amendments to the immunity, or ◦ declines immunity (see below); • provides an explanation outlining its decision; and • returns the report and notice to Legal Services. <p>Legal Services advise Special Programmes of the Solicitor General's decision and any suggested amendments.</p> </td> <td style="vertical-align: top;"> <p>advise the Manager: Special Programmes of any suggested amendments to the notice.</p> </td> </tr> </tbody> </table>	included...	not included...	<ul style="list-style-type: none"> • send the report and draft notice to the Crown Law Office (Solicitor General) to confirm the legality of the immunity. <p>The Crown Law Office (Solicitor- General):</p> <ul style="list-style-type: none"> • makes a decision to: <ul style="list-style-type: none"> ◦ approve immunity, or, ◦ suggest amendments to the immunity, or ◦ declines immunity (see below); • provides an explanation outlining its decision; and • returns the report and notice to Legal Services. <p>Legal Services advise Special Programmes of the Solicitor General's decision and any suggested amendments.</p>	<p>advise the Manager: Special Programmes of any suggested amendments to the notice.</p>
included...	not included...				
<ul style="list-style-type: none"> • send the report and draft notice to the Crown Law Office (Solicitor General) to confirm the legality of the immunity. <p>The Crown Law Office (Solicitor- General):</p> <ul style="list-style-type: none"> • makes a decision to: <ul style="list-style-type: none"> ◦ approve immunity, or, ◦ suggest amendments to the immunity, or ◦ declines immunity (see below); • provides an explanation outlining its decision; and • returns the report and notice to Legal Services. <p>Legal Services advise Special Programmes of the Solicitor General's decision and any suggested amendments.</p>	<p>advise the Manager: Special Programmes of any suggested amendments to the notice.</p>				
6	<p>The Co-ordinator: Special Programmes should:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 50%; text-align: left;">if immunity is declined</th> <th style="width: 50%; text-align: left;">if immunity is approved or requires amendments</th> </tr> </thead> <tbody> <tr> <td style="vertical-align: top;">return the decision and correspondence to the District Commander.</td> <td style="vertical-align: top;">make the necessary amendments to the notice.</td> </tr> </tbody> </table>	if immunity is declined	if immunity is approved or requires amendments	return the decision and correspondence to the District Commander.	make the necessary amendments to the notice.
if immunity is declined	if immunity is approved or requires amendments				
return the decision and correspondence to the District Commander.	make the necessary amendments to the notice.				

(W. Olsson, personal communication, September 9, 2022, cont. on p. 48).

Step	Action
7	<p>On completion of the consultation process, the Co-ordinator: Special Programmes must:</p> <ul style="list-style-type: none"> • submit the notice, report and advice from Legal Services to the Commissioner for approval via the National Manager: National Criminal Investigations Group • if approved, retain a copy of the notice, report and original signed reward notice • send the original notice and report and a copy of the signed reward notice to the O/C Investigation through the District Commander • record in the reward directory: <ul style="list-style-type: none"> ◦ the issuing of the reward, and ◦ any subsequent payment of the reward.

(cont. from p. 47, W. Olsson, personal communication, September 9, 2022).

Also included in this section and inserted below is a step-by-step guide to requesting funding for a reward, which mentions non-financial rewards, including consulting with Crown Law and the Solicitor General to discuss immunity from prosecution and extra steps the police must take to ensure the legality of immunity offered. Interestingly, the chapter explicitly addresses external funding and how police should "make every effort to avoid the inference that the private company or individual is using their funds for regards to buy the inquiry from Police, or purchasing immunity from prosecution of an offender, or paying off witnesses." (W. Olsson, personal communication, September 9, 2022). The police manual excerpt does not give any examples of where a reward, financial or otherwise, might be appropriate.

External funding

Where a private company or individual is offering to fund a reward, the O/C Investigation must apply to the Commissioner through the District Commander for approval to post the reward.

The Police reward should be an amount in excess of the private contribution as this ensures that the Crown is seen as the reward instigator.

All procedures for [internal funding](#) also apply to external funding. In addition to the internal steps above, Police should follow the steps in this table for external funding.

Step	Action
1	<p>Make every effort to avoid the inference that the private company or individual is:</p> <ul style="list-style-type: none"> • using their funds for rewards to buy the inquiry from Police, or • purchasing immunity from prosecution of an offender, or • paying off witnesses. <p>Note: Hence the need to bind Police to also contribute towards payment of the reward.</p>
2	<p>The Co-ordinator: Special Programmes must prepare a formal letter for the private individual, or head of the private company confirming that:</p> <ul style="list-style-type: none"> • they must reimburse Police for up to 50% of any reward that Police might pay; and • it is the sole prerogative of the Commissioner of Police to determine if and to whom the reward should be paid.

(W. Olsson, personal communication, September 9, 2022).

When a claim for a reward is made, the officer in charge of the investigation must complete a report to send to the District Commander outlining why the reward should be paid to this claimant. This includes the value of the information provided for the investigation, the recipient's credibility to testify at trial, and reasons for the recipient(s) to come forward with information. It is then up to the Police Commissioner to approve the claim. Samples of a reward notice and the template for this report are included as Appendices B and C.

This police manual has an extra section specifically addressing 'Prison/cellmate witnesses,' otherwise known as prison informants. It discusses the higher level of scrutiny and questioning this type of evidence will elicit at trial and that police must consider any reputational risk in relying on this type of information. The police manual refers to the Solicitor-General's guidelines, discussed in chapter 5.3.1 of this thesis and attached as Appendix A, on using prison inmate admissions and states that this must be followed. It also states that each time a witness is considered for use, they must be recorded in the Police Register for Inmate Witnesses, which was introduced in August 2021 (J. Van den Heuvel, personal communication, June 6, 2023). Police also provided a portion of their investigative interviewing witness guide, noting that while prison informants can provide substantial evidence, this incurs a "higher level of judicial scrutiny" and more intense questioning (W. Olsson, personal communication, September 9, 2022). Police state that prison informant evidence presents a reputational risk for police and that the Territorial Detective Superintendent must be advised if this information is to be relied on in court. This section also directs the police officer to review the Supreme Court's direction on using prison informant evidence.

The police were not prepared to provide information relating to Police confidential informants. They stated that providing this type of information would "arm criminals with information about Police's methodologies and reduce Police's capability to solve serious crime" (W. Olsson, personal communication, September 9, 2022). They withheld this information under section 6(c) of the OIA, stating "in that making that information

available would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences” (W. Olsson, personal communication, September 9, 2022).

The police advised that they do not have a specific policy regarding the disclosure of incentives to prosecution witnesses, stating that under the Criminal Disclosure Act 2008, they are required to disclose all relevant information “if it has a material bearing on a case against a defendant”, and that any incentive would be considered relevant information and must be disclosed under this legislation (W. Olsson, personal communication, September 9, 2022). The police advised that they comply with the Criminal Disclosure Act 2008 provisions, which state that all relevant information must be disclosed unless it can be withheld for a valid reason (W. Olsson, personal communication, September 9, 2022).

Concerning the query regarding the number of rewards offered for criminal cases, the police provided a table showing 11 rewards offered from January 2013 to July 2022, totalling \$750,000. They were not prepared to elaborate on these rewards, including whether any of them were claimed or paid out, stating “it would be likely to prevent members of the public coming forward in the future and Police is reliant on information from the public to assist investigations” (W. Olsson, personal communication, September 9, 2022) and would prejudice the maintenance of the law.

5.4 United States of America

5.4.1 Legislation

As mentioned in a previous section of this research, the US has allowed incentivised witness evidence as early as the beginning of the 19th century. Fessinger et al. (2020) discuss how the United States Supreme Court has approved using informant evidence since 1878. Prison informants, specifically, were ruled constitutional by the United States Supreme Court in 1966 (Allen, 2020). The federal court has consistently ruled informant evidence admissible and has allowed the use of incentives for prosecution witnesses (Fessinger et al., 2020). The Supreme

Court argues that despite the inherent issues within incentivised witness evidence, the US has several precedential Supreme Court cases they believe are sufficient to protect the integrity of the court process (Fessinger et al., 2020; Surratt, 2018). This includes the *Brady* rule and the cases of *Giglio v. United States* [1972] and *United States v. Singleton* [1998].

5.4.1.1 *Brady* rule and *Giglio v. United States*

In 1963, a landmark ruling was made in the case of *Brady v. Maryland* (*Brady*). Here it was determined that defendants have the right to access exculpatory evidence held by the police and prosecutors that could prove their innocence (Surratt, 2018). Unfortunately, it has been argued that the *Brady* decision does not have authority in many cases and "lacks teeth," primarily because prosecutors are unlikely to disclose information they think the defence would not uncover otherwise (Allen, 2020).

In 1972, another landmark Supreme Court ruling determined that the prosecution must reveal any inducements or benefits given to an informant under the Confrontation Clause of the Sixth Amendment (Cassidy, 2004, as cited in Neuschatz et al., 2008; Surratt, 2018). That clause is supposed to be a safeguard that assures the defendant's legal rights by enabling cross-examination of the witness and allows the jury to scrutinise the reasons why a witness may testify (Neuschatz et al., 2008).

The issue with these provisions is that the information is often not disclosed freely or promptly, which causes timing issues when it comes to trial and raising reliability concerns. Incentives also tend to be offered verbally and usually finalised at the conclusion of a trial which results in a conviction, so there is nothing in writing which means there is technically nothing to be disclosed to the defence and, therefore, nothing available for a jury to scrutinise (Allen, 2020; Neuschatz et al., 2008). Sometimes, authorities subtly imply that a witness may receive an incentive if they cooperate in an investigation, with a "wink or nod" (Mazur, 2002, as cited in Neuschatz et al., 2008, p. 138).

5.4.1.2 Singleton

Several jurisdictions within the US have introduced judicial warnings and tighter laws relating to incentivised witnesses. A panel of three Tenth Circuit judges in the case *Singleton I* determined that by offering leniency to a co-offender witness in exchange for evidence, the government was committing a federal crime and going against the "anti-gratuity" rules set by themselves, the federal government (Schumm, 1999, p. 329). The wording of this law articulates that anyone who either directly or indirectly offers inducements to another person for testimony given in any legal proceedings can be punished by fine or imprisonment (Schumm, 1999). In pre-trial motions, Singleton asked the district court to suppress the evidence of the incentivised witness. However, the district court ruled that the anti-gratuity laws did not apply to the government (Schumm, 1999). The Tenth Circuit panel stated, with common-sense logic behind this decision, "Government leniency in exchange for testimony can create a powerful incentive to lie and derail the truth-seeking purpose of the criminal justice system." (*United States v. Singleton*, as cited in Schumm, 1999, pp. 327-328).

Nine days later, the precedent set in *Singleton I* was reversed by another panel of judges from the Tenth Circuit (Fessinger et al., 2020). This was due, in part, to an enormous influx of applications from defence lawyers who believed their clients required reconsideration of their convictions. It was also due to another determination by the panel who decided that the anti-gratuity laws did not apply to those working for the federal United States Attorney or Assistant United States Attorney doing business within the office, a view that the original three-judge panel entirely disagreed with (Schumm, 1999). The original three-judge panel reiterated their views that the laws did indeed encompass the government and that incentivising witnesses created conditions that encouraged perjury.

5.4.1.3 Mandatory minimum sentencing and substantial assistance departure

The United States of America imposes federal mandatory minimum sentencing for serious felonies such as murder, kidnapping, sexual assault, firearms and drug felonies

(Fessinger et al., 2020). This came about to add certainty for victims by way of a minimum sentence for their perpetrator and as a form of deterrence to discourage people from committing serious crimes. With the introduction of mandatory minimum sentencing, along came what is known as "substantial assistance departure" (Schumm, 1999). Substantial assistance departure is a set of guidelines that allow the sentencing judge to depart from the mandatory minimum sentence, giving the defendant a lesser sentence than what is usually required if it is proven that the offender has provided "substantial assistance" in cooperating with authorities on a case against another person that has led to the conviction or otherwise solving of a crime (Schumm, 1999, p. 337).

Fessinger et al. (2020) argue that the rampant use of informant evidence can be attributed to the introduction of mandatory minimum sentences, stating that prior to these guidelines, the judiciary had far greater discretion regarding sentencing, including considering multiple factors concerning the defendant, which could be weighed against the offending. Since the imposition of mandatory minimum sentences, substantial assistance departure has become dramatically beneficial to defendants, meaning that this type of evidence may be offered or sought after more. It can be argued that when a defendant is given the option of cooperating for a lesser sentence compared to not cooperating and receiving a mandatory minimum sentence, there is little choice involved at all (Fessinger et al., 2020).

In 2017 it was reported that 26.2% of all defendants at a federal level received a substantial assistance departure, which increased to 40.5% in some circuits (United States Sentencing Commission, 2017). This indicates that federal courts extensively use incentivised witness evidence to bolster their cases and achieve convictions while departing from what is otherwise agreed as minimum sentences for those giving evidence. This raises the question of transparency and fairness, where defendants who know of others' crimes are rewarded with shorter sentences for providing information, and those who have no information to give serve disproportionate sentences for the same crimes.

