Preliminary Paper No 14

EVIDENCE LAW: CODIFICATION

A discussion paper

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

These should be forwarded to:

The Director, Law Commission, PO Box 2590,
Wellington

by Friday 14 June 1991

April 1991
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

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Preface

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

> Purpose: To make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.
>
> With this purpose in mind the Law Commission is asked to examine the statutory and common law governing evidence in proceedings before courts and tribunals and make recommendations for its reform with a view to codification.

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

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

Both references were given to the Law Commission by the Minister of Justice in August 1989.

This paper on codification and the accompanying paper on principles for reform and hearsay are the first of a series of Law Commission discussion papers on aspects of evidence law. Further papers are likely to deal with topics such as evidence, opinion evidence, evidence of character, privilege and confessions. Some of the topics which relate particularly to criminal evidence - such as confessions, the right to silence and the privilege against self-incrimination - will be considered in conjunction with the work on criminal procedure.

Our aim is to complete our review of core evidence law by 1992. Although this may be an ambitious undertaking, we believe it is preferable to deal with the whole topic in as short a period as possible rather than undertake a process of piecemeal reform. Dealing with the topic as a whole also helps to ensure that our proposals on each aspect are consistent. The result should be more coherent reform.

Our work on evidence law is being assisted by an advisory committee comprising the Hon Mr Justice R C Savage, Judge J D Rabone, Mr L H Atkins QC and Dr R S Chambers. Mr G Thornton QC, legislative counsel, is helping with aspects of drafting and Mrs G Te Heu Heu is acting as a consultant on issues relating to te ao Maori.

As the reference progresses, the Commission will be consulting a wide range of people with special interest in evidence law. In respect of this paper we have already received valuable assistance from a number of people including Dr D L Mathieson QC, Mr R Mahoney of Otago University and Mr B W Robertson of Victoria University of Wellington.

The Commission hopes that each discussion paper will draw a wide response. Since the law of evidence is a subject of such practical significance, we particularly wish to consult and take account of the views of all those with an interest in the topic. We therefore ask that readers express their views at this and later stages of the project.

This paper does not merely discuss the issues and put questions for consideration. It indicates our provisional conclusions following extensive research and considerable preliminary consultation. It also includes a draft of the early sections of an evidence code and a commentary thereon. The intention is to enable detailed and practical consideration of our proposals. We emphasise, however, that we are not committed to the views indicated and our provisional conclusions should not be taken as precluding further consideration of the issues.

Submissions or comments on this paper should be sent to the Director, Law Commission, PO Box 2590, Wellington, if at all possible, by Friday 14 June 1991. Any initial inquiries can be directed to Paul McKnight (04 733-453).

Summary of Views

1 An evidence code should be a true code in the sense of being comprehensive, systematic in structure, pre-emptive of the common law and based on principles.

2 An evidence code will contain policies (or purposes), principles and rules. Evidence policies - rational ascertainment of facts, fair procedures, securing public and social interests (such as privilege and public interest immunity) and efficiency - should be made explicit in the code so as to clarify its basis and guide interpretation.

The code principles are derived from the code policies. Principles stated in the early part of the code include (i) the principle that all logically relevant evidence is admissible unless excluded by the code and (ii) the principle that evidence should be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or unjustifiable expense or consumption of time.

Specific rules will also be required, both to state what other evidence should be excluded and to deal with the many general evidential matters. Rules, however, should not be overly detailed. Rules which are too detailed frequently become over-inclusive or under-inclusive. The purposes and principles of the code will also assist in the interpretation of the rules. (Chapter III)

3 The same purposive approach to interpretation should be adopted for a code as for statutes generally. Though the code will embody the wisdom and experience of the common law it will also substantially reform the law. The principles contained in the code will therefore provide the basis for the future development of the law.

The problem of "gaps" in a code is somewhat illusory. If in a given case the code appears insufficiently specific, reference to the general policies and principles will enable the code to be interpreted appropriately. Where the topic actually lies outside the scope of the code the common law will govern (although the code's policies may inform the common law) - but the code should aim to include all matters properly part of the law of evidence. (Chapter IV)

4 A code should, by and large, follow the categories of our present law and of the modern codes and draft codes (for instance hearsay evidence, opinion evidence, privilege) since these have a sound logical basis. However, in some respects the categories might be organised in a more coherent way and the categories might be modified (for instance making a separate category for evidence in criminal proceedings). (Chapter V)

5 A draft of the early sections of a code, a commentary thereon and a draft structure for a code are annexed at the conclusion of the discussion paper.

Summary of Questions

These questions appear at the end of the chapters of this paper.

1 Should an evidence code set out to be a true code in the sense of being comprehensive, systematic in structure, pre-emptive and principled in its approach? (Chapter II)

2 What policies or principles should an evidence code express? (Specific comments on the draft provisions are invited.) Should they be supplemented by rules? How detailed should these rules be? (Chapter III)

3 What principles should apply to the interpretation of a code? Should these be different from those applying to an ordinary Act? Is there a need to provide gap-filling measures? What function should a commentary have? (Chapter IV)

4 How should an evidence code be structured and what categories of evidence should it deal with? (Specific comments on the draft scheme are invited.) (Chapter V)

I

Introduction

1 A primary purpose of the evidence reference is "to make the law as clear, simple and accessible as is practicable".[1] The reference provides an opportunity to take stock of the way our law is going, and where necessary to make a fresh start. In our principles paper[2] we suggested that there is a need to break out of the complexity and incoherence which, over the years, the sheer number of cases and a technical approach to the rules of evidence have created.[3] Our reference requires us to consider codification of the law of evidence as the vehicle for reform. In this paper we address some questions about the aims and methodology of codification, and reach some provisional conclusions about our future work on the project.