5.4.1.4 Other relevant legislation and rulings

Although the danger with incentivised informant evidence is well known, many individual states in the US do not have any safeguards besides what is provided under federal law. A small number of states have implemented regulations on the use of incentivised witnesses, primarily considering jailhouse informants (Sutterer, 2022). This includes clearly outlining what information must be disclosed regarding informants, jury directions regarding the integrity of the evidence, pre-trial admissibility hearings, and independent corroboration requirements (Sutterer, 2022). For example, the state of Illinois has implemented reliability hearings to wade through prison informant evidence (Innocence Project, 2013). Texas has introduced a corroboration requirement for informants on drug cases, and a mandatory tracking of any incentives a witness may be given in exchange for evidence (Allen, 2020; Innocence Project, 2013). The state of California approved a proposed law in 2007 to invalidate convictions resulting from uncorroborated evidence. However, this was overturned by the Governor and did not eventuate (Innocence Project, 2013). While not in the United States of America, a Canadian inquiry recommended that a judge assess the credibility of incentivised informant evidence before admitting it (Innocence Project, 2013). Sutterer (2022) notes that while only a small number of US states have implemented these safeguards, there has been an upward trend in legislative reform from state to state over the past fifteen years, which shows a greater understanding of the risks that incentivised witness evidence poses.

5.4.2 Police policy

In the US, investigative agents oversee informants and these agents make all the decisions on whether someone becomes an informant, how useful the informant's information may be, and the agent becomes the conduit between the informant and prosecution (Natapoff, 2009). According to Natapoff (2009), there are limited protections for an informant prior to an arrest, as rights such as Miranda warnings are only prompted once a suspect has been arrested or taken into custody, and the Sixth Amendment right to counsel is only afforded to a suspect once they have been formally charged. This

means any statements made by an informant could be used against them, and law enforcement can legally negotiate with a suspect without the presence of a lawyer, opening the door for potential threats and coercion (Natapoff, 2009). It also provides the opportunity for police to avoid arresting the suspect in exchange for becoming an informant (Natapoff, 2009). Natapoff (2009) states this is settled in constitutional law, where the Supreme Court has ruled that police cannot be forced to arrest an offender. Other rewards for informants can include amendments to charges, or downplaying aggravating features of a crime such as exchanging a felony drugs charge to a misdemeanour (Natapoff, 2009). Police do not have authority to grant immunity, however, as this is a prosecution decision, though courts have previously granted immunity on the balance of fairness based on a promise from police to an informant if an informant reasonably believed they would be granted immunity from prosecution (Natapoff, 2009).

According to Natapoff (2009), the issue of informants being allowed to continue to commit crimes varies across jurisdictions. Many police departments in California have written policy relating to informants and make it clear that officers are not to condone any criminal activity by their confidential informants, and the Las Vegas Police Department states that the law should not be broken when using informants to gather information (Natapoff, 2009). These policies contrast with the U.S. Department of Justice guidelines that govern federal informants used by the FBI, DEA, and other agencies (Natapoff, 2009). The federal guidelines outline instances where illegal activity can be authorised by an informant's handler, including the manufacture, distribution, and provision of drugs (Natapoff, 2009). The federal guidelines state, however, that informants are not allowed to "participate in an act of violence except in self-defense, to obstruct justice, to commit illegal acts that would be unlawful if committed by a law enforcement official, such as breaking and entering, or to initiate a plan to commit a criminal offense" and that any "illegal activity must be authorized in advance, in writing, and for a specific period of time,

and that the authorizing agent must make a determination that the benefits outweigh the risks” (Natapoff, 2009, pp. 61-62).

5.5 Comparison of legislation and policy

While both New Zealand and the US have disclosure rules that vaguely encapsulate the use of incentivised witnesses, neither country has identified a way to ensure the safety of this type of witness nor the efficacy of the disclosure rules in place. In both instances, legislation and landmark rulings have specified that defendants have the right to access evidence that has a material bearing on their case. Similarly, in both countries, what is deemed relevant and disclosable is decided by police and prosecutors, and some researchers have even commented that these rules are toothless as prosecution and police are unlikely to disclose clearly exculpatory evidence (Allen, 2020; Dyhrberg, 2002; Surratt, 2018). Another issue with these provisions is that incentives offered to witnesses are not generally recorded and tend to be offered verbally, with completion of the benefit typically occurring after a conviction is secured. This means there is no physical evidence of a witness’s ulterior motive to be disclosed, and nothing available for a judge or jury to assess (Allen, 2020; Neuschatz et al., 2008).

It is noted that in the US that while there are federal anti-gratuity laws preventing the use of incentivised witnesses, these do not apply to agents prosecuting for the federal government, and this has raised concerns as to whether it encourages perjury (Schumm, 1999). The US also has substantial assistance departure for mandatory minimum sentencing, which involves an informant receiving a discount on their sentence for providing information to authorities where they would ordinarily have to face a minimum period of imprisonment (Fessinger et al., 2020; Schumm, 1999). New Zealand does not have similar regulations codified in law and although there are guidelines from the Solicitor-General regarding the handling of prison informants, it is unclear how often informants receive a lesser sentence in exchange for providing information in New Zealand.

Several states in the US have safeguards directly relating to incentivised witnesses and additional to the federal legislation, including jury directions and independent

corroboration hearings (Sutterer, 2022). In New Zealand, the legislation on jury directions and assessment by a Judge to exclude evidence is vague and incentivised witnesses are not specifically targeted. The Solicitor-General guidelines relating to prison informants and secondary confession evidence are ineffective without legislative change, and could even heighten the risk of miscarriages of justice due to opaque agreements between police or prosecution and informer (White, 2021).

As discussed earlier, when considering the limitations of international comparative criminology, finding information relating to the federal law enforcement of the US and their use of incentivised witnesses has proved difficult. This is due to multiple issues: time constraints, the lack of willingness on the part of the federal law enforcement of the US to publish policy in an accessible manner, and the stark difference between the US law enforcement, which has local, state, and federal law enforcement, as opposed to New Zealand's consolidated national police force. This is why the police policy aspects of this research differed, with the New Zealand section being based on procedure directly retrieved from police with targeted questions relating to all incentivised witnesses, and the US section relating primarily to prison and confidential informants, as this is where most literature is established.

5.6 Summary

Chapter 5 discussed the history, legislation, and policy regarding the use of incentivised witnesses across New Zealand and the US. This chapter introduced the origins of the Anglo-centric justice system utilised by both New Zealand and the US, going on to describe policy transfer. The policy transfer section was accompanied by examples of how New Zealand has taken note of initiatives in the US and implemented them in Aotearoa New Zealand. Chapter 5 discussed the legislation in New Zealand focusing on topics closely related to incentivised witnesses, such as the Criminal Disclosure Act 2008 and the Evidence Act 2006, and outlined the policy and procedures New Zealand police officers undertake for the use of incentivised witnesses in New Zealand, concluding with an overview of comparable legislation in the US.

6. Case studies

Chapter 6 presents the repercussions of the use of incentivised witnesses by discussing case studies that further demonstrates the reality of this concern. The US has a wealth of wrongful conviction cases to study, having the undesirable position as the country with the most wrongful convictions in the world (Johnson, 2019). A factor in uncovering and identifying these miscarriages of justice is the use of DNA evidence in criminal cases, particularly ones involving sexual assault and murder. Out of the 367 DNA-based wrongful conviction cases in the US, one-fifth of these involve prison informant evidence, making incentivised witness testimony one of the leading contributing factors of miscarriage of justice cases (Innocence Project, 2019). In cases where there is less likelihood to be DNA evidence present, for example, arson or burglary charges or a murder case with no body and no murder weapon, it is less clear how many wrongful convictions are caused by incentivised witnesses. While wrongful conviction cases in New Zealand are less frequent than in the US, which can largely be attributed to the significant difference in population numbers, miscarriages of justice involving incentivised witnesses have been controversial and highly reported in New Zealand news media. This is due to the public's perception of incentives for testimony, primarily regarding the use of prison informants and whether the community thinks this is fair.

6.1 Teina Pora

A well-publicised miscarriage of justice case is that of Teina Pora. In March 1992, Susan Burdett was found dead in her home, having been a victim of rape and murder.

Police did not have any leads for months until Mr Pora, a 17-year-old with undiagnosed foetal alcohol spectrum disorder (FASD), found a baseball bat in a drain and mentioned this to family members, commenting that it could have been the murder weapon that killed "the lady in Pah Road" which was the street where Susan Burdett lived (*Pora v R* [2015]). He was interviewed immediately after this incident and voluntarily gave fingerprints and blood samples. He denied this statement and advised that he simply stated that he had seen a bat in a concrete pipe.

Mr Pora was interviewed regarding an unrelated stolen vehicle complaint in March 1993. He was interviewed by police for several hours over four days, with no lawyer. During these interviews, Mr Pora claimed that "mobsters" were out to get him, and he asked if anyone had been arrested for the murder of Susan Burdett (*Pora v R* [2015]). Police advised that they had not arrested anyone and made Mr Pora aware of a \$20,000 reward available to anyone with information that assisted in the investigation and that he could get possible immunity from prosecution if he were not a principal offender. Though he claimed to understand the circumstances, Mr Pora does not have typical comprehension skills, which is now known due to his FASD diagnosis.

As he believed he would receive a financial reward for providing information, Mr Pora began telling the police several stories of what happened to Susan Burdett on the evening she was attacked. These stories contradict each other and, at times, are vague and implausible. The stories are too varied to explain all the differing accounts, with many inconsistencies and inaccuracies containing various details of people he implicated in the attack, which could not be corroborated. Mr Pora's stories did not support forensic evidence found at the scene. Significantly, Mr Pora could not identify Ms Burdett's house or vehicle when taken to the area by police and acquiesced to knowing the house when police physically pointed it out. Hon. Rodney Hansen KC later described his confession as "utterly unconvincing" (Hansen, 2016).

An expert on FASD pointed out in later proceedings that Mr Pora had high hopes of receiving the reward money and could not foresee the future consequences of his decision-making (*Pora v R* [2015]). Due to the nature of personality traits associated with FASD, he was eager to please the police officers, and despite being caught out in lies, he could not tell the truth; otherwise, he would receive no reward, resulting in an even deeper web of deceit (*Pora v R* [2015]). Mr Pora believed he needed to claim this reward money, as he was unemployed with a young child and relied on stealing cars and other burglaries to get by but wanted out of a life of crime (Hansen, 2016). Despite the inconsistencies, due to the graphic nature of the confessions, police moved forward with

charging Mr Pora. In 1994 he was tried and convicted of the rape and murder of Susan Burdett, receiving a life sentence with a minimum period of imprisonment of 13 years.

In 1998, Malcolm Rewa was convicted of the rape of Susan Burdett based on DNA evidence, but he was not convicted of murder at this trial. As a result of this conviction, Mr Pora was entitled to appeal against his convictions. In 2000, Mr Pora had a retrial where he was again convicted on the exact same charges and sentenced to life imprisonment with the same minimum term as his 1994 sentence. Mr Pora appealed to the Privy Council, and on 3 March 2015, he was successful, having his convictions quashed after it was established that his confessions to participating in the commission of these crimes were unreliable considering his neurodiversity diagnosis. On 13 March 2015, the Privy Council made an order that he should not have a retrial (Hansen, 2016).

Though the Privy Council identified that Mr Pora was not responsible for the crimes he had been twice convicted of, and despite someone else being convicted based on DNA evidence, Mr Pora was not immediately able to apply for compensation as there is no automatic legal right to compensation for wrongful conviction in New Zealand (Hansen, 2016). The New Zealand Government, under Cabinet Guidelines, requires the wrongfully convicted, amongst several other criteria, to establish their own innocence "on the balance of probabilities" to be eligible for any financial compensation (New Zealand Government, 2016) This was no different for Mr Pora regardless of the Privy Council decision and despite the two decades he was wrongfully imprisoned.

In June 2015, then Justice Minister Amy Adams instructed Hon. Rodney Hansen CNZM KC, a former High Court Judge, to assess the file and advise the Ministry of Justice on whether he was satisfied that Mr Pora had proven his innocence. Mr Hansen advised the Ministry of Justice on 23 March 2016 that he was satisfied that Mr Pora was innocent of the charges he had been convicted of. As a result, he was instructed to provide a further report detailing the quantum of compensation that Mr Pora should be awarded (New Zealand Government, 2016). To compensate for his loss of liberty, legal fees, and other non-financial losses such as reputational harm, loss of family and other

relationships, and emotional harm, Mr Hansen concluded that Mr Pora was entitled to the sum of \$2,520,949.42 (New Zealand Government, 2016). After a lengthy legal battle, this amount was increased by just under a million dollars to adjust for inflation, bringing his final compensation figure to \$3,509,048.42. After Mr Pora had his convictions quashed, Mr Rewa was found guilty of the murder at a trial in 2019.

While Mr Pora himself was an incentivised witness, his case features several informants who received benefits for their false evidence, which ultimately sealed his fate. Mr Pora's case involved a prison informant who told authorities that Mr Pora had confessed to killing someone (Hansen, 2016). The reality is that this prison informant was given a loan of \$150 by a police officer and a letter of support for sentencing, which was only discovered after Mr Pora's second trial (Hansen, 2016). Mr Pora's sister, cousin, and three aunts composed a story using newspaper articles to implicate him, and his sister later admitted to lying in original police statements. Shockingly, this recantation was recorded in 1993. Police at the time recommended that no further action be taken in relation to Mr Pora as a suspect and that the family were attempting to orchestrate rumours that implicated Mr Pora, though eventually, police still chose to charge him (Hansen, 2016).

Unsurprisingly, the police refused to provide any information about people who had received part of the \$20,000 reward offered before Mr Pora's convictions were quashed (Taylor, 2013). However, inquiries by independent investigators have uncovered that at least \$15,000 of this reward money had been claimed by three witnesses (Taylor, 2013). One witness, whose name and other identifying factors are redacted in reporting, received a reward of \$7,000 (Hansen, 2016). It is known that one of Mr Pora's aunts received financial compensation paid to her by the police, and police are unable to advise who else received reward money as their "records are incomplete" (Hansen, 2016).