2 As in the principles paper, we have been able to draw on a range of existing codes and draft codes - including, in particular, the draft Code of the Canadian Law Reform Commission, the United States Federal Rules of Evidence and the Australian Law Reform Commission's draft Evidence Act.[4] The first is important because it demonstrates a principled approach to reform of evidence law, based on an appreciation of the aims and purposes of codification. The second is important because it is a well-developed code in theoretical terms, which has been successfully applied in practice in the United States federal jurisdiction and which is the basis of many of the state codes.[5] The third is important because it is a comprehensive codification of the law in a legal system which is close to our own. It was also preceded by the fullest consultation; and its implementation, both at the federal level and in some states, is under consideration.

1 See also s 5(1) of the Law Commission Act 1985 referring to understandability and accessibility of the law.

2 Law Commission, Evidence Law: Principles For Reform, (NZLC PP13, 1991), the companion paper to this paper and referred to throughout this paper as "the principles paper".

3 See principles paper chapter V.

4 See ALRC Report No 38 (1987), Federal Rules of Evidence for US Courts and Magistrates (1975), CLRC Report (1975). Other codes and draft codes considered were the India Evidence Act 1872 (the "Stephen" Code), the American Law Institute Model Code of Evidence (1942), the California Evidence Code (1965), the Scottish Law Commission's draft Code (1968), and the Canadian Federal/Provincial Task Force draft Act (1982).

5 The Federal Rules have been adopted (sometimes in modified form) in 35 States.

3 To illustrate our thinking on the preliminary issues discussed in this paper, a draft of the early sections of a code, accompanied by a commentary, concludes this paper. We ask readers to respond, not only to the questions put in the paper itself, but also to the draft legislation with comments on drafting as well as substance. A practical perspective on the reforms proposed will be invaluable to our work throughout the evidence project. We also include for information and comment an outline of topics which may be covered by an evidence code. We emphasise, however, that our views about the contents of a code are still at a very early stage and may well be subject to alteration as we progress through the reference.

II

Defining a Code

4 In the principles paper we indicated the preliminary view that codification would provide the vehicle for instituting the reforms which are necessary to bring our law into line with the principles identified in that paper. The question now to be addressed is what exactly codification involves.

5 "Codification" is a concept which has been accorded a number of meanings. In its broadest sense, codification is used simply to describe the reduction of the law to a written form. The term is often used loosely. Thus when Parliament passes a statute dealing with an area of law which was previously left entirely to the common law, it is sometimes said the law has been codified. Strictly speaking, however, a code is more than a statutory consolidation or restatement of the law.[6]

6 A true code may be defined as a legislative enactment which is comprehensive, systematic in its structure, pre-emptive and which states the principles to be applied.[7] It is pre-emptive in that it displaces all other law in its subject area, save only that which the code excepts. It is systematic in that all of its parts form a coherent and integrated body. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be applied in a relatively self-sufficient way.[8] It is, however, the final element which particularly distinguishes a code from other legislative enactments: the purpose of a code, as opposed to more limited statutory enactments, is to establish a legal order based on principles. In the civil law experience, codification has facilitated the creation of a legal framework which provides a degree of stability and directs the evolution of the law.[9] The same is true of some of our own successful codes - the Sale of Goods Act 1908, the Bills of Exchange Act 1908, the Land Transfer Act 1961 and the Crimes Act 1961 - which have lasted relatively unaltered in concept and form for many years.[10]

6 Bergel, "Principles and Methods of Codification" (1988) 48 Lou LR 1073.

7 Brooks, "The Common Law and the Evidence Code: Are They Compatible?" (1978) 27 UNBLJ 27, 29.

8 See Hawkland, "Uniform Commercial 'Code' Methodology" [1962] U Ill Law Forum 291, 292.

9 Bergel, note 6 at 1074-1076.

10 More recent examples of codes are the Matrimonial Property Act 1976 and the Accident Compensation Act 1982.

7 Our present view is that codification in the above sense is the best option for reform of evidence law. In this area the law should be stated not only comprehensively but also in a coherent and integrated way based on principles. Indeed, as indicated in our principles paper, it is the failure of our law adequately to reflect principles which has led to many of the present problems. A code should rectify this.

8 It is sometimes suggested that a code stultifies the development of the law and unduly fetters the judges. We do not think either of those suggestions is correct. Moreover, they are not borne out by New Zealand experience in relation to the many Acts which have codified areas of our law. A properly drafted code provides enduring principles on the basis of which the law can be developed. Where the code provides specific rules they may require amendment from time to time, but the need for this is minimised if the rules are firmly based on principles rather than on ad hoc circumstances. As to the argument that the judges would be fettered, judges themselves have indicated the need for a more principled approach to the drafting of legislation. Thus Lord Wilberforce has said:

> [B]y presenting to the courts legislation drafted in a simple way by definition of principle, we may restore to judges what they have lost for many years to their great regret; the task of interpreting law according to statements of principle rather than by painfully hacking their way through the jungles of detailed and intricate legislation.[11]

(Or, it might be added in this context, the jungle of common law precedent.) Moreover, the practical achievements of codes such as the Federal Rules of Evidence suggest it is possible successfully to enact an evidence code based on sound principles. Undoubtedly, however, the success of any codification of the law of evidence will rest to a large degree on its acceptability to the profession and judiciary. We hope the responses to this paper will give some guidance on that.

QUESTION

> Should an evidence code set out to be a true code in the sense of being comprehensive, systematic in structure, pre-emptive and principled in its approach?

11 Gt Brit H L Debates, vol 264, 1965; columns 1175-6 (1.4.1965), cited in Letourneau and Cohen, "Codification and Law Reform: Some Lessons from the Canadian Experience" [1990] Stat LR 183, 194. Letourneau and Cohen also point out that the virtues of codification are the virtues of all competent legislation.

III

Policies, Principles and Rules

9 On what principles is an evidence code to be based? Here it is necessary to distinguish between principles in a pure sense, and those which are really more in the nature of policies or social goals. Both are important in an evidence code.

POLICIES

10 The policies or purposes of an evidence code can be derived from the purposes of the trial. We discuss these in detail in our principles paper.[12] To reiterate, accepting that a central purpose of a trial is the rational ascertainment of facts, a particular purpose of evidence law must be to promote rational methods for fact-finding. Other trial policies are: party freedom (the substantial role the adversary system allows to parties); fairness to the parties and others involved in court proceedings; reflection of public and social interests (such as privilege and public interest immunity); and efficiency and finality in proceedings. Sometimes only one of these will be significant. In other cases a number will need to be weighed and balanced against each other.

11 Both the Canadian draft Code and the Federal Rules contain statements of purposes. Section 1 of the Canadian Code states that:

> The purpose of this Code is to establish rules of evidence to help secure the just determination of proceedings, and to that end to assist in the ascertainment of the facts in issue, in the elimination of unjustifiable expense and delay, and in the protection of other important social interests.

12 Although expressed in rather more general terms, rule 102 of the United States Federal Rules of Evidence is similar in purport:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

The basic theme of the Federal Rules, as expressed in r 102 and reflected in the other rules, is that evidence which may assist the fact-finding process should not be kept from the trier of fact unless this is warranted by another of the

12 See principles paper (NZLC PP13, 1991) chapter IV.

specified trial policies. Commentators stress the significance of r 102 in providing the basis for understanding and applying the other rules, enabling the courts to use them in an appropriate way and to avoid an overly technical approach to the law.[13]

13 The Canadian and US federal provisions set out above can be compared with our suggested provision, s 1 of our draft at the conclusion of this paper.

14 We would expect to express a set of policies or purposes in a code of evidence for two reasons. From a drafting point of view, they make the end goals explicit and force examination of the code's provisions on that basis. This is important when it comes to understanding the aims and methodology of codification. From an interpretation point of view, they assist interpretation of the code so that its provisions are applied in the light of the policies. This is of particular significance when it comes to judicial consideration of the code, as we indicate in the next chapter.

PRINCIPLES

15 The general policies discussed above cannot be the sole basis of an evidence code. Something more specific is required to indicate how the purposes of evidence law are to be achieved. Principles are the means to that end. In this context (essentially a practical one) the principles should also reflect something of how they are to be applied in actual cases. These are principles which "look like rules".[14]

16 Principles can be derived from the general policies set out above. For example, if a primary function of evidence law is to promote the rational ascertainment of facts, this suggests that a basic tenet of an evidence code should be Thayer's principle that all logically relevant evidence is admissible unless there is some policy reason to exclude it.[15] Indeed, all the modern evidence codes and draft codes begin with a rule of relevance expressed in those terms. The Canadian Law Reform Commission draft Evidence Code, for instance, states:

> All relevant evidence is admissible except as provided in this Code or in any other Act.[16]

13 See for instance Leonard, "Power and Responsibility in Evidence Law" (1990) 63 S Cal LR 937.

14 Dworkin, "The Model of Rules I", Taking Rights Seriously (1977) pp 25, 26.

15 Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) pp 266, 530.

16 Section 4.

Other codes and draft codes go on to spell out the converse proposition that all irrelevant evidence is inadmissible, but otherwise their formulations are similar.[17]

17 Should evidence which is logically relevant but which has little probative value be excluded by a code? In our principles paper we note that some of our present rules represent at least in part a judgment about the probative value of evidence. For example, a doctrine of "sufficient relevance" can be used to set a higher standard for admissibility than simple logical relevance. While we do not at this stage reject the possibility of formulating specific exclusionary rules on the basis of slight probative value, we are doubtful of the desirability of doing so on that ground alone.

18 There is, however, a much stronger argument for exclusion if evidence is not only of relatively low probative value but also infringes one or other of the policies of the code.[18] Evidence which may impede the court's fact-finding function or infringe a party's rights to procedural fairness must be carefully considered as to its admissibility. Thus, evidence of low probative value which would be highly prejudicial because of its emotive impact on a fact-finder (distorting ability to judge the facts objectively), or misleading because of the undue weight which may be given to it, should be excluded both because of its impact on the rational ascertainment of facts and also because a party's right to defend his or her case is at stake.

19 Evidence may also need to be excluded on efficiency grounds - for instance, because it would be highly likely to confuse the issues, or would unnecessarily waste the time of the court. It may be thought the parties themselves can be trusted to set practical limits on the quantity and standard of evidence, but this is not always so. Their particular interests in the matter may prevent them from discerning the appropriate limits to evidence.