6.2 David Tamihere

This is one of New Zealand's most contentious and still ongoing cases involving prison informants. In April 1989, two Swedish tourists named Heidi Paakkonen and Urban

Hoglin, who were travelling around the Coromandel Peninsula in New Zealand, were reported missing after failing to meet with friends on 14 April and missing their airline bookings on 20 April 1989 (*Tamihere David Wayne v R* [1992]). At the same time, David Tamihere (Mr Tamihere), who had previously been convicted of manslaughter, was living in the Coromandel bush after absconding from his address while on bail for a sexual assault case.

Once he was found at a house in Blockhouse Bay, Auckland, Mr Tamihere was arrested on a warrant that had been issued in 1986. Also found at this house were items belonging to the two tourists (*Tamihere David Wayne v R* [1992]). During questioning at Mount Eden prison, he admitted having stolen Heidi and Urban's car and sold some of the belongings that were in the car (*R v Tamihere* [1990]). Heidi and Urban were presumed dead. As a result of the circumstances, Mr Tamihere was charged with the murder of Heidi and Urban on or about 8 April 1989. At the time of the trial, neither Heidi nor Urban's bodies had been found (*R v Tamihere* [1990]).

A Crown witness who formerly boarded with Mr Tamihere and his family at the Blockhouse Bay house claimed that Mr Tamihere's son showed him a watch that he says his father gave him in April 1989. The Crown witness believed that it looked like the watch Urban was wearing in a photograph, however, he did not assert this was the same watch (*Tamihere David Wayne v R* [1992]). Mr Tamihere was identified by two trampers as having been at a campsite on 8 April 1989, near where Heidi and Urban were last seen, with a tomahawk or machete in hand and accompanying a blonde woman who strongly resembled Heidi Paakkonen. The trampers described the woman as being "out of place" and someone who "conveyed an impression of unease" (*R v Tamihere* [1990]). Mr Tamihere confirmed he had been at this campsite previously, but around 4 April, before Heidi and Urban were believed to have gone missing (*Tamihere David Wayne v R* [1992]).

The way in which Mr Tamihere was formally identified by the trampers was contentious and is essential to his claimed miscarriage of justice; however, this is only one aspect of

the questionable police work undertaken in this investigation and judicial direction or warnings given to the jury during trial. During their investigation, police obtained evidence from several imprisoned witnesses, and three of these prison informants gave testimony at trial.

All three of the stories supplied by the prison informants differ from each other in terms of what happened to Urban and Heidi. Witness A said that Mr Tamihere had disclosed that he, along with three other males, met Heidi and Urban on a bush track in the Coromandel. Witness A claims that Mr Tamihere and the three other males sexually assaulted both Heidi and Urban and killed them by breaking their necks before burying them near the edge of a bluff. He also produced sketch plans of the area where the purported murders happened, and he said these plans were drawn by Mr Tamihere to explain his story further. According to the Crown, the plans were detailed and even marked the position of a car at the end of the road the campsite was on (*R v Tamihere* [1990]). Witness B said that Heidi and Urban were killed and cut up by Mr Tamihere alone.

Witness C, who provided the most damning evidence, claims that he had several conversations with Mr Tamihere regarding the case. He stated that Mr Tamihere said that when the trappers saw him, Urban was still alive and was tied to a tree by Mr Tamihere. Mr Tamihere also told him that he sexually violated both Heidi and Urban and murdered Urban with blows to the head, and strangled Heidi later, disposing of their bodies at sea (*R v Tamihere* [1990]).

There were no disputes that the evidence of all three inmates was admissible at the trial (*R v Tamihere* [1990]). The three prison informants all had name suppression throughout the trial and subsequent appeals. While the prison informants' evidence contradicted each other, it was convenient for police as one informant's evidence, in particular, strengthened the dubious eyewitness identification. Mr Tamihere was found guilty by a jury on 5 December 1990 due to the circumstantial evidence of the car theft and watch

evidence and the cumulative effect of the questionable eyewitness identification, which was strengthened by the prison informant (*R v Tamihere* [1992]).

In late 1991, Urban Hoglin's body was found approximately 73 kilometres away from where he was last sighted and where the Crown alleged Mr Tamihere murdered him. Urban was not buried at sea, as asserted by one of the prison informants; he was, in fact, found in a shallow grave at the bottom of a bluff on the complete opposite side of the Coromandel Peninsula from the last known sighting. It appeared that Urban had been stabbed in the neck and shoulder, and there was a possible decapitation attempt. Urban had no discernible sign of a skull fracture or broken neck, and his watch was still on his wrist (*Tamihere David Wayne v R* [1992]). To date, Heidi's body has never been found.

Mr Tamihere appealed based on this new evidence. The Crown maintained at the Court of Appeal that it never "tied itself to the places of murder or disposal" and that Mr Tamihere had the means and knowledge to access the location where Urban was found (*Tamihere David Wayne v R* [1992]). The Court of Appeal stated that they "would be surprised if the jury had given much credence to any of the detail and the stories Tamihere was said to have told these witnesses" (*Tamihere David Wayne v R* [1992]). The Crown did not assert that the prison informant statements were necessarily correct. The Crown claimed that the statements were significant as they showed Mr Tamihere had been discussing his involvement in the disappearance of the couple. In his summing-up at the original trial, the judge asked the jury to "treat the statements with care", saying they were not proof of murder (*Tamihere David Wayne v R* [1992]).

Other issues dealt with on appeal related to jury direction given by the judge. Mr Tamihere complained that there was insufficient jury direction relating to Witness A's evidence. Witness A admitted in cross-examination that he was serving his own interest by giving evidence for police and the Crown as he hoped to get a reduction during upcoming sentencing for his role in importing heroin to New Zealand. Section 12C of the Evidence Act 1908 required the judge to "consider whether or not it would be appropriate to instruct the jury on the need for special caution" in considering his evidence (*Tamihere*

David Wayne v R [1992]). The Court of Appeal ruled that when the judge was dealing with the prison informant evidence, he told the jury to "treat with care evidence from persons who would not normally be regarded as reliable witnesses" and summarised the three prison informants' evidence with comments that the Court of Appeal believed were suitable. The Court of Appeal believed he clearly spelt out the incentives Witness A hoped to gain by giving evidence and "concluded with a further injunction to treat their evidence with care" (*Tamihere David Wayne v R* [1992]).

Mr Tamihere's counsel at the Court of Appeal submitted that this did not go far enough and that the Judge should have warned the jury that there are inherent risks where a witness has a purpose of his own to serve. The Court of Appeal labelled this submission "hairsplitting" as the jury "could have been under no illusion about witness 'A's interest in giving evidence favourable to the Crown." Counsel also complained about the reliability of the other two prison informants, and the Court of Appeal had a similar ruling that the judge dealt with their evidence adequately (*Tamihere David Wayne v R* [1992]). Mr Tamihere's appeal was unsuccessful.

Throughout the years following, Witness C made several comments about the evidence he gave against Mr Tamihere. In August 1995, Witness C swore an affidavit in front of Mr Tamihere's brother and a lawyer stating, "The fact of the matter is David Wayne Tamihere never made any confession to me of any kind. David Wayne Tamihere actually always maintained his innocence" (*Taylor v C* [2016]). In July 1996, Witness C was interviewed by Paul Holmes for the *Holmes* television show, where he reiterated his recantation and said he believed police knew at the time his testimony was fabricated (*Taylor v C* [2017]). He also claimed that police offered him part of a \$100,000 reward (Hurley, 2017). This resulted in an investigation by the Independent Police Conduct Authority (IPCA), which cleared police of any wrongdoing. As of August 1996, Witness C had retracted his retraction and claimed that the original recantation was due to threats made to him and his parents (*Taylor v C* [2016]). On 11 June 2007, Witness C wrote a letter to Mr Tamihere stating, "As you know it was all false and fabricated by police

anyway," which was in relation to his trial evidence. He claimed he would make a complete statement to "exonerate" Mr Tamihere (*Taylor v C* [2016]).

As a result of these continued statements made relating to his evidence, jailhouse lawyer Arthur Taylor lodged a private prosecution against Witness C in what is likely the first "secret witness" prosecution case in New Zealand's history (*Taylor v C* [2016]). Part of the submissions in this private prosecution case outlined that in 2015, Witness C was again recorded as a Crown witness for the prosecution of another inmate. The Crown elected not to use the evidence of Witness C at that trial, but Arthur Taylor submitted this as evidence of Witness C's propensity to "snitch" on people in prison. Witness C also lied in proceedings before the Human Rights Review Tribunal (*Taylor v C* [2017]).

On 1 September 2017, Witness C was found guilty of eight charges of perjury and sentenced to eight years and seven months imprisonment (*Taylor v Witness C* [2017]). His name suppression was revoked, considering the significant public interest regarding the "assault on the justice system" that false informants commit (*Taylor v Witness C* [2017]). He could then legally be named Roberto Conchie Harris, a convicted double murderer who had been sentenced to life in prison in 1983. After the murder charges, he was convicted of 23 other offences during various releases, some of them sexual crimes involving children (New Zealand Parole Board, 2020). He remained in prison until his death in 2021.

Witness B died in February 1995. After Witness C was convicted of perjury, Arthur Taylor was successful in having Witness B's name suppression revoked (*Arthur William Taylor v The Queen* [2018]). He was named Stephen Kapa in April 2018 (Hurley, 2018).

Witness A, a convicted heroin importer testified as a prison informant for a different murder case, the murder of Mr Bell in 1990. At an appeal for one of the men convicted of this murder, defence counsel produced evidence that Witness A complained to police about not receiving part of the \$20,000 reward for evidence relating to the murder of Mr Bell. Witness A was also transferred to another prison after the murder trial, and at the

new prison, he was found to have made false allegations against prison officers. In 2006, Witness A left New Zealand using a passport with another person's identity. While the appeal was unsuccessful, these issues, along with the proven undermined credibility of his evidence given in the trial of Mr Tamihere, show that Witness A's reliability as a witness was dubious. The identity of Witness A is still unknown.

Released on parole in 2010, Mr Tamihere has always maintained that he is innocent of the murders of Heidi Paakkonen and Urban Hoglin. In April 2020, Her Excellency the Governor-General granted Mr Tamihere a Royal prerogative of mercy. This means that although he has exhausted all his available appeals, Mr Tamihere is able to have his case reconsidered as the developments relating to DNA evidence since the discovery of Urban's body in 1991 and the perjury conviction of Witness C in 2017 "could lead the Court of Appeal to conclude that a miscarriage of justice may have occurred" (New Zealand Gazette, 2020). His appeal was to be heard on 12 July 2023, but has since been pushed back to November 2023 (White, 2023). The Court of Appeal will consider if the convictions may be held, a retrial ordered, or even quash these convictions if they are satisfied that the convictions are unsafe or if a miscarriage of justice has indeed occurred.

6.3 Scott Watson

On New Year's Eve 1997, New Zealanders Ben Smart and Olivia Hope went missing after a New Year's Eve celebration at a lodge in the Endeavour Inlet, Marlborough Sounds. Ben, aged 21, and Olivia, aged 17, have since been presumed dead as their bodies, nor any of their possessions, have been sighted or located. They were last seen by a water taxi driver who dropped them off at a yacht belonging to an unidentified solo male in the Endeavour Inlet in the early hours of 1 January 1998. Although no motive for murder apart from inferences made to a possible sexual motivation and no method of murder was discussed at trial, it is accepted that Ben and Olivia were murdered by the mystery yachtsman who disposed of their bodies in the Cook Strait (*Scott Watson v R* [2000]).

Scott Watson, 26 years old at the time, was also celebrating at the lodge where Ben and Olivia were partying. Mr Watson had an extensive criminal record from his teenage years, mainly relating to theft and cannabis offences, and an assault charge from ten years prior. In 1989 and 1990, Mr Watson did two short stints in prison (White, 2007). As a result of these prior charges, notwithstanding that Mr Watson had only one criminal conviction since 1990, he was immediately targeted by the police as having the "pedigree" to commit such a crime (White, 2020).

The water taxi driver told police that he dropped Ben and Olivia off at a 38-40 foot wooden ketch, which is a boat with two masts. He described the ketch as having a blue stripe and round portholes and was rafted to between three and five other boats. There are also subsequent statements that show the water taxi driver was mistaken about the exact position of the ketch (White, 2007). Police were unable to confirm if there were any ketches matching the description that the water taxi driver gave in the Endeavour Inlet on New Year's Eve during the beginning of the investigation (White, 2007). However, in the weeks following, there were numerous reports from members of the public who had sighted a ketch fitting the description, but the witnesses were not followed up by police or were advised that their statements were not required (White, 2007). Mr Watson arrived at the Endeavour Inlet in his sloop, which is a boat with one mast. Mr Watson's sloop was made of steel and had no portholes (*Scott Watson v R* [2000]).

Witnesses had difficulty in identifying Mr Watson in visual identification procedures. When the water taxi driver was shown photographs of Mr Watson twice, he was not identified (White, 2021). However, when police showed the water taxi driver a photograph of Mr Watson with his eyes half-closed, the driver stated that the eyes were the same as the man he had seen on New Year's Eve with Ben and Olivia (White, 2021). He did also say that the appearance of the man in the photograph was "too tidy" to be the offender. A second eyewitness, the bar manager of the lodge, also identified Mr Watson via the mid-blink photograph (*Scott Watson v R* [2000]).

Mr Watson was arrested in June 1998, by which time he had already been subjected to a trial by the media for six months. Picton, the town he lived in, was small, and rumours spread quickly. Name suppression was not granted. Police undertook operations such as pulling his sloop from the water for forensic testing in view of the public and media (White, 2007; White, 2020). They also bugged his phone lines hoping to catch an incriminating statement from Mr Watson to his girlfriend at the time (Brotherston, 2018). Police and media did nothing to stymie harmful and untrue allegations of incest between Mr Watson and his sister, which only further damaged his character, and it has been alleged by Oliva's father that the police started these rumours (White, 2007).

Mr Watson's boat was seized publicly on 12 January 1998, and according to forensic testing, had been repainted since the new year, and the interior of the vessel had been "methodically wiped, removing fingerprints" (*Scott Watson v R* [2000]). Scratch marks were found on the inside of a hatch cover in the boat, which were likely caused by fingernails. The Crown attributed these scratch marks to a victim trying to escape, whereas Mr Watson and his family claimed his nieces caused the damage by playing on the hatch cover. Portions of cushion covers were missing; however, there was no indication of what may have been on these cushion covers. A blanket was seized, where investigators found human hairs, which were later attributed to Olivia Hope by forensic testing. This forensic testing consisted of microscopic examination, which "showed no distinguishable differences from sample hair sourced to Olivia Hope" and gave a positive DNA match, though one of the hairs had a mixed DNA profile (*Scott Watson v R* [2000]). According to prosecutors, Mr Watson made inculpatory statements about the murders to fellow prisoners while on remand at Addington Prison, apparently giving a "graphic description" of how Olivia died (*Scott Watson v R* [2000]).

Both eyewitnesses have since recanted their statements, noting that Mr Watson's appearance was too tidy to be the offender and the photograph shown to them was misleading (White, 2007). The bar manager signed an affidavit to recant her statement, and the water taxi driver has made several statements regarding the pressure he felt

from police at the time of the investigation (White, 2021). He has said it seemed police were "desperate to arrest someone", and he believes that due to this desperation, he could have been wrongfully charged with the crime if Mr Watson was not (White, 2007). Some of the complaints relating to the way the investigation was run have been investigated by the IPCA, who said there was room for improvement in the way police conducted themselves.

In relation to the incentivised witness testimony, two prison witnesses claimed that Mr Watson had confessed to the crime, and one of these witnesses claims to have provided evidence for an inducement, labelled Witness A. This witness is not to be confused with any of the other case studies discussed in chapter 6, as courts and police use this label format to distinguish between witnesses they do not want to be identifiable in one singular case. Witness A, whose evidence was admitted, has since come forward stating that his evidence was fabricated (Horwood & Bingham, n.d.). Witness A claimed in a phone call to the NZ Herald that police visited him at least ten times in prison and in a drug rehabilitation centre (Horwood & Bingham, n.d.). He claims that his written statement prepared by police contained several inaccuracies, primarily about the alleged sexual assault and cause of Olivia's death, and that when he tried to raise the issue, he was told that he had signed it so he must have said it (Horwood & Bingham, n.d.). Witness A states that he believes he would not have received parole if he had not testified and that he felt his life was threatened, but by carrying favour with police; he would be protected. Two lawyers have also purportedly been contacted by Witness A to recant his statements; however, he is unwilling to sign any documents, so it is unable to be taken further (Horwood & Bingham, n.d.).

A second prison informant, labelled Witness B, claims that he was "good friends" with Mr Watson in prison and they interacted frequently. However, Mr Watson and Witness B were never in the cellmates and had little time to forge a friendship to the extent that Mr Watson would feel comfortable making a confession (White, 2007). It was later discovered that police had provided Witness B a car and cellphone to use, along with

charges against him reduced the day he spoke to police about the apparent secondary confessions made by Mr Watson (Bingham, 2000).

Mr Watson was found guilty in September 1999 and was sentenced to life in prison with a minimum non-parole period of 17 years (*Scott Watson v R* [2000]). He appealed in 2000, citing that the DNA evidence was inconclusive and could have been contaminated at the testing site, and that the judge did not provide sufficient warning to the jury on the eyewitness identification evidence. This appeal was unsuccessful (*Scott Watson v R* [2000]). He was subsequently declined leave to appeal to the Privy Council in 2003, and his first application for a Royal prerogative of mercy was declined in 2013 (*Scott Watson v R* [2021]). His second application for a Royal prerogative of mercy, relating to the DNA evidence and eyewitness identification photo montage, was approved in 2020, and a hearing is set for June 2024 (*Scott Watson v R* [2022]; White, 2023). Despite good conduct in prison and the fact he has upcoming court dates that require preparation which would most easily be done if he were out of prison, Mr Watson has consistently been refused bail due to his denial of offending. If this appeal is unsuccessful, Mr Watson's next parole hearing is scheduled for October 2023 (New Zealand Parole Board, 2021).

6.4 Gail Maney

In August 1989, Deane Fuller-Sandys went missing. His body has never been found, and at the time of his disappearance, it was thought that he may have been swept off the rocks and drowned while fishing on the west coast of Auckland (*Maney Gail Denese v R* [1999]). Also in mid-1989, Leah Stephens disappeared, with her remains being found in June 1992 and a homicide investigation commencing soon after (*Maney Gail Denese v R* [1999]). Throughout the investigation, police made connections between the disappearances of Dean and Leah and, as a result, ultimately charged Gail Maney and Stephen Stone with the murder of Deane Fuller-Sandys.

At some point in 1989, Ms Maney's property was burgled, where various leather goods and drugs were stolen (*Maney Gail Denese v R* [1999]). The police case was that Ms

Maney believed it was Deane Fuller-Sandys who had committed the burglary despite him not meeting the description of the alleged burglar, and as a result, Ms Maney commissioned Mr Stone to murder Deane (*Maney Gail Denese v R* [1999]). The police believed that Deane was assaulted and shot in the garage of Ms Maney's house (*Maney Gail Denese v R* [1999]). This prosecution involved several incentivised witnesses, both accomplice witnesses and witnesses who claimed to have received threats, who were coerced, or received a disincentive to give evidence against Ms Maney and Mr Stone.

One of the witnesses, known as AB, was a flatmate of Ms Maney's and lived at the property where the alleged murder occurred (*Maney Gail Denese v R* [1999]). AB knew Deane for many years and knew the other people allegedly involved in the events. AB claimed that Ms Maney met with Deane and accused him of the burglary, which he denied (*Maney Gail Denese v R* [1999]). Between one and two days later, at the insistence of Ms Maney, AB invited Deane over to the property, at which point Ms Maney and Deane got into an argument. Mr Stone and Deane then allegedly had a fistfight, during which point the group moved into the garage, and Mr Stone shot Deane (*Maney Gail Denese v R* [1999]). AB alleges that Mr Stone handed the gun to the other people present and forced them all to shoot Deane's body (*Maney Gail Denese v R* [1999]). AB acknowledges she was a drug user, and therefore her memory could have been affected (*Maney Gail Denese v R* [1999]).

The second witness, known as CD, was another flatmate of Ms Maney's, supported the statements of AB and claimed that Ms Maney talked about "putting a hit" on Deane and that Mr Stone would complete this (*Maney Gail Denese v R* [1999]). A third witness, Greg Allen Polley, claims that he was present when Deane was shot and directly implicates Ms Maney in the prior assault, alleging she kicked Deane while he was on the ground and shouted abuse at him (*Maney Gail Denese v R* [1999]). All of these witnesses had their evidence challenged in court due to the inconsistencies between their statements, their histories of having "poor characters", and due to the witnesses either being under

witness protection or being granted immunity (*Maney Gail Denese v R* [1999]; *Maney Gail Denise v R* [2005]).³

Three further witnesses, additional to AB, CD and Greg Allen Polley, gave secondary confession evidence to assist police and the Crown. All three of these statements give weight to the prosecution case that the defendants believed Deane robbed Ms Maney, and one of the witnesses claim that Ms Maney told him she had Deane “dealt with” (*Maney Gail Denese v R* [1999]). Of note, at the time of the police investigation, the detective senior sergeant who was leading the investigation was caught smoking cannabis by some colleagues (Maas & Dudding, 2018). After he had left the New Zealand police, this ex-police officer was imprisoned in Rarotonga on drugs charges involving cannabis (Maas & Dudding, 2018). While no conclusions are being drawn about the efficacy of a police investigation headed by someone under the influence of cannabis, the issue of his subsequent conviction speaks to this ex-police officer’s moral compass and integrity.

Ms Maney denied and continues to deny any involvement with the alleged murder or an associated assault and claims she has never met Deane and therefore could not have commissioned his murder (Dudding, 2023). Ultimately, the jury accepted the evidence of AB, CD, and Polley, bolstered by the additional three witnesses’ evidence (*Maney Gail Denese v R* [1999]). Ms Maney and Mr Stone were convicted on 26 March 1999, nearly a decade on from the alleged murder with no body found (*Maney Gail Denese v R* [1999]). Ms Maney successfully appealed in 1999 and a retrial was ordered on the basis that the trial Judge did not sufficiently put the defence’s case to the jury in summing up (*Maney Gail Denese v R* [1999]). If the Judge had done so, the jury may have had a reasonable doubt as to whether Ms Maney was guilty, and because all the information was not available to the jury a miscarriage of justice may have occurred (*Maney Gail Denese v R* [1999]). At the retrial in 2000 Ms Maney was once again convicted.

³ The spelling Ms Maney’s names are directly reflective of the spelling in the judgments.

On 3 July 2003, one of the key witnesses, AB, swore an affidavit recanting her inculpatory statements against Ms Maney and Mr Stone (*Maney Gail Denise v R* [2005]). This affidavit confirmed some key details about the timing of the burglary which supported the defence case (*Maney Gail Denise v R* [2005]). Witness AB claims she and witness CD were pressured by police to produce a statement, after being shown statements already purportedly given to police by other witnesses (*Maney Gail Denise v R* [2005]). The two women discussed the case at the police station and agreed to write statements confirming what the other witnesses had said, as they had been threatened of being charged as accessories (*Maney Gail Denise v R* [2005]). Both women were terrified of losing their children, and in AB's case, she wrote a statement that agreed with the other witnesses in order to be granted immunity (*Maney Gail Denise v R* [2005]). This recantation was presented at appeal in 2005, though it proved to be unsuccessful in overturning the conviction. The Court of Appeal ruled that the statement was "utterly lacking in credibility on all relevant matters put in issue" and "[o]ne way or another, she is a false witness; whether at trial or before us. Our task is to decide in which Court she has not given true evidence on relevant matters. We find her essential evidence before us is the false version" (*Maney Gail Denise v R* [2005], p. 9). In issuing its decision, the Court of Appeal deemed that AB was not offered immunity based on a conviction, just on truthful evidence (*Maney Gail Denise v R* [2005]).

In 2019, after a podcast outlining the details of the case gained popularity, a second witness whose identity is suppressed came forward to recant their statement (Maas & Dudding, 2019). This witness has also claimed police intimidation and pressure to gain an inculpatory statement from them, and investigators currently working to prove Ms Maney's innocence have identified that this particular witness was vulnerable at the time of the original homicide investigation (Maas & Dudding, 2019). The witness recalls police officers coming to their house, advising them that other people were implicating them in the murder, and that police were going to make their life miserable if they did not admit to knowledge of the alleged murder (Maas & Dudding, 2019). This recantation was

supported by a police officer who worked on the murder investigation, telling reporters that when the witness got in the police car after providing a statement said, “Nothing I told those detectives is true” (Akoorie, 2019). The lead investigator on her crusade for innocence believes that Ms Maney’s case could be a greater miscarriage of justice than Teina Pora’s, and is even more difficult to raise due to the jurisdictional issues and Ms Maney having exhausted all her available appeals even to the Supreme Court (Dudding, 2023). As of 2023, Ms Maney’s investigation team are finalising the evidence to file in court to have her case heard for a third, and hopefully final time, where her innocence is proven (Dudding, 2023).

6.5 Summary

Chapter six has presented four case studies to show how different types of incentivised witnesses are used in criminal proceedings, which may contribute to miscarriages of justice and wrongful convictions. Teina Pora’s case highlights how one decision made by someone vulnerable and susceptible to people-pleasing behaviour, and years of denial from all authorities involved, has tragically resulted in Mr Pora spending decades behind bars for a crime he did not commit. David Tamihere’s case shows how eager police and prosecution are to secure a conviction, despite their witnesses’ evidence differing so significantly and despite the known propensity of those witnesses to give evidence against others for their own benefit. Scott Watson and Gail Maney’s cases demonstrate that police pressuring and coercion tactics were used extensively in the late 1990’s, to the detriment of natural justice. These case studies also show that incentivised witness evidence is often combined with other miscarriage of justice risk factors such as faulty eyewitness identification. These real life examples further demonstrate the consequences of using incentivised witnesses in New Zealand criminal cases.

7. Why incentivised witnesses are problematic

There are inherent dangers associated with incentivised witnesses and numerous repercussions with their use. As discussed in detail in an earlier section, wrongful convictions and other miscarriages of justice are the most glaring risk related to using incentivised witnesses in criminal cases and nearly one in five cases of exoneration by DNA evidence in the US features informants (Fessinger et al., 2020). The use of incentivised witness evidence creates a situation where the witness wants to meet the prosecution's needs at any cost, which inevitably involves creating false evidence at times (Neuschatz et al., 2008). Sherrin (1997, as cited in High, 2021, p. 235) has commented that the use of prison informants is "fundamentally unfair and violates the accused's right to remain silent" as the secondary confession evidence is essentially making a statement on the accused's behalf, and that this type of evidence elicited from those in custody is intrinsically coercive.