20 All the modern evidence codes and draft codes impose some limits on the general principle of logical relevance, expressed in terms of unfair prejudice, misleading or confusing effect and time-wasting. The formulation in r 403 of the Federal Rules of Evidence is a case in point:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

17 Rule 401 defines "relevant evidence" as -

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

18 See principles paper (NZLC PP13, 1991) paras 63-66.

> danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.[19]

Although formulated in terms of a "discretion", the provision really expresses substantive principles about the circumstances in which evidence should be excluded - and we consider it better to make this explicit. The judge should determine admissibility on the basis of the principles. It should be clear that if evidence offends against the principles there is no residual discretion to refuse to exclude it.[20] Formulating the provision as non-discretionary also has the advantage of enabling a consistent approach to the principles to be developed by way of appellate supervision, since the trial judge's decision can be fully reviewed.[21]

21 Other principles are also relevant to the exclusion of logically probative evidence, even though these may not be formulated in a general provision such as r 403 of the Federal Rules of Evidence. Thus, concerns about procedural fairness may require that probative evidence obtained in breach of an important procedural right should be excluded (though, as indicated in our principles paper,[22] in some instances the better point of control may be at the stage the evidence is obtained); and different principles apply to privilege and public interest immunity. Since such principles are relatively subject specific, in the code they are probably best placed with their substantive provisions. Indeed this is customarily done in the modern codes and draft codes.

RULES

22 It is necessary to consider how much detail should be contained in an evidence code. Could it be drafted entirely in terms of principles of relevance, probative value, prejudicial effect, protection of important procedural rights, and so on? Or should an attempt be made to specify exactly how those principles would apply in particular cases?

19 For an exaggerated account of the influence of the worst aspects of the adversary system on lawyers see Frank, "The 'Fight' Theory Versus the 'Truth' Theory", Courts on Trial (1949) p 80.

20 See Leonard, note 13.

21 The Australian draft Act uses a similar formulation but makes a distinction for cases where the evidence is adduced against an accused (omitting the reference to "substantially") - see ss 117 (the general discretion to exclude) and 118 (the discretion in criminal proceedings).

22 See para 19 and generally paras 43-48.

The question is often framed in a different way: how much should be left to the discretion of the judge and how much should be specified in mandatory rules? We think, however, that to frame the question in terms of discretion versus rules obscures the issue, because it suggests that without rules there is nothing to control the fact-finder's decision, whereas limits would always be imposed by well-expressed principles.

23 Our present rules of evidence are characterised by their specificity. As we have seen, much of the law is expressed in terms of relatively detailed and technical rules which exclude certain categories of evidence such as "hearsay", "opinion" and "character", and which are subject to exceptions and exceptions to exceptions. The aim originally may have been to minimise uncertainty in the law but, as the analysis in the principles paper indicates, the result has been the opposite. Rather than being clear and understandable, the law is complex, confusing and difficult to apply. Indeed, as Brooks points out, this uncertainty has actually introduced a large element of unwanted and undesirable discretion into the law:

> If discretion means the unaccountable freedom to decide one way or the other, one might argue that no body of principles could bestow on trial judges more discretion than the existing jurisprudence on the law of evidence.... On almost any contentious offer of proof, a respectable argument either for or against its admission can be made on the basis of the authorities. It is a disingenuous judge who, on a particular point of evidence, cannot decide a point either way and cite a body of authority in support of his decision. That, I would argue, is discretion: the ability to draw on one line of authority or another, and resolve the case either way, without having to render a principled judgment on the merits of the issue.[23]

24 In general, Brooks argues against excessive use of specific rules on the basis that they tend to be both over-inclusive and under-inclusive. It is impossible to predict exactly the cases that will arise: very detailed rules will still catch only some of the cases, and will include some that should be excluded. This concern is particularly significant where the rules are to be formulated in a code, since the aim, ideally, is to avoid frequent and detailed amendment to deal with particular problems. For these reasons Brooks argues against too great a level of specificity in the drafting of a code - and that was the approach adopted in the Canadian Law Reform Commission's draft Evidence Code.[24]

23 Brooks, "The Law Reform Commission of Canada's Evidence Code" (1978) 16 Osgoode Hall LJ 241, 306.

24 The drafting style is derivative of the American Law Institute Model Code.

25 The Australian Law Reform Commission, however, has expressed concern about the danger of leaving matters to decision by judges without sufficient statutory guidance. The Australian Commission emphasises the importance of ensuring predictability and equality before the law, and suggests that only rules can really achieve that. Efficiency of trial proceedings also requires that the parties should, as far as possible, know where they stand on the question of admissibility before the trial. Moreover:

> It must be remembered that rules of evidence, unlike rules of substantive law, "must often be applied by the court without substantial time for reflection". A rules approach tends to be more certain, easier to implement and thus less time-consuming than a discretionary [principled] approach. In many contexts, therefore, they are more satisfactory for court use.[25]

26 This view is reflected in the draft Act prepared by the Australian Law Reform Commission, which in drafting style often adopts a relatively detailed approach.

27 Without doubt the ideal code should be as clear, simple and user-friendly as possible. The code should therefore avoid stating the law so tersely that its meaning cannot readily be elucidated. The aim should be to maximise predictability and uniformity in the application of the principles of the code, while endeavouring to avoid the distortion of the policies and principles which can so easily result from rules which are overly specific. Our preference therefore is to aim for a careful balance - to supplement the principles with rules while keeping these at a level which allows for some flexibility.

QUESTIONS

> What policies or principles should an evidence code express? (Specific comments on the draft provisions are invited.) Should they be supplemented by rules? How detailed should these rules be?

25 ALRC, Report 26, Evidence: Interim Report (1985) p 39.

IV

Interpreting a Code

28 Lord Scarman has pointed out:

> The health of our law will, indeed, largely depend upon the way in which its codes are interpreted by the judges.[26]

However carefully drafted, a code can never state the law with sufficient specificity to prescribe the answer in every case. Nor should it attempt to do so. There will always be a need to interpret and apply the law in particular cases.

GENERAL APPROACH TO INTERPRETATION

29 The draft Act appended to the Law Commission's recent report, A New Interpretation Act,[27] requires an Act to be interpreted "in the light of its purpose and in its context"[28]. That provision does not set out to alter in substance the requirement of our present Acts Interpretation Act that a "fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act" should be applied to the interpretation of statutes. This principle of interpretation is of particular relevance where the statute is in the form of a code since the aim is to move away from a technical or rule based approach. Indeed, the Canadian draft states specifically that:

> This Code shall be liberally construed to secure its purpose and is not subject to the rule that statutes in derogation of the common law shall be strictly construed.[29]

However, we do not think such a provision is necessary. The general approach to interpretation is already covered by s 5(j) of the Acts Interpretation Act 1924 and it is doubtful whether the law of New Zealand now requires a strict construction of statutes in derogation of the common

26 Scarman, "Codification and Judge-Made Law: A Problem of Co-Existence" (1966-67) 42 Indiana LJ 355, 363.

27 NZLC R17, 1990.

28 Draft Interpretation Act s 9(1) -

> The meaning of an enactment is to be ascertained from its text in the light of its purpose and in its context.

29 Section 2.

law. Moreover, the inclusion of the policies or purposes in the code is in itself sufficient to indicate that they are the starting point for interpretation.

REFERENCE TO THE PRE-EXISTING COMMON LAW

30 One of the features of a code as defined in para 6 is that it should be pre-emptive - that is it should supersede existing law and make a fresh start. If that is so, references to prior judicial decisions can obstruct that objective.

31 This has not always been fully accepted with respect to codes adopted in common law countries. In Bank of England v Vagliano Bros [1891] AC 107, 145, Lord Herschell qualified his general view that reference should not be made to previous common law authorities, by adding:

> I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in a code.[30]

In our view, however, any ambiguity in the meaning of a provision of the code must be resolved by reference to the policies and principles of the code rather than to the pre-existing common law. That is not to say that previous common law cases will never be of value. Though the object of an evidence code is substantially to reform the law, the code will, wherever appropriate, embody the wisdom and experience of the common law. There will, therefore, be a significant number of instances where the code policies and principles will be the same as those underlying the common law. In those instances reference to earlier cases may well be helpful in elucidating the application of the principles contained in the code.

THE PROBLEM OF "GAPS"

32 A code will not necessarily deal with every specific point and it is sometimes suggested that "gaps" in a code will be a source of difficulty.

30 See also Robinson v Canadian Pacific Railway Corporation [1892] AC 481 and more recently R v Fulling [1987] QB 426, 431 where this approach was endorsed.

33 A gap may be said to arise in different ways. First, some developments, especially of a technological nature, may not be in contemplation or fully evolved when the code is being drafted. Indeed, in the context of an ordinary statute, such developments spring to mind as the typical "unprovided-for case".

34 Second, a gap may be said to arise because the topic by its nature is outside the scope of the code. For instance, if an evidence code dealt only with the core elements of admissibility, topics such as the burden and standard of proof, judge and jury functions, and witnesses - all of which may also be regarded as part of the law of evidence - would not be covered. In civil law systems these would be regarded as gaps because there is no statute which governs them directly.[31]

35 The Canadian Law Reform Commission included a provision in its draft Code which was specifically designed to deal with both types of gaps. It states:

> Matters of evidence not provided for in this Code shall be determined in the light of reason and experience so as to secure the purpose of this Code.[32]

On the other hand the Federal Rules and the Australian draft Act have no such provision. The question is whether such a provision is necessary.

36 Leonard, citing Dworkin, suggests that a gap-filling provision is not necessary for the first type of gap referred to above.[33] He considers that, in strictness, there can be no such gap in a code which is based on properly formulated principles. We agree that the general code policies will be applicable and will govern in all cases within the scope of the code. Moreover, in the particular context of admissibility, a principle which states that all relevant evidence is admissible unless excluded under some other provision of the code is completely comprehensive. Where there is an issue about how that principle is to be applied in any situation not specifically dealt with in the code, the judge will need to consider whether there is a basis for applying the general exclusion on the grounds that the evidence is unfairly prejudicial, misleading, unjustifiably expensive or time consuming. If none of those grounds mandate exclusion, the evidence is simply admissible. If it emerges that in respect of some matter a more specific code provision is

31 Brooks, "The Common Law and the Evidence Code: Are They Compatible?" (1978) 27 UNBLJ 27, 38.

32 See s 3.

33 Leonard, "Power and Responsibility in Evidence Law" (1990) 63 S Cal LR 937.

required, this should be dealt with either by an amendment to the code or by particular legislation which supplements the code. But, in the absence of such legislation, the principles of the code will govern the situation.

37 In respect of the second type of gap referred to above, the omitted topic is not governed by the code since, by definition, it is beyond the scope of the code. In that situation gap-filling by analogy from the code principles is quite common in civil law jurisdictions. As Franklin points out:

> [T]he orthodoxies of civilian technique call for the use of a code text by way of analogy to meet the problem of the unprovided case. This is a striking difference from the British tradition, where we even encounter theories that statutes should not be given effect in situations that they actually control. The civilian, however, is accustomed to regard a code text as having the same sort of projective value as the common law regards the decisions of the judges as having.... The technique of the civilian in solving the unprovided case, thus becomes a struggle over the projective value of code articles.[34]

We would, however, be reluctant to endorse such an approach to uncodified aspects of evidence law. Although it is not unknown for our judges to apply statutory principles by analogy to other areas of law,[35] it would be unusual to think of the principles of the code as the basis for development of significant areas of common law deliberately left uncodified. A better approach, in our view, is to ensure full codification of evidence law which does not leave gaps of this kind. The definition of a code set out in para 6 above indicates that a code should be comprehensive; and evidence is not a topic the coverage of which is so vast that its main aspects cannot be codified. Indeed, most of the modern codes and draft codes cover the traditional areas of evidence law.