7.1 No corroboration requirement

Currently, there is no corroboration required under current New Zealand law for evidence given by witnesses. As High (2021) notes, the current judicial directions in place are not sufficient to protect against reliability issues. Dyhrberg (2002) has postulated that the judicial system participates "blindly" when it comes to incentivised witness evidence and accepts testimony without it being scrutinised or corroborated, which could be catastrophic in terms of wrongful convictions or miscarriages of justice.

7.2 Prosecutorial bias and "implicit vouching"

When the prosecution puts forward a witness, there is the implication that police and the Crown have faith that the information provided by this witness is credible and trustworthy. This makes the jury believe that the prosecution would not have called the witness to give evidence if their evidence was not dependable, even if the jury knows the witness has been incentivised. This problematic phenomenon is known as "implicit prosecutorial vouching" and may give more weight to the evidence than it ought to (Anderson, 2021, p. 10). This concern is further impacted by prosecutorial bias and confirmation bias,

where the Crown puts forward “information that confirms rather than denies their initial assessment,” plugging gaps in their own theories and placing greater weight on an informant's reliability (Anderson, 2021, p. 11). This is exacerbated by public pressure to bring a case to conclusion, which usually involves the conviction of a suspect, which can then lead to “tunnel vision” by authorities where law enforcement centres their focus on one line of enquiry only (Anderson, 2021, p. 11).

Additionally, the use of incentivised witnesses generally stands to benefit one side more than the other – the prosecution. A prosecutor is enabled under the law to exchange rewards for information, whereas if a defendant attempted to offer money, lenience, or other benefits to an informant they could be accused of or charged with tampering (Natapoff, 2009). As Natapoff (2009) discusses, this is lopsided, and as a result there are less incentives for an informant to provide information that benefits the defence when given the option.

7.3 The impact of incentives on false accusations

Fessinger et al. (2020) describe a study undertaken by Swanner, Beike, and Alexander (2010) where volunteers were instructed to participate in a laboratory exercise, completing activities on the laboratory computer in pairs and not hit a particular key; otherwise, the computer would crash. The computer would then have a simulated crash regardless of whether the key was hit. The pair would then be taken separately to rooms to discuss with the lead administrator of the laboratory how the situation could be resolved and that they would likely have to stay behind to complete a second test. However, the administrator told half of the participants that if they confessed to who crashed the computer, only one of the pair would have to stay behind. The outcome of this study showed that participants were more likely to implicate others, despite it not factually happening, if there was an incentive to do so (Fessinger et al., 2020).

In a similar study completed by the same researchers, one member of the pair was an actual participant, and another was a member of the research team, unbeknownst to the participant. The research team member was instructed to be the typist, and again, a

simulated crash was administered. This allowed the research team to ensure the specific key to cause the crash was not hit, which showed that any secondary confessions by the participant were obviously erroneous. In this study, if participants were promised an incentive, they were more likely to implicate their partner, showing that even a small incentive for a relatively low-level offence can produce false information (Fessinger et al., 2020). In this second experiment, 34% of the informers in this scenario gave a false secondary confession if there were no incentives, and 55% of informers gave a false secondary confession if an incentive was offered, making the false evidence 21% more likely to occur if an incentive is offered (Swanner et al., 2010, p. 62).

As a result of these studies, Fessinger et al. (2020) deduce that it is likely that if there were more significant risks and rewards at stake, informants would be much more predisposed to providing false evidence. It is clear that even a small enticement can induce anyone to give false information to officials, even about their friends or family (Fessinger et al., 2020). This is demonstrated in the earlier chapter 6.1, where one of Teina Pora's aunts received a financial reward from the police, and where a prison informant gave evidence against him for a \$150 loan and a letter of recommendation from police (Hansen, 2016).

7.4 Informants as a "last resort"

Incentivised witnesses are most used when authorities have circumstantial evidence to prosecute someone, but witness testimony will seal the deal. This is why informants are often used as a last resort when the prosecution has little else to support their case (Cassidy, 2004, as cited in Neuschatz et al., 2008). Evidence from incentivised witnesses is frequently used in high-stakes cold cases or cases where no physical, DNA or video evidence is available (Rappold, 2005, as cited in Neuschatz et al., 2008). There is also the implication of immunity from prosecution for co-offenders. When people who would have otherwise been given life imprisonment sentences if found guilty, they can receive a "get out of jail free card" by informing their accomplices. This practice is simply unethical, as there are no exceptions when it comes to crimes where a lower punishment

can be negotiated in exchange for cooperation (Natapoff, 2009). This means that even murderers and child pornography offenders can have their situations mitigated by offering incriminating evidence against someone else (Natapoff, 2009).

7.5 Jury instructions and juror psychology

Jury instructions and jury psychology are two aspects of incentivised witness research that have been extensively studied (Dufraimont, 2008; Fessinger et al., 2020; High, 2021; Neuschatz et al., 2008; Neuschatz et al., 2012; Neuschatz et al., 2020; Wetmore et al., 2020; Wetmore et al., 2022). Studies have shown that juries are easily influenced by witness testimony, even when the jury is informed of the witness' motivation to lie or the incentives received (Fessinger et al., 2020).

Jurors are not typically swayed by who the witness is, whether they are a prison informant, accomplice witness, or a member of the public, nor are they affected by how the informer claims they received their information, and they are not influenced by whether the witness has given incentivised testimony previously (Fessinger et al., 2020). For example, as described by Neuschatz et al. (2008), a study that analysed mock jurors' conviction rates showed that jurors are significantly more likely to convict when there was testimony from a cooperating witness which involved a confession made by the defendant to the witness, than if there was no cooperating witness who gave evidence. In two more studies reported on by Fessinger et al. (2020), it was shown that evidence from an informant was more persuasive than eyewitness evidence and character witness evidence. This is incredible, considering eyewitnesses have first-hand information, compared to informants' secondary evidence which can be sourced from anywhere.

One of the main points of a jury trial is that people are judged by a panel of their peers, meaning laypeople to the law. Dufraimont (2008) rightly notes that jurors tend to be untrained in the law and lack the knowledge and experience to assess dubious evidence adequately. While cross-examination of the witness is typically conducted, the lack of legal proficiency by jurors does not enable them to make a sufficient assessment of the evidence at hand, as the jury often overlooks the issues that make the evidence doubtful

(Dufraimont, 2008; High, 2021). Jurors are not often concerned about the origin of the evidence, even when explicitly warned by the judge that the evidence given by a certain witness may not be entirely dependable (Anderson, 2021).

7.6 No public data on the use of informants

There is no recorded data on the use of informants, as identified by Scheck & Neufeld (2002), who are leading experts on wrongful convictions. Because there is no publicly recorded data on the use of informants, any research completed regarding this topic is typically anecdotal (Scheck & Neufeld, 2002). While the use of informants is pervasive throughout the US, most jurisdictions do not track the number of informants used or their yield (Natapoff, 2009). There is an inherent danger to informants and to the public, particularly when police confidential informants are used. There can be disastrous outcomes when witnesses should receive incentives or protections, but the protections are not implemented properly, as discussed in section 7.7 Risk to vulnerable communities.

7.7 Risk to vulnerable communities

People of colour and Indigenous people may be more at risk of prison informant evidence, considering the disproportionate imprisonment rates of people of colour compared to white or Pākehā people (Fernando, 2018; McIntosh & Workman, 2017; Quince, 2007). Compared to white people, Black Americans are sentenced to prison nearly five times more, and Latin Americans are sentenced to prison 1.3 times more than white Americans (The Sentencing Project, 2021). By comparison, Indigenous Māori in Aotearoa New Zealand make up 52% of the imprisoned population despite being approximately 15% of the population in New Zealand (Ministry of Justice, 2023), Intersectionality comes into play here, too, as women of colour and wāhine Māori have drastically more dismal statistics than their male counterparts, with 56% of women sentenced to prison in New Zealand identifying as wāhine Māori (Corrections Ara Poutama New Zealand, 2020).

Informants can be vulnerable and at risk too, as Natapoff (2009) articulates that part of onboarding an informant can involve “the purposeful manipulation of their vulnerability” (p. 54). Informants who have access to adequate legal representation and who have a high level of literacy or education are better equipped to make decisions on whether they want to cooperate (Natapoff, 2009). Vulnerable informants, which includes those who are youths, have neurodiversities, mental health issues, or learning disabilities, may be more likely to assist law enforcement in what they are led to believe is a high-risk environment, and have the potential to produce false information (Natapoff, 2009). The risk to vulnerable informants is demonstrated in the case study of Teina Pora, who has FASD, located in section 6.1 of this thesis.

7.8 Cost to the taxpayer

Incentivised witnesses come at a significant cost not only to the wrongly accused and the victims of those crimes by way of personal sacrifice but also to the taxpayer in financial means. While ex-gratia payouts for miscarriages of justice can cost in the millions which comes out of the Ministry of Justice budget and are an obvious cost to the public, little thought is given to how police confidential informants and other informants receive payment or where this comes from.

As discussed earlier in section 4.2 Police confidential informants, New Zealand Police have paid \$1,860,586 amount to confidential informants between 2013 and 2022 (J. Van den Heuvel, personal communication, June 6, 2023). Earlier research states that this figure was as high as \$6.1 million from when records first began to 2021 (Dennett, 2021). In the US, it is estimated that \$548 million USD has been paid out to confidential informants across the Federal Bureau of Investigations (FBI), Drug Enforcement Agency (DEA), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) between 2011 and 2018. This information is available as it is subject to OIA and Freedom of Information laws, however, we will likely never know how much other informants are paid if they are not part of a confidential informant programme.

7.9 Summary

Chapter seven has outlined why incentivised witnesses are problematic. This has included discussion on no corroboration requirement, the issue of prosecutorial bias and how prosecutors appear to “vouch” for their witnesses simply by having them give evidence. It discussed the impacts that incentives have on false confessions, and how there is danger in using informants as a “last resort”. The chapter gave an overview of jury psychology and how instructions to juries may or may not alter juror decision making. Chapter 7 raised the issue that there is no public data available on the use of informants, and portrayed the risks that informants pose on vulnerable communities, including the cost to the taxpayer.

8. Discussion

8.1 Introduction

This research has defined what an incentivised witness is, how this type of evidence is used, and why this type of evidence is problematic, along with key historical aspects of the use of incentivised witnesses. This analysis of existing literature combined with case studies supports the theory that incentivised witnesses contribute to miscarriages of justice in Aotearoa New Zealand. The results indicate that compared to other jurisdictions, New Zealand legislation is lacking in safeguards to prevent potential miscarriages of justice. Legislation and policy regarding the use of incentivised witnesses in Aotearoa New Zealand should be strengthened, to ensure greater protections for the defence and to prevent people from taking advantage of the system. Several recommendations have been made for legislative or policy and process change, which are relatively minimally resource intensive and could be quickly adopted by key participants in the New Zealand criminal legal system.

8.2 Recommendations for policy and legislation change

It is acknowledged that without using incentivised witnesses, particularly confidential informants and rewards for cold cases, authorities may not be able to solve crimes by using conventional avenues (Anderson, 2021; Dyhrberg, 2002). However, further research regarding the use of incentivised witnesses and how to ensure the safety of the justice system is paramount to avoiding further miscarriages of justice (Fessinger et al., 2020). Rules and safeguards are critical to ensure the fallibility of using this type of second-hand evidence is disclosed and available to all relevant decision-makers (Dufraimont, 2008). Various court decisions and socio-legal scholars have raised the need for greater prosecutorial guidance, a register of informants, using experts to educate juries on witness testimony, limiting incentives, increasing disincentives for false evidence, and simply ruling out certain types of witnesses such as prison informants (Anderson, 2021; Fessinger et al., 2020; High, 2021; Natapoff, 2009; Neuschatz et al., 2012). These safeguards are explored in detail below.

8.2.1 Use of experts

Courts have routinely used experts in specific fields to explain certain kinds of evidence or give their opinion on evidence, such as memory science and eyewitness identification evidence. This usage could be extended to experts in the field of incentivised witness testimony to explain to the jury the aspects of this type of evidence that is not immediately clear to laypeople or that the judge is unable to provide in jury instructions, such as the likelihood of a person providing false information, as discussed in Fessinger et al. (2020). This would also assist the jury in assessing the credibility of the witness (Dufraimont, 2008; Fessinger et al., 2020). Expert advice on incentivised witness evidence could also point out flaws in the evidence that a jury is unlikely to identify and would educate them on the problems issues this type of evidence contains (Dufraimont, 2008; High, 2021). According to Dufraimont (2008), some US jurisdictions allow either experts to provide evidence or allow jury instructions, assigning the judge decision-making power over which of these protections can be used.

8.2.2 Enhanced jury instructions

The Evidence Act 2006 already has judicial warnings and directions in place whereby the judge can instruct the jury to consider evidence given by certain types of witnesses carefully, especially when there may be incentives involved. These directions can easily be strengthened to both ensure the safety of the admissibility of this type of evidence and ensure the jury remains the factfinder of the trial (Anderson, 2021). The enhanced jury instructions can be issued by the judge at the earliest point in the trial to ensure that the jury has all information available to them prior to the witness giving evidence. This is likely to be the most effective way to implement the strengthened directions, as the jury will have more of an opportunity to assess the evidence in an impartial manner (Anderson, 2021; Dufraimont, 2008). Specifically, juries should be warned of the fallibility of this type of evidence, educated on how informants are able to fabricate information, and exactly how incentives can influence evidence given by an informant (Innocence Project, 2013). Dyhrberg (2002) states that with regard to prison informants, the jury

should be warned that this type of evidence is inherently unreliable and that the witness has a strong motivation to lie.

8.2.3 Limiting the use of prison informants

As shown in the literature and previous research, prison informants directly contribute to wrongful convictions and miscarriages of justice (Allen, 2020; Innocence Project, 2013; Medwed, 2019; Surratt, 2018; Sutterer, 2022; Wetmore et al., 2022; Wetmore et al., 2020) There are growing calls by academics, defence lawyers, supporters of defendants and the general public to have their use limited, if not excluded entirely (Anderson, 2021; Dyhrberg, 2002; High, 2021; Fessinger et. al, 2020). Currently, judges tend to refrain from excluding evidence as the jury needs to hear any relevant evidence and can draw their own conclusions (Anderson, 2021; Dyhrberg, 2002; High, 2021). This use can be limited by changing legislation to make any incentivised witness evidence inadmissible or by forcing judges to exclude it when it does not meet a minimum reliability standard (Dufraimont, 2008). However, Dufraimont (2008) also argues that incentivised witness evidence offers little material value to the Crown case and excluding this evidence overall “would cost the system little in terms of valuable information” (p. 332).

8.2.4 Increased disclosure methods

Dyhrberg (2002) suggests the following information about the witness be disclosed to the defence:

- All of the witness's previous convictions.
- If an accomplice witness, their role in the offence.
- The nature of the evidence they are providing.
- If they were in custody when the information was disclosed to authorities.
- The reward or inducement sought, whether that is a cash reward or any other offer of assistance.
- Whether immunity was offered, being considered, or has been granted.

- Any records which assist the defence or jury in assessing the witness's credibility, including records of contact between the witness and the defendant and any evaluations regarding the witness.
- Any actions were taken by authorities to corroborate the evidence.
- Identification of any other court cases where the witness may give evidence and what the nature of that evidence is.

Increased disclosure methods would provide the defence with all the relevant information to enable cross-examination of the witness more effectively and thoroughly. It will also enable the jury to assess each aspect of the witness and make a judgment on their credibility with the whole information (High, 2021). What makes this difficult, however, as discussed in earlier sections, is that deals are rarely confirmed prior to a trial commencing and are most often agreed to after a conviction due to the prosecutor waiting to see how beneficial this evidence is to their case (Anderson, 2021). A way to mitigate this is to forbid authorities from entering post-trial agreements with Crown witnesses (Anderson, 2021).

8.2.5 Informant register

The use of informants needs to be more heavily regulated to avoid miscarriages of justice, particularly those where repeat “secret witnesses” are present, such as in the David Tamihere case study discussed earlier in chapter 6.2. A simple way of controlling this type of evidence is by holding an informant register, which would provide instantaneous confirmation of the reliability of a witness or provide the tools required to make this assessment (Anderson, 2021). New Zealand police have advised that they are using a prison informant register as of August 2021. While not confirmed by police, as they are unwilling to disclose information about confidential informants, it is fair to assume they hold a record of confidential informant details. However, these registers should be extended to all types of incentivised witnesses. The register should keep details such as any occasion where a witness has offered to give information to authorities in exchange for an incentive, regardless of whether they participated in a trial

(Dyhrberg, 2002). It should include any information relevant to the witness, including whether they have received rewards in the past and what their general reliability as a witness is like (Anderson, 2021; Sutterer, 2022). This will also help police to manage their informants better. The US state of Texas has introduced a mandatory recording of prison informants, which tracks any incentives a witness may be given in exchange for evidence (Allen, 2020).

8.2.6 Recording all police and prosecution interactions with witnesses

Another protection that would reduce miscarriages of justice is recording all interactions with any witness or another person working with the prosecution who stands to benefit from providing information. Currently, it is not common practice to record all interactions with a witness. This is, in part, due to New Zealand police not having body camera equipment available to use (New Zealand Police Association, 2021). Video or audio recording with the date, time, location, and topics discussed should be recorded to ensure completeness (Dyhrberg, 2002). This will ensure that the information is documented and physically exists, which can then be disclosed to the defence and available for the jury to make an informed decision on the reliability of the witness (Anderson, 2021). It will also reduce the risk of authorities either intentionally or unintentionally feeding information to witnesses that may bolster or aid in falsifying evidence (Innocence Project, 2013). Improvements to the way that police conduct their use of informants will go a long way to reducing miscarriages of justice (Dufraimont, 2008).

8.2.7 Reliability hearings and reliability threshold

Currently, New Zealand legislation does not have any reliability threshold for evidence from incentivised witnesses as it does for other types of unreliable witness evidence, as noted by the Supreme Court (High, 2021). There is always the question of whether statements made by incentivised witnesses were ever uttered by the defendant. Therefore, there is a need for exclusionary rules to be applied where the judge assesses the reliability of the evidence prior to admission of said evidence (High, 2021). Another

option would be to establish a committee or other independent body to audit the proposed evidence. Such committees do exist elsewhere in the world, particularly for prison informant evidence, such as the In-Custody Informant Committees in Canada (Campbell, 2018, as cited in High, 2021). This could be extended to incentivised witnesses who are not in custody as well.

Corroboration is a critical aspect of this evidence, which could be assessed in these types of reliability hearings or committee meetings (Innocence Project, 2013; Sutterer, 2022). The state of Illinois holds reliability hearings which must be conducted prior to an informant providing evidence (Innocence Project, 2019). According to Natapoff (2009), the Los Angeles County District Attorney's office requires "strong corroboration" of jailhouse informant evidence in addition to prohibiting financial payments over \$50. The Los Angeles County District Attorney's office also must have an informant vetted by the Jailhouse Informant Committee belonging to the same office (Natapoff, 2009). Though this Jailhouse Informant Committee belongs to the same office as the Los Angeles County District Attorney's office, there is great potential for the teams to work together to ensure there is a robust and efficient analysis of potential informants. There is also a Central Index of jailhouse informants that prosecutors must check to make an assessment on their motives, and part of this is considering whether the informant has been a witness before or has offered to be a witness previously (Natapoff, 2009).

8.2.8 Legislative change

Legislative amendments are required to curb the adverse effects of incentivised witness evidence and hold those involved accountable, with some legal commentators even going so far as to say that a legislative change is the only way that it can be regulated (Anderson, 2021; Dufraimont, 2008). At the very least, a structured plan for the use of this type of evidence is required, with critical rules in place that benefit everyone involved in a court case (Dyhrberg, 2002). As discussed in the earlier legislation section, evidence can be excluded under section 8 of the Evidence Act if its evidential value is outweighed by a risk of prejudice. This section could be extended to specifically include evidence

from incentivised witnesses, as judges have a gatekeeping role to an extent, though this is still a conservative approach (High, 2021). According to Dufraimont (2008), a specific exclusionary rule could be added to the Evidence Act, which as High (2021) states, would bring incentivised witness evidence in line with other types of evidence that contribute to miscarriages of justice, such as visual identification evidence⁴ and false confession evidence.⁵ Likewise, operating on the “presumption of inadmissibility” would ensure that this type of evidence is appropriately monitored and admitted only when it is clear that the evidence is reliable (High, 2021). As of June 2023, the Law Commission is undertaking a review of the Evidence Act 2006. As part of this review, the use of prison informants and other informants is being considered for possible changes to legislation (Law Commission, 2023). Charging for perjury or false information given at trial is a possible way to deter witnesses from giving falsified evidence. This could be introduced with change in law or Crown prosecutor policy, when a Crown witness has been found to have falsified information, they must be charged with perjury. However, as Anderson (2021) notes, the Crown would not be in favour of charging their own star witnesses as it risks undermining the prosecutor who presented them. It may also deter genuine witnesses from providing evidence for fear of being prosecuted themselves (Anderson, 2021).

8.2.9 Greater responsibility of Crown prosecutors

High (2021) expresses that prosecutors have "ethical obligations" when using incentivised witness evidence, particularly if that evidence can be viewed as unreliable, and they should be held accountable for these obligations. The judiciary has previously commented that gatekeeping of this type of evidence does not rest solely on judges, and prosecutors have a duty to weed out unreliable witnesses and not call them to provide evidence if their testimony cannot be relied upon (High, 2021). Formal policies could be implemented for Crown prosecutors that would outline the specific criteria prosecutors

⁴ Section 45(1) of the Evidence Act 2006.

⁵ Sections 28, 29 and 30(6) of the Evidence Act 2006.

can follow in terms of admissibility for incentivised witnesses, including what types of rewards or incentives would be acceptable, good record keeping, and reporting or keeping note of witnesses who have been found to have lied (High, 2021).

8.3 Summary

The safeguards discussed in this thesis are not without obstacles, and researchers have identified incidences where these safeguards do not work. For example, Fessinger et al. (2020) have identified that the success of several protections in the US are yet to be realised, even where they have been implemented, and increased disclosure methods and strengthened jury instructions failed to protect people from at least 22 wrongful convictions. However, this could be due to the way the safeguards were implemented or interpreted and may not reflect the benefits of the safeguards themselves. Fessinger et al. (2020) identified jury instructions regarding incentivised witnesses as present in only half of the cases they analysed. This is also evident in the New Zealand Solicitor-General's Guidelines for use of Inmate Admissions, which clearly state that any agreed incentives must be disclosed but makes no mention of a post-conviction agreement (Anderson, 2021).

Clearly, funding concerns and time available would have an impact on being able to conduct admissibility hearings, though any financial anxiety could be eased by the potential savings of avoiding miscarriages of justice (Dufraimont, 2008). This cost and time concern is evident for expert advice as well. While having an expert may provide background context and help jurors assess credibility, some researchers have determined that jurors will still hold incentivised witnesses, primarily prison informants, to a higher standard based on the implicit prosecutorial vouching as discussed in the earlier section 7.2 and therefore this type of safeguard will be ineffective (Anderson, 2021). Any safeguards to be implemented by the New Zealand courts will take support from the judiciary, which is hesitant to remove any relevant evidence from the jury. Police and prosecution would have to adhere to new rules, which could result in the Crown losing cases if they are unable to use an incentivised witness. It could also result in

legitimate witnesses refusing to come forward for fear of retribution, including the risk of perjury or risk to personal safety if their identity was uncovered.

Many of the proposed safeguards and reforms are relatively non-resource intensive and arise out of common sense. A jury cannot be expected to be experts on psychological processes and what might influence a witness to lie on the stand, just the same as defence lawyers cannot be expected to adequately cross-examine a witness if they do not have all the information available that relates to prosecution witnesses. Academics, lawyers, and other researchers agree that incentivised witness evidence is sometimes unavoidable in our criminal legal system (Anderson, 2021; Dyhrberg, 2002; Innocence Project, 2013). This research does not advocate for an outright ban on this type of evidence but supports oversight, rules, and policies to be implemented that make the process more regulated, transparent, and safer.

As of June 2023, the Law Commission is undertaking a review of the Evidence Act 2006. As part of this review, the use of prison informants and other informants is being considered for possible changes to legislation (Law Commission, 2023).

9. Conclusion

In summary, this thesis examined criminal cases involving incentivised witnesses and how this type of evidence has contributed to miscarriages of justice in Aotearoa New Zealand. This research is supported by existing literature; however, new conclusions and comparisons have been drawn using comparative criminology. This chapter outlines the significant findings of this thesis, along with the strengths and weaknesses of the research, concluding with recommendations for future research. Chapter nine concludes the thesis by presenting the overall findings of the research. This includes the practical implications experienced in the research, the strengths and limitations of the study, recommendations for future research, and concluding statements.

9.1 Major findings

Overall, this study defines what incentivised witnesses are and how they are used in criminal cases. The research compared legislation and policy between Aotearoa New Zealand and the United States of America, and highlighted real-life case studies in Aotearoa New Zealand where this type of evidence is problematic. Several recommendations have been made for legislative or policy and process change, which are relatively minimally resource intensive and could be quickly adopted by key participants in the New Zealand criminal legal system.

9.2 Strengths of the research

This study has raised the critical issue that few academic studies assess incentivised witnesses as a whole and analyse the implications that using this type of evidence encourages. It adds to the literature and informs the reader on all the other types of incentivised witnesses, whereas most other studies focus on prison informants or police confidential informants (Allen, 2020; Anderson, 2021; Fessinger et al., 2020; Gebert, 1979; High, 2021; Key et al., 2017; Neuschatz et al., 2008; Neuschatz et al., 2012; Neuschatz et al., 2020; Surratt, 2018; Sutterer, 2022; Wetmore et al., 2020; Wetmore et al., 2022). It also adds to the conversation about changes to New Zealand's evidence law. Miscarriage of justice studies is an under-researched area, particularly in the New

Zealand context, and this thesis addresses this gap while giving a New Zealand perspective on the issue, where most research regarding miscarriages of justice and wrongful convictions is based in the US.

9.3 Limitations of the research

The most significant limitation of this research is that by using secondary data, the findings in the research may not be truly reflective of the current climate, particularly in Aotearoa New Zealand. All the studies referred to in this thesis were completed overseas, which, while applicable to this research, is not necessarily reflective of New Zealand juror's attitudes and experiences. For a truly comprehensive piece of writing in the New Zealand context, a study similar to those described in Fessinger et al. (2020) could be replicated in New Zealand. This would require collaboration with psychological researchers. Relying on case studies that are currently going through the court system makes their impression weaker, as some are not confirmed miscarriages of justice. There were several additional cases that the researcher wanted to examine. However, there were embargoes on the publication of the judgments due to ongoing legal issues, which meant the details could not be published in this thesis.