AIDS TO INTERPRETATION

38 The Law Commission on occasions provides a commentary as well as a draft Act. The commentary, together with the report, is intended to explain in detail the purport of the provisions in the draft Act. New Zealand courts have indicated a willingness to look at reports of law reform

34 Franklin, "The Historical Function of the American Law Institute: Restatement as Transitional to Codification?" (1934) 47 Harv LR 1367, 1378-79.

35 See for instance R v Uljee [1982] 1 NZLR 561.

bodies as, among other things, an aid to interpreting statutes which result from their recommendations.[36]

39 In the case of the Federal Rules, the Advisory Committee's Notes play a helpful role in understanding and interpreting the substantive provisions. Terms such as "relevance" and "prejudicial" are explained there and, for ease of reference, the Notes are customarily published along with the Rules (although they are neither an official part of the text nor explicitly referred to in the Rules).[37]

40 We have also noted that in an early work on a draft evidence code the Scottish Law Commission suggested that a commentary could be used:

(a) to justify and explain the principles which the Code embodies;

(b) to indicate its intended field of application;

(c) to make clear in what respects it is intended to alter the substance of the existing law, and

(d) to point out the relationship between the Articles.[38]

41 We have accordingly provided a commentary as an interpretive aid. As indicated already, the principles of the code should be explicit in the code, as should its intended field of application; and, although comparisons with the previous law may be helpful, the ultimate determination of the provisions of the code should be on the basis of the principles of the code rather than the common law. The main purpose of a commentary is to elaborate and illustrate the principles and rules contained in the code, and we hope those dealing with the code will find the commentary valuable. Other material which comes later, such as select committee reports, may also be useful and may indeed be needed to explain developments between the draft Act at the time the commentary was prepared and the enacted version of the code.

36 See for instance Brown v Langwoods Photo Stores Ltd [1991] 1 NZLR 173 (reference to a report of the Contracts and Commercial Law Reform Committee as an aid to understanding the Contractual Remedies Act 1979).

37 For a useful discussion see Cleary, "Preliminary Notes on Reading the Rules of Evidence" (1978) 57 Neb LR 908.

38 Scottish Law Commission, Draft Evidence Code (First Part) (Memorandum No 8, 1969) p 5.

QUESTIONS

What principles should apply to the interpretation of a code? Should these be different from those applying to an ordinary Act? Is there a need to provide gap-filling measures? What function should a commentary have?

V

A Possible Code Structure

42 We suggested above that a code should set out to be comprehensive, so that substantial aspects of evidence law are not excluded from its scope. In our principles paper we examined the topics which might come within the general subject of evidence law and concluded that, as well as the core aspects of admissibility, topics such as the burden and standard of proof, functions of the judge and jury, and witnesses should, for the sake of completeness, be covered in our review. For the same reason, provisions about them should be included in an evidence code. The particular questions addressed in this chapter concern the structure of a code and the topics which need to be covered.

CODE CATEGORIES

43 Our present law is commonly divided into the categories mentioned above - that is, admissibility (including hearsay evidence, opinion evidence, evidence of character, confessions, privilege), the burden and standard of proof, functions of judge and jury and witnesses. An alternative approach would be to depart from the common law categories and use categories such as:

- documentary evidence
- expert evidence
- evidence in criminal proceedings (for example, confessions, unfairly obtained evidence)
- children's evidence
- evidence derived from new technologies

Such an approach would focus on the practical issues which arise, for instance whether and how a particular document should be admitted into evidence, how and when expert evidence may be tendered, how to deal with a child witness and whether a child's evidence can be given without the child having to appear in court. This would cut across the distinctions between admissibility and other matters and would reconceptualise the approach to evidence law.

44 However, while this approach has some appeal, and will certainly inform our views, the existing approach has a coherent and logical basis. We consider it will remain easier for users of the code to relate to the existing categories (which is the approach followed by all modern codes and draft codes).

45 This is not to say that the existing categories cannot be organised in a more coherent way, for instance by dealing with the burden and standard of proof, judge and jury, and witnesses under a general category of "the trial process". Nor does it exclude the possibility of modifications to the categories. The code provisions concerning privilege, for instance, might include rules about compellability because of their close relationship. We might also have a separate sub-category for admissibility of evidence in criminal cases, for which there is a precedent in the Canadian draft Code under the sub-heading, "Exclusion Because of Manner Evidence Obtained". Furthermore, within the existing categories the main emphasis could, and probably should, be on areas of practical difficulty (for instance, in opinion evidence, the particular issues concerning experts).

A DRAFT CODE STRUCTURE

46 A list of categories to be covered in an evidence code is set out at the end of this paper. The draft structure outlines the scope of the code and lists what we consider to be the main topics of evidence law. We emphasise that the structure and list of topics are still tentative. As the reference progresses to cover major areas of the law, our views may well change. We think, however, that a draft structure is necessary at this stage to guide our work and will also be helpful to those who are considering our discussion papers.

QUESTION

How should an evidence code be structured and what categories of evidence should it deal with? (Specific comments on the draft scheme are invited.)