9.4 Recommendations for Future Research

While highlighting the key issues of this type of evidence, this research barely brushes the surface of how incentivised witnesses contribute to miscarriages of justice in Aotearoa New Zealand. The literature can be further contributed to by conducting more in-depth research, which includes interviewing relevant stakeholders such as police, prosecution and defence lawyers, and people who have claimed to be a victim of false informant testimony. The New Zealand public could be consulted via an attitudinal survey to gain a clearer understanding of the public's knowledge of incentives and rewards used and views on whether they are comfortable with taxpayer money being used for this type of evidence. The research can be expanded to cover informants who are contracted by police to complete espionage work which adds another layer to an incentivised witness. More profound questions about the use of informants need to be asked of police, along

with further reasoning as to why they will not provide any information to the public around confidential informants.

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Appendices

Appendix A, Solicitor-General's Guidelines for use of Inmate Admissions

CROWN LAW

SOLICITOR-GENERAL'S GUIDELINES
FOR USE OF INMATE ADMISSIONS

As at 6 August 2021



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1. PURPOSE

- 1.1 These Guidelines have been written for prosecutors, but other participants in the justice system may find them useful.
- 1.2 The purpose of these Guidelines is to provide guidance to prosecutors in respect of prosecutions where there is evidence proposed to be used that is derived from an inmate admission or statement concerning another person's alleged offending (inmate admissions evidence).
- 1.3 These Guidelines should be read together with the *Solicitor-General's Prosecution Guidelines* 2013 (*Prosecution Guidelines*), along with any other guidelines issued by the Solicitor-General specific to prosecutions. If there is any inconsistency between these Guidelines and the *Prosecution Guidelines*, these Guidelines should be preferred.

2. COMPLIANCE

- 2.1 It is expected all public prosecutions, whether conducted by Crown prosecutors, government agencies or (instructed) counsel, should approach inmate admissions evidence in accordance with these Guidelines.
- 2.2 In addition, all law practitioners conducting a private prosecution must continue to adhere to the Law Society's general rules of professional conduct. The Solicitor-General expects that such prosecutors should also consider and apply all relevant principles in these Guidelines.

3. INMATE ADMISSIONS EVIDENCE

Introduction

- 3.1 There is a risk of unreliability in respect of admissions evidence from prison inmates. Such evidence has been linked to determinations of miscarriage of justice and cases of wrongful conviction in a number of overseas jurisdictions and in New Zealand. The Supreme Court has also observed the need for guidance for prosecutors on the use of inmate admissions evidence (see *W* (SC38/2019) *v* *R*¹).
- 3.2 Some inmate witnesses have demonstrated remarkable ingenuity in obtaining what appears to be compelling information in order to support false evidence. At the same time, defendants can and do make incriminating statements to fellow inmates, and inmates can, like other witnesses, provide valuable and reliable evidence. Inmate witnesses' circumstances and motivations vary considerably.
- 3.3 The general scheme of the Evidence Act 2006 is that concerns about the reliability of evidence can be met by section 8 (which requires a case-by-case assessment of various factors (discussed in *W*)), the testing that occurs in the trial process itself, and the availability of a warning direction to the jury under section 122 concerning potential unreliability. Due to the particular risks associated with inmate admissions evidence, it is appropriate that the Crown takes an especially careful approach to the decision to call it.

¹ *W* (SC38/2019) *v* *R* [2020] NZSC 93, [2020] 1 NZLR 382.

Application

- 3.4 These Guidelines apply only where an inmate (who is not a co-defendant, accomplice, undercover operative or confidential informant) has provided evidence of incriminating statements made to them by a defendant that:
- 3.4.1 were made while they were imprisoned together; and
 - 3.4.2 relate to offences occurring outside the prison or custodial institution.

Overall public interest assessment – guiding principles

- 3.5 Prosecutors must carefully review proposed inmate admissions evidence to ensure it is in the public interest to call it on behalf of the Crown, having regard to the known dangers associated with such evidence.
- 3.6 Prosecutors should only adduce inmate admissions evidence if they are satisfied it is more likely than not reliable.
- 3.7 The assessment whether to call the evidence must include consideration of factors that might reasonably affect the reliability of the evidence, while also respecting the role of the fact finder at the trial.
- 3.8 Inmate admissions evidence is likely to be appropriate only in serious cases.
- 3.9 It is unlikely to be in the public interest to prosecute based only on the uncorroborated evidence of an inmate admissions witness.

Procedure

- 3.10 In every case, the decision whether or not to call an inmate admissions witness should be made by the Crown Solicitor.
- 3.11 The decision to call inmate admissions evidence requires an appropriate degree of inquiry into the reliability of the evidence, including whether the types of information and factors outlined below are engaged. In order for the Crown Solicitor to satisfy herself or himself of the reliability of the inmate admissions evidence, the New Zealand Police and/or relevant government agency may be required to undertake additional investigatory or preparatory work to seek material that goes beyond what is usually available on an investigation file. Whether and to what extent further material is required is a judgment call for the Crown Solicitor. For instance, there is no requirement to seek information from non-parties where there is no indication they hold relevant material.
- 3.12 There is no obligation to investigate the proposed inmate admissions evidence further, if, based on the material initially provided by the government agency investigator, the Crown Solicitor decides it will not be necessary to call an inmate admissions witness.
- 3.13 In terms of the information made available, the Crown Solicitor should ensure it includes details (to the extent available) regarding the inmate admissions witness's previous convictions; current sentences imposed and length of term remaining; how many times they have offered/disclosed/given evidence of this type; how their evidence has been treated and the reason for this treatment; significance (if any) of any such evidence used to the matter(s) then at issue; and any benefit or other preference received by them.

- 3.14 In situations where further or other information comes to light that affects the original view of the inmate admissions evidence (particularly as to its reliability), the Crown Solicitor should reassess their original decision regarding whether or not to call that witness.
- 3.15 Information obtained that relates to the reliability of the inmate admissions evidence is disclosable, subject to applicable sections of relevant legislation, including section 16 of the Criminal Disclosure Act 2008.
- 3.16 Where the decision is made to call inmate admissions evidence the Crown Solicitor should record their decision and the reasons for it (including any reassessment).

Factors to consider

3.17 The following non-exhaustive factors should be taken into account where applicable:

3.17.1 *Motive*

- Whether the information was solicited from, or volunteered by, the witness.
- Any offers or promises made to the witness.
- Other inducements (such as sentence reduction, withdrawal of charges, plea arrangement, bail, changes to conditions of imprisonment, safety measures).
- Any prior interactions between the witness and investigating officers.
- The nature of the witness's interview in which the inmate admission was recounted (for example, audio/visual recording, written statement) (acknowledging that where possible, disclosures of such evidence should be recorded).
- Any requests made by the witness that may relate to their willingness to give evidence or the circumstances of their disclosure of an admission (whether or not agreed to).
- The witness's explanation for coming forward.
- Other motivations (for instance, grudge, gang allegiance).
- Whether any ulterior motive or inducement is likely to be still operative at the time of giving evidence.
- Any threats against, or safety concerns of or for, the witness.

3.17.2 *Circumstances of alleged interactions*

- The plausibility of the witness's account of the alleged interaction with the inmate.
- Any records related to the alleged interaction, and the contemporaneity of these.
- Whether the alleged interaction is supported by Department of Corrections records or other inmates.
- Any delay before coming forward and the reasons for it.

3.17.3 ***Confirmatory evidence***

- The level of detail and specificity of the evidence.
- Consistency of the evidence with known facts and with other statements made by the witness.
- Whether the witness's evidence led to the discovery of other evidence.
- Whether the witness's evidence contained information not in the public domain.

3.17.4 ***Opportunity to concoct***

- The witness's potential access to alternative sources of information. (For example: media reports/articles/editorials; disclosure documents; other witnesses/co-defendants/gang members; Police).
- The timing of the disclosure of the witness's evidence relative to media reports/articles/editorials.

3.17.5 ***Character and state of the witness***

- Conviction history, especially as to fraud, dishonesty, perjury and perverting the course of justice.
- Material from New Zealand Police databases, such as the National Intelligence Application (NIA).
- Whether the witness has given inmate admissions evidence in the past (including consulting any inmate witness register and other records maintained by New Zealand Police and other New Zealand government agencies in this regard).
- Where the witness has given inmate admissions evidence in the past, details should be obtained (to the extent available), and assessed for reliability – noting that any transcript or recording of the witness's evidence will likely be required.
- Any other issues or matters that may go to reliability, including court ordered assessment and treatment (by way of example).

Appendix 1 - Sample reward notice

\$..... REWARD

(insert picture for public viewing, if available)

On *DD/Month/YYYY First name Last name*, also known as *Alias*, aged *.. years*, was *state crime* in *location* on *location* (included exact area, suburb, city).

(state in one line description of crime)

It is hereby notified that a reward of *state amount Dollars (\$xx,xxx)* will be paid for material information or evidence which leads to the conviction of any person or persons responsible for the *crime* or *Victim name(s)*.

The Commissioner of Police absolute discretion will determine the amount of the reward and will apportion it if there is more than one claimant.

This offer shall remain in force until *DD/Month/YYYY*.

Information should be supplied to the *District* Police Station phone: 0800 *Op* (0800) or the nearest Police Station.

Commissioner of Police at Wellington on this day Month Year

Appendix 2 - Sample report to pay recipient
DD/MM/YYYY

To: *(enter name)*
Special Programmes, National Criminal Investigations Group

Through: *(enter name)*
National Manager: Criminal Investigations

Subject: Operation *(enter name)* - Report to pay the reward to *(enter recipient)*

Use this sample template to prepare the report to pay the reward to the recipient outlining these topics:

Reasons why the reward should be paid

Circumstances impacting on payment

Recommendations as to the amount that should be paid

Seriousness of the offence being investigated

Value of the information provided for the investigation

Possibility of the evidence to be obtained by other means

Credibility of the recipient to testify at trial

Occurred or possible disadvantages to the recipient(s)

Reasons for the recipient(s) to come forward with information

Other adequate means have been or can be rewarded to the recipient(s)

Any other exceptional circumstances relevant to the issue of payment.

(enter name)
Officer in Charge (O/C) Investigation

Appendix D, Section 16 of the Criminal Disclosure Act

16 Reasons for withholding information

- (1) A prosecutor may withhold any information to which the defendant would otherwise be entitled under this Act if—
 - (a) disclosure of the information is likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
 - (b) disclosure of the information is likely to endanger the safety of any person; or
 - (c) the information is—
 - (i) material that is prepared by or for the prosecutor to assist the conduct of the hearing or trial; or
 - (ii) a communication dealing with matters relating to the conduct of the prosecution and is between—
 - (A) the prosecutor and another person employed by the same person or agency that employs the prosecutor; or
 - (B) the prosecutor and any adviser to the prosecutor; or
 - (iii) analytical or evaluative material prepared, in connection with an investigation that led to the defendant being charged, by a person employed by a person or agency for another person employed by that person or agency or for the prosecutor; or
 - (d) the information is subject to [sections 108 and 109](#) of the Evidence Act 2006 (which relates to information about undercover police officers); or
 - (e) the information is subject to a pre-trial witness anonymity order under [section 110](#) of the Evidence Act 2006 or a witness anonymity order under [section 112](#) of the Evidence Act 2006; or
 - (f) the information is subject to [section 16](#) of the Victims Rights Act 2002 (which relates to information about witnesses' addresses); or
 - (g) the disclosure of the information would be likely to prejudice—
 - (i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
 - (ii) the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation; or
 - (h) disclosure of the information would be likely to facilitate the commission of another offence; or
 - (i) disclosure of the information would constitute contempt of court or contempt of the House of Representatives; or
 - (j) the information could be withheld under any privilege applicable under the rules of evidence; or
 - (k) disclosure of the information would be contrary to the provisions of any other enactment; or
 - (l) the information is publicly available and it is reasonably practicable for the defendant to obtain the information from another source; or
 - (m) the information has previously been made available to the defendant; or
 - (n) the information does not exist or cannot be found; or
 - (o) the information—
 - (i) reflects on the credibility of a witness who is not to be called by the prosecutor to give evidence but who may be called by the defendant to give evidence; and
 - (ii) is not for any other reason relevant.
- (2) If part only of the information may be withheld, the prosecutor must make the remainder of the information available if it is possible to protect the withheld information by deletion, summary, or otherwise.
- (3) If the prosecutor becomes aware that there has ceased to be any justification for withholding all or part of any information that has been withheld under this Act, the prosecutor must, if the criminal proceedings have not yet been completed, disclose that information to the defendant as soon as reasonably practicable.

Appendix E, Sections 12B, 12C, 13B and 13C of the Evidence Act 1908

12B Corroboration of evidence of accomplice not required

- (1) No corroboration of the evidence given by an accomplice of the accused shall be required for the accused to be convicted, and it shall not be necessary for the Judge to give any warning to the jury relating to the absence of corroboration.
- (2) Nothing in this section shall derogate from the provisions of section 75(1) (evidence of treason) or section 112 (evidence of perjury, false oath, or false statement) of the [Crimes Act 1961](#).

This Act was repealed, as from 1 August 2007, by [section 215 Evidence Act 2006](#) (2006 No 69). See [clause 2\(2\) Evidence Act 2006 Commencement Order 2007](#) (SR 2007/190).

Sections 12B and 12C were inserted, as from 6 November 1986, by [section 2 Evidence Amendment Act \(No 2\) 1986](#) (1986 No 87).