Early Sections for an Evidence Code

PART 1
PURPOSES

Purposes

1 The purposes of this Code are to:

(a) promote the rational ascertainment of facts in proceedings; and

(b) help promote fairness to parties and witnesses in proceedings and to all persons concerned in the investigation of criminal offences; and

(c) help secure rights of confidentiality and other important public and social interests; and

(d) help promote the expeditious determination of proceedings and the elimination of unjustifiable expense.

Compare Canadian draft Code s 1, Federal Rules of Evidence r 102 (above paras 11-12)

PART 2
GENERAL PRINCIPLES

Fundamental principle - relevant evidence is admissible

2 (1) All relevant evidence is admissible in proceedings except evidence that is excluded in accordance with this Code or any other Act.

(2) Evidence that is not relevant is not admissible in proceedings.

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

Compare Canadian draft Code s 4(1) (above para 16), ALRC draft Act s 51

Compare Federal Rules of Evidence r 401, ALRC draft Act s 50

General exclusion

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

(a) have an unfairly prejudicial effect; or

(b) confuse the issues; or

(c) mislead the court or jury; or

(d) result in unjustifiable consumption of time; or

(e) result in unjustifiable expense.

Compare Canadian draft Act s 5, Federal Rules of Evidence r 403 (above para 20), ALRC draft Act ss 117 & 118

PART 3
ADMISSIBILITY RULES

[The sections under this head will, to whatever extent is appropriate, cover all the current exclusionary rules - see Draft Structure.]

COMMENTARY

C1 The draft provisions set out the purposes of the code, the fundamental principle that all logically relevant evidence is admissible and a general exclusionary principle. Other specific exclusions will follow these early provisions.

Section 1

C2 This section states the four purposes of the draft evidence code. These are derived from the trial policies discussed in the principles paper and in para 10 of this paper. The provisions are designed to make explicit the purposes of the code and are of considerable importance to the interpretation of the entire code. Sometimes only one of the purposes will be significant, but more often a number will require to be assessed together and on occasions balanced against one another. The purposes are not set out in order of priority - priorities can only be ascertained on a case by case basis, dependent on the issue to be decided.

Section 1(a)

C3 The first stated purpose is to promote the rational ascertainment of facts. Many trials require the court to ascertain what actually happened in the past (and sometimes to attempt to predict the future). Trials also require fact-finders to analyse and evaluate evidence carefully. The law of evidence should assist this process.

Section 1(b)

C4 The second purpose is to help promote procedural fairness. The parties' right to present and defend their case, the accused's right to cross-examine witnesses and the right to silence, all of which are mentioned specifically in the Bill of Rights Act 1990, are examples of rights intended to be accommodated by this purpose. Section 1(b) also promotes the interests of those who are not parties, such as witnesses and victims, in both civil and criminal proceedings. Section 1(b) is intended to have a wide scope and to enable the law of evidence to help promote not only procedural rights which arise primarily in the trial, but also procedural rights which arise primarily at other stages of the criminal and civil process.

Section 1(c)

C5 The third purpose is to help secure important public and social interests. This is intended to encapsulate the interests which lie behind privilege, public interest immunity and other public and social interests which may need to be reflected in the law of evidence.

Section 1(d)

C6 The fourth purpose is to help promote efficiency both in time and cost. It is important that trials operate easily and speedily, not only for the participants but also for others waiting in the queue.

Section 1(a)-(d)

C7 These purposes will often overlap. For instance, the admissibility of unfairly obtained evidence may need to be considered in relation to the purposes stated in paragraphs (a) (rational ascertainment of facts), (b) (promotion of fairness to the accused) and (c) (the need to secure proper actions by investigating authorities); and the efficiency purpose of paragraph (d) will often need to be appropriately balanced against the other purposes.

Sections 2(1) and 2(2)

C8 These are standard provisions in modern evidence codes and draft codes. They provide that all relevant evidence is admissible, and conversely that evidence which is not relevant is not admissible.

Section 2(3)

C9 "Relevant" evidence is defined as that which is logically relevant, anything which according to logic and good sense has a bearing on the issues. The definition is deliberately framed in broad terms (drawing in particular on r 401 of the Federal Rules of Evidence) to ensure that evidence is relevant if it has a tendency to prove or disprove any fact of consequence to the determination of the proceedings (including, for example, credibility of a witness). Relevance is not an inherent characteristic of any given item of evidence and relevance cannot be determined in the abstract. Whether an item of evidence is relevant always needs to be considered in relation to the use to which the item of evidence is to be put. However, evidence which is properly relevant is not rendered irrelevant because it may be put to another, improper, use - though a jury may need to be warned not to use the evidence improperly (and the evidence may also be liable to be excluded under s 3 or one of the other provisions of the code). Similarly, evidence is not rendered irrelevant because it may be rebutted or disbelieved; and evidence is not to be treated as irrelevant merely because it relates to background matters or matters which may not be in dispute. Finally, the relevance of an item of evidence may not be apparent at the time the evidence is tendered. In that event counsel may wish to assure the court that the relevance of the evidence will in due course become apparent. It is then necessary for the court to have a power to admit the evidence conditional upon its relevance in due course being established (for example, by other evidence). The code will, therefore, contain a provision dealing with conditional admissibility, probably in that part of the code which sets out the functions of the judge and jury.[39]

39 For further commentary on the similar provisions contained in rr 401 and 402 of the Federal Rules of Evidence see the Advisory Committee's Notes to those Rules and Weinstein's Evidence Manual (1990) para 6.01.

Section 3

C10 This is the general head under which relevant evidence may be excluded. It draws in particular on s 5 of the Canadian Law Reform Commission's draft Code, but there are similar provisions in the other modern codes and draft codes. It is in addition to the specific exclusionary rules which will follow. Section 3 states that relevant evidence is to be excluded if its probative value is outweighed by the danger that the evidence may have an unfairly prejudicial effect, confuse the issues, mislead the court or jury, or result in unjustifiable expense or consumption of time. To a considerable extent, these bases for exclusion already exist in the common law. Section 3 makes it clear that relevant evidence can only be excluded if, on balance, the negative effect of the evidence actually outweighs its probative value. Some comparable provisions in other codes state that (at least in civil cases) the outweighing must be substantial, but we are of the view that the balancing exercise which the judge must conduct is best left as we have expressed it. This is also the way our current law expresses the principle. However, the lack of a requirement that the dangers of the evidence must "substantially" outweigh its probative value is not an indication that s 3 will be a frequent basis for the exclusion of evidence.

C11 As the law at present stands there is doubt whether the power to exclude unfairly prejudicial evidence applies to civil cases.[40] We think that it is important for all paragraphs of s 3 to apply to civil cases, both judge alone and jury. In practice the judge will often have to hear the evidence (or receive a summary of it) to determine whether it is likely to be unfairly prejudicial, confusing or misleading. This is a particular (and not uncommon) difficulty whenever admissibility issues arise in a judge-alone trial, but the exclusionary provision should at least alert a judge sitting alone to the risks of such evidence.

C12 Any decision concerning the exclusion of evidence under s 3 must depend on the facts of each case. Section 3 is not, however, framed in terms of a discretion. It states that the evidence "shall be excluded". The judge will therefore have to strike an appropriate and, on occasions, difficult balance. But the judge's decision will always be capable of appellate review, which is appropriate because s 3 states important principles which need to be applied in a consistent way.[41]

40 See Forbes, "Extent of the Judicial Discretion to Reject Prejudicial Evidence in Civil Cases" (1988) 62 ALJ 211.

41 See para 20.

C13 The positive side of the balancing principle in s 3 is "probative value". Probative value will depend on such matters as how strongly the evidence points to the inference which it is said to support, and how important the evidence is to the ultimate issues in the trial. In balancing probative value against prejudicial effect care must be taken not to encroach on the legitimate function of the jury in assessing the weight of evidence and credibility.

Section 3(a)

C14 In relation to the exclusion of prejudicial evidence, "unfairly" is used to indicate that it is not sufficient if the evidence is simply adverse to the interests of, say, an accused.[42] The evidence must be unfairly prejudicial: there must be an undue tendency to influence a decision on an improper or illogical basis, commonly an emotional one (for instance graphic photographs of a murder victim when the nature of the injuries is not in issue).

Section 3(b)

C15 By way of example, evidence may confuse the issues where it will require a great deal of elaboration, detailed rebuttal or complicated jury instruction to demonstrate that the evidence actually has little probative value, and thus cause the fact-finder to become lost in a maze of trivia.

Section 3(c)

C16 Again as an example, evidence may mislead the fact-finder where it appears far more persuasive than it really is (as is occasionally the case with some types of expert and statistical evidence). The application of ss 3(b) and 3(c) will normally require the judge to consider what other evidence is likely to be available or required - in many instances other evidence (coupled, where appropriate, with a suitable direction to the jury) will readily counter any confusing or misleading tendency.

Sections 3(d) and 3(e)

C17 These recognise explicitly, as the common law recognises implicitly, that the admission of evidence in proceedings is costly, both in time and money. Sometimes its probative value does not warrant this, particularly when it would simply repeat earlier evidence.[43]

42 R v During [1973] 1 NZLR 366, 375 per Turner J; see also Cross on Evidence (4th New Zealand ed, 1989) p 37.

43 This is sometimes treated as a separate ground in the modern codes and draft codes - for instance r 403 of the Federal Rules.

C18 The grounds contained in s 3 may on occasions shade into one another and are therefore not completely distinct categories. For instance, evidence which misleads the fact-finder may suggest an improper basis for decision and so be unfairly prejudicial; and evidence which confuses the issues may result in the evidence assuming more importance to the case than it should, and so mislead the fact-finder.[44]

44 For further commentary on the similar provisions contained in r 403 of the Federal Rules of Evidence see the Advisory Committee's Notes to that Rule and Weinstein's Evidence Manual (1990) para 6.2. See also Dolan, "Rule 403: The Prejudice Rule in Evidence" (1976) Southern California LR 220 and Gold, "Limiting Judicial Discretion to Exclude Prejudicial Evidence" (1984) University of California, Davis LR 59.

Draft Structure for an Evidence Code

PART 1 - PURPOSES

Purposes

PART 2 - GENERAL PRINCIPLES

Relevant Evidence is Admissible
General Exclusion

PART 3 - ADMISSIBILITY RULES (OR SPECIFIC EXCLUSIONS)

Division 1 - Hearsay Evidence

Division 2 - Opinion Evidence

Includes Expert Evidence

Division 3 - Rules Relating to Criminal Proceedings

Confessions
Unfairly Obtained Evidence
[Privilege Against Self-Incrimination?]

Division 4 - Character and Conduct Evidence

Includes:
- Similar Facts
- Previous Convictions
- Credibility

Division 5 - Miscellaneous Exclusionary Rules

Division 6 - Waiver of Rules

PART 4 - PRIVILEGE AND CONFIDENTIALITY

Includes:
- Compellability
- Professional/Clerical Privilege
- Spousal Privilege
- [Privilege Against Self-Incrimination?]
- Public Interest Immunity

PART 5 - THE TRIAL PROCESS

Division 1 - General Rules

Burden of Proof
Presumptions
Standard of Proof