12C Witnesses having some purpose of their own to serve

Where in any criminal proceedings it appears to the Judge that a witness may have some purpose of his or her own to serve in giving evidence and that for that reason there is a risk that the witness may give false evidence that is prejudicial to the accused, the Judge shall consider whether or not it would be appropriate to instruct the jury on the need for special caution in considering the evidence given by the witness.

This Act was repealed, as from 1 August 2007, by [section 215 Evidence Act 2006](#) (2006 No 69). See [clause 2\(2\) Evidence Act 2006 Commencement Order 2007](#) (SR 2007/190).

Sections 12B and 12C were inserted, as from 6 November 1986, by [section 2 Evidence Amendment Act \(No 2\) 1986](#) (1986 No 87).

13B Pre-trial witness anonymity order

- (1) This section applies if a person is charged with an offence and is to be proceeded against by indictment.
- (2) At any time after the person is charged, the prosecutor or defendant may apply to a Judge for an order—
 - (a) Excusing the applicant from disclosing to the other party prior to the preliminary hearing the name, address, and occupation of any witness, and (except with leave of the Judge) any other particulars likely to lead to the witness's identification; and
 - (b) Excusing the witness from stating at the preliminary hearing his or her name, address, and occupation, and (except with leave of the Judge) any other particulars likely to lead to the witness's identification.
- (3) The Judge must hear and determine the application in chambers, and—
 - (a) The Judge must give each party an opportunity to be heard on the application; and
 - (b) Neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.
- (4) The Judge may make the order if he or she believes on reasonable grounds that—
 - (a) The safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed prior to the trial; and
 - (b) Withholding the witness's identity until the trial would not be contrary to the interests of justice.
- (5) Without limiting subsection (4), in considering the application, the Judge must have regard to—
 - (a) The general right of an accused to know the identity of witnesses; and
 - (b) The principle that witness anonymity orders are justified only in exceptional circumstances; and
 - (c) The gravity of the offence; and
 - (d) The importance of the witness's evidence to the case of the party who wishes to call the witness; and
 - (e) Whether it is practical for the witness to be protected prior to the trial by any other means; and
 - (f) Whether there is other evidence which corroborates the witness's evidence.
- (6) If a pre-trial witness anonymity order is made under this section,—
 - (a) The party who applied for the order must give the Judge the name, address, and occupation of the witness; and
 - (b) During the course of the preliminary hearing, no counsel, solicitor, officer of the Court, or other person involved in the preliminary hearing may disclose the name, address, or occupation of the witness, or any other particulars likely to lead to the witness's identification; and
 - (c) During the course of the preliminary hearing,—
 - (i) No oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to the name, address, or occupation of the witness who is subject to the order; and
 - (ii) Except with leave of the Judge, no oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to any other particulars likely to lead to the identification of the witness who is subject to the order; and
 - (d) No person may publish, in any report or account relating to the proceeding, the name, address, or occupation of the witness, or any particulars likely to lead to the witness's identification.
- (7) A pre-trial witness anonymity order may be made by—
 - (a) A District Court Judge who holds a warrant under the [District Courts Act 1947](#) to conduct trials on indictment;
 - (b) If the preliminary hearing is held in a Youth Court, a Judge referred to in section 274(2)(a) of the [Children, Young Persons, and Their Families Act 1989](#);
 - (c) A High Court Judge.

This Act was repealed, as from 1 August 2007, by [section 215 Evidence Act 2006](#) (2006 No 69). See [clause 2\(2\) Evidence Act 2006 Commencement Order 2007](#) (SR 2007/190).

Sections 13B to 13J were inserted, as from 11 December 1997, by [section 3 Evidence \(Witness Anonymity\) Amendment Act 1997](#) (1997 No 103). See [section 4](#) of that Act as to the review of the operation of sections 13B to 13J, after the expiry of a period of 3 years from 11 December 1997, by the Ministry of Justice. See [section 6](#) of that Act as to the application of sections 13B to 13J to proceedings in progress on 11 December 1997.

13C Witness anonymity order for purpose of High Court trial

- (1) This section applies if a person is charged with an indictable offence and either—
 - (a) Is committed to the High Court for trial; or
 - (b) Is committed to a District Court for trial and is the subject of an application under [section 28J](#) of the [District Courts Act 1947](#) to transfer the proceeding to the High Court.
- (2) At any time after the person is committed for trial, the prosecutor or the accused may apply to a High Court Judge for a witness anonymity order under this section.
- (3) The Judge must hear and determine the application in chambers, and—
 - (a) The Judge must give each party an opportunity to be heard on the application; and
 - (b) Neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.
- (4) The Judge may make a witness anonymity order if satisfied that—
 - (a) The safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and
 - (b) Either—
 - (i) There is no reason to believe that the witness has a motive or tendency to be untruthful, having regard (where applicable) to the witness's previous convictions or the witness's relationship with the accused or any associates of the accused; or
 - (ii) The witness's credibility can be tested properly without disclosure of the witness's identity; and
 - (c) The making of the order would not deprive the accused of a fair trial.
- (5) Without limiting subsection (4), in considering the application, the Judge must have regard to—
 - (a) The general right of an accused to know the identity of witnesses; and
 - (b) The principle that witness anonymity orders are justified only in exceptional circumstances; and
 - (c) The gravity of the offence; and
 - (d) The importance of the witness's evidence to the case of the party who wishes to call the witness; and
 - (e) Whether it is practical for the witness to be protected by any means other than an anonymity order; and
 - (f) Whether there is other evidence which corroborates the witness's evidence.
- (6) If a witness anonymity order is made under this section,—
 - (a) The party who applied for the order must give the Judge the name, address, and occupation of the witness; and
 - (b) The witness may not be required to state in Court his or her name, address, or occupation; and
 - (c) During the course of the trial, no counsel, solicitor, officer of the Court, or other person involved in the proceeding may disclose—
 - (i) The name, address, or occupation of the witness; or
 - (ii) Except with leave of the Judge, any other particulars likely to lead to the witness's identification; and
 - (d) During the course of the trial,—
 - (i) No oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to the name, address, or occupation of the witness who is subject to the order; and
 - (ii) Except with leave of the Judge, no oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to any other particulars likely to lead to the identification of the witness who is subject to the order; and
 - (e) No person may publish, in any report or account relating to the proceeding, the name, address, or occupation of the witness, or any particulars likely to lead to the witness's identification.

This Act was repealed, as from 1 August 2007, by [section 215](#) Evidence Act 2006 (2006 No 69). See [clause 2\(2\)](#) Evidence Act 2006 Commencement Order 2007 (SR 2007/190).

Sections 13B to 13J were inserted, as from 11 December 1997, by [section 3](#) Evidence (Witness Anonymity) Amendment Act 1997 (1997 No 103). See [section 4](#) of that Act as to the review of the operation of sections 13B to 13J, after the expiry of a period of 3 years from 11 December 1997, by the Ministry of Justice. See [section 6](#) of that Act as to the application of sections 13B to 13J to proceedings in progress on 11 December 1997.

Appendix F, Sections 7, 8, 27, 45, 110, and 112 of the Evidence Act 2006

7 Fundamental principle that relevant evidence admissible

- (1) All relevant evidence is admissible in a proceeding except evidence that is—
 - (a) inadmissible under this Act or any other Act; or
 - (b) excluded under this Act or any other Act.
- (2) Evidence that is not relevant is not admissible in a proceeding.
- (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

8 General exclusion

- (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
 - (a) have an unfairly prejudicial effect on the proceeding; or
 - (b) needlessly prolong the proceeding.
- (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

27 Defendants' statements offered by prosecution

- (1) Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant is admissible against that defendant, and is admissible against a co-defendant in the proceeding only if it is admitted under [section 22A](#).
- (2) However, evidence offered under subsection (1) is not admissible against that defendant if it is excluded under [section 28](#), [29](#), or [30](#).
- (3) [Subpart 1](#) (hearsay evidence) except [section 22A](#), [subpart 2](#) (opinion evidence and expert evidence), and [section 35](#) (previous consistent statements rule) do not apply to evidence offered under subsection (1).
- (4) *[Repealed]*

Section 27(1): amended, on 8 January 2017, by [section 9\(1\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 27(3): amended, on 8 January 2017, by [section 9\(2\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 27(4): repealed, on 8 January 2017, by [section 9\(3\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

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.

Section 45(3)(b): amended, on 8 January 2017, by [section 16\(1\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 45(3)(c): amended, on 8 January 2017, by [section 16\(1\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 45(3)(d): amended, on 8 January 2017, by [section 16\(1\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 45(4)(a): amended, on 8 January 2017, by [section 16\(1\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 45(4)(b): amended, on 8 January 2017, by [section 16\(1\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 45(4)(c): amended, on 8 January 2017, by [section 16\(1\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

Section 45(4)(e): amended, on 8 January 2017, by [section 16\(2\)](#) of the Evidence Amendment Act 2016 (2016 No 44).

110 Pre-trial witness anonymity order

- (1) This section and [section 111](#) apply if a person is charged with a category 3 or 4 offence.
- (2) At any time after the person is charged, the prosecution or the defendant may apply to a Judge for an order—
 - (a) excusing the applicant from disclosing to the other party before the trial the name, address, and occupation of any witness, and (except with the leave of the Judge) any other particulars likely to lead to the witness's identification; and
 - (b) excusing the witness from stating in any formal statement, or in giving oral evidence in accordance with an oral evidence order, his or her name, address, and occupation, and (except with leave of the Judge) any other particulars likely to lead to the witness's identification.
- (3) The Judge must hear and determine the application in chambers, and—
 - (a) the Judge must give each party an opportunity to be heard on the application; and
 - (b) neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.
- (4) The Judge may make the order if he or she believes on reasonable grounds that—
 - (a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed before the trial; and
 - (b) withholding the witness's identity until the trial would not be contrary to the interests of justice.
- (5) Without limiting subsection (4), in considering the application, the Judge must have regard to—
 - (a) the general right of a defendant to know the identity of witnesses; and
 - (b) the principle that witness anonymity orders are justified only in exceptional circumstances; and
 - (c) the gravity of the offence; and
 - (d) the importance of the witness's evidence to the case of the party who wishes to call the witness; and
 - (e) whether it is practical for the witness to be protected prior to the trial by any other means; and
 - (f) whether there is other evidence that corroborates the witness's evidence.
- (6) A pre-trial witness anonymity order may be made—
 - (a) by a District Court Judge who holds a warrant under the [District Court Act 2016](#) to conduct jury trials;
 - (b) if the preliminary hearing is held in the Youth Court, by a Judge referred to in [section 274\(2\)\(a\)](#) of the [Oranga Tamariki Act 1989](#);
 - (c) by a High Court Judge.

Compare: 1908 No 56 s 13B(1)–(5), (7)

Section 110(1): replaced, on 1 July 2013, by [section 5](#) of the Evidence Amendment Act 2011 (2011 No 89).

Section 110(2): replaced, on 1 July 2013, by [section 5](#) of the Evidence Amendment Act 2011 (2011 No 89).

Section 110(6)(a): amended, on 1 March 2017, by [section 261](#) of the District Court Act 2016 (2016 No 49).

Section 110(6)(a): amended, on 1 July 2013, by [section 5](#) of the Evidence Amendment Act 2011 (2011 No 89).

Section 110(6)(b): amended, on 14 July 2017, by [section 149](#) of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 (2017 No 31).

Section 110(6)(b): amended, on 1 March 2017, by [section 261](#) of the District Court Act 2016 (2016 No 49).

112 Witness anonymity order for purpose of High Court trial

- (1) This section and [section 113](#) apply if a person is charged with a category 3 or 4 offence.
- (2) The prosecution or the defendant may apply to a High Court Judge for a witness anonymity order under this section.
- (3) The Judge must hear and determine the application in chambers, and—
 - (a) the Judge must give each party an opportunity to be heard on the application; and
 - (b) neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.
- (4) The Judge may make a witness anonymity order if satisfied that—
 - (a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and
 - (b) either—
 - (i) there is no reason to believe that the witness has a motive or tendency to be dishonest, having regard (where applicable) to the witness's previous convictions or the witness's relationship with the defendant or any associates of the defendant; or
 - (ii) the witness's credibility can be tested properly without disclosure of the witness's identity; and
 - (c) the making of the order would not deprive the defendant of a fair trial.
- (5) Without limiting subsection (4), in considering the application, the Judge must have regard to—
 - (a) the general right of a defendant to know the identity of witnesses; and
 - (b) the principle that witness anonymity orders are justified only in exceptional circumstances; and
 - (c) the gravity of the offence; and
 - (d) the importance of the witness's evidence to the case of the party who wishes to call the witness; and
 - (e) whether it is practical for the witness to be protected by any means other than an anonymity order; and
 - (f) whether there is other evidence that corroborates the witness's evidence.

Compare: 1908 No 56 s 13C(1)–(5)

Section 112(1): replaced, on 1 July 2013, by [section 4](#) of the Evidence Amendment Act 2013 (2013 No 29).

Section 112(2): replaced, on 1 July 2013, by [section 4](#) of the Evidence Amendment Act 2013 (2013 No 29).

Section 112(4)(b)(i): amended, on 1 July 2013, by [section 5](#) of the Evidence Amendment Act 2011 (2011 No 89).

Section 112(4)(c): amended, on 1 July 2013, by [section 5](#) of the Evidence Amendment Act 2011 (2011 No 89).

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 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.

Section 126(3): inserted, on 8 January 2017, by [section 35](#) of the Evidence Amendment Act 2016 (2016 No 44